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**IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA**

**RUBEN MONTEMAYOR,**

**Petitioner,**

**vs.**

**WARDEN M.S. EVANS,**

**Respondent.**

**1:05-cv-0944 WMW HC**

**MEMORANDUM OPINION  
AND ORDER DENYING  
MOTION TO AMEND AND  
DISMISSING PETITION FOR  
WRIT OF HABEAS CORPUS  
FOR FAILURE TO COMPLY  
WITH COURT ORDERS**

Petitioner is a state prisoner proceeding pro se on a petition for writ of habeas corpus pursuant to 28 U.S.C. Section 2254. Pursuant to Title 28 U.S.C. § 636(c)(1), the parties have consented to the jurisdiction of the United States Magistrate Judge.

On January 8, 2008, the court granted Petitioner’s request and entered a stay in this action to allow Petitioner to exhaust his Cunningham claim in state court. Pursuant to this order, Petitioner was required to file a status report with this court every sixty days, informing the court of the progress of his case in state court. Petitioner did not file a status report in March 2008 or in May 2008. On June 11, 2008, the court ordered Petitioner to show cause

1 within twenty (20) days why this petition should not be dismissed for failure to comply with a  
2 court order. The court expressly warned Petitioner that his failure to respond would result in  
3 the dismissal of this case. The twenty days passed and Petitioner did not respond to the  
4 court's order. Accordingly, on July 9, 2008, the court entered a memorandum opinion and  
5 order dismissing this case for failure to comply with a court order.

6 Petitioner also filed another petition for writ of habeas corpus in this court. Although  
7 received by the court and filed on July 10, 2008, this petition was constructively filed on July  
8 3, 2008. See Rule 3(d), Rules Governing Section 2254 Proceedings (codifying the mailbox  
9 rule for petitioners confined in state prison). The Clerk of the Court opened a new case  
10 number for this case: 1:08-cv-00981 - OWW-DLB HC. On August 12, 2008, the court  
11 ordered Respondent to file a response to the petition.

12 On October 14, 2008, Respondent filed a response to the court's order of August 12,  
13 2008, in which he requested that the court consolidate Petitioner's two petitions. The court  
14 granted that request on November 17, 2008, ordered that 1:05-cv-0944 WMW HC be  
15 reopened, that all future filings be filed in 1:05-cv-0944 WMW HC, and that 1:08-cv-0981-  
16 OWW-DLB HC to be closed.

17 Petitioner's petition in 1:08-cv-0981-OWW-DLB HC was constructively filed six  
18 days before the adjudication of the petition in 1:05-cv-0944 WMW was completed.  
19 Therefore, the petition must be construed as a motion to amend in 1:05-cv-0944 WMW.  
20 Woods v. Carey, 525 F.3d 886, 888-90 (9<sup>th</sup> Cir. 2008) (a new pro se habeas petition filed  
21 before adjudication of a prior habeas petition is complete should be construed as a motion to  
22 amend the pending petition). Respondent opposes this motion to amend. Specifically,  
23 Respondent argues that Petitioner's exhaustion petition filed in the California Supreme Court  
24 was denied on November 28, 2007, well before the court granted a stay in 1:05-cv-0944  
25 WMW HC on January 8, 2008. Further, Respondent argues that Petitioner knew the  
26 disposition of his petition by the California Supreme Court at the time the court issued the  
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1 order granting the stay. Respondent notes that the incoming mail log for Petitioner while  
2 housed at Salinas Valley State Prison shows that Petitioner received the denial order from the  
3 California Supreme Court on December 4, 2007.

4 Petitioner argues in response that the court should allow him to amend his petition in  
5 this action with the petition filed in 1:08-cv-0981 OWW DLB HC. Petitioner states that  
6 Respondent incorrectly argues that his state petition was exhausted at the time Petitioner filed  
7 his motion for a stay in this court. Respondent does not make that argument. Rather, as set  
8 forth above, Respondent argues that the California Supreme Court denied Petitioner's  
9 petition before this court ruled on Petitioner's motion for a stay, and Petitioner failed to  
10 inform this court of the California Supreme Court's decision. Thus, Petitioner allowed this  
11 court to enter an entirely unnecessary stay. Petitioner admits that he did not file the court-  
12 ordered status reports in this case and did not respond to this court's order to show cause  
13 issued June 11, 2008. Petitioner claims that he "misunderstood" the court's order to show  
14 cause and "constructed his exhausted claim within his amended petition." Petitioner claims  
15 that his petition in 1:08-cv-0981 OWW DLB HC was filed to "replace" the petition which  
16 was stayed in 1:05-cv-0944 WMW.

17 The court finds that as set forth above, Petitioner did not file any of the court-ordered  
18 status reports in 1:05-cv-0944 WMW HC. Petitioner thus did not inform this court of the  
19 California Supreme Court's denial of his petition. Petitioner did not respond to this court's  
20 June 11, 2008 order to show cause. Rather than comply with this court's orders, Petitioner  
21 filed a new petition some seven months after his Cunningham petition was exhausted.  
22 The court finds Petitioner's explanation that he "misunderstood" the court's order to show  
23 cause to lack credibility. There is no indication on the petition in 1:08-cv-0981 OWW DLB  
24 HC that it was intended to be filed in 1:05-cv-0944 WMW. The court finds, therefore, that  
25 the petition in 1:08-cv-0981 OWW DLB HC was filed in an attempt to avoid the  
26 consequences of Petitioner's failure to comply with this court's orders in 1:05-cv-0944  
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1 WMW HC.

2 Accordingly, for the reasons set forth above and those already expressed in this  
3 court's memorandum opinion and order entered July 9, 2008, this court HEREBY ORDERS  
4 as follows:

- 5 1) The petition for writ of habeas corpus filed in 1:08-cv-0981 OWW DLB HC is  
6 construed as a motion to amend in this consolidated action;
- 7 2) Petitioner's motion to amend the petition in this action is DENIED;
- 8 2) This action is DISMISSED for failure to comply with the court order requiring  
9 Petitioner to file status reports in this action and failing to respond to this court's  
10 order to show cause; and
- 11 2) The Clerk of the Court is directed to enter judgment for Respondent and to close this  
12 case.

13  
14 IT IS SO ORDERED.

15 **Dated: January 12, 2009**

15 **/s/ William M. Wunderlich**  
16 **UNITED STATES MAGISTRATE JUDGE**