



1 but had in fact been dismissed for failure to exhaust administrative remedies. (Id.). On May 2, 2008,  
2 Petitioner filed a response to the motion to dismiss, conceding that his status as a life prisoner  
3 without the possibility of parole precluded him from habeas relief and requesting that the Court  
4 dismiss the petition without prejudice on those grounds. (Doc. 8). However, Petitioner disagrees  
5 that he failed to exhaust his administrative remedies, contending that, for various reasons, his  
6 attempts to exhaust his claim were thwarted by officials in the state prison system. (Id.).

7 **DISCUSSION**

8 A. Procedural Grounds for Motion to Dismiss

9 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition  
10 if it “plainly appears from the face of the petition and any attached exhibits that the petitioner is not  
11 entitled to relief in the district court . . . .” The Ninth Circuit has allowed respondents to file a  
12 motion to dismiss in lieu of an answer if the motion attacks the pleadings for failing to exhaust state  
13 remedies or being in violation of the state’s procedural rules. See e.g., O’Bremski v. Maass, 915  
14 F.2d 418, 420 (9th Cir. 1990) (using Rule 4 to evaluate motion to dismiss petition for failure to  
15 exhaust state remedies); White v. Lewis, 874 F.2d 599, 602-603 (9th Cir. 1989) (using Rule 4 as  
16 procedural grounds to review motion to dismiss for state procedural default); Hillery v. Pulley, 533  
17 F.Supp. 1189, 1194 & n.12 (E.D. Cal. 1982) (same). Thus, a respondent can file a motion to dismiss  
18 after the court orders a response, and the court should use Rule 4 standards to review the motion. 2.

19 In this case, Respondent’s motion to dismiss is based on a purported failure by Petitioner to  
20 exhaust his state administrative remedies and his failure to state a habeas claim. Because  
21 Respondent’s motion is similar in procedural standing to a motion to dismiss for failure to exhaust  
22 state remedies or for state procedural default and Respondent has not yet filed a formal answer, the  
23 Court will review Respondent’s motion pursuant to its authority under Rule 4.

24 B. The Two Motions to Dismiss

25 Rule 4 of the Rules Governing § 2254 Cases requires the Court to make a preliminary review  
26 of each petition for writ of habeas corpus and to dismiss a petition if it plainly appears from the face  
27 of the petition that the petitioner is not entitled to relief. Rule 4 of the Rules Governing 2254 Cases;  
28 see Hendricks v. Vasquez, 908 F.2d 490 (9th Cir.1990). A federal court may only grant a petition for

1 writ of habeas corpus if the petitioner can show that “he is in custody in violation of the Constitution  
2 . . . .” 28 U.S.C. § 2254(a). A habeas corpus petition is the correct method for a prisoner to  
3 challenge the “legality or duration” of his confinement. Badea v. Cox, 931 F.2d 573, 574 (9th Cir.  
4 1991)( quoting Preiser v. Rodriguez, 411 U.S. 475, 485, 93 S. Ct. 1827 (1973)).

5 Habeas corpus jurisdiction is available for a prisoner’s claim that he has been denied good  
6 time credits without due process of law, and for expungement of a disciplinary record if  
7 expungement is likely to accelerate the prisoner's eligibility for parole. Bostic v. Carlson, 884 F.2d  
8 1267, 1269 (9th Cir.1989); see Preiser, 411 U.S. at 486 (noting that habeas corpus serves to provide  
9 a forum for prisoners who claim that they are “being unlawfully subjected to physical restraint”).

10 Here, however, Petitioner concedes that he is serving three life sentences without possibility  
11 of parole. (Doc. 8, p. 1). Because Petitioner is not eligible for parole, neither the loss of credits nor  
12 the expungement of his prison disciplinary record will have any direct effect on the duration of his  
13 sentence. Under California law, a sentence of life imprisonment without the possibility of parole  
14 precludes the possibility of release from prison except upon commutation by the Governor. See  
15 People v. Whitt, 51 Cal.3d 620, 656-657 (1990). The possibility that a federal determination that the  
16 disciplinary process was constitutionally defective might be factor in a decision to commute a  
17 prisoner’s sentences is pure speculation.

18 Accordingly, to the extent Petitioner seeks habeas corpus relief to be restored to a status  
19 entitled to earn good time and work credits that would reduce his overall sentence, the petition would  
20 have to be dismissed for failure to state a claim upon which habeas relief may be afforded because,  
21 even if the Court were to restore Petitioner to a status entitling him to earn such credits, that remedy  
22 would not affect the “legality or duration” of Petitioner’s confinement. Preiser, 411 U.S. at 485.

23 However, in his response to Respondent’s motion to dismiss, Petitioner has himself requested  
24 that the petition be dismissed without prejudice. (Doc. 8, p. 2). Although the request is buried in  
25 Petitioner’s response, the Court nevertheless construes the request as a motion to dismiss the petition  
26 without prejudice. Subject to other provisions of law, a Petitioner may voluntarily dismiss an action  
27 without leave of court before service by the adverse party of an answer or motion for summary  
28 judgment. Fed. R. Civ. P. 41(a). Otherwise, an action shall not be dismissed except “upon order of

1 the court and upon such terms and conditions as the court deems proper.” Fed. R. Civ. P. 41(a)(2).

2 A motion for voluntary dismissal pursuant to Federal Rule of Civil Procedure 41(a)(2) should  
3 be granted unless a defendant can show that it will suffer some plain legal prejudice as a result of the  
4 dismissal. Smith v. Lenches, 263 F.3d 972, 975 (9th Cir. 2001); see Stevedoring Services of  
5 America v. Armilla International B.V., 889 F.2d 919, 921 (9th Cir. 1989)(the purpose of Rule  
6 41(a)(2) is “to permit a plaintiff to dismiss an action without prejudice so long as the defendant will  
7 not be prejudiced...or unfairly affected by dismissal.” “[L]egal prejudice does not result merely  
8 because the defendant will be inconvenienced by having to defend in another forum or where a  
9 plaintiff would gain a tactical advantage by that dismissal. Smith, 263 F.3d at 976. Rather, legal  
10 prejudice is “prejudice to some legal interest, some legal claim, some legal argument.” Id.

11 Here, Respondent filed a responsive pleading, i.e., a motion to dismiss, before Petitioner filed  
12 his request for dismissal. No stipulation for dismissal has been filed in this case. Accordingly, the  
13 motion to dismiss lies in the discretion of the Court, and the Court should grant Petitioner’s motion  
14 *unless* Respondent will suffer legal prejudice thereby. Smith, 263 F.3d at 975. Certainly,  
15 Respondent has already expended effort in this case by filing a detailed motion to dismiss the  
16 petition and a reply to Petitioner’s opposition to that motion to dismiss. Nevertheless, Respondent  
17 did not oppose Petitioner’s request for voluntary dismissal without prejudice in his reply. The same  
18 result would obtain, i.e., dismissal of the petition, regardless of which motion to dismiss were  
19 granted.

20 Accordingly, nothing in the record suggests that Respondent would be legally prejudiced  
21 should the Court grant Petitioner’s motion to dismiss in lieu of Respondent’s own motion to dismiss.  
22 Although Petitioner does not provide great detail for his reasons for dismissal, nothing in the record  
23 now before the Court suggests that the dismissal is being sought for improper motives or to gain a  
24 tactical advantage. Rather, it appears to the Court that Petitioner has reasonably concluded that  
25 Respondent’s motion to dismiss has merit, that a prisoner serving a life term without the possibility  
26 of parole is not entitled to habeas relief for being assigned a status that results in a loss of work or  
27 good time credits, and, hence, that dismissal without prejudice is his best course at this juncture.

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1 Further, granting Petitioner’s motion to dismiss in lieu of Respondent’s motion would  
2 obviate the need for the Court to address the disputed issue of whether Petitioner has fully exhausted  
3 his administrative remedies as a predicate to filing the instant petition or the legal effect of the  
4 procedural bar imposed by the state court in dismissing Petitioner’s state petition for failure to  
5 exhaust administrative remedies. Accordingly, the Court will recommend that Petitioner’s request  
6 for dismissal without prejudice be granted, and that Respondent’s motion to dismiss be denied as  
7 moot.

8 **RECOMMENDATIONS**

9 Based on the foregoing, the Court HEREBY RECOMMENDS that:

- 10 1. Petitioner’s motion to dismiss the petition without prejudice (Doc. 8), be GRANTED; and  
11 2. Respondent’s motion to dismiss the petition (Doc. 7), be DENIED as MOOT.

12 These Findings and Recommendations are submitted to the United States District Judge  
13 assigned to this case, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 72-304  
14 of the Local Rules of Practice for the United States District Court, Eastern District of California.  
15 Within fifteen (15) days after being served with a copy, any party may file written objections with the  
16 court and serve a copy on all parties. Such a document should be captioned “Objections to  
17 Magistrate Judge’s Findings and Recommendations.” Replies to the objections shall be served and  
18 filed within ten (10) court days (plus three days if served by mail) after service of the objections.  
19 **Petitioner and Respondent are forewarned that no extensions of time to file objections or**  
20 **replies will be granted.** The District Judge will then review the Magistrate Judge’s ruling pursuant  
21 to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to file objections within the  
22 specified time may waive the right to appeal the District Judge’s order. Martinez v. Ylst, 951 F.2d  
23 1153 (9th Cir. 1991).

24  
25 IT IS SO ORDERED.

26 Dated: February 6, 2009  
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/s/ Theresa A. Goldner  
UNITED STATES MAGISTRATE JUDGE