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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

RANDALL C. GRAY,	)	1:08-cv-00717-AWI-SKO-HC
	)	
Petitioner,	)	FINDINGS AND RECOMMENDATION TO
	)	DENY MOTION FOR DEFAULT JUDGMENT
	)	(DOC. 31)
v.	)	
	)	OBJECTIONS DUE: THIRTY DAYS
J. D. HARTLEY, Warden,	)	
	)	
Respondent.	)	
	)	
	)	

Plaintiff is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and Local Rules 302 and 304. Pending before the Court is Petitioner’s motion for default judgment filed on July 12, 2010.<sup>1</sup>

I. Background

August 14, 2008, the Court directed Respondent to file a response to the petition no later than sixty (60) days after service of the order. On November 12, 2008, Respondent served by

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<sup>1</sup> In filing an answer, Respondent proceeded in accordance with the Court’s order directing a response. Therefore, the Court exercises its discretion to conserve the resources of the Court and the parties by considering and determining Petitioner’s motion for default judgment without requiring any input from Respondent.

1 mail on Petitioner and timely filed in this Court a motion to  
2 dismiss in response to the petition. (Doc. 15.) On September  
3 21, 2009, the motion to dismiss was denied, and a response to the  
4 petition was ordered. On December 21, 2009, Respondent served  
5 and filed a timely response to the petition. Respondent briefed  
6 the merits of the petition, which concerns the constitutionality  
7 of a denial of Petitioner's parole, and also contested the  
8 presence of cognizable claims based upon Respondent's  
9 interpretation of the principles governing review of a parole  
10 decision such as that before the Court in the instant case.  
11 Petitioner filed a traverse on March 2, 2010.

12 On July 12, 2010, Petitioner filed a motion for default  
13 judgment based on Petitioner's understanding that Respondent had  
14 not timely responded to the petition. (Doc. 31, 2.)

15 Respondent has not responded to the applications for default  
16 judgment. However, the pertinent facts are clear from the  
17 documents filed in this case.<sup>2</sup> The Court finds that the motions  
18 are ready for decision.

## 19 II. Application for Default Judgment

20 With respect to Petitioner's application, the Court finds  
21 that, as detailed above, Respondent timely responded to the  
22 petition because the response was filed within the time ordered  
23 by the Court. The Court thus finds that there has been no delay  
24 in the response to the petition.

25 Further, the initial filing of a motion to dismiss instead  
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27 <sup>2</sup>The Court may take judicial notice of court records. Fed. R. Evid.  
28 201(b); United States v. Bernal-Obeso, 989 F.2d 331, 333 (9<sup>th</sup> Cir. 1993);  
Valerio v. Boise Cascade Corp., 80 F.R.D. 626, 635 n. 1 (N.D. Cal. 1978),  
aff'd, 645 F.2d 699 (9<sup>th</sup> Cir. 1981).

1 of an answer was appropriate and was authorized by the Court's  
2 order of August 14, 2008, which referred to the possibility of  
3 Respondent's filing a motion to dismiss and set forth a briefing  
4 schedule for any such motion. (Doc. 4, p. 2.) It is established  
5 that the filing of a motion to dismiss is authorized by Rule 4 of  
6 the Rules Governing Section 2254 Cases in the District Courts.  
7 Rule 4, Advisory Committee Notes, 1976 Adoption and 2004  
8 Amendments.

9 In any event, a petitioner is not entitled to a default  
10 judgment where a respondent fails to respond to a petition for  
11 writ of habeas corpus. Title 28 U.S.C. § 2241(c) (3) provides  
12 that the writ of habeas shall not extend to a prisoner unless he  
13 is in custody in violation of the Constitution, laws, or treaties  
14 of the United States. Section 2243 provides that the Court shall  
15 summarily hear and determine the facts and dispose of the matter  
16 as law and justice require. It is established that it is the  
17 petitioner's burden to show that he is in custody in violation of  
18 the laws of the United States. Miller-El v. Cockrell, 537 U.S.  
19 322, 358 n. 3 (2003). A failure by state officials to comply  
20 timely with the deadlines set by the Court does not relieve  
21 Petitioner of this burden of proof or entitle him to entry of a  
22 default or a default judgment. Gordon v. Duran, 895 F.2d 610,  
23 612 (9th Cir. 1990); see also Bleitner v. Welborn, 15 F.3d 652,  
24 653 (7th Cir. 1994) (no entitlement to default judgment because  
25 of an untimely response); United States ex rel. Mattox v. Scott,  
26 507 F.2d 919, 924 (7th Cir. 1974) (late filing of a motion to  
27 dismiss did not entitle a petitioner to entry of default);  
28 Bermudez v. Reid, 733 F.2d 18, 21 (2nd Cir. 1984) (late filing of

1 an answer did not justify default judgment).

2 Insofar as Petitioner seeks to proceed to judgment by having  
3 the merits of the petition considered, the Court will proceed in  
4 due course to consider the merits of the petition.

5 III. Recommendation

6 Accordingly, pursuant to the foregoing analysis, it is  
7 RECOMMENDED that Petitioner's application for default judgment be  
8 denied.

9 This report and recommendation is submitted to the United  
10 States District Court Judge assigned to the case, pursuant to the  
11 provisions of 28 U.S.C. § 636 (b) (1) (B) and Rule 72-304 of the  
12 Local Rules of Practice for the United States District Court,  
13 Eastern District of California. Within thirty (30) days after  
14 being served with a copy, any party may file written objections  
15 with the Court and serve a copy on all parties. Such a document  
16 should be captioned "Objections to Magistrate Judge's Findings  
17 and Recommendations." Replies to the objections shall be served  
18 and filed within fourteen (14) days (plus three days if served by  
19 mail) after service of the objections. The Court will then  
20 review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636  
21 (B) (1) (C). The parties are advised that failure to file  
22 objections within the specified time may waive the right to  
23 appeal the District Court's order. Martinez v. Ylst, 951 F.2d  
24 1153 (9th Cir. 1991).

25  
26 IT IS SO ORDERED.

27 **Dated: July 28, 2010**

**/s/ Sheila K. Oberto**  
**UNITED STATES MAGISTRATE JUDGE**