

1 pp. 10-11).

2 On March 19, 2009, the Court ordered Respondent to file a response to the petition.
3 (Doc. 6). On May 13, 2009, Respondent filed a motion to dismiss, contending that Grounds One
4 and Two had not been exhausted in state court because Petitioner had not “fairly presented” those
5 claims to the California Supreme Court as federal claims. (Doc. 11). On December 8, 2009,
6 Petitioner filed a notice of change of address, indicating that Petitioner had been released on
7 parole, arguing that the case was not moot, and requesting that the Court allow the proceedings to
8 continue. (Doc. 15). On January 4, 2010, Respondent filed an opposition, arguing that because
9 he had been released on parole, Petitioner’s claims were now moot and successive. (Doc. 17).

10 On February 11, 2010, the Court issued Findings and Recommendations denying
11 Respondent’s motion to dismiss on grounds of mootness and that the petition was a second and
12 successive petition. (Doc. 18). However, the Court recommended granting the motion to
13 dismiss Grounds One and Two because they had not been exhausted. On March 19, 2010, the
14 District Judge adopted the Findings and Recommendations, permitting Petitioner fifteen days to
15 withdraw the unexhausted claims and to proceed on Ground Three or else face having the entire
16 petition dismissed. (Doc. 20). On April 1, 2010, Petitioner filed the instant motion to proceed
17 on Ground Three and to file an amended petition as to Ground Three. (Doc. 21). On April 3,
18 2010, the Court granted Petitioner’s motion and on June 1, 2010, Petitioner filed his first
19 amended petition, containing only Ground Three from the original petition. (Doc. 23).

20 On June 4, 2010, the Court ordered Respondent to file a response thereto. (Doc. 25). On
21 September 10, 2010, Respondent filed the Answer to Ground Three. (Doc. 32). On September
22 15, 2010, Petitioner filed the instant motion to dismiss the first amended petition, in which
23 Petitioner basically concedes that the case is moot because, since the federal district court’s order
24 discharging him from parole has been affirmed on appeal, he has already received the relief he
25 was seeking in this case. (Doc. 34). Respondent has not filed an objection to Petitioner’s motion
26 to dismiss.

1 **DISCUSSION**

2 Subject to other provisions of law, a Petitioner may voluntarily dismiss an action without
3 leave of court before service by the adverse party of an answer or motion for summary judgment.
4 Fed. R. Civ. P. 41(a). Otherwise, an action shall not be dismissed except “upon order of the
5 court and upon such terms and conditions as the court deems proper.” Fed. R. Civ. P. 41(a)(2).
6 A motion for voluntary dismissal pursuant to Federal Rule of Civil Procedure 41(a)(2) should be
7 granted unless a defendant can show that it will suffer some plain legal prejudice as a result of
8 the dismissal. See Smith v. Lenches, 263 F.3d 972, 975 (9th Cir. 2010); see also Stevedoring
9 Svcs. Of America v. Armilla Int’l B.V., 889 F.2d 919, 921 (9th Cir. 1989)(stating that the
10 purpose of Rule 41(a)(2) is “to permit a plaintiff to dismiss an action without prejudice so long as
11 the defendant will not be prejudiced...or unfairly affected by dismissal.”) “[L]egal prejudice does
12 not result merely because the defendant will be inconvenienced by having to defend in another
13 forum or where a plaintiff would gain a tactical advantage by that dismissal. Smith, 263 F.3d at
14 976. Rather, legal prejudice is “prejudice to some legal interest, some legal claim, some legal
15 argument.” See Smith, 263 F.3d at 976.

16 Here, Respondent had filed an answer before Petitioner filed his request for dismissal.
17 No stipulation for dismissal has been filed in this case. See Fed. R. Civ. P. 41(a)(1).
18 Accordingly, the motion to dismiss lies in the discretion of the Court, and the Court should grant
19 Petitioner’s motion unless Respondent will suffer legal prejudice thereby. Smith, 263 F.3d at
20 975. Certainly, Respondent has already expended considerable effort in this case, first by filing a
21 motion to dismiss and by opposing the continuation of the case after Petitioner was paroled, and
22 subsequently by filing a voluminous Answer to the remaining Ground Three in the instant
23 petition.

24 Nevertheless, the issue before the Court is legal prejudice to Respondent. To date,
25 Respondent has not filed an opposition to Petitioner’s motion to dismiss nor has Respondent in
26 any way suggested that Respondent would be legally prejudiced should the Court grant the
27 motion to dismiss the petition. In his motion, Petitioner himself admits that the “relief provided
28 him by the United States District Court in CV 05-6276-RSWL (OP), ordering him discharged

1 within the specified time may waive the right to appeal the Order of the District Court. Martinez
2 v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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IT IS SO ORDERED.

Dated: September 29, 2010

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE