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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

HAROLD WALKER,)	1:09-cv-00522-AWI-JLT HC
)	
Petitioner,	)	FINDINGS AND RECOMMENDATIONS TO
	)	GRANT RESPONDENT’S MOTION TO
v.	)	DISMISS PETITION FOR WRIT OF HABEAS
	)	CORPUS (Doc. 17)
)	
GEORGE S. GUIRBINO,	)	FINDINGS AND RECOMMENDATIONS
	)	REGARDING PETITIONER’S MOTION FOR
Respondent.	)	EMERGENCY INJUNCTIVE RELIEF (Doc. 8)
)	
	)	ORDER DIRECTING OBJECTIONS TO BE
	)	FILED WITHIN TWENTY DAYS
)	
	)	ORDER DENYING PETITIONER’S MOTION
	)	FOR RELEASE (Doc. 15)

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Petitioner filed this petition on March 19, 2009, raising a series of claims, the exact number of which cannot precisely be determined since Petitioner has listed them in a running narrative in his form petition. However it appears that Petitioner is seeking to raise three primary claims, two of which challenge parole revocations, and one of which challenges a disciplinary

1 proceeding that extended the terms of his parole revocation. (Doc. 1).¹

2 The Court notes that this is not the first time Petitioner has appears in habeas proceedings
3 in this Court. Petitioner originally challenged his 2004 conviction, out of which these subsequent
4 parole revocations and extensions arise, in case no. 1:04-cv-06452-TAG. On October 3, 2008,
5 the Court denied Petitioner’s claims on their merits and entered judgment against Petitioner.
6 (Docs. 61 & 62 in case no. 1:04-cv-06452-TAG). Petitioner’s appeal of that final order is still
7 pending in the Ninth Circuit.²

8 _____ From the order on the merits in case no. 1:04-cv-06452-TAG, the Court has determined
9 that Petitioner was originally convicted in the Fresno County Superior Court in 2004 of the
10 following: (1) corporal injury to a co-habitant (Cal. Pen. Code § 273.5(a)); false imprisonment by
11 violence (Pen. Code § 236); (3) dissuading a witness by force or threat (Pen. Code § 136.1(
12 c)(1)); (4) resisting or obstructing a police officer (Pen. Code § 148(a)(1)); (5) vandalism (Pen.
13 Code § 594(a)); and (6) false imprisonment by violence (Pen. Code § 236). Petitioner was
14 sentenced to a term of three years and eight months.

15 It appears that Petitioner was originally paroled on November 26, 2006. (Doc. 8, p. 8).
16 Less than two months later, Petitioner violated his parole and was re-incarcerated until mid-
17 December 2007, when he was again released on parole. (*Id.*). Three weeks later, on January 4,
18 2008, Petitioner was cited for a parole violation that forms the basis for his claims in this

19 _____
20 ¹Respondent reads the petition to state an additional claim relating to a parole extension. (Doc. 17, p. 2).
21 The record of Petitioner’s numerous parole releases, parole violations, and re-incarcerations is far from clear. It is
22 possible that Petitioner suffered an additional parole revocation extension in November 2008 as a result of
23 possession of a manufactured weapon. (Doc. 8, p. 14). That allegation is not evident from the Court’s own reading
of the petition. However, as the discussion that follows will make clear, regardless of how many parole revocations
or extensions Petitioner has suffered, the fact that he has completed those terms of re-incarceration and is presently
on parole once again moots any claims arising out of those prior revocations or extensions.

24 ²The court may take notice of facts that are capable of accurate and ready determination by resort to sources
25 whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b); United States v. Bernal-Obeso, 989 F.2d
26 331, 333 (9th Cir. 1993). The record of a court’s own proceedings is a source whose accuracy cannot reasonably be
27 questioned, and judicial notice may be taken of a court’s own records. Mullis v. United States Bank. Ct., 828 F.2d
28 1385, 1388 n.9 (9th Cir. 1987); Valerio v. Boise Cascade Corp., 80 F.R.D. 626, 635 n. 1 (N.D.Cal.1978), *aff’d*, 645
F.2d 699 (9th Cir.); *see also* Colonial Penn Ins. Co. v. Coil, 887 F.2d 1236, 1239 (4th Cir. 1989); Rodic v.
Thistledown Racing Club, Inc., 615 F.2d 736, 738 (6th. Cir. 1980). Accordingly, this Court sua sponte takes judicial
notice of its own records, including the instant case as well as case no. 1:04-cv-06452-TAG.

1 petition, alleging that Petitioner had used cocaine and had failed to participate in a drug treatment
2 program. (Doc. 1, p. 4). Petitioner alleges that his parole was revoked and he was incarcerated
3 for those violations on February 2, 2008. (Id.).

4 Although the record is far from clear, it appears that Petitioner was released from that
5 parole revocation incarceration on May 26, 2008, and the following day, on May 27, 2008,
6 Petitioner complied with an order to appear at the Fresno Parole Office following his release
7 from prison. (Doc. 8, p. 8; Doc. 1, p. 11). At that time, Petitioner refused to provide a urine
8 sample for anti-narcotics testing. (Id.). Petitioner refused to provide a urine sample several days
9 later, on June 2, 2008. (Id.). On June 5, 2008, a parole officer attempted to confirm that
10 Petitioner was residing at the Fresno Rescue Mission, but the sign-in sheets did not contain any
11 signatures for Petitioner. (Id.). On June 9, 2008, Petitioner again refused to provide a urine
12 sample and was taken into custody for a parole revocation hearing. (Id.). On July 14, 2008, the
13 Board of Parole Hearings (“the Board”) revoked his parole and Petitioner was re-incarcerated as
14 a result of these violations. (Doc. 8, p. 1).

15 Thereafter, Petitioner was scheduled to be paroled again on November 8, 2008, but, after
16 a Board extension hearing on November 16, 2008, his parole revocation was extended for
17 committing a disciplinary violation, i.e., battery on another inmate, on October 17, 2008. (Id.;
18 Doc. 17, Ex. 5; Doc. 8, p. 1). This rules violation extended Petitioner’s parole release date until
19 April 7, 2009. (Doc. 1, p. 5).

20 This chronology coincides with the Court’s own docket in this case, which indicates that
21 Petitioner filed a Notice of Change of Address on April 9, 2009, indicating that he had been
22 released on parole. (Doc. 7). On July 17, 2009, however, Petitioner filed a second Notice of
23 Change of Address, indicating he had been re-incarcerated at Kern Valley State Prison
24 (“KVSP”), Delano, California. (Doc. 16). From the present record, the Court cannot determine
25 the reasons for Petitioner’s latest re-incarceration in July 2009. However, inasmuch as the
26 instant petition was filed four months earlier, on March 19, 2009, the claims in the instant
27 petition cannot be premised on the events giving rise to Petitioner’s most recent incarceration.

28 As mentioned, the instant petition was filed on March 19, 2009. On April 20, 2009,

1 Petitioner filed a motion for emergency injunctive relief to be released from custody of Wasco
2 State Prison. (Doc. 8). On June 19, 2009, the Court ordered Respondent to file a response to the
3 petition. (Doc. 9). On July 15, 2009, Petitioner filed a motion to grant release, in which
4 Petitioner, in essence, argues the merits of the petition and requests an order from this Court
5 releasing him from Respondent’s custody. (Doc. 15). On August 18, 2009, Respondent filed the
6 instant motion to dismiss the petition, contending that Petitioner’s claims are not fully exhausted
7 and that the petition is moot because Petitioner has now been released once again on parole.
8 (Doc. 17).

9 On August 25, 2009, Petitioner filed with this Court a Notice of Change of Address,
10 indicating his transfer to “Fresno Parole Units 3-6, 2222 G Street, Fresno, CA 93706.” (Doc.
11 18). On November 2, 2009, Petitioner filed his opposition to the motion to dismiss, contending
12 that he had exhausted all issues and that because he was still in Respondent’s custody, albeit on
13 parole, the claims are not moot. (Doc. 21).

14 **DISCUSSION**

15 **A. Procedural Grounds for Motion to Dismiss**

16 As mentioned, Respondent has filed a Motion to Dismiss the petition on the grounds that
17 Petitioner has failed to exhaust his claims in state court and because the claims themselves are
18 now moot in light of Petitioner’s release on parole. Rule 4 of the Rules Governing Section 2254
19 Cases allows a district court to dismiss a petition if it “plainly appears from the face of the
20 petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district
21 court” Rule 4 of the Rules Governing Section 2254 Cases; see also Hendricks v. Vasquez,
22 908 F.2d 490 (9th Cir.1990).

23 The Ninth Circuit has allowed Respondent’s to file a Motion to Dismiss in lieu of an
24 Answer if the motion attacks the pleadings for failing to exhaust state remedies or being in
25 violation of the state’s procedural rules. See, e.g., O’Bremski v. Maass, 915 F.2d 418, 420 (9th
26 Cir. 1990) (using Rule 4 to evaluate motion to dismiss petition for failure to exhaust state
27 remedies); White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (using Rule 4 as procedural
28 grounds to review motion to dismiss for state procedural default); Hillery v. Pulley, 533 F.Supp.

1 1189, 1194 & n.12 (E.D. Cal. 1982) (same). Thus, a Respondent can file a Motion to Dismiss
2 after the court orders a response, and the Court should use Rule 4 standards to review the motion.
3 See Hillery, 533 F. Supp. at 1194 & n. 12.

4 In this case, Respondent's Motion to Dismiss contends that the petition contains
5 unexhausted claims and that, in any event, those claims are now moot. Because Respondent's
6 Motion to Dismiss is similar in procedural standing to a Motion to Dismiss for failure to exhaust
7 state remedies or for state procedural default and because Respondent has not yet filed a formal
8 Answer, the Court will review Respondent's Motion to Dismiss pursuant to its authority under
9 Rule 4.

10 B. The Petition Is Moot.

11 The case or controversy requirement of Article III of the Federal Constitution deprives the
12 Court of jurisdiction to hear moot cases. Iron Arrow Honor Soc'y v. Heckler, 464 U.S. 67, 70
13 104 S.Ct. 373, 374-75 (1983); NAACP., Western Region v. City of Richmond, 743 F.2d 1346,
14 1352 (9th Cir. 1984). A case becomes moot if the “the issues presented are no longer ‘live’ or
15 the parties lack a legally cognizable interest in the outcome.” Murphy v. Hunt, 455 U.S. 478,
16 481, 102 S.Ct. 1181, 1183 (1984). The Court simply has no power to decide cases that do not
17 affect the rights of the litigants in the case before them. Defunis v. Odegaard, 416 U.S. 312, 316,
18 94 S.Ct. 1704, 1705 (1974); Mitchell v. Dupnik, 75 F.3d 517, 527-28 (9th Cir. 1996). “To
19 satisfy the Article III case or controversy requirement, a litigant must have suffered some actual
20 injury that can be redressed by a favorable judicial decision.” Iron Arrow, 464 U.S. at 70, 104
21 S.Ct. at 375; Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38, 96 S.Ct. 1617, 1924
22 (1976); NAACP, Western Region, 743 F.2d at 1353.

23 At the time of the filing of the petition, Petitioner was in Respondent's custody for a
24 parole violation. That custody was extended several times by disciplinary findings that Petitioner
25 had committed rules violations. When Petitioner was released again on parole, he re-offended
26 and his parole was revoked. However, it appears undisputed that, subsequent to the filing of the
27 instant petition, Petitioner was once again released from imprisonment and placed on parole, his
28 prior parole revocation terms having been completed. Thus, although Petitioner remains in the

1 constructive custody of Respondent in his capacity as a parolee, Petitioner is not currently “in
2 custody” for the parole violations and disciplinary violations which form the basis of this habeas
3 corpus proceeding.

4 A habeas petition that challenges an underlying conviction is not rendered moot by the
5 expiration of the sentence that was imposed as a result of the conviction. Lane v. Williams, 455
6 U.S. 624, 631-32, 102 S.Ct. 1322, 1327 (1982); Sibron v. New York, 392 U.S. 40, 55-56, 88
7 S.Ct. 1889, 1898-99 (1968); Wood v. Hall, 130 F.3d 373, 376 (9th Cir.1997). In such a case,
8 there is a presumption that a criminal conviction has some continuing, collateral consequences
9 that will preclude mootness, even if the collateral consequences are remote and unlikely to occur.
10 See Spencer v. Kemna, 523 U.S. 1, 118 S.Ct. 978, 983, 985 (1998). However, this presumption
11 of continuing collateral consequences that is applied to criminal convictions does not extend to
12 parole revocations. Spencer, 523 U.S. at 112. If a petitioner’s parole violation term has already
13 been served, the petitioner who seeks to challenge that parole revocation must demonstrate that
14 continuing collateral consequences exist to preclude mootness. Id. at 13-16; see Cox v.
15 McCarthy, 829 F.2d 800, 803 (9th Cir.1987).

16 In this case, it appears undisputed that Petitioner has *already served* both the two parole
17 revocation terms and the parole revocation extension which form the basis of the instant habeas
18 petition. Petitioner has not alleged, let alone proven, that any collateral consequences will result
19 from the challenged parole revocations or the extension. In this regard, the Supreme Court has
20 reviewed many hypothetical collateral consequences of a parole revocation finding—e.g., its use
21 in a possibly future parole denial, in a possible future parole revocation, for impeachment
22 evidence, and for a civil rights lawsuit--and found these consequences too speculative and
23 dependent on too many other variables to constitute collateral consequences that would preclude
24 mootness. Spencer, 523 U.S. at 12-16.

25 Therefore, a finding by this Court in Petitioner’s favor concerning the petition’s claims
26 would not entitle Petitioner to any beneficial collateral consequence. In other words, no
27 disability suffered by Petitioner will be removed, nor will Petitioner be entitled to any additional
28 benefit, even if this Court were to find that any of the constitutional violations alleged in the

1 instant petition actually occurred. See Lane, 455 U.S. at 633, 102 S.Ct. at 1328. Thus, this
2 petition is moot. Simply put, the Court cannot order Petitioner to be released from a term of
3 incarceration that he no longer serves. Cox, 829 F.2d at 803.

4 Petitioner is free to pursue his grievances as civil rights claims, should he so desire. The
5 fact that this habeas claim arising out of his re-incarceration for his parole revocation is now
6 moot because of his re-release on parole does not in any way restrict his ability to pursue
7 appropriate legal remedies under 42 U.S.C. § 1983. Spencer, 523 U.S. at 19 (Souter, J.,
8 diss.)(mootness of habeas claim arising out of completed parole revocation term does not
9 preclude petitioner from pursuing civil rights claim).³

10 Regarding Petitioner's motion for release from custody (Doc. 15), the Court construes
11 that motion as, in essence, a motion for a ruling on the merits of the petition. So construing said
12 motion, the Court denies the motion in light of the Court's Recommendation that the petition's
13 claims are moot.

14 Regarding Petitioner's motion for emergency injunctive relief in the form of an order
15 releasing him from prison (Doc. 8), in light of the Court's recommendations and the chronology
16 set forth in this Findings and Recommendations, Petitioner's request for injunctive relief is moot
17 and should therefore be denied.

18 **ORDER**

19 For the foregoing reasons, the Court HEREBY ORDERS as follows:

- 20 1. The Court CONSTRUES Petitioner's motion for release (Doc. 15), as a request for a
21 ruling on the merits; and,
22 2. So construed, Petitioner's motion for a ruling on the merits (Doc. 15), is DENIED in
23 light of the Court's recommendation that the petition is moot.

24 **RECOMMENDATION**

25 Accordingly, the Court RECOMMENDS:

- 26 1. That Respondent's Motion to Dismiss the petition for writ of habeas corpus (Doc.
27

28 ³In light of the Court's Recommendation that the petition be dismissed as moot, the Court need not address
Respondent's alternative ground for dismissal, i.e., that Petitioner has failed to exhaust his claims in state court.

1 17), be GRANTED;

2 2. That the petition for writ of habeas corpus (Doc. 1), be DISMISSED as MOOT; and,

3 3. That Petitioner's motion for emergency injunctive relief (Doc. 8), be DENIED as
4 MOOT.

5 This Findings and Recommendations is submitted to the United States District Judge
6 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the
7 Local Rules of Practice for the United States District Court, Eastern District of California.

8 Within twenty (20) days after being served with a copy, any party may file written objections
9 with the court and serve a copy on all parties. Such a document should be captioned "Objections
10 to Magistrate Judge's Findings and Recommendations." The Court will then review the
11 Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that
12 failure to file objections within the specified time may waive the right to appeal the District
13 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

14 IT IS SO ORDERED.

15 Dated: February 4, 2010

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE