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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

NICHOLAS J. QUEEN,	)	1:09-cv-01224-SKO-HC
	)	
Petitioner,	)	ORDER GRANTING RESPONDENT'S
	)	MOTION TO DISMISS THE PETITION
	)	AND DISMISSING THE PETITION AS
v.	)	SUCCESSIVE PURSUANT TO 28 U.S.C.
	)	§ 2244(a) (Doc. 1)
H. A. RIOS, JR., Warden,	)	
	)	ORDER DIRECTING THE CLERK TO
Respondent.	)	CLOSE THE ACTION
	)	
	)	

Petitioner is a federal prisoner proceeding pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. Pursuant to 28 U.S.C. § 636(c)(1), the parties have consented to the jurisdiction of the United States Magistrate Judge to conduct all further proceedings in the case, including the entry of final judgment, by manifesting their consent in writings signed by the parties or their representatives and filed by Petitioner on July 23 and 24, 2009, and on behalf of Respondent on June 9, 2010. Pending before the Court is Respondent's motion to dismiss the petition, filed on November 29, 2010. Petitioner filed opposition to the motion on

1 December 8, 2010; no reply was filed.

2 I. Propriety of a Motion to Dismiss

3 The Court may dismiss a petition for writ of habeas corpus  
4 either on its own motion under Habeas Rule 4, pursuant to the  
5 respondent's motion to dismiss, or after an answer to the  
6 petition has been filed. Advisory Committee Notes to Habeas Rule  
7 8, 1976 Adoption; see, Herbst v. Cook, 260 F.3d 1039, 1042-43  
8 (9th Cir. 2001).

9 A district court must award a writ of habeas corpus or issue  
10 an order to show cause why it should not be granted unless it  
11 appears from the application that the applicant is not entitled  
12 thereto. 28 U.S.C. § 2243. Rule 4 of the Rules Governing  
13 Section 2254 Cases in the United States District Courts (Habeas  
14 Rules) is applicable to proceedings brought pursuant to § 2241.  
15 Habeas Rule 1(b). Habeas Rule 4 permits the filing of "an  
16 answer, motion, or other response," and thus it authorizes the  
17 filing of a motion in lieu of an answer in response to a  
18 petition. Rule 4, Advisory Committee Notes, 1976 Adoption and  
19 2004 Amendments. This gives the Court the flexibility and  
20 discretion initially to forego an answer in the interest of  
21 screening out frivolous applications and eliminating the burden  
22 that would be placed on a respondent by ordering an unnecessary  
23 answer. Advisory Committee Notes, 1976 Adoption. Rule 4 confers  
24 upon the Court broad discretion to take "other action the judge  
25 may order," including authorizing a respondent to make a motion  
26 to dismiss based upon information furnished by respondent, which  
27 may show that a petitioner's claims suffer a procedural or  
28 jurisdictional infirmity, such as res judicata, failure to

1 exhaust state remedies, or absence of custody. Id.

2 The Supreme Court has characterized as erroneous the view  
3 that a Rule 12(b)(6) motion is appropriate in a habeas corpus  
4 proceeding. See, Browder v. Director, Ill. Dept. of Corrections,  
5 434 U.S. 257, 269 n. 14 (1978); but see Lonchar v. Thomas, 517  
6 U.S. 314, 325-26 (1996). In light of the broad language of Rule  
7 4, this circuit has held that motions to dismiss are appropriate  
8 in cases that proceed pursuant to 28 U.S.C. § 2254 and present  
9 procedural issues such as failure to exhaust state remedies and  
10 procedural default. O'Bremski v. Maas, 915 F.2d 418, 420 (9th  
11 Cir. 1990); White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989).  
12 Analogously, a motion to dismiss is appropriate in the present  
13 proceeding brought pursuant to § 2241 because information  
14 concerning other District Courts' proceedings will be considered  
15 to determine the propriety of the petition.

16 Accordingly, the Court will proceed pursuant to Rule 4 to  
17 consider the Respondent's motion to dismiss.

## 18 II. Background

19 At the time the petition was filed, Petitioner was  
20 incarcerated in the United States Penitentiary at Atwater,  
21 California (USP Atwater); he was later moved to the Federal  
22 Correctional Institution at Bennettsville, South Carolina (FCI  
23 Bennettsville). (Pet. 1.) Respondent concurs that the warden of  
24 USP Atwater, H. A. Rios, Jr., is the proper respondent for the  
25 purpose of the motion to dismiss, and Respondent does not contest  
26 venue. (Mot. 2:1-24.)

27 Petitioner was convicted of robbery in the United States  
28 District Court of Maryland, Northern Division, and he was

1 previously convicted of criminal offenses in state court. (Pet.  
2 2.) In the petition, Petitioner challenges the manner in which  
3 his federal sentence is being executed. Petitioner alleges that  
4 he began serving his federal sentence, was transferred to state  
5 custody, and was thereafter returned to federal custody to  
6 complete service of the federal sentence. Petitioner alleges  
7 that the marshals erred in returning Petitioner to federal  
8 custody, and because Petitioner was subjected to serving a  
9 sentence in a piecemeal fashion, Petitioner is entitled to  
10 release. (Pet. 2-6.)

11 The present petition is not the first petition filed with  
12 respect to the judgment pursuant to which Petitioner is detained.  
13 The Court may take judicial notice of court records. Fed. R.  
14 Evid. 201(b); United States v. Bernal-Obeso, 989 F.2d 331, 333  
15 (9th Cir. 1993); Valerio v. Boise Cascade Corp., 80 F.R.D. 626,  
16 635 n. 1 (N.D. Cal. 1978), aff'd, 645 F.2d 699 (9th Cir. 1981).  
17 The Court will take judicial notice of the docket and documents  
18 filed in another federal court action that are pertinent to this  
19 proceeding.

20 The Court takes judicial notice of the docket and docketed  
21 orders in Nicholas J. Queen v. Donald Romine, Warden, 3:98-cv-  
22 02074-RPC-JVW, a proceeding in the United States District Court,  
23 Middle District of Pennsylvania. The full text of the Court's  
24 order of January 21, 2000, denying the petition for writ of  
25 habeas corpus is not available in the PACER electronic docket  
26 system. However, the docket reflects that Petitioner appealed  
27 from the judgment after an unsuccessful motion for a new trial  
28 that was construed as a motion for reconsideration. (Docs. 19-

1 21, 23-29.) After the judgment was affirmed on appeal,  
2 Petitioner moved in the District Court for relief from the  
3 judgment pursuant to Fed. R. Civ. P. 60(b) on November 29, 2001.  
4 (Doc. 30.)

5 The documents subject to judicial notice establish that the  
6 District Court for the Middle District of Pennsylvania determined  
7 the legality of Petitioner's detention with respect to  
8 Petitioner's claim concerning a right to release based on the  
9 piecemeal service of his sentence. In his Rule 60(b) motion in  
10 the District Court for the Middle District of Pennsylvania,  
11 Petitioner attached portions of the court's order of January 21,  
12 2000, in which the court had denied the petition. (Doc. 30, 5,  
13 10-12.) He also described the order in a subsequent motion.<sup>1</sup>  
14 (Doc. 47, 3.)

15 The portions of the order set forth in Petitioner's Rule  
16 60(b) motion reflect that the District Court concluded that  
17 Petitioner's federal and state sentences were intended to be  
18 served concurrently. Petitioner received continuous credit  
19 toward service of his federal sentence from September 30, 1994,  
20 the date sentence was imposed, as well as credit on his federal  
21 sentence for all time spent in pre-trial detention on state  
22 charges, from June 4, 1993, through September 19, 1993.  
23 Petitioner had argued in the petition that his return to Maryland  
24 state custody on December 16, 1994, was improper because it  
25 caused him to serve his federal sentence in a piecemeal fashion,  
26 and it warranted immediate release. The court concluded that

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28 <sup>1</sup> The Court notes that a subsequent post-judgment motion by Petitioner was the subject of another appeal later filed by Petitioner, and in that proceeding, the Court of Appeals affirmed the judgment. (Doc. 54-2, 1-3.)

1 Petitioner was in federal custody via a writ of habeas corpus ad  
2 prosequendum when sentenced in federal court; the state retained  
3 primary jurisdiction of Petitioner, so his placement in federal  
4 prison in October 1994 was erroneous and did not constitute  
5 commencement of service of his federal sentence. Therefore, when  
6 Petitioner was returned to federal custody, there was no  
7 piecemeal service of the federal sentence. (Doc. 30, 10-12; doc.  
8 47, 3.)

9 III. Successive Petition

10 Because the petition was filed after April 24, 1996, the  
11 effective date of the Antiterrorism and Effective Death Penalty  
12 Act of 1996 (AEDPA), the AEDPA applies to the petition. Lindh v.  
13 Murphy, 521 U.S. 320, 327 (1997); Jeffries v. Wood, 114 F.3d  
14 1484, 1499 (9th Cir. 1997).

15 Title 28 U.S.C. § 2244(a) provides:

16 No circuit or district judge shall be required  
17 to entertain an application for a writ of habeas corpus  
18 to inquire into the detention of a person pursuant to  
19 a judgment of a court of the United States if it  
20 appears that the legality of such detention has been  
determined by a judge or court of the United States  
on a prior application for a writ of habeas corpus,  
except as provided in section 2255.

21 In addition, the gate-keeping provisions of the AEDPA place the  
22 responsibility on the Court of Appeals to authorize successive  
23 petitions concerning state court judgments pursuant to 28 U.S.C.  
24 § 2254. 28 U.S.C. § 2244(b).

25 However, the provisions requiring prior appellate permission  
26 to proceed with a successive petition pertain expressly to claims  
27 presented under § 2254 and contain no reference to petitions  
28 filed under § 2241. Thus, the gate-keeping provisions do not

1 apply to habeas petitions filed under § 2241. Barapind v. Reno,  
2 225 F.3d 1100, 1111 (9th Cir. 2000).

3 Nevertheless, § 2244(a) prevents a federal inmate from using  
4 § 2241 to call into question the validity of a federal court  
5 conviction or sentence that has already been subject to a federal  
6 court's determination of legality, such as when the validity of a  
7 conviction or sentence has already been subject to federal  
8 collateral review. Id. (citing Valona v. United States, 138 F.3d  
9 693, 694 (7th Cir. 1998)); accord, Valona v. United States, 138  
10 F.3d 693, 694-95 (7th Cir. 1998) (concluding that §2244(a) bars  
11 successive petitions under § 2241 directed to the same issue  
12 concerning execution of a sentence); Chambers v. United States,  
13 106 F.3d 472, 475 (2d Cir. 1997) (barring as a second § 2241  
14 petition a repetitive challenge to application of time credits in  
15 the administrative calculation of a federal sentence). The  
16 statutory restrictions in the AEDPA on successive petitions have  
17 been characterized as a modified res judicata rule restraining  
18 what in traditional habeas corpus practice was known as "abuse of  
19 the writ," a "complex and evolving body of equitable principles  
20 informed and controlled by historical usage, statutory  
21 developments, and judicial decisions." Felker v. Turpin, 518  
22 U.S. 651, 664 (1996) (citing McCleskey v. Zant, 499 U.S. 467, 489  
23 (1991)). The appropriate disposition of a successive petition is  
24 dismissal. Queen v. Miner, 550 F.3d 253, 255 (3d Cir. 2008);  
25 Chambers v. United States, 106 F.3d 472, 475 (2d Cir. 1997).

26 Here, Petitioner's claim of illegal confinement is based on  
27 the movement of Petitioner from federal custody to a state  
28 institution to serve a state sentence, and the subsequent return

1 of Petitioner to federal custody to serve piecemeal the remainder  
2 of Petitioner's federal sentence. This is essentially the same  
3 claim that was made in the District Court for the Middle District  
4 of Pennsylvania, where the court rendered a decision on the  
5 legality of the detention.

6 Therefore, the petition will be dismissed.

7 IV. Disposition

8 Accordingly, it is ORDERED that:

9 1) Respondent's motion to dismiss the petition is GRANTED,  
10 and the petition is DISMISSED with prejudice as successive; and

11 2) The Clerk is DIRECTED to close this action because the  
12 dismissal will terminate the action.

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14 IT IS SO ORDERED.

15 Dated: February 3, 2011

/s/ Sheila K. Oberto  
UNITED STATES MAGISTRATE JUDGE

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