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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

FRANK RIVERA,	)	1:10-cv-00223-SMS-HC
	)	
Petitioner,	)	ORDER DENYING PETITIONER'S MOTION
	)	FOR A STAY (Doc. 31)
	)	
v.	)	ORDER CONSTRUING THE SECOND
	)	PETITION (Doc. 13) TO BE A
JAMES D. HARTLEY, Warden,	)	SEPARATE PETITION AND DIRECTING
	)	THE CLERK TO FILE IT IN A NEW
Respondent.	)	ACTION
	)	
		) ORDER DIRECTING THE SUBSTITUTION
		OF WARDEN JAMES D. HARTLEY AS
		RESPONDENT (Docs. 26, 28)
		ORDER VACATING PRIOR ORDER AND
		DIRECTIONS TO RESPONDENT TO
		RESPOND (Docs. 10, 12)
		ORDER REQUIRING RESPONDENT TO
		FILE A RESPONSE TO THE PETITION
		(Doc. 1)
		ORDER SETTING A BRIEFING SCHEDULE
		ORDER DIRECTING THE CLERK TO
		SERVE DOCUMENTS ON THE ATTORNEY
		GENERAL

Petitioner is a state prisoner proceeding pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 that was transferred to this Court from the

1 United States District Court for the Central District of  
2 California. The matter has been referred to the Magistrate Judge  
3 pursuant to 28 U.S.C. § 636(b)(1) and Local Rules 302 and 304.  
4 Pending before the Court are the petition and Petitioner's motion  
5 for a stay filed on March 17, 2010.

6 I. Motion for a Stay

7 Petitioner's initial petition, challenging the denial of  
8 parole by the California Board of Parole Hearings (BPH) on March  
9 1, 2006, was filed in the United States District Court for the  
10 Central District of California. (Doc. 1, pet. in no. 09-cv-4873-  
11 ABC-AN, 7-8, 18.) Petitioner then filed in that district a  
12 second petition challenging the BPH's later denial of his parole  
13 on March 25, 2008. (Doc. 13, 9, 10, 32.) When the second  
14 petition was construed by the Central District to be an amended  
15 petition in the first action, Petitioner first objected and then  
16 filed a notice of appeal on January 29, 2010. (Docs. 17, 14.)

17 Judicial notice may be taken of court records. Valerio v.  
18 Boise Cascade Corp., 80 F.R.D. 626, 635 n. 1 (N.D.Cal.1978),  
19 *aff'd*, 645 F.2d 699 (9th Cir. 1981); see also Colonial Penn Ins.  
20 Co. v. Coil, 887 F.2d 1236, 1239 (4th Cir. 1989); Rodic v.  
21 Thistledown Racing Club, Inc., 615 F.2d 736, 738 (6th. Cir.  
22 1980). The Court takes judicial notice of the docket of the  
23 United States Court of Appeals for the Ninth Circuit in Rivera v.  
24 Mendoza-Powers, case no. 10-55336, which reflects that on April  
25 15, 2010, the court dismissed Petitioner's appeal from the  
26 Central District's order in Central District case no. 2:09-cv-  
27 04873-ABC-AN for lack of jurisdiction because the orders  
28 challenged in the appeal were not final or appealable. The

1 mandate issued on May 7, 2010. A motion to reconsider filed by  
2 Petitioner was denied as untimely on June 23, 2010. It therefore  
3 appears of record that the appeal is no longer pending.

4 A court has the inherent power to stay proceedings as an  
5 incident to the power in each court to control the disposition of  
6 the cases on its docket. Smith v. Mail Boxes, Etc. USA, Inc.,  
7 191 F.Supp.2d 1155, 1157 (E.D.Cal. 2002). Here, because the  
8 appeal is no longer pending in the Ninth Circuit Court of  
9 Appeals, the reason for the requested stay has ceased to exist.

10 Accordingly, the request for a stay will be denied.

11 II. Screening the Petition

12 Rule 4 of the Rules Governing § 2254 Cases in the United  
13 States District Courts (Habeas Rules) requires the Court to make  
14 a preliminary review of each petition for writ of habeas corpus.  
15 The Court must summarily dismiss a petition "[i]f it plainly  
16 appears from the petition and any attached exhibits that the  
17 petitioner is not entitled to relief in the district court...."  
18 Habeas Rule 4; O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir.  
19 1990); see also Hendricks v. Vasquez, 908 F.2d 490 (9th Cir.  
20 1990). Habeas Rule 2(c) requires that a petition 1) specify all  
21 grounds of relief available to the Petitioner; 2) state the facts  
22 supporting each ground; and 3) state the relief requested.  
23 Notice pleading is not sufficient; rather, the petition must  
24 state facts that point to a real possibility of constitutional  
25 error. Rule 4, Advisory Committee Notes, 1976 Adoption;  
26 O'Bremski v. Maass, 915 F.2d at 420 (quoting Blackledge v.  
27 Allison, 431 U.S. 63, 75 n. 7 (1977)). Allegations in a petition  
28 that are vague, conclusory, or palpably incredible are subject to

1 summary dismissal. Hendricks v. Vasquez, 908 F.2d 490, 491 (9th  
2 Cir. 1990).

3 Further, the Court may dismiss a petition for writ of habeas  
4 corpus either on its own motion under Habeas Rule 4, pursuant to  
5 the 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 Here, the Court of Appeals has ruled that the screening  
10 order of the Central District was not a final or appealable  
11 order. Because this Court now has the benefit of both petitions  
12 and Petitioner's objections to the order of the Central District  
13 construing his second petition, and further considering  
14 Petitioner's status as a pro se litigant, this Court exercises  
15 its discretion to consider Petitioner's petitions anew and re-  
16 screen the petitions.

17 A. The Second Petition (Doc. 13)

18 The Central District relied on Woods v. Carey, 525 F.3d 886  
19 (9th Cir. 2008) in construing the second petition as a motion to  
20 amend the pending petition. However, Woods involved a second  
21 petition that was either successive or was an amendment of the  
22 original petition. In contrast, Petitioner's second petition  
23 here challenged the denial of his parole in March 2008, and not  
24 the denial of his parole in March 2006. Because Petitioner did  
25 not allege the same claim or grounds in the two petitions, his  
26 second petition was not successive.

27 Further, Petitioner did not move to amend the original  
28 petition; instead, he filed a second petition, and he listed the

1 case number of the proceedings involving the first petition in  
2 the appropriate blank for related or previously filed cases in  
3 the Central District. (Doc. 1, 1.)

4 A court construes a pro se litigant's habeas petition with  
5 deference. Maleng v. Cook, 490 U.S. 488, 493 (1989); Belgarde v.  
6 State of Montana, 123 F.3d 1210, 1213 (9th Cir. 1997).

7 Petitioner's two petitions both address decisions to deny parole  
8 based on unsuitability, but because they relate to two different  
9 decisions, they are not successive. 28 U.S.C. § 2244(b); Hill v.  
10 State of Alaska, 297 F.3d 895, 898-99 (9th Cir. 2002). Further,  
11 the second petition does not purport to amend the originally  
12 filed petition, and the petition is not otherwise reasonably  
13 construed as an amendment of the prior petition.

14 Accordingly, the Court construes the second petition as a  
15 separate petition that should be filed in a new action to be  
16 opened by the Clerk, and should be disregarded in the present  
17 proceeding. The Court will proceed on the originally filed  
18 petition in this action.

19 B. The Initially Filed Petition (Doc. 1)

20 1. Vacating the Orders to Respond

21 On October 20, 2009, while this case was pending in the  
22 Central District, the court directed Respondent to file a  
23 response. (Doc. 10.) On January 11, 2010, the court amended the  
24 order and gave additional directions. (Doc. 12.) However, after  
25 Petitioner filed his notice of appeal, counsel for Respondent  
26 entered an appearance and requested further instructions and  
27 scheduling concerning a response. (Doc. 26.) It does not appear  
28 that a response was ever filed.

1 In order to achieve consistent administrative treatment of  
2 petitions pending in this district, the Court will vacate the  
3 previous order, entitled "ORDER RE FURTHER PROCEEDINGS (Parole  
4 Denial)" (Doc. 10), and the directions given in the minutes  
5 filed January 11, 2010 (Doc. 12), and will issue its own order  
6 directing the filing of a response.

7 2. Order to File a Response

8 The Court has conducted a preliminary review of the  
9 petition. It is not clear from the face of the petition whether  
10 Petitioner is entitled to relief. 28 U.S.C. § 2243.  
11 Accordingly, pursuant to Rule 4 of the Rules Governing Section  
12 2254 Cases and Rule 16 of the Federal Rules of Civil Procedure,<sup>1</sup>  
13 the Court will order that a response be filed.

14 III. Substitution of Warden James D. Hartley as  
15 Respondent

16 Here, in the original petition, Petitioner initially named  
17 Kathy Mendoza-Powers, Warden, as Respondent. (Pet. 1.) However,  
18 in the notice of appearance of counsel for Respondent, the  
19 Attorney General states that because Petitioner is housed at  
20 Avenal State Prison, the present warden, namely, Warden Hartley,  
21 is the appropriate respondent. (Doc. 26, 1 n. 1.) Further, it is  
22 stated that counsel's appearance will be on behalf of Respondent  
23 James D. Hartley. (Doc. 26 n. 1.)

24 The Court construes this as a request to substitute the

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25 <sup>1</sup>The Federal Rules of Civil Procedure "apply to proceedings for habeas  
26 corpus ... to the extent that the practice in those proceedings (A) is not  
27 specified in a federal statute, the Rules Governing Section 2254 Cases, or the  
28 Rules Governing Section 2255 Cases; and (B) has previously conformed to the  
practice in civil actions." Fed. R. Civ. P. 81(a)(4). Rule 12 also provides  
"[t]he Federal Rules of Civil Procedure, to the extent that they are not  
inconsistent with any statutory provisions or these rules, may be applied to a  
proceeding under these rules." Rule 12, Rules Governing Section 2254 Cases.

1 proper Respondent.

2 A failure to name the proper respondent destroys personal  
3 jurisdiction. Stanley v. California Supreme Court, 21 F.3d 359,  
4 360 (9th Cir. 1994). However, personal jurisdiction, including  
5 the requirement of naming the technically correct custodian under  
6 § 2242 and the Habeas Rules, may be waived on behalf of the  
7 immediate custodian by the relevant government entity, such as  
8 the state in a § 2254 proceeding. Smith v. Idaho, 392 F.3d 350,  
9 355-56, 356 n. 4 (9th Cir. 2004) (where the state conceded it had  
10 waived lack of jurisdiction over a petitioner's immediate  
11 custodian and submitted itself in his stead to the jurisdiction  
12 of the federal courts). A court has the discretion to avoid  
13 delay and waste of the resources of the court and the parties by  
14 recognizing a waiver instead of requiring formal amendment of the  
15 petition by the Petitioner. Id. at 356 n. 6.

16 Here, the Court exercises its discretion to recognize  
17 Respondent's waiver of jurisdiction and to direct the  
18 substitution of a proper respondent pursuant to Fed. R. Civ. P.  
19 25(d). The Court concludes that James D. Hartley, Warden of  
20 Avenal State Prison, Petitioner's institution of confinement, is  
21 an appropriate respondent in this action, and that pursuant to  
22 Fed. R. Civ. P. 25(d), he should be substituted in place of the  
23 California Department of Corrections.

24 IV. Disposition

25 Accordingly, it is ORDERED that:

26 1) Petitioner's motion for a stay of the proceedings pending  
27 resolution of his appeal in the Ninth Circuit Court of Appeals is  
28 DENIED; and

1           2) The second petition filed in this action (doc. 13, filed  
2 January 11, 2010) is CONSTRUED as a as a separate petition that  
3 should be filed in a new action to be opened by the Clerk, and  
4 should be disregarded in the present proceeding; and

5           3) The Clerk is DIRECTED to file the second petition for  
6 writ of habeas corpus (doc. 13) in a new action to be opened by  
7 the Clerk; and

8           4) The previous orders of the transferor court directing  
9 Respondent to file a response to the petition(s) (Docs. 10, 12)  
10 are VACATED; and

11           5) With respect to the pending petition in this action (doc.  
12 1),

13           a) The Clerk SUBSTITUTE James D. Hartley, Warden of  
14 Avenal State Prison, as the Respondent in this action pursuant to  
15 Fed. R. Civ. P. 25(d); and

16           b) Respondent shall proceed to respond to the petition  
17 as follows:

18           1) Respondent SHALL FILE a RESPONSE to the petition<sup>2</sup> within  
19 **SIXTY (60) days** of the date of service of this order. See Rule 4,  
20 Rules Governing Section 2254 Cases; Cluchette v. Rushen, 770 F.2d  
21 1469, 1473-1474 (9<sup>th</sup> Cir. 1985) (court has discretion to fix time  
22 for filing a response). A response can be made by filing one of  
23 the following:

- 24           A. An ANSWER addressing the merits of the petition.  
25           Respondent SHALL INCLUDE with the ANSWER any and  
26           all transcripts or other documents necessary for

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27  
28           <sup>2</sup>Respondent is advised that a scanned copy of the petition is available  
in the Court's electronic case filing system (CM/ECF).



1 the resolution of the issues presented in the  
2 petition. See Rule 5, Rules Governing Section  
3 2254 Cases. Any argument by Respondent that a  
4 claim of Petitioner has been *procedurally*  
5 *defaulted* SHALL BE MADE in the ANSWER, but must  
6 also address the merits of the claim asserted.

7 B. A MOTION TO DISMISS the petition. A motion to  
8 dismiss SHALL INCLUDE copies of all Petitioner's  
9 state court filings and dispositive rulings. See  
10 Rule 5, Rules Governing Section 2254 Cases.<sup>3</sup>

11 2. If Respondent files an answer to the petition,  
12 Petitioner MAY FILE a traverse within **THIRTY (30) days**  
13 of the date Respondent's answer is filed with the  
14 Court. If no traverse is filed, the petition and  
15 answer are deemed submitted at the expiration of the  
16 thirty (30) days.

17 3. If Respondent files a motion to dismiss, Petitioner  
18 SHALL FILE an opposition or statement of non-opposition  
19 within **TWENTY-ONE (21) days** of the date Respondent's  
20 motion is filed with the Court. If no opposition is  
21 filed, the motion to dismiss is deemed submitted at the  
22 expiration of the thirty (30) days. Any reply to an  
23

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24 <sup>3</sup>Rule 4 of the Rules Governing Section 2254 Cases provides that upon the  
25 Court's determination that summary dismissal is inappropriate, the "judge must  
26 order the respondent to file an answer, motion, or other response within a  
27 fixed time, or to take other action the judge may order." Rule 4, Rules  
28 Governing Section 2254 Cases; see also Advisory Committee Notes to Rules 4 and  
5 of Rules Governing Section 2254 Cases (stating that a dismissal may obviate  
the need for filing an answer on the substantive merits of the petition and  
that the respondent may file a motion to dismiss for failure to exhaust);  
White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (providing that a motion  
to dismiss pursuant to Rule 4 is proper in a federal habeas proceeding).

1 opposition to the motion to dismiss SHALL BE FILED  
2 within **SEVEN (7) days** after the opposition is served.

3 4. Unless already submitted, both Respondent and  
4 Petitioner SHALL COMPLETE and RETURN to the Court  
5 within **THIRTY (30) days** a consent/decline form  
6 indicating whether the party consents or declines to  
7 consent to the jurisdiction of a the United States  
8 Magistrate Judge pursuant to Title 28 U.S.C.  
9 § 636(c)(1).

10 5. The Clerk of the Court is DIRECTED to SERVE a copy of  
11 this order on the Attorney General or his  
12 representative.

13 All motions shall be submitted on the record and briefs  
14 filed without oral argument unless otherwise ordered by the  
15 Court. Local Rule 230(1). Extensions of time will only be  
16 granted upon a showing of good cause. All provisions of Local  
17 Rule 110 are applicable to this order.

18  
19 IT IS SO ORDERED.

20 **Dated: July 20, 2010**

/s/ Sandra M. Snyder  
UNITED STATES MAGISTRATE JUDGE