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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MARCUS WHITAKER,
Petitioner,
v.
TIM VIRGA, Warden,
Respondent.

1:11-cv-01680 AWI MJS HC
FINDINGS AND RECOMMENDATION TO
DISMISS PETITION FOR WRIT OF
HABEAS CORPUS WITHOUT
PREJUDICE
(Doc. 1)

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

I. DISCUSSION

A. Procedural History

On July 29, 2011, Petitioner filed a petition for writ of habeas corpus in this court. See Whitaker v. Virga, Case No. 1:11-cv-01252-LJO -JLT (E.D. Cal., 2011)¹. Concurrently with the petition, Petitioner filed a motion to stay the proceedings while he attempted to exhaust his state remedies with respect to claims of ineffective assistance of counsel. On September 30, 2011, the Court granted Petitioner’s motion to stay the proceeding, and held the petition in abeyance while Petitioner attempted to exhaust his state remedies.

¹A court may take judicial notice of court records. See Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir. 1994); MGIC Indem. Co. v. Weisman, 803 F.2d 500, 504 (9th Cir. 1986).

1 On October 5, 2011, Petitioner filed in this Court the present petition challenging his
2 conviction for murder, robbery and related charges by the Merced County Superior Court.
3 (Pet., ECF No. 1.) Attached to it is a declaration requesting this Court stay the original habeas
4 petition while Petitioner continues to pursue state court remedies. The Petition appears to be
5 a copy of a state habeas corpus petition filed with the Merced County Superior Court. The
6 Court required Petitioner to.

7 It appears that the present filing of a copy of Petitioner's state court petition may be
8 Petitioner's response to the Court's directive in Case No. 1:11-cv-01252-LJO -JLT that he file
9 status reports regarding his state filings.

10 The Court screened the petition, and on December 5, 2011, issued an order to show
11 cause. (Order, ECF No. 8). In the order, the Court informed Petitioner that he could voluntarily
12 withdraw the more recent petition if it was intended only as a status report in the original
13 action. However, if and to the extent Petitioner's wanted to continue to prosecute the recent
14 petition, the Court ordered him to show cause why it should not be dismissed for failure to
15 exhaust or for filing a second or successive petition.

16 The Court ordered Petitioner to respond to the order to show cause within thirty (30)
17 days of service of the order. On January 18, 2012, Petitioner filed a response to the order to
18 show cause. (Resp., ECF No. 9.) From the response, it is clear that Petitioner did not intend
19 to initiate a second federal habeas corpus petition, but instead was attempting to provide
20 notice to this Court regarding his state filings.

21 **B. Voluntary Withdrawal of a Petition**

22 The federal courts have a duty to construe pro se pleadings liberally. Hamilton v. United
23 States, 67 F.3d 761, 764 (9th Cir.1995) (citing Hughes v. Rowe, 449 U.S. 5, 9 (1980)
24 (quotation omitted)). Consistent with such duty, the Court will construe Petitioner's January 18,
25 2012, response as a motion pursuant to Federal Rule of Civil Procedure 41(a)(1) to voluntarily
26 dismiss the action without prejudice. (See Rule 12, Rules Governing Section 2254 Cases,
27 "The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any
28 statutory provisions or these rules, may be applied to a proceeding under these rules.") It is

1 clear that Petitioner filings in the present case were intended to be filed in Case No.
2 1:11-cv-01252-LJO-JLT. The Court hereby recommends that the present petition be
3 dismissed without prejudice. Petitioner's first filed action, Case No. 1:11-cv-01252-LJO -JLT,
4 shall not be affected by the dismissal of this case. All future status reports should be filed in
5 that matter. The Court shall also direct the Clerk of Court to file Petitioner's January 18, 2011
6 response in Case No. 1:11-cv-01252-LJO -JLT.

7 **II. ORDER AND RECOMMENDATION**

8 Accordingly, the Court hereby recommends that the petition is DISMISSED without
9 prejudice.

10 Furthermore, the Court ORDERS the Clerk of Court to file a copy of this order and
11 Petitioner's response filed on January 18, 2012 as exhibits in Case No. 1:11-cv-01252-LJO
12 -JLT.

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

25 IT IS SO ORDERED.

26 Dated: January 21, 2012

1st Michael J. Seng
UNITED STATES MAGISTRATE JUDGE

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