

1 **DISCUSSION**

2 A. Procedural Grounds for Motion to Dismiss

3 As mentioned, Respondent has filed a Motion to Dismiss the petition as being successive.
4 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition if it
5 “plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not
6 entitled to relief in the district court” Rule 4 of the Rules Governing Section 2254 Cases.

7 The Ninth Circuit has allowed Respondent’s to file a Motion to Dismiss in lieu of an Answer if
8 the motion attacks the pleadings for failing to exhaust state remedies or being in violation of the state’s
9 procedural rules. See, e.g., O’Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990) (using Rule 4 to
10 evaluate motion to dismiss petition for failure to exhaust state remedies); White v. Lewis, 874 F.2d
11 599, 602-03 (9th Cir. 1989) (using Rule 4 as procedural grounds to review motion to dismiss for state
12 procedural default); Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n.12 (E.D. Cal. 1982) (same). Thus,
13 a Respondent can file a Motion to Dismiss after the court orders a response, and the Court should use
14 Rule 4 standards to review the motion. See Hillery, 533 F. Supp. at 1194 & n. 12.

15 In this case, Respondent’s motion to dismiss is based upon a claim that the petition is
16 successive and violates the “abuse of the writ” doctrine. Because Respondent’s motion to dismiss is
17 similar in procedural standing to a motion to dismiss for failure to exhaust state remedies or for state
18 procedural default and Respondent has not yet filed a formal Answer, the Court will review
19 Respondent’s motion to dismiss pursuant to its authority under Rule 4.

20 B. Successive Petitions.

21 Section 2244(a) provides as follows:

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

26 This gate-keeping provision confers exclusive authority on the Court of Appeals to authorize
27 successive petitions regarding state court judgments pursuant to 28 U.S.C. § 2254. 28 U.S.C. §
28 2244(b). However, the provisions requiring prior appellate permission to proceed with a successive

1 petition pertain expressly to claims presented under § 2254, and contain no reference to petitions filed
2 under § 2241. Thus, the gate-keeping provisions do not apply to habeas petitions filed under § 2241.
3 Barapind v. Reno, 225 F.3d 1100, 1111 (9th Cir.2000).

4 Nevertheless, § 2244(a) prevents a federal inmate from utilizing § 2241 to challenge the
5 validity of a federal court conviction or sentence which has previously been presented to the federal
6 court for determination, such as when challenged by way of federal collateral review. Id.; accord,
7 Valona v. United States, 138 F.3d 693, 694–695 (9th Cir.1998) (concluding that § 2244(a) bars
8 successive petitions under § 2241 directed to the same issue concerning execution of a sentence);
9 Chambers v. United States, 106 F.3d 472, 475 (2d Cir.1997) (barring as a second § 2241 petition a
10 repetitive challenge to application of time credits in the administrative calculation of a federal
11 sentence).

12 AEDPA's bar against successive petitions has been referred to as a modified res judicata rule
13 placing limits on the traditional habeas corpus rule against “abuse of the writ,” a “complex and
14 evolving body of equitable principles informed and controlled by historical usage, statutory
15 developments, and judicial decisions.” Felker v. Turpin, 518 U.S. 651, 664, 116 S.Ct. 2333 (1996)
16 (citing McCleskey v. Zant, 499 U.S. 467, 489, 111 S.Ct. 1454 (1991)). If a successive petition is filed,
17 dismissal is the appropriate disposition. Queen v. Miner, 550 F.3d 253, 255 (3d Cir.2008); Chambers
18 v. United States, 106 F.3d 472, 475 (2d Cir.1997).

19 In the instant petition, Petitioner challenges the failure of the Bureau of Prisons to award him
20 all of the credits to which he claims he is entitled. He bases his claim on two separate federal
21 convictions and sentences, imposed at different times, but which were ordered to be served
22 concurrently by the latter sentencing court. However, Petitioner presented this identical claim to the
23 United States District Court for the Northern District of West Virginia, in Jose Torres-Hurtado v.
24 Warden Kuma Deboo, case number 2:10cv8, which the court reviewed on its merits and denied with
25 prejudice on May 3, 2010. (Doc. 9, Ex. 5).¹ Accordingly, the instant petition for writ of habeas
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28 ¹ The court may take notice of facts that are capable of accurate and ready determination by resort to sources whose
accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b); United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th
Cir. 1993). The docket and proceedings of sister federal district courts are facts that are subject to judicial notice under

1 corpus must be dismissed with prejudice as successive.

2 **ORDER**

3 Accordingly, it is HEREBY ORDERED as follows:

- 4 1. Respondent's motion to dismiss (Doc. 9), is GRANTED;
- 5 2. The Petition for Writ of Habeas Corpus (Doc. 1), is DISMISSED with prejudice as
- 6 successive;
- 7 3. The Clerk of the Court is DIRECTED to enter judgment and close the file; and,
- 8 4. No certificate of appealability is required.

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10 IT IS SO ORDERED.

11 Dated: May 14, 2014

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE

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27 Rule 201(b). Accordingly, the Court hereby takes judicial notice of the docket and proceedings of Torres-Hurtado v.

28 Deboo, no. 2:10cv8, in the U.S. District Court, Northern District of West Virginia.