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8	IN THE UNITED STATES DISTRICT COURT		
9	FOR THE EASTERN DISTRICT OF CALIFORNIA		
10		1:15-cv-00603 MJS HC	
11	ANGEL A. DIAZ,	FINDINGS AND RECOMMENDATION TO GRANT MOTION TO DISMISS AND	
12	Petitioner,	CONSTRUE PETITION AS A MOTION TO	
13	V.	AMEND (Doc. 8)	
14		ORDER DIRECTING CLERK OF COURT TO ASSIGN A DISTRICT COURT JUDGE TO	
15	MARTIN BITER,	THE INSTANT MATTER	
16	Respondent.		
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18	Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas		
19	corpus pursuant to 28 U.S.C. § 2254. Respondent is represented in this action by		
20	Kathleen McKenna, of the Office of the Attorney General for the State of California.		
21	I. BACKGROUND		
22	On April 17, 2015, Petitioner filed the instant petition challenging his March, 2012		
23	conviction from the Kings County Superior Court for smuggling a controlled substance		
24	into a correctional facility, aiding and abetting in criminal gang activity, and various		
25	enhancements. (Pet., ECF No. 1 at 1.) Petitioner was sentenced to an indeterminate		
26	term of thirty (30) years to life in state prison. (Id.) In the present petition, Petitioner		
27	claims: (1) that the trial court failed to strike Petitioner's prior convictions in violation of		
28	his due process rights, and (2) that appellate counsel was ineffective for failing to provide		

<u>1</u> transcript records in support of the appeal. (Pet. at 4.)

Respondent was directed to file an answer to the petition within sixty days.
(Order, ECF No. 4.) On June 17, 2015, Respondent filed a response in the form of a
motion to dismiss the petition. (Mot. to Dismiss, ECF No. 8.) Respondent asserts that
Petitioner had previously filed a petition challenging the same conviction, that the petition
should be construed as a motion to amend in the prior petition, and this action be
dismissed. (Id.)

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II. <u>ANALYSIS</u>

9 In <u>Woods v. Carey</u>, 525 F.3d 886 (9th Cir. 2008), the Court held that a petition
10 filed before a prior petition has been adjudicated should be considered a motion to
11 amend the prior petition rather than a second or successive petition.

12 The instant petition was filed on April 17, 2015. As noted by Respondent, 13 Petitioner filed a petition for writ of habeas corpus in this Court on October 27, 2014: 14 Diaz v. Biter, Case No. 1:14-cv-01673-JLT-HC. The petition was rather vague, and either 15 challenged Petitioner's 2012 conviction or his prior convictions from 2011 that were used 16 as strikes in enhancing his sentence for the 2012 conviction. (Case No. 1:14-cv-01673-17 JLT-HC, Pet. at 4.) On December 24, 2014, Respondent moved to dismiss the petition, 18 and after briefing by the parties, the Court granted the motion and dismissed the petition 19 on May 7, 2015. (Case No. 1:14-cv-01673-JLT-HC, ECF Nos. 14, 23.) The Court held 20 that to the extent Petitioner challenged his 2011 conviction, the challenge was barred 21 under Lackawanna County Dist. Attorney v. Coss, 532 U.S. 394 (2001). Additionally, to 22 the extent that the petition sought to challenge his 2012 conviction, the Court held that 23 Petitioner neither stated a cognizable federal claim nor exhausted his state court 24 remedies.

Because the document that was initially filed in the instant case (1:15-cv-00603-MJS-HC) relates to the same judgment challenged by Petitioner in the earlier-filed case number (1:14-cv-00603-JLT-HC), and this petition was filed while the earlier filed petition was still pending, it is appropriate to construe the document as a motion to amend the

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Therefore, it is recommended that the instant petition initially will be construed as a motion to amend the petition in case number 1:14-cv-00603-JLT-HC, and that the document be re-filed in that action.

5 III. RECON

RECOMMENDATION

6 Accordingly, it is hereby recommended that:

- The motion to dismiss (Doc. 8) be GRANTED and the habeas petition
 initially filed in filed in this action on April 17, 2015, be CONSTRUED as a
 motion to amend the petition in case number 1:14-cv-01673-JLT-HC;
- 10 2) The Clerk of Court be DIRECTED to file the petition (ECF No. 1) as a
 11 motion to amend in case no. 1:14-cv-01673-JLT-HC; and
 - 3) The Clerk of Court be directed to close the current action.

Further, the Court ORDERS the Clerk of Court to assign a District Court Judge tothe instant matter.

This Findings and Recommendation is submitted to the assigned District Judge, 15 16 pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty (30) days after 17 being served with the Findings and Recommendation, any party may file written 18 objections with the Court and serve a copy on all parties. Such a document should be 19 captioned "Objections to Magistrate Judge's Findings and Recommendation." Any reply 20 to the objections shall be served and filed within fourteen (14) days after service of the 21 objections. The parties are advised that failure to file objections within the specified time 22 may waive the right to appeal the District Court's order. Wilkerson v. Wheeler, 772 F.3d 23 834, 839 (9th Cir. 2014).

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IT IS SO ORDERED.

Dated: September 22, 2015

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Ist Michael J. Seng

UNITED STATES MAGISTRATE JUDGE

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