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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

<b>ANGEL A. DIAZ,</b>  Petitioner,  v.  <b>MARTIN BITER, Warden,</b>  Respondent.
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1:15-cv-00603 AWI MJS HC

**ORDER ADOPTING FINDINGS AND  
RECOMMENDATION TO GRANT MOTION  
TO DISMISS AND CONSTRUE PETITION  
AS A MOTION TO AMEND**

**(Docs. 8, 10)**

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

On April 17, 2015, Petitioner filed the instant petition challenging his March, 2012 conviction from the Kings County Superior Court. 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.)

On September 23, 2015, the Magistrate Judge recommended that the instant petition to 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.

1 As of the date of this order, Petitioner has filed no objections or response of any  
2 kind to the Findings and Recommendation.

3 In accordance with the provisions of 28 U.S.C. § 636 (b), this Court has reviewed  
4 the case. Having carefully reviewed the entire file, the Court concludes that the  
5 Magistrate Judge's Findings and Recommendation is supported by the record and  
6 proper analysis.

7 Accordingly, IT IS HEREBY ORDERED that:

- 8 1. The motion to dismiss (Doc. 8) is GRANTED and the habeas petition  
9 initially filed in filed in this action on April 17, 2015, is CONSTRUED as a  
10 motion to amend the petition in case number 1:14-cv-01673-JLT-HC;
- 11 2. The Clerk of Court is DIRECTED to file the petition (ECF No. 1) as a  
12 motion to amend in case no. 1:14-cv-01673-JLT-HC;
- 13 3. The Clerk of Court is directed to close the current action; and
- 14 4. The Court DENIES the issuance of a Certificate of Appealability. 28 U.S.C.  
15 § 2253(c); Slack v. McDaniel, 529 U.S. 473, 484 (2000) In order to obtain a  
16 COA, petitioner must show: (1) that jurists of reason would find it debatable  
17 whether the petition stated a valid claim of a denial of a constitutional right;  
18 and (2) that jurists of reason would find it debatable whether the district  
19 court was correct in its procedural ruling. Slack v. McDaniel, 529 U.S. at  
20 484. In the present case, jurists of reason would not find debatable  
21 whether the petition was properly dismissed.

22 IT IS SO ORDERED.

23 Dated: February 1, 2016

24   
25 SENIOR DISTRICT JUDGE