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

QUOC XUONG LUU,

Petitioner,

No. CIV S-08-2630 JAM KJM P

vs.

D.K. SISTO, et al.,

Respondents.

FINDINGS AND RECOMMENDATIONS

_____/

Petitioner is proceeding pro se and in forma pauperis with an application for writ of habeas corpus under 28 U.S.C. § 2254. His “motion to set aside the court’s order of amended petition” is pending before the court. Petitioner filed the motion after the undersigned recommended that his original petition be dismissed and petitioner given thirty days in which to file an amended petition (Docket No. 29); however, petitioner filed the motion before the district judge assigned to this case adopted that recommendation and granted petitioner thirty days’ leave to amend. See Docket No. 39. The district judge’s adoption of the findings and recommendations has therefore rendered petitioner’s motion moot.¹ Moreover, petitioner has himself rendered his motion moot by filing two amended petitions, one before and one after the

¹ Petitioner also filed separate objections to the magistrate’s findings and recommendations. See Docket No. 32.

1 district judge adopted the findings and recommendations and granted him leave to amend.
2 (Docket Nos. 38 and 42). For those reasons, his motion to set aside the court's order allowing an
3 amended petition should be denied.

4 Petitioner has also filed a notice of interlocutory appeal with the Ninth Circuit and
5 a request in this court for a certificate of appealability. A certificate of appealability may issue
6 under 28 U.S.C. § 2253 "only if the applicant has made a substantial showing of the denial of a
7 constitutional right." 28 U.S.C. § 2253(c)(2). The court must either issue a certificate of
8 appealability indicating which issues satisfy the required showing or must state the reasons why
9 such a certificate should not issue. Fed. R. App. P. 22(b). Petitioner has not made a substantial
10 showing of the denial of a constitutional right. Accordingly, a certificate of appealability should
11 not issue in this action.

12 Finally, petitioner has filed what he styles as a "motion for summary judgment."
13 (Docket No. 44.) The court has not yet screened the amended petition. If the court orders service
14 of the petition, it also will set a schedule for the filing of an answer or responsive motion, and a
15 traverse. Petitioner's "motion" will be denied.

16 Accordingly, IT IS RECOMMENDED that:

17 1. Petitioner's motion to set aside the court's order of amended petition (Docket
18 No. 36) be denied as moot.

19 2. Petitioner's request for a certificate of appealability (Docket No. 40) be
20 denied.

21 3. Petitioner's "motion for summary judgment" (Docket No. 44) be denied.

22 These findings and recommendations are submitted to the United States District
23 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
24 one days after being served with these findings and recommendations, any party may file written
25 objections with the court and serve a copy on all parties. Such a document should be captioned
26 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections

1 shall be served and filed within seven days after service of the objections. The parties are
2 advised that failure to file objections within the specified time may waive the right to appeal the
3 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991). **If a party does not**
4 **plan to file objections or a reply that party is encouraged to file a prompt notice informing**
5 **the court of as much.**

6 DATED: September 3, 2010.

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10 U.S. MAGISTRATE JUDGE