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

10 DAVID LEE WHITE,

11 Petitioner,

No. CIV S-09-0790 LKK KJM P

12 vs.

13 K. DICKINSON,

14 Respondents.

FINDINGS AND RECOMMENDATIONS

15 _____/
16 Petitioner is a state prisoner proceeding pro se and in forma pauperis with an
17 application for writ of habeas corpus under 28 U.S.C. § 2254. Respondent has filed a motion to
18 dismiss, arguing that the petition is successive and untimely. See Docket No. 12. Petitioner has
19 responded with, first, a motion to amend the petition and, second, a motion to withdraw the
20 petition. See Docket Nos. 14 and 18.

21 Although the motion to withdraw is, by its terms, directed at the original (and still
22 effective) petition, on June 10, 2010, the court ordered petitioner to clarify whether he means to
23 withdraw the original petition and thus dismiss this case pursuant to Federal Rule of Civil
24 Procedure 41 or whether he only means to withdraw his motion to amend the petition. See
25 Docket No. 19. The court gave petitioner fourteen days in which to respond to the order. The
26 docket notes show the order was served on petitioner at the address he provided the court, but the

1 court has received no response or communication of any kind from petitioner since issuing the
2 order.

3 Because the motion to amend the petition has not been ruled upon, there is no
4 amended petition operative in this case.¹ See 28 U.S.C. § 1915A (requiring the court to screen
5 all actions brought by prisoners seeking redress against a governmental entity). The court
6 apprised petitioner of the consequences of granting the motion as to the original petition but
7 received no clarification, objection or other response. The court concludes, therefore, that the
8 motion to withdraw the petition should be granted and recommends that this case be dismissed
9 without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2).

10 Accordingly, IT IS RECOMMENDED that:

11 1. The motion to withdraw the petition for writ of habeas corpus (Docket No. 18)
12 be granted.

13 2. Petitioner's motion to amend (Docket No. 14) be denied as moot.

14 3. This case be dismissed without prejudice pursuant to Federal Rule of Civil
15 Procedure 41(a)(2).

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

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24 ¹ Respondent has filed a statement of non-opposition to the motion to amend, but in it he
25 reasserts his position that the amended position should be dismissed as successive or, in the
26 alternative, as untimely. See Docket No. 15. Respondent has not responded to the motion to
withdraw the petition.

1 shall be served and filed within fourteen 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).

4 DATED: August 14, 2010.

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7 U.S. MAGISTRATE JUDGE
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