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

ALONZO MCKINNEY,

Petitioner,

No. CIV S-09-1650 KJM P

vs.

J. WALKER,

Respondent.

Order

_____ /

Petitioner is a state prisoner proceeding with appointed counsel with an application for writ of habeas corpus under 28 U.S.C. § 2254. He has consented to magistrate judge jurisdiction.

By order filed February 10, 2010, petitioner’s second amended petition was dismissed. The court appointed the Federal Defender to represent petitioner for the limited purpose of assisting him in determining what claims, if any, he has under 28 U.S.C. § 2254 and in pleading such claims. See Order at 2 (docket no. 16). Petitioner was granted sixty days leave to submit, through the assistance of counsel, either a third amended petition or a voluntary notice of dismissal of this action.

The sixty day period has now expired, and petitioner has not filed an amended application or a voluntary notice of dismissal. Instead, he has filed a motion to appoint new

1 counsel. See Docket No. 19. Petitioner's counsel has filed a notice stating that he has conferred
2 with his client in person and in writing and has "explain[ed] the options that [are] available."
3 Notice at 2 (docket no. 20). Counsel further states that he has received a letter in response from
4 petitioner. Id. Without disclosing the contents of that letter, counsel states that he has now
5 "fulfilled the obligations of the Court's appointment and, as a result of Mr. McKinney's
6 communication ... asks that he be relieved as counsel for petitioner." Id. He also requests that
7 petitioner's motion for new counsel be removed from the record because it discloses privileged
8 communication between petitioner and his counsel, and "it is highly unlikely that Mr. McKinney
9 understands that filing such a document could be construed as a waiver of the attorney-client
10 privilege[.]" Id.

11 Although petitioner has not responded to his counsel's notice regarding the
12 possible effect of disclosing privileged communications in his motion for new counsel, the court,
13 in an abundance of caution, will order that his motion be sealed. The court will also order that
14 the Federal Defender's request to be relieved as counsel for petitioner be granted. Finally,
15 because petitioner has failed to file a third amended complaint or otherwise utilize the court's
16 appointment of counsel to comply with the court's previous order, the court will dismiss this
17 case without prejudice. See Local Rule 110; Fed. R. Civ. P. 41(b).

18 Accordingly, IT IS HEREBY ORDERED that:

- 19 1. The Clerk of Court is directed to seal petitioner's motion for appointment of
20 new counsel (docket no. 19).
- 21 2. Counsel for petitioner is relieved of his appointment.
- 22 3. This action is dismissed without prejudice.

23 DATED: June 10, 2010.

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U.S. MAGISTRATE JUDGE