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

EARL HENRY DOWN,

Petitioner,

No. 2:09-cv-2794 MCE EFB P

vs.

J. HAVILAND, et al.,

Respondents.

ORDER

_____ /

Petitioner is a state prisoner without counsel seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On December 28, 2012, petitioner filed a document entitled “Petition to Supplement Ancillary Expanded Subject Matter to Existing Petition for Writ of Habeas Corpus.” Dckt. No. 27. In the document petitioner explains that he wishes to expand on “issues already in litigation” and that the motion “is not meant to introduce new issues.” *Id.* at 1.

The motion alleges that the Board of Parole Hearings violated his right to due process by disregarding the matrix guidelines and failing to consider petitioner’s good time credits. *Id.* at 1-2. Petitioner claims that this conduct “has resulted in detention disproportionate to Petitioner’s sentence” and amounts to a violation of “the Separation of Powers Doctrine.” *Id.* at 2. While petitioner’s habeas petition contains a claim that the BPH violates the Separation of Powers Doctrine by assuming sentencing function of a court, the petition contains no allegations

1 concerning the BPH's use of the matrix guidelines or failure to consider petitioner's good time
2 credits. *See* Dckt. No. 1. The pending motion's reference to a violation of the "Separation of
3 Powers Doctrine" appears to be nothing more than an attempt to tie the newly asserted
4 allegations to a claim asserted in this petition.

5 Contrary to petitioner's representation, through the instant motion petitioner attempt to
6 assert a new claim for relief. However, petitioner must amend his petition to assert a new claim.
7 Because more than 21 days have passed since the date respondent filed an answer to the petition,
8 petitioner may amend the petition only with respondents' written consent or the court's leave.
9 Fed. R. Civ. P. 15(a)(2); Rule 12, Rules Governing Section 2254 Cases. There is no indication
10 that respondent has given written consent, and petitioner has not sought leave from the court to
11 amend his petition.

12 Furthermore, the instant motion cannot properly be construed as a request to amend the
13 petition, as it does not comply with the court's local rules. Local Rule 220 provides:

14 Unless prior approval to the contrary is obtained from the Court, every pleading
15 to which an amendment or supplement is permitted as a matter of right or has
16 been allowed by Court order shall be retyped and filed so that it is complete in
itself without reference to the prior or superseded pleading.

17 Here, the pending motion only contains a single new claim and does not include the
18 claims asserted in the original petition. It is clear from the instant motion that petitioner does not
19 wish to abandon his pending claims, but merely wishes to augment his petition. Furthermore,
20 petitioner has not filed a proposed amended petition as required when seeking leave to amend.
21 E.D. Cal. Local Rule 137(c).

22 As petitioner has not requested leave of court to amend his petition, the instant motion
23 will be denied. The denial is without prejudice to petitioner filing a motion to amend his
24 petition. If petitioner decides to seek amendment, he is admonished that he must demonstrate
25 that any new claims have been properly exhausted by presenting them to the California Supreme
26 Court or that state remedies are no longer available. He must also assert all new claims within

1 the one-year statutory period provided by 28 U.S.C. § 2244(d)(1). Further, any motion to amend
2 must be accompanied by a proposed amended petition that is complete in itself without reference
3 to any prior petition. However, should petitioner decline to seek amendment, the matter will
4 stand submitted for decision on the claims currently before the court.

5 Accordingly, it is hereby ORDERED that:

6 1. Petitioner's December 28, 2012 motion, Dckt. No. 27, is denied without prejudice to
7 filing a motion to amend the petition;

8 2. Petitioner may file a motion to amend the petition within 30 days of the date of this
9 order; and

10 3. Should petitioner decline to file a motion to amend the petition within 30 days, the
11 matter will stand submitted for decision on the claims in the October 7, 2009 petition currently
12 pending before the court.

13 DATED: March 7, 2013.

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15 EDMUND F. BRENNAN
16 UNITED STATES MAGISTRATE JUDGE
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