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

JOSE H. MAGANA-TORRES,

Petitioner,

No. CIV-S-10-2712 MCE EFB (TEMP) P

vs.

LARRY SMALL,

Respondent.

FINDINGS AND RECOMMENDATIONS

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Petitioner, a state prisoner proceeding without counsel in this case, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has paid the filing fee. Respondent has filed a motion to consolidate or, in the alternative, to dismiss it. Respondent argues that this petition is duplicative of the petition pending in Case No. CIV S-10-2669 WBS CMK, filed September 30, 2010, wherein petitioner challenges his state court conviction through the assistance of his counsel. Petitioner has not responded to the motion to consolidate or dismiss the instant petition.

A suit is duplicative if the “claims, parties and available relief do not significantly differ between the two actions.” *Barapind v. Reno*, 72 F. Supp.2d 1132, 1145 (E.D. Cal.1999) (citation omitted). “When a complaint involving the same parties and issues has already been filed in [a] federal district court, the court has discretion to abate or dismiss the second action.” *Welch v.*

1 *Board of Prison Terms*, 2008 WL 4000474 at \*2 (E.D. Cal.) (citation omitted). The court finds  
2 that dismissal of the second action is the proper course here.

3 IT IS HEREBY RECOMMENDED that the motion to dismiss, Dckt. No. 16, be granted  
4 and this action be dismissed without prejudice. *See* Fed. R. Civ. P. 41(b).

5 These findings and recommendations are submitted to the United States District Judge  
6 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
7 after being served with these findings and recommendations, any party may file written  
8 objections with the court and serve a copy on all parties. Such a document should be captioned  
9 “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections  
10 within the specified time may waive the right to appeal the District Court’s order. *Turner v.*  
11 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991). In  
12 his objections petitioner may address whether a certificate of appealability should issue in the  
13 event he files an appeal of the judgment in this case. *See* Rule 11, Federal Rules Governing  
14 Section 2254 Cases (the district court must issue or deny a certificate of appealability when it  
15 enters a final order adverse to the applicant).

16 DATED: May 16, 2011.

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18 EDMUND F. BRENNAN  
19 UNITED STATES MAGISTRATE JUDGE  
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