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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

ISAAC ELI GALVAN,	)	1:10-cv-00665-OWW-JLT HC
	)	
Petitioner,	)	FINDINGS AND RECOMMENDATIONS TO
	)	DISMISS THE PETITION FOR WRIT OF
v.	)	HABEAS CORPUS FOR VIOLATION OF
	)	THE ONE-YEAR STATUTE OF
	)	LIMITATIONS AND AS A SECOND OR
GONZALEZ,	)	SUCCESSIVE PETITION (Doc. 1)
	)	
Respondent.	)	ORDER REQUIRING OBJECTIONS TO BE
	)	FILED WITHIN TWENTY DAYS

**PROCEDURAL HISTORY**

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The instant federal petition for writ of habeas corpus was filed on April 8, 2010.<sup>1</sup> When the Court’s preliminary review of the petition indicated that it might be

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<sup>1</sup>In Houston v. Lack, the United States Supreme Court held that a pro se habeas petitioner's notice of appeal is deemed filed on the date of its submission to prison authorities for mailing, as opposed to the date of its receipt by the court clerk. Houston v. Lack, 487 U.S. 166, 276, 108 S.Ct. 2379, 2385 (1988). The rule is premised on the pro se prisoner's mailing of legal documents through the conduit of "prison authorities whom he cannot control and whose interests might be adverse to his." Miller v. Sumner, 921 F.2d 202, 203 (9<sup>th</sup> Cir. 1990); see, Houston, 487 U.S. at 271, 108 S.Ct. at 2382. The Ninth Circuit has applied the "mailbox rule" to state and federal petitions in order to calculate the tolling provisions of the AEDPA. Saffold v. Neland, 250 F.3d 1262, 1268-1269 (9<sup>th</sup> Cir. 2000), *amended* May 23, 2001, *vacated and remanded on other grounds sub nom. Carey v. Saffold*, 536 U.S. 214, 226 (2002). The date the petition is signed may be considered the earliest possible date an inmate could submit his petition to prison authorities for filing under the mailbox rule. Jenkins v. Johnson, 330 F.3d 1146, 1149 n. 2 (9<sup>th</sup> cir. 2003). Accordingly, for all of Petitioner’s state petitions and for the instant federal petition, the Court will consider, where such information is available, the date of signing of the petition (or the date of signing of the proof of service if no signature appears on the petition) as the earliest possible filing date and the operative date of filing under the mailbox rule for calculating the running of the statute of limitation. Petitioner signed the instant petition on

1 untimely, the Court, on May 24, 2010, issued an Order to Show Cause why the petition should not be  
2 dismissed pursuant to 28 U.S.C. § 2244(d). (Doc. 6). The Order to Show Cause required that  
3 Petitioner file his response within thirty days. On June 24, 2010, Petitioner filed his response. (Doc.  
4 8).

## 5 DISCUSSION

### 6 A. Preliminary Review of Petition

7 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition  
8 if it “plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is  
9 not entitled to relief in the district court . . . .” Rule 4 of the Rules Governing Section 2254 Cases.  
10 The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of  
11 habeas corpus, either on its own motion under Rule 4, pursuant to the respondent’s motion to  
12 dismiss, or after an answer to the petition has been filed. Herbst v. Cook, 260 F.3d 1039 (9<sup>th</sup>  
13 Cir.2001).

14 The Ninth Circuit, in Herbst v. Cook, concluded that a district court may dismiss *sua sponte* a  
15 habeas petition on statute of limitations grounds so long as the court provides the petitioner adequate  
16 notice of its intent to dismiss and an opportunity to respond. 260 F.3d at 1041-42. By issuing the  
17 Order to Show Cause, the Court afforded Petitioner the notice required by the Ninth Circuit in  
18 Herbst.

### 19 B. Limitation Period for Filing a Petition for Writ of Habeas Corpus

20 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of  
21 1996 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas  
22 corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063  
23 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9<sup>th</sup> Cir. 1997) (en banc), *cert. denied*, 118 S.Ct. 586  
24 (1997). The instant petition was filed on April 8, 2010, and thus, it is subject to the provisions of  
25 the AEDPA.

26 The AEDPA imposes a one year period of limitation on petitioners seeking to file a federal  
27 petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As amended, § 2244, subdivision (d)

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28 April 8, 2010. (Doc. 1, p. 77).

1 reads:

2 (1) A 1-year period of limitation shall apply to an application for a writ of habeas  
3 corpus by a person in custody pursuant to the judgment of a State court. The  
4 limitation period shall run from the latest of –

5 (A) the date on which the judgment became final by the conclusion of direct  
6 review or the expiration of the time for seeking such review;

7 (B) the date on which the impediment to filing an application created by  
8 State action in violation of the Constitution or laws of the United States is removed, if  
9 the applicant was prevented from filing by such State action;

10 (C) the date on which the constitutional right asserted was initially recognized by  
11 the Supreme Court, if the right has been newly recognized by the Supreme Court and made  
12 retroactively applicable to cases on collateral review; or

13 (D) the date on which the factual predicate of the claim or claims presented  
14 could have been discovered through the exercise of due diligence.

15 (2) The time during which a properly filed application for State post-conviction or  
16 other collateral review with respect to the pertinent judgment or claim is pending shall  
17 not be counted toward any period of limitation under this subsection.

18 28 U.S.C. § 2244(d).

19 In most cases, the limitation period begins running on the date that the petitioner’s direct  
20 review became final. Here, the Petitioner was convicted on July 2, 2001. (Doc. 1, p. 1). Petitioner  
21 initiated a direct review of his conviction in the California courts, and eventually filed a petition for  
22 review that was denied by the California Supreme Court on November 13, 2002. (Doc. 1, p. 2).  
23 Thus, direct review would have concluded on February 12, 2003, when the ninety-day period for  
24 seeking review in the United States Supreme Court expired. Barefoot v. Estelle, 463 U.S. 880, 887  
25 (1983); Bowen v. Roe, 188 F.3d 1157, 1159 (9<sup>th</sup> Cir.1999); Smith v. Bowersox, 159 F.3d 345, 347  
26 (8<sup>th</sup> Cir.1998). Petitioner would then have one year from the following day, i.e., February 13, 2003,  
27 or until February 12, 2004, absent applicable tolling, within which to file his federal petition for writ  
28 of habeas corpus.

As mentioned, the instant petition was filed on April 8, 2010, over six years after the date the  
one-year period would have expired. Thus, unless Petitioner is entitled to either statutory or  
equitable tolling, the instant petition is untimely and should be dismissed.

C. Tolling of the Limitation Period Pursuant to 28 U.S.C. § 2244(d)(2)

Under the AEDPA, the statute of limitations is tolled during the time that a properly filed

1 application for state post-conviction or other collateral review is pending in state court. 28 U.S.C.  
2 § 2244(d)(2). A properly filed application is one that complies with the applicable laws and rules  
3 governing filings, including the form of the application and time limitations. Artuz v. Bennett, 531  
4 U.S. 4, 8, 121 S. Ct. 361 (2000). An application is pending during the time that ‘a California  
5 petitioner completes a full round of [state] collateral review,’ so long as there is no unreasonable  
6 delay in the intervals between a lower court decision and the filing of a petition in a higher court.  
7 Delhomme v. Ramirez, 340 F. 3d 817, 819 (9th Cir. 2003), abrogated on other grounds as recognized  
8 by Waldrip v. Hall, 548 F. 3d 729 (9th Cir. 2008)(per curium)(internal quotation marks and citations  
9 omitted); see Evans v. Chavis, 546 U.S. 189, 193-194, 126 S. Ct. 846 (2006); see Carey v. Saffold,  
10 536 U.S. 214, 220, 222-226, 122 S. Ct. 2134 (2002); see also, Nino v. Galaza, 183 F.3d 1003, 1006  
11 (9th Cir. 1999).

12         Nevertheless, there are circumstances and periods of time when no statutory tolling is  
13 allowed. For example, no statutory tolling is allowed for the period of time between finality of an  
14 appeal and the filing of an application for post-conviction or other collateral review in state court,  
15 because no state court application is “pending” during that time. Nino, 183 F.3d at 1006-1007.  
16 Similarly, no statutory tolling is allowed for the period between finality of an appeal and the filing of  
17 a federal petition. Id. at 1007. In addition, the limitation period is not tolled during the time that a  
18 federal habeas petition is pending. Duncan v. Walker, 563 U.S. 167, 181-182, 121 S.Ct. 2120  
19 (2001); see also, Fail v. Hubbard, 315 F. 3d 1059, 1060 (9th Cir. 2001)(as amended on December 16,  
20 2002). Further, a petitioner is not entitled to statutory tolling where the limitation period has already  
21 run prior to filing a state habeas petition. Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003)  
22 (“section 2244(d) does not permit the reinitiation of the limitations period that has ended before the  
23 state petition was filed.”); Jiminez v. White, 276 F. 3d 478, 482 (9th Cir. 2001). Finally, a petitioner  
24 is not entitled to continuous tolling when the petitioner’s later petition raises unrelated claims. See  
25 Gaston v. Palmer, 447 F.3d 1165, 1166 (9th Cir. 2006).

26         In his petition, Petitioner alleges that he filed the following state habeas petitions: (1) filed in  
27 the Superior Court of Kern County on March 19, 2007, and denied on April 24, 2009; (2) filed in the  
28 California Court of Appeal, Fifth Appellate District (“5<sup>th</sup> DCA”) on June 12, 2009, and denied on

1 June 24, 2009; and (3) filed in the California Supreme Court on August 26, 2009, and denied on  
2 February 3, 2010. (Doc. 1, pp. 73-76).<sup>2</sup>

3 Unfortunately for Petitioner, none of these filings entitle Petitioner to statutory tolling under  
4 the AEDPA. A petitioner is not entitled to tolling where the limitations period has already run prior  
5 to filing a state habeas petition. Green v. White, 223 F.3d 1001, 1003 (9<sup>th</sup> Cir. 2000); Jiminez v.  
6 Rice, 276 F.3d 478 (9<sup>th</sup> Cir. 2001); see Webster v. Moore, 199 F.3d 1256, 1259 (11<sup>th</sup> Cir.  
7 2000)(same); Ferguson v. Palmateer, 321 F.3d 820 (9<sup>th</sup> Cir. 2003)(“section 2244(d) does not permit  
8 the reinitiation of the limitations period that has ended before the state petition was filed.”); Jackson  
9 v. Dormire, 180 F.3d 919, 920 (8<sup>th</sup> Cir. 1999) (petitioner fails to exhaust claims raised in state habeas  
10 corpus filed after expiration of the one-year limitations period). As mentioned, the limitations  
11 period expired on February 12, 2004, over three years *before* Petitioner filed his first state habeas  
12 petition on March 19, 2007. Accordingly, Petitioner cannot avail himself of the statutory tolling  
13 provisions of the AEDPA for these three petitions.

14 In his response to the Order to Show Cause, Petitioner argues that he filed additional state  
15 habeas petitions that are not reflected in the Court’s May 24, 2010 Order to Show Cause.  
16 Specifically, Petitioner indicates that he filed the following additional state habeas petitions: (1) filed  
17 in the Kern County Superior Court on January 22, 2003, and denied on March 17, 2003; (2) filed in  
18 the 5<sup>th</sup> DCA on April 3, 2003, and denied on June 13, 2003; (3) filed in the Kern County Superior  
19 Court on September 2, 2003, and denied on September 30, 2003; (4) filed in the California Supreme  
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21 <sup>2</sup>The court may take notice of facts that are capable of accurate and ready determination by resort to sources whose  
22 accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b); United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th Cir.  
23 1993). The record of state court proceeding is a source whose accuracy cannot reasonably be questioned, and judicial notice  
24 may be taken of court records. Mullis v. United States Bank, Ct., 828 F.2d 1385, 1388 n.9 (9th Cir. 1987); Valerio v. Boise  
25 Cascade Corp., 80 F.R.D. 626, 635 n. 1 (N.D.Cal.1978), *aff’d*, 645 F.2d 699 (9th Cir.); see also Colonial Penn Ins. Co. v.  
26 Coil, 887 F.2d 1236, 1239 (4th Cir. 1989); Rodic v. Thistledown Racing Club, Inc., 615 F.2d 736, 738 (6th. Cir. 1980). As  
27 such, the internet website for the California Courts, containing the court system’s records for filings in the Court of Appeal  
28 and the California Supreme Court are subject to judicial notice. The Court thus takes judicial notice of the California Courts  
internet website, which the Court has accessed in order to corroborate and to supplement Petitioner’s chronology of filings  
in state court. That electronic database only reflects the actual date of filing of the petitions. Since Petitioner has not  
provided the Court with copies of the petitions themselves, the actual date of filing, rather than the date Petitioner submitted  
the petitions to prison authorities, must be used. The Court notes, however, that the use of the actual filing date, rather than  
the “mailbox rule,” would not, given Petitioner’s delay in filing the instant petition, have any material effect on the Court’s  
timeliness analysis.

1 Court on September 2, 2003, and denied on June 9, 2004; (5) filed in the Kern County Superior  
2 Court on October 15, 2003, and denied on October 29, 2003; and (6) filed in the California Supreme  
3 Court on December 4, 2003, and denied on June 9, 2004. (Doc. 8, p. 12).

4 Assuming, without deciding, that all of these state petitions were “properly filed” within the  
5 meaning of the AEDPA such as to entitle Petitioner to statutory tolling for their pendency and for the  
6 intervals between the petitions, those six state petitions do not make the instant federal petition  
7 timely. As discussed above, the one-year period commenced on February 13, 2002. Petitioner filed  
8 his first state habeas petition on January 22, 2003 in the Kern County Superior Court. At that point,  
9 343 days of his allotted 365 days had already elapsed, leaving him only twenty-two days remaining.  
10 His last petition was denied on June 9, 2004. The one-year period would have re-commenced the  
11 following day, i.e., on June 10, 2004, and would have run unabated until it expired twenty-two days  
12 later, i.e., on July 2, 2004. As discussed, the instant petition was filed on April 8, 2010, almost six  
13 years after the one-year period had elapsed, thus making the petition untimely even if Petitioner  
14 properly filed the additional state petitions referred to above and was entitled to the full statutory  
15 tolling for those petitions.

16 Although Petitioner may assume that because his present claim is premised upon the United  
17 States Supreme Court’s decision in Cunningham v. California, 549 U.S. 270 (2007), he should  
18 obtain a different result, Petitioner is wrong. Cunningham has not been held to be retroactive;  
19 indeed, the Ninth Circuit has held that, instead, it is Blakely v. Washington, 542 U.S. 296 (2004),  
20 that is retroactive. Butler v. Curry, 528 F.3d 624, 639 (9th Cir. 2008). Accordingly, in determining  
21 whether Blakely should apply to a given federal petition, the issue is whether the “direct review” of  
22 the state petitioner’s claims concluded before or after Blakely was announced, not before or after the  
23 decision in Cunningham. Butler, 528 F.3d at 639. Blakely was decided on June 24, 2004. As  
24 mentioned, Petitioner direct appeal became final on February 12, 2003, over a year before Blakely  
25 was decided. Accordingly, Blakely is inapplicable to Petitioner’s case, and, therefore, the principles  
26 reiterated in Cunningham are likewise inapplicable retroactively to Petitioner’s case. Butler, 528  
27 F.3d at 639. Put another way, the fact that Cunningham was decided on January 22, 2007, shortly  
28 before Petitioner filed his latest round of state habeas petitions challenging his sentence, does not

1 affect the original “window” for Petitioner to file his federal petition, and likewise does not alter this  
2 Court’s analysis of the untimeliness of the instant petition.

3 In both his petition and his response to the Order to Show Cause, Petitioner argues that his  
4 appeal from the 2001 conviction was still ongoing and “active” at the time Blakely was decided, and  
5 therefore its principles are applicable to Petitioner’s sentence. (Doc. 1, p. 17; Doc. 8, p. 4).  
6 However, the test is not whether Petitioner was actively attacking his conviction at the time that  
7 Blakely was decided. The test is whether he was engaged in the process of “direct review” at the  
8 time. However, by the time Blakely was decided on June 24, 2004, Petitioner had concluded his  
9 direct appeal more than a year before, on February 12, 2003. Instead, he was engaged in habeas  
10 review, which constitutes a collateral attack upon his conviction and sentence. Thus, February 12,  
11 2003 is the operative date for determining whether Blakely applies and, clearly, it does not. Butler,  
12 528 F.3d at 639.

#### 13 D. Equitable Tolling

14 The limitation period is subject to equitable tolling when “extraordinary circumstances  
15 beyond a prisoner’s control make it impossible to file the petition on time.” Shannon v. Newland,  
16 410 F. 3d 1083, 1089-1090 (9th Cir. 2005)(internal quotation marks and citations omitted). “When  
17 external forces, rather than a petitioner’s lack of diligence, account for the failure to file a timely  
18 claim, equitable tolling of the statute of limitations may be appropriate.” Miles v. Prunty, 187 F.3d  
19 1104, 1107 (9th Cir. 1999). “Generally, a litigant seeking equitable tolling bears the burden of  
20 establishing two elements: “(1) that he has been pursuing his rights diligently, and (2) that some  
21 extraordinary circumstance stood in his way.” Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct.  
22 1807 (2005). “[T]he threshold necessary to trigger equitable tolling under AEDPA is very high, lest  
23 the exceptions swallow the rule.” Miranda v. Castro, 292 F. 3d 1062, 1066 (9th Cir. 2002)(citation  
24 omitted). As a consequence, “equitable tolling is unavailable in most cases.” Miles, 187 F. 3d at  
25 1107.

26 Here, Petitioner has made no claim of entitlement to equitable tolling and, based on the  
27 record now before the Court, the Court sees no basis for such a claim. Accordingly, Petitioner is not  
28 entitled to equitable tolling. Thus, the petition is untimely and should be dismissed.

1           E. The Petition Should Be Dismissed As A Second Or Successive Petition.

2           Alternatively, the petition should be dismissed as a second or successive petition. In his  
3 response to the Order to Show Cause, Petitioner includes documentation that references a prior  
4 federal habeas corpus petition filed by Petitioner in this Court. In case number 1:04-cv-6446-LJO-  
5 JMD, Petitioner also challenged his 2001 conviction in the Kern County Superior Court, raising  
6 multiple claims of ineffective assistance of trial counsel. The Court’s own electronic docketing  
7 system indicates that the issues were fully briefed and Findings and Recommendations to deny the  
8 petition on the merits was filed on April 8, 2008. Subsequently, the Findings and Recommendations  
9 were adopted by the District Judge who entered judgment against Petitioner on July 7, 2008.  
10 Petitioner appealed that denial to the Ninth Circuit, but the appellate court issued an order on  
11 February 5, 2009 refusing to issue a certificate of appealability.

12           A federal court must dismiss a second or successive petition that raises the same grounds as a  
13 prior petition. 28 U.S.C. § 2244(b)(1). The Court must also dismiss a second or successive petition  
14 raising a new ground unless the petitioner can show that 1) the claim rests on a new, retroactive,  
15 constitutional right or 2) the factual basis of the claim was not previously discoverable through due  
16 diligence, and these new facts establish by clear and convincing evidence that but for the  
17 constitutional error, no reasonable fact-finder would have found the applicant guilty of the  
18 underlying offense. 28 U.S.C. § 2244(b)(2)(A)-(B). However, it is not the district court that decides  
19 whether a second or successive petition meets these requirements, which allow a petitioner to file a  
20 second or successive petition.

21           Section 2244 (b)(3)(A) provides: “Before a second or successive application permitted by this  
22 section is filed in the district court, the applicant shall move in the appropriate court of appeals for an  
23 order authorizing the district court to consider the application.” In other words, Petitioner must  
24 obtain leave from the Ninth Circuit before he can file a second or successive petition in district court.  
25 See Felker v. Turpin, 518 U.S. 651, 656-657 (1996). This Court must dismiss any second or  
26 successive petition unless the Court of Appeals has given Petitioner leave to file the petition because  
27 a district court lacks subject-matter jurisdiction over a second or successive petition. Pratt v. United  
28 States, 129 F.3d 54, 57 (1st Cir. 1997); Greenawalt v. Stewart, 105 F.3d 1268, 1277 (9th Cir. 1997),



1 *cert. denied*, 117 S.Ct. 794 (1997); Nunez v. United States, 96 F.3d 990, 991 (7th Cir. 1996).

2       Because the current petition was filed after April 24, 1996, the provisions of the  
3 Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) apply to Petitioner's current  
4 petition. Lindh v. Murphy, 521 U.S. 320, 327 (1997). The petition in case number 1:04-cv-064460-  
5 LJO-JMD challenged Petitioner's 2001 conviction on the grounds of ineffective assistance of  
6 counsel. The instant petition challenges the same conviction on the grounds that the sentence to the  
7 upper term is unconstitutional. For state inmates, the AEDPA provides only two exceptions for a  
8 second or successive petition. First, an exception is made for the discovery of a factual predicate that  
9 could not have been previously discovered by due diligence and the facts underlying the claim, if  
10 proven in light of the evidence as a whole, would be sufficient to establish by clear and convincing  
11 evidence that but for the constitutional error, no reasonable fact-finder would have found the  
12 petitioner guilty of the underlying offense. 28 U.S.C. § 2244(b)(2)(B). That exception is  
13 inapplicable here since Petitioner is not contending that he has discovered the factual predicate for  
14 his claim of an illegal sentence after his first petition. Rather, he is contending that the intervening  
15 United States Supreme Court decision in Cunningham is the justification for a second or successive  
16 petition.

17       A second exception allows a second or successive petition if it is based upon a new rule of  
18 constitutional law made retroactive by the United States Supreme Court. 28 U.S.C. § 2244(b)(2)(A).  
19 As discussed, however, in the preceding sections, Cunningham has not been made retroactive by the  
20 United States Supreme Court. Accordingly, this exception is also inapplicable.

21       Because neither exception to the "second or successive" bar has been met, and because  
22 Petitioner has made no showing that he has obtained prior leave from the Ninth Circuit to file his  
23 successive petition attacking his 2001 Kern County conviction, the petition is barred by the AEDPA  
24 as a second or successive petition. That being so, this Court has no jurisdiction to consider  
25 Petitioner's renewed application for relief from that conviction under § 2254 and must dismiss the  
26 petition. See Greenawalt, 105 F.3d at 1277; Nunez, 96 F.3d at 991. If Petitioner desires to proceed  
27 in bringing this petition for writ of habeas corpus, he must first file for leave to do so with the Ninth  
28 Circuit. See 28 U.S.C. § 2244 (b)(3).

1 **RECOMMENDATION**

2 Accordingly, the Court HEREBY RECOMMENDS that the habeas corpus petition be  
3 DISMISSED for Petitioner’s failure to comply with 28 U.S.C. § 2244(d)’s one year limitation period  
4 and because it is a second or successive petition under the AEDPA.

5 This Findings and Recommendation is submitted to the United States District Court Judge  
6 assigned to this case, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304 of  
7 the Local Rules of Practice for the United States District Court, Eastern District of California.  
8 Within twenty (20) days after being served with a copy, any party may file written objections with  
9 the court and serve a copy on all parties. Such a document should be captioned “Objections to  
10 Magistrate Judge’s Findings and Recommendation.” Replies to the objections shall be served and  
11 filed within fourteen (14) court days (plus three days if served by mail) after service of the  
12 objections. The Court will then review the Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636  
13 (b)(1)(C). The parties are advised that failure to file objections within the specified time may waive  
14 the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9<sup>th</sup> Cir. 1991).

15  
16 IT IS SO ORDERED.

17 Dated: July 1, 2010

/s/ Jennifer L. Thurston  
UNITED STATES MAGISTRATE JUDGE