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## UNITED STATES DISTRICT COURT

## EASTERN DISTRICT OF CALIFORNIA

LUIS ALBERTO VALENCIA,

Petitioner,

v.

CONNIE GIPSON, Warden,

Respondent.

Case No. 1:13-cv-01864-LJO-SMS HC

ORDER STRIKING THE ORDER ADOPTING FINDINGS AND RECOMMENDATIONS AND REOPENING THE PERIOD FOR PETITIONER TO COMMENT THEREON

(Docs. 19, 20, and 22)

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. On August 20, 2014, the Magistrate Judge issued findings and recommendations recommending that the Court dismiss count two but allow the petition to proceed on remaining counts. The Clerk of Court mailed Petitioner a copy of the findings and recommendations. On September 4, 2014, the copy mailed to Petitioner was returned to the Clerk mark "undeliverable, name and ID do not match." Thereafter, the Court ordered that the findings and recommendations be adopted.

Local Rule 183 required Petitioner to advise the Court of a change of address within 63 days. When Petitioner did not do so, the Magistrate Judge recommended that the case be dismissed without prejudice for failure to prosecute. In this instance, the copy of the findings and recommendations that the Clerk mailed to Petitioner's last known address was successfully delivered. On November 24, 2014, Petitioner advised the Court that his address had not changed and that he could not explain why the copy of Document 19 was not delivered to him.

Having failed to receive the findings and recommendations recommending dismissal for Petitioner's second ground for relief (Doc. 19), Petitioner requests that the Court set aside the order adopting the findings and recommendations (Doc. 20) and reopen the time in which he may comment on the findings and recommendations (Doc. 19). Rule 60(b)(1) permits relief from an order such as the findings and recommendations (Doc. 19) for excusable neglect. Because Petitioner never received a copy of the findings and recommendations (Doc. 19), his failure to file comments within the permitted time period constitutes excusable neglect.

Accordingly, the Court hereby ORDERS that the October 28, 2014 Order Adopting
Findings and Recommendations be vacated and that comment period provided for the August 20,
2014 findings and recommendations recommending the dismissal of count two of the petition (Doc.
19) be reopened for thirty (30) days from the date of service of this order. The Clerk of Court is
directed to serve petitioner with both a copy of this Order and a copy of the August 20, 2014
findings and recommendations (Doc. 19) at his address as shown on the docket.

Within thirty (30) days after being served with copies of the August 20, 2014 findings and recommendations (Doc. 19), Petitioner may file written objections with the Court. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636(b)(1)(C). Petitioner is advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9<sup>th</sup> Cir. 1991).

IT IS SO ORDERED.

Dated: November 26, 2014 /s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE