



1 the State of California.

2 **I. Background**

3 Petitioner is currently in the custody of the California Department of Corrections  
4 pursuant to a judgment of the Superior Court of California, County of Kings, upon  
5 pleading to second degree murder on May 18, 2011. (See Lodged Doc. No. 1.) On June  
6 16, 2011, Petitioner was sentenced to an indeterminate state prison term of fifteen years  
7 to life. (Id.)

8 Petitioner did not appeal his conviction. However, Petitioner filed three post-  
9 conviction collateral challenges with respect to his conviction:

- 10 1. California Court of Appeal, Fifth Appellate District  
11 Filed: November 12, 2014<sup>1</sup>;  
Denied: December 5, 2014;
- 12 2. California Supreme Court  
13 Filed: December 14, 2014<sup>2</sup>;  
Denied: January 7, 2015;
- 14 3. California Supreme Court  
15 Filed: January 15, 2015<sup>3</sup>;  
Denied: April 29, 2015;

16 (See Lodged Docs. 2-7.)

17 On May 19, 2015, Petitioner filed the instant federal Petition for Writ of Habeas  
18 Corpus in this Court.<sup>4</sup> On September 14, 2015, Respondent filed a Motion to Dismiss the  
19 petition as being filed outside the one-year limitations period prescribed by 28 U.S.C. §  
20 2244(d). (ECF No. 20, Mot. to Dismiss.) Petitioner filed an opposition to the motion

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22 <sup>1</sup> Under the mailbox rule, the Court deems petitions filed on the date Petitioner handed a petition  
23 to prison authorities for mailing. Houston v. Lack, 487 U.S. 266, 276, 108 S.Ct. 2379, 2385, 101 L. Ed. 2d  
24 245 (1988); Campbell v. Henry, 614 F.3d 1056 (9th Cir. 2010); see also Rule 3(d) of the Rules Governing  
25 Section 2254 Cases. Although the petition was filed on November 19, 2014, the petition shall be  
26 considered filed on November 12, 2014, the date Petitioner signed the petition.

27 <sup>2</sup> Although the petition was filed on December 23, 2014, the petition shall be considered filed on  
28 December 14, 2014, the date Petitioner signed the petition.

<sup>3</sup> Although the petition was filed on January 22, 2015, the petition shall be considered filed on  
January 15, 2015, the date Petitioner signed the petition.

<sup>4</sup> Although the petition was filed on June 1, 2015, the petition shall be considered filed on May 19,  
2015, the date Petitioner signed the petition.

1 alleging that although untimely, he was entitled to tolling based on the equitable  
2 exception for actual innocence. (ECF No. 23.) On September 30, 2015, the Court issued  
3 findings and recommendations to dismiss the petition as untimely. (ECF No. 24.) In  
4 response, Petitioner filed objections and a motion to appoint counsel. (ECF Nos. 25-26.)  
5 Petitioner objections include hundreds of pages of argument and exhibits. While not  
6 completely coherent, the objections allude to significant issues with regard to Petitioner's  
7 mental stability, and therefore raise issues as to whether Petitioner is entitled to  
8 equitable tolling based on his mental impairment and/or whether the Court should inquire  
9 further in this regard, including possibly holding an evidentiary hearing, prior to making a  
10 determination.

11 Based on the record before the Court, including the evidence presented in  
12 Petitioner's objections to the findings and recommendation, the Court issues the  
13 following amended findings and recommendation.

## 14 **II. Discussion**

### 15 **A. Procedural Grounds for Motion to Dismiss**

16 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to  
17 dismiss a petition if it "plainly appears from the petition and any attached exhibits that the  
18 petitioner is not entitled to relief in the district court . . . ." Rule 4 of the Rules Governing  
19 Section 2254 Cases.

20 The Ninth Circuit has allowed respondents to file a motion to dismiss in lieu of an  
21 answer if the motion attacks the pleadings for failing to exhaust state remedies or being  
22 in violation of the state's procedural rules. See, e.g., O'Bremski v. Maass, 915 F.2d 418,  
23 420 (9th Cir. 1990) (using Rule 4 to evaluate motion to dismiss petition for failure to  
24 exhaust state remedies); White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (using  
25 Rule 4 as procedural grounds to review motion to dismiss for state procedural default);  
26 Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n. 12 (E.D. Cal. 1982) (same). Thus, a  
27 respondent can file a motion to dismiss after the court orders a response, and the Court  
28 should use Rule 4 standards to review the motion. See Hillery, 533 F. Supp. at 1194 &

1 n. 12.

2 In this case, Respondent's motion to dismiss is based on a violation of the one-  
3 year limitations period. 28 U.S.C. § 2244(d)(1). Because Respondent's motion to dismiss  
4 is similar in procedural standing to a motion to dismiss for failure to exhaust state  
5 remedies or for state procedural default and Respondent has not yet filed a formal  
6 answer, the Court will review Respondent's motion to dismiss pursuant to its authority  
7 under Rule 4.

8 **B. Commencement of Limitations Period Under 28 U.S.C. § 2244(d)(1)(A)**

9 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death  
10 Penalty Act of 1996 (hereinafter "AEDPA"). AEDPA imposes various requirements on all  
11 petitions for writ of habeas corpus filed after the date of its enactment. Lindh v. Murphy,  
12 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th  
13 Cir. 1997).

14 In this case, the petition was filed on May 19, 2015 and is subject to the  
15 provisions of AEDPA. AEDPA imposes a one-year period of limitation on petitioners  
16 seeking to file a federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As  
17 amended, § 2244, subdivision (d) reads:

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

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

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

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

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

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

5 28 U.S.C. § 2244(d).

6 Under § 2244(d)(1)(A), the limitations period begins running on the date that the  
7 petitioner's direct review became final or the date of the expiration of the time for seeking  
8 such review. In this case, Petitioner did not appeal the judgment issued on June 16,  
9 2011. Accordingly, his conviction became final 60 days later on August 15, 2011. Cal.  
10 Rules of Court 8.308(a); Mendoza v. Carey, 449 F.3d 1065, 1067 (9th Cir. 2006). The  
11 AEDPA statute of limitations began to run the following day, on August 16, 2011.  
12 Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001).

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

14 28 U.S.C. § 2244(d)(2) states that the “time during which a properly filed  
15 application for State post-conviction or other collateral review with respect to the  
16 pertinent judgment or claim is pending shall not be counted toward” the one year  
17 limitation period. 28 U.S.C. § 2244(d)(2). In Carey v. Saffold, the Supreme Court held  
18 the statute of limitations is tolled where a petitioner is properly pursuing post-conviction  
19 relief, and the period is tolled during the intervals between one state court's disposition of  
20 a habeas petition and the filing of a habeas petition at the next level of the state court  
21 system. 536 U.S. 214, 216 (2002); see also Nino v. Galaza, 183 F.3d 1003, 1006 (9th  
22 Cir. 1999). Nevertheless, state petitions will only toll the one-year statute of limitations  
23 under § 2244(d)(2) if the state court explicitly states that the post-conviction petition was  
24 timely or was filed within a reasonable time under state law. Pace v. DiGuglielmo, 544  
25 U.S. 408 (2005); Evans v. Chavis, 546 U.S. 189 (2006). Claims denied as untimely or  
26 determined by the federal courts to have been untimely in state court will not satisfy the  
27 requirements for statutory tolling. Id.

28 Petitioner did not file any post-conviction challenges to the judgment during the  
one year limitations period. Therefore, the period commenced on August 16, 2011 and

1 expired on year later on August 15, 2012.

2 The statute of limitations therefore expired over two years before the instant  
3 federal petition was filed on May 19, 2015. While Petitioner filed three post-conviction  
4 challenges starting in November, 2014, petitions filed after the expiration of the statute of  
5 limitations period have no tolling effect. Ferguson v. Palmateer, 321 F.3d 820 (9th Cir.  
6 2003) ("section 2244(d) does not permit the reinitiation of the limitations period that has  
7 ended before the state petition was filed."). The instant federal petition is untimely.

#### 8 **D. Equitable Tolling**

9 The limitations period is subject to equitable tolling if the petitioner demonstrates:  
10 "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary  
11 circumstance stood in his way." Holland v. Florida, 130 S. Ct. 2549, 2560-62 (2010);  
12 quoting Pace v. DiGuglielmo. Petitioner bears the burden of alleging facts that would  
13 give rise to tolling. Pace, 544 U.S. at 418; Hinton v. Pac. Enters., 5 F.3d 391, 395 (9th  
14 Cir. 1993). In his opposition to the motion to dismiss, Petitioner claims he is entitled to an  
15 equitable exception to the limitations period based on his actual innocence. However, in  
16 his objections to the findings and recommendation, Petitioner elaborates as to his mental  
17 condition both prior to and after the crime of conviction. Petitioner's opposition lacks  
18 clarity, however, "[a] document filed *pro se* is to be liberally construed, and ... must be  
19 held to less stringent standards than formal pleadings drafted by lawyers." Woods v.  
20 Carey, 525 F.3d 886, 889-890 (9th Cir. 2008) (citations omitted). In light of Petitioner's  
21 *pro se* status, and his possible mental impairment, the Court will construe his objections  
22 as raising a equitable tolling defense based on his mental state. The Court will address  
23 both defenses in turn.

#### 24 **1. Actual Innocence**

25 On May 28, 2013, the Supreme Court held that a federal court may entertain an  
26 untimely claim if a petitioner makes a showing of actual innocence. McQuiggin v.  
27 Perkins, 133 S. Ct. 1924, 185 L. Ed. 2d 1019, 2013 WL 2300806 (2013). To qualify for  
28 the equitable exception to the timeliness bar based on actual innocence, a petitioner

1 "must show that it is more likely than not that no reasonable juror would have convicted  
2 him in the light of the new evidence." 133 S. Ct. at 1935 (quoting Schlup v. Delo, 513  
3 U.S. 298, 327 (1995)). "[T]he emphasis on 'actual innocence' allows the reviewing  
4 tribunal also to consider the probative force of relevant evidence that was either  
5 excluded or unavailable at trial." Schlup, 513 U.S. at 327. "The gateway should open  
6 only when a petition presents 'evidence of innocence so strong that a court cannot have  
7 confidence in the outcome of the trial unless the court is also satisfied that the trial was  
8 free of nonharmless constitutional error.'" McQuiggin, 133 S. Ct. 1924, 1936 (quoting  
9 Schlup, 513 U.S. at 316.) "Unexplained delay in presenting new evidence bears on the  
10 determination whether the petitioner has made the requisite showing." 133 S. Ct. 1924,  
11 1935.

12 Petitioner asserts that he is actually innocent because of the alleged  
13 ineffectiveness of his trial counsel. (Opp'n at 2-4.) Petitioner's claims, without further  
14 explanation, do not undermine his guilt. Petitioner has not described any new evidence,  
15 or why that evidence establishes his factual innocence. The evidence presented in the  
16 opposition simply is not sufficient to support a finding of actual innocence. Petitioner's  
17 new evidence, if presented to a reasonable juror, would not convince the juror of his  
18 innocence. Petitioner's actual innocence claim is without merit.

## 19 **2. Mental Impairment**

20 The Ninth Circuit has determined that mental incompetence can represent an  
21 extraordinary circumstance and serve as a basis for equitable tolling under AEDPA. See  
22 Orthel v. Yates, 795 F.3d 935, 938-41 (9th Cir. 2015); Bills v. Clark, 628 F.3d 1092, 1100  
23 (9th Cir. Cal. 2010); Laws v. Lamarque, 351 F.3d 919, 923 (9th Cir. 2003). Whether  
24 mental illness warrants tolling depends on whether the petitioner's mental illness during  
25 the relevant time "constituted the kind of extraordinary circumstances beyond his control,  
26 making filing impossible, for which equitable tolling is available." Laws, 351 F.3d 919,  
27 922-23 (9th Cir. 2003). The Ninth Circuit has explained that eligibility for equitable tolling  
28 due to mental impairment requires the petitioner to meet a two-part test:

1 (1) First, a petitioner must show his mental impairment was an  
2 "extraordinary circumstance" beyond his control, by demonstrating the  
3 impairment was so severe that either  
4 (a) petitioner was unable rationally or factually to personally understand  
5 the need to timely file, or

6 (b) petitioner's mental state rendered him unable personally to prepare a  
7 habeas petition and effectuate its filing.

8 (2) Second, the petitioner must show diligence in pursuing the claims to  
9 the extent he could understand them, but that the mental [\*11] impairment  
10 made it impossible to meet the filing deadline under the totality of the  
11 circumstances, including reasonably available access to assistance.

12 To reiterate: the "extraordinary circumstance" of mental  
13 impairment can cause an untimely habeas petition at different stages in  
14 the process of filing by preventing petitioner from understanding the need  
15 to file, effectuating a filing on his own, or finding and utilizing assistance to  
16 file. The "totality of the circumstances" inquiry in the second prong  
17 considers whether the petitioner's impairment was a but-for cause of any  
18 delay. Thus, a petitioner's mental impairment might justify equitable tolling  
19 if it interferes with the ability to understand the need for assistance, the  
20 ability to secure it, or the ability to cooperate with or monitor assistance  
21 the petitioner does secure. The petitioner therefore always remains  
22 accountable for diligence in pursuing his or her rights.

23 Bills v. Clark, 628 F.3d 1092, 1099-1100 (9th Cir. 2010) (internal citations and  
24 footnote omitted). Therefore, in order to evaluate whether a petitioner is entitled to  
25 equitable tolling, a district court should:

26 (1) find the petitioner has made a non-frivolous showing that he had a  
27 severe mental impairment during the filing period that would entitle him to  
28 an evidentiary hearing; (2) determine, after considering the record,  
whether the petitioner satisfied his burden that he was in fact mentally  
impaired; (3) determine whether the petitioner's mental impairment made it  
impossible to timely file on his own; and (4) consider whether the  
circumstances demonstrate the petitioner was otherwise diligent in  
attempting to comply with the filing requirements.

Id. at 1100-01.

If the petition or the record contains some evidence of a period of mental  
incompetency, courts have generally required further factual development of the record.  
See Laws, 351 F.3d at 923-24 (describing extended incompetency evaluations at  
petitioner's trial); Rohan ex rel. Gates v. Woodford, 334 F.3d 803, 814 (9th Cir. 2003)  
(describing a record documenting "serious mental problems for many years"). On the  
other hand, where a prisoner fails to show "any causal connection" between the grounds



1 upon which he asserts a right to equitable tolling and his inability to timely file a federal  
2 habeas application, the equitable tolling claim will be denied. Gaston v. Palmer, 417 F.3d  
3 1030, 1034 (9th Cir. 2005) (Not clear error to find equitable tolling inapplicable where  
4 prisoner fails to show causal connection between physical and mental disabilities and  
5 inability to timely file petition.). Also, “[w]here the record is amply developed, and where it  
6 indicates that the petitioner's mental incompetence was not so severe as to cause the  
7 untimely filing of his habeas petition, a district court is not obligated to hold evidentiary  
8 hearings to further develop the factual record, notwithstanding a petitioner's allegations  
9 of mental incompetence.” Orthel v. Yates, 795 F.3d at 939-940 (citing Roberts v.  
10 Marshall, 627 F.3d 768, 773 (9th Cir. 2010)).

11 Respondent has not addressed the issue of whether Plaintiff’s mental disabilities  
12 might have served as an extraordinary circumstance that stood in Petitioner's way of  
13 timely filing. As noted, however, Petitioner’s objections to the findings and  
14 recommendation represent significant evidence that Petitioner’s mental health may have  
15 been in question during the relevant period from August, 2011 to May, 2015.

16 Following is an overview of the records provided by Petitioner regarding his  
17 mental state:

18 A year before the limitations period commenced, and prior to Petitioner’s trial, Dr.  
19 Frank Wilson of the California Forensic Medial Group drafted a progress note after  
20 Petitioner failed to meet with him on October 8, 2010. Wilson stated, “I called this a  
21 psychotic disorder in the past. I think that it probably still is. I think that it is a probably a  
22 chronic schizophrenic process.” (ECF No. 25-1 at 80.) Wilson recommended continued  
23 medication and visits. (Id.)

24 The next week, Wilson made the following notes upon visiting with Petitioner:

25 S: He missed his 90-day follow-up last week and today was smiling  
26 about it like a cat caught with a canary. This is a man who allegedly killed  
27 his father in the father’s barn and then set the barn on fire. Realizing then  
28 that he had marijuana in there, he went in and tried to get the marijuana  
out. He is facing arson and murder. Looking at him, you would not tell that  
he is facing this. Inappropriate smiling. I strongly suspect that he was  
psychotic at the time of the commission of this crime. He has been down

1 since November of last year so he is working up to a year. He was not in  
2 any position to tell us where the case was going, mainly because I do not  
3 think he was aware.

4 O: His examination was otherwise benign. He clearly had an  
5 inappropriate affect and diminished verbal output but was not hostile. I  
6 could not tell whether he was responding to internal stimuli or not.

7 A: The diagnosis is certainly chronic paranoid schizophrenia.

8 (Id. at 81.) When seen on January 21, 2011, Wilson noted that Petitioner was  
9 “surprisingly blasé, laughing almost inappropriately at times” but also found that there  
10 was “no evidence of the psychotic process that we saw earlier.” (ECF No. 25-1 at 82.) It  
11 was again noted on April 15, 2011 that Petitioner was “carrying a diagnosis of paranoid  
12 type schizophrenia.” (Id. at 84.)

13 On February 6, 2012, Petitioner was evaluated at Wasco State Prison. (ECF No.  
14 25-1 at 86-87.) The psychologist noted that Petitioner reported a history of psychosis  
15 and mood swings, and that it was appropriate that Petitioner remain in the prison’s  
16 mental health services delivery system. (Id.) At the evaluation, Petitioner reported  
17 ongoing mood swings with intense highs, and psychotic symptoms including auditory  
18 and visual hallucinations. (Id.)

19 At a September 28, 2012 interview, Petitioner denied having any auditory or  
20 visual hallucinations, and the clinician noted that Petitioner did not appear to be  
21 responding to any internal stimuli. (ECF No. 25-1 at 89.) Almost two years later, on May  
22 14, 2014, Petitioner’s telepsychiatry progress note states that when he was seen on  
23 November 25, 2013, it was considered that his psychotic like symptoms, mood, and  
24 sleeping difficulties were induced by substance abuse. (ECF No. 25-1 at 85.) It was  
25 specifically noted that Petitioner stopped hearing voices when he stopped using  
26 methamphetamine in 2009. (Id.)

27 The Court finds that Petitioner has made a non-frivolous showing that may have  
28 been severely mentally impaired during part of or all of the filing period that would entitle  
him to an evidentiary hearing. Bills, 628 F.3d at 1100-01. Specifically, and consistently  
with Ninth Circuit authority, this Court holds that further factual development is required

1 before the Court can determine whether Petitioner's mental capacity rendered him  
2 unable to prepare a habeas petition. See e.g., Laws v. Lamarque, 351 F.3d at 924  
3 (Noting the inadequate record before the court, when petitioner's previous competence  
4 inquiry required the assistance of three psychiatrists and two psychologists.)

5 As noted, Petitioner has presented evidence in the form of various evaluations  
6 and reports that he has suffered from serious mental disorders that would impair his  
7 ability to function normally. To the extent that Petitioner suffered from hallucinations and  
8 was reacting to such internal stimuli rather than reality, it could have impeded his ability  
9 to timely seek habeas relief. The Court cannot at this juncture confirm the accuracy of  
10 the evaluations, or determine whether such mental deficiencies existed during the  
11 relevant time period and stood in the way of Petitioner's timely filing. However,  
12 Petitioner's showing is sufficient to require this Court to allow Petitioner to present more  
13 evidence to support his claims.

14 The Court can dismiss a petition only if it "plainly appears from the petition and  
15 any attached exhibits that the petitioner is not entitled to relief in the district court . . . ."   
16 Rule 4 of the Rules Governing Section 2254 Cases. Petitioner has alleged potential  
17 grounds for equitable tolling. It is possible that when given the benefit of equitable tolling,  
18 Petitioner could be found to have timely filed the instant petition. As issues of fact and  
19 law exist with regard to whether Petitioner timely filed the petition, it does not "plainly  
20 appear" that Petitioner is barred from relief based on the statute of limitations.  
21 Respondent has not met the pleading burden, and the motion to dismiss must be denied  
22 at this time.

23 The Court has not made a determination as to whether Petitioner is entitled to  
24 equitable tolling. Should Respondent choose, he may file a renewed motion to dismiss  
25 addressing equitable tolling issues upon expanding the record by way of discovery or  
26 even an evidentiary hearing.<sup>5</sup> See Rules 6-8 of the Rules Governing Section 2254

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27 <sup>5</sup> The Court notes that Petitioner presented other grounds for tolling in his objections to the  
28 findings and recommendation, including lack of access to his legal files. As the Court is not capable of  
(continued...)

1 Cases. However, it may be that significant evidence, possibly including expert witness  
2 evidence, will be required to determine such issues. Additionally, due to the complexity  
3 of such a determination, the Court would likely find it appropriate to appoint Petitioner  
4 counsel to assist in presenting the tolling defense based on technical mental health  
5 assessments. Alternatively, Respondent may address Petitioner's claims on the merits.

### 6 **III. Conclusion**

7 As explained above, Petitioner failed to file the instant petition for Habeas Corpus  
8 within the one year limitation period required by 28 U.S.C. § 2244(d). However,  
9 Petitioner may be excused from timely filing due to equitable tolling based on his mental  
10 condition. Accordingly, it does not plainly appear that Petitioner is barred from relief  
11 based on the expiration of the statute of limitations. The Court recommends that  
12 Respondent's motion to dismiss be denied without prejudice to filing a renewed motion  
13 to dismiss based on the statute of limitations after the record has been expanded.  
14 Alternatively, Respondent may address Petitioner's claims on the merits.

### 15 **IV. Recommendation**

16 Accordingly, the Court HEREBY RECOMMENDS that the motion to dismiss for  
17 Petitioner's failure to comply with 28 U.S.C. § 2244(d)'s one year limitation period be  
18 DENIED without prejudice.

19 This Findings and Recommendation is submitted to the assigned United States  
20 District Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and  
21 Rule 304 of the Local Rules of Practice for the United States District Court, Eastern  
22 District of California. Within thirty (30) days after the date of service of this Findings and  
23 Recommendation, any party may file written objections with the Court and serve a copy  
24 on all parties. Such a document should be captioned "Objections to Magistrate Judge's  
25 Findings and Recommendation." Replies to the Objections shall be served and filed

26 \_\_\_\_\_  
(...continued)

27 addressing Petitioner's allegations of equitable tolling, it need not address the merits of Petitioner's other  
28 claims of tolling at this time. Should Respondent file a renewed motion to dismiss, Petitioner's other claims  
of tolling should be addressed at that juncture.

1 within fourteen (14) days after service of the Objections. The Finding and  
2 Recommendation will then be submitted to the District Court for review of the Magistrate  
3 Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(c). The parties are advised that  
4 failure to file objections within the specified time may waive the right to appeal the  
5 District Court's order. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014).

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IT IS SO ORDERED.

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Dated: August 25, 2016

/s/ Michael J. Seng  
UNITED STATES MAGISTRATE JUDGE

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