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

**NATHAN CAETANO,**  
  
Petitioner,  
  
**v.**  
  
**S. PEERY,**  
  
Respondent.

1:15-cv-00832 LJO MJS HC

**ORDER**

**ADOPTING FINDINGS AND  
RECOMMENDATION;  
  
DENYING MOTION TO DISMISS;  
  
GRANTING MOTIONS TO RULE ON  
FINDINGS AND RECOMMENDATION;  
  
DENYING, WITHOUT PREJUDICE,  
MOTION TO APPOINT COUNSEL;  
  
DENYING, WITHOUT PREJUDICE,  
MOTION FOR PRODUCTION OF  
DISCOVERY**

**[Docs. 20, 31, 35-38, 40]**

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 25, 2016, the Magistrate Judge issued an Amended Findings and Recommendation to deny, without prejudice, Respondent's Motion to Dismiss because of the potential Petitioner could be found entitled to equitable tolling based on his mental condition. This Amended Findings and Recommendation was served on all parties. The

1 parties were given thirty days thereafter to file objections to the Amended Findings and  
2 Recommendations. No objections were filed within the allotted time or otherwise.

3 In accordance with the provisions of 28 U.S.C. § 636 (b)(1)(C), this Court has  
4 conducted a *de novo* review of the case. Having carefully reviewed the entire file, the  
5 Court concludes that the Magistrate Judge's Amended Findings and Recommendation is  
6 supported by the record and proper analysis.

7 Petitioner has however filed several motions since the Magistrate Judge issued  
8 the Amended Findings and Recommendation. The Court will address each in turn.

9 First, Petitioner requests that the Court rule upon the Amended Findings and  
10 Recommendation. (ECF No. 40.) The motion is GRANTED, and the Court, by way of this  
11 Order, is adopting the Amended Findings and Recommendation and denying the motion  
12 to dismiss.

13 Petitioner requests additional discovery to support his claims. (See, e.g., ECF  
14 Nos. 35-38.) These motions are DENIED without prejudice.

15 First, several of the requests appear to be for production of evidence in support of  
16 Petitioner's claim of equitable tolling. However, as Respondent has not objected to the  
17 Findings and Recommendation, there is no pending challenge to the timeliness of  
18 Plaintiff's Petition and so no current need for evidence in support of Petitioner's claim of  
19 equitable tolling.

20 To the extent Petitioner requests additional discovery regarding the merits of his  
21 claim, the motions are still DENIED without prejudice. This Court, in reviewing  
22 Petitioner's claims and determining if the state court decision was reasonable, may only  
23 rely upon the record before the state court. See Cullen v. Pinholster, 131 S. Ct. 1388,  
24 1398 (2011) ("We now hold that review under § 2254(d)(1) is limited to the record that  
25 was before the state court that adjudicated the claim on the merits."). As such, further  
26 discovery is not warranted at this time. If, upon substantive review of the petition, the  
27 Court determines that discovery is necessary, it will provide Petitioner the opportunity to  
28 conduct same.

1 Finally, Petitioner requests the appointment of counsel. There currently exists no  
2 absolute right to appointment of counsel in habeas proceedings. See, e.g., Anderson v.  
3 Heinze, 258 F.2d 479, 481 (9th Cir. 1958); Mitchell v. Wyrick, 727 F.2d 773, 774 (8th Cir.  
4 1984). However, Title 18 U.S.C. ' 3006A(a)(2)(B) authorizes the appointment of counsel  
5 at any stage of the case if "the interests of justice so require." See Rule 8(c), Rules  
6 Governing Section 2254 Cases. In the present case, the Court does not find that the  
7 interests of justice require the appointment of counsel at the present time. Petitioner's  
8 request for appointment of counsel is DENIED without prejudice.

9 Accordingly, IT IS HEREBY ORDERED that:

- 10 1. The Amended Findings and Recommendation issued August 25, 2016, is  
11 ADOPTED IN FULL;
- 12 2. Respondent's Motion to Dismiss is DENIED;
- 13 3. Petitioner's motion requesting ruling (ECF No. 40) is GRANTED;
- 14 4. Petitioner's motions for discovery and appointment of counsel are DENIED  
15 without prejudice (ECF No. 35-38); and
- 16 5. The Court hereby orders the Magistrate Judge to schedule further briefing  
17 as appropriate in light the Court's ruling on Respondent's motion to  
18 dismiss.

19  
20 IT IS SO ORDERED.

21 Dated: February 7, 2017

/s/ Lawrence J. O'Neill  
22 UNITED STATES CHIEF DISTRICT JUDGE