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

TONY GEROLAGA,

Petitioner,

No. CIV S-06-02396 WBS DAD P

vs.

WARDEN KRAMER,

Respondent.

ORDER AND

FINDINGS AND RECOMMENDATIONS

_____ /

Petitioner, a state prisoner confined in Folsom State Prison, has submitted an application for enlargement of time to file a federal habeas petition. Petitioner states that his “due date is Nov. 2, 2006, as per this Court’s Order of Calif. Supreme Court to submit a Petition for Writ of Habeas Corpus/United States District Court of Calif.” Petitioner’s application was not accompanied by a habeas petition, and nothing in the application shows that petitioner has a November 2, 2006 deadline or that venue lies in this court.

A federal habeas action is commenced by filing an application for habeas corpus relief, and no habeas action is considered “pending” until such an application is filed. Woodford v. Garceau, 538 U.S. 202, 210 (2003). The application for habeas corpus relief must seek adjudication on the merits of the petitioner’s claims. Id. at 207. The filing of some other document, such as a motion for appointment of counsel, an application to proceed in forma

1 pauperis, or a request for extension of time, will not commence a habeas action and will not toll
2 the statute of limitations because such documents are not equivalent to an application for relief
3 from the petitioner's state judgment of conviction. See Isley v. Arizona Dep't of Corrections,
4 383 F.3d 1054, 1055 (9th Cir. 2004).

5 The petitioner in this case has not properly commenced a federal habeas action.
6 This case should be dismissed without prejudice to a properly commenced habeas action. When
7 petitioner submits a habeas petition, it must not include the case number assigned to this case.

8 Accordingly, IT IS ORDERED that:

- 9 1. Petitioner's October 31, 2006 application for an enlargement of time is denied
10 2. The Clerk of the Court is directed to send petitioner a habeas petition form
11 with an application to proceed in forma pauperis in a habeas case; and

12 IT IS RECOMMENDED that this action be dismissed without prejudice to the
13 proper commencement of a habeas action.

14 These findings and recommendations will be submitted to the United States
15 District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within
16 ten days after being served with these findings and recommendations, petitioner may file written
17 objections with the court. A document containing any objections should be titled "Objections to
18 Findings and Recommendations." Petitioner is advised that failure to file objections within the
19 specified time may, under certain circumstances, waive the right to appeal the District Court's
20 order. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

21 DATED: November 13, 2006.

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24 _____
25 DALE A. DROZD
26 UNITED STATES MAGISTRATE JUDGE

25 DAD:13:bb
26 gero2396.56nop