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

EDWARD ONTIVEROS,

Petitioner,

No. CIV S-07-1441 JAM DAD P

vs.

R.J. SUBIA,

Respondent.

ORDER

_____ /

Petitioner is a state prisoner seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On March 12, 2010, the United States Court of Appeals for the Ninth Circuit affirmed in part and reversed in part this court’s granting of defendant’s motion to dismiss. In remanding the case, the Ninth Circuit explained that petitioner’s claims in his pro se Opening Brief that he state habeas filing was delayed because he has a documented mental handicap and was the subject of prison lock-downs were sufficient to preserve an equitable tolling claim for review on appeal. The court also concluded that this court should have more fully developed the record with respect to petitioner’s equitable tolling claim through an evidentiary hearing.

On March 18, 2010, counsel for respondent filed a request that judicial notice be taken of respondent’s motion to dismiss. (Doc. No. 7.) Respondent’s counsel noted that respondent had moved to dismiss the petition due to petitioner’s failure to exhaust his claims in

1 state court but that the court had not ruled on that aspect of the motion after concluding that the
2 petition was time barred. Respondent requested that the court rule now rule on that previously
3 unaddressed issue. On April 1, 2010, petitioner's counsel filed a motion requesting that a
4 briefing schedule be set with respect to the exhaustion issue raised in respondent's motion to
5 dismiss. That motion will be granted and a briefing schedule will be set.¹

6 Accordingly, IT IS HEREBY ORDERED that:

- 7 1. Petitioner's motion for briefing schedule (Doc. No. 32) is granted;
- 8 2. Petitioner shall file, within twenty-eight days of the date of this order, any
9 opposition to respondent's motion to dismiss for failure to exhaust;
- 10 3. Respondent's reply, if any, shall be filed and served within fourteen days after
11 service of the opposition; and
- 12 4. The matter will be set for hearing, if deemed appropriate by the court, after the
13 submission of the briefing.

14 DATED: May 4, 2010.

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17 _____
DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

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21 _____
22 ¹ In the motion requesting a briefing schedule, petitioner reiterates his March 9, 2010
23 request for appointment of counsel. However, the record reveals that on March 12, 2009, the
24 court issued an order appointing Steve Defillippis of Picone and Defillippis as petitioner's
25 counsel of record in this action. (Doc. No. 25.) In accordance with that order, attorney
26 Defillippis was to serve as petitioner's attorney of record "until such time as [he is] relieved or
other action is taken to appoint a different attorney." *Id.* Attorney Defillippis has not been
relieved as the attorney of record in this action. The court therefore finds that petitioner's
requests for appointment of counsel is moot in light of the appointment of attorney Defillippis.