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

RICHARD JOSEPH CRANE,

Petitioner,

No. CIV S-09-0852 FCD EFB P
No. CIV S-09-1511 DAD P
No. CIV S-10-2604 EFB P

vs.

MIKE McDONALD,

Respondent.

ORDER AND
FINDINGS AND RECOMMENDATIONS

_____/

Petitioner is a state prisoner proceeding without counsel in three currently pending petitions for writ of habeas corpus: No. CIV S-09-0852 FCD EFB P, No. CIV S-09-1511 DAD P, and No. CIV S-10-2604 EFB P. *See* 28 U.S.C. § 2254. Petitioner seeks consolidation of all three petitions. Case No. CIV S-09-0852 FCD EFB P, Dckt. Nos. 17 & 29. The parties have filed cross motions in Case No. CIV S-09-0852 FCD EFB P. Respondent moves to dismiss, Dckt. No. 26, and petitioner moves for summary judgment in his favor, Dckt. No. 30.

In Case No. CIV S-09-1511 DAD P, the court has dismissed the petition and granted petitioner until November 22, 2010 to file an amended petition.¹ Case No. CIV S-09-1511 DAD P, Dckt. Nos. 15 & 19. The most recently-filed petition, Case No. CIV S-10-2604 EFB P, has

¹ On November 17, 2010, petitioner requested an extension of time to comply with that order.

1 not yet been screened by the court.

2 For the reasons set forth below, the court denies petitioner's requests for consolidation,
3 but orders that case No. CIV S-09-1511 DAD P be reassigned to the undersigned pursuant to
4 Local Rule 190(d). Further, the court recommends that respondent's motion to dismiss Case No.
5 CIV S-09-0852 be granted in part and denied in part, and that petitioner's motion for summary
6 judgment in that case be denied. Lastly, the court recommends dismissal of Case No. CIV S-10-
7 2604 EFB P for failure to state a claim cognizable under § 2254.

8 **I. Consolidation**

9 Consolidation of the three above-listed cases is appropriate only if they involve a
10 common question of law or fact, Fed. R. Civ. P. 42(a), and challenge the same state court
11 judgment, Rule 2(e), Rules Governing § 2254 Cases in the United States District Courts.

12 In the first-filed petition, Case No. 09-0852 FCD EFB P, petitioner raises several
13 challenges² to a rules violation report ("RVR") issued against him on November 22, 2005 for
14 refusing a prison job:

15 (1) that he was deprived of due process because the RVR was false and
16 contravened a ruling in a prior administrative appeal;

17 (2) that he was deprived of due process and his First Amendment rights
18 when he was issued the RVR because he had a right to refuse to sign forms
19 agreeing to the job and his conduct did not violate any prison rule;

20 (3) that he was deprived of due process and his First Amendment rights
21 when he was issued the RVR because he had been legally excused from accepting
22 the job.

21 Case No. 09-0852 FCD EFB P, Petition, Dckt. No. 1 at 4-5, 8, 14-17, 19-30. Petitioner mentions
22 in his appended memorandum that the Board of Parole Hearings ("BPH") used the challenged
23 RVR as a basis to deny him parole on March 1, 2007. *Id.* at 13, 17. While petitioner did not
24 include a challenge to propriety of the BPH's denial of parole itself in the section of the form
25

26 ² For ease of reference, the court will number each separate claim sequentially.

1 petition enumerating his grounds for relief, *see id.* at 4-5, he alleges in the attached memorandum
2 that the parole hearing “was rendered unconstitutional” by the BPH’s consideration of the RVR
3 and subsequent related failure-to-report-to-work disciplinary actions, *id.* at 28. Petitioner also
4 included in the memorandum allegations implying that the facts of the commitment offense did
5 not justify the denial of parole. *Id.* at 28-29. Accordingly, the court construes the petition as
6 further alleging:

7 (4) that he was deprived of due process because the March 1, 2007
8 decision of the BPH was not supported by some evidence of his current
9 dangerousness.

10 In Case No. CIV S-09-1511 DAD P, petitioner alleges:

11 (5) that prison officials denied him his rights under the Eighth and
12 Fourteenth Amendments by declining his need for protective custody in 2001;

13 (6) that he was deprived of due process and his rights under the First
14 Amendment when officials issued the November 22, 2005 RVR because it
15 interfered with his “out-to-court” status at the time and contravened a ruling in a
16 prior administrative appeal;

17 (7) that he was deprived of due process because officials placed him in
18 administrative segregation or solitary confinement periodically from October
19 2001 forward, where he has been unable to complete programs that would
20 enhance his parole eligibility;

21 (8) that he was deprived of his rights under the Eighth Amendment by
22 being deprived of outdoor exercise for large chunks of 2004, 2005, 2006, 2007,
23 2008, and 2009.

24 Case No. CIV S-09-1511 DAD P, Dckt. No. 9 at 4-6. Petitioner separately submitted a
25 memorandum in support of his petition which suggested additional claims:

26 (9) that prison officials failed to protect him from violent assaults
occurring in 1988, 1992, 2000, 2003, and 2009;

(10) that respondent is “denying [petitioner] parole under the proper
standards as a retaliation against the petitioner for his legal actions” and that he is
not currently dangerous;

(11) that petitioner was placed in administrative segregation from March
20, 2008 to September 15, 2008 without a charge and in retaliation for a civil
rights suit he was pursuing.

1 Case No. CIV S-09-1511 DAD P, Dckt. No. 10 at 9-21. On September 14, 2010, the court
2 dismissed the petition on review under Rule 4 of the Rules Governing § 2254 Cases in the
3 United States District Courts, because “several of the grounds for relief stated by petitioner
4 therein are not cognizable in a federal habeas action” and other grounds “require further
5 clarification.” *Id.*, Dckt. No. 15 at 1. Specifically, the court dismissed claims (5) and (8) without
6 leave to amend, because those claims concerned the conditions of petitioner’s confinement rather
7 than the fact or duration of confinement and thus must be litigated under 42 U.S.C. § 1983 rather
8 than through a habeas petition. *Id.* at 2, 3, 5-6. The court also dismissed claim (6) because it
9 was already the subject of Case No. CIV S-09-0852 FCD EFB P. *Id.* at 2-3. The court
10 dismissed claim (7) with leave to amend, instructing petitioner to identify the specific parole
11 hearing he wished to challenge, state what findings or recommendations the BPH made at the
12 hearing that supported his claim, and explain how any alleged constitutional error impacted the
13 duration of his confinement. *Id.* at 3. The court informed petitioner that a single habeas petition
14 can challenge only one state court judgment, that he must exhaust his state court remedies, and
15 that he must state his constitutional claims clearly in his petition and not in an attachment. *Id.* at
16 6. The court did not address claims (9), (10), and (11), which were included solely in the
17 memorandum filed by petitioner and not in the petition itself, but impliedly rejected these claims
18 as improperly filed in a supplemental filing. *See* E.D. Cal. L.R. 109(b).

19 In Case No. CIV S-10-2604 EFB P, petitioner raises two claims, which are identical to
20 claims (7) and (11) summarized above. Case No. CIV S-10-2604 EFB P, Dckt. No. 1 at 4-5.

21 In sum, all three of the pending petitions raise one potentially common claim – that
22 petitioner has been erroneously denied parole. This claim is properly the subject of a single
23 habeas petition only if petitioner challenges a single parole denial, as different parole denials
24 must be challenged in separate habeas actions. Rule 2(e), Rules Governing § 2254 Cases in the
25 U.S. District Courts; *Melchhionne v. Tilton*, No. 1:08-cv-00116 OWW DLB HC, 2008 WL
26 608385 at *2 (E.D. Cal. Mar. 4, 2008). In Case No. CIV S-09-0852 FCD EFB P, petitioner

1 challenges the BPH decision of March 1, 2007. Petitioner has not indicated the BPH decision he
2 wishes to challenge in Case No. CIV S-09-1511 DAD P (as the court noted in its order of
3 September 14, 2010) or in Case No. CIV S-10-2604 EFB P. Accordingly, consolidation of the
4 petitions is not appropriate unless and until petitioner clarifies that he wishes to challenge the
5 same parole denial in each petition, and the court will thus deny petitioner's requests for
6 consolidation (Docket Nos. 17 & 29).³ However, all three cases are properly assigned to the
7 same district judge or magistrate judge under Local Rule 190(d). According, the court will order
8 that Case No. CIV S-09-1511 be reassigned to the undersigned.⁴

9 **II. *In forma pauperis* petition and Screening, Case No. CIV S-10-2604 EFB P**

10 Petitioner seeks leave to proceed *in forma pauperis* in case No. CIV S-10-2604 EFB P,
11 Dckt. Nos. 2 & 4. He makes the required showing. Therefore, the request is granted. *See* 28
12 U.S.C. § 1915(a). However, the court must discharge its screening obligation. For the reasons
13 explained below, the court finds that the petition must be dismissed. *See* Rule 4, Rules
14 Governing § 2254 Cases.

15 A district court must entertain a habeas petition “in behalf of a person in custody
16 pursuant to the judgment of a State court only on the ground that he is in custody in violation of
17 the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). A judge
18 entertaining a habeas petition “shall forthwith award the writ or issue an order directing the
19 respondent to show cause why the writ should not be granted, unless it appears from the
20 application that the applicant or person detained is not entitled thereto.” 28 U.S.C. § 2243. The
21 petition must be dismissed if on initial review the court finds that “it plainly appears from the

22
23 ³ Petitioner argues that consolidation is appropriate because all three cases concern acts
24 taken in furtherance of a single conspiracy to retaliate against him. However, the governing
25 rules require that different state judgments be challenged in separate petitions. Thus, because it
is possible that petitioner wishes to challenge more than one decision to deny him parole, it is not
presently clear that the cases may be consolidated.

26 ⁴ Petitioner filed his consent to proceed before a United States Magistrate Judge on June
12, 2009.

1 petition and any attached exhibits that the petitioner is not entitled to relief in the district court.”
2 Rule 4, Rules Governing § 2254 Cases. An application for federal habeas relief must specify all
3 grounds for relief, state facts supporting each ground and state the relief requested. Rule 2,
4 Rules Governing § 2254 Cases. While under Ninth Circuit precedent, this court must liberally
5 construe the allegations of a prisoner proceeding without counsel, *see Roy v. Lampert*, 465 F.3d
6 964, 970 (9th Cir. 2006), the court cannot grant relief based on conclusory allegations not
7 supported by any specific facts, *Jones v. Gomez*, 66 F.3d 199, 204-05 (9th Cir. 1995); *James v.*
8 *Borg*, 24 F.3d 20, 26 (9th Cir. 1994).

9 As provided above, in Case No. CIV S-10-2604 EFB P, petitioner alleges that: (a) he was
10 deprived of due process because officials placed him in administrative segregation or solitary
11 confinement periodically from October 2001 forward, where he has been unable to complete
12 programs that would enhance his parole eligibility (denoted claim (7) *infra*); and (b) that
13 petitioner was placed in administrative segregation from March 20, 2008 to September 15, 2008
14 without a charge and in retaliation for a civil rights suit he was pursuing (denoted claim (11)
15 *infra*). Dckt. No. 1 at 4-5. Petitioner raised claim (7) in Case No. CIV S-09-1511 DAD P, and
16 the court dismissed it as lacking adequate factual support. The claim must be dismissed for the
17 same reason here. Petitioner will be given leave to include this claim in an amended petition, but
18 must identify the specific parole denial he wishes to challenge, state what findings or
19 recommendations the BPH made that underly his claim of constitutional violation, and explain
20 how the alleged constitutional violation impacts the duration of his confinement. If petitioner’s
21 allegations in Case No. CIV S-10-2604 EFB P concern the same instance of parole denial as the
22 allegations in Case No. CIV S-09-1511 DAD P, but a different instance of parole denial than that
23 occurring on March 1, 2007, petitioner should not file an amended claim in Case No. CIV S-10-
24 2604 but rather solely in Case No. CIV S-09-1511. If the only instance of parole denial
25 petitioner wishes to challenge in all three pending case is that of March 1, 2007, he should file a
26 new motion for consolidation in Case No. CIV S-09-0852 FCD EFB P so informing the court.

1 Claim (11) must be dismissed without leave to amend as it is not cognizable in a federal
2 petition for writ of habeas corpus. Even if petitioner were successful on this claim, such a result
3 would not shorten his sentence. Accordingly, this court lacks habeas jurisdiction over the claim.
4 *Ramirez v. Galaza*, 334 F.3d 850, 859 (9th Cir. 2003) (“[H]abeas jurisdiction is absent . . . where
5 a successful challenge to a prison condition will not necessarily shorten the prisoner’s
6 sentence.”). As it is clear that petitioner cannot allege that the allegedly retaliatory
7 administrative segregation affected the duration of his imprisonment, the petition will be
8 dismissed without leave to amend. *See Lopez v. Smith*, 203 F.3d 1122, 1128 (9th Cir. 2000)
9 (stating that an indigent prisoner proceeding without counsel must be given leave to file
10 amended complaint unless the court can rule out any possibility that the plaintiff could state a
11 claim). However, this order is without prejudice to petitioner filing a civil rights action
12 challenging his placement in administrative segregation from March 20, 2008 to September 15,
13 2008.

14 The court reiterates the admonitions in the court’s order of September 14, 2010 in Case
15 No. CIV S-09-1511 DAD P: If petitioner wishes to challenge separate adverse parole decisions,
16 each decision must be challenged in a separate habeas petition. Further, petitioner must exhaust
17 his state court remedies on each claim before he may obtain federal habeas relief. And lastly, in
18 any amended petition filed, petitioner must make clear in the body of the petition what federal
19 constitutional claims he wishes to bring. He must answer each question on the habeas petition
20 form, identify each claim he seeks to present, and explain how his federal constitutional rights
21 were violated in connection with each claim.

22 **III. Respondent’s Motion to Dismiss, Case No. CIV S-09-0852 FCD EFB P**

23 Respondent moves to dismiss Case No. CIV S-09-0852 FCD EFB P on the grounds that
24 it is untimely and raises claims not cognizable in a federal habeas action. Dckt. No. 26.

25 A one-year limitations period for seeking federal habeas relief begins to run from the
26 latest of the date the judgment became final on direct review, the date on which a state-created

1 impediment to filing is removed, the date the United States Supreme Court makes a new rule
2 retroactively applicable to cases on collateral review or the date on which the factual predicate of
3 a claim could have been discovered through the exercise of due diligence. 28 U.S.C.
4 § 2244(d)(1).

5 There is no statutory tolling of the limitations period “from the time a final decision is
6 issued on direct state appeal [to] the time the first state collateral challenge is filed” *Nino v.*
7 *Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999). However, once a petitioner properly files a state
8 post-conviction application the period is tolled, and remains tolled for the entire time that
9 application is “pending.” 28 U.S.C. § 2244(d)(2). “[A]n application is ‘properly filed’ when its
10 delivery and acceptance are in compliance with the applicable laws and rules governing filings.”
11 *Artuz v. Bennett*, 531 U.S. 4, 8 (2000). In California, a properly filed post-conviction application
12 is “pending” during reasonable intervals between a lower court decision and filing a new petition
13 in a higher court. *Carey v. Saffold*, 536 U.S. 214, 223-27 (2002). A federal habeas application
14 does not provide a basis for statutory tolling. *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001).

15 The limitations period may also be equitably tolled where a habeas petitioner establishes
16 two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary
17 circumstance stood in his way. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). In light of this
18 pronouncement, the Ninth Circuit has reiterated that the threshold necessary to trigger equitable
19 tolling is very high, and clarified that equitable tolling only applies where a petitioner shows that
20 despite diligently pursuing his rights, some external force *caused* the untimeliness. *Waldron-*
21 *Ramsey v. Pacholke*, 556 F.3d 1008, 1011 (9th Cir. 2009).

22 Petitioner has the burden of showing facts entitling him to statutory and equitable tolling.
23 *Smith v. Duncan*, 297 F.3d 809, 814 (9th Cir. 2002); *Miranda v. Castro*, 292 F.3d 1063, 1065
24 (9th Cir. 2002).

25 As described above, the petition in Case No. CIV S-09-0852 FCD EFB P raises three
26 claims concerning the validity of discipline imposed on petitioner on November 22, 2005 for

1 refusing a prison job. The petition, liberally construed as is appropriate in this pro se prisoner-
2 filed action, also raises a claim that the BPH decision to deny petitioner parole on March 1, 2007
3 was not supported by some evidence of petitioner's current dangerousness. Respondent does not
4 address the parole-denial claim in its motion to dismiss and accordingly the court will not
5 address the propriety of that claim in these findings and recommendations.⁵

6 The court agrees with respondent that petitioner's claims regarding the discipline
7 imposed on November 22, 2005 are both untimely and not cognizable in a federal habeas action.
8 The discipline became final on direct review when petitioner's administrative appeal was denied
9 at the Director's Level on September 19, 2006. Ex. C in Supp. of Pet'n. Between July 7, 2007
10 and August 20, 2008, petitioner had petitions regarding the discipline pending in the state courts.
11 Exs. 1-7 in Supp. of Resp.'s Mot. to Dism. He filed the instant petition on March 27, 2009.
12 Thus, 290 days elapsed between the final administrative determination and petitioner's first state
13 petition and 219 days elapsed between the final state court habeas denial and the filing of this
14 federal petition, for a total of 509 days. Petitioner presents no argument or evidence suggesting
15 that the limitations period should be equitably tolled for any of this time. Accordingly,
16 petitioner's claims regarding the propriety of the November 22, 2005 RVR are not timely and
17 should be dismissed.⁶

18 ////

20 ⁵ Respondent argues that the parole-denial claim was not presented in the petition.
21 However, as the court has discussed *infra*, the supporting memorandum appended to the petition
22 includes this claim.

23 ⁶ Petitioner argues that his administrative appeal did not become final until February 9,
24 2007, when the Director's Level informed him that he had filed his appeal for the second time
25 and it would not review the second filing. *See* Ex. C in Supp. of Pet'r's Opp'n to Resp.'s Mot. to
26 Dism. It is clear, however, that the merits review of petitioner's administrative appeal concluded
on September 19, 2006 and the court should not allow a later limitations-period start-date based
on petitioner's improper second administrative appeal. The court notes that, even if the
limitations period were to begin on February 9, 2007, petitioner filed his federal petition too late
– 148 days elapsed between that date and his first state petition and 219 days elapsed between
the denial of his final state petition and the filing of the federal petition, for a total of 367 days.

1 Moreover, these claims are not proper subjects of a federal habeas petition, as the
2 discipline imposed did not affect the duration of petitioner’s confinement. Ex. C in Supp. of
3 Pet’n (decision at the Director’s Level noting that petitioner’s administrative appeal had been
4 partially granted at the Second Level of Review “to amend the credit loss to zero.”); *Ramirez*,
5 334 F.3d at 859 (“[H]abeas jurisdiction is absent . . . where a successful challenge to a prison
6 condition will not necessarily shorten the prisoner’s sentence.”). As petitioner suffered no loss
7 of time credits and a successful challenge to the RVR would not necessarily invalidate the
8 BPH’s decision to deny petitioner parole, petitioner’s challenges to the validity of the RVR are
9 not cognizable in this federal habeas action.

10 **IV. Petitioner’s Motion for Summary Judgment, No. CIV S-09-0852 FCD EFB P**

11 In conjunction with his opposition to respondent’s motion to dismiss, petitioner has
12 requested summary judgment. Case No. CIV S-09-0852 FCD EFB P, Dckt. No. 30. As the
13 court has recommended dismissal of three of the four claims raised in Case No. CIV S-09-0852
14 FCD EFB P, summary judgment of those claims in petitioner’s favor is inappropriate. With
15 regard to the remaining parole-denial claim, petitioner has not complied with Local Rule 260.
16 He has not provided a statement of undisputed facts. Nor has he shown that he is entitled to
17 summary judgment. Accordingly, petitioner’s request for summary judgment is denied without
18 prejudice to petitioner filing a new motion, as to the remaining parole-denial claim, that complies
19 with Federal Rule of Civil Procedure 56 and Local Rule 260.

20 **V. Summary, Order, and Recommendations**

21 For clarity, the court notes that the status of the petitions as a result of this order and the
22 order of September 14, 2010 in Case No. CIV S-09-1511 DAD P is as follows: Allegations
23 denoted *infra* as claims (5), (6), (8), and (11) have been dismissed without leave to amend and
24 should not be included in any subsequent or amended petitions. Claims (9) and (10) were not
25 properly filed in Case No. CIV S-09-1511 DAD P. Claim (7) has been dismissed with leave to
26 amend as provided in this order and the order of September 14, 2010 in Case No. CIV S-09-1511

1 DAD P. Case No. CIV S-09-1511 DAD P will be reassigned to the undersigned.

2 Should the recommendations made herein be adopted, claims (1)-(3) will be dismissed
3 without leave to amend and should not be included in any subsequent or amended petitions.
4 Claim (4) remains to be addressed through further dispositive motion or on the merits.

5 The court emphasizes to petitioner that a federal habeas petition is proper only to
6 challenge the fact that he is confined or the duration of that confinement (for example, claims
7 that his conviction or sentence were unlawful or that he has wrongfully been deprived parole or
8 time credits), and not to challenge the conditions of his confinement (for example, claims that he
9 has been denied exercise or has not been protected from assaults). Challenges to conditions of
10 confinement which do not implicate the fact or duration of confinement may not be brought in a
11 federal habeas action as explained in this order and the order of September 14, 2010 in Case No.
12 CIV S-09-1511 DAD P and should not be included in any amended or subsequent habeas
13 petitions.

14 Accordingly, it is hereby ORDERED that:

15 1. This action, Case No. CIV S-09-0852 FCD EFB P, is related to petitioner's habeas
16 petitions at Case No. Civ. S-09-1511 DAD P. Accordingly, Case No. Civ. S-09-1511 DAD P is
17 hereby reassigned to the undersigned. The Clerk is directed to make appropriate adjustment in
18 the assignment of civil cases to compensate for the reassignment.

19 2. Petitioner's motions for consolidation in Case No. CIV S-09-0852 FCD EFB P, Dckt.
20 Nos. 17 and 29, are denied.

21 3. Petitioner's request to proceed *in forma pauperis* in Case No. CIV S-10-2604 EFB P,
22 Dckt. Nos. 2 & 4, is granted.

23 4. The petition filed in Case No. CIV S-10-2604 EFB P is dismissed. Petitioner's claim
24 that he was placed in administrative segregation from March 20, 2008 to September 15, 2008 is
25 dismissed without leave to amend, but without prejudice to petitioner's raising the claim in a
26 civil rights action. Petitioner's claim that he has been deprived of programs he must complete to

1 be eligible for parole is dismissed with leave to amend. Petitioner shall have 30 days from the
2 date of this order to file an amended petition identifying the specific parole denial he wishes to
3 challenge, stating what findings or recommendations the BPH made that underly his claim of
4 constitutional violation, explaining how the alleged constitutional violation impacts the duration
5 of his confinement, and otherwise complying with this order.

6 It is further RECOMMENDED that:

7 1. Respondent's September 15, 2010 motion to dismiss in Case No. CIV S-09-0852 FCD
8 EFB P, Dckt. No. 26, be granted in part and petitioner's claims regarding the validity of the
9 November 22, 2005 RVR be dismissed.

10 2. Respondent be provided 30 days from the date of any order adopting these findings
11 and recommendations to file a dispositive motion regarding the remaining parole-denial claim or
12 to answer to the petition.

13 3. Petitioner's October 18, 2010 motion for summary judgment in Case No. CIV S-09-
14 0852 FCD EFB P, Dckt. No. 30, be denied.

15 These findings and recommendations are submitted to the United States District Judge
16 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
17 after being served with these findings and recommendations, any party may file written
18 objections with the court and serve a copy on all parties. Such a document should be captioned
19 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections
20 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
21 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).
22 In his objections petitioner may address whether a certificate of appealability should issue in the
23 event he files an appeal of the judgment in this case. *See* Rule 11, Federal Rules Governing


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1 Section 2254 Cases (the district court must issue or deny a certificate of appealability when it
2 enters a final order adverse to the applicant).

3 Dated: January 19, 2011.

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5 EDMUND F. BRENNAN
6 UNITED STATES MAGISTRATE JUDGE
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