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

CHARLES RAY SMITH,

Petitioner,

No. CIV S-09-2967 MCE GGH P

vs.

M. MCDONALD,

Respondent.

FINDINGS AND RECOMMENDATIONS

_____ /

Petitioner, a state prisoner proceeding with counsel, has filed this application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On December 14, 2012, petitioner filed an unopposed request to lift stay, dismiss the Strickland claim, and enter judgment. This court had previously denied the Cronic claim, and stayed the case for exhaustion of the Strickland claim in the state courts. (Dkt. no. 50.)

A certificate of appealability may issue under 28 U.S.C. § 2253 “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The court must either issue a certificate of appealability indicating which issues satisfy the required showing or must state the reasons why such a certificate should not issue. Fed. R. App. P. 22(b). Based on petitioner’s request for dismissal of the Strickland claim, a

1 certificate of appealability should be not be issued in regard to that claim. However, the
2 undersigned recommends that a certificate of appealability be granted as to the Chronic claim.

3 Accordingly, IT IS HEREBY RECOMMENDED that:

- 4 1. The stay imposed by order of April 9, 2012, (dkt. no. 51), be lifted;
- 5 2. Petitioner’s request to dismiss his Strickland ineffective assistance of counsel
6 claim be granted;
- 7 3. A certificate of appealability should not be issued in regard to the Strickland
8 claim;
- 9 4. A certificate of appealability be granted for the Chronic claim; and
- 10 4. Final judgment be entered.

11 These findings and recommendations are submitted to the United States District
12 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
13 days after being served with these findings and recommendations, any party may file written
14 objections with the court and serve a copy on all parties. Such a document should be captioned
15 “Objections to Magistrate Judge's Findings and Recommendations.” Any reply to the objections
16 shall be served and filed within ten days after service of the objections. The parties are advised
17 that failure to file objections within the specified time may waive the right to appeal the District
18 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

19 Dated: January 15, 2013

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21 /s/ Gregory G. Hollows
22 UNITED STATES MAGISTRATE JUDGE
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