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

ALBERT DAVIS,

Petitioner,

No. CIV-S-10-1636 GEB CKD P

vs.

R. LOPEZ,

Respondent.

ORDER AND

FINDINGS AND RECOMMENDATIONS

_____ /

Petitioner is a California prisoner proceeding pro se with a petition for writ of habeas corpus under 28 U.S.C. § 2254. Petitioner challenges a conviction entered in Sacramento County in 2006 for first degree murder. He presents two claims. The first concerns exclusion of evidence. In the second, petitioner asserts the prosecution used peremptory challenges in a racially discriminatory manner.

On October 18, 2010, petitioner filed a motion requesting that he be allowed to amend his habeas petition by deleting his first claim. Respondent does not oppose this request. Therefore, petitioner’s motion to amend will be granted and his first claim will be deemed withdrawn.

Respondent, in a motion to dismiss filed September 23, 2010, asserts petitioner’s second claim is time-barred. A review of court records reveals that petitioner’s second claim has

1 already been found to be time-barred. See Davis v. Lopez, CIV-S-10-0474 GEB CMK P (Davis
2 II). Judgment was entered in Davis II on January 18, 2011. Petitioner did not appeal so
3 judgment in Davis II is final.

4 While this action was filed earlier than Davis II, it was still filed too late. As
5 indicated in the findings and recommendations filed in Davis II on December 1, 2010, the
6 limitations period applicable to petitioner’s remaining claim commenced on December 31, 2008.
7 There is no basis for tolling, so the limitations period ran out one year later, well before this
8 action was filed on January 26, 2010 in the United States District Court for the Northern District
9 of California.¹

10 Accordingly, IT IS HEREBY ORDERED that

11 1. Petitioner’s October 18, 2010 “motion to amend habeas petition” is granted;

12 and

13 2. Claim one in petitioner’s habeas petition is deemed withdrawn.

14 IT IS HEREBY RECOMMENDED that:

15 1. Respondent’s September 23, 2010 motion to dismiss be granted with respect to
16 claim two in petitioner’s habeas petition; and

17 2. This case be closed.

18 These findings and recommendations are submitted to the United States District
19 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
20 one days after being served with these findings and recommendations, any party may file written
21 objections with the court and serve a copy on all parties. Such a document should be captioned
22 “Objections to Magistrate Judge’s Findings and Recommendations.” In his objections petitioner
23 may address whether a certificate of appealability should issue in the event he files an appeal of

24
25 ¹ The court would deem petitioner’s habeas petition filed for purposes of the statute of
26 limitations on the day he gave it to prison officials for mailing. See Houston v. Lack, 487 U.S.
266, 270 (1988). However, petitioner fails to indicate when that was. The petition was signed by
petitioner on January 9, 2010, after the limitations period expired.

1 the judgment in this case. See Rule 11, Federal Rules Governing Section 2254 Cases (the district
2 court must issue or deny a certificate of appealability when it enters a final order adverse to the
3 applicant). Any reply to the objections shall be served and filed within fourteen days after
4 service of the objections. The parties are advised that failure to file objections within the
5 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
6 F.2d 1153 (9th Cir. 1991).

7 Dated: August 17, 2011

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9 CAROLYN K. DELANEY
10 UNITED STATES MAGISTRATE JUDGE

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