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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSEPH G. ALCALA,
Petitioner,
v.
MIKE MARTEL, et al.,
Respondents.

No. 2:10-cv-03448 KJM AC P

FINDINGS AND RECOMMENDATIONS

Petitioner is a state prisoner proceeding pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition challenges a 2008 prison disciplinary proceeding for obstructing a peace officer in the performance of his duties. The disciplinary violation involved petitioner’s refusal to accept a cellmate. ECF No. 1.

I. Procedural History

A brief procedural history of the case is provided as context for the current position of the parties. Respondents’ first motion to dismiss was denied on April 11, 2013, in an order finding petitioner’s claims cognizable in a habeas corpus action. See ECF Nos. 21 (Findings and Recommendation); 24 (Order). The remaining argument in the motion to dismiss was denied without prejudice by Order of June 3, 2013. ECF No. 25. Respondents were allowed to renew their argument if they could demonstrate that petitioner’s incarceration was unaffected by his 90 day loss of behavior credit and that the procedural due process protections of Wolff v. McDonnell, 418 U.S. 539 (1974), did not apply to his disciplinary conviction. Id. at 2-3. In the

1 alternative, respondents were ordered to file an answer to the petition. Id. at 3.

2 On July 5, 2013, respondents renewed their argument that no clearly established federal
3 law prescribes what process is due for a prison disciplinary decision that does not deprive the
4 prisoner of credits that actually reduce his period of incarceration. After full briefing, the motion
5 to dismiss was once again denied on March 26, 2014. ECF Nos. 34 (Order); 32 (Findings and
6 Recommendations). Respondents were ordered to file an answer to the petition.

7 On May 27, 2014, respondents filed their answer, ECF No. 35, contending that (1) the
8 petition was untimely filed, (2) the court lacks jurisdiction over the petition because any relief
9 would not result in petitioner's speedier release from custody,¹ and (3) even on the merits
10 petitioner is not entitled to any relief because the state court decision was not contrary to nor an
11 unreasonable application of clearly established federal law. ECF No. 35. Petitioner filed his
12 traverse on June 18, 2014. ECF No. 36. Accordingly, the habeas petition is fully briefed and ripe
13 for adjudication.

14 II. Federal Habeas Petition

15 Petitioner, who is serving a sentence of 15 years to life, alleges that on July 3, 2008
16 he returned to Mule Creek State Prison from a hospital where he was receiving chemotherapy
17 treatment for stage four lymphoma. Upon his return, he was placed in Administrative
18 Segregation ("Ad Seg") on a "non-disciplinary" hold, instead of in the hospital's infirmary. See
19 ECF No. 35-1 at 27. He asserts that he was held in Ad Seg without the benefit of having a
20 classification hearing to be classified as an "Inmate Medical Patient," in violation of the due
21 process clause of the Fourteenth Amendment. Due to his medical condition, petitioner was
22 admitted to San Joaquin General Hospital on July 11, 2008 and discharged on July 21, 2008. See
23 ECF No. 35-3 at 23-25 (Transfer Summary from San Joaquin General Hospital). Following his
24 July 21, 2008 return to Ad Seg, petitioner claims that he received an improper rules violation
25 report ("RVR") for refusing to accept a cell-mate. Petitioner was issued the RVR on July 25,

26 ¹ Respondents do not renew the jurisdictional argument, which was previously rejected by the
27 court, in their memorandum of points and authorities. Because the matter has been previously
28 adjudicated, the undersigned will not revisit the issue here. See ECF Nos. 21 (Findings and
Recommendation), 24 (Order).

1 2008 for his failure to comply with a direct order to double cell on July 24, 2008. See ECF No.
2 35-1 at 33 (copy of RVR). Although petitioner contends that he should have been exempt from
3 accepting a cell-mate in light of his medical condition, he was found guilty at the hearing on the
4 RVR on August 15, 2008. See ECF No. 35-1 at 34-35. He was assessed a 90 day loss of
5 behavior credit for the disciplinary violation. Petitioner, whose last RVR was in 1994, argues that
6 he suffered harm because he was denied parole in 2010 after the Board of Parole Hearings relied
7 on the 2008 RVR in finding that he was unsuitable for release on parole.

8 III. Respondent's Answer

9 As an initial basis to deny relief, respondents assert that the federal habeas petition was
10 untimely filed. ECF No. 35 at 4. Respondents contend that the statute of limitations commenced
11 on January 7, 2009, the day following the exhaustion of petitioner's administrative remedies and
12 thus the date the factual predicate of his claim was discovered. Id. at 4 (citing Redd v. McGrath,
13 343 F.3d 1077, 1082 (9th Cir. 2003)). The statute of limitations then ran for a period of 69 days
14 until petitioner filed his first state habeas corpus petition in the trial court on March 17, 2009. Id.
15 Respondents concede that petitioner is entitled to statutory tolling until November 10, 2009 when
16 the California Supreme Court denied his state habeas petition. Id. Thus, by respondents
17 calculation, the federal habeas petition was filed 112 days late. Id. However, this calculation
18 does not acknowledge the possibility that equitable tolling could render the federal petition
19 timely.

20 The second ground upon which respondents rely is based on the merits of petitioner's due
21 process claim. Respondents invoke CDCR regulations to assert that the due process protections
22 of Wolff v. McDonnell, 418 U.S. 539 (1974) and Superintendent v. Hill, 472 U.S. 445, 454
23 (1985), do not apply to petitioner because the credit loss resulting from his disciplinary hearing
24 will not affect his release date since he already passed his minimum eligible parole date. Id. at 6.
25 They further argue that petitioner is barred from relief under the AEDPA because granting the
26 instant petition would require extending the holding of Wolff to a situation where its application
27 is not clearly established. Id. at 7. Doing so, respondents contend, would lead to the conflicting
28 result that while a federal court cannot examine the substance of parole authorities' ultimate

1 decision to deny parole pursuant to Swarthout v. Cooke, 562 U.S. 216 (2011), it can review the
2 substantive information relied upon by the parole board by applying a heightened level of due
3 process protections. Id.

4 IV. Petitioner's Traverse

5 With respect to respondent's statute of limitations defense, petitioner contends that he was
6 diligent in pursuing his administrative, state, and federal remedies following his disciplinary
7 hearing. ECF No. 36 at 7-9. He commenced a federal habeas action challenging this disciplinary
8 conviction on December 8, 2009. Id. at 8. However, that original petition as well as a subsequent
9 one was both dismissed with leave to amend. Id. at 8-9. Petitioner merely followed the federal
10 district court's instructions to proceed with his issues by filing a civil rights complaint pursuant to
11 42 U.S.C. § 1983. Id. at 9. It was not until October 26, 2010 that petitioner was instructed to file
12 a separate habeas corpus petition challenging his disciplinary conviction. Id. at 9. Once again,
13 petitioner followed the district court's instructions and filed the instant federal habeas corpus
14 petition on December 22, 2010.² Id.

15 On the merits of his due process claim, petitioner asserts that prison officials violated their
16 own rules and regulations by not affording him an Ad Seg classification hearing within 10 days of
17 his placement in that unit. ECF No. 36 at 5. In fact, he alleges that he was held in Ad Seg for 33
18 days without the benefit of any hearing conducted by the Classification Committee. Id. As a
19 result of this failure to determine whether petitioner's ongoing Ad Seg placement was proper, he
20 received a RVR when he refused to double cell with another inmate who was placed in Ad Seg
21 for "fighting, violence and choking-out his previous cellmate." Id. at 5. Petitioner alleges that he
22 had a liberty interest protected by the due process clause that was violated once this RVR was
23 relied upon by the Board of Parole Hearings to deny him release in 2010. Id. at 6.

24 V. Statute of Limitations

25 The court will first address respondents' argument that the instant federal petition should
26 be dismissed as time-barred. Section 2244(d)(1) of Title 28 of the United States Code contains a

27 ² Petitioner's state and federal habeas petitions are entitled to the benefit of the prison mailbox
28 rule in determining their constructive filing date. See Houston v. Lack, 487 U.S. 266 (1988).

1 one year statute of limitations for filing a habeas petition in federal court. The one year clock
2 commences from one of several alternative triggering dates. See 28 U.S.C. § 2244(d)(1). The
3 parties agree that the triggering mechanism for challenges to prison disciplinary proceedings is
4 “the date on which the factual predicate of the claim or claims presented could have been
5 discovered through the exercise of due diligence.” 28 U.S.C. § 2244(d)(1)(D); see also Redd v.
6 McGrath, 343 F.3d 1077, 1082 (9th Cir. 2003). In this case the statute of limitations commenced
7 on January 7, 2009, the day following the completion of the prison’s administrative appeal
8 process and thus the date the factual predicate of petitioner’s claims was discovered. The statute
9 of limitations expired one year later on January 7, 2010, absent any statutory or equitable tolling.

10 A. Statutory Tolling

11 Under the AEDPA, the statute of limitations is tolled during the time that a properly filed
12 application for state post-conviction or other collateral review is pending in state court. 28 U.S.C.
13 § 2244(d)(2). Petitioner filed his first state habeas corpus petition in the Amador County Superior
14 Court on March 17, 2009, thus tolling the statute of limitations. It remained tolled until
15 November 10, 2009, the day the California Supreme Court denied petitioner’s state habeas corpus
16 petition. Thus, with the added benefit of statutory tolling, the one year statute of limitations was
17 extended until September 3, 2010, rendering the federal petition untimely filed by 110 days.

18 B. Equitable Tolling

19 A habeas petitioner is entitled to equitable tolling of AEDPA's one-year statute of
20 limitations only if the petitioner shows: (1) that he has been pursuing his rights diligently; and (2)
21 that some extraordinary circumstance stood in his way and prevented timely filing. See Holland
22 v. Florida, 560 U.S. 631 (2010); Ramirez v. Yates, 571 F.3d 993, 997 (9th Cir. 2009). An
23 “extraordinary circumstance” has been defined as an external force that is beyond the inmate’s
24 control. Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999). The diligence required for
25 equitable tolling purposes is “reasonable diligence,” not “maximum feasible diligence.” See
26 Holland, 560 U.S. at 2565; see also Bills v. Clark, 628 F.3d 1092, 1096 (9th Cir. 2010).

27 In their answer, respondents do not acknowledge the availability of equitable tolling
28 which could render the petition timely filed. Liberally construed, petitioner’s traverse seeks

1 equitable tolling on grounds that the district court's dismissal of petitioner's prior federal habeas
2 petitions in Case No. 2:09-cv-03407-KJM-JFM was erroneous and resulted in the untimely filing
3 of the current petition. See Haines v. Kerner, (requiring liberal construction of pro se pleadings);
4 see also Sossa v. Diaz, 729 F.3d 1225 (9th Cir. 2013) (granting equitable tolling based on
5 petitioner's justified reliance on several magistrate judge orders extending the deadline to file an
6 amended petition following an initial screening order that dismissed the original petition with
7 leave to amend). Without specifically requesting equitable tolling, petitioner asserts that he was
8 merely following the instructions contained in the district court's orders in Case No. 2:09-cv-
9 03407-KJM-JFM. Accordingly, the court will review the procedural history of petitioner's
10 related case of 2:09-cv-03407-KJM-JFM to determine whether equitable tolling is warranted.

11 Petitioner submitted a § 2254 petition on December 6, 2009 that was filed in this court as
12 Case No. 2:09-cv-03407-KJM-JFM. The court construed petitioner's habeas claims as
13 challenging his "placement in Administrative Segregation instead of the prison infirmary
14 following his return from a hospital where he was treated for cancer and... [an] unwarranted rule
15 violation for refusing to accept a cell-mate while in Administrative Segregation." See ECF Nos.
16 1, 5 in Case No. 2:09-cv-03407-KJM-JFM. On January 19, 2010 this habeas petition was
17 dismissed with leave to file it as a civil rights action pursuant to 42 U.S.C. § 1983. See ECF No.
18 5 in Case No. 2:09-cv-03407-KJM-JFM. Petitioner filed an amended § 2254 petition on February
19 13, 2010 raising the same claims as in his original habeas petition. See ECF No. 8 in Case No.
20 2:09-cv-03407-KJM-JFM. On March 4, 2010, the amended § 2254 petition was once again
21 dismissed with leave to file it as a civil rights complaint because "the amended petition sets forth
22 claims cognizable in a § 1983 suit and not a § 2254 petition." See ECF No. 9 in Case No. 2:09-
23 cv-03407-KJM-JFM.

24 After receiving an extension of time, petitioner filed a civil rights complaint on April 28,
25 2010 which still contained the due process challenge to petitioner's 2008 prison disciplinary
26 proceeding. See ECF No. 12 in Case No. 2:09-cv-03407-KJM-JFM. Before the court could
27 screen this § 1983 complaint, petitioner filed what is identified on the docket as a second
28 amended civil rights complaint on June 18, 2010. See ECF No. 17 in Case No. 2:09-cv-03407-

1 KJM-JFM. The district court's screening order of October 27, 2010 dismissed petitioner's due
2 process challenge to the prison disciplinary finding, but granted leave to file it as a § 2254
3 petition, which is what petitioner had done at the outset. See ECF No. 19 in Case No. 2:09-cv-
4 03407-KJM-JFM. Consistent with the district court's order, petitioner filed the instant federal
5 habeas petition on December 22, 2010 which was opened as a separate habeas corpus action
6 related to the pending civil rights complaint. See ECF No. 6 (Related Case Order).

7 The above case history suggests, indeed almost commands, that equitable tolling be
8 granted. Here, petitioner timely filed a § 2254 petition raising the same challenges as the present
9 petition not just once but twice, only to be rebuffed by the court which repeatedly instructed
10 petitioner to file the claims as a § 1983 complaint. Once petitioner complied with the court's
11 instructions to file the claims as a § 1983 action, the court changed its position and directed
12 petitioner to file his prison disciplinary challenge as a § 2254 petition. See Pliler v. Ford, 542
13 U.S. 225, 235 (O'Connor, J., concurring) (providing the fifth vote for the majority and stating that
14 "if the petitioner is affirmatively misled, either by the court or by the State, equitable tolling
15 might well be appropriate."). By that time, the statute of limitations had already expired. This is
16 a classic example of a circumstance beyond petitioner's control that warrants equitable tolling.
17 See Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999); see also Sossa v. Diaz, 729 F.3d 1225
18 (9th Cir. 2013).

19 The only remaining question is whether petitioner has been pursuing his rights diligently.
20 In this case there is no indication that petitioner sat on his rights. Indeed, unlike many prisoners
21 who request multiple extensions of time to file amended petitions or complaints, here petitioner
22 relied on a single extension of time in Case No. 2:09-cv-03407-KJM-JFM. Petitioner diligently
23 complied with the court's orders and filing deadlines. Accordingly, he is entitled to equitable
24 tolling from December 6, 2009, the date he filed his original habeas petition in Case No. 2:09-cv-
25 03407-KJM-JFM, until December 22, 2010, the date he filed the instant habeas petition.

26 For these reasons, the undersigned recommends rejecting respondent's argument that the
27 instant petition be dismissed on the basis of the statute of limitations. Accordingly, the
28 undersigned will proceed to review the petition on the merits.

1 VI. Standard of Review on the Merits

2 Ignoring the undersigned's Findings and Recommendations of January 3, 2014 (ECF No.
3 32), which were adopted by Order of March 26, 2014 (ECF No. 34), respondents argue that
4 AEDPA's standard of deferential review applies to this case. ECF No. 35 at 4-6. The court made
5 clear in its prior Findings and Recommendations that the lodged state court record submitted in
6 support of respondent's motion to dismiss failed to demonstrate that petitioner's due process
7 challenge was "adjudicated on the merits" in state court proceedings. ECF No. 32 at 4-5. Even
8 with their answer, respondents failed to produce a copy of the California Supreme Court order
9 denying petitioner's state habeas application. The only evidence produced with the answer was a
10 printout from the California Appellate Courts Case Information website which indicates the date
11 the California Supreme Court ruled on petitioner's state habeas application with a notation
12 indicating that it was denied. ECF No. 35-8 at 2. Once again, respondents' failure to produce a
13 copy of the California Supreme Court decision prevents this court from determining whether
14 AEDPA deference applies to petitioner's due process challenges. Accordingly, the undersigned
15 will assume without deciding that de novo review applies to petitioner's due process claims.

16 VII. Merits

17 Petitioner's habeas application presents three grounds for relief. Petitioner first alleges
18 that Mule Creek State Prison officials acted with deliberate indifference to his medical condition
19 in violation of the Eighth Amendment. ECF No. 1 at 12, 15-17. The Findings and
20 Recommendations of November 2, 2012 (ECF No. 21 at 1-2 & n.1) found this claim duplicative
21 of that raised in petitioner's related § 1983 case. See Case No. 2:09-cv-3407-KJM-JFM. These
22 Findings and Recommendations were adopted in relevant part by Order of April 11, 2013 (ECF
23 No. 24). Petitioner's first claim has already been dismissed as duplicative. It is also barred in this
24 action by res judicata, because the related case has resulted in a final judgment. See Robi v. Five
25 Platters, Inc., 838 F.2d 318, 321-22 (9th Cir. 1988).

26 Petitioner's second and third claims are closely related. Petitioner asserts in Ground Two
27 that his placement in Ad Seg without a classification hearing violated his due process rights in
28 violation of Wolff v. McDonnell, 418 U.S. 539 (1974) and Sandin v. Conner, 515 U.S. 472

1 (1995). ECF No. 1 at 12, 18-20. Ground Three claims that petitioner’s “unwarranted” RVR for
2 refusing double-celling was invalid because proper classification would have exempted him from
3 double-celling on the basis of his medical condition; his denial of parole on the basis of the RVR
4 thus wrongly deprived him of a liberty interest. Id. at 13, 21-22. As a remedy, petitioner asks the
5 court to reverse the guilty finding from the RVR hearing and to expunge all references to this
6 disciplinary charge from his central prison file. ECF No. 1 at 13.

7 The court has already held that petitioner’s interwoven challenges to his Ad Seg
8 placement and RVR determination are cognizable in habeas because the RVR, historically
9 predicated on the fact and terms of petitioner’s Ad Seg placement, cost petitioner good-time
10 credits and formed a basis for the denial of parole. ECF Nos. 21, 24, 32, 34.³ Habeas relief is
11 appropriate if, and only if, the adverse disciplinary finding – the decision with nexus to the
12 duration of petitioner’s confinement, and thus the only decision reviewable in habeas – is itself
13 constitutionally infirm. Petitioner offers two possible bases for the infirmity of the disciplinary
14 finding: (1) the disciplinary charge was unwarranted and the guilty finding invalid because
15 petitioner should not have been required to double-cell in the first place, due to his medical
16 condition, and (2) the disciplinary finding is invalid because petitioner’s underlying Ad Seg
17 placement was invalid, due to the lack of a classification hearing.

18 Petitioner has presented a novel due process claim for which this court cannot grant relief,
19 even under a de novo standard of review. Under either of petitioner’s theories, the disciplinary
20 finding is alleged to be invalid because of a due process violation earlier in the chain of events
21 that led to the charge, and independent of the RVR process itself. This court’s review of a prison
22 disciplinary decision is limited. The only cognizable issues are (1) substantively, whether the
23 disciplinary finding was supported by “some evidence” as required by Superintendent v. Hill, 472
24 U.S. 445, 454 (1985); and (2) procedurally, whether the disciplinary hearing itself afforded
25 petitioner the minimum procedural protections required by Wolff v. McDonnell, 418 U.S. 539,

26 _____
27 ³ See Docken v. Chase, 393 F.3d 1024, 1028 (9th Cir. 2004) (“[H]abeas corpus jurisdiction exists
28 when a petitioner seeks expungement of a disciplinary finding from his record if expungement is
likely to accelerate the prisoner's eligibility for parole.”).

1 563-68 (1974). The court addresses these issues in turn.

2 A federal court may invalidate a prison disciplinary finding that affects the duration of
3 custody only where there is a complete absence of evidence to support the finding. See Hill, 472
4 U.S. at 454 (due process requires “some evidence”); see also Burnsworth v. Gunderson, 179 F.3d
5 771, (9th Cir. 1999) (even after Sandin, federal court may order expungement of a disciplinary
6 finding that is not supported by “some evidence”). Here, the record reflects the existence of
7 evidence that petitioner refused an order to double-cell. Petitioner does not contend otherwise; he
8 admits that he refused to double-cell, because he believed that he should not be required to do so
9 for medical reasons. The undisputed existence of “some evidence” to support the findings
10 satisfies Hill and takes the disciplinary finding outside the reach of this court.

11 What petitioner really means is that his refusal to double-cell should have been excused at
12 or before the RVR hearing because of his medical status. However, no legal authority supports
13 the proposition that a prison violates due process, entitling the prisoner to habeas relief from a
14 disciplinary finding that is supported by some evidence, by failing to consider or provide medical
15 exemptions to general disciplinary rules.

16 Regarding the applicable procedural protections, petitioner does not allege that he failed to
17 receive notice and a Wolff-compliant hearing *in relation to the RVR*. Petitioner’s procedural due
18 process theory focuses instead on his initial assignment to Ad Seg and the concomitant order for
19 double-celling. The specific procedures required under Wolff for deprivation of good-time
20 credits are not required for lesser penalties such as segregation. See Wolff, 418 U.S. at 571-72 &
21 n.19; Hewitt v. Helms, 459 U.S. 460, 476 (1982); Toussaint v. McCarthy, 801 F.2d 1080, 1100-
22 01 (9th Cir. 1986). The Due Process Clause does not create a liberty interest in a particular
23 classification. Moody v. Daggett, 429 U.S. 78, 88 n.9 (1976); see also McFarland v. Cassady,
24 779 F.2d 1426, 1428 (9th Cir. 1985) (constitution does not create a liberty interest in remaining in
25 the general population). Even if petitioner’s alleged placement in Ad Seg for non-disciplinary
26 purposes -- when prison regulations required that he instead be classified as an inmate medical
27 patient -- constituted an “atypical and significant hardship. . . in relation to the ordinary incidents
28 of prison life,” Sandin, 515 U.S. at 484, it does not follow that the subsequent disciplinary

1 finding violated due process.

2 There is no legal authority for the proposition that an error in classification, even
3 classification that violates prison regulations or due process, renders unconstitutional a
4 subsequent and independent disciplinary charge for failing to comply with the terms of the
5 classification. Plaintiff's remedy for inappropriate classification, or improper use of Ad Seg as a
6 medical bed, lay in the administrative appeals process and possible judicial review in the civil
7 rights context.⁴ The fact of an inappropriate classification, however, does not exempt an inmate
8 from compliance with applicable regulations while challenging that classification, or support
9 habeas relief from a subsequent disciplinary finding.

10 If AEDPA applies to this case as respondent contends, the lack of clearly established
11 federal law to support petitioner's due process theory would begin and end the analysis. See
12 Wright v. Van Patten, 552 U.S. 120, 125-26 (2008) (per curiam) (where no Supreme Court
13 precedent controls a legal issue, the state court's denial of relief cannot be unreasonable within
14 the meaning of AEDPA). Even under pre-AEDPA standards, the court lacks authority to order
15 expungement of a prison disciplinary violation that was supported by some evidence, where the
16 inmate's rights under Wolff were not violated in relation to the disciplinary hearing itself.

17 Accordingly, IT IS HEREBY RECOMMENDED that:

- 18 1. The instant petition be deemed timely filed on the basis of equitable tolling;
- 19 2. That relief be denied on the merits for the reasons stated herein; and,
- 20 3. Petitioner's federal habeas corpus petition be dismissed with prejudice.

21 These findings and recommendations are submitted to the United States District Judge
22 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days
23 after being served with these findings and recommendations, any party may file written
24 objections with the court and serve a copy on all parties. Such a document should be captioned

25 ⁴ As noted previously in discussion of equitable tolling, petitioner initially filed his challenges to
26 the RVR together with a challenge to the conditions of his confinement. See Case No. 2:09-cv-
27 03407-KJM-JFM, ECF No. 97 at 7. The court has acknowledged that confusion regarding the
28 proper vehicle for the instant claims characterized the earlier stages of this litigation. However,
petitioner's complaints about his Ad Seg placement have consistently been presented in the
context of his challenge to the RVR, and not as a free-standing basis for relief of any kind.

1 “Objections to Magistrate Judge’s Findings and Recommendations.” If petitioner files objections,
2 he shall also address whether a certificate of appealability should issue and, if so, why and as to
3 which issues. A certificate of appealability may issue under 28 U.S.C. § 2253 “only if the
4 applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. §
5 2253(c)(3). Any response to the objections shall be filed and served within fourteen days after
6 service of the objections. The parties are advised that failure to file objections within the
7 specified time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951
8 F.2d 1153 (9th Cir. 1991).

9 DATED: October 9, 2014

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11 ALLISON CLAIRE
12 UNITED STATES MAGISTRATE JUDGE
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