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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

DANTE L. LOVE,  
Petitioner,  
v.  
WILLIAM KNIPP,  
Respondent.

No. 2:14-cv-2817 JAM CKD P

ORDER AND  
FINDINGS AND RECOMMENDATIONS

Petitioner is a California prisoner proceeding pro se with an application for writ of habeas corpus under 28 U.S.C. § 2254. On August 25, 2015, the court recommended that this action be dismissed under Federal Rule of Civil Procedure 41(b) for petitioner’s failure to file an opposition, or a statement of non-opposition to respondent’s pending motion to dismiss, in which respondent argues, among other things, that petitioner’s claims are time-barred. On October 15, 2015, petitioner filed a document in which he indicates that he does not oppose dismissal, but asks for “leave to refile a petition . . . upon a showing of special circumstances [p]ursuant to 28 U.S.C. § 2244(d)(1)(B) & 28 U.S.C. § 2244(d)(1)(C).” Essentially, petitioner is indicating that he believes he has valid arguments to counter respondent’s argument that this action is time-barred, but he cannot articulate them at this point.

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1 Pursuant to Federal Rule of Civil Procedure 41(a)(1),<sup>1</sup> this action can be dismissed at any  
2 time by petitioner before an answer is filed with the dismissal being without prejudice. The court  
3 interprets the document filed by petitioner October 15, 2015 as a request for dismissal without  
4 prejudice and there does not appear to be any reason why that request must not be granted under  
5 Rule 41(a)(1) since respondent has not yet filed an answer. Accordingly, the court will  
6 recommend that petitioner's request for dismissal be granted. Petitioner is warned that if he  
7 initiates a second habeas action asserting the same claims brought in this action, any dismissal  
8 under Rule 41(a) of that action would be with prejudice.

9 Accordingly, IT IS HEREBY ORDERED that the court's August 25, 2015 findings and  
10 recommendations are vacated.

11 IT IS HEREBY RECOMMENDED that:

- 12 1. Petitioner's request that his amended petition for writ of habeas corpus be dismissed  
13 without prejudice be granted;
- 14 2. Petitioner's amended petition for writ of habeas corpus be dismissed without prejudice;
- 15 3. Respondent's motion to dismiss (ECF No. 28) be denied without prejudice; and
- 16 4. This case be closed.

17 These findings and recommendations are submitted to the United States District Judge  
18 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
19 after being served with these findings and recommendations, any party may file written  
20 objections with the court and serve a copy on all parties. Such a document should be captioned  
21 "Objections to Magistrate Judge's Findings and Recommendations." In his objections petitioner  
22 may address whether a certificate of appealability should issue in the event he files an appeal of  
23 the judgment in this case. See Rule 11, Federal Rules Governing Section 2254 Cases (the district  
24 court must issue or deny a certificate of appealability when it enters a final order adverse to the  
25 applicant). Any response to the objections shall be served and filed within fourteen days after

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26 <sup>1</sup> Rule 12 of the Rules Governing Section 2254 cases indicates "[t]he Federal Rules of Civil  
27 Procedure, to the extent they are not inconsistent with any statutory provisions or these rules, may  
28 be applied to a proceeding under these rules." There does not appear to be any reason why Rule  
41(a) should not apply to this case.

1 service of the objections. The parties are advised that failure to file objections within the  
2 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951  
3 F.2d 1153 (9th Cir. 1991).

4 Dated: December 3, 2015



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CAROLYN K. DELANEY  
UNITED STATES MAGISTRATE JUDGE

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