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UNITED STATES DISTRICT COURT

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FOR THE EASTERN DISTRICT OF CALIFORNIA

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STEVEN LEE MORTENSEN,

No. 2:16-cv-2187 MCE AC P

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Petitioner,

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v.

FINDINGS AND RECOMMENDATIONS

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BUTTE COUNTY SUPERIOR COURT,
et al.,

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Respondents.

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Petitioner, a state prisoner proceeding pro se, has filed an 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. For the reasons stated herein, the court will recommend that the petition be dismissed for lack of prosecution.

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PROCEDURAL HISTORY

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Petitioner filed the instant petition in this court on September 14, 2016. ECF No. 1. On September 13, 2017, respondent Seibel filed a motion to dismiss on the grounds that the petition was premature given that petitioner's direct appeal was still pending in the California Court of Appeal. See ECF No. 13. Petitioner did not oppose the motion.

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On February 5, 2018, the docket was updated to indicate a change of address for petitioner. The new address appeared to be a private one; not one affiliated with the California Department of Corrections and Rehabilitation.

1 On September 4, 2018, the undersigned ordered petitioner to file a response to respondent
2 Seibel's motion to dismiss within ten days and to update the court on the status of his state habeas
3 proceedings. See ECF No. 16. At that time, petitioner was warned that failure to comply with
4 the order might result in the dismissal of the action for failure to prosecute. See id.

5 On September 14, 2018, the court's September 4, 2018 order was returned as
6 "undeliverable, attempted – not known." Despite its return, petitioner was properly served. See
7 E.D. Cal., L.R. 182(f) (2009) (stating service of documents at prior address of party is fully
8 effective). For these reasons, the court will recommend that this action be dismissed for lack of
9 prosecution.

10 II. CERTIFICATE OF APPEALABILITY

11 Pursuant to Rule 11 of the Federal Rules Governing Section 2254 Cases, this court must
12 issue or deny a certificate of appealability when it enters a final order adverse to the applicant. A
13 certificate of appealability may issue only "if the applicant has made a substantial showing of the
14 denial of a constitutional right." 28 U.S.C. § 2253(c)(2). For the reasons set forth in these
15 findings and recommendations, a substantial showing of the denial of a constitutional right has
16 not been made in this case. Therefore, no certificate of appealability should issue.

17 Accordingly, IT IS HEREBY RECOMMENDED that:


- 18 1. The petition (ECF No. 1) be DISMISSED for lack of prosecution;
- 19 2. Respondent's pending motion to dismiss the petition as premature (ECF No. 13) be
20 DENIED as moot; and
- 21 3. This court DECLINE to issue the certificate of appealability referenced in 28 U.S.C. §
22 2253.

23 These findings and recommendations are submitted to the United States District Judge
24 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
25 after being served with these findings and recommendations, petitioner may file written
26 objections with the court. Such a document should be captioned "Objections to Magistrate
27 Judge's Findings and Recommendations." Petitioner is advised that failure to file objections

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1 within the specified time may waive the right to appeal the District Court's order. Martinez v.
2 Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: September 19, 2018

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5 ALLISON CLAIRE
6 UNITED STATES MAGISTRATE JUDGE
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