1 2 3 UNITED STATES DISTRICT COURT 4 5 FOR THE EASTERN DISTRICT OF CALIFORNIA 6 7 S. DEANDA, No. 2:16-cy-2755 JAM GGH P 8 Petitioner, 9 ORDER:FINDINGS AND v. RECOMMENDATION 10 UNKNOWN, 11 Respondent. 12 13 Petitioner has requested an extension of time to file a petition for writ of habeas corpus. 14 Good cause appearing, IT IS HEREBY ORDERED that: 1. Petitioner's request for an extension of time (ECF No. 8) is denied; 15 2. This order shall be served on Michael Patrick Farrell, Senior Assistant Attorney 16 17 General, State of California. 18 IT IS RECOMMENDED that the action be dismissed without prejudice. 19 As explained previously, petitioner cannot preempt the AEDPA habeas corpus time 20 limitations by continually requesting extensions of time to file a petition. A habeas corpus 21 proceeding is not commenced until a petition is filed. See Rules Governing 2254 Actions, Rule 22 12, adopting Fed.R.Civ.P rules, unless inconsistent with the habeas rules, and Fed.R.Civ.P. 3 providing that an action is "commenced" with the filing of a complaint. Therefore, a [non-death 23 24 penalty] habeas action is "commenced" with the filing of a petition. Without some document 25 which cognizably could be termed a petition, even if defective, no habeas action is commenced. 26 Unless statutes or the rules otherwise provide, a court has no jurisdiction to issue determinations 27 on issues which may or may not be raised once the action is commenced and ongoing,-- when the 28 respondent party has been served and is available to contest the issue, if respondent so desires.

1 Some courts agree with the undersigned; some do not. See United States v. Leon, 203 2 F.3d 162 (2nd Cir. 2000) (no jurisdiction); Soocha v. Pollard, 621 F.3d 667 (7th Cir. 2010) 3 (jurisdiction). Lower courts fall on both sides of the question. And, the Supreme Court ruled in a 4 death penalty habeas context, with a *statutorily authorized*, more or less mandatory, counsel 5 appointment procedure, that death penalty habeas corpus actions commence with a request for 6 counsel. McFarland v. Scott, 512 U.S. 849 (1994). However, this present "action" does not 7 derive from a death penalty case. 8 It makes no more sense in the context of a non-death penalty habeas proceeding to review, 9 ex parte, a possible statute of limitations defense and extensions of time regarding the 10 commencement of the action, than it does to make the same determination in a contract or tort 11 context prior to the commencement of the action. The undersigned agrees with Leon. 12 These findings and recommendations are submitted to the United States District Judge 13 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days 14 after being served with these findings and recommendations, petitioner may file written 15 objections with the court and serve a copy on all parties. Such a document should be captioned 16 "Objections to Magistrate Judge's Findings and Recommendations." Petitioner is advised that 17 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 19, 2017 /s/ Gregory G. Hollows 20 UNITED STATES MAGISTRATE JUDGE 21 22 23 24 25 Dean.2755.EOT.amm

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