Doc. 14 (HC) Peterson v. Diaz 1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 FOR THE EASTERN DISTRICT OF CALIFORNIA 10 11 RICHARD ANTHONY PETERSON, No. 2:19-cv-01480 GGH P 12 Petitioner, 13 ORDER AND FINDINGS AND v. RECOMMENDATIONS 14 RALPH M. DIAZ, 15 Respondent. 16 17 Petitioner, a state prisoner proceeding pro se, has filed a petition for writ of habeas corpus 18 pursuant to 28 U.S.C. §2254. The matter was referred to the United States Magistrate Judge 19 pursuant to 28 U.S.C. §636(b)(1) and Local Rule 302(c). Pending before the court is petitioner's 20 motion for summary judgment. ECF No. 10. 21 The Federal Rules of Civil Procedure may be applied to habeas proceedings, "to the extent 22 that they are not inconsistent with any statutory provisions or these rules[.]" 28 U.S.C. § 2254, 23 Rule 12. A motion for summary judgment pursuant to Fed. R. Civ. P 56 is not appropriate in this 24 instance because the court will address the merits of the petition accordingly with its scheduling order. 25 26 Petitioner filed his federal habeas petition on July 30, 2019. ECF No. 1. The court directed 27 respondent to file a response within 60 days from the date of its September 10, 2019 order. ECF 28 No. 5. On November 12, 2019, respondent, as ordered, filed a motion to dismiss. ECF No. 9.

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On November 14, 2019, petitioner filed a motion for summary judgment requesting that the court grant summary judgment on the pleadings due to respondent's failure to timely file a response to the habeas petition. ECF No. 10. Although, petitioner is correct that respondent filed his motion to dismiss late (by one day given that November 9 occurred on a Saturday), respondent has now responded. Respondent has filed a motion in accordance with the court's order and accordingly, the court will address the merits of the petition upon competition of the parties' briefing. This case should be decided on its merits rather than a one-day unexcused late filing.

Accordingly, IT IS HEREBY ORDERED that the Clerk shall assign a district judge to this action.

Further, IT IS HEREBY RECOMMENDED that the motion for summary judgment (ECF No. 10) be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any response to the objections shall be filed and served within fourteen days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: November 28, 2019

/s/ Gregory G. Hollows UNITED STATES MAGISTRATE JUDGE

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