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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL LEE ROESSLER,
Petitioner,
v.
PATRICK COVELLO,
Respondent.

No. 2:19-cv-02422-KJM-JDP (HC)

ORDER

Petitioner, a state prisoner proceeding pro se, has filed this application for a writ of habeas corpus under 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge as provided by 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On February 9, 2021, the magistrate judge filed findings and recommendations recommending dismissal of petitioner’s action for failure to prosecute, which were served on all parties and contained notice that any objections to the findings and recommendations were to be filed within fourteen days. ECF No. 31. Petitioner filed objections to the findings and recommendations. ECF No. 32. In the objections, the petitioner explained the prison law library has been shut down for a number of months, he has been moved seven different times in the last few months due to COVID-19, and his mail appears to be getting lost or significantly delayed as a result of his relocations. *Id.*

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1 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this
2 court has conducted a *de novo* review of this case. Having reviewed the file in light of the
3 objections, the court declines to adopt the findings and recommendations. While it is the case that
4 petitioner did not respond substantively to the order to show cause the magistrate judge issued before he
5 issued the findings and recommendations, ECF No. 29, petitioner did move for a stay in light of the
6 conditions he represented interfered with his researching his case, ECF No. 30 (saying in late November
7 2020, he was told he had COVID-19, moved to the gym, and then subsequently moved five different
8 times). His objections reiterate the same reasons for his inability to craft a response to the motion to
9 dismiss, which was filed at or about the time the emergence of COVID-19 and its serious effects became
10 apparent to public health authorities and the public at large. The magistrate judge has cited the correct
11 authority for determining whether to dismiss an action for failure to prosecute, and properly notes the
12 fourth factor favoring disposition on the merits weighs against dismissal. *See* ECF No. 31 at 2 (citing
13 *Carey v. King*, 856 F.2d 1439, 1440 (9th Cir. 1988)). This court finds, however, that the fifth factor asking
14 whether “less drastic sanctions” are available, also weighs against dismissal given the court’s ability to
15 appoint counsel on a limited basis to file an opposition to the motion to dismiss, while cautioning
16 petitioner that he must cooperate with counsel and assist with the preparation of a motion in a timely
17 manner now. Under the circumstances, with the coronavirus pandemic persisting and the inability to
18 project with confidence a date by which it will be suppressed, appointing counsel in this manner and
19 subject to clear deadlines will help ensure the pending motion is decided on the merits.

20 Accordingly, IT IS HEREBY ORDERED that:

- 21 1. The findings and recommendations filed February 9, 2021, are **not** adopted.
- 22 2. This case is referred to the CJA Panel Administrator in the Federal Defender’s Office
23 for the identification of counsel to be appointed for the limited purpose of preparing petitioner’s
24 response to the motion to dismiss filed at ECF No. 13.
- 25 3. Opposition to respondent’s motion to dismiss is due within sixty days (60) of this
26 order.

27 DATED: April 1, 2021.

28 
CHIEF UNITED STATES DISTRICT JUDGE