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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 N. WALLACE,

12 Petitioner,

13 vs.

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15 LARRY SMALL, Warden,

16 Respondent.
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CASE NO. 08cv1146-LAB (POR)

**ORDER OVERRULING
OBJECTIONS TO REPORT AND
RECOMMENDATION; AND**

**ORDER DENYING MOTION TO
DISMISS PETITION**

[Docket no. 29.]

18 On February 9, 2009, Warden Larry Small (the "Respondent") moved to dismiss the
19 amended petition filed by Nathaniel Wallace (the "Petitioner"). The motion was referred to
20 Magistrate Judge Louisa Porter for report and recommendation pursuant to 28 U.S.C.
21 § 636(b) and Civil Local Rule 72.1(d). On August 20, 2009, Judge Porter issued her report
22 and recommendation (the "R&R"). Although the R&R recommended denying Respondent's
23 motion to dismiss, it was Petitioner who filed objections to the R&R. Respondent filed no
24 objections of his own, and did not reply to Petitioner's objections.

25 Petitioner argues he has been in custody longer than he should have been. His
26 argument is that he has served his sentence on all counts of which he was convicted except
27 (arguably) count 4. He contends the trial court never included this count in its
28 pronouncement of judgment or sentenced him for this count, and he was improperly

1 "sentenced" on this count by the California Department of Corrections and Rehabilitation,
2 by simply writing in a sentence on the abstract of judgment.

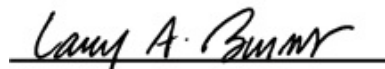
3 The R&R notes that the documentary record is incomplete, and based on the record
4 before the Court, the motion to dismiss must therefore be denied without prejudice. In the
5 event Respondent again moves to dismiss, the R&R requires him both to file a complete
6 record, and also to brief the legal significance of the abstract of judgment as it pertains to the
7 jury's verdict and the sentence imposed at the sentencing hearing.

8 Petitioner's objections consist of, essentially, a summary of the claims he raises in his
9 amended petition. It is unclear what exactly he is objecting to, since the ruling is favorable
10 to him. It may be that he believes the motion should be denied with prejudice rather than
11 without, but he does not say so. In any event, the Court finds denial without prejudice is
12 appropriate given the incompleteness of the record. Petitioner's objections are therefore
13 **OVERRULED AS MOOT**. The Court **ADOPTS** the R&R and **DENIES** the motion to dismiss.

14 Because it is apparent the complete record will be needed, Respondent is directed
15 to obtain it promptly so as to be able to file it without undue delay when required.

16 **IT IS SO ORDERED.**

17 DATED: September 14, 2009

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19 **HONORABLE LARRY ALAN BURNS**
20 United States District Judge
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