

APPENDIX

A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 18 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

KEENAN G. WILKINS, AKA Nerrah
Brown,

Plaintiff-Appellant,

v.

C. JOKSCH, Correctional Officer; et al.,

Defendants-Appellees.

No. 19-16674

D.C. No. 2:18-cv-02518-MCE-
DMC
Eastern District of California,
Sacramento

ORDER

Before: SILVERMAN, McKEOWN, and BRESS, Circuit Judges.

On August 6, 2019, the district court revoked appellant's in forma pauperis status, finding that the Prisoner Litigation Reform Act's "three strikes" provision barred appellant from bringing his cause of action in forma pauperis because he had previously filed three actions that had been dismissed as frivolous, malicious, or for failure to state a claim, and appellant did not allege that he was under imminent danger of serious physical injury. *See* 28 U.S.C. § 1915(g). However, a review of the record indicates that appellant adequately alleged that he faced imminent danger of serious physical injury at the time he filed his complaint. *See id.*; *Williams v. Paramo*, 775 F.3d 1182, 1190 (9th Cir. 2015) (holding that a prisoner "may meet this requirement by alleging that prison officials continue with a practice that has injured him or others similarly situated in the past" (brackets

and internal quotation marks omitted)).

We therefore vacate the district court's August 6, 2019 order and remand for further proceedings consistent with this order.

All pending motions are denied as moot.

VACATED and REMANDED.

APPENDIX

B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 19-16674

D.C. No. 2:18-cv-02518-MCE-
DMC
Eastern District of California,
Sacramento

ORDER

Before: SILVERMAN, McKEOWN, and BRESS, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 26) is denied. *See*
9th Cir. R. 27-10.

All remaining pending motions are denied as moot.

No further filings will be entertained in this closed case.

APPENDIX

C

**SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001**

July 9, 2020

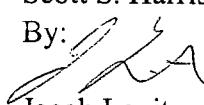
Keenan Wilkins
AN2387
P.O. Box 32290
Stockton, CA 95213

RE: Wilkins v. Galvin, et al.
No: 19-6705

Dear Mr. Wilkins:

The petition for rehearing in the above-entitled case was postmarked June 17, 2020, received June 25, 2020, and is herewith returned as out-of-time.

Pursuant to Rule 44 of the Rules of this Court, a petition for rehearing must be submitted within 25 days after the decision of the Court. As the petition for writ of certiorari was denied on May 18, 2020, the petition for rehearing was due on or before June 12, 2020.

Sincerely,
Scott S. Harris, Clerk
By: 
Jacob Levitan
(202) 479-3392

Enclosures

PROOF OF SERVICE

I, Keenan Wilkins, Declare:

On 6/17/20 I gave COOR officer
3 Envelopes Containing:

"Petitioners Request For Rehearing
and/or Reconsideration"

Wilkins v Galvin et al

No. 19-6705

Addressed To:

1. Office of CLK

Supreme Ct of US
Washington, DC 20543

2. David Goodwin

D.A.G.

State Atty Gen Office
1300 1/4 St Ste
Sac, CA 94244

3. David M. Shapiro, Esq

Roderick + Solange
MacArthur Justice Ctr
Northwestern Pritker
School of Law

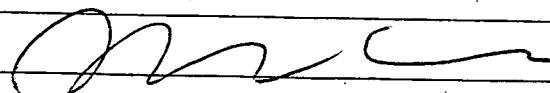
375 East Chicago Ave

Chicago IL 60611

For outgoing US Postal Mail

I declare this is true under
Penalty of Perjury

Executed this 17th day of June
2020 at Stockton, California.



Keenan Wilkins
Petitioner

RECEIVED

JUN 25 2020

OFFICE OF THE CLERK
SUPREME COURT, U.S.

1 Keenan Wilkins - AN2387

2 (aka Nerrah Brown)

3 California Health Care Facility

4 PO Box 32290

5 Stockton, CA 95213

6 Petitioner, In Pro Per

7

8 UNITED STATES SUPREME COURT

9

10 KEENAN G. WILKINS
Petitioner

11 No. 19-6705

12 vs

13 J. GALVIN, et al
14 Respondant

15 PETITIONER'S
16 REQUEST FOR
17 REHEARING AND/OR
18 RECONSIDERATION

19 I. INTRODUCTION

20 Petitioner, Keenan Wilkins received
21 a letter from Counsel of Record
22 David M. Shapiro dated
23 Stating the Court denied his
24 Petition For Certiorari

25 Petitioner respectfully seeks
26 Rehearing and/or Reconsideration
27 by the Court to address 2
28 Claims "Conceded" by Respondant
but left "Unaddressed" by Petitioner's
Counsel --- Claims far more
eggregious than the one presented

1 II. REASON FOR REHEARING/RECONSIDERATION

2

3 a. Petitioner's original Petition Sought

4 relief on 3 Claims:

5 1. Lack of Jurisdiction

6 2. Section 1915 (Failure To Prosecute)

7 3. Erroneous "Frivolous" Finding

8

9 b. The Court ordered a response and

10 Respondant only addressed "one" of the 3

11 Claims --- The Section 1915 failure to

12 Prosecute Claim. 9th Circuit and US Supreme

13 Court Law holds that Respondants failure

14 to argue the other 2 claims resulted in

15 Waiver and/or Concession to the arguments

16 (Medelin v Dretke (2005) 544 US 660; Clem v.

17 Lomeli, 566 F3d 1177, 9th Cir 2009; Tapia v. Wells

18 2015 US Dist Lexis 102836),

19

20 c. Counsel of Record the ONLY

21 addressed in Reply Brief the

22 Respondant's Section 1915 failure

23 To Prosecute Arguments but left

24 Wholly unaddressed Respondant's

25 "Concession" to the most

26 egregious of the 3 Claims ---

27 the 9th Circuits lack of

28 Jurisdiction to make a

1 "frivolous" finding on a "Non-
2 Briefed Appeal --- when all
3 that's before it was whether
4 to Grant/Deny IFF for the
5 Appeal (Rule 24; See *Buck v Davis*
6 137 S.Ct 759 (2017)).

7

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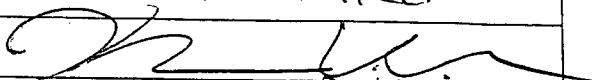
10 **III. CONCLUSION**

11 Wherefore, Petitioner respectfully
12 seeks Rehearing and/or
13 Reconsideration to address
14 the "Conceded" to most
15 egregious claim' (Lack
16 of Jurisdiction) as this
17 action circumvents Constitutional
18 Due Process and Statues,
19 creating incredible hardship
20 for indigent prisoners
21 subjected to Constitutional
22 deprivations.

23
24 Dated: 6/16/20

Respectfully

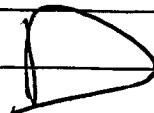
25 Submitted

26 

27 Keenan Wilkins

28 Petitioner

APPENDIX



1 11-cv-2704

2 Defendants next argue that Brown v. Alameda, 11-cv-2704 LHK (N.D. Cal.), counts as a
3 strike. On May 1, 2012, the Northern District dismissed 11-2704 for failing to comply with
4 Federal Rules of Civil Procedure 18 and 20. (ECF No. 50-5 at 39-41.) The Northern District
5 found that the amended complaint contained improperly joined defendants and claims. (Id.)

6 The Northern District did not dismiss 11-2704 on the grounds that plaintiff failed to state
7 claims upon which relief may be granted. The Northern District also did not dismiss 11-2704 on
8 the grounds that plaintiff's claims were frivolous, i.e., "of little weight or importance: having no
9 basis in law or fact..." Andrews, 398 F.3d at 1121. Finally, the Northern District did not dismiss
10 11-2704 on the grounds that it was malicious, i.e., filed with the "intention or desire to harm
11 another." Id.

12 Because the Northern District did not dismiss 11-2704 on the grounds that it was
13 frivolous, malicious, or failed to state a claim upon which relief may be granted, the undersigned
14 finds that 11-2704 does not qualify as a strike pursuant to 42 U.S.C. § 1915(g).¹ Rather, 11-2704
15 is an unsuccessful case that does not qualify as a strike. Andrews, 398 F.3d at 1121.

16 12-cv-16170

17 Defendants next argue that the Ninth Circuit's dismissal of plaintiff's appeal of the district
18 court's order in 11-2704 counts as a strike. The background to this appeal follows herein.

19 After plaintiff appealed the dismissal of 11-2704, in 12-16170 the Ninth Circuit referred
20 the case back to the district court to determine whether plaintiff's in forma pauperis status should
21 continue on appeal or if the appeal was taken in bad faith. (ECF No. 50-6 at 1.) The district court
22 certified that the appeal was frivolous and therefore not taken in good faith. (ECF No. 50-5 at 45-
23 46.)

24 In 12-16170, the Ninth Circuit then issued an order confirming the district court's
25 certification that plaintiff's appeal was frivolous. (ECF No. 50-6 at 3.) The Ninth Circuit denied
26

27 ¹ Dismissal of a complaint, in its entirety, for improper joinder is not proper. See Williams v.
28 California Department of Corrections, 467 Fed.Appx. 672 at *674 (9th Cir. 2012), citing Fed. R.
Civ. P. 21 ("Misjoinder of parties is not a ground for dismissing an action.")

1 plaintiff's application to proceed in forma pauperis on appeal and ordered him to pay the filing
2 fee. (Id.) After plaintiff failed to pay the filing fee, on September 12, 2012, the Ninth Circuit
3 dismissed the appeal for plaintiff's failure to pay the filing fee. (Id. at 5.)

4 The issue before the undersigned is whether the dismissal of plaintiff's appeal for failure
5 to file an in forma pauperis application, after the appeal was found frivolous, counts as a strike
6 under § 1915(g). In considering whether 12-16170 qualifies as a § 1915(g) strike, the
7 undersigned notes the following cases.

8 In Hafed v. Fed. Bureau of Prison, 635 F.3d 1172, 1179 (10th Cir. 2011), the Tenth
9 Circuit held that an appeal dismissed for failure to pay the filing fee, after the appeal was found
10 frivolous, is a § 1915(g) strike. In Hafed, the plaintiff appealed a district court order dismissing
11 an action as frivolous. Id. at 1178. The Tenth Circuit stated that the determination that the appeal
12 was frivolous by the appellate court when it denied the appellant's motion to proceed in forma
13 pauperis on appeal "can properly be termed the 'but for' cause of that court's subsequent
14 dismissal ... it would be 'hypertechnical' to hold that the resulting dismissal for nonpayment was
15 not a strike." Id.

16 In contrast to the Tenth Circuit, the Eleventh Circuit in Daker v. Commissioner, Georgia
17 Department of Corrections, 820 F.3d 1278 (11th Cir. 2016), held that an appeal dismissed for
18 failure to prosecute, after having been found frivolous, does not count as a § 1915(g) strike,
19 apparently without regard for the reasons behind the dismissal by the district court.

20 In Harris v. Mangum, 863 F.3d 1133, 1142-43 (9th Cir. 2017), the Ninth Circuit found
21 that actions dismissed for failure to file amended complaints, after the original complaints were
22 dismissed for failing to state a claim, count as strikes under 28 U.S.C. § 1915(g). The Ninth
23 Circuit found that dismissals, under these circumstances, "'rang the PLRA bells of ... failure to
24 state a claim,' even if the 'procedural posture' meant that the entry of judgment in each case was
25 delayed until it became clear that Harris would not file an amended complaint that did state a
26 claim." Id. at 1142, citing Thompson v. Drug Enf't Admin., 492 F.3d 428, 433 (D.C. Cir. 2007).

27 Based on the circumstances surrounding 12-16170, the undersigned finds that it does not
28 qualify as a strike under § 1915(g). If the court adopts the reasoning of the Eleventh Circuit in

1 Daker, 12-16170 is not a strike. Appeal 12-16170 can also be distinguished from Harris and
2 Hafed because the underlying order by the Northern District did not dismiss plaintiff's case as
3 frivolous, malicious or for failing to state a claim upon which relief may be granted. Instead, the
4 district court dismissed the case based on improper joinder. Based on these circumstances, even
5 though the district certified that the appeal was not taken in good faith, which the Ninth Circuit
6 confirmed, plaintiff's appeal did not ring the PLRA bell.

7 13-cv-17060

8 Defendants next argue that the Ninth Circuit's dismissal of plaintiff's appeal no. 13-17060
9 is a § 1915(g) strike. The background to this appeal follows herein.

10 Following the Ninth Circuit's dismissal of appeal 12-16170, plaintiff filed two motions in
11 the district court: a motion for relief from judgment pursuant to Federal Rule of Civil Procedure
12 60(b) and a motion for administrative justice. (See ECF No. 50-5 at 48-49.) The district court
13 denied both of these post-judgment motions in one order. (Id.) In particular, the district court
14 denied the 60(b) motion as untimely. (Id.) The district court denied the motion for administrative
15 justice on the grounds that it sought legal advice, which the court was not authorized to provide.
16 (Id.)

17 Plaintiff appealed the district court's order denying his 60(b) motion and motion for
18 administrative justice. In 13-17060, the Ninth Circuit referred the case back to the district court
19 to determine whether plaintiff's in forma pauperis status should continue on appeal, or if the
20 appeal was taken in bad faith. (ECF No. 50-7 at 2.) The district court found that plaintiff's
21 appeal was frivolous and therefore not taken in good faith. (ECF No. 50-5 at 51-52.)

22 In 13-17060, the Ninth Circuit issued an order confirming that plaintiff's appeal was
23 frivolous. (ECF No. 50-7 at 4-5.) The Ninth Circuit granted plaintiff twenty-one days to pay the
24 filing fee. (Id.) On March 17, 2014, the Ninth Circuit dismissed the appeal after plaintiff failed
25 to pay the filing fee. (Id. at 6.)

26 Case 13-17060 is not a strike for the same reasons 12-16170 is not a strike. The district
27 court order appealed in 13-17060 did not involve a finding of frivolousness, failure to state a
28 claim or maliciousness. While the district court and the Ninth Circuit found that plaintiff's appeal

1 was frivolous, 13-17060 did not ring the PLRA bell.

2 Conclusion

3 For the reasons discussed above, the undersigned finds that plaintiff does not have three
4 prior strikes pursuant to 28 U.S.C. § 1915(g). While other jurists ~~may~~ disagree with
5 undersigned's findings that four of the five cases discussed do not qualify as strikes, the
6 undersigned does not enter orders finding § 1915(g) strikes lightly.²

7 In the motion to dismiss, defendants also argue that plaintiff is collaterally estopped from
8 challenging his ineligibility for in forma pauperis status under 28 U.S.C. § 1915(g) because the
9 Northern District has previously determined that plaintiff has § 1915(g) strikes in four of the
10 cases cited by defendants, 97-2298, 08-3850, 11-2704 and 13-17060. As discussed above, the
11 undersigned did not find that 08-3850, 11-2704 and 13-17060 count as strikes under § 1915(g).

12 On April 26, 2017, in Brown v. Contra Costa, 16-7016 TEH, the Northern District ordered
13 plaintiff to show cause why the case should not be deemed to be three strikes barred and the
14 application to proceed in forma pauperis denied based on 97-2298, 08-3850, 11-2704 and 13-
15 17060. (ECF No. 50-8 at 1-5.) The district court denied plaintiff's application to proceed in
16 forma pauperis, but defendants in the instant action did not provide this court with a copy of the
17 order making that finding. After plaintiff failed to pay the filing fee, the district court dismissed
18 16-7016. (Id. at 7.) Plaintiff appealed the order denying his application to proceed in forma
19 pauperis. (Id. at 15.)

20 Assuming that the Northern District found the four cases cited above to count as strikes
21 under 28 U.S.C. § 1915(g), while the undersigned gives such a decision significant consideration,
22 this court is not bound by the decision of another district court.

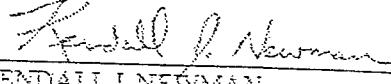
23 Accordingly, for the reasons discussed above, IT IS HEREBY RECOMMENDED that
24 defendants' motion to revoke plaintiff's in forma pauperis status (ECF No. 50) be denied.

25 These findings and recommendations are submitted to the United States District Judge
26 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
27

28 ² Neither party addresses the issue of whether plaintiff meets the imminent injury exception to
§ 1915(g). Accordingly, the undersigned also does not address this issue.

1 after being served with these findings and recommendations, any party may file written
2 objections with the court and serve a copy on all parties. Such a document should be captioned
3 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
4 objections shall be filed and served within fourteen days after service of the objections. The
5 parties are advised that failure to file objections within the specified time may waive the right to
6 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

7 Dated: October 23, 2017

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11 KENDALL J. NEWMAN
12 UNITED STATES MAGISTRATE JUDGE

13 Wilk347.mtd
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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

KEENAN WILKINS, also known as
Nerrah Brown,

No. 2:18-cv-02518-MCE-DMC-P

Plaintiff,

ORDER

C. JOKSCH, et al.,

Defendants.

Plaintiff, a prisoner proceeding pro se, brings this civil rights action pursuant to 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to Eastern District of California local rules.

On June 18, 2019, the Magistrate Judge filed findings and recommendations herein which were served on the parties and which contained notice that the parties may file objections within the time specified therein. Timely objections to the findings and recommendations have been filed.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304(f), this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

1 Accordingly, IT IS HEREBY ORDERED that:

2 1. The findings and recommendations filed June 18, 2019, are adopted in full;

3 2. Defendant's motion to revoke plaintiff's in forma pauperis status (ECF

4 No. 13) is granted;

5 3. This action is dismissed without prejudice to re-filing upon pre-payment of

6 the filing fee;

7 4. All other pending motions (ECF Nos. 32, 33 and 37) are denied as moot;

8 and

9 5. The Clerk of the Court is directed to enter judgment and close this file.

10 IT IS SO ORDERED.

11 Dated: August 6, 2019



MORRISON C. ENGLAND, JR.
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

KEENAN WILKINS, also known as
Nerrah Brown.

No. 2:18-CV-2518-MCE-DMC-P

Plaintiff:

FINDINGS AND RECOMMENDATIONS

C. JOKSCH, et al..

Defendants

Plaintiff, a prisoner proceeding pro se, brings this civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is defendant Foulk's motion to revoke plaintiff's in forma pauperis status (ECF No. 13) and defendant Joksch's joinder (ECF No. 23). Defendants contend in forma pauperis status should be revoked pursuant to the Prison Litigation Reform Act (PLRA).

The PLRA's "three strikes" provision, found at 28 U.S.C. § 1915(g), provides as follows:

In no event shall a prisoner bring a civil action . . . under this section if the prisoner has, on three or more prior occasions, while incarcerated or detained . . . , brought an action . . . in a court of the United States that was dismissed on the ground that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

Id.

1 Thus, when a prisoner plaintiff has had three or more prior actions dismissed for one of the
2 reasons set forth in the statute, such “strikes” preclude the prisoner from proceeding in forma
3 pauperis unless the imminent danger exception applies. Dismissals for failure to exhaust
4 available administrative remedies generally do not count as “strikes” unless the failure to exhaust
5 is clear on the face of the complaint. See Richey v. Dahne, 807 F.3d 1202, 1208 (9th Cir. 2015).
6 Dismissed habeas petitions do not count as “strikes” under § 1915(g). See Andrews v. King, 398
7 F.3d 1113, 1122 (9th Cir. 2005). Where, however, a dismissed habeas action was merely a
8 disguised civil rights action, the district court may conclude that it counts as a “strike.” See id. at
9 n.12.

10 When in forma pauperis status is denied, revoked, or otherwise unavailable under
11 § 1915(g), the proper course of action is to dismiss the action without prejudice to re-filing the
12 action upon pre-payment of fees at the time the action is re-filed. In Tierney v. Kupers, the Ninth
13 Circuit reviewed a district court’s screening stage dismissal of a prisoner civil rights action after
14 finding under § 1915(g) that the plaintiff was not entitled to proceed in forma pauperis. See 128
15 F.3d 1310 (9th Cir. 1998). Notably, the district court dismissed the entire action rather than
16 simply providing the plaintiff an opportunity to pay the filing fee. The Ninth Circuit held that the
17 plaintiff’s case was “properly dismissed.” Id. at 1311. Similarly, in Rodriguez v. Cook, the
18 Ninth Circuit dismissed an inmate’s appeal in a prisoner civil rights action because it concluded
19 that he was not entitled to proceed in forma pauperis on appeal pursuant to the “three strikes”
20 provision. See 169 F.3d 1176 (9th Cir. 1999). Again, rather than providing the inmate appellant
21 an opportunity to pay the filing fee, the court dismissed the appeal without prejudice and stated
22 that the appellant “may resume this appeal upon prepaying the filing fee.”

23 This conclusion is consistent with the conclusions reached in at least three other
24 circuits. In Dupree v. Palmer, the Eleventh Circuit held that denial of in forma pauperis status
25 under § 1915(g) mandated dismissal. See 284 F.3d 1234 (11th Cir. 2002). The court specifically
26 held that “the prisoner cannot simply pay the filing fee after being denied IFP status” because
27 “[h]e must pay the filing fee at the time he *initiates* the suit.” Id. at 1236 (emphasis in original).
28 The Fifth and Sixth Circuits follow the same rule. See Adepegba v. Hammons, 103 F.3d 383 (5th

1 Cir. 1996); In re Alea, 86 F.3d 378 (6th Cir. 2002).

2 This court has previously determined plaintiff has three or more “strikes.” See
3 Wilkins v. Gonzalez, No. 2:16-CV-0347-KJM-KJN; Brown (aka Wilkins) v. Galvin, No. 2:16-
4 CV-2629-JAM-DB. The court takes judicial notice of these prior determinations, see Chandler v.
5 U.S., 378 F.2d 906, 909 (9th Cir. 1967), and likewise concludes plaintiff has three or more
6 “strikes.” The court also finds plaintiff has not faced imminent danger of serious bodily physical
7 injury at the time the action was filed. See Andrews v. Cerbantes, 493 F.3d 1047, 1055 (9th Cir.
8 2007). Plaintiff claims of being forced to share a cell with predatory inmates in late 2013 and into
9 2014. See ECF No. 1, pgs. 6-7. According to plaintiff, this alleged conduct exposed him to
10 safety risks, in violation of the Eighth Amendment. See id. 8. Plaintiff also states that, on April
11 4, 2014, his classification was “made ‘single cell’ status.” Id. Thus, as of the time this action was
12 filed, plaintiff was not in imminent danger of serious physical injury resulting from a predatory
13 cellmate. To the extent plaintiff worries about the possibility of being double-celled in the future,
14 any danger would be speculative, not imminent as of the date the complaint was filed.

15 Based on the foregoing, the undersigned recommends that defendant’s motion to
16 revoke plaintiff’s in forma pauperis status (ECF No. 13) be granted and that this action be
17 dismissed without prejudice to re-filing upon pre-payment of the full filing fee.

18 These findings and recommendations are submitted to the United States District
19 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days
20 after being served with these findings and recommendations, any party may file written objections
21 with the court. Responses to objections shall be filed within 14 days after service of objections.
22 Failure to file objections within the specified time may waive the right to appeal. See Martinez v.
23 Ylst, 951 F.2d 1153 (9th Cir. 1991).

24

25 Dated: June 18, 2019



26 DENNIS M. COTA
27 UNITED STATES MAGISTRATE JUDGE
28