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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10 HENRY C. BARNETT,

11 Petitioner,

12 v.

13 K. HOLLAND, Warden,

14 Respondent.
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CASE NO. CV 16-2465-VBF (FFM)

REPORT AND RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE

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17 This Report and Recommendation is submitted to the Honorable Valerie Baker
18 Fairbank, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order
19 05-07 of the United States District Court for the Central District of California. For the
20 reasons discussed below, it is recommended that the Petition be denied and the action
21 be dismissed with prejudice.

22
23 **I. PROCEEDINGS**

24 Petitioner Henry C. Barnett, a state prisoner in the custody of the California
25 Department of Corrections, constructively filed a Petition for Writ of Habeas Corpus
26 by a Person in State Custody pursuant to 28 U.S.C. § 2254 on April 6, 2016. On
27 September 16, 2016, Respondent filed a motion to dismiss the Petition. On October 3,

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1 2016, Petitioner filed an opposition to the motion to dismiss. The matter, thus, stands
2 submitted and ready for decision.

3 II. PROCEDURAL HISTORY

4 On August 9, 1995, a Los Angeles Superior Court jury found Petitioner guilty
5 of one count of vehicle theft (Cal. Penal Code § 10851). In a bifurcated proceeding,
6 the trial court found true the allegation that Petitioner had two prior "strike"
7 convictions. Thereafter, Petitioner was sentenced to twenty-five years to life in state
8 prison.

9 Petitioner appealed his conviction. On January 28, 1997, the California Court
10 of Appeal affirmed the judgment. Petitioner did not file a petition for review in the
11 California Supreme Court.

12 On March 10, 1998, however, Petitioner initiated a series of collateral attacks to
13 his conviction and sentence, the last of which was denied on April 23, 1998. Fifteen
14 years later, beginning on August 15, 2013, he initiated a second series of state court
15 collateral attacks to his conviction and sentence. The last of that series of collateral
16 attacks was denied by the California Court of Appeal on December 14, 2015.

17 Petitioner then initiated this action on April 6, 2016. After the undersigned
18 issued an order notifying Petitioner that each of his claims for relief was unexhausted,
19 Petitioner requested a stay of the proceedings. On May 27, 2016, the undersigned
20 issued a Report and Recommendation recommending that Petitioner's request to stay
21 the instant proceedings be denied and that the Petition be dismissed without prejudice.

22 In the meantime, Petitioner filed a habeas corpus petition in California Supreme
23 Court, which denied the petition on June 22, 2016. He then filed a motion to amend
24 the instant Petition in order to allege his newly-exhausted claims. Accordingly, the
25 undersigned withdrew the Report and Recommendation and granted Petitioner's
26 motion to amend the Petition.

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III. DISCUSSION

A. Statute of Limitations

1. Applicable Law

The current Petition was filed after the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") was signed into law and is, thus, subject to AEDPA's one-year limitation period, as set forth at 28 U.S.C. § 2244(d). *See Calderon v. U.S. Dist. Court (Beeler)*, 128 F.3d 1283, 1286 (9th Cir. 1997).¹ Title 28 U.S.C. § 2244(d) provides the following:

(1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review.

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

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¹ *Beeler* was overruled on other grounds in *Calderon v. U.S. Dist. Court (Kelly)*, 163 F.3d 530, 540 (9th Cir. 1998) (en banc).

1 (D) the date on which the factual predicate of the claim or claims presented could have
2 been discovered through the exercise of due diligence.
3 28 U.S.C. § 2244(d)(1).
4

5 **2. The Petition Was Not Filed Within the Limitation Period**

6 In most cases, the limitation period begins running on the date on which the
7 petitioner's direct review becomes final. *Lopez v. Felker*, 536 F. Supp. 2d 1154, 1156
8 (C.D. Cal. 2008). Direct review in Petitioner's case proceeded only before the
9 California Court of Appeal, which affirmed his conviction on January 28, 1997.
10 Petitioner did not file a petition for review in the California Supreme Court.
11 Accordingly, his conviction became final on March 9, 1997, forty days after the court
12 of appeal affirmed his conviction. *See* Cal. R. Ct. 8.264(b)(1), 8.500(e)(1); *see also*
13 *Smith v. Duncan*, 297 F.3d 809, 812-13 (9th Cir. 2002).

14 Pursuant to Rule 6(a) of the Federal Rules of Civil Procedure, day one of the
15 one-year statute of limitations began on the next day (March 10, 1997), and day 365
16 ended at the end of the day on March 10, 1998. *See* 28 U.S.C. § 2244(d)(1)(A); *see*
17 *also Patterson v. Stewart*, 251 F.3d 1243, 1246 (9th Cir. 2001). Petitioner, however,
18 constructively filed the instant Petition on April 6, 2016, over eighteen years later.
19 Consequently, the present action is untimely, unless statutory or equitable tolling of
20 the limitations period is warranted.
21

22 **3. Statutory Tolling**

23 Title 28 U.S.C. § 2244(d)(2) provides that "[t]he time during which a properly
24 filed application for state post-conviction or other collateral review with respect to the
25 pertinent judgment or claim is pending shall not be counted toward any period of
26 limitation under this subsection."

27 The statute of limitations is not tolled between the date on which a judgment
28 becomes final and the date on which the petitioner files his first state collateral

1 challenge because there is no case “pending.” *Nino v. Galaza*, 183 F.3d 1003, 1006
2 (9th Cir. 1999). Once an application for post-conviction review commences, it is
3 “pending” until a petitioner “complete[s] a full round of [state] collateral review.”
4 *Delhomme v. Ramirez*, 340 F.3d 817, 819 (9th Cir. 2003) (citing *Biggs v. Duncan*, 339
5 F.3d 1045, 1048 (9th Cir. 2003)). “One full round” generally means that the statute of
6 limitations is tolled while a petitioner is properly pursuing post-conviction relief, from
7 when the petitioner files his first state habeas petition until the California Supreme
8 Court rejects his final collateral challenge. *Carey v. Saffold*, 536 U.S. 214, 219-20,
9 122 S. Ct. 2134, 153 L. Ed. 2d 260 (2002); *see also Nino*, 183 F.3d at 1006;
10 *Delhomme*, 340 F.3d at 819. The period tolled includes the time between a lower
11 court decision and the filing of a new petition in a higher court, as long as the interval
12 between the filing of those petitions is “reasonable.” *Delhomme*, 340 F.3d at 819
13 (citing *Biggs*, 339 F.3d at 1048 n.1).

14 Here, statutory tolling does not render the instant Petition timely. Petitioner did
15 not file his first state habeas petition until March 10, 1998 -- that is, on the last day of
16 his one-year statute of limitations. To be sure, the limitations period was tolled from
17 March 10, 1998 until April 23, 1998, when the last of his first round of state court
18 collateral attacks was denied. The limitations period, however, was not tolled during
19 the more than fifteen-year period between April 23, 1998, and August 15, 2013, when
20 he initiated his second round of state collateral attacks. Thus, absent equitable tolling,
21 the Petition is untimely.

22 23 4. Equitable Tolling

24 AEDPA’s limitations period may be subject to equitable tolling if the petitioner
25 shows that extraordinary circumstances prevented him from filing a timely federal
26 habeas petition and that he acted diligently in pursuing his rights. *Holland v. Florida*,
27 560 U.S. 631, 130 S. Ct. 2549, 2562, 177 L. Ed. 2d 130 (2010); *Miranda v. Castro*,

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1 292 F.3d 1063, 1066 (9th Cir. 2002). The petitioner bears the burden of showing that
2 equitable tolling is appropriate. *Miranda*, 292 F.3d at 1065.

3 Here, Petitioner asserts that he is entitled to equitable tolling for two reasons.
4 First, he maintains that he has a relatively low level of education and has no training
5 in the law. Second, he attributes his failure to raise his claims to the incompetence of
6 his trial counsel and appellate counsel. In particular, he contends that he urged both
7 trial counsel and appellate counsel to challenge his sentence, but both refused to do so.

8 Neither of Petitioner's allegations warrants equitable tolling of the statute of
9 limitations. First, the law is well established that neither limited educational skills nor
10 ignorance of the law constitutes an "extraordinary circumstance" entitling a habeas
11 petitioner to any equitable tolling of the limitation period. *See, e.g., Raspberry v.*
12 *Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006) (holding that "a pro se petitioner's lack
13 of legal sophistication is not, by itself, an extraordinary circumstance warranting
14 equitable tolling" of the AEDPA limitations period); *Baker v. Cal. Dep't of Corr.*, 484
15 F. App'x. 130, 131 (9th Cir. 2012) ("Low literacy levels, lack of legal knowledge, and
16 need for some assistance . . . are not extraordinary circumstances to warrant equitable
17 tolling") (citation omitted).

18 Second, there is no evidence that counsels' performance in any way prevented
19 Petitioner from filing a timely federal habeas petition. In general, routine instances of
20 attorney negligence or misconduct are insufficient to justify equitable tolling of the
21 AEDPA's one-year statute of limitations. *See Holland*, 130 S. Ct. at 2564 (stating that
22 "garden variety claim of excusable neglect," such as miscalculating and missing
23 deadline, does not warrant equitable tolling); *Randle v. Crawford*, 604 F.3d 1047,
24 1058 (9th Cir. 2009) (equitable tolling unwarranted where appellate counsel failed to
25 perfect a timely appeal, failed to advise petitioner correctly concerning the time within
26 which to file a state habeas case, and failed to provide petitioner with case files in
27 order to file state petition). By contrast, where an attorney's misconduct is sufficiently
28 egregious, it may constitute an "extraordinary circumstance" warranting equitable

1 tolling of the AEDPA's statute of limitations. *See Holland*, 130 S.Ct. at 2564-65
2 (observing that failing to timely file federal habeas petition might warrant equitable
3 tolling because attorney failed to research proper filing date, petitioner repeatedly
4 alerted attorney to importance of timely filing petition, and attorney failed to
5 communicate with client for period of years despite petitioner's pleas for information).

6 Here, the alleged negligence of Petitioner's appellate and trial counsel, even if
7 true, does not constitute the type of egregious error required to equitably toll the
8 statute of limitations. At most, appellate and trial counsel opted not to challenge
9 Petitioner's sentence as Petitioner had instructed them to do so. However, neither trial
10 counsel's nor appellate counsel's failure to follow Petitioner's instruction prevented
11 Petitioner, himself, from filing a timely federal petition challenging his sentence.
12 Moreover, any purported error on counsels' part necessarily occurred nearly two
13 decades before Petitioner filed his federal habeas petition. Thus, Petitioner can show
14 no causal relationship between counsels' purported errors and the untimeliness of his
15 current Petition.

16 In short, Petitioner has not established that he was unable to timely file a federal
17 petition as a result of extraordinary circumstances beyond his control. Thus, there is
18 no basis to equitably toll the AEDPA limitations period so as to render the current
19 Petition timely.

20 21 **5. Factual Predicate of Petitioner's Challenge to His Sentence**

22 Presumably relying on 28 U.S.C. § 2244(d)(1)(D), Petitioner contends that his
23 Petition is timely because he did not discover the factual predicate of the claims
24 asserted therein until only a few months before he filed the instant Petition.
25 Specifically, Petitioner maintains that he could not prove that his current sentence was
26 unconstitutional until he first obtained records from his 1984 conviction showing that
27 he had only one prior strike, not two as the trial court found. According to Petitioner,
28 he obtained the records from his 1984 conviction on June 14, 2016. Based on those

1 records, Petitioner maintains that he was “was induced to plead guilty in the (1984)
2 conviction based entirely on a promises [sic] that the ‘plea’ would result in only one
3 ‘strike,’ and the court (now) must enforce that promise.” (Opp. at 5.)

4 This argument is meritless. Regardless of whether he was able to obtain the
5 records supporting his claims, Petitioner was demonstrably aware of the facts
6 necessary to challenge his current sentence based on attack to the validity of his 1984
7 conviction. *See Hasan v. Galaza*, 254 F.3d 1150, 1154 n.3 (9th Cir. 2001) (stating the
8 statute of limitations begins to run when prisoner “knows” important facts, not when
9 prisoner recognizes their legal significance). Indeed, Petitioner states that, in fact, he
10 urged his trial counsel and his appellate counsel to assert the challenges to his
11 sentence that he now seeks to assert in this Petition. (See Opp. at 2 (stating that
12 he “repeatedly [sic] filed with counsel to strike a strike -- and motion to modify
13 sentence”); *id.* at 3 (stating that counsel did not follow up on Petitioner claim that he
14 had only one prior, even though Petitioner “repeatedly” [sic] told counsel at trial that
15 Petitioner had only one prior). Accordingly, he is not entitled to a later start date for
16 the statute of limitations under § 2244(d)(1)(D).

17 Regardless, even if Petitioner’s challenges to his sentence were not time-barred,
18 they would fail. At bottom, Petitioner seeks to challenge his current sentence based
19 on a challenge to the validity of his 1984 conviction. Specifically, he claims that his
20 1984 conviction for two strikes is invalid either because he believed that he was
21 pleading guilty to only one strike or because the two crimes of which he was
22 convicted in 1984 were part of one continuous act. (Opp. at 3. Pet., Attach at 3.)
23 Petitioner is precluded from maintaining this claim because a state prisoner who has
24 failed to pursue available remedies to challenge a prior conviction (or has done so
25 unsuccessfully) may not collaterally attack that conviction later through a petition
26 under 28 U.S.C. § 2254 directed at the enhanced state sentence. *See Lackawanna*
27 *County Dist. Att’y v. Coss*, 532 U.S. 394, 403-04, 121 S. Ct. 1567, 149 L. Ed. 2d 608
28 (2001). In *Lackawanna*, the Supreme Court concluded that once a state conviction is

1 no longer open to direct or collateral attack, the conviction may be regarded as
2 conclusively valid. *Id.* at 403. If a sentencing court later uses that conviction to
3 enhance a criminal sentence, the defendant cannot challenge the enhanced sentence
4 through a federal habeas corpus petition. *Id.* at 404. The Supreme Court recognizes
5 only one exception to this rule: where petitioner raises a claim of the denial of
6 assistance of counsel as set forth in *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792
7 9 L. Ed. 2d 799 (1963)). *Lackawanna*, 532 U.S. at 404.

8 This precedent forecloses any claim based on the validity of Petitioner's 1984
9 conviction. Indeed, by arguing either that his 1984 guilty plea was not knowingly and
10 voluntary or that the two crimes of which he was convicted were part of one
11 continuous act, Petitioner is attempting to do precisely what *Lackawanna* prohibits --
12 namely, attack his current sentence based on a challenge to the validity of a prior
13 conviction. *See Lackawanna*, 532 U.S. 403-04 (*see supra*). Because Petitioner was
14 not denied counsel in connection with his 1984 conviction, *Lackawanna* forecloses
15 any challenge to the constitutionality of that conviction.

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17 * * *

18 Petitioner failed to file his federal habeas petition within one year of the date on
19 which the AEDPA's one-year limitations period began to run. Neither statutory nor
20 equitable tolling brings the Petition within the limitations period. Accordingly, the
21 Petition is time-barred.

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V. RECOMMENDATION

The Magistrate Judge therefore recommends that the Court issue an order: (1) granting Respondent's motion to dismiss; (2) approving and adopting this Report and Recommendation and (3) directing that judgment be entered denying the Petition with prejudice as time-barred.

DATED: December 15, 2016

/ s / FREDERICK F. MUMM
FREDERICK F. MUMM
United States Magistrate Judge

NOTICE

1
2 Reports and Recommendations are not appealable to the Court of Appeals, but
3 are subject to the right of any party to timely file Objections as provided in the Local
4 Rules Governing the Duties of the Magistrate Judges, and review by the District Judge
5 whose initials appear in the docket number. No Notice of Appeal pursuant to the
6 Federal Rules of Appellate Procedure should be filed until entry of the Judgment of
7 the District Court.
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

HENRY C. BARNETT,

Petitioner,

v.

K. HOLLAND (Warden, CCI-Tehachapi),

Respondent.

Case No. LA CV 16-02465-VBF-FFM

ORDER

Overruling Petitioner Barnett's Objections;
Adopting the Report & Recommendation;

Granting Respondent's Motion to Dismiss;
Dismissing Habeas Petition as Untimely;
Dismissing the Action With Prejudice;

Directing Issuance of Separate COA Ruling;
Directing Entry of Separate Final Judgment;
Terminating and Closing the Action (JS-6)

Pursuant to 28 U.S.C. § 636(b)(1), the Court has reviewed the Petition for Writ of Habeas Corpus by a Person in State Custody Pursuant to 28 U.S.C. section 2254 ("petition") (CM/ECF Document ("Doc") 1) as amended by the Magistrate Judge's Order granting leave to amend (Docs 10-11), the respondent warden's motion to dismiss and accompanying memorandum (Doc 17), the relevant decision(s) of the California state courts, the "lodged documents" submitted by the respondent in paper form (Docs 18-1 through 18-9, listed in the Notice of Lodging), petitioner's brief opposing the motion to dismiss (Doc 20), the Report and Recommendation ("R&R") issued by the United States Magistrate Judge pursuant to Fed. R. Civ. P. 72(b)(1) and 28 U.S.C. § 636(b)(1)(B)

1 on December 16, 2016 (Doc 25), petitioner's timely objections filed January 3, 2017 (Doc 26), and
2 the applicable law.

3 "Federal Rule of Civil Procedure 72(b)(2) gave respondent a right to respond to the
4 objections, but the time to do so has elapsed and respondent has filed neither a response nor a request
5 for an extension of time. Accordingly, the Court proceeds to the merits without waiting further."
6 *Ruelas v. Muniz*, No. SA CV 14-01761-VBF, 2016 WL 540769, *1 (C.D. Cal. Feb. 9, 2016).

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8 "As required by Fed. R. Civ. P. 72(b)(3), the Court has engaged in de novo review of
9 the portions of the R&R to which petitioner has specifically objected and finds no defect of
10 law, fact, or logic in the . . . R&R." *Rael v. Foulk*, No. LA CV 14-02987 Doc. 47, 2015 WL
11 4111295, *1 (C.D. Cal. July 7, 2015), *COA denied*, No. 15-56205 (9th Cir. Feb. 18, 2016).

12 "The Court finds discussion of [the] objections to be unnecessary on this record. The
13 Magistrates Act 'merely requires the district judge to make a de novo determination of those portions
14 of the report or specified proposed findings or recommendation to which objection is made.'" It
15 does not require the district judge to provide a written explanation of the reasons for rejecting
16 objections. See *MacKenzie v. California AG*, SA CV 12-00432, 2016 WL 5339566, *1 (C.D. Cal.
17 Sept. 21, 2016) (Fairbank, J.) (quoting *United States ex rel. Walterspiel v. Bayer AG*, 639 F. App'x
18 164, 168-69 (4th Cir.) (per curiam) ("The district court complied with this requirement. Accordingly,
19 we find no procedural error in the district court's decision not to address specifically Walterspiel's
20 objections."), *cert. denied*, – U.S. –, 137 S. Ct. 162 (2016)) (brackets & internal quote marks
21 omitted). "This is particularly true where, as here, the objections are plainly unavailing." *Smith v.*
22 *California Judicial Council*, No. ED CV 14-01413-VBF Doc. 93, 2016 WL 6069179, *2 (C.D. Cal.
23 Oct. 17, 2016).

24 Accordingly, the Court will accept the Magistrate Judge's factual findings and legal
25 conclusions and implement his recommendations.

26
27 ORDER

28 Petitioner's objection [Doc #26] is **OVERRULED**.

1 Magistrate Judge Mumm's well-reasoned Report and Recommendation [Doc #25] is
2 **ADOPTED.**

3 The respondent's motion to dismiss [Doc #17] is **GRANTED.**

4 The 28 U.S.C. § 2254 habeas corpus petition s **DISMISSED with prejudice as untimely.**

5
6 The Court will rule on a certificate of appealability by separate order.

7
8 Final judgment will be entered in favor of respondent consistent with this order.

9 "As required by Fed. R. Civ. P. 58(a), the Court will enter judgment by separate document."
10 *Toy v. Soto*, 2015 WL 2168744, *1 (C.D. Cal. May 5, 2015) (citing *Jayne v. Sherman*, 706 F.3d 994,
11 1009 (9th Cir. 2013)) (footnote 1 omitted), *appeal filed*, No. 15-55866 (9th Cir. June 5, 2015).

12
13 This action is **DISMISSED** with prejudice.

14 **The case SHALL BE TERMINATED and closed (JS-6).**

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17 Dated: Wednesday, February 22, 2017



18 Valerie Baker Fairbank

19 Senior United States District Judge
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JUL 21 2017

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

HENRY C. BARNETT,

Petitioner-Appellant,

v.

KIM HOLLAND, Warden,

Respondent-Appellee.

No. 17-56030

D.C. No.

2:16-cv-02465-VBF-FFM

Central District of California,
Los Angeles

ORDER

A review of the record suggests that this court may lack jurisdiction over the request for certificate of appealability because the notice of appeal was not filed or deposited for mailing in the prison's internal mail system within 30 days from entry of the district court's final order on May 25, 2017. *See* 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A), (c).

Within 21 days after the filing date of this order, appellant shall move for voluntary dismissal of the request for certificate of appealability or show cause why it should not be dismissed for lack of jurisdiction. If appellant elects to show cause, a response may be filed within 10 days after service of appellant's memorandum.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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APPENDIX-D
FILED

OCT 3 2017

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

HENRY C. BARNETT,

Petitioner-Appellant,

v.

KIM HOLLAND, Warden,

Respondent-Appellee.

No. 17-56030

D.C. No.

2:16-cv-02465-VBF-FFM

Central District of California,
Los Angeles

ORDER

Before: O'SCANNLAIN and GOULD, Circuit Judges.

We have received and reviewed appellant's response to this court's July 21, 2017, order to show cause.

The request for a certificate of appealability is denied because the notice of appeal was not timely filed and appellant did not file a motion to extend time for appeal in the district court within the jurisdictional time limit. *See* 28 U.S.C.

§§ 2107, 2253(c)(2); Fed. R. App. P. 4(a)(5)(A).

Any pending motions are denied as moot.

DENIED.

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APPENDIX-F
FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NOV 28 2017

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

HENRY C. BARNETT,

Petitioner-Appellant,

v.

KIM HOLLAND, Warden,

Respondent-Appellee.

No. 17-56030

D.C. No.

2:16-cv-02465-VBF-FFM

Central District of California,
Los Angeles

ORDER

Before: LEAVY and TALLMAN, Circuit Judges.

The motion for reconsideration (Docket Entry No. 5) is denied. *See* 9th Cir.

R. 27-10.

No further filings will be entertained in this closed case.

**Additional material
from this filing is
available in the
Clerk's Office.**