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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

NICHOLAS E. FANADY,

1:08-cv-00963-OWW-DLB (HC)

Petitioner,

FINDINGS AND RECOMMENDATION
REGARDING PETITION FOR WRIT OF
HABEAS CORPUS

v.

[Doc. 1]

MICHAEL S. EVANS, Warden

Respondent.

Petitioner is a state prisoner proceeding with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner is represented by Philip M. Brooks, Esq.

BACKGROUND

Following a jury trial in the California Superior Court for the County of Fresno, Petitioner was convicted of nine counts of committing a lewd act on a child (Cal. Pen. Code¹ §288(a)), two counts of oral copulation (§ 288a(c)(1)), one count of attempted sexual penetration (§§ 289(j), 664), and one count of an attempted lewd act on a child (§§ 288(a), 664). Petitioner was sentenced to an indeterminate term of seventy-five years to life. (3 CT at 636-640.)

The judgment was affirmed by the California Court of Appeal, Fifth Appellate District.) The California Supreme Court summarily denied review on April 11, 2007.

Petitioner filed the instant federal petition for writ of habeas corpus on July 9, 2008. (Court Doc. 1.) Respondent filed an answer to the petition on September 19, 2008, and Petitioner filed a

¹ All further references are to the California Penal Code unless otherwise indicated.

1 traverse on October 15, 2008. (Court Docs. 16, 19.)

2 STATEMENT OF FACTS²

3 In 1995, W.V. encountered defendant when he was nine or ten years old. W.V. was at
 4 Woodward Park with family and friends. The first time he saw defendant, defendant exposed himself.
 5 Later that day, W. V. wandered off by himself and defendant followed him. Defendant talked to him
 6 and led him into the restroom. Defendant pulled down his shorts and asked W.V. if he wanted to touch
 7 defendant's penis. Defendant grabbed W. V.'s hand and put it on defendant's penis and moved W. V.'s
 8 hand back and forth. While doing this, defendant's other hand was on W. V.'s testicles. Defendant took
 9 off W. V.'s pants and touched W. V.'s penis. Defendant put his mouth on W. V.'s penis. Defendant
 10 stopped when someone entered the restroom. Defendant pulled up W. V.'s pants and his own pants
 11 and walked out. (Count 1-lewd and lascivious act of placing victim's hand on defendant's penis; count
 12 2-lewd and lascivious act of rubbing victim's testicles; count 3-lewd and lascivious act of putting victim's
 13 penis in his mouth; count 4-oral copulation, an alternative count to count 3; these counts were charged
 14 under Pen.Code [footnote] § 288, subd. (a), except count 4, which comes under § 288a, subd. (c)(1).)

15 W. V.'s second encounter with defendant was in the summer of 1995. W.V. saw defendant
 16 walking and W.V. tried to hide. W.V. stayed with his parents for awhile and then went to play with his
 17 brother. Defendant found W.V. W. V.'s brother left. Defendant led W.V. into a hollowed-out place
 18 between some branches. Defendant massaged W. V.'s penis and testicles. He pulled down W. V.'s
 19 pants and felt his penis and testicles. Defendant put his mouth on W. V.'s penis. (Count 5-lewd and
 20 lascivious act of placing victim's penis in his mouth; count 6-oral copulation, an alternative count to
 21 count 5; count 7-rubbing victim's testicles; these charges were under § 288, subd. (a), except count 6,
 22 which comes under § 288a, subd. (c)(1).)

23 W.V. saw defendant at the park by the amphitheater in 1996. Defendant pulled down W. V.'s
 24 pants. Defendant felt W. V.'s testicles and then orally copulated him. Defendant masturbated until he
 25 ejaculated. He asked W.V. if he wanted a birthday gift. (Count 8-lewd and lascivious act under § 288,
 26 subd. (a).)

27 The last encounter W.V. had with defendant was in 1997. W.V. was at the park. Defendant
 28 walked W.V. to the restroom, expressing his feelings for him. In the restroom, defendant touched W.
 V.'s private parts over his clothes. The clothes came off and defendant kissed W.V. all over. Defendant
 pulled W.V. close and touched their penises together. He then orally copulated W.V. Defendant also
 attempted to put his finger in W. V.'s anus, but W.V. prevented him from doing this. (Count 9-lewd and
 lascivious act of pressing their exposed penises together; count 11-lewd and lascivious act of orally
 copulating victim; count 12-attempted sexual penetration when defendant attempted to put his finger in
 the victim's anus; these charges were under § 288, subd. (a), except count 12, which comes under §§
 264/289, subd. (j).)³

W.V. did not have the courage to tell anyone what happened until he learned of defendant's
 arrest in 2004 for incidents occurring in 2000 and 2004.

In 2000, D.P. was 11 years old and living with his mother in Fresno. Defendant was a local
 television broadcaster. D.P. saw defendant on television. On a televised newscast, defendant remarked
 he had not seen one of the new golden dollar coins that were in circulation. D.P. wanted to bring a coin
 to the station to give to defendant. D.P. and his mother drove to the television station to give the coin to

² The Court finds the Court of Appeal correctly summarized the facts in its January 23, 2007, opinion. See
 Unpublished Opinion, 2007 WL 155179. Thus, the Court adopts the factual recitations set forth by the California
 Court of Appeal, Fifth Appellate District.

³ Count 10 was dismissed.

1 defendant. Defendant came out to the reception area and D.P. gave him the coin. Defendant then took
2 D.P. and his mother on a short tour of the station. Defendant gave D.P. some items from the station to
take home with him. He invited D.P. to come back to the station and have lunch with him.

3 D. P.'s mother made an appointment for D.P. to return to the station. She dropped D.P. off at
4 the station. Defendant took D.P. out to lunch and brought him back to the station for a broadcast.
When they were finished, defendant drove D.P. home.

5 Defendant telephoned D. P., e-mailed him, and mailed him letters. He invited D.P. on a fishing
6 trip at a location near his house. D. P.'s mother agreed to the fishing trip and on May 20, 2000,
defendant arrived at D.P.'s home to take him fishing.

7 D.P. and defendant fished. Defendant then asked D.P. if he had ever gone skinny-dipping. D.P.
8 did not know what skinny-dipping was. Defendant described it to him. Defendant said to D. P., "let's
try it." D.P. agreed. D.P. and defendant took off their clothes and got into the water. Defendant put his
9 arm around D.P. and glided D.P. through the water. D.P. felt defendant's chest touch his back. D.P.
10 also felt defendant's penis touch his lower back, "just above his crack." D.P. did not know if
defendant's penis touched him intentionally or accidentally. D.P. got out of the water and said he was
11 not comfortable. When D.P. got out of the water, D.P. had an erection. Defendant noticed the erection
and said to D.P. that he had a "stiffy." D.P. was embarrassed. Defendant also told D.P. that he had a
12 nice body. (Count 13, lewd and lascivious act, § 288, subd. (a).) D.P. and defendant got dressed and
went farther down the river to a tree house defendant said he built with a boy named Jimmy (James C
13). Defendant told D.P. it was a tradition to "pee" off the side of the tree house, so D.P. and defendant
urinated off the side of the tree house. Defendant also encouraged D.P. to call his mother and tell her he
was okay. D.P. called his mother.

14 D.P. and defendant then went to defendant's house. D.P. sat on the couch. Defendant went to
15 his bathroom and took a shower because he had to get ready for an event. Defendant invited D.P. into
his bedroom. Defendant stood naked in the bathroom and D.P. could see him. Defendant came out and
16 asked D.P. if he wanted to pick out a tie for him. D.P. picked out the tie. Defendant got dressed and
took D.P. home.
17 D.P. told his mother what happened approximately three or four weeks afterwards. His mother
reported the incident to the police.

18 On May 16, 2004, 10-year-old Jay G. was at Woodward Park with his friend Stephen and his
19 cousin Daniel. The boys were looking for crawdads and had separated themselves from the adults they
came to the park with. Defendant approached the boys and asked Stephen how old he was. Defendant
20 had a dog and asked the boys if they wanted to pet his dog. Daniel and Stephen petted the dog and
defendant took pictures of them. Defendant then showed them their pictures as well as some "nasty"
21 pictures. Defendant put his hand on the back of Jay's neck and started to lead him away. Daniel told
Jay to come with them. The boys left because they thought defendant was weird. Defendant ran off.
22 (Concerning Jay G.: count 14-attempted lewd act under §§ 664/288, subd, (a); count 15-misdemeanor
annoying or molesting a minor under § 647.6.⁴

23 The boys told the adults in their group what had happened. Fred Venglarcik was one of the
24 adults. He and another individual went to look for defendant. Venglarcik saw defendant and followed
him. Venglarcik asked to see defendant's cell phone. Defendant said he did not have a cell phone and
25 accused Venglarcik of harassing him. Defendant said he was going to call the police. One of the women
told defendant to stay there because the police were on the way. Defendant walked away. Venglarcik
26 followed him and could see defendant making movements with his hands. Defendant went into the

27 ⁴ Prior to trial, defendant pleaded guilty to two counts of annoying or molesting a minor regarding Daniel
28 and Stephen.

1 bathroom. Venglarcik heard the toilet flushing in the bathroom.

2 Police officers arrived. Defendant was in possession of a camera and had his dog with him.
3 Defendant said he had not done anything wrong and was not taking pictures. Police officer Kenneth
4 Gong worked in the computer crime area. He analyzed the camera seized from defendant. At first, it
5 appeared the camera was blank. After utilizing other computer software, Gong was able to retrieve
6 digital images from the camera. In addition, Gong retrieved pictures of children at the park and “kiddie
7 porn” from defendant's laptop computer that was seized from his residence.

8 Clinical psychologist Randall Robinson testified regarding child sexual abuse accommodation
9 syndrome. He said that oftentimes children do not report child sexual abuse, and it is quite unusual for
10 boys to disclose abuse.

11 Other Incidents

12 In addition to the evidence regarding the counts before the jury, the court allowed numerous
13 witnesses to testify to prior incidents involving defendant. One boy reported that in December of 2003
14 he was walking to the park with a friend. Defendant asked them if they needed to go to the bathroom.
15 Defendant said to them that when he woke up that morning his penis was sticking straight out. On
16 another occasion, in March of 2004, defendant started playing with his penis in front of three young
17 boys in the bathroom at Woodward Park.⁵

18 Two boys testified that they were at Woodward Park when defendant approached them and
19 that he dropped pornographic pictures in front of them for them to see. They left because they were
20 scared; defendant followed.

21 James C. lived down the street from defendant. James testified to numerous instances when
22 defendant would touch him and orally copulate him. They also engaged in acts of masturbation and
23 watched pornography together. Defendant bought James toys.

24 Two boys testified that they saw defendant at Woodward Park. Defendant was riding his bike
25 and was exposing his penis to the boys.

26 Defense

27 Defendant testified on his own behalf. He admitted that he has an unnatural interest in boys. He
28 agreed with many of the accusations against him. He said that all of the accusations by James were
false. He testified that he only engaged in oral copulation with W.V. on three occasions, not four. He
said that most of what D.P. testified to was true except his penis did not touch D. P.'s back and he did
not walk around naked in front of D.P. He had no sexual intent or interest in D.P. He also denied
masturbating in front of the three boys in the restroom at Woodward Park; he was in fact shaking or
wiggling his penis to get their attention. He said that he touched Jay while trying to lead him away from
the water, but there was nothing sexual in the touching.

(Lodged Doc. No. 3, Unpublished Opinion, 2007 WL 155179, at *1-*4.)

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⁵ Prior to trial, defendant pleaded guilty to three additional counts of annoying or molesting a minor for these incidents.

1 DISCUSSION

2 A. Jurisdiction

3 Relief by way of a petition for writ of habeas corpus extends to a person in custody pursuant to
4 the judgment of a state court if the custody is in violation of the Constitution or laws or treaties of the
5 United States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); Williams v. Taylor, 529 U.S. 362, 375,
6 120 S.Ct. 1495, 1504, n.7 (2000). Petitioner asserts that he suffered violations of his rights as
7 guaranteed by the U.S. Constitution. The challenged conviction arises out of the Fresno County
8 Superior Court, which is located within the jurisdiction of this Court. 28 U.S.C. § 2254(a); 2241(d).

9 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of
10 1996 (“AEDPA”), which applies to all petitions for writ of habeas corpus filed after its enactment.
11 Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997); Jeffries v. Wood, 114 F.3d 1484,
12 1499 (9th Cir. 1997), *cert. denied*, 522 U.S. 1008, 118 S.Ct. 586 (1997) (quoting Drinkard v.
13 Johnson, 97 F.3d 751, 769 (5th Cir.1996), *cert. denied*, 520 U.S. 1107, 117 S.Ct. 1114 (1997),
14 *overruled on other grounds by Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059 (1997) (holding
15 AEDPA only applicable to cases filed after statute's enactment). The instant petition was filed after the
16 enactment of the AEDPA and is therefore governed by its provisions.

17 B. Standard of Review

18 This Court may entertain a petition for writ of habeas corpus “in behalf of a person in custody
19 pursuant to the judgment of a State court only on the ground that he is in custody in violation of the
20 Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a).

21 The AEDPA altered the standard of review that a federal habeas court must apply with respect
22 to a state prisoner's claim that was adjudicated on the merits in state court. Williams v. Taylor, 120
23 S.Ct. 1495, 1518-23 (2000). Under the AEDPA, an application for habeas corpus will not be granted
24 unless the adjudication of the claim “resulted in a decision that was contrary to, or involved an
25 unreasonable application of, clearly established Federal law, as determined by the Supreme Court of
26 the United States;” or “resulted in a decision that was based on an unreasonable determination of the
27 facts in light of the evidence presented in the State Court proceeding.” 28 U.S.C. § 2254(d); Lockyer
28 v. Andrade, 123 S.Ct. 1166 (2003) (disapproving of the Ninth Circuit’s approach in Van Tran v.

1 Lindsey, 212 F.3d 1143 (9th Cir. 2000)); Williams v. Taylor, 120 S.Ct. 1495, 1523 (2000). “A
2 federal habeas court may not issue the writ simply because that court concludes in its independent
3 judgment that the relevant state-court decision applied clearly established federal law erroneously or
4 incorrectly.” Lockyer, at 1175 (citations omitted). “Rather, that application must be objectively
5 unreasonable.” Id. (citations omitted).

6 While habeas corpus relief is an important instrument to assure that individuals are
7 constitutionally protected, Barefoot v. Estelle, 463 U.S. 880, 887, 103 S.Ct. 3383, 3391-3392
8 (1983); Harris v. Nelson, 394 U.S. 286, 290, 89 S.Ct. 1082, 1086 (1969), direct review of a criminal
9 conviction is the primary method for a petitioner to challenge that conviction. Brecht v. Abrahamson,
10 507 U.S. 619, 633, 113 S.Ct. 1710, 1719 (1993). In addition, the state court’s factual determinations
11 must be presumed correct, and the federal court must accept all factual findings made by the state court
12 unless the petitioner can rebut “the presumption of correctness by clear and convincing evidence.” 28
13 U.S.C. § 2254(e)(1); Purkett v. Elem, 514 U.S. 765, 115 S.Ct. 1769 (1995); Thompson v. Keohane,
14 516 U.S. 99, 116 S.Ct. 457 (1995); Langford v. Day, 110 F.3d 1380, 1388 (9th Cir. 1997).

15 C. Instructional Error

16 Petitioner contends that his due process rights were violated when the trial court instructed the
17 jury with CALJIC Nos. 2.03 [a false or misleading statement made by the defendant prior to trial may
18 be viewed as showing consciousness of guilt], 2.06 [consciousness of guilt could be inferred by
19 concealing evidence], and 2.52 [defendant’s flight could show consciousness of guilt], because such
20 instructions “violated the mandate of the United States Supreme Court that there be absolute
21 impartiality as between defense and prosecution with regard to jury instructions.”

22 The Court of Appeal rejected Petitioner’s claim citing to the California Supreme Court’s
23 decision in People v. Boyette, 29 Cal.4th 381, 438-439 (2002), which upheld the very same
24 instructions challenged in the instant petition. The cited portion of the Boyette decision states:

25 “[E]ach of [these] instructions made clear to the jury that certain types of
26 deceptive or evasive behavior on a defendant’s part could indicate consciousness of
27 guilt, while also clarifying that such activity was not of itself sufficient to prove a
28 defendant’s guilt, and allowing the jury to determine the weight and significance
assigned to such behavior. The cautionary nature of the instructions benefits the
defense, admonishing the jury to circumspection regarding evidence that might
otherwise be considered decisively inculpatory. [Citations.] We therefore conclude that

1 these consciousness-of-guilt instructions did not improperly endorse the prosecution's
2 theory or lessen its burden of proof" and thus were not improper pinpoint instructions.

3 Boyette, at 438-439 (quoting People v. Jackson, 13 Cal.4th 1164, 1224 (1996).)

4 The challenged instructions as given to the jury in the instant case stated the following:

5 CALJIC No. 2.03:

6 If you find that before this trial the defendant made a willfully false or
7 deliberately misleading statement concerning the crimes for which he is now being tried,
8 you may consider that statement as a circumstance tending to prove a consciousness of
9 guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and
10 significance, if any, are for you to decide.

11 (CT 516.)

12 CALJIC No. 2.06:

13 If you find that the defendant attempted to suppress evidence against himself in
14 any manner, such as by destroying evidence, this attempt may be considered by you as
15 a circumstance tending to show consciousness of guilt. However, this conduct is not
16 sufficient by itself to prove guilt, and its weight and significance, if any, are for you to
17 decide.

18 (CT 517.)

19 CALJIC No. 2.52:

20 The flight of a person immediately after the commission of a crime, or after he is
21 accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if
22 proved, may be considered by you in the light of all other proved facts in deciding
23 whether the defendant is guilty or not guilty. The weight to which this circumstance is
24 entitled is a matter for you to decide.

25 (CT 532.)

26 A challenge to a jury instruction solely as an error under state law does not state a claim
27 cognizable in a federal habeas corpus action. See Estelle v. McGuire, 502 U.S. 62, 71-72 (1991). To
28 obtain federal collateral relief for errors in the jury charge, a petitioner must show that the ailing
instruction by itself so infected the entire trial that the resulting conviction violates due process. See id.
at 72. Additionally, the instruction may not be judged in artificial isolation, but must be considered in
the context of the instructions as a whole and the trial record. Id. The court must evaluate jury
instructions in the context of the overall charge to the jury as a component of the entire trial process.
See United States v. Frady, 456 U.S. 152, 169 (1982) (*citing Henderson v. Kibbe*, 431 U.S. 145,
154 (1977)). Furthermore, even if it is determined that the instruction violated the petitioner's right to

1 due process, a petitioner can only obtain relief if the unconstitutional instruction had a substantial
2 influence on the conviction and thereby resulted in actual prejudice under Brecht v. Abrahamson, 507
3 U.S. 619, 637, 113 S.Ct. 1710 (1993) (whether the error had a substantial and injurious effect or
4 influence in determining the jury's verdict.). See Hanna v. Riveland, 87 F.3d 1034, 1039 (9th Cir.
5 1996). The burden of demonstrating that an erroneous instruction was so prejudicial that it will support
6 a collateral attack on the constitutional validity of a state court's judgment is even greater than the
7 showing required to establish plain error on direct appeal." Id. With this standard in mind, the court
8 will now examine the challenged instructions.

9 The challenged instructions given in this case were nothing more than the standard
10 consciousness-of-guilt instructions. All of the instructions were properly phrased in permissive, not
11 mandatory terms, as the jury was instructed jury that it may, but was not required to, infer
12 consciousness of guilt from false statements and/or suppressing evidence, or guilt by evidence of flight
13 by defendant. In addition, the jury was specifically instructed that consciousness-of-guilt or guilt
14 evidence was not sufficient in itself to support a finding of guilt, and any weight to give to such evidence
15 was the exclusive province of the jury. Moreover, the trial court did not single out any particular
16 testimony by defendant and the determination of whether the jury found such conscious-of-guilt
17 evidence was left open for the jury to determine. Further, the jury was instructed with CALJIC Nos.
18 2.20 ["[i]n determining the believability of a witness you may consider anything that has a tendency
19 reasonably to prove or disprove the truthfulness of the testimony of the witness . . ."], 2.21.2 ["[a]
20 witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others.
21 You may reject the whole testimony of a witness who willfully has testified falsely as to a material point .
22 . . ."], 2.24 ["[e]vidence of the character of a witness for honesty or truthfulness may be considered in
23 determining his believability."], and 2.90 ["a] defendant in a criminal action is presumed to be innocent
24 until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown,
25 he is entitled to a verdict of not guilty. This presumption upon the People the burden of proving him
26 guilty beyond a reasonable doubt."]. (CT 521, 524, 526, 538.) Also, "[i]t is clear that criminal
27 defendants are not entitled to a false aura of veracity when they take the stand," and "when accused
28 elects to become a witness and testify in his own behalf, 'his credibility may be impeached, his

1 testimony may be assailed, and is to be weighed as that of any other witness.” United States v. Portillo,
2 633 F.3d 1313, 1322 (9th Cir. 1980) (quoting Reagan v. United States, 157 U.S. 301, 305 (1895));
3 see also Turner v. Marshall, 63 F.3d 807, 819-820 (9th Cir. 1995) (upholding constitutionality of
4 CALJIC No. 2.03 stating “[s]o long as the instruction does not state that inconsistent statements
5 constitute evidence of guilt, but merely states that the jury may consider them as indicating a
6 consciousness of guilt, the instruction would not violate constitutional rights.), overruled on other
7 grounds in Tolbert v. Page, 182 F.3d 677 (9th Cir. 1999). In Reagan, the Supreme Court quoted with
8 approval instructions that specifically advised a jury to consider that defendant’s “demeanor and
9 conduct upon the witness stand and *during the trial*.” Id. at 308 (emphasis added). Viewed as a
10 whole, it cannot be said that the consciousness-of-guilt instructions violated Petitioner’s constitutional
11 right to impartiality, and the state courts’ determination of this issue was not contrary to, or an
12 unreasonable application of, clearly established Supreme Court precedent.

13 In any event, even if it was error for the trial court to give the consciousness-of-guilt
14 instructions, Petitioner has failed to establish that the challenged instructions had a “substantial and
15 injurious effect or influence in determining the jury’s verdict.” Brecht v. Abrahamson, 507 U.S. at 637.
16 As explained in the statement of facts above, the evidence against Petitioner was strong and generally
17 uncontroverted. Without the benefit of the consciousness-of-guilt instructions, it is very likely that the
18 jury would have applied its common sense to draw a negative inference against Petitioner based on the
19 facts that he fled, destroyed evidence, and made false statements. The challenged instructions arguably
20 benefitted Petitioner by instructing the jury that the consciousness of guilt evidence was not in itself
21 sufficient to warrant a finding of guilt. Further, given the fact that Petitioner himself admitted
22 wrongdoing during his testimony at trial (see RT 3036-3128), it is highly improbable the challenged
23 instructions had a “substantial and injurious effect on the jury’s verdict.”

24 RECOMMENDATION

25 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 26 1. The instant petition for writ of habeas corpus be DENIED; and
- 27 2. The Clerk of Court be directed to enter judgment in favor of Respondent.

28 This Findings and Recommendation is submitted to the assigned United States District Court

1 Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 72-304 of the Local
2 Rules of Practice for the United States District Court, Eastern District of California. Within thirty (30)
3 days after being served with a copy, any party may file written objections with the court and serve a
4 copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings
5 and Recommendation." Replies to the objections shall be served and filed within ten (10) court days
6 (plus three days if served by mail) after service of the objections. The Court will then review the
7 Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure
8 to file objections within the specified time may waive the right to appeal the District Court's order.
9 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

10
11 IT IS SO ORDERED.

12 **Dated: December 11, 2008**

/s/ Dennis L. Beck
13 UNITED STATES MAGISTRATE JUDGE
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