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7 **UNITED STATES DISTRICT COURT**
8 **EASTERN DISTRICT OF CALIFORNIA**
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10 PEDRO F. DURAN,

11 Petitioner,

12 v.

13 DAVEY,

14 Respondent.

Case No. 1:16-cv-00100-LJO-EPG-HC

FINDINGS AND RECOMMENDATION TO
GRANT RESPONDENT'S MOTION TO
DISMISS AND TO DISMISS PETITION
FOR WRIT OF HABEAS CORPUS

(ECF Nos. 1, 13)

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16 Petitioner is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus
17 pursuant to 28 U.S.C. § 2254. In his petition, Petitioner challenges the application of amended
18 California Penal Code section 2933.6 to him, arguing that it violates his plea agreement and the
19 *Ex Post Facto* Clause. The undersigned recommends granting Respondent's motion to dismiss
20 because the instant petition was filed outside the one-year limitation period and is unexhausted.

21 **I.**

22 **BACKGROUND**

23 Petitioner is currently in the custody of the California Department of Corrections and
24 Rehabilitation ("CDCR"). On January 4, 2010, Petitioner was convicted, pursuant to a plea, in
25 the Kings County Superior Court of assault with a deadly weapon and sentenced to an
26 imprisonment term of four years. (ECF No. 13-1 at 19).¹ At the time of Petitioner's offense and
27 conviction, California law permitted inmates housed in the security housing unit ("SHU") who

28 ¹ Page numbers refer to the ECF page numbers stamped at the top of the page.

1 were validated as prison gang associates to accrue good time credits. Cal. Penal Code §
2 2933.6(a) (2009). On January 25, 2010, the law was amended to deny credits to said inmates.
3 Nevarez v. Barnes, 749 F.3d 1124, 1126 (9th Cir. 2014) (per curiam).

4 On March 3, 2011, Petitioner was validated as an associate of the Northern Structure
5 prison gang. (ECF No. 13-1 at 29). On October 29, 2013, Petitioner appeared before the
6 Institutional Classification Committee (“ICC”) for a SHU 180 Day Review. The ICC elected to
7 continue Petitioner’s work group/privilege group at D-2/D, zero-credit-earning status, due to
8 Petitioner being an associate of the Northern Structure prison gang. (ECF No. 13-1 at 45).
9 Petitioner’s administrative appeal was denied at the first and second levels of review. (Id. at 41–
10 43). Finally, on July 28, 2014, Petitioner’s administrative appeal was canceled at the third level
11 of review based on untimeliness because Petitioner failed to submit his appeal within 30 days of
12 his initial placement in work group/privilege group D-2/D, which occurred on March 3, 2011.
13 (Id. at 40).

14 On August 22, 2014,² Petitioner filed a state petition for writ of habeas corpus in the
15 Kings County Superior Court, which denied the petition on November 26, 2014. (ECF No. 13-1
16 at 2, 55–57). Thereafter, Petitioner filed a state habeas petition in the California Court of Appeal,
17 Fifth Appellate District, which denied the petition on February 25, 2015. (Id. at 69). On August
18 11, 2015, Petitioner filed a state habeas petition in the California Supreme Court, which denied
19 the petition on November 10, 2015.³ (Id. at 60, 85).

20 On December 29, 2015, Petitioner filed the instant federal petition for writ of habeas
21 corpus, challenging the application of amended California Penal Code section 2933.6 to him as a
22 violation of his plea agreement and the *Ex Post Facto* Clause. (ECF No. 1). Petitioner requests

23 ² Pursuant to the prison mailbox rule, a *pro se* prisoner’s habeas petition is filed “at the time . . . [it is] delivered . . .
24 to the prison authorities for forwarding to the court clerk.” Hernandez v. Spearman, 764 F.3d 1071, 1074 (9th Cir.
25 2014) (alteration in original) (internal quotation marks omitted) (quoting Houston v. Lack, 487 U.S. 266, 276
(1988)). See also Rule 3(d), Rules Governing Section 2254 Cases. The Court notes that Respondent applied the
26 mailbox rule in the motion to dismiss. (ECF No. 13 at 2 n.2).

27 ³ The California Courts website shows that the California Supreme Court denied the petition on November 10, 2015,
28 with citation to People v. Duvall, 9 Cal. 4th 464, 474 (1995), and In re Miller, 17 Cal. 2d 734, 735 (1941). Appellate
Case Information, California Courts, http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=2118016&doc_no=S228674 (last updated Aug. 22, 2016). See Worthy v. Hartley, 2010 WL 1339215, *3 n.2 (E.D.
Cal. Apr. 2, 2010) (“[T]he internet website for the California Courts, containing the court system’s records for filings
in the Court of Appeal and the California Supreme Court are subject to judicial notice.”).

1 that he be released on the date he would have been released under the previous version of section
2 2933.6 that was in place prior to January 25, 2010. (Id. at 15). On March 30, 2016, Respondent
3 filed a motion to dismiss, arguing that the petition is untimely and not fully exhausted. (ECF No.
4 13).

5 **II.**

6 **DISCUSSION**

7 **A. Statute of Limitations**

8 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act
9 of 1996 (“AEDPA”). The AEDPA imposes various requirements on all petitions for writ of
10 habeas corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320 (1997);
11 Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc). The instant petition was filed
12 after the enactment of the AEDPA and is therefore governed by its provisions. The AEDPA
13 imposes a one-year period of limitation on petitioners seeking to file a federal petition for writ of
14 habeas corpus. 28 U.S.C. § 2244(d)(1). Section 2244(d) provides in pertinent part:

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

18 . . .

19 (D) the date on which the factual predicate of the claim or claims
20 presented could have been discovered through the exercise of due
diligence.

21 (2) The time during which a properly filed application for State
22 post-conviction or other collateral review with respect to the
pertinent judgment or claim is pending shall not be counted toward
any period of limitation under this subsection.

23 28 U.S.C. § 2244(d). The Ninth Circuit has held that when a habeas petitioner challenges an
24 administrative decision, § 2244(d)(1)(D) applies and the AEDPA’s one-year limitation period
25 runs from when the factual predicate of the habeas claim could have been discovered through the
26 exercise of due diligence. Mardesich v. Cate, 668 F.3d 1164, 1172 (9th Cir. 2012). The Ninth
27 Circuit further held that “[a]s a general rule, the state agency’s denial of an administrative appeal
28 is the ‘factual predicate’ for such habeas claims.” Id.

1 Respondent asserts that Petitioner was aware of the factual predicate of his claims on
2 March 3, 2011, when the CDCR validated Petitioner as an associate of a prison gang. (ECF No.
3 13 at 3). It was at this time that Petitioner stopped earning good time credits pursuant to
4 California Penal Code section 2933.6(a). Respondent argues that because Petitioner's
5 administrative appeal was canceled as untimely, there is no basis for deeming the CDCR's
6 decision at the third level of review as the factual predicate for Petitioner's claims. (Id.). The
7 Ninth Circuit has yet to address explicitly what constitutes the factual predicate of a habeas claim
8 when the petitioner did not timely request review of the administrative decision at issue. Some
9 district courts in this circuit have held that the limitation period begins to run from the date the
10 administrative decision was made rather than the date the untimely administrative appeal was
11 denied. See, e.g., Moreland v. Virga, No. 1:12-cv-0561 LKK KJN, 2012 WL 5838970, at *7
12 (E.D. Cal. Nov. 16, 2012); Wilson v. Gonzalez, No. CV 12-3836 DMG (FFM), 2012 U.S. Dist.
13 LEXIS 183772, at *8–9 (C.D. Cal. Oct. 3, 2012), report and recommendation adopted, 2012 U.S.
14 Dist. LEXIS 183743 (C.D. Cal. Dec. 28, 2012); Clark v. McEwen, No. 10cv02149 AJB(RBB),
15 2012 WL 1205509, at *7–8 (S.D. Cal. Feb. 28, 2012), report and recommendation adopted, 2012
16 WL 1205300 (S.D. Cal. Apr. 11, 2012).

17 The Court finds the above cases persuasive. Further, in light of Petitioner's challenge to
18 the application of amended California Penal Code section 2933.6 to him and his request to be
19 released on the date he would have been released under the previous version of section 2933.6
20 that was in place prior to January 25, 2010, the basis for Petitioner's claims is his initial gang
21 validation and resultant zero-credit-earning status rather than the ICC's subsequent decision to
22 continue Petitioner's zero-credit-earning status. Accordingly, the Court finds that the initial
23 administrative decision is the "factual predicate" of Petitioner's claims. Here, the initial
24 administrative decision was made on March 3, 2011, but Petitioner did not receive notice of the
25 decision until April 1, 2011. (ECF No. 13-1 at 29). Thus, the one-year limitation period began
26 running the next day on April 2, 2011, and absent tolling, was set to expire on April 2, 2012.⁴

27 _____
28 ⁴ April 1, 2012 fell on a Sunday. Accordingly, the limitation period continued to run until the next business day. See
Fed. R. Civ. P. 6(a)(1)(C).

1 See Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001) (citing Fed. R. Civ. P. 6(a)).

2 The “time during which a properly filed application for State post-conviction or other
3 collateral review with respect to the pertinent judgment or claim is pending shall not be counted
4 toward” the one-year limitation period. 28 U.S.C. § 2244(d)(2). However, § 2244(d) “does not
5 permit the reinitiation of the limitations period that has ended before the state petition was filed.”
6 Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003). Here, the limitation period expired on
7 April 2, 2012, and Petitioner’s first state habeas petition was filed on August 22, 2014.
8 Accordingly, Petitioner is not entitled to statutory tolling under § 2244(d)(2).

9 The limitation period also is subject to equitable tolling if the petitioner demonstrates
10 ““(1) that he has been pursuing his rights diligently, and (2) that some extraordinary
11 circumstance stood in his way’ and prevented timely filing.” Holland v. Florida, 560 U.S. 631,
12 649 (2010) (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)). Petitioner has failed to file
13 a response to the motion to dismiss and has not made any showing that he is entitled to equitable
14 tolling. Therefore, the instant petition was not timely filed, and dismissal is warranted on this
15 ground.

16 **B. Exhaustion**

17 A petitioner in state custody who is proceeding with a petition for writ of habeas corpus
18 must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The exhaustion doctrine is based
19 on comity to the state court and gives the state court the initial opportunity to correct the state’s
20 alleged constitutional deprivations. Coleman v. Thompson, 501 U.S. 722, 731 (1991); Rose v.
21 Lundy, 455 U.S. 509, 518 (1982). A petitioner can satisfy the exhaustion requirement by
22 providing the highest state court with a full and fair opportunity to consider each claim before
23 presenting it to the federal court. O’Sullivan v. Boerckel, 526 U.S. 838, 845 (1999); Duncan v.
24 Henry, 513 U.S. 364, 365 (1995); Picard v. Connor, 404 U.S. 270, 276 (1971). To provide the
25 highest state court the necessary opportunity, the petitioner must “fairly present” the claim with
26 “reference to a specific federal constitutional guarantee, as well as a statement of the facts that
27 entitle the petitioner to relief.” Duncan, 513 U.S. at 365; Gray v. Netherland, 518 U.S. 152, 162–
28 63 (1996). See also Davis v. Silva, 511 F.3d 1005, 1009 (9th Cir. 2008) (“Fair presentation

1 requires that the petitioner ‘describe in the state proceedings both the operative facts and the
2 federal legal theory on which his claim is based so that the state courts have a “fair opportunity”
3 to apply controlling legal principles to the facts bearing upon his constitutional claim.’”)
4 (citations omitted).

5 In the instant case, Petitioner filed a state habeas petition in the California Supreme
6 Court. (ECF No. 13-1 at 60). The only claim for habeas relief raised in the petition was that
7 application of amended California Penal Code section 2933.6 violated his plea agreement. (*Id.* at
8 62). Petitioner did not label his claim as a federal claim, and there was no reference to the *Ex*
9 *Post Facto* Clause or any citation to federal law or cases involving federal claims. See Baldwin
10 v. Reese, 541 U.S. 27, 32 (2004) (“A litigant wishing to raise a federal issue can easily indicate
11 the federal law basis for his claim in a state-court petition or brief, for example, by citing in
12 conjunction with the claim the federal source of law on which he relies or a case deciding such a
13 claim on federal grounds, or by simply labeling the claim ‘federal.’”). Therefore, Petitioner
14 failed to provide the California Supreme Court with a full and fair opportunity to consider his *ex*
15 *post facto* claim, and dismissal is warranted on this ground.

16 III.

17 RECOMMENDATION

18 Accordingly, the Court HEREBY RECOMMENDS that:

- 19 1. Respondent’s motion to dismiss (ECF No. 13) be GRANTED; and
- 20 2. The petition for writ of habeas corpus be DISMISSED.

21 This Findings and Recommendation is submitted to the assigned United States District
22 Court Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local
23 Rules of Practice for the United States District Court, Eastern District of California. Within
24 **THIRTY (30) days** after service of the Findings and Recommendation, any party may file
25 written objections with the court and serve a copy on all parties. Such a document should be
26 captioned “Objections to Magistrate Judge’s Findings and Recommendation.” Replies to the
27 objections shall be served and filed within fourteen (14) days after service of the objections. The
28 assigned United States District Court Judge will then review the Magistrate Judge’s ruling

1 pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within
2 the specified time may waive the right to appeal the District Court's order. Wilkerson v.
3 Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th
4 Cir. 1991)).

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6 IT IS SO ORDERED.

7 Dated: August 29, 2016

8 /s/ Eric P. Gray
9 UNITED STATES MAGISTRATE JUDGE
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