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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

DEMOND MAURICE MIMMS,

1: 08 CV 0532 AWI WMW HC

Petitioner,

FINDINGS AND RECOMMENDATIONS RE  
MOTION TO DISMISS PETITION FOR WRIT  
OF HABEAS CORPUS

v.

[Doc. 10]

GEORGE GALAZA, WARDEN,

Respondent.

\_\_\_\_\_ /

Petitioner is a prisoner proceeding with a petition for writ of habeas corpus pursuant to 28 U.S.C. Section 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72-302. Pending before the court is Respondent’s motion to dismiss.

**PROCEDURAL HISTORY**

On February 11, 1999, Petitioner was convicted of battery by a prisoner and sentenced to serve a term of eight years. On June 14, 2004, Petitioner was convicted of gassing and assessed an additional two-year term, consecutive to his eight-year term. Petitioner’s full ten-year term expires

1 on February 10, 2009. In 2007, Prisoner officials reviewed Petitioner’s good-credit earnings and  
2 losses to calculate his earliest possible release date. They found that although Petitioner was eligible  
3 to earn up to 729 days of credit for good behavior, he failed to earn 604 of those days. In addition,  
4 Petitioner forfeited 3540 days of credit for bad behavior. Because Petitioner’s credit loss  
5 overwhelmed his earned credit, his earliest possible release date remained set at his maximum  
6 release date, February 10, 2009.

7 Petitioner disputed his release date in a petition for writ of habeas corpus filed with the  
8 California Court of Appeal on September 25, 2007, alleging that “the prison illegally alter [sic]  
9 maximum release date to an earliest possible release date, thereby revoking petitioner [sic]  
10 maximum term of imprisonment.” The court denied this petition without comment on October 4,  
11 2007.

12 Petitioner next filed a petition with the California Supreme Court on October 17, 2007.,  
13 raising the same claim. The court denied the petition with a citation to In re Dexter, 25 Cal.3d 921  
14 (1979), which indicates a dismissal for failure to exhaust administrative remedies.

## 15 LEGAL STANDARD

### 16 JURISDICTION

17 Relief by way of a petition for writ of habeas corpus extends to a person in custody pursuant  
18 to the judgment of a state court if the custody is in violation of the Constitution or laws or treaties of  
19 the United States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); Williams v. Taylor, 120 S.Ct.  
20 1495, 1504 fn.7 (2000). Petitioner asserts that he suffered violations of his rights as guaranteed by  
21 the United States Constitution. In addition, the conviction challenged arises out of Corcoran State  
22 Prison, which is located within the jurisdiction of this court. 28 U.S.C. § 2254(a); 2241(d).  
23 Accordingly, the court has jurisdiction over the action.

24 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of  
25 1996 (“AEDPA”), which applies to all petitions for writ of habeas corpus filed after its enactment.  
26 Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997), *cert. denied*, 522 U.S. 1008, 118 S.Ct.  
27 586 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9<sup>th</sup> Cir. 1997) (quoting Drinkard v. Johnson, 97  
28 F.3d 751, 769 (5<sup>th</sup> Cir.1996), *cert. denied*, 520 U.S. 1107, 117 S.Ct. 1114 (1997), *overruled on other*

1 grounds by Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059 (1997) (holding AEDPA only applicable  
2 to cases filed after statute's enactment). The instant petition was filed after the enactment of the  
3 AEDPA, thus it is governed by its provisions.

#### 4 STANDARD OF REVIEW

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

8 The AEDPA altered the standard of review that a federal habeas court must apply with  
9 respect to a state prisoner's claim that was adjudicated on the merits in state court. Williams v.  
10 Taylor, 120 S.Ct. 1495, 1518-23 (2000). Under the AEDPA, an application for habeas corpus will  
11 not be granted unless the adjudication of the claim “resulted in a decision that was contrary to, or  
12 involved an unreasonable application of, clearly established Federal law, as determined by the  
13 Supreme Court of the United States;” or “resulted in a decision that was based on an unreasonable  
14 determination of the facts in light of the evidence presented in the State Court proceeding.” 28  
15 U.S.C. § 2254(d); Lockyer v. Andrade, 123 S.Ct. 1166, 1173 (2003) (disapproving of the Ninth  
16 Circuit’s approach in Van Tran v. Lindsey, 212 F.3d 1143 (9<sup>th</sup> Cir. 2000)); Williams v. Taylor, 120  
17 S.Ct. 1495, 1523 (2000). “A federal habeas court may not issue the writ simply because that court  
18 concludes in its independent judgment that the relevant state-court decision applied clearly  
19 established federal law erroneously or incorrectly.” Lockyer, at 1174 (citations omitted). “Rather,  
20 that application must be objectively unreasonable.” Id. (citations omitted).

21 While habeas corpus relief is an important instrument to assure that individuals are  
22 constitutionally protected, Barefoot v. Estelle, 463 U.S. 880, 887, 103 S.Ct. 3383, 3391-3392 (1983);  
23 Harris v. Nelson, 394 U.S. 286, 290, 89 S.Ct. 1082, 1086 (1969), direct review of a criminal  
24 conviction is the primary method for a petitioner to challenge that conviction. Brecht v.  
25 Abrahamson, 507 U.S. 619, 633, 113 S.Ct. 1710, 1719 (1993). In addition, the state court’s factual  
26 determinations must be presumed correct, and the federal court must accept all factual findings made  
27 by the state court unless the petitioner can rebut “the presumption of correctness by clear and  
28 convincing evidence.” 28 U.S.C. § 2254(e)(1); Purkett v. Elem, 514 U.S. 765, 115 S.Ct. 1769

1 (1995); Thompson v. Keohane, 516 U.S. 99, 116 S.Ct. 457 (1995); Langford v. Day, 110 F.3d 1380,  
2 1388 (9<sup>th</sup> Cir. 1997).

### 3 DISCUSSION

4 Respondent moves to dismiss this petition on the grounds of failure to exhaust state judicial  
5 remedies and failure to state grounds for federal habeas relief. Petitioner opposes the motion.  
6 Because the court finds it must dismiss the petition on the second ground, it finds it unnecessary to  
7 address the first.

#### 8 Procedural Basis for Motion to Dismiss

9 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a  
10 petition if it “plainly appears from the face of the petition and any exhibits annexed to it that the  
11 Petitioner is not entitled to relief in the district court . . . .” The Advisory Committee Notes to Rule 5  
12 of the Rules Governing § 2254 Cases state that “an alleged failure to exhaust state remedies may be  
13 raised by the Attorney General, thus avoiding the necessity of a formal answer as to that ground.”  
14 The Ninth Circuit has referred to a respondent’s motion to dismiss as a request for the court to  
15 dismiss under Rule 4 of the Rules Governing § 2254 Cases. See, e.g., O’Bremski v. Maass, 915  
16 F.2d 418, 420 (1991); White v. Lewis, 874 F.2d 599, 602-03 (9<sup>th</sup> Cir. 1989); Hillery v. Pulley, 533  
17 F.Supp. 1189, 1194 & n.12 (E.D. Cal. 1982). Based on the Rules Governing Section 2254 Cases and  
18 case law, the court will review Respondent’s motion to dismiss pursuant to its authority under Rule  
19 4.

#### 20 Failure to State Claim for Relief

21 The entirety of Petitioner’s claim is as follows:

22 Prison alter maximum release date of maximum term of imprisonment

23 On 7/2007 petitioner was sentence [sic] two (2) years for battery by prisoner in Hanford  
24 Superior Court. The term runs consecutive to the prison term expired 2/10/07. However the  
25 prison alter the maximum release date of 2/10/07 to an earliest possible release date thereby  
altering the maximum term of imprisonment.

26 Notice pleading is insufficient in a habeas corpus petition: rather the petition must include facts which  
27 if proven entitle the petition to habeas relief. O’Bremski v. Maas, 915 F.2d 418, 420 (9<sup>th</sup> Cir. 1990).

28 If a petition fails to allege sufficient facts to state a claim for habeas corpus relief, dismissal is proper

1 pursuant to Rule 4 of the Rules Governing Section 2254 Cases. Id. In this case, Petitioner does not  
2 does not assert any legal basis for his claim and does not specify what constitutional violation has  
3 allegedly occurred. While Petitioner mentions a “liberty interest” in his opposition to the motion to  
4 dismiss, he does not dispute the procedural history of his case, and provides no possible basis for a  
5 due process claim. The court must therefore conclude that Petitioner has failed to state a claim that  
6 he is in custody is in violation of the Constitution or laws or treaties of the United States, and  
7 therefore has failed to state a claim for habeas corpus pursuant to 28 U.S.C. § 2254(a).

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9 Based on the foregoing, IT IS HEREBY RECOMMENDED as follows:

- 10 1) that Respondent’s motion to dismiss be GRANTED;
- 11 2) that this petition for writ of habeas corpus be DISMISSED for failure to state a claim; and
- 12 3) that the Clerk of the Court be directed to enter judgment for Respondent and to close this case.

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15 These findings and recommendations are submitted to the United States District Judge  
16 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636 (b) (1). Within thirty days  
17 after being served with these findings and recommendations, any party may file written objections  
18 with the court and serve a copy on all parties. Such a document should be captioned “Objections to  
19 Magistrate Judge’s Findings and Recommendations.” Any reply to the objections shall be served and  
20 filed within ten days after service of the objections. The parties are advised that failure to file  
21 objections within the specified time may waive the right to appeal the District Court’s order.  
22 Martinez v. Y1st, 951 F.2d 1153 (9th Cir. 1991).

23 IT IS SO ORDERED.

24 **Dated:** January 12, 2009

/s/ William M. Wunderlich  
UNITED STATES MAGISTRATE JUDGE

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