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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

12 ROGER ERNEST CHAVEZ, ) 1:08-CV-01559 AWI SMS HC  
13 Petitioner, )  
14 ) FINDINGS AND RECOMMENDATION  
15 v. ) REGARDING RESPONDENT'S MOTION  
16 ) TO DISMISS  
17 ) [Doc. #14]  
18 K. MENDOZA-POWERS, )  
19 Respondent. )

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

## BACKGROUND

Petitioner is currently in the custody of the California Department of Corrections pursuant to a judgment of the Superior Court of California, County of San Francisco, following his conviction in 1993 of second degree murder with a weapon enhancement. See Petition at 2. Petitioner was sentenced to serve a total indeterminate term of 16 years to life in state prison. *Id.*

On October 24, 2006, Petitioner appeared at a parole consideration hearing. See Exhibit 1, Respondent's Motion to Dismiss ("Motion"). At the conclusion of the hearing, the Board of Parole

1 Hearings (“Board”) determined Petitioner was unsuitable for parole. Id.

2 On February 10, 2008,<sup>1</sup> Petitioner filed a petition for writ of habeas corpus in the San  
3 Francisco County Superior Court. Id. The petition was denied on March 10, 2008. See Exhibit 2,  
4 Motion. Petitioner then filed a petition in the California Court of Appeals, and the petition was  
5 denied on April 25, 2008. See Exhibit 3, Motion. On June 2, 2008, Petitioner filed a petition in the  
6 California Supreme Court. See Exhibit 4, Motion. That petition was denied on November 12, 2008.  
7 Id.

8 On September 4, 2008, Petitioner filed the instant federal petition for writ of habeas corpus.  
9 On February 17, 2009, Respondent filed a motion to dismiss the petition for violating the one-year  
10 limitations period set forth in 28 U.S.C. § 2244(d)(1). Petitioner filed an opposition on March 2,  
11 2009. Respondent filed a reply on March 12, 2009.

## 12 DISCUSSION

### 13 A. Procedural Grounds for Motion to Dismiss

14 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a  
15 petition if it “plainly appears from the petition and any attached exhibits that the petitioner is not  
16 entitled to relief in the district court . . . .” Rule 4 of the Rules Governing Section 2254 Cases.

17 The Ninth Circuit has allowed respondents to file a motion to dismiss in lieu of an answer if  
18 the motion attacks the pleadings for failing to exhaust state remedies or being in violation of the  
19 state’s procedural rules. See, e.g., O’Bremski v. Maass, 915 F.2d 418, 420 (9<sup>th</sup> Cir. 1990) (using Rule  
20 4 to evaluate motion to dismiss petition for failure to exhaust state remedies); White v. Lewis, 874  
21 F.2d 599, 602-03 (9<sup>th</sup> Cir. 1989) (using Rule 4 as procedural grounds to review motion to dismiss for  
22 state procedural default); Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n.12 (E.D. Cal. 1982) (same).  
23 Thus, a respondent can file a motion to dismiss after the court orders a response, and the Court  
24 should use Rule 4 standards to review the motion. See Hillery, 533 F. Supp. at 1194 & n. 12.

25 In this case, Respondent’s motion to dismiss is based on a violation of 28 U.S.C. 2244(d)(1)’s  
26 one-year limitations period. Because Respondent’s motion to dismiss is similar in procedural

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28 <sup>1</sup>Pursuant to the mailbox rule, the Court deems the petitions filed on the date that Petitioner signed and delivered  
it to prison authorities for filing. Houston v. Lack, 487 U.S. 266, 276 (1988).

1 standing to a motion to dismiss for failure to exhaust state remedies or for state procedural default  
2 and Respondent has not yet filed a formal answer, the Court will review Respondent's motion to  
3 dismiss pursuant to its authority under Rule 4.

4 **B. Limitation Period for Filing a Petition for Writ of Habeas Corpus**

5 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of  
6 1996 (hereinafter "AEDPA"). The AEDPA imposes various requirements on all petitions for writ of  
7 habeas corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059,  
8 2063 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9<sup>th</sup> Cir. 1997) (en banc), *cert. denied*, 118 S.Ct.  
9 586 (1997).

10 In this case, the petition was filed on September 4, 2008, and therefore, it is subject to the  
11 provisions of the AEDPA. The AEDPA imposes a one-year period of limitation on petitioners  
12 seeking to file a federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As amended,  
13 § 2244, subdivision (d) reads:

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

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

18 (B) the date on which the impediment to filing an application created by  
19 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;

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

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

23 (2) The time during which a properly filed application for State post-conviction or  
24 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.

25 28 U.S.C. § 2244(d).

26 In a situation such as this where the petitioner is challenging a parole determination, the  
27 Ninth Circuit has held that the statute of limitations commences when the parole board renders its  
28 decision. Redd v. McGrath, 343 F.3d 1077, 1079 (9<sup>th</sup> Cir.2003) (holding that § 2241(d)(1)(D) applies

1 in the context of parole decisions and that the parole board's denial is the "factual predicate" of the  
2 inmate's claim that triggers the commencement of the limitations period). Thus, the triggering event  
3 under § 2244(d)(1)(D) was the Board's October 24, 2006, decision denying parole. The limitations  
4 period therefore expired one year later on October 24, 2007. Petitioner did not file his federal  
5 petition until September 4, 2008, almost one year after the limitations period had expired.

6 **C. Tolling of the Limitation Period Pursuant to 28 U.S.C. § 2244(d)(2)**

7 Title 28 U.S.C. § 2244(d)(2) states that the "time during which a properly filed application  
8 for State post-conviction or other collateral review with respect to the pertinent judgment or claim is  
9 pending shall not be counted toward" the one year limitation period. 28 U.S.C. § 2244(d)(2). In  
10 Carey v. Saffold, the Supreme Court held the statute of limitations is tolled where a petitioner is  
11 properly pursuing post-conviction relief, and the period is tolled during the intervals between one  
12 state court's disposition of a habeas petition and the filing of a habeas petition at the next level of the  
13 state court system. 536 U.S. 214, 215 (2002); see also Nino v. Galaza, 183 F.3d 1003, 1006 (9<sup>th</sup> Cir.  
14 1999), *cert. denied*, 120 S.Ct. 1846 (2000).

15 In this case, the statute of limitations began to run on October 25, 2006 and expired on  
16 October 24, 2007. Petitioner's state habeas petitions did not operate to toll the limitations period,  
17 because the limitations period had already expired by the time he filed his first petition. Once the  
18 limitations period has run, it cannot be revived by a collateral action. Jiminez v. Rice, 276 F.3d 478,  
19 482 (9<sup>th</sup> Cir. 2001). Therefore, the instant federal petition remains untimely.

20 **RECOMMENDATION**

21 Accordingly, the Court HEREBY RECOMMENDS that Respondent's motion to dismiss be  
22 GRANTED and the petition be DISMISSED with prejudice for Petitioner's failure to comply with  
23 28 U.S.C. § 2244(d)'s one year limitation period.

24 This Findings and Recommendation is submitted to the Honorable Anthony W. Ishii, United  
25 States District Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule  
26 72-304 of the Local Rules of Practice for the United States District Court, Eastern District of  
27 California.

28 Within thirty (30) days after being served with a copy, any party may file written objections

1 with the court and serve a copy on all parties. Such a document should be captioned "Objections to  
2 Magistrate Judge's Findings and Recommendation." Replies to the objections shall be served and  
3 filed within ten (10) court days (plus three days if served by mail) after service of the objections.  
4 The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). 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 (9<sup>th</sup> Cir. 1991).

7 IT IS SO ORDERED.

8 **Dated: April 17, 2009**

**/s/ Sandra M. Snyder**  
UNITED STATES MAGISTRATE JUDGE

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