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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

MOSES VALDIVIA,

1:09-cv-01443-LJO-SMS (HC)

Petitioner,

FINDINGS AND RECOMMENDATION  
REGARDING RESPONDENT’S MOTION TO  
DISMISS

v.

[Doc. 14]

IVAN D. CLAY,

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 filed the instant petition for writ of habeas corpus in the United States District Court for the Central District of California on August 3, 2009. (Court Doc. 1.) The petition was transferred to this Court on August 14, 2009. (Court Doc. 4.)

Petitioner challenges the Board of Parole Hearings’ 2006 finding of unsuitability.

On October 27, 2009, Respondent filed the instant motion to dismiss on the ground the petition is untimely under 28 U.S.C. § 2244(d)(1). (Court Doc. 14.) Petitioner filed an opposition on November 12, 2009. (Court Doc. 15.)

DISCUSSION

A. Procedural Grounds for Motion to Dismiss

Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a

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

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

12         In this case, Respondent's motion to dismiss is based on a violation of 28 U.S.C.  
13 2244(d)(1)'s one-year limitations period. Therefore, the Court will review Respondent’s motion  
14 to dismiss pursuant to its authority under Rule 4.

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

16         On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act  
17 of 1996 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas  
18 corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059,  
19 2063 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9<sup>th</sup> Cir. 1997) (en banc), *cert. denied*, 118  
20 S.Ct. 586 (1997). The instant petition was filed on March 3, 2008, and thus, it is subject to the  
21 provisions of the AEDPA.

22         The AEDPA imposes a one year period of limitation on petitioners seeking to file a  
23 federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As amended, Section 2244,  
24 subdivision (d) reads:

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

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

1 (B) the date on which the impediment to filing an application created by  
2 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;

3 (C) the date on which the constitutional right asserted was initially recognized  
4 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

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

7 (2) The time during which a properly filed application for State post-  
8 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.

9  
10 In most cases, the limitations period begins running on the date that the petitioner's direct  
11 review became final. In a situation such as this where the petitioner is challenging a parole board  
12 decision, the Ninth Circuit has held that direct review is concluded and the statute of limitations  
13 commences when the final administrative appeal is denied. See Redd v. McGrath, 343 F.3d  
14 1077, 1079 (9<sup>th</sup> Cir.2003) (holding that § 2241(d)(1)(D) applies in the context of parole decisions  
15 and that the Board of Prison Term's denial of an inmate's administrative appeal is the "factual  
16 predicate" of the inmate's claim that triggers the commencement of the limitations period).

17 In this instance, the Board of Parole Hearings denied parole on February 7, 2006.  
18 However, Respondent recognizes that the Board's decision did not become final until 120 days  
19 thereafter, so the one-year limitation period did not begin to run until June 7, 2006. Cal. Code  
20 Regs. tit. 15, § 2041(h) (decision to deny parole to life prisoner is final within 120 days of initial  
21 hearing).

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

23 Title 28 U.S.C. § 2244(d)(2) states that the "time during which a properly filed  
24 application for State post-conviction or other collateral review with respect to the pertinent  
25 judgment or claim is pending shall not be counted toward" the one year limitation period. 28  
26 U.S.C. § 2244(d)(2). In Carey v. Saffold, the Supreme Court held the statute of limitations is  
27 tolled where a petitioner is properly pursuing post-conviction relief, and the period is tolled  
28 during the intervals between one state court's disposition of a habeas petition and the filing of a

1 habeas petition at the next level of the state court system. 536 U.S. 214, 215 (2002); see also  
2 Nino v. Galaza, 183 F.3d 1003, 1006 (9<sup>th</sup> Cir. 1999), *cert. denied*, 120 S.Ct. 1846 (2000).  
3 Nevertheless, state petitions will only toll the one-year statute of limitations under § 2244(d)(2) if  
4 the state court explicitly states that the post-conviction petition was timely or was filed within a  
5 reasonable time under state law. Pace v. DiGuglielmo, 544 U.S. 408 (2005); Evans v. Chavis,  
6 546 U.S. 189 (2006). Claims denied as untimely or determined by the federal courts to have been  
7 untimely in state court will not satisfy the requirements for statutory tolling. Id.

8 Petitioner did not seek state court relief until December 1, 2008, in the Ventura County  
9 Superior Court. (Exhibit A, to Motion.) There is no tolling for the time between the effective  
10 date of the administrative decision, June 7, 2006, and the filing of the superior court petition on  
11 December 1, 2008. Nino v. Galaza, 183 F.3d 1003, 1006 (9<sup>th</sup> Cir. 1999) (“AEDPA’s statute of  
12 limitations is not tolled from the time a final decision is issued on direct state appeal and the time  
13 the first state collateral challenge is filed because there is no case ‘pending’ during that  
14 interval.”). Therefore, because Petitioner did not file his first post-conviction collateral action  
15 until over two years after the statute of limitations expired, the instant petition is clearly  
16 untimely. Green v. White, 223 F.3d 1001, 1003 (9<sup>th</sup> Cir.2000) (Petitioner is not entitled to  
17 tolling where the limitations period has already run); see also Webster v. Moore, 199 F.3d 1256  
18 (11<sup>th</sup> Cir.2000); Rendall v. Carey, 2002 WL 1346354 (N.D.Cal.2002).

#### 19 RECOMMENDATION

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

- 21 1. Respondent’s motion to dismiss the instant petition as untimely be GRANTED; and,
- 22 2. The Clerk of Court be directed dismiss this action with prejudice.

23 This Findings and Recommendation is submitted to the assigned United States District  
24 Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 72-304 of  
25 the Local Rules of Practice for the United States District Court, Eastern District of California.  
26 Within thirty (30) days after being served with a copy, any party may file written objections with  
27 the court and serve a copy on all parties. Such a document should be captioned “Objections to  
28 Magistrate Judge’s Findings and Recommendation.” Replies to the objections shall be served

1 and filed within ten (10) court days (plus three days if served by mail) after service of the  
2 objections. The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. §  
3 636 (b)(1)(C). The parties are advised that failure to file objections within the specified time  
4 may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th  
5 Cir. 1991).

6  
7 IT IS SO ORDERED.

8 **Dated: December 4, 2009**

/s/ Sandra M. Snyder  
UNITED STATES MAGISTRATE JUDGE

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