



1 The California Supreme Court denied the petition for review on June 11, 2008.

2 Petitioner did not file any other petitions for post-conviction relief in the state courts.

3 Petitioner filed the instant federal petition for writ of habeas corpus on February 1, 2010.

4 Respondent filed the instant motion to dismiss on June 9, 2010. Petitioner filed an opposition on  
5 September 13, 2010.

6 DISCUSSION

7 A. Procedural Grounds for Motion to Dismiss

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

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

20 In this case, Respondent's motion to dismiss is based on a violation of 28 U.S.C.  
21 2244(d)(1)'s one-year limitations period. Therefore, the Court will review Respondent’s motion  
22 to dismiss pursuant to its authority under Rule 4.

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

24 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act  
25 of 1996 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas  
26 corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059,  
27 2063 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc), *cert. denied*, 118  
28 S.Ct. 586 (1997). The instant petition was filed on February 1, 2010, and thus, it is subject to the

1 provisions of the AEDPA.

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

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

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

9 (B) the date on which the impediment to filing an application created by  
10 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;

11 (C) the date on which the constitutional right asserted was initially recognized  
12 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

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

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

17 In most cases, the limitation period begins running on the date that the petitioner’s direct  
18 review became final. Here, on June 11, 2008, the California Supreme Court denied review.  
19 Thus, direct review became final on September 9, 2008, when the ninety day time frame to file a  
20 petition for writ of certiorari expired. Therefore, the one year limitations period began on the  
21 following day, September 10, 2008, and absent tolling, was set to expire on September 10, 2009.  
22 See Patterson v. Stewart, 251 F.3d 1243, 1245 (9th Cir. 2001) (holding that Rule 6(a) of the  
23 Federal Rules of Civil Procedure governs the calculation of statutory tolling applicable to the  
24 one year limitations period.)

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

26 Title 28 U.S.C. § 2244(d)(2) states that the “time during which a properly filed  
27 application for State post-conviction or other collateral review with respect to the pertinent  
28

1 judgment or claim is pending shall not be counted toward” the one year limitation period. 28  
2 U.S.C. § 2244(d)(2). In Carey v. Saffold, the Supreme Court held the statute of limitations is  
3 tolled where a petitioner is properly pursuing post-conviction relief, and the period is tolled  
4 during the intervals between one state court's disposition of a habeas petition and the filing of a  
5 habeas petition at the next level of the state court system. 536 U.S. 214, 215 (2002); see also  
6 Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 1846 (2000).  
7 Nevertheless, state petitions will only toll the one-year statute of limitations under § 2244(d)(2)  
8 if the state court explicitly states that the post-conviction petition was timely or was filed within  
9 a reasonable time under state law. Pace v. DiGuglielmo, 544 U.S. 408 (2005); Evans v. Chavis,  
10 546 U.S. 189 (2006). Claims denied as untimely or determined by the federal courts to have been  
11 untimely in state court will not satisfy the requirements for statutory tolling. Id.

12         It appears Petitioner is attempting to argue that his previous filing in this Court tolled the  
13 limitations period and demonstrated due diligence on his part. On March 19, 2009, Petitioner  
14 filed a petition for writ of habeas corpus in this Court in case number 1:09-cv-00517-OWW-  
15 TAG (HC). On December 8, 2009, the petition was dismissed without prejudice for failure to  
16 exhaust the state judicial remedies. A federal petition for writ of habeas corpus does not serve to  
17 statutorily toll the limitations period within the meaning of section 2244(d)(2). Duncan v.  
18 Walker, 533 U.S. 167, 172 (2001).

19 D.     Equitable Tolling

20         The AEDPA’s limitations period is subject to equitable tolling if the petitioner  
21 demonstrates: “(1) that he has been pursuing his rights diligently, and (2) that some  
22 extraordinary circumstance stood in his way.” Holland v. Florida, 130 S.Ct.2549, 2562 (2010);  
23 Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005). Petitioner bears the burden of alleging facts  
24 that would give rise to tolling. Pace, 544 U.S. at 418; Smith v. Duncan, 297 F.3d 809 (9th  
25 Cir.2002); Hinton v. Pac. Enters., 5 F.3d 391, 395 (9th Cir.1993).

26         The delay in this case was not beyond Petitioner’s control. Rather, prior to dismissal of  
27 the first petition in case number 1:09-cv-00517-OWW-TAG (HC), Petitioner was advised of the  
28 options of withdrawing the unexhausted claims and proceeding with exhausted claims only or

1 dismissing the entire petition without prejudice. Petitioner implicitly chose the latter option by  
2 continuing to argue that all of his claims were exhausted. See 1:09-cv-00517 OWW-TAG (HC),  
3 Objections, ECF No. 13. Petitioner cannot now retract his decision by simply refileing the  
4 petition deleting the unexhausted claims. Petitioner knew his first petition could proceed  
5 through this Court, thus any delay in pursuing his claims was the result of his choice to dismiss  
6 the first petition. Accordingly, Respondent’s motion to dismiss the instant petition as untimely  
7 should be granted.

8 RECOMMENDATION

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

- 10 1. Respondent’s motion to dismiss the instant petition be GRANTED; and  
11 2. The instant petition for writ of habeas corpus be DISMISSED with prejudice as  
12 untimely under 28 U.S.C. § 2244(d)(2).

13 This Findings and Recommendation is submitted to the assigned United States District  
14 Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304 of the  
15 Local Rules of Practice for the United States District Court, Eastern District of California.  
16 Within thirty (30) days after being served with a copy, any party may file written objections with  
17 the court and serve a copy on all parties. Such a document should be captioned “Objections to  
18 Magistrate Judge’s Findings and Recommendation.” Replies to the objections shall be served  
19 and filed within fourteen (14) days after service of the objections. The Court will then review  
20 the Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that  
21 failure to file objections within the specified time may waive the right to appeal the District  
22 Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

23 IT IS SO ORDERED.

24 **Dated: September 28, 2010**

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