

1 challenges.

2 On January 11, 2010², Petitioner filed a federal petition for writ of habeas corpus in this
3 Court. On June 17, 2010, Respondent filed a motion to dismiss the petition as being filed outside the
4 one-year limitations period prescribed by 28 U.S.C. § 2244(d)(1) and for failure to exhaust state
5 remedies. Petitioner filed an opposition on August 12, 2010. Respondent did not file a reply.

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

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

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

23 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of
24 1996 (hereinafter “AEDPA”). The AEDPA imposes various requirements on all petitions for writ of
25 habeas corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059,

26
27 ²Although the petition was filed in this Court on February 1, 2010, it contains a proof of service dated January 11,
28 2010. Pursuant to the mailbox rule, the Court will deem the petition filed on January 11, 2010, the date Petitioner presumably
handed his petition to prison authorities for filing. Houston v. Lack, 487 U.S. 266, 276 (1988).

1 2063 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc), *cert. denied*, 118 S.Ct.
2 586 (1997).

3 In this case, the petition was filed on January 11, 2010, and therefore, it is subject to the
4 provisions of the AEDPA. The AEDPA imposes a one-year limitations period on petitioners seeking
5 to file a federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As amended, § 2244,
6 subdivision (d) reads:

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

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

12 (B) the date on which the impediment to filing an application created by
13 State action in violation of the Constitution or laws of the United States is removed, if
14 the applicant was prevented from filing by such State action;

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

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

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

23 28 U.S.C. § 2244(d).

24 In most cases, the limitations period begins running on the date that the petitioner's direct
25 review became final. In this case, the appellate court affirmed judgment on September 16, 2003.
26 Petitioner did not seek review in the California Supreme Court. Thus, direct review concluded on
27 October 26, 2003, when the forty (40) day period for seeking review in the California Supreme Court
28 expired. Cal. Rules of Court, rules 24 and 28. The statute of limitations commenced on the
following day, October 27, 2003, and expired one year later on October 26, 2004. Patterson v.
Stewart, 251 F.3d 1243, 1246 (9th Cir.2001). Here, Petitioner delayed filing the instant petition until
January 11, 2010, exceeding the due date by almost six years. Absent any applicable tolling, the
instant petition is barred by the statute of limitations.

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

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

9 As previously stated, the statute of limitations began to run on October 27, 2003, and expired
10 on October 26, 2004. Petitioner did not file any post-conviction applications for collateral relief in
11 the state courts in that time frame. Accordingly, he is not entitled to statutory tolling, and the federal
12 petition remains untimely.

13 D. Exhaustion

14 A petitioner who is in state custody and wishes to collaterally challenge his conviction by a
15 petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The
16 exhaustion doctrine is based on comity to the state court and gives the state court the initial
17 opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501
18 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982); Buffalo v. Sunn, 854 F.2d 1158,
19 1163 (9th Cir. 1988).

20 A petitioner can satisfy the exhaustion requirement by providing the highest state court with a
21 full and fair opportunity to consider each claim before presenting it to the federal court. Picard v.
22 Connor, 404 U.S. 270, 276 (1971); Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir. 1996). A federal
23 court will find that the highest state court was given a full and fair opportunity to hear a claim if the
24 petitioner has presented the highest state court with the claim's factual and legal basis. Duncan v.
25 Henry, 513 U.S. 364, 365 (1995) (legal basis); Kenney v. Tamayo-Reyes, 504 U.S. 1 (1992) (factual
26 basis).

27 In this case, Petitioner has not presented any of his claims to the California Supreme Court.
28 Respondent correctly argues that the petition is unexhausted and must be dismissed. 28 U.S.C. §

1 2254(b)(1).

2 **RECOMMENDATION**

3 Accordingly, the Court HEREBY RECOMMENDS that the motion to dismiss be
4 GRANTED and the habeas corpus petition be DISMISSED with prejudice for Petitioner's failure to
5 comply with 28 U.S.C. § 2244(d)'s one year limitation period and for failure to exhaust state
6 remedies.

7 This Findings and Recommendation is submitted to the Honorable Oliver W. Wanger, United
8 States District Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule
9 304 of the Local Rules of Practice for the United States District Court, Eastern District of California.
10 Within thirty (30) days after date of service of this Findings and Recommendation, any party may
11 file written objections with the Court and serve a copy on all parties. Such a document should be
12 captioned "Objections to Magistrate Judge's Findings and Recommendation." Replies to the
13 Objections shall be served and filed within fourteen (14) days after service of the Objections. The
14 Finding and Recommendation will then be submitted to the District Court for review of the
15 Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure
16 to file objections within the specified time may waive the right to appeal the Order of the District
17 Court. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

18
19
20
21
22
23
24
25
26
27
28

IT IS SO ORDERED.

Dated: August 30, 2010

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE