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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

DANIEL TORRES,	)	1:10-cv-00773-OWW-JLT HC
	)	
Petitioner,	)	FINDINGS AND RECOMMENDATION RE:
	)	RESPONDENT’S MOTION TO DISMISS
v.	)	THE PETITION (Doc. 1)
	)	
JAMES HARTLEY,	)	ORDER DIRECTING OBJECTIONS TO BE
	)	FILED WITHIN TWENTY DAYS
Respondent.	)	

**PROCEDURAL HISTORY**

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The instant federal petition for writ of habeas corpus was filed on April 6, 2010.<sup>1</sup> The petition alleges that the “retroactive” change in California law effected by the

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<sup>1</sup>In Houston v. Lack, the United States Supreme Court held that a pro se habeas petitioner's notice of appeal is deemed filed on the date of its submission to prison authorities for mailing, as opposed to the date of its receipt by the court clerk. Houston v. Lack, 487 U.S. 166, 276, 108 S.Ct. 2379, 2385 (1988). The rule is premised on the pro se prisoner's mailing of legal documents through the conduit of "prison authorities whom he cannot control and whose interests might be adverse to his." Miller v. Sumner, 921 F.2d 202, 203 (9<sup>th</sup> Cir. 1990); see, Houston, 487 U.S. at 271, 108 S.Ct. at 2382. The Ninth Circuit has applied the “mailbox rule” to state and federal petitions in order to calculate the tolling provisions of the AEDPA. Saffold v. Neland, 250 F.3d 1262, 1268-1269 (9<sup>th</sup> Cir. 2000), *amended* May 23, 2001, *vacated and remanded on other grounds sub nom.* Carey v. Saffold, 536 U.S. 214, 226 (2002); Stillman v. LaMarque, 319 F.3d 1199, 1201 (9<sup>th</sup> Cir. 2003); Smith v. Ratelle, 323 F.3d 813, 816 n. 2 (9<sup>th</sup> Cir. 2003). The date the petition is signed may be considered the earliest possible date an inmate could submit his petition to prison authorities for filing under the mailbox rule. Jenkins v. Johnson, 330 F.3d 1146, 1149 n. 2 (9<sup>th</sup> Cir. 2003), *overruled on other grounds*, Pace v. DiGuglielmo, 544 U.S. 408, 125 S.Ct. 1807 (2005). Accordingly, for all of Petitioner’s state petitions and for the instant federal petition, the Court will consider the date of signing of the petition (or the date of signing of the proof of service if no signature appears on the petition) as the earliest

1 passage of Proposition 9 in November 2008 as “California Penal [Code] Section 3041(a)(2)(3)”  
2 exposes Petitioner “to a sufficient risk of prolonged incarceration and a more severe punishment...in  
3 violation of due notice [sic] of law, and the ex post facto clause.” (Doc. 1, p. 6). Petitioner also  
4 alleges that the new law “was causing or would cause Petitioner to be in illegal physical confinement  
5 and when depriving Petitioner good-time, work-time, pre and post confinement credits, in violatioin  
6 of due notice [sic], the Sixth Amendment, and ex post facto, protected by the due process claus of  
7 the Fourteenth Amendment to the United States Constitution.” (Id.).

8 On June 11, 2010, the Court ordered Respondent to file a response to the petition. (Doc. 7).  
9 On August 10, 2010, Respondent filed the instant motion to dismiss, contending that the petition was  
10 untimely and that it failed to state a claim upon which habeas relief could be granted. (Doc. 10).  
11 Petitioner filed his opposition to the motion to dismiss on August 18, 2010. (Doc. 11).

## 12 DISCUSSION

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

14 As mentioned, Respondent has filed a Motion to Dismiss the petition as being filed outside  
15 the one year limitations period prescribed by Title 28 U.S.C. § 2244(d)(1). Rule 4 of the Rules  
16 Governing Section 2254 Cases allows a district court to dismiss a petition if it “plainly appears from  
17 the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the  
18 district court . . . .” Rule 4 of the Rules Governing Section 2254 Cases.

19 The Ninth Circuit has allowed Respondent’s to file a Motion to Dismiss in lieu of an Answer  
20 if the motion attacks the pleadings for failing to exhaust state remedies or being in violation of the  
21 state’s procedural rules. See, e.g., O’Bremski v. Maass, 915 F.2d 418, 420 (9<sup>th</sup> Cir. 1990) (using Rule  
22 4 to evaluate motion to dismiss petition for failure to exhaust state remedies); White v. Lewis, 874

23 \_\_\_\_\_  
24 possible filing date and the operative date of filing under the mailbox rule for calculating the running of the statute of  
25 limitation. Petitioner signed the instant petition on February 1, 2010. (Doc. 1, p. 5). Respondent contends that Petitioner  
26 did not comply with Rule 3(d) of the Rules Governing Section 2254 Cases, requiring the attachment of either a certificate  
27 of mailing or a declaration or notarized statement indicating the date Petitioner provided his petition to prison authorities  
28 along with a statement that the postage had been prepaid. (Doc. 10, p. 4). Respondent urges therefore that the Court find  
the appropriate filing date to be the actual filing date of August 10, 2010. (Id.). The Court, however, notes that along with  
the original petition, Petitioner filed a motion to proceed in forma pauperis. (Doc. 2). That motion is signed and dated April  
6, 2010. Since both documents were filed together, it seems obvious that the petition could not have been delivered to prison  
authorities earlier than April 6, 2010. Accordingly, the Court will use that date as the filing date for purposes of the AEDPA’s  
statute of limitations. See Jenkins, 330 F.3d at 1149 n. 2

1 F.2d 599, 602-03 (9<sup>th</sup> Cir. 1989) (using Rule 4 as procedural grounds to review motion to dismiss for  
2 state procedural default); Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n.12 (E.D. Cal. 1982) (same).

3 Thus, a Respondent can file a Motion to Dismiss after the court orders a response, and the Court  
4 should use Rule 4 standards to review the motion. See Hillery, 533 F. Supp. at 1194 & n. 12.

5 In this case, Respondent's Motion to Dismiss is based on a violation of 28 U.S.C. §  
6 2244(d)(1)'s one year limitation period and the failure to state a federal habeas claim. Because  
7 Respondent's Motion to Dismiss is similar in procedural standing to a Motion to Dismiss for failure  
8 to exhaust state remedies or for state procedural default and Respondent has not yet filed a formal  
9 Answer, the Court will review Respondent's Motion to Dismiss pursuant to its authority under Rule  
10 4.

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

12 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of  
13 1996 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas  
14 corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063  
15 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9<sup>th</sup> Cir. 1997) (en banc), *cert. denied*, 118 S.Ct. 586  
16 (1997). The instant petition was filed on April 6, 2010, and thus, it is subject to the provisions of  
17 the AEDPA.

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

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

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

25 (B) the date on which the impediment to filing an application created by  
26 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;

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

(D) the date on which the factual predicate of the claim or claims presented

1 could have been discovered through the exercise of due diligence.

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

5 28 U.S.C. § 2244(d).

6 In most cases, the limitation period begins running on the date that the petitioner's direct  
7 review became final. Here, Petitioner is challenging the legality of California's enactment of a law  
8 affecting the timing of parole suitability hearings. Thus, the AEDPA's one-year statute of  
9 limitations, as embodied in § 2244(d)(1), would apply. Under subsection (d), the limitation period  
10 begins to run on "the date on which the factual predicate of the claim or claims presented could have  
11 been discovered through the exercise of due diligence." In the context of the enactment of a new  
12 law, the Court agrees with Respondent that the factual basis would be the actual enactment of the  
13 law. In this instance, the challenged law, i.e., Proposition 9, was enacted on November 5, 2008.  
14 Hence, the one-year period would commence the day after the law was enacted, i.e., November 6,  
15 2008, and would have expired, absent applicable tolling, one year later, i.e., on November 5, 2009.

16 As mentioned, the instant petition was filed on April 6, 2010, approximately five months  
17 after the date the one-year period would have expired. Thus, unless Petitioner is entitled to either  
18 statutory or equitable tolling, the instant petition is untimely and should be dismissed.

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

20 Under the AEDPA, the statute of limitations is tolled during the time that a properly filed  
21 application for state post-conviction or other collateral review is pending in state court. 28 U.S.C.  
22 § 2244(d)(2). A properly filed application is one that complies with the applicable laws and rules  
23 governing filings, including the form of the application and time limitations. Artuz v. Bennett, 531  
24 U.S. 4, 8, 121 S. Ct. 361 (2000). An application is pending during the time that "a California  
25 petitioner completes a full round of [state] collateral review," so long as there is no unreasonable  
26 delay in the intervals between a lower court decision and the filing of a petition in a higher court.  
27 Delhomme v. Ramirez, 340 F. 3d 817, 819 (9th Cir. 2003), abrogated on other grounds as recognized  
28 by Waldrip v. Hall, 548 F. 3d 729 (9th Cir. 2008)(per curium)(internal quotation marks and citations  
omitted); see Evans v. Chavis, 546 U.S. 189, 193-194, 126 S. Ct. 846 (2006); see Carey v. Saffold,

1 536 U.S. 214, 220, 222-226, 122 S. Ct. 2134 (2002); see also, Nino v. Galaza, 183 F.3d 1003, 1006  
2 (9th Cir. 1999).

3 Nevertheless, there are circumstances and periods of time when no statutory tolling is  
4 allowed. For example, no statutory tolling is allowed for the period of time between finality of an  
5 appeal and the filing of an application for post-conviction or other collateral review in state court,  
6 because no state court application is “pending” during that time. Nino, 183 F.3d at 1006-1007;  
7 Raspberry v. Garcia, 448 F.3d 1150, 1153 n. 1 (9<sup>th</sup> Cir. 2006). Similarly, no statutory tolling is  
8 allowed for the period between finality of an appeal and the filing of a federal petition. Id. at 1007.  
9 In addition, the limitation period is not tolled during the time that a federal habeas petition is  
10 pending. Duncan v. Walker, 563 U.S. 167, 181-182, 121 S.Ct. 2120 (2001); see also, Fail v.  
11 Hubbard, 315 F. 3d 1059, 1060 (9th Cir. 2001)(as amended on December 16, 2002). Further, a  
12 petitioner is not entitled to statutory tolling where the limitation period has already run prior to filing  
13 a state habeas petition. Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (“section 2244(d)  
14 does not permit the reinitiation of the limitations period that has ended before the state petition was  
15 filed.”); Jiminez v. White, 276 F. 3d 478, 482 (9th Cir. 2001). Finally, a petitioner is not entitled to  
16 continuous tolling when the petitioner’s later petition raises unrelated claims. See Gaston v. Palmer,  
17 447 F.3d 1165, 1166 (9th Cir. 2006).

18 Here, Respondent concedes that Petitioner is entitled to statutory tolling for the pendency of  
19 Petitioner’s state court habeas petition filed in the California Supreme Court. (Doc. 10, p. 4). That  
20 petition was filed on August 12, 2009 and denied on January 13, 2010. (Doc. 10, Ex. 1). Thus,  
21 when Petitioner filed that state petition on August 12, 2009, 279 days had already expired of his 365-  
22 day limitation period. The one-year period re-commenced the day following the California Supreme  
23 Court’s denial of Petitioner’s habeas petition, i.e., on January 14, 2010, at which time Petitioner had  
24 only 86 days remaining in which to timely file his petition. In other words, Petitioner had to file his  
25 petition within 86 days, or by April 10, 2010, in order to meet AEDPA’s timeliness requirement.  
26 Since the Court has found that, for purposes of this motion to dismiss, Petitioner filed his petition on  
27 April 6, 2010, four days before the one-year period expired, the petition is timely. Accordingly, the  
28 Court recommends that Respondent’s motion to dismiss for untimeliness should be denied.

1           D. Failure To State A Claim Upon Which Federal Habeas Relief Can Be Granted.

2           As mentioned, Petitioner contends that the passage of Proposition 9 in November 2008, and  
3 enacted as “California Penal Code 3041(a)(2)(3),” exposes Petitioner “to a sufficient risk of  
4 prolonged incarceration and a more severe punishment...in violation of due notice [sic] of law, and  
5 the ex post facto clause.” (Doc. 1, p. 6). Petitioner also alleges that the new law “was causing or  
6 would cause Petitioner to be in illegal physical confinement and when depriving Petitioner good-  
7 time, work-time, pre and post confinement credits, in violation of due notice [sic], the Sixth  
8 Amendment, and ex post facto, protected by the due process clause of the Fourteenth Amendment to  
9 the United States Constitution.” (Id.).

10           Respondent contends that the petition should be dismissed for failure to state a cognizable  
11 federal habeas claim because Petitioner has failed to “allege his current credit earning status, how  
12 Proposition 9 prevents him from earning credits, how the passage of Proposition 9 unlawfully  
13 aggravates the factors of his crime, or how the passage of Proposition 9 prolongs his term of  
14 incarceration.” (Doc. 10, p. 3). Respondent argues that such deficient pleadings fail to “satisfy the  
15 pleading requirements of Rule 2(c), and that, “[w]ithout knowing the facts that support Petitioner’s  
16 allegations or the specific grounds that support relief, Respondent is unable to respond to the  
17 Petition.” (Id.). The Court agrees that the petition, as presently framed, fails to state a cognizable  
18 claim for federal habeas relief.

19           The basic scope of habeas corpus is prescribed by statute. Subsection (c) of Section 2241 of  
20 Title 28 of the United States Code provides that habeas corpus shall not extend to a prisoner unless  
21 he is “in custody in violation of the Constitution.” 28 U.S.C. § 2254(a) states that the federal courts  
22 shall entertain a petition for writ of habeas corpus only on the ground that the petitioner “is in  
23 custody in violation of the Constitution or laws or treaties of the United States. See also, Rule 1 to  
24 the Rules Governing Section 2254 Cases in the United States District Court. The Supreme Court has  
25 held that “the essence of habeas corpus is an attack by a person in custody upon the legality of that  
26 custody . . .” Preiser v. Rodriguez, 411 U.S. 475, 484 (1973). Furthermore, in order to succeed in a  
27 petition pursuant to 28 U.S.C. § 2254, Petitioner must demonstrate that the adjudication of his claim  
28 in state court resulted in a decision that was contrary to, or involved an unreasonable application of,

1 clearly established Federal law, as determined by the Supreme Court of the United States; or resulted  
2 in a decision that was based on an unreasonable determination of the facts in light of the evidence  
3 presented in the State court proceeding. 28 U.S.C. § 2254(d)(1), (2).

4       Regarding pleading, Rule 2 of the Rules Governing Section 2254 Cases provides that the  
5 petition:

6               ". . . shall specify all the grounds for relief which are available to the petitioner and of  
7               which he has or by the exercise of reasonable diligence should have knowledge and  
8               shall set forth in summary form the facts supporting each of the grounds thus  
              specified."

9 Rule 2(c), 28 U.S.C. § 2254. Thus, a petitioner must state his claim with sufficient specificity. See  
10 Hendricks v. Vasquez, 908 F.2d at 491-92; Wacht v. Cardwell, 604 F.2d 1245, 1246-47 (9th  
11 Cir.1979). Additionally, the Advisory Committee Note to these rules explains that: "'(N)otice'  
12 pleading is not sufficient, for the petition is expected to state facts that point to a 'real possibility of  
13 constitutional error.'" 28 U.S.C. § 2254, p. 1111; *Quoted approvingly in Blackledge v. Allison*, 431  
14 U.S. 63, 75 n.7, 97 S.Ct. 1621 (1977). Conclusory allegations which are not supported by a  
15 statement of specific facts do not warrant habeas relief. James v. Borg, 24 F.3d 20, 26 (9th Cir.  
16 1994).

17       Regarding pleading a constitutional violation, merely placing a "due process" label on an  
18 alleged violation does not entitle Petitioner to federal relief. Langford v. Day, 110 F.3d 1386, 1388-  
19 89 (1996). Broad, conclusory allegations of unconstitutionality are insufficient to state a cognizable  
20 claim. Jones v. Gomez, 66 F.3d 199, 205 (9th Cir.1995)(holding that conclusory allegations made  
21 with no reference to the record or any document do not merit habeas relief); Greyson v. Kellam, 937  
22 F.2d 1409, 1412 (9th Cir.1991) (bald assertions of ineffective assistance of counsel did not entitle the  
23 petitioner to an evidentiary hearing); see also Hiiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir.1999),  
24 *citing Gray v. Netherland*, 518 U.S. 152, 162-63 (1996) ("general appeals to broad constitutional  
25 principles, such as due process, equal protection, and the right to a fair trial, are insufficient to  
26 establish exhaustion); Borg, 24 F.3d at 29 ("Conclusory allegations which are not supported by a  
27 statement of specific facts do not warrant habeas relief." ); Allard v. Nelson, 423 F.2d 1216, 1217  
28 (9th Cir.1970) (conclusory allegations in a habeas petition fail to state a claim and do not suffice to

1 shift the burden to the state to answer an order to show cause.) Hence, a petitioner in federal court  
2 cannot merely characterize some state act as unconstitutional and expect this Court to explore all  
3 possible grounds under each article and amendment of the Constitution. While courts should  
4 liberally interpret pro se pleadings with leniency and understanding, this should not place on the  
5 reviewing court the entire onus of creating a federal claim for the petitioner.

6 Proposition 9, approved by California voters in 2008, amended California Penal Code §  
7 3041.5, inter alia, to defer subsequent parole consideration hearing for longer periods of time:

8 (b)(3) The board shall schedule the next hearing, after considering the views and interests of  
9 the victim, as follows:

10 (A) Fifteen years after any hearing at which parole is denied, unless the board finds by clear  
11 and convincing evidence that the criteria relevant to the setting of parole release dates  
12 enumerated in subdivision (a) of Section 3041 are such that consideration of the public and  
13 victim's safety does not require a more lengthy period of incarceration for the prisoner than  
14 10 additional years.

15 Cal. Pen. Code § 3041.5(b)(3)(A).<sup>2</sup>

16 California Penal Code § 3041 provides as follows:

17 (a) In the case of any inmate sentenced pursuant to any provision of law, other than  
18 Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, the Board of Parole  
19 Hearings shall meet with each inmate during the third year of incarceration for the  
20 purposes of reviewing the inmate's file, making recommendations, and documenting  
21 activities and conduct pertinent to granting or withholding postconviction credit. One  
22 year prior to the inmate's minimum eligible parole release date a panel of two or more  
23 commissioners or deputy commissioners shall again meet with the inmate and shall  
24 normally set a parole release date as provided in Section 3041.4. No more than one  
25 member of the panel shall be a deputy commissioner. In the event of a tie vote, the matter  
26 shall be referred for an en banc review of the record that was before the panel that  
27 rendered the tie vote. Upon en banc review, the board shall vote to either grant or deny  
28 parole and render a statement of decision. The en banc review shall be conducted  
pursuant to subdivision (e). The release date shall be set in a manner that will provide  
uniform terms for offenses of similar gravity and magnitude with respect to their threat to  
the public, and that will comply with the sentencing rules that the Judicial Council may  
issue and any sentencing information relevant to the setting of parole release dates. The  
board shall establish criteria for the setting of parole release dates and in doing so shall  
consider the number of victims of the crime for which the inmate was sentenced and  
other factors in mitigation or aggravation of the crime. At least one commissioner of the  
panel shall have been present at the last preceding meeting, unless it is not feasible to do  
so or where the last preceding meeting was the initial meeting. Any person on the hearing  
panel may request review of any decision regarding parole for an en banc hearing by the  
board. In case of a review, a majority vote in favor of parole by the board members  
participating in an en banc review is required to grant parole to any inmate.

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<sup>2</sup>There is no mention in Pen. Code § 3041.5 of good-time or work-time credits.



1 (b) The panel or the board, sitting en banc, shall set a release date unless it determines that  
2 the gravity of the current convicted offense or offenses, or the timing and gravity of current or  
3 past convicted offense or offenses, is such that consideration of the public safety requires a  
4 more lengthy period of incarceration for this individual, and that a parole date, therefore,  
5 cannot be fixed at this meeting. After the effective date of this subdivision, any decision of  
6 the parole panel finding an inmate suitable for parole shall become final within 120 days of  
7 the date of the hearing. During that period, the board may review the panel's decision. The  
8 panel's decision shall become final pursuant to this subdivision unless the board finds that the  
9 panel made an error of law, or that the panel's decision was based on an error of fact, or that  
10 new information should be presented to the board, any of which when corrected or  
11 considered by the board has a substantial likelihood of resulting in a substantially different  
12 decision upon a rehearing. In making this determination, the board shall consult with the  
13 commissioners who conducted the parole consideration hearing. No decision of the parole  
14 panel shall be disapproved and referred for rehearing except by a majority vote of the board,  
15 sitting en banc, following a public meeting.

16 (c) For the purpose of reviewing the suitability for parole of those inmates eligible for parole  
17 under prior law at a date earlier than that calculated under Section 1170.2, the board shall  
18 appoint panels of at least two persons to meet annually with each inmate until the time the  
19 person is released pursuant to proceedings or reaches the expiration of his or her term as  
20 calculated under Section 1170.2.

21 (d) It is the intent of the Legislature that, during times when there is no backlog of inmates  
22 awaiting parole hearings, life parole consideration hearings, or life rescission hearings,  
23 hearings will be conducted by a panel of three or more members, the majority of whom shall  
24 be commissioners. The board shall report monthly on the number of cases where an inmate  
25 has not received a completed initial or subsequent parole consideration hearing within 30  
26 days of the hearing date required by subdivision (a) of Section 3041.5 or paragraph (2) of  
27 subdivision (b) of Section 3041.5, unless the inmate has waived the right to those  
28 timeframes. That report shall be considered the backlog of cases for purposes of this section,  
and shall include information on the progress toward eliminating the backlog, and on the  
number of inmates who have waived their right to the above timeframes. The report shall be  
made public at a regularly scheduled meeting of the board and a written report shall be made  
available to the public and transmitted to the Legislature quarterly.

(e) For purposes of this section, an en banc review by the board means a review conducted by  
a majority of commissioners holding office on the date the matter is heard by the board. An  
en banc review shall be conducted in compliance with the following:

- (1) The commissioners conducting the review shall consider the entire record of the hearing that resulted in the tie vote.
- (2) The review shall be limited to the record of the hearing. The record shall consist of the transcript or audiotape of the hearing, written or electronically recorded statements actually considered by the panel that produced the tie vote, and any other material actually considered by the panel. New evidence or comments shall not be considered in the en banc proceeding.
- (3) The board shall separately state reasons for its decision to grant or deny parole.
- (4) A commissioner who was involved in the tie vote shall be recused from consideration of the matter in the en banc review.

1 As can readily be seen from the full text of § 3041, no subdivision 3041(a)(2)(3) exists.  
2 Accordingly, the Court cannot address Petitioner’s claim that this non-existent statutory subdivision  
3 violates federal constitutional principles.<sup>3</sup> Moreover, it does not appear that Petitioner is claiming  
4 that an increase in duration between parole hearings violates the ex post facto provisions of the U.S.  
5 Constitution. See Gilman v. Davis, 690 F. Supp. 2d 1105 (E.D. Cal. 2010)(granting injunctive relief  
6 to inmates claiming Proposition 9 violates the federal ex post facto prohibition). Rather, Petitioner  
7 appears to be arguing that he is being exposed to a significant risk of prolonged incarceration by  
8 virtue of losing good-time and/or work-time credits in violation of the ex post facto clause. (Doc. 1,  
9 p. 6; Doc. 11, pp. 2-3).

10 The U.S. Constitution prohibits states from passing any “ex post facto law.” U.S. Const.,  
11 Art. 1, § 10. A law is an ex post facto law if it meets two conditions. First, “it must apply to events  
12 occurring before its enactment.” Weaver v. Graham, 450 U.S. 24, 29, 101 S.Ct. 960 (1981). “In  
13 other words, it must be retrospective.” Hunter v. Ayers, 336 F.3d 1007, 1011 (9<sup>th</sup> Cir. 2003). It must  
14 also disadvantage the person affected by either altering the definition of criminal conduct or  
15 increasing the punishment for the crime. Id. The ex post facto prohibition applies in the context of  
16 prison time credits. Weaver, 450 U.S. at 29 (ex post facto prohibition applied to state statute  
17 reducing the amount of good time credits which could be earned by prisoners); Hunter, 336 F.3d at  
18 1011 (ex post facto prohibition applied to regulations that eliminated restoration of forfeited good  
19 time credits for serious infractions). In the context of prison time credits, “the core question for ex  
20 post facto purposes is whether the changed law imposes ‘punishment more severe than the  
21 punishment assigned by law when the act to be punished occurred.’” Hunter, 336 F.3d at 1011  
22 (quoting Weaver, 450 U.S. at 30).

23 Here, as Respondent correctly notes, Petitioner has failed to articulate a specific deprivation  
24 of credits, referencing instead only a “sufficient risk” of, or theoretical loss of, credits. (Doc. 1, p. 6).  
25 Petitioner has failed to allege his present credit status, he has failed to allege how Proposition 9 has  
26 or would negatively impact his credit-earning status, and he has failed to explain how Proposition 9  
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28 <sup>3</sup>In his opposition to the motion to dismiss, Petitioner refers to Cal. Penal Code § 3041(a)(b). (Doc. 11, p. 3).  
However, that subdivision does not exist either.

1 has either aggravated the factors of his crime or prolonged his term of incarceration. Instead,  
2 Petitioner has made a series of vague, generalized conclusions regarding violations of due process,  
3 ex post facto, and the Sixth Amendment. He has, in short, failed to provide any specific factual or  
4 legal allegations that would permit either Respondent or the Court to fully comprehend how or in  
5 what manner the State of California's passage of Proposition 9 entitles Petitioner to federal habeas  
6 relief.

7 Accordingly, the Court will recommend that Respondent's motion to dismiss for failure to  
8 state a claim should be granted. See Escobedo v. Hartley, 2010 WL 3382405, \* 3 (E.D. Cal. Sept. 9,  
9 2010). However, in an abundance of caution, Petitioner will be granted leave to file an amended  
10 petition within thirty days. If Petitioner chooses to file an amended petition, he must accurately  
11 identify the statute or regulation he claims has worked a deprivation of his good-time and work-time  
12 credits, and he must explain how the statute or regulation he identifies has either aggravated his  
13 crime or prolonged his sentence. Failure to provide such specific factual and legal allegations in the  
14 amended petition will result in a Recommendation that the amended petition be dismissed.

#### 15 **RECOMMENDATION**

16 Accordingly, the Court HEREBY RECOMMENDS as follows:

- 17 1. Respondent's motion to dismiss (Doc. 10), should be DENIED on the grounds that the  
18 petition was untimely under 28 U.S.C. § 2244(d);
- 19 2. Respondent's motion to dismiss should be GRANTED for failure to state a claim upon  
20 which federal habeas relief can be granted;
- 21 3. The petition for writ of habeas corpus should be DISMISSED for failure to state a claim.  
22 Petitioner should be granted leave to file an amended petition stating a cognizable claim  
23 for federal habeas relief.

24 This Findings and Recommendation is submitted to the United States District Court Judge  
25 assigned to this case, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304 of  
26 the Local Rules of Practice for the United States District Court, Eastern District of California.  
27 Within twenty (20) days after being served with a copy, any party may file written objections with  
28 the court and serve a copy on all parties. Such a document should be captioned "Objections to

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

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IT IS SO ORDERED.

Dated: October 14, 2010

/s/ Jennifer L. Thurston  
UNITED STATES MAGISTRATE JUDGE