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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

DANIEL ANDREW DAVIS,

1:10-cv-01304-AWI-DLB (HC)

Petitioner,

FINDINGS AND RECOMMENDATION  
REGARDING RESPONDENT’S MOTION TO  
DISMISS THE INSTANT PETITION

v.

[Doc. 20]

M. MARTEL, Warden

Respondent.

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

BACKGROUND

Following a jury trial, Petitioner was convicted of assault by means of force likely to produce great bodily injury (Cal. Penal Code<sup>1</sup> § 245(a)(1)) and found the accompanying great bodily injury allegation true (§ 12022.7(a)). The court found true two prior serious felony allegations, along with other prior conviction allegations. (§§ 667(b)-(i), 1170.12(a)-(d) & 667.5(b)). Petitioner was sentenced to a twenty-five-years-to-life term plus fifteen years.

The California Court of Appeal affirmed the judgment on January 16, 2008, and the California Supreme Court denied review on October 16, 2008.

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<sup>1</sup> All further statutory references to the charges filed against Petitioner are to the California Penal Code unless otherwise indicated.

1 Petitioner filed a petition for writ of habeas corpus in the California Supreme Court. The  
2 court denied the petition.

3 On February 12, 2010, Petitioner filed the instant federal petition for writ of habeas  
4 corpus. Respondent filed a motion to dismiss on October 20, 2010. Petitioner did not file an  
5 opposition.

## 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 F.  
19 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

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1 S.Ct. 586 (1997). The instant petition was filed on July 12, 2010, and thus, it is subject to the  
2 provisions of the AEDPA.

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

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

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

10 (B) the date on which the impediment to filing an application created by  
11 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;

12 (C) the date on which the constitutional right asserted was initially recognized  
13 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

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

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

18 In most cases, the limitation period begins running on the date that the petitioner’s direct  
19 review became final. Here, on October 16, 2008, the California Supreme Court denied the  
20 Petition for Review. Therefore, direct review became final ninety days later, when the time for  
21 filing a petition for writ of certiorari expired, i.e. January 14, 2009. Bowen v. Roe, 188 F.3d  
22 1157, 1159-1160 (9th Cir. 1999). Therefore, the one year limitations period began on the  
23 following day, January 14, 2009, and absent tolling, was set to expire on January 15, 2010. See  
24 Patterson v. Stewart, 251 F.3d 1243, 1245 (9th Cir. 2001) (holding that Rule 6(a) of the Federal  
25 Rules of Civil Procedure governs the calculation of statutory tolling applicable to the one year  
26 limitations period.)

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

2 Title 28 U.S.C. § 2244(d)(2) states that the “time during which a properly filed  
3 application for State post-conviction or other collateral review with respect to the pertinent  
4 judgment or claim is pending shall not be counted toward” the one year limitation period. 28  
5 U.S.C. § 2244(d)(2). In Carey v. Saffold, the Supreme Court held the statute of limitations is  
6 tolled where a petitioner is properly pursuing post-conviction relief, and the period is tolled  
7 during the intervals between one state court's disposition of a habeas petition and the filing of a  
8 habeas petition at the next level of the state court system. 536 U.S. 214, 215 (2002); see also  
9 Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 1846 (2000).  
10 Nevertheless, state petitions will only toll the one-year statute of limitations under § 2244(d)(2) if  
11 the state court explicitly states that the post-conviction petition was timely or was filed within a  
12 reasonable time under state law. Pace v. DiGuglielmo, 544 U.S. 408 (2005); Evans v. Chavis,  
13 546 U.S. 189 (2006). Claims denied as untimely or determined by the federal courts to have been  
14 untimely in state court will not satisfy the requirements for statutory tolling. Id.

15 At the time Petitioner mailed a petition for post-conviction relief in the California  
16 Supreme Court on August 18, 2009-215 days of the one-year limitation period had elapsed. The  
17 California Supreme Court denied the petition on January 21, 2010. Therefore, the limitations  
18 period resumed the day after the petition was denied.

19 Petitioner mailed the federal petition on July 12, 2010, which was 171 days after the  
20 California Supreme Court denied the petition. (Ex. B, to Amd. Motion.) The federal petition is  
21 untimely because it was filed 386 days after the one-year statute of limitations began – twenty-  
22 one days after the expiration of the one-year limitations period.

23 D. Equitable Tolling

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

1 v. Pac. Enters., 5 F.3d 391, 395 (9th Cir.1993). Petitioner has not presented, nor does this Court,  
2 any basis to equitably toll the limitations period.

3 RECOMMENDATION

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

- 5 1. Respondent’s motion to dismiss be GRANTED; and  
6 2. The instant petition for writ of habeas corpus be DISMISSED with prejudice.

7 This Findings and Recommendation is submitted to the assigned United States District  
8 Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304 of the  
9 Local Rules of Practice for the United States District Court, Eastern District of California.

10 Within thirty (30) days after being served with a copy, any party may file written objections with  
11 the court and serve a copy on all parties. Such a document should be captioned “Objections to  
12 Magistrate Judge’s Findings and Recommendation.” Replies to the objections shall be served  
13 and filed within fourteen (14) days after service of the objections. The Court will then review the  
14 Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that  
15 failure to file objections within the specified time may waive the right to appeal the District  
16 Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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19 IT IS SO ORDERED.

20 **Dated: December 2, 2010**

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