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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TOMMY DAVIDSON,
Petitioner,

v.

AMY MILLER,
Respondent.

Case No. 1:14-cv-00745 AWI MJS (HC)

**FINDINGS AND RECOMMENDATION
REGARDING RESPONDENT'S MOTION
TO DISMISS**

[Doc. 11]

Petitioner is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent is represented in this action by Robert C. Nash, of the Office of the Attorney General for the State of California.

I. BACKGROUND

Petitioner is currently in the custody of the California Department of Corrections pursuant to a judgment of the Superior Court of California, County of Kern, upon being convicted by a jury on March 9, 2010 of first degree murder with a number of special circumstances and sentencing enhancements. (See Lodged Docs. No. 1-2.) On May 18, 2010, Petitioner was sentenced to an indeterminate state prison term of life without the possibility of parole, plus twenty-five (25) years to life, plus an additional twenty-two (22) years. (Id.)

1 On October 31, 2011, the California Court of Appeal, Fifth Appellate District,
2 affirmed the judgment. (Lodged Doc. 2.) Review was denied by the California Supreme
3 Court on February 15, 2012. (Lodged Docs. 3-4.)

4 Starting in January 2013, Petitioner filed three post-conviction collateral
5 challenges with respect to his conviction in the state courts filed as follows:

- 6 1. Kern County Superior Court
7 Filed: January 9, 2013¹;
8 Denied: April 16, 2013;
- 9 2. California Court of Appeal, Fifth Appellate District
10 Filed: May 2, 2013²;
11 Denied: July 26, 2013;
- 12 3. California Supreme Court
13 Filed: September 18, 2013³;
14 Denied: January 21, 2014;

15 (See Lodged Docs. 5-10.)

16 On April 23, 2014, Petitioner filed the instant federal Petition for Writ of Habeas
17 Corpus in this Court.⁴ On August 20, 2014, Respondent filed a Motion to Dismiss the
18 petition as having been filed outside the one-year limitations period prescribed by 28
19 U.S.C. § 2244(d). (Mot. to Dismiss, p.1.) Petitioner filed objections to the motion on
20 September 10, 2014, and Respondent filed a reply on September 17, 2014. (ECF Nos.
21 13-14.)

22 **II. DISCUSSION**

23 **A. Procedural Grounds for Motion to Dismiss**

24 _____
25 ¹ Under the mailbox rule, the Court deems petitions filed on the date Petitioner handed a petition
26 to prison authorities for mailing. Houston v. Lack, 487 U.S. 266, 276, 108 S.Ct. 2379, 2385, 101 L. Ed. 2d
27 245 (1988); Campbell v. Henry, 614 F.3d 1056 (9th Cir. 2010); see also Rule 3(d) of the Rules Governing
28 Section 2254 Cases. Although the petition was filed on January 16, 2013, the petition shall be considered
filed on January 9, 2013, the date Petitioner signed the petition.

² Although the petition was filed on June 4, 2013, the petition shall be considered filed on May 2,
2013, the date Petitioner signed the petition.

³ Although the petition was filed on October 9, 2013, the petition shall be considered filed on
September 18, 2013, the date Petitioner signed the petition.

⁴ Although the petition was filed on May 19, 2014, the petition shall be considered filed on April 23,
2014, the date Petitioner signed the petition.

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

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

15 In this case, Respondent's motion to dismiss is based on a violation of the one-
16 year limitations period. 28 U.S.C. § 2244(d)(1). Because Respondent's motion to dismiss
17 is similar in procedural standing to a motion to dismiss for failure to exhaust state
18 remedies or for state procedural default and Respondent has not yet filed a formal
19 answer, the Court will review Respondent’s motion to dismiss pursuant to its authority
20 under Rule 4.

21 **B. Commencement of Limitations Period Under 28 U.S.C. § 2244(d)(1)(A)**

22 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death
23 Penalty Act of 1996 (hereinafter “AEDPA”). AEDPA imposes various requirements on all
24 petitions for writ of habeas corpus filed after the date of its enactment. Lindh v. Murphy,
25 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th
26 Cir. 1997).

27 In this case, the petition was filed on April 23, 2014 and is subject to the
28 provisions of AEDPA. AEDPA imposes a one-year period of limitation on petitioners

1 seeking to file a federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As
2 amended, § 2244, subdivision (d) reads:

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

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

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

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

12 (D) the date on which the factual predicate of the claim or claims
13 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 claim is pending shall not be counted toward any period of limitation
16 under this subsection.

17 28 U.S.C. § 2244(d).

18 Under § 2244(d)(1)(A), the limitations period begins running on the date that the
19 petitioner's direct review became final or the date of the expiration of the time for seeking
20 such review. In this case, the California Supreme Court denied review on February 15,
21 2012. The state appeal process became final ninety days later, on May 15, 2012, when
22 the time for seeking certiorari with the United States Supreme Court expired. U.S.
23 Supreme Court rule 13; Bowen v. Rowe, 188 F.3d 1157 (9th Cir. 1999). The AEDPA
24 statute of limitations began to run the following day, on May 16, 2012. Patterson v.
25 Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001).

26 Petitioner had one year from May 16, 2012, absent applicable tolling, in which to
27 file his federal petition for writ of habeas corpus. However, Petitioner delayed in filing the
28 instant petition until April 23, 2014, nearly a year after the statute of limitations period

1 expired. Absent the later commencement of the statute of limitations or any applicable
2 tolling, the instant petition is barred by the statute of limitations.

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

4 28 U.S.C. § 2244(d)(2) states that the “time during which a properly filed
5 application for State post-conviction or other collateral review with respect to the
6 pertinent judgment or claim is pending shall not be counted toward” the one year
7 limitation period. 28 U.S.C. § 2244(d)(2). In Carey v. Saffold, the Supreme Court held
8 the statute of limitations is tolled where a petitioner is properly pursuing post-conviction
9 relief, and the period is tolled during the intervals between one state court's disposition of
10 a habeas petition and the filing of a habeas petition at the next level of the state court
11 system. 536 U.S. 214, 216 (2002); see also Nino v. Galaza, 183 F.3d 1003, 1006 (9th
12 Cir. 1999). Nevertheless, state petitions will only toll the one-year statute of limitations
13 under § 2244(d)(2) if the state court explicitly states that the post-conviction petition was
14 timely or was filed within a reasonable time under state law. Pace v. DiGuglielmo, 544
15 U.S. 408 (2005); Evans v. Chavis, 546 U.S. 189 (2006). Claims denied as untimely or
16 determined by the federal courts to have been untimely in state court will not satisfy the
17 requirements for statutory tolling. Id.

18 Petitioner filed his first petition with the Kern County Superior Court on January 9,
19 2013, and his second petition with the California Court of Appeal on May 2, 2013.
20 Respondent concedes that Petitioner is entitled to tolling during the time the petitions
21 were pending in state court and a reasonable period between filing the petitions.
22 However, 238 days of the limitation period passed before the first application was filed.
23 Based on such tolling, 127 days of the limitations period remained when the California
24 Court of Appeal petition was denied on July 26, 2013.

25 Petitioner next filed a petition with the California Supreme Court. (Lodged Doc 9.)
26 The petition is signed on October 1, 2013. However, the proof of service of mailing is
27 dated roughly two weeks earlier on September 19, 2013. (Id.) Due to the inconsistencies
28 in dates, the Court ordered Respondent to provide the prison mail records for the

1 relevant time period. (Order, ECF No. 15.) Respondent provided those records on
2 October 28, 2014, but they do not reflect any outgoing mail during the relevant period.
3 (ECF No. 16.) Respondent notes that there is a record of incoming mail to Petitioner
4 from the California Supreme Court on October 1, 2014. (Id.) Respondent speculates that
5 the record might actually be for the mailing of Petitioner's petition, but mistakenly listed
6 as incoming mail, rather than outgoing mail. Without more, this Court is unable to
7 definitively tell from the mailing log alone when the petition was mailed.

8 While Respondent argues that the petition was provided to prison staff for mailing
9 on October 1, 2013, the date stamps on the petition provide strong evidence that
10 Petitioner mailed the petition in mid-September. The California Supreme Court placed a
11 'filed' stamp on the petition dated on October 9, 2013. Additionally, on the lower right
12 hand corner, the California Supreme Court stamped the petition as 'received' on
13 September 23, 2013. (See Lodged Doc. 9 at 1.) Based on the earlier date that the
14 petition was received, the Court finds it likely that the petition was mailed prior to
15 September 23, 2103, and that Petitioner is entitled to the filing date of September 18,
16 2013, the date placed on the proof of service of mailing.

17 In producing the mail logs, Respondent argues that Petitioner could not have
18 validly filed the application prior to signing, and is only entitled to a filing date on October
19 1, 2013. Respondent refers to state law for the proposition that petitions must be verified
20 to be properly filed in state court. (Response, ECF No. 16 at 3, citing Cal Penal Code §
21 1474(3); People v. Madaris, 122 Cal. App. 3d 234, 241 (1981); People v. Adams, 101
22 Cal. App. 3d 791, 802 (1980).) However, in this case, Petitioner did verify the petition. It
23 appears he inserted the wrong date. Respondent has not provided any authority
24 suggesting such an error would nullify Petitioner's verification. The California Supreme
25 Court, in reviewing the petition, denied the petition on other grounds. (See Lodged Doc.
26 10.)

27 Respondent has provided no authority to suggest that an improper verification
28 would deprive Petitioner of the benefit of the mailbox rule as established under federal

1 law. See Houston v. Lack, 487 U.S. 266, 276, 108 S.Ct. 2379, 2385, 101 L. Ed. 2d 245
2 (1988); Campbell v. Henry, 614 F.3d 1056 (9th Cir. 2010). As the Supreme Court
3 explained in Houston v. Luck, the mailbox rule was created based on the need to create
4 a straightforward method to determine the date of mailing. Houston, 487 U.S. at 275
5 ("The pro se prisoner does not anonymously drop his notice of appeal in a public
6 mailbox -- he hands it over to prison authorities who have well-developed procedures for
7 recording the date and time at which they receive papers for mailing and who can readily
8 dispute a prisoner's assertions that he delivered the paper on a different date. Because
9 reference to prison mail logs will generally be a straightforward inquiry, making filing turn
10 on the date the pro se prisoner delivers the notice to prison authorities for mailing is a
11 bright-line rule, not an uncertain one.") Based on the record before the Court, the Court
12 finds that Petitioner is entitled to the earlier filing date of September 18, 2013, the date
13 that Petitioner verified as the date of mailing on the proof of service.

14 Thus, Petitioner's California Court of Appeal decision was denied on July 26,
15 2013, and Petitioner filed his California Supreme Court decision 54 days later on
16 September 18, 2013. In Evans v. Chavis, 546 U.S. 189, 201 (2006) the Supreme Court
17 ruled that a delay of six months between the denial of a petition and the filing of another
18 was an "unjustified delay," The Court stated, "Six months is far longer than the 'short
19 periods of time,' 30 to 60 days, that most States provide for filing an appeal to the state
20 supreme court." Id. As petitioner filed his petition in less than sixty days, the court finds
21 that the petition is entitled to interval tolling during the time between petitions and during
22 the time the petition was pending. See Velasquez v. Kirkland, 639 F.3d 964 (9th Cir.
23 2011). Therefore 127 days of the limitations period remained when the Supreme Court
24 Petition was denied on January 21, 2014.

25 Petitioner filed the instant petition 92 days later on April 23, 2014. As 35 days of
26 the limitations period remained, the petition was timely filed. The Court recommends that
27 the motion to dismiss be denied with respect to the untimeliness claim.
28

1 **D. Exhaustion**

2 **1. Applicable Law**

3 As a matter of comity, a federal court will not grant habeas relief to a petitioner
4 held in state custody unless he has exhausted the available state judicial remedies on
5 every ground presented in the petition. 28 U.S.C. § 2254(b)(1)(A); Rose v. Lundy, 455
6 U.S. 509, 518-22, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982). "[T]he exhaustion doctrine is
7 designed to give the state courts a full and fair opportunity to resolve federal
8 constitutional claims before those claims are presented to the federal courts." O'Sullivan
9 v. Boerckel, 526 U.S. 838, 845, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999); see also
10 Baldwin v. Reese, 541 U.S. 27, 29, 124 S. Ct. 1347, 158 L. Ed. 2d 64 (2004) (to give the
11 State the chance to pass upon and resolve violations of his federal rights, a state
12 prisoner must exhaust available state remedies before seeking federal habeas relief).

13 Exhaustion requires that the petitioner's contentions be "fairly presented" to the
14 state courts and disposed of on the merits by the highest court of the state. See James
15 v. Borg, 24 F.3d 20, 24 (9th Cir. 1994); Carothers v. Rhay, 594 F.2d 225, 228 (9th Cir.
16 1979). A claim has not been "fairly presented" unless the prisoner has described in the
17 state court proceedings both the operative facts and the federal legal theory on which
18 the claim is based. Gray v. Netherland, 518 U.S. 152, 162-163, 116 S. Ct. 2074, 135 L.
19 Ed. 2d 457 (1996); Davis v. Silva, 511 F.3d 1005, 1009 (9th Cir. 2008); Castillo v.
20 McFadden, 399 F.3d 993, 999 (9th Cir. 2005). Thus, a claim is unexhausted where the
21 petitioner did not fairly present either the factual or the legal basis for the claim to the
22 state's highest court. See Picard v. Connor, 404 U.S. 270, 275, 92 S. Ct. 509, 30 L. Ed.
23 2d 438 (1971).

24 Petitioner has the burden of demonstrating that he has exhausted available state
25 remedies. See, e.g., Williams v. Craven, 460 F.2d 1253, 1254 (9th Cir. 1972); Werts v.
26 Vaughn, 228 F.3d 178, 192 (3rd Cir. 2000). For purposes of exhaustion, the petition
27 "must be read in context and understood based on the particular words used." Peterson
28 v. Lampert, 319 F.3d 1153, 1159 (9th Cir. 2003) (en banc); Davis, 511 F.3d at 1009

1 (citations and quotations omitted). The exhaustion requirement is not meant to "trap the
2 unwary pro se prisoner." Slack v. McDaniel, 529 U.S. 473, 487, 120 S. Ct. 1595, 146 L.
3 Ed. 2d 542 (2000). Rather, "the [Supreme] Court has held pro se pleadings to a less
4 stringent standard than briefs by counsel and reads pro se pleadings generously,
5 'however inartfully pleaded.'" Davis, 511 F.3d at 1009 n. 4 (citing Haines v. Kerner, 404
6 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972) (per curiam)).

7 **2. Review of Petitioner's Claims**

8 Petitioner raises seven claims in the instant Petition: (1) Failure to grant defense
9 counsel's request to allow witnesses to testify in a closed courtroom because they feared
10 for their safety violated Petitioner's Sixth Amendment right to present a defense and right
11 to compulsory process; (2) The trial court erred when it struck the testimony of Myja
12 Gardner, denying Petitioner his state and federal right to a fair trial; (3) The trial court
13 erred when it allowed the prosecution to admit propensity evidence in the guise of expert
14 opinion; (4) The denial of Petitioner's motion for juror identification deprived Petitioner of
15 effective assistance of counsel because counsel could not adequately investigate
16 potential juror misconduct; (5) There was insufficient evidence to prove the gang
17 enhancement and special circumstance; (6) Petitioner's counsel was ineffective in
18 failing to investigate and present potential favorable evidence on behalf of Petitioner by
19 not cross-examining witnesses against him; and (7) The trial court violated the
20 defendant's constitutional rights to due process under the Sixth and Fourteenth
21 Amendments by failing to instruct the jury of the factual elements of the charge of active
22 participation in a criminal street gang. (Pet.)

23 On December 1, 2011, Petitioner filed a petition for review in the California
24 Supreme Court raising the following five arguments: (1) "Failure to grant defense
25 counsel's request to allow Myja Gardner and Deandra Key to testify in a closed
26 courtroom because they feared for their safety from the Eastside Crips violated
27 Appellant's Sixth Amendment right to present a defense and right to compulsory
28 process;" (2) "The trial court erred when it struck the testimony of Myja Gardner, denying

1 Appellant his state and federal right to a fair trial;" (3) "The trial court erred when it
2 allowed the prosecution to admit propensity evidence in the guise of expert opinion;" (4)
3 "Appellant's motion for juror identification information should have been granted;" and (5)
4 "The evidence is insufficient to prove the gang enhancement, Penal Code section
5 186.22, subdivision (b)(1) and the gang special circumstance, Penal Code section 190.2,
6 subdivision (a)(22)." (Lod. Doc. 3.)

7 On October 1, 2013, Petitioner filed a petition for writ of habeas corpus in the
8 California Supreme Court raising the following three claims: (1) "The trial court violated
9 defendant's constitutional right to due process under the Sixth Amendment by failing to
10 instruct the jury of the factual elements that the prosecution was required to prove before
11 the jury could properly find true the defendant active[ly] participated in a criminal street
12 gang within the definition of 186.22(a);" (2) "The trial court erred in allowing the
13 admissibility of witness Antoinette Mitchell's testimony, it was irrelevant, speculative
14 hearsay testimony that lacked foundation that Appellant was an 'active participant' in a
15 criminal street gang and that the offense was gang related;" and (3) "Appellant received
16 ineffective assistance of counsel when counsel's representation fell below the objective
17 standard by not providing legal assistance. Counsel failed to investigate and present
18 potential favorable evidence on behalf of Appellant by not cross-examining witnesses
19 presented against him." (Lod. Doc. 9.)

20 Respondent does not challenge exhaustion with regard to the first five claims of
21 the instant petition that were presented on direct appeal. However, Respondent asserts
22 that claims six and seven, presented in Petitioner's state habeas corpus petitions, were
23 not properly exhausted. Claims six and seven of the instant petition were presented to
24 the California Supreme Court (Lodged Doc. 9.) The California Supreme Court denied the
25 petition with citations to People v. Duvall, 9 Cal.4th 464, 474 (1995); In re Dixon, 41
26 Cal.2d 756, 759 (1953); In re Swain, 34 Cal.2d 300, 304 (1949); and In re Lindley, 29
27 Cal.2d 709, 723 (1947). (Lodged Doc. 10.)

28 Respondent asserts that the citations to In re Swain and People v. Duvall

1 reference the California rule that, to meet his initial burden of pleading adequate grounds
2 for relief, a California habeas petitioner must state fully and with particularity the facts
3 upon which relief is sought. See People v. Duvall, 9 Cal.4th at 474; In re Swain, 34
4 Cal.2d at 303-04; see also Gaston v. Palmer, 417 F.3d 1030, 1038-39 (9th Cir. 2005).⁵
5 The failure to meet the pleading requirements of Duvall and Swain can be cured in a
6 renewed petition. See Kim v. Villalobos, 799 F.2d 1317, 1319 (9th Cir. 1986). Thus,
7 where the California Supreme Court denies a habeas petition with citations to Duvall or
8 Swain, the denial can signify a failure to exhaust available state remedies. See Kim, 799
9 F.2d at 1319. However, a federal habeas court must examine independently the
10 sufficiency of the petitioner's California Supreme Court petition, and will reach the merits
11 of the claims where the state petition presented the claims "with as much particularity as
12 is practicable[.]" *Id.* at 1320.

13 Applying the independent examination required by the decision in Kim to this
14 case, the Court finds that Petitioner's claims were fairly presented with as much
15 particularity as practicable in his habeas petition filed in the California Supreme Court.
16 Kim, 799 F.2d at 1320. In the first habeas claim presented to the California Supreme
17 Court, Petitioner argued that the trial court violated defendant's constitutional right to due
18 process under the Sixth Amendment by failing to instruct the jury of the factual elements
19 required to show that defendant actively participated in a criminal street gang within the
20 definition of Cal. Penal Code § 186.22(a). (See Lodged Doc. 9 at 4-14.) Specifically,
21 Petitioner presents the state court the relevant federal and state law regarding due
22 process requirements (Lodged Doc. 9 at 4-5), explains why the burden of proof from
23 proving enhancements is the same as for criminal offenses (*Id.* at 6-7), and provides
24 significant factual support for his argument, including many cites to the transcript of the
25 trial. (*Id.* at 1-14.)

26 ⁵ A citation to Swain can also signify that the court deemed the petition to be untimely, see Bennett
27 v. Mueller, 322 F.3d 573, 578-79 (9th Cir. 2003), but when accompanied by a citation to Duvall, a citation
28 to Swain indicates dismissal for lack of particularity. See Pombrio v. Hense, 631 F.Supp.2d 1247, 1252
(C.D. Cal. 2009).

1 In his third claim for relief in California Supreme Court habeas petition, Petitioner
2 claims that he received ineffective assistance of counsel based on counsel's failure to
3 cross examine the prosecution's witnesses. (Lodged Doc. 9 at 20-24.) In his claim
4 Petitioner presents the relevant federal authority for the claim and provides factual
5 support, including describing the witnesses that counsel failed to cross-examine. (Id. at
6 21, 23-24.)

7 The Court finds that Petitioner's claims were fairly presented to the California
8 Supreme Court, with as much particularity as practicable. Kim, 799 F.2d at 1320.
9 Respondent provides no basis to conclude otherwise. (See, generally, Motion to Dismiss
10 at 1-6; Opposition to Motion to Amend at 12-13.) Therefore, Respondent's Motion to
11 Dismiss this action due to Petitioner's failure to satisfy the exhaustion requirement
12 should be denied. See, e.g., Nguon v. Walker, 2011 U.S. Dist. LEXIS 87223, 2011 WL
13 3501011, at *3-*4 (E.D. Cal. 2011) (denying motion to dismiss petition as unexhausted
14 despite the fact that California Supreme Court denied habeas petition with citation to
15 Duvall, because independent examination of the state petition revealed that petitioner's
16 claims were "fairly presented to the California Supreme Court, with as much
17 particular[ity] as practicable").

18 **III. CONCLUSION**

19 As explained above, Petitioner filed the petition within the one year limitations
20 period and presented claims six and seven of the petition with as much particularity as
21 practicable. This Court recommends that Respondent's Motion to Dismiss be DENIED.

22 **IV. RECOMMENDATION**

23 Accordingly, the Court HEREBY RECOMMENDS that the motion to dismiss for
24 Petitioner's failure to comply with 28 U.S.C. § 2244(d)'s one year limitation period and
25 failure to exhaust state remedies under 28 U.S.C. § 2254(b) be DENIED.

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

1 District of California. Within thirty (30) days after the date of service of this Findings and
2 Recommendation, any party may file written objections with the Court and serve a copy
3 on all parties. Such a document should be captioned "Objections to Magistrate Judge's
4 Findings and Recommendation." Replies to the Objections shall be served and filed
5 within fourteen (14) days after service of the Objections. The Finding and
6 Recommendation will then be submitted to the District Court for review of the Magistrate
7 Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(c). The parties are advised that failure
8 to file objections within the specified time may result in the waiver of rights on appeal.
9 Wilkerson v. Wheeler, __ F.3d __, __, No. 11-17911, 2014 WL 6435497, at *3 (9th Cir.
10 Nov. 18, 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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IT IS SO ORDERED.

Dated: November 26, 2014

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE