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8 **UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**
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11 ARTHUR OCHOA,

12 Petitioner,

13 v.

14 FEDERAL DISTRICT COURTS,¹

15 Respondent.

Case No. 1:16-cv-00575-DAD-SAB-HC

FINDINGS AND RECOMMENDATION
RECOMMENDING DISMISSAL OF
PETITION FOR WRIT OF HABEAS
CORPUS

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

19 **I.**

20 **BACKGROUND**

21 On April 20, 2016,² Petitioner filed the instant petition for writ of habeas corpus. (ECF
22 No. 1). On May 25, 2016, the Court ordered Petitioner to show cause why the petition should not

23 ¹ The Court notes that Petitioner has not named a proper Respondent, such as the warden of the facility in which he
24 is held or the chief officer in charge of state penal institutions. See Rule 2(a), Rules Governing Section 2254 Cases;
25 Rumsfeld v. Padilla, 542 U.S. 426, 435 (2004); Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996). The
26 Court previously gave Petitioner an opportunity to amend the name of Respondent, but Petitioner failed to do so.
27 Moreover, amendment is futile because the Court recommends that the petition be dismissed for nonexhaustion and
28 untimeliness.

² Pursuant to the mailbox rule, a *pro se* prisoner's habeas petition is filed "at the time . . . [it is] delivered . . . to the
prison authorities for forwarding to the court clerk." Hernandez v. Spearman, 764 F.3d 1071, 1074 (9th Cir. 2014)
(alteration in original) (internal quotation marks omitted) (quoting Houston v. Lack, 487 U.S. 266, 276 (1988)). See
also Rule 3(d), Rules Governing Section 2254 Cases. Petitioner has submitted a proof of service by mail for the
petition showing he mailed it on April 20, 2016. (ECF No. 1 at 5).

1 be dismissed for nonexhaustion and untimeliness. (ECF No. 6). On May 25, 2016, the order to
2 show cause was served on Petitioner and contained notice that a response should be filed within
3 thirty days of the date of service of the order. Over thirty days have passed and Petitioner has not
4 responded to the Court’s order to show cause.

5 **II.**

6 **DISCUSSION**

7 Rule 4 of the Rules Governing Section 2254 Cases requires preliminary review of a
8 habeas petition and allows a district court to dismiss a petition before the respondent is ordered
9 to file a response, if it “plainly appears from the petition and any attached exhibits that the
10 petitioner is not entitled to relief in the district court.”

11 **A. Exhaustion**

12 A petitioner in state custody who is proceeding with a petition for writ of habeas corpus
13 must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The exhaustion doctrine is based
14 on comity to the state court and gives the state court the initial opportunity to correct the state’s
15 alleged constitutional deprivations. Coleman v. Thompson, 501 U.S. 722, 731 (1991); Rose v.
16 Lundy, 455 U.S. 509, 518 (1982). A petitioner can satisfy the exhaustion requirement by
17 providing the highest state court with a full and fair opportunity to consider each claim before
18 presenting it to the federal court. O’Sullivan v. Boerckel, 526 U.S. 838, 845 (1999); Duncan v.
19 Henry, 513 U.S. 364, 365 (1995); Picard v. Connor, 404 U.S. 270, 276 (1971).

20 Here, it is unclear whether Petitioner raised his claims before the California Supreme
21 Court. It is possible that Petitioner presented all of his claims to the California Supreme Court
22 and failed to indicate this to the Court, but as Petitioner has not responded to the order to show
23 cause, it appears that Petitioner failed to exhaust his claims in the instant petition. If Petitioner
24 has not sought relief in the California Supreme Court, the Court cannot proceed to the merits of
25 those claims. 28 U.S.C. § 2254(b)(1).

26 **B. Statute of Limitations**

27 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act
28 of 1996 (“AEDPA”). The AEDPA imposes various requirements on all petitions for writ of

1 habeas corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320 (1997);
2 Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc). The instant petition was filed
3 after the enactment of the AEDPA and is therefore governed by its provisions.

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

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

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

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

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

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

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

20 28 U.S.C. § 2244(d).

21 In most cases, the limitation period begins running on the date that the petitioner's direct
22 review became final. In this case, it is unclear when direct review became final. The petition only
23 states that Petitioner was convicted on January 29, 2009, and appealed to the California Court of
24 Appeals, Fifth Appellate District. (ECF No. 1 at 1, 3).³ Petitioner had one year from the
25 conclusion of direct review, absent applicable tolling, in which to file his federal petition for writ
26 of habeas corpus. It appears that Petitioner may have filed the instant petition beyond the
27 expiration of the statute of limitations because it has been more than seven years since

28 ³ Page numbers refer to the ECF page numbers stamped at the top of the page.

1 Petitioner’s conviction and the petition itself states that Petitioner’s “delay in claimed grounds
2 for relief” was due to not having “new evidence.” (ECF No. 1 at 3).

3 1. Statutory Tolling Pursuant to 28 U.S.C. § 2244(d)(2)

4 Section 2244(d)(2) states that the “time during which a properly filed application for
5 State post-conviction or other collateral review with respect to the pertinent judgment or claim is
6 pending shall not be counted toward” the one-year limitation period. Petitioner states that he
7 currently has a state habeas corpus petition “in process seeking relief through SB 261 bill.” (ECF
8 No. 1 at 4). If the limitations period had already expired at the time the state collateral challenge
9 was filed, the collateral challenge has no tolling consequences. See Green v. White, 223 F.3d
10 1001, 1003 (9th Cir. 2000). As Petitioner has not responded to the order to show cause, it is
11 unclear whether Petitioner is entitled to statutory tolling.

12 2. Equitable Tolling

13 The limitations period also is subject to equitable tolling if the petitioner demonstrates
14 ““(1) that he has been pursuing his rights diligently, and (2) that some extraordinary
15 circumstance stood in his way’ and prevented timely filing.” Holland v. Florida, 560 U.S. 631,
16 649 (2010) (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)). Petitioner bears the burden
17 of alleging facts that would give rise to tolling. Holland, 560 U.S. at 649; Pace, 544 U.S. at 418.
18 The petition states that Petitioner’s delay in filing the instant federal petition was due to not
19 having new evidence. However, as Petitioner failed to respond to the order to show cause,
20 Petitioner has not explained how lack of new evidence prevented him from timely filing and or
21 demonstrated that he has been pursuing his rights diligently.

22 **III.**

23 **RECOMMENDATION**

24 Accordingly, IT IS HEREBY RECOMMENDED that the petition for writ of habeas
25 corpus be DISMISSED WITHOUT PREJUDICE for nonexhaustion and untimeliness.

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

1 **THIRTY (30) days** after service of the Findings and Recommendation, any party may file
2 written objections with the court and serve a copy on all parties. Such a document should be
3 captioned “Objections to Magistrate Judge’s Findings and Recommendation.” Replies to the
4 objections shall be served and filed within fourteen (14) days after service of the objections. The
5 assigned United States District Court Judge will then review the Magistrate Judge’s ruling
6 pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within
7 the specified time may waive the right to appeal the District Court’s order. Wilkerson v.
8 Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th
9 Cir. 1991)).

10 IT IS SO ORDERED.

11 Dated: July 22, 2016

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14 UNITED STATES MAGISTRATE JUDGE
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