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7 **UNITED STATES DISTRICT COURT**  
8 **EASTERN DISTRICT OF CALIFORNIA**  
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10 JUAN MANUEL MONTENEGRO FLORES,

11 Petitioner,

12 v.

13 DAVID BAUGHMAN,<sup>1</sup>

14 Respondent.

Case No. 1:18-cv-00707-LJO-SAB-HC

FINDINGS AND RECOMMENDATION TO  
GRANT RESPONDENT'S MOTION TO  
DISMISS AND DISMISS FIRST AMENDED  
PETITION FOR WRIT OF HABEAS  
CORPUS

ORDER DIRECTING CLERK OF COURT  
TO SUBSTITUTE DAVID BAUGHMAN AS  
RESPONDENT

(ECF Nos. 20, 22)

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

20 **I.**

21 **BACKGROUND**

22 On June 26, 2007, Petitioner pleaded guilty in the Tulare County Superior Court to two  
23 counts of attempted murder. Petitioner was sentenced to an imprisonment term of thirty-nine  
24 years and four months. (LD<sup>2</sup> 1). On May 6, 2011, the California Court of Appeal, Fifth Appellate  
25 District affirmed the judgment. (LD 2). Petitioner did not seek review in the California Supreme  
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27 <sup>1</sup> David Baughman is the Warden of California State Prison - Sacramento, where Petitioner is currently incarcerated.  
(ECF No. 22 at 1 n.1). Accordingly, David Baughman is substituted as Respondent in this matter. See Ortiz-  
Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996).

28 <sup>2</sup> "LD" refers to the documents electronically lodged by Respondent on March 29, 2019. (ECF No. 23).

1 Court. Petitioner subsequently filed five state post-conviction collateral challenges, which were  
2 all denied. (LDs 3–12).

3 On May 21, 2018,<sup>3</sup> Petitioner constructively filed a federal petition for writ of habeas  
4 corpus. (ECF No. 1). On December 12, 2018, the Court dismissed the petition due to Petitioner’s  
5 failure to sign the petition under penalty of perjury. The Court granted Petitioner leave to file an  
6 amended petition. (ECF No. 16).

7 On January 22, 2019, Petitioner constructively filed the first amended petition. (ECF No.  
8 20). On March 29, 2019, Respondent filed a motion to dismiss the first amended petition as  
9 untimely, or in the alternative to dismiss because ground two is unexhausted and ground one is  
10 not a cognizable federal claim. (ECF No. 22). Petitioner has not filed an opposition to the motion  
11 to dismiss, and the time for doing so has passed.

## 12 II.

### 13 DISCUSSION

14 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act  
15 of 1996 (“AEDPA”). AEDPA imposes various requirements on all petitions for writ of habeas  
16 corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320 (1997); Jeffries v.  
17 Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc). The first amended petition was filed after  
18 the enactment of AEDPA and is therefore governed by its provisions.

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

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

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

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26 <sup>3</sup> Pursuant to the mailbox rule, a pro se prisoner’s habeas petition is filed “at the time . . . [it is] delivered . . . to the  
27 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)). The  
28 mailbox rule applies to both federal and state habeas petitions. Campbell v. Henry, 614 F.3d 1056, 1059 (9th Cir.  
2010). Respondent applies the mailbox rule in the motion to dismiss. (ECF No. 22 at 2 n.2).

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

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

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

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

16 28 U.S.C. § 2244(d).

#### 17 **A. Commencement of Limitation Period**

18 In most cases, the limitation period begins running on the date that the petitioner’s direct  
19 review became final or the expiration of the time for seeking such review. In his first claim,  
20 Petitioner seeks relief based on People v. Rodriguez, 47 Cal. 4th 501 (Cal. 2009), and People v.  
21 Le, 61 Cal. 4th 416 (Cal. 2015). (ECF No. 1 at 4).<sup>4</sup> Accordingly, the Court will determine  
22 whether § 2244(d)(1)(B)–(D) are applicable and entitle Petitioner to a later commencement of  
23 the limitation period.

24 Section 2244(d)(1)(B) provides that the one-year limitation period begins to run from the  
25 date on which a state-created impediment, in violation of the Constitution or laws of the United  
26 States, is removed. 28 U.S.C. § 2244(d)(1)(B). The Ninth Circuit has held that a state court  
27 decision announcing a new interpretation or clarification of state law does not constitute a state-  
28 created impediment under § 2244(d)(1)(B). Shannon v. Newland, 410 F.3d 1083, 1087–88 (9th  
Cir. 2005). Thus, Rodriguez and Le are not a state-created impediment, and § 2244(d)(1)(B) is  
inapplicable.

Section 2244(d)(1)(C) provides that the one-year limitation period begins to run from the  
date on which a “newly recognized” constitutional right, made retroactively applicable to cases

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<sup>4</sup> Page numbers refer to the ECF page numbers stamped at the top of the page.

1 on collateral review, was initially recognized by the Supreme Court. 28 U.S.C. § 2244(d)(1)(C).  
2 Rodriguez held that California Penal Code section 1170.1(f) bars the imposition of both a  
3 firearm enhancement under section 12022.5(a)(1) and a gang enhancement under section  
4 186.22(b)(1)(C) in connection with a single offense. Rodriguez, 47 Cal. 4th at 508. Le held that  
5 California Penal Code section 1170.1(f) bars the imposition of both a firearm enhancement under  
6 section 12022.5(a)(1) and a gang enhancement under section 186.22(b)(1)(B) in connection with  
7 a single offense, when the offense qualifies as a serious felony solely because it involved firearm  
8 use. Le, 61 Cal. 4th at 429. Rodriguez and Le are California Supreme Court cases that concerned  
9 the interpretation of a California state statute, and thus, did not involve newly recognized  
10 constitutional rights made retroactively applicable to cases on collateral review by the United  
11 States Supreme Court. Accordingly, § 2244(d)(1)(C) is inapplicable.

12 Section 2244(d)(1)(D) provides that the one-year limitation period begins to run from  
13 “the date on which the factual predicate of the claim or claims presented could have been  
14 discovered through the exercise of due diligence.” 28 U.S.C. § 2244(d)(1)(D). The Ninth Circuit  
15 has held that a state court decision announcing a new interpretation or clarification of state law  
16 does not constitutes a “factual predicate” under § 2244(d)(1)(D). Shannon, 410 F.3d at 1089.  
17 Accordingly, § 2244(d)(1)(D) is inapplicable.

18 Based on the foregoing, § 2244(d)(1)(A) is applicable in the instant case and the  
19 limitation period began running on the date that Petitioner’s direct review became final. Here, as  
20 Petitioner did not appeal to the California Supreme Court, his judgment became final when his  
21 time for seeking review with the state’s highest court expired. See Gonzalez v. Thaler, 565 U.S.  
22 134, 150 (2012). The time to seek review with the California Supreme Court expired on June 15,  
23 2011, forty days after the Court of Appeal’s decision was filed. See Cal. R. Ct. 8.366(b)(1) (“[A]  
24 Court of Appeal decision . . . is final in that court 30 days after filing.”); Cal. R. Ct. 8.500(e)(1)  
25 (“A petition for review must be . . . filed within 10 days after the Court of Appeal decision is  
26 final in that court.”). The one-year limitation period commenced running the following day, June  
27 16, 2011, and absent tolling, was set to expire on June 15, 2012. See Patterson v. Stewart, 251  
28 F.3d 1243, 1246 (9th Cir. 2001) (citing Fed. R. Civ. P. 6(a)).



1 Further, the Clerk of Court is DIRECTED to substitute David Baughman as Respondent  
2 in this matter.

3 This Findings and Recommendation is submitted to the assigned United States District  
4 Court Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local  
5 Rules of Practice for the United States District Court, Eastern District of California. Within  
6 **THIRTY (30) days** after service of the Findings and Recommendation, any party may file  
7 written objections with the court and serve a copy on all parties. Such a document should be  
8 captioned “Objections to Magistrate Judge’s Findings and Recommendation.” Replies to the  
9 objections shall be served and filed within fourteen (14) days after service of the objections. The  
10 assigned United States District Court Judge will then review the Magistrate Judge’s ruling  
11 pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within  
12 the specified time may waive the right to appeal the District Court’s order. Wilkerson v.  
13 Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th  
14 Cir. 1991)).

15 IT IS SO ORDERED.

16 Dated: May 8, 2019

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19 UNITED STATES MAGISTRATE JUDGE  
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