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7 8		TATES DISTRICT COURT
	IN THE UNITED STATES DISTRICT COURT	
9	FOR THE EASTERN DISTRICT OF CALIFORNIA	
10	CHARLES SHELDON McGEE, Jr.,	
11	Petitioner,	No. CIV S-09-2127 MCE DAD P
12	VS.	
13	JAMES A. YATES <sup>1</sup> ,	ORDER AND
14	Respondent.	FINDINGS AND RECOMMENDATIONS
15	/	
16	Petitioner is a state prisoner proceeding pro se with a petition for a writ of habeas	
17	corpus pursuant to 28 U.S.C. § 2254. Before the court is respondent's motion to dismiss the	
18	petition as untimely under the applicable one-year statute of limitations.	
19	<b>RESPONDENT'S MOTION</b>	
20	In moving to dismiss, respondent provides the following chronology of events	
21	surrounding petitioner's conviction, state court appeals and post-conviction collateral challenges	
	surrounding petitioner's conviction, state co	ourt appeals and post-conviction collateral challenges
22	surrounding petitioner's conviction, state co to his judgment of conviction.	ourt appeals and post-conviction collateral challenges
22 23		ourt appeals and post-conviction collateral challenges
	to his judgment of conviction.	t that petitioner was transferred from Mule Creek
23	to his judgment of conviction. <sup>1</sup> Respondent has informed the cour State Prison to Pleasant Valley State Prison warden at Pleasant Valley State Prison. The	

On April 25, 2003, petitioner was convicted following a jury trial in the Yolo County Superior Court of second degree robbery, assault with a deadly weapon, and failure to register as a sex offender. On August 4, 2003, petitioner was sentenced to thirty years to life in state prison. (Lodg. Doc. 1.)

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On April 15, 2005, the California Court of Appeal for the Third Appellate
District, reversed petitioner's judgment of conviction on the charge of failing to register as a sex
offender and struck the related prison term enhancements. (Lodg. Doc. 2.) The judgment of
conviction was affirmed in all other respects. (Id.) No petition for review was filed on
petitioner's behalf in the California Supreme Court.

Several years later, on January 9, 2009, petitioner filed a habeas petition with the
California Supreme Court. On June 24, 2009, that petition was denied as untimely as indicated
by the California Supreme Court's citation to <u>In re Robbins</u>, 18 Cal. 4th 770, 780 (1998) in
denying relief.

In moving to dismiss the pending federal petition, respondent argues that pursuant 14 15 to California Rules of Court 8.264 and 8.500 a petition for review to the California Supreme 16 Court must be filed within forty-days of the decision by the California Court of Appeals. 17 Respondent observes that since no petition for review was filed on petitioner's behalf, the state 18 court judgment became final on May 25, 2005, forty-days after the decision of the Court of 19 Appeals was issued. According to respondent, the statute of limitations for petitioner's filing of 20 a federal habeas petition therefore began to run on May 26, 2005, and would have expired on 21 May 25, 2006, absent any tolling. Respondent argues that because petitioner did not file any 22 post-conviction collateral challenges to his conviction in state court within the one-year 23 limitations period, there can be no statutory tolling of the federal statute of limitations. 24 Respondent also contends that because petitioner's habeas petition filed with the California 25 Supreme Court was denied with a citation to Robbins, that petition was not properly filed for purposes of 28 U.S.C. § 2244(d)(2). Accordingly, respondent argues, the untimely state court 26

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petition cannot serve to toll the statute of limitations while it was pending before the California 1 2 Supreme Court. Petitioner has filed no opposition to respondent's motion to dismiss his federal 3 4 habeas petition. 5 ANALYSIS Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a 6 7 one-year statute of limitations applies to a petition for writ of habeas corpus filed in federal court 8 by a person in custody pursuant to the judgment of a state court. 28 U.S.C.  $\S$  2244(d)(1). The 9 period of limitation applies to all federal habeas petitions filed after the statute was enacted. 10 Lindh v. Murphy, 521 U.S. 320, 322-23 (1997). Because this action was commenced in 2009, 11 the AEDPA period of limitation is applicable to the petition. 12 Under 28 U.S.C. § 2244(d)(1), the statute of limitations begins to run from the 13 latest of: (A) date on which judgment became final by the conclusion of direct 14 review or that time period; 15 (B) date on which the impediment to filing an application is removed; 16 (C) date on which the constitutional right asserted was initially recognized 17 by the Supreme Court; or 18 (D) date on which the factual predicate of the claim(s) could have been discovered 19 20 In this case, under § 2244(d)(1)(A), petitioner's judgment of conviction became 21 final on May 25, 2005, after the expiration of the forty-days during which a petition for review 22 could have been filed with the California Supreme Court. See California Rules of Court, Rules 23 8.264 (former Rule 24(b)) and 8.500 (formerly Rule 28). The statute of limitations for the filing of an application for federal habeas relief therefore began to run on May 26, 2005, and ran 24 25 uninterrupted until it expired on May 26, 2006. Although petitioner eventually filed a state 26 habeas petition with the California Supreme Court, that petition was filed over 2-1/2 years after

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1	the statute of limitations for the filing of a federal petition had expired. Once the federal statute	
2	of limitations has expired, a subsequently filed state habeas petition cannot revive the statute of	
3	limitations and has no tolling effect. Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir.) ("[W]e	
4	hold that section 2244(d) does not permit the reinitiation of the limitations period that has ended	
5	before the state petition was filed."); Jiminez v. Rice, 276 F.3d 478, 482 (9th Cir. 2001) (holding	
6	that where petitioner filed his state post-conviction relief proceeding "after the AEDPA statute of	
7	limitations ended [t]hat delay resulted in an absolute time bar"); see also Rashid v.	
8	Khulmann, 991 F. Supp. 254, 259 (S.D. N.Y., 1998) ("The tolling provision does not	
9	"revive" the limitations period (i.e., restart the clock at zero); it can only serve to pause a clock	
10	that has not yet fully run. Once the limitations period is expired, collateral petitions can no	
11	longer serve to avoid a statute of limitations.").	
12	Therefore, petitioner's federal habeas petition is untimely and respondent's	
13	motion to dismiss that petition should be granted.	
14	CONCLUSION	
15	In accordance with the above, IT IS HEREBY ORDERED that:	
16	1. The Clerk of the Court is directed to substitute James A. Yates in place of	
17	"Warden, Mule Creek State Prison," as the respondent in this action; and	
18	2. The Clerk of the Court is directed to change petitioner's address of record to	
19	Pleasant Valley State Prison.	
20	Also, IT IS HEREBY RECOMMENDED that:	
21	1. Respondent's January 14, 2010 motion to dismiss this action as filed beyond	
22	the one-year statute of limitations (Doc. No. 12) be granted; and	
23	2. This action be dismissed.	
24	These findings and recommendations are submitted to the United States District	
25	Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty-	
26	one days after being served with these findings and recommendations, any party may file written	
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objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within seven days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991). DATED: May 25, 2010. ale A Dage DALE A. DROZD DAD:4 UNITED STATES MAGISTRATE JUDGE mcge2127.mtd