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

AARON P. STONE,

Petitioner,

No. CIV S-10-3454 KJM GGH P

vs.

M. MARTEL, et al.,

Respondents.

FINDINGS and RECOMMENDATIONS

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Petitioner is a state prisoner proceeding pro se with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent has moved to dismiss the petition, arguing that it is untimely, or in the alternative, that the claims raised are not exhausted. Petitioner has opposed the motion, and has additionally filed several other motions. For the reasons outlined below, the undersigned recommends that the motion to dismiss be granted, and that the remaining motions be denied as moot.

**BACKGROUND**

On November 14, 2006, petitioner was convicted by jury of six counts of violation of California Penal Code § 288(a), Lewd Acts with a Child Under 14, and was subsequently sentenced to a term of eighteen years on the convictions. The sentence consisted of: (1) an eight year sentence for one of the counts, and (2) five consecutive, middle term sentences of 2 years

1 each on the remaining five counts. On July 31, 2008, the Court of Appeals, Third Appellate  
2 District, overturned the conviction in part, finding insufficient evidence to support the  
3 convictions, and modified the sentence to eliminate the corresponding consecutive two year term  
4 on the overturned court. Lodged Doc. No. 1, at p. 12 (“The sentence is modified to eliminate the  
5 consecutive term imposed on count six. The trial court is directed to amend the abstract of  
6 judgment to reflect the foregoing....As so modified, the judgment is affirmed.”) In accordance  
7 with the Court of Appeal’s order, on November 28, 2008, the trial court entered a new sentence  
8 for 16 years. See Doc. No. 1, p. 80.<sup>1</sup>

9           On September 8, 2008, petitioner filed a petition for review in the California  
10 Supreme Court. His petition raised the following questions: (1) whether petitioner’s Fourteenth  
11 Amendment due process rights were violated by the trial court’s admission of evidence of  
12 defendant’s prior bad acts; (2) whether the trial court’s imposition of an upper-term sentence  
13 violated petitioner’s Fifth, Sixth, and Fourteenth Amendment rights, since the trial court, rather  
14 than a jury, had made the findings underlying the factors relied upon by the trial court in  
15 imposing the upper-term sentence; and (3) whether the trial court erred in sentencing petitioner to  
16 consecutive terms of imprisonment. See Lodged Doc. No. 2. On October 16, 2008, the Supreme  
17 Court denied review in a summary order which did not cite to any authority. See Lodged Doc.  
18 No. 3. A review of the record reflects that petitioner has not filed any other challenges in the  
19 state Supreme Court. See Doc. No. 36, p. 6.

20           On January 14, 2009, the time for petitioner to file a petition for writ of certiorari  
21 in the United States Supreme Court expired. See Sup. Ct. R. 13. A review of the record reflects  
22 that petitioner did not file any petitions with the United States Supreme Court.

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25 <sup>1</sup> Citations are to page numbers assigned by the Court’s CM/ECF system.

1 In the meantime, petitioner sought collateral relief in the Superior Court and the  
2 Court of Appeals. The record before this court reflects that, between 2007 and 2010, petitioner  
3 filed more than twenty petitions or motions attacking the criminal judgment.

4 A brief review of these pleadings is necessary to determine the respondent's  
5 motion:

6 (1) On January 17, 2007,<sup>2</sup> petitioner filed a petition for writ of habeas corpus  
7 in the Court of Appeal for the State of California, Third Appellate District  
8 (docket no. C054619). See Lodged Doc. No. 52. Petitioner alleged,  
9 among other things, that the evidence was insufficient to support his  
10 conviction, and that his trial counsel was ineffective. Id. The Court of  
11 Appeal denied the petition on January 25, 2007, citing In re Hillery, 202  
12 Cal. App. 2d 293, 294 (1962) (petitioners should first seek habeas relief in  
13 superior courts) and In re Harris, 5 Cal. 4th 813, 826-27 (1993) (habeas  
14 may not be employed as a substitute for an appeal). See Lodged Doc. No.  
15 53.

16 (2) On May 3, 2007, petitioner filed a petition for writ of habeas corpus in  
17 Sacramento County Superior Court (docket no. 07F04643). See Lodged  
18 Doc. No. 4. Petitioner alleged, among other things, that the evidence  
19 adduced at trial was insufficient to support his convictions. Petitioner also  
20 noted that he had a pending appeal in the Court of Appeal. On May 30,  
21 2007, the Superior Court dismissed the petition, noting that it was without  
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23 <sup>2</sup> Under Houston v. Lack, a pleading is deemed filed when it is delivered to prison officials  
24 for forwarding to the court. See 487 U.S. 266, 276, 108 S. Ct. 2379 (1988); see also Stillman v.  
25 LaMarque, 319 F.3d 1199, 1201 (9<sup>th</sup> Cir. 2003). Where petitioner was proceeding pro se and  
26 attached a signed, dated declaration of mailing to his filed pleading, the undersigned has used the  
service date as the filing date.

1 authority to proceed on the writ petition for any error which was or might  
2 have been presented to the appellate court. See Lodged Doc. No. 5.

3 (3) On June 13, 2007, petitioner filed a petition for writ of habeas corpus in  
4 Sacramento County Superior Court (docket no. 07F05632). See Lodged  
5 Doc. No. 6. Petitioner alleged, among other things, that the evidence at  
6 trial was insufficient to support his convictions and that the victim's  
7 testimony was not credible. On July 30, 2007, the Superior Court, noting  
8 that petitioner's appeal was still pending, denied the petition "for the same  
9 reason his earlier petition was denied — while the appeal is pending, this  
10 court lacks authority to entertain any claim which was, or should have  
11 been, presented to the Court of Appeal." See Lodged Doc. No. 7.

12 (4) On June 18, 2007, petitioner filed a petition for writ of habeas corpus in  
13 Sacramento County Superior Court (docket no. 07F06036). See Lodged  
14 Doc. No. 8. Petitioner alleged, among other things, that his counsel was  
15 incompetent and that his pre-trial bail amount was too high. On August 8,  
16 2007, the Superior Court denied the petition, finding that petitioner failed  
17 to establish a prima facie showing on either the counsel or bail claims.  
18 See Lodged Doc. No. 9. (A third claim was dismissed because the direct  
19 appeal was still pending.)

20 (5) On July 31, 2008, the Court of Appeal affirmed the judgment against  
21 petitioner, except as to Count 6, which was reversed for insufficient  
22 evidence. On or about November 24, 2008, the trial court entered its  
23 amended sentence.

24 (6) On September 8, 2008, petitioner filed a petition for review in the  
25 California Supreme Court. (Docket Number S166573), (see Lodged Doc.  
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1 No. 2) which was denied on October 16, 2008. See Lodged Doc. No. 3.

2 (7) On December 17, 2008, petitioner filed a petition for writ of habeas corpus  
3 in Sacramento County Superior Court (docket no. 08F10306). See Lodged  
4 Doc. No. 10. Among other things, petitioner alleged that the trial court  
5 abused its discretion in not sentencing petitioner to probation, and in  
6 allowing testimony regarding incidents of domestic violence between  
7 petitioner and the victim's mother. On February 5, 2009, the Superior  
8 Court found that this petition was successive, because the third petition  
9 challenging the judgment, Case No. 07F06036, was denied on its merits.  
10 See Lodged Doc. No. 11. The Superior Court found that each of  
11 petitioner's claims were procedurally barred, and, in the alternative, that  
12 petitioner failed to make a prima facie showing for relief.

13 (8) On March 12, 2009, petitioner filed a petition for writ of habeas corpus in  
14 the Court of Appeal, Third Appellate District (docket no. C061287). See  
15 Lodged Doc. No. 54. Petitioner argued that the Superior Court erred in  
16 finding his most recent habeas petition successive because the Superior  
17 Court had lacked jurisdiction to review his prior habeas petitions, filed  
18 while his direct appeal was still pending. He additionally argued, among  
19 other things, that his sentence was unconstitutional because the trial court  
20 failed to sentence him to probation when he was eligible for it. On April  
21 2, 2009, the Court of Appeal denied the petition as successive, citing  
22 People v. Kim, 45 Cal. 4th 1078, 1101 (2009) (piecemeal presentation of  
23 known claims is prohibited) and In re Clark, 5 Cal. 4th 750, 777 (1993)  
24 (same). See Lodged Doc. No. 55.

25 (9) On April 13, 2009, petitioner filed a petition for writ of habeas corpus in  
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1 Sacramento County Superior Court (docket no. 09F03042). See Lodged  
2 Doc. No. 12. Petitioner alleged that the Superior Court’s three prior  
3 decisions, denying his prior habeas petitions on the ground that his appeal  
4 was pending, were void judgments, and asked that the Superior Court  
5 “clarify this matter regarding any procedural bar...” Petitioner  
6 additionally argued that the trial court abused its discretion in not  
7 sentencing petitioner to probation, and that his trial counsel was  
8 ineffective. On May 28, 2009, the Superior Court denied the petition,  
9 finding that it was his fifth challenging the criminal judgment and that it  
10 was successive. See Lodged Doc. No. 13. The Superior Court  
11 additionally found that there was no merit in petitioner’s sentencing or  
12 counsel claims.

13 (10) On June 12, 2009, petitioner filed a petition for writ of habeas corpus in  
14 the Court of Appeal, Third Appellate District (docket no. C062079). See  
15 Lodged Doc. No. 56. Petitioner alleged that the trial court “acted in excess  
16 of its jurisdiction,” and asks to be re-sentenced. He claims that he only  
17 became aware of the grounds for re-sentencing after the trial court denied  
18 his first three petitions. On June 18, 2009, the Court of Appeal denied the  
19 petition as successive, citing to In re Clark, supra. See Lodged Doc. No.  
20 57.

21 (11) On July 15, 2009 and July 21, 2009, petitioner filed motions for  
22 modification of his sentence in his original criminal case. See Lodged  
23 Doc. Nos. 14 and 15. Each motion was a one-page form. Petitioner did  
24 not give any grounds in support of the application. The motions were  
25 denied in minute orders by Judge Savage on July 21, 2009 and on August  
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1 4, 2009. See Lodged Doc. Nos. 16 and 17.

2 (12) On August 28, 2009, petitioner filed a petition for writ of mandate or  
3 prohibition with the Court of Appeal, Third Appellate District (docket no.  
4 C062771), seeking to overturn his sentence because, he argued, the trial  
5 court unconstitutionally enhanced his sentence in violation of Cunningham  
6 v. California, 127 S. Ct. 856, 549 U.S. 270 (2007). See Lodged Doc. No.  
7 58. He again argues that the trial court abused its discretion in not  
8 sentencing him to probation. On September 3, 2009, the Court of Appeal  
9 denied the petition. See Lodged Doc. No. 59.

10 (13) On September 24, 2009, petitioner filed a petition for writ of mandate or  
11 prohibition with the Court of Appeal, Third Appellate District (docket no.  
12 C063009), raising again the Cunningham sentencing argument he had  
13 raised in his August 28, 2009 petition. See Lodged Doc. No. 60. On  
14 October 8, 2009, the Court of Appeal denied the petition. See Lodged  
15 Doc. No. 61.

16 (14) On October 13, 2009, petitioner filed a petition for writ of mandamus in  
17 the Court of Appeal, Third Appellate District (docket no. C063172),  
18 alleging errors in his original sentence, and in his amended sentence. See  
19 Lodged Doc. No. 62. In particular, petitioner claimed that he was not  
20 present at his re-sentencing hearing, and that his sentence violated  
21 Cunningham, supra. On November 12, 2009, the Court of Appeal denied  
22 the petition. See Lodged Doc. No. 63.

23 (15) On December 22, 2009, petitioner filed a petition for writ of mandate or  
24 prohibition with the Sacramento County Superior Court (docket number  
25 34-2009-80000409), alleging that his original sentence and amended  
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1 sentence were illegal because, among other things, the record does not  
2 support an upper-term sentence. Petitioner also argues that his due process  
3 rights were violated because he was not present at the re-sentencing  
4 hearing. See Lodged Doc. No. 18. The Superior Court construed the  
5 mandamus as a habeas petition (see Lodged Doc. No. 19), and, on March  
6 2, 2010, denied it (see Lodged Doc. No. 20), finding it successive and  
7 untimely, and additionally finding no merit to the claims. In particular, the  
8 Superior Court noted that there was no Cunningham error, because  
9 petitioner’s prior convictions were sufficient “aggravating factors” in  
10 support of an upper-term sentence.

11 (16) On March 15, 2010, petitioner filed a petition for writ of habeas corpus in  
12 the Sacramento County Superior Court (docket no. 10F01858). See  
13 Lodged Doc. No. 21. Petitioner had initiated an administrative proceeding  
14 at his prison, claiming that his sentence was not valid and asking the  
15 prison to recall the sentence. The prison denied his claims, explaining that  
16 the records reflected that he was sentenced legally. On April 19, 2010, the  
17 Superior Court denied petitioner’s petition, which it described as an effort  
18 by petitioner to obtain “a court order, on habeas corpus, that the  
19 Department file with the court a recommendation for recall of the  
20 sentence.....because [petitioner] is not sentenced by the court or his  
21 sentence is unlawful. This claim is utterly meritless.” See Lodged Doc.  
22 No. 22.

23 (17) On April 6, 2010, petitioner filed a petition for writ of habeas corpus in the  
24 Amador County Superior Court (docket no. 10-HC-1259), alleging that the  
25 trial court abused its discretion in not sentencing him to probation, and  
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1 also violated his due process rights in not having him present during re-  
2 sentencing. See Lodged Doc. No. 23. On April 23, 2010, Amador County  
3 Superior Court transferred the petition to Sacramento County (see Lodged  
4 Doc. Nos. 24, 25, 26).

5 (18) On April 12, 2010, petitioner filed a petition for writ of habeas corpus in  
6 the Amador County Superior Court (docket no. 10-HC-1262), alleging,  
7 among other things, that his sentence is illegal under Cunningham and that  
8 he should have been sentenced to probation. See Lodged Doc. No. 27. On  
9 April 26, 2010, Amador County transferred the petition to Sacramento  
10 County. See Lodged Doc. Nos. 28, 29, 30, 31.

11 (19) On May 17, 2010, petitioner filed a letter addressed to Judge Kenny of the  
12 Sacramento County Superior Court, which appears to seek reconsideration  
13 of the court's March 2, 2010 order. See Lodged Doc. No. 34. Petitioner  
14 wrote that he addressed his motion to Judge Kenny, since Judge Kenny  
15 had construed petitioner's December 22, 2009 mandamus petition as one  
16 for a writ of habeas corpus.

17 (20) On May 17, 2010, the Sacramento County Superior Court issued an order  
18 denying the May 17, 2010 motion for reconsideration, as well as the two  
19 petitions transferred from Amador County. The trial court noted:

20 As petitioner was warned in the court's denial order [dated March  
21 2, 2010], petitioner is now engaging in a **gross abuse of the writ  
22 process** that is now progressing to a new stage in which petitioner  
23 is seeking relief from other trial courts from his judgment from this  
24 court. That petitioner cannot do. As petitioner is raising no new  
25 issue and has been repeatedly turned down in his requests for  
26 probation and modification of sentence, his is **grossly abusing the  
writ process.**

Lodged Doc. No. 35.

1 (21) On June 8, 2010, petitioner filed a petition for writ of habeas corpus with  
2 the Amador County Superior Court (docket no. 10-HC-1293), alleging that  
3 the warden of Mule Creek State Prison had unlawfully accepted and  
4 surrendered petitioner into custody because petitioner's commitment order  
5 is not authorized by any provisions of law. See Lodged Doc. No. 37.  
6 Petitioner additionally moved the Amador County Court that it retain  
7 jurisdiction over the petition since the Amador court had previously  
8 transferred prior petitions to Sacramento County, but that Sacramento had  
9 "defaulted." On June 24, 2010, Amador County Judge Harlan denied the  
10 petition for failure to establish a prima facie case for relief, citing In re  
11 Duvall, 9 Cal. 4th 464, 474-75 (1995). See Lodged Doc. No. 38.

12 (22) On June 28, 2010, petitioner filed a petition for writ of habeas corpus in  
13 Sacramento County Superior Court (docket no. 10F04420), alleging that  
14 Warden Michael Martel had unlawfully accepted and surrendered  
15 petitioner into custody. See Lodged Doc. No. 41. On July 19, 2010,  
16 Judge Roman of the Sacramento County Superior Court denied the  
17 petition, finding that the petition was untimely and successive. The  
18 Sacramento court noted that this was petitioner's ninth habeas petition  
19 challenging his criminal judgment, adding:

20 [g]enerally, a defendant convicted of a felony has **but one**  
21 **opportunity** to bring a habeas corpus petition before a California  
22 court. Once that opportunity has been exhausted, future claims on  
23 habeas **will not be cognizable at all**, unless the claims meet the  
24 Robbins/Clark bar. In the absence of an extraordinary reason for  
25 not bringing a successive claim in an earlier petition, it is **a gross**  
26 **abuse of the writ process** to file endless, unsubstantiated,  
frivolous, piecemeal new petitions, such as this one, with this court  
that are barred under Robbins/Clark.

Lodged Doc. No. 42.

1 (23) On July 12, 2010, petitioner filed a petition for writ of mandate or  
2 prohibition in Amador County Superior Court (docket no. 10cv6782),  
3 alleging that Sacramento County Judge Kenny had previously granted his  
4 prior petition for writ of mandamus. See Lodged Doc. No. 43. He  
5 additionally argued that Amador County's prior transfer orders were  
6 actually orders granting habeas relief. Petitioner additionally argued that  
7 his sentence was illegal. On August 5, 2010, Amador County deemed the  
8 petition to be one for habeas relief (see Lodged Doc. No. 44), and, on  
9 August 24, 2010, denied it for failure to state a prima facie case for relief.  
10 See Lodged Doc. No. 50.

11 (24) On July 14, 2010, petitioner filed a writ of mandate or prohibition in  
12 Sacramento County Superior Court (docket no. 10F05222). See Lodged  
13 Doc. No. 45. The petition is identical to the one filed in Amador County  
14 on July 12, 2010. On September 13, 2010, the Sacramento County  
15 Superior Court denied the petition. See Lodged Doc. No. 46.

16 (25) On July 21, 2010, petitioner filed a petition for writ of mandate or  
17 prohibition in the Court of Appeal, Third Appellate District (docket no.  
18 C065586), also identical to the one filed on July 12, 2010 in Amador  
19 County. See Lodged Doc. No. 64. On July 29, 2010, the Court of Appeal  
20 denied the petition. See Lodged Doc. No. 65.

21 (26) On December 27, 2010, petitioner filed in this court a Complaint under the  
22 Civil Rights Act, 42 U.S.C. § 1983, against Allison Dunham, from the  
23 Sacramento District Attorney's Office, and M. Martel, Warden of Mule  
24 Creek State Prison. See Doc. No. 1. On January 10, 2011, this court  
25 ordered that the complaint be construed as a petition for writ of habeas  
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1 corpus filed pursuant to 28 U.S.C. § 2254. See Doc. No. 6. On May 11,  
2 2011, respondents moved to dismiss the petition. See Doc. No. 36. It is  
3 this motion which is currently before the court.

4 **THE CURRENT PETITION**

5 Petitioner now proceeds on the petition described supra. See Doc. No. 1.<sup>3</sup> For  
6 relief, he appears to seek dismissal of his criminal conviction. See Doc. 1, page 3. As grounds,  
7 petitioner appears to allege that: (1) his 2008 re-sentencing hearing violated his due process  
8 rights, because he was not present at the hearing; (2) the sentencing judge acted in excess of his  
9 jurisdiction by imposing an illegal sentence; (3) the sentencing judge faxed a false commitment  
10 document to the California Department of Corrections, which was false because it read that  
11 petitioner was present at the re-sentencing hearing when he was not; (4) the California  
12 Department of Corrections accepted the false documentation, and then aided and abetted the  
13 sentencing judge's deliberate falsification by altering their file information to give the  
14 "appearance" that petitioner was at the re-sentencing hearing; (5) Sacramento County Superior  
15 Court Judges Roman, Connelly, and Earl illegally barred petitioner from remedying these errors  
16 by applying the wrong legal principals; and (6) the district attorney has failed to respond to the  
17 "60 Day Action Order" issued by Sacramento County Judge Connelly on January 28, 2010. See  
18 id.

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21 <sup>3</sup> On May 18, 2011, petitioner filed a "Complaint" pursuant to 28 U.S.C. § 1651. The  
22 Complaint is one page, and attached to it as Exhibit A is a Motion to Dismiss for Failure to  
23 Prosecute, which appears to be a motion to dismiss the underlying criminal conviction. The  
24 undersigned denied similar Motions to Dismiss on May 3, 2011 and July 14, 2011. Respondent has  
25 moved for dismissal of the Complaint, in the event the court considers it to be an amended habeas  
26 petition. See Doc. No. 46. Because the undersigned previously denied similar motions filed by the  
petitioner, the undersigned will instead recommend that the court construe the Complaint as another  
motion to dismiss the underlying conviction, and deny it for the reasons cited in the undersigned's  
May 3, 2011 and July 14, 2011 orders.

1           Petitioner claims that Judge Connelly “issued my writ of mandate as a habeas  
2 corpus granting review of and 60 day action order to District Attorney Allison Dunham....” and  
3 that respondent has now exceeded the 60 days requirement, resulting in a failure to prosecute.  
4 See Doc. No. 1 at 3, 6-7, 9-10, 22. Petitioner appears to allege that Sacramento County Judge  
5 Connelly’s January 28, 2010 order, which construed the petition for writ of mandate as a petition  
6 for writ of habeas corpus, created an obligation for the District Attorney to correct what  
7 petitioner considers to be an error in his sentence, and that the District Attorney’s “failure to  
8 prosecute in a timely manner” violates his due process and speedy trial rights, entitling him to  
9 dismissal of the criminal case. See Doc. No. 1 at 22. In support, petitioner argues that the  
10 District Attorney bears the complete burden to correct errors of law, or to notify the courts of  
11 errors. See id. Petitioner appears to allege that, once the trial court served “the prosecuting  
12 attorney (D.A.) in any case for preliminary examination for case review, under Penal Code 1382  
13 the D.A. has 60 days to bring defendant to resentencing.” See id.

14           Petitioner also alleges that he received ineffective assistance of trial and appellate  
15 counsel. In support, petitioner argues that the “sentence itself is more than enough evidence to  
16 support the fact that [trial counsel] intentionally denied petitioner a fundamentally fair  
17 representation,” that counsel supported the trial court’s unethical and illegal operation in excess  
18 of its jurisdiction, and that counsel never objected to the disproportionate sentence. See Doc. No.  
19 1 at 16.

20           Petitioner argues that appellate counsel was also ineffective, that she also  
21 supported the trial court’s illegal procedures, and that she supported the violation of petitioner’s  
22 right to be present at re-sentencing. Id.

23 **THE MOTION TO DISMISS**

24           Respondent now moves to dismiss this habeas petition, arguing that it is untimely  
25 filed or, in the alternative, that the claims raised by petitioner are not exhausted. Petitioner  
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1 opposes the motion, restating his arguments that the criminal judgment is void, that his  
2 constitutional rights were violated when he was not allowed to be present at re-sentencing, and  
3 that, pursuant to California Department of Corrections policy, he is entitled to release because the  
4 prosecutor failed to prosecute Judge Connelly's "60 day action order" in a timely manner.

5 Timeliness

6 Unlike the usual case involving the AEDPA limitations statute in which the  
7 petitioner has slept on his issues, petitioner herein was abusively diligent, both before and after  
8 the finality of his conviction for AEDPA purposes. However, this pseudo-diligence does not  
9 save this petition from being found untimely.

10 Respondent argues that petitioner's habeas petition was due on January 14, 2010,  
11 and is late, because it was not filed until December 27, 2010. Respondent acknowledges that  
12 petitioner is entitled to toll any time when he had a "properly filed" petition pending in the state  
13 court. Giving petitioner credit for time when arguably "properly filed" petitions were pending,  
14 respondent argues that petitioner's federal petition was due no later than March 4, 2010.  
15 Respondent argues that any state petitions filed after that date cannot toll the deadline.

16 In opposition, petitioner appears to argue that, under relevant California law for  
17 non-capital cases, there is no standard by which the court can determine if there has been a  
18 substantial delay, and that denial of his numerous writs in the state court based on this "wrong  
19 legal principle was inappropriate and violated petitioner's 14<sup>th</sup> amend. rights." See Doc. No. 38,  
20 p. 6.

21 Exhaustion

22 Respondent alternatively argues that petitioner has failed to exhaust his current  
23 arguments in the state court, and that the arguments raised by petitioner appear to be based on  
24 events that occurred after petitioner's petition for review was denied at the state Supreme Court.

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1 In his opposition, petitioner does not address the exhaustion arguments raised by  
2 respondent.

3 **RELEVANT AUTHORITY**

4 Timeliness

5 Under the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”), 28  
6 U.S.C. § 2244(d)(1)(A), a federal petition for writ of habeas corpus ordinarily must be filed  
7 within one year after the state court judgment becomes final by the conclusion of direct review of  
8 the expiration of the time to seek direct review. E.g., Porter v. Ollison, 620 F.3d 952, 958 (9th  
9 Cir. 2010). The time during which a properly filed application for state post-conviction or  
10 collateral review (including California habeas proceedings) is pending does not count toward this  
11 one-year period. Id., citing 28 U.S.C. § 2244(d)(2).

12 However, a petition filed before completion of direct review, or one filed after the  
13 expiration of the statute of limitations, does not operate to effect the petitioner’s available time at  
14 all. See Waldrip v. Hall, 548 F.3d 729, 735 (9th Cir. 2005) (“pre-finality” petitions); Jiminez v.  
15 Rice, 276 F.3d 478, 482 (9th Cir. 2001), cert. denied, 538 U.S. 949, 123 S. Ct. 1627 (2003)  
16 (applications for state post-conviction relief do not toll statute of limitations if filed after statute  
17 of limitations has expired).

18 The relevant considerations for this petition are (1) whether petitioner’s many  
19 state court collateral petitions and motions were “properly filed,” and, if so, (2) during what  
20 periods were they “pending”?

21 “Properly Filed”

22 An application is “properly filed” when its delivery and acceptance are in  
23 compliance with the applicable laws and rules governing filings. Artuz v. Bennett, 531 U.S. 4, 8,  
24 121 S. Ct. 361, 364 (2000). This question is distinct from whether the claims considered in the  
25 application are meritorious and free of procedural bar. Id. (identifying distinction between  
26

1 condition to filing and condition to obtaining relief).

2           Untimely petitions are not properly filed. Pace v. DiGuglielmo, 544 U.S. 408,  
3 417, 125 S. Ct. 1807, 1814 (2005) (where state court rejects petition as untimely, it was not  
4 “properly filed” and petitioner is not entitled to statutory tolling), Carey v. Saffold, 536 U.S. 214,  
5 225-26, 122 S. Ct. 2134, 2141 (2002) (if state court rules that petition is untimely, that is “the  
6 end of the matter,” regardless of whether state court also addressed merits of the claims, or  
7 whether timeliness ruling was “entangled” with the merits). Under California state law, a  
8 successive petition presenting additional claims that could have been presented in an earlier  
9 collateral petition is, of necessity, a “delayed petition.” See In re Clark, 5 Cal. 4th at 770.<sup>4</sup>

10           At least one court in this district has found that the Clark bar extends to successive  
11 petitions where petitioner does not raise any new claims:

12                           The California Supreme Court’s reasons for finding a successive petition  
13 raising new claims to be untimely is equally applicable to a successive  
14 petition raising identical claims. There is no indication in Clark that the  
15 California Supreme Court meant to find that successive duplicative  
16 petition was timely, whereas a successive petition raising new claims was  
17 not.

18           See Chance v. Martell, 2011 U.S. Dist. LEXIS 103235 \*13-14 (Sept. 13, 2011) (Newman, M.J.)  
19 (discussing whether Clark barred tolling for interval between first and second, successive  
20 petition).

21                           “Pending”

22           Collateral review is considered to be “pending” during the interim between a writ  
23 being denied at one court level and a new petition being filed at the next highest court level as  
24 long as the petition at the next level is filed within a reasonable period of time. Carey v.

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25           <sup>4</sup> There is no California rule outside of case law which prohibits the filing of a successive  
26 petition, though such a petition may be procedurally barred. Cf. 28 U.S.C. § 2244(a), (b) (petitioner  
seeking to file successive petition in federal district court must first obtain authorization from the  
Court of Appeals) with Cal. Rules of Court R. 4.551 and Cal. Penal Code § 1474.



1 Scaffold, 536 U.S. at 222-25, 122 S. Ct. at 2139-2141.

2           If the time to file a federal petition has not already expired when a second round  
3 of properly filed California habeas petitions begins, the second round of petitions will also toll  
4 the § 2244(d)(1) period. See Porter v. Ollison, 620 F.3d at 952 (“For tolling to be applied based  
5 on a second round [of petitions filed in the state court], the petition cannot be untimely or an  
6 improper successive petition.”). However, the interval between the two rounds is not tolled. Id.  
7 Additionally, according to the Porter decision, a second round will not toll the AEDPA deadline  
8 if the second petition is “untimely or an improper successive petition.” See id., citing Townsend  
9 v. Knowles, 562 F.3d 1200, 1205 (9th Cir.), cert. denied, 130 S. Ct 193 (2009) (untimely state  
10 court petition not properly filed).

11           The Ninth Circuit has also answered whether a petitioner may be entitled to  
12 interval tolling between two Superior Court petitions, finding that where a petitioner elects to  
13 begin a second round of petitions in the Superior Court before completing a full round of review  
14 through the highest available state court, petitioner may be entitled to interval tolling between the  
15 first and second Superior Court petitions if the second petition is timely, and “the successive  
16 petition was attempting to correct deficiencies of a prior petition,” because the petitioner “is still  
17 making proper use of state court procedures and habeas review is still pending.” See Banjo v.  
18 Ayers, 614 F.3d 964, 968-69 (9th Cir. 2010).

## 19 **ANALYSIS**

20           Under the chronology outlined above, petitioner’s petition for review was denied  
21 in the California Supreme Court on October 16, 2008, and the time to seek direct review ended  
22 on January 14, 2009, when his 90-day period to file a petition for writ of certiorari with the  
23 United States Supreme Court ended. Petitioner thereafter had one year in which to file his  
24 federal petition, beginning January 15, 2009, and ending one year later, on January 14, 2010.

25 \\\

1           Petitioner, however, did not file his federal petition until December 27, 2010,  
2 some 348 days afterwards, and so it is untimely unless he is entitled to toll the deadline.

3           The undersigned finds that petition is not entitled to tolling under 28 U.S.C.  
4 § 2244(d)(2):

5           – The petitions filed January 17, 2007; May 3, 2007; June 13, 2007; and June 18,  
6 2007, should have no effect on the petitioner’s statute of limitations, as they were filed prior to  
7 completion of direct review. See Waldrip v. Hall, 548 F.3d at 735.

8           – The petitions filed December 17, 2008, March 12, 2009, April 13, 2009, June  
9 12, 2009, and December 22, 2009, were denied as successive, and were therefore untimely under  
10 California law. See In re Clark, 5 Cal. 4th at 770. As untimely petitions, they were not properly  
11 filed. See Pace v. DiGuglielmo, 544 U.S. at 417.

12           – The motions for modification of sentence, filed July 15, 2009 and July 21, 2009,  
13 were filed with the Superior Court nine (9) months after the state Supreme Court denied review  
14 of petitioner’s judgment and sentence, and more than eight (8) months after the Superior Court  
15 entered the amended judgment and sentence. Pursuant to California Penal Code section 1170,  
16 the superior court may, within 120 days of the date of commitment, recall a sentence and  
17 commitment previously ordered and re-sentence the prisoner. After that time period, the  
18 sentencing court does not have jurisdiction to vacate or to modify the sentence. See Dix v.  
19 Superior Court, 53 Cal. 3d. 442, 464 (1991); People v. Lockridge, 12 Cal. App. 4th 1752, 1757  
20 (1993). The motions are accordingly not “properly filed,” because the court in which petitioner  
21 filed them lacked jurisdiction to provide the relief requested. See Blair v. Crawford, 275 F.3d  
22 1156, 1158 (9th Cir. 2002), citing Artuz v. Bennett, 531 U.S. at 9, 121 S. Ct. at 364 (“If, for  
23 example, an application is erroneously accepted by the clerk of a court lacking jurisdiction....it  
24 will be *pending*, but not *properly filed*.”)(emphasis in original).

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1                   – The mandamus petitions filed August 28, 2009, September 24, 2009, and  
2 October 13, 2009 were untimely, since they were filed at least ten months after entry of the  
3 judgment. See People v. Superior Court (Brent), 2 Cal. App. 4th 675, 682 (1992) (“Where there  
4 is otherwise no statutory authority or time limit in filing a writ, it must usually be filed within 60  
5 days”).

6                   – The petitions and motions filed March 15, 2010; April 6, 2010; April 12, 2010;  
7 May 17, 2010; June 8, 2010; June 28, 2010; July 12, 2010; July 14, 2010; and July 21, 2010,  
8 were filed after January 15, 2010, when the statute of limitations expired. They do not affect  
9 tolling. See Jiminez v. Rice, 276 F.3d at 482.

10                   Because the petition was not timely filed, the undersigned does not reach  
11 respondent’s alternative argument that petitioner failed to exhaust his arguments in state court.

12                   The undersigned additionally recommends that the remaining motions be denied  
13 as moot.

14                   Accordingly, IT IS HEREBY RECOMMENDED that:

- 15                   1.       The respondent’s motion to dismiss (Doc. No. 36) the petition be  
16                               GRANTED.
- 17                   2.       The Complaint filed May 5, 2011 (Doc. No. 39) be construed as a motion  
18                               to dismiss the underlying criminal conviction, and, so construed, be  
19                               DENIED.
- 20                   3.       All other motions (Doc Nos. 46, 48, 56 and 58) be DENIED as moot.

21                   These findings and recommendations are submitted to the United States District  
22 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen  
23 days after being served with these findings and recommendations, any party may file written  
24 objections with the court and serve a copy on all parties. Such a document should be captioned  
25 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections  
26

1 shall be served and filed within fourteen days after service of the objections. The parties are  
2 advised that failure to file objections within the specified time may waive the right to appeal the  
3 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

4 If petitioner files objections, he shall also address if a certificate of appealability  
5 should issue and, if so, as to which issues. A certificate of appealability may issue under 28  
6 U.S.C. § 2253 "only if the applicant has made a substantial showing of the denial of a  
7 constitutional right." 28 U.S.C. § 2253(c)(2). The certificate of appealability must "indicate  
8 which specific issue or issues satisfy" the requirement. 28 U.S.C. § 2253(c)(3).

9 DATED: November 17, 2011

10 /s/ Gregory G. Hollows  
11 UNITED STATES MAGISTRATE JUDGE

12 GGH:rb  
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