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

DAMIAN TOYEBO,

No. 2:12-cv-2268-JAM-CMK-P

Petitioner,

vs.

FINDINGS AND RECOMMENDATION

S. HUBARD,

Respondent.

_____ /

Petitioner, a state prisoner proceeding with counsel, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pending before the court is respondent’s unopposed motion to dismiss (Doc. 16).

I. BACKGROUND

Petitioner was convicted in the Sacramento County Superior Court of first degree murder in 1989, and was sentenced to 32 years to life. (Pet., Doc. 1, at 1). A parole consideration hearing for petitioner was held on December 2, 2009. At that hearing, the Board of Parole Hearings determined petitioner was not suitable for parole, and denied petitioner parole for ten years. (See Pet., Ex. B). The Board’s decision was rendered at the time of the hearing on

1 December 2, 2009, but states it was not final until April 1, 2010. (Id.) Petitioner filed a habeas
2 petition with the Kings County Superior Court on March 6, 2011, which was apparently
3 transferred to the Sacramento County Superior Court on May 9, 2011. The Sacramento County
4 Superior Court denied the petition on December 12, 2011. Petitioner continued to proceed on his
5 petition through the State courts. His final state petition filed with the California Supreme Court
6 was denied on July 11, 2012. Petitioner submitted the instant petition on August 28, 2012, which
7 was received by the court and filed on September 4, 2012.

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9 **II. MOTION TO DISMISS**

10 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to
11 dismiss a petition if it “plainly appears from the petition and any attached exhibits that the
12 petitioner is not entitled to relief in the district court” Rule 4 of the Rules Governing
13 Section 2254 Cases. The Ninth Circuit has allowed respondents to file a motion to dismiss in
14 lieu of an answer if the motion attacks the pleadings for failing to exhaust state remedies or being
15 in violation of the state's procedural rules. See, e.g., O'Bremski v. Maass, 915 F.2d 418, 420 (9th
16 Cir. 1990) (using Rule 4 to evaluate motion to dismiss petition for failure to exhaust state
17 remedies); White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (using Rule 4 as procedural
18 grounds to review motion to dismiss for state procedural default); Hillery v. Pulley, 533 F. Supp.
19 1189, 1194 & n. 12 (E.D. Cal. 1982) (same). Thus, a respondent can file a motion to dismiss
20 after the court orders a response, and the Court should use Rule 4 standards to review the motion.
21 See Hillery, 533 F. Supp. at 1194 & n.12. The petitioner bears the burden of showing that he has
22 exhausted state remedies. See Cartwright v. Cupp, 650 F.2d 1103, 1104 (9th Cir. 1981).

23 Respondent brings this motion to dismiss petitioner's federal habeas corpus
24 petition as filed beyond the one-year statute of limitations, pursuant 28 U.S.C. § 2244(d).

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1 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death
2 Penalty Act of 1996 (hereinafter “AEDPA”). AEDPA imposes various requirements on all
3 petitions for writ of habeas corpus filed after the date of its enactment. See Lindh v. Murphy,
4 521 U.S. 320 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc). In this
5 case, the petition pending in this court was effectively filed on August 28, 2012, and therefore, it
6 is subject to the provisions of AEDPA. AEDPA imposes a one-year statute of limitation on
7 petitioners seeking to file a federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1).

8 As amended, § 2254(d) reads:

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

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

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

21 (C) the date on which the constitutional right was
22 asserted was initially recognized by the Supreme
23 Court, if the right has been newly recognized by the
24 Supreme Court and made retroactively applicable to
25 cases on collateral review; or

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

(2) The time during which a properly filed application for State
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.

28 U.S.C. § 2244(d).

The statute of limitations for habeas petitions challenging parole suitability
hearings is based on § 2244(d)(1)(D), that is, the date on which the factual predicate of the claim
or claims could have been discovered through the exercise of due diligence. See Shelby v.
Bartlett, 391 F.3d 1061, 1062 (9th Cir. 2004), Redd v. McGrath, 343 F.3d 1077, 1079 (9th Cir.

1 2003). In habeas proceedings challenging an administrative decision, courts within the Ninth
2 Circuit, relying on the opinions in Shelby and Redd, have determined that discovery of the
3 factual predicate cannot occur until the administrative decision is final. See Shelby, 391 F.3d at
4 1065-66; Redd, 343 F.3d at 1084-85; Tafoya v. Subia, 2:07cv2389, 2010 WL 668920 *2-3 (E.D.
5 Cal. Feb. 23, 2010).

6 Here, petitioner is challenging the December 2, 2009, denial of parole, which was
7 final on April 1, 2010. As stated above, the statute of limitations period does not start to run
8 until a parole denial is “final.” Therefore, the statute of limitations began on April 2, 2010, the
9 day after the Board’s decision became final. Petitioner filed his state habeas petition on March 6,
10 2011, and the limitations period was tolled until the California Supreme Court’s denial on July
11 11, 2012. Thus, 338 days of the 365 day statute of limitations ran between Board’s decision and
12 the time petitioner filed his first state habeas petition. Following the California Supreme Court’s
13 denial of his petition on July 11, 2012, the statute began running again. Petitioner then waited
14 another 48 days between the denial of his petition by the California Supreme Court and filing his
15 federal petition in this court, for a total of 386 days. Thus, petitioner’s petition was filed 21 days
16 beyond the statute of limitations. Petitioner’s federal habeas petition was therefore untimely, and
17 the motion to dismiss should be granted on this ground.¹

18 19 **III. CONCLUSION**

20 Based on the foregoing, the undersigned recommends that respondent’s motion to
21 dismiss (Doc. 16) be granted.

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24 ¹ Respondent also contends petitioner’s claims challenging the basis of the Board’s
25 decision are not cognizable based on Swarthout v. Cook, 131 S. Ct. 859, 862 (2011) and his ex
26 post facto claims do not invoke Federal jurisdiction as his claim would not necessarily achieve an
earlier release from prison and his claim would be included in the Gilman class action. As his
petition is untimely, and petitioner does not oppose the motion to dismiss, the court need not
specifically address these other arguments.

1 These findings and recommendations are submitted to the United States District
2 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days
3 after being served with these findings and recommendations, any party may file written
4 objections with the court. The document should be captioned “Objections to Magistrate Judge's
5 Findings and Recommendations.” Failure to file objections within the specified time may waive
6 the right to appeal. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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8 DATED: August 14, 2014

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10 **CRAIG M. KELLISON**
11 UNITED STATES MAGISTRATE JUDGE
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