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

EDWARD ROTH,

No. 2:16-CV-1107-JAM-CMK-P

Petitioner,

vs.

FINDINGS AND RECOMMENDATIONS

RONALD RACKLEY,

Respondent.

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Petitioner, a state prisoner proceeding pro se, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pending before the court is respondent’s motion to dismiss (Doc. 10).

**I. BACKGROUND**

Petitioner was convicted in January 2011 of gross vehicular manslaughter and assault with a deadly weapon with an enhancement for inflicting great bodily injury, and was sentenced to 14 years in prison. Petitioner did not appeal. On May 26, 2015, petitioner filed a petition for a writ of habeas corpus in the California Superior Court alleging that the limitation on the ability to earn good-time credits pursuant to California Penal Code § 2933.1 was being

1 improperly applied to his sentence. The Superior Court denied the petition in a decision issued  
2 on July 28, 2015. In that decision, the court concluded that, as a matter of state law, § 2933.1  
3 appropriately applied to his entire sentence. The California Court of Appeal and California  
4 Supreme Court both summarily denied petitioner’s claim. Petitioner filed his federal petition on  
5 May 23, 2016.

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7 **II. DISCUSSION**

8 Respondent argues that petitioner’s federal petition is untimely, that the sole claim  
9 raised in the petition is unexhausted, and that the claim is not cognizable.

10 **A. Timeliness**

11 Federal habeas corpus petitions must be filed within one year from the later of:  
12 (1) the date the state court judgment became final; (2) the date on which an impediment to filing  
13 created by state action is removed; (3) the date on which a constitutional right is newly-  
14 recognized and made retroactive on collateral review; or (4) the date on which the factual  
15 predicate of the claim could have been discovered through the exercise of due diligence. See 28  
16 U.S.C. § 2244(d). Typically, the statute of limitations will begin to run when the state court  
17 judgment becomes final by the conclusion of direct review or expiration of the time to seek direct  
18 review. See 28 U.S.C. § 2244(d)(1).

19 Because petitioner did not file a direct appeal, the judgment became final 60 days  
20 after sentencing. See Cal. Rule of Court 31(d). Petitioner was sentenced on January 7, 2011.  
21 Thus, the judgment became final on March 8, 2011. Respondent argues that the one-year  
22 limitations period began running the next day and expired on March 10, 2012. According to  
23 respondent, the instant federal petition – filed more than four years later in May 2016 – is  
24 untimely.

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1           Petitioner contends that the limitations period did not begin running until April 3,  
2 2015. Specifically, petitioner claims that he “noted a discrepancy as to how the Department of  
3 Corrections and Rehabilitations (CDC&R) was calculating his earning of credits. . .” on March  
4 25, 2015. Next, petitioner states that he received a memorandum on April 3, 2015, from the  
5 Correctional Case Record Analyst informing petitioner that his credits here being properly  
6 calculated. Petitioner argues that he could not have known the factual predicate of his claim until  
7 he received the April 3, 2015, memorandum.

8           Petitioner’s argument is unpersuasive. As respondent notes, § 2933.1 was the law  
9 in California when petitioner was sentenced. Had petitioner exercised due diligence, he would  
10 have known the factual predicate of his claim at the time he was sentenced. The court concludes  
11 that the one-year limitations period began to run in March 2011 and expired in March 2012 and  
12 the instant federal petition – filed more than four years later – is untimely.

13           **B.    Exhaustion**

14           Under 28 U.S.C. § 2254(b), the exhaustion of available state remedies is required  
15 before claims can be granted by the federal court in a habeas corpus case. See Rose v. Lundy,  
16 455 U.S. 509 (1982); see also Kelly v. Small, 315 F.3d 1063, 1066 (9th Cir. 2003); Hunt v.  
17 Pliler, 336 F.3d 839 (9th Cir. 2003). Claims may be denied on the merits notwithstanding lack of  
18 exhaustion. See 28 U.S.C. § 2254(b)(2). “A petitioner may satisfy the exhaustion requirement  
19 in two ways: (1) by providing the highest state court with an opportunity to rule on the merits of  
20 the claim . . .; or (2) by showing that at the time the petitioner filed the habeas petition in federal  
21 court no state remedies are available to the petitioner and the petitioner has not deliberately  
22 by-passed the state remedies.” Batchelor v. Cupp , 693 F.2d 859, 862 (9th Cir. 1982) (citations  
23 omitted). The exhaustion doctrine is based on a policy of federal and state comity, designed to  
24 give state courts the initial opportunity to correct alleged constitutional deprivations. See Picard  
25 v. Connor, 404 U.S. 270, 275 (1971); see also Rose, 455 U.S. at 518.

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1           Regardless of whether the claim was raised on direct appeal or in a post-  
2 conviction proceeding, the exhaustion doctrine requires that each claim be fairly presented to the  
3 state’s highest court. See Castille v. Peoples, 489 U.S. 346 (1989). Although the exhaustion  
4 doctrine requires only the presentation of each federal claim to the highest state court, the claims  
5 must be presented in a posture that is acceptable under state procedural rules. See Sweet v.  
6 Cupp, 640 F.2d 233 (9th Cir. 1981). Thus, an appeal or petition for post-conviction relief that is  
7 denied by the state courts on procedural grounds, where other state remedies are still available,  
8 does not exhaust the petitioner’s state remedies. See Pitchess v. Davis, 421 U.S. 482, 488  
9 (1979); Sweet, 640 F.2d at 237-89.

10           In addition to presenting the claim to the state court in a procedurally acceptable  
11 manner, exhaustion requires that the petitioner make the federal basis of the claim explicit to the  
12 state court by including reference to a specific federal constitutional guarantee. See Gray v.  
13 Netherland, 518 U.S. 152, 162-63 (1996); see also Shumway v. Payne, 223 F.3d 982, 998 (9th  
14 Cir. 2000). It is not sufficient for the petitioner to argue that the federal nature of the claim is  
15 self-evident. See Lyons v. Crawford, 232 F.3d 666, 668 (9th Cir. 2000), amended by 247 F.3d  
16 904 (9th Cir. 2001).

17           A review of the petition filed in the California Supreme Court reflects a reference  
18 to “Fourteenth Amendment, U.S. Const.” and a reference to “the Due Process Clause (Fourteenth  
19 Amendment, U.S. Const.)” The court finds these references minimally sufficient to have  
20 exhausted petitioner’s claim by invoking the specific federal constitutional guarantee of fairness  
21 embodied in the Due Process Clause of the Fourteenth Amendment.

22           **C.    Cognizability**

23           A writ of habeas corpus is available under 28 U.S.C. § 2254 only on the basis of a  
24 transgression of federal law binding on the state courts. See Middleton v. Cupp, 768 F.2d 1083,  
25 1085 (9th Cir. 1985); Gutierrez v. Griggs, 695 F.2d 1195, 1197 (9th Cir. 1983). It is not  
26 available for alleged error in the interpretation or application of state law. Middleton, 768 F.2d at

1 1085; see also Lincoln v. Sunn, 807 F.2d 805, 814 (9th Cir. 1987); Givens v. Housewright, 786  
2 F.2d 1378, 1381 (9th Cir. 1986). Habeas corpus cannot be utilized to try state issues de novo.  
3 See Milton v. Wainwright, 407 U.S. 371, 377 (1972).

4           However, a “claim of error based upon a right not specifically guaranteed by the  
5 Constitution may nonetheless form a ground for federal habeas corpus relief where its impact so  
6 infects the entire trial that the resulting conviction violates the defendant’s right to due process.”  
7 Hines v. Enomoto, 658 F.2d 667, 673 (9th Cir. 1981) (citing Quigg v. Crist, 616 F.2d 1107 (9th  
8 Cir. 1980)); see also Lisenba v. California, 314 U.S. 219, 236 (1941). In order to raise such a  
9 claim in a federal habeas corpus petition, the “error alleged must have resulted in a complete  
10 miscarriage of justice.” Hill v. United States, 368 U.S. 424, 428 (1962); Crisafi v. Oliver, 396  
11 F.2d 293, 294-95 (9th Cir. 1968); Chavez v. Dickson, 280 F.2d 727, 736 (9th Cir. 1960).

12           The court agrees with respondent that petitioner’s claim is not cognizable.  
13 Petitioner’s claim is based entirely on an alleged misapplication of state law, specifically  
14 § 2933.1. While the court finds that petitioner exhausted his claim by reference to the Due  
15 Process Clause of the Fourteenth Amendment, the court also finds that the due process aspect of  
16 petitioner’s claim cannot rise to the level of infecting the entire trial so as to render the  
17 conviction fundamentally unfair because petitioner’s claim relates only to the execution of his  
18 sentence, not the underlying trial. Nothing in petitioner’s claim suggests that his trial was unfair,  
19 that his conviction was unfair, or even that his sentence was unfair.

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1 **III. CONCLUSION**

2 The court finds that petitioner’s federal petition is untimely and that the claim  
3 raised therein is not cognizable. Based on the foregoing, the undersigned recommends that  
4 respondent’s motion to dismiss (Doc. 10) be granted.

5 These findings and recommendations are submitted to the United States District  
6 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days  
7 after being served with these findings and recommendations, any party may file written  
8 objections with the court. Responses to objections shall be filed within 14 days after service of  
9 objections. Failure to file objections within the specified time may waive the right to appeal.  
10 See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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13 DATED: August 8, 2017

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15 **CRAIG M. KELLISON**  
16 UNITED STATES MAGISTRATE JUDGE  
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