



1 **I. BACKGROUND**

2 **A. Procedural History**

3 Petitioner is currently serving a sentence of 16 years for assault with  
4 semiautomatic firearm, discharge of a firearm with gross negligence, exhibiting a weapon with  
5 the intent to resist, and possession of a controlled substance. ECF No. 7. Petitioner was booked  
6 on April 21, 2012, into the Sacramento County main jail on various charges, including those  
7 stated above. Id. at 28. On May 11, 2012, Petitioner signed an optional waiver, accepting the  
8 assessment offer and giving up his right to a probable cause and full revocation hearing at that  
9 time because local charges had been filed against him. Id. at 32. However, at that point  
10 Petitioner could still request a hearing within 15 days of the end of the local proceedings. Id. On  
11 May 11, 2012, the same day as Petitioner signed the waiver, a revocation hearing was held and  
12 probable cause found, regarding various charges including attempted murder. Id. at 30. There is  
13 no evidence in the record indicating that Petitioner ever requested a hearing within 15 days of  
14 judgment and sentencing in Sacramento County Superior Court. Id. at 50. In 2016, however,  
15 Petitioner attempted to administratively appeal an in-prison decision regarding ineligibility for a  
16 camp program due to the probable cause finding of attempted murder, but the appeal was  
17 canceled as untimely. Id.

18 Petitioner filed his first habeas petition in Sacramento County Superior Court,  
19 which was denied on April 3, 2017, for failure to exhaust his administrative remedies. Id. at 51.  
20 Petitioner then filed a petition for a writ of habeas corpus in the California Court of Appeal, Third  
21 Appellate District, which was summarily denied. Id. at 54. Petitioner filed his last state court  
22 petition in the California Supreme Court, which was summarily denied on October 25, 2017. Id.  
23 at 56. Petitioner filed his federal habeas, currently pending before this court, on December 26,  
24 2017. ECF No. 1. The petition was dismissed by this Courts July 13, 2018, order for lack of  
25 jurisdiction because Petitioner failed to name the appropriate state officer. ECF No. 6. Petitioner  
26 filed his first amended petition on August 13, 2018. ECF No. 7.

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1 agent failed to properly investigate and submitted an inaccurate charge resulting in a due process  
2 violation. This claim too, alleges a federal constitutional error and is thus also properly  
3 cognizable in federal habeas.

4 Because Petitioner's claims allege constitutional violations that effect his term of  
5 confinement, and because Petitioner's claims are not asserting errors in state law, this Court finds  
6 Petitioner has stated cognizable federal habeas claims.

7 **B. Naming the Proper Respondent—Personal Jurisdiction**

8 A petitioner who is seeking habeas corpus relief under 28 U.S.C. § 2254 must  
9 name the state officer having custody of him as the respondent to the petition. Habeas Rule 2(a);  
10 Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996); Stanley v. California Supreme  
11 Court, 21 F.3d 359, 360 (9th Cir. 1994). Generally, the person having custody of an incarcerated  
12 petitioner is the warden of the prison in which the petitioner is incarcerated because the warden  
13 has “day-to-day control over” the petitioner and thus can produce the petitioner in court.  
14 Brittingham v. United States, 982 F.2d 378, 379 (9th Cir. 1992); Stanley, 21 F.3d at 360. A  
15 petitioner's failure to name a proper respondent may require dismissal of his habeas petition for a  
16 failure to name a person who can produce the petitioner in response to an order of the Court and  
17 thereby to secure personal jurisdiction. See, Smith v. Idaho, 392 F.3d 350, 355 n.3 (9th Cir. 2004)

18 Here, Petitioner is currently incarcerated at California Rehabilitation Center,  
19 Norco, yet Petitioner did not name the warden of that facility as the respondent in this case.  
20 Rather Petitioner named Jerry E. Powers, Operational Director of Adult Parole, and Jennifer  
21 Shaffer, Executive Officer of the Board of Parole Hearings as Respondents. Neither of these  
22 individuals have custody of Petitioner, neither of these individuals can produce Petitioner in  
23 court, and neither of these individuals have “day to day control” over Petitioner. Thus, neither  
24 Jerry E. Powers nor Jennifer Shaffer are state officers having custody of Petitioner and as such  
25 neither are proper respondents. For that reason, this Court does not have personal jurisdiction  
26 over the Respondents in this case. Because this Court lacks personal jurisdiction over the  
27 Respondents this Court recommends the petition for a writ of habeas corpus be dismissed.

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1           **C.     Statute of Limitations**

2           Even if Petitioner had named the proper Respondent, dismissal of the petition  
3 would still be proper because the habeas claims are bared by the one-year statute of limitations.  
4 The current Petition was filed after the Antiterrorism and Effective Death Penalty Act of 1996  
5 (AEDPA) was signed into law and is, thus, subject to AEDPA’s one-year limitation period, as set  
6 forth at 28 U.S.C. § 2244(d). See Calderon v. U.S. Dist. Court (Beeler), 128 F.3d 1283, 1286 (9th  
7 Cir. 1997). Title 28 U.S.C. § 2244(d) provides the following:

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

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

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

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

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

26                     28 U.S.C. § 2244(d)(1).

27           The limitations period is tolled while a properly filed application for post-  
28 conviction relief is pending in state court. See 28 U.S.C. § 2244(d)(2). An application for such  
relief is only “properly filed,” however, if it is authorized by and in compliance with state  
law. See Artuz v. Bennett, 531 U.S. 4, 8 (2000) (“[A]n application is ‘properly filed’ when its  
delivery and acceptance are in compliance with the applicable laws and rules governing filings.”).  
It bears noting that there is no tolling for periods of unreasonable delay between state court  
applications. See Carey v. Saffold, 536 U.S. 214, 225 (2002).

                   Petitioner’s first ground for relief relates to an alleged denial of due process  
because he did not receive a revocation hearing after a finding of probable cause in 2012.  
Petitioner alleges a statutory change, which went into effect on July 1, 2013, altered the parole

1 revocation process in California and allowed the board to improperly revoke his parole without  
2 affording him a hearing at the conclusion of his criminal proceedings in February 2014. Even  
3 giving Petitioner the most generous application of the statute of limitations, which would be the  
4 conclusion of his criminal proceedings on February 7, 2014, the one-year period would have  
5 lapsed in February of 2015. Petitioner did not file his first state habeas petition until April of  
6 2017, over two years after the statute lapsed, thus Petitioner cannot receive any tolling during the  
7 pendency of his state court actions. Petitioner did not file his first federal habeas petition until  
8 December of 2017, almost three years after the statute had lapsed. For this reason, Petitioner's  
9 first ground for relief is bared by the statute of limitations.

10 Petitioner's second ground for relief relates to a January 5, 2016, classification  
11 decision, applying a "VIO" administrative label to Petitioner pursuant to California Code of  
12 Regulations, title 15, section 3375.2, which categorization designates inmates with current or past  
13 conviction for violent felonies. The record indicates that Petitioner knew of the VIO  
14 classification on or near the date of issuance—January 5, 2016. ECF No. 7 at 11. For that  
15 reason, the statute of limitations began to run the following day, January 6, 2016, and lapsed  
16 January 6, 2017. Petitioner again can get no statutory tolling for the pendency of his state court  
17 actions because the statute of limitations had already lapsed prior to their filing. Because  
18 Petitioner's federal habeas was filed almost a year after the statute of limitations lapsed,  
19 December 2017, Petitioner's second ground is also bared by the statute of limitations.

20 Petitioner's third ground asserts the parole officer erroneously charged him with  
21 attempted murder in 2012. This claim largely mirrors the first claim as it relates to the May 11,  
22 2012, finding of probable cause as to attempted murder. Just as Petitioner's first ground for relief  
23 is barred by the statute of limitations, so too is his third. Petitioner acknowledged receipt of the  
24 murder charge in 2012, and did not file his federal habeas until December 26, 2017. Petitioner  
25 can get no statutory tolling for his state court actions because they were filed beginning in April  
26 of 2017, almost five years after the statute had already lapsed. For that reason, Petitioner's third  
27 ground for relief is bared by the statute of limitations.

28 Thus, all three grounds for relief are bared by the statute of limitations and for that

1 reason this Court recommends the petition be dismissed.

2 **III. CONCLUSION**

3 Based on the foregoing, the undersigned recommends that Respondent's motion to  
4 dismiss (ECF No. 13) 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 objections  
8 with the court. Responses to objections shall be filed within 14 days after service of objections.  
9 Failure to file objections within the specified time may waive the right to appeal. See Martinez v.  
10 Ylst, 951 F.2d 1153 (9th Cir. 1991).

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Dated: June 10, 2019



DENNIS M. COTA  
UNITED STATES MAGISTRATE JUDGE