



1 **I. Timeliness**

2 The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) became law on April  
3 24, 1996 and imposed for the first time a statute of limitations on petitions for a writ of habeas  
4 corpus filed by state prisoners. Under AEDPA, prisoners challenging non-capital state convictions  
5 or sentences must file petitions for relief within one year of the latest of the date on which: (1) the  
6 judgment became final after the conclusion of direct review or the time passed for seeking direct  
7 review; (2) an impediment to filing an application created by unconstitutional state action was  
8 removed, if such action prevented petitioner from filing; (3) the constitutional right asserted was  
9 recognized by the Supreme Court, if the right was newly recognized by the Supreme Court and made  
10 retroactive to cases on collateral review; or (4) the factual predicate of the claim could have been  
11 discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1).

12 Section 2244's one-year limitations period applies to all habeas petitions filed by persons in  
13 "custody pursuant to the judgment of a state court," even if the petition challenges a pertinent  
14 administrative decision rather than a state court judgment. Shelby v. Bartlett, 391 F.3d 1061, 1063  
15 (9th Cir. 2004) (quoting 28 U.S.C. § 2244(d)(1)). For prisoners challenging administrative decisions  
16 such as the revocation of good time credits or the denial of parole, § 2244(d)(1)(D) applies and the  
17 one-year limitations period begins to run on the date the administrative decision becomes final. Id.  
18 at 1066 (limitations period began to run the day after petitioner received timely notice of the denial  
19 of his administrative appeal challenging disciplinary decision). The "factual predicate" of the habeas  
20 claim is the administrative appeal board's denial of the administrative appeal; it is not the denial of  
21 the state habeas petition.<sup>1</sup> Redd v. McGrath, 343 F.3d 1077, 1082 (9th Cir. 2003). But because  
22 prisoners cannot administratively appeal parole decisions as of May 1, 2004, see Cal. Code Regs., tit.  
23 15, § 2050 (repealed May 1, 2004), the statute should begin running on the date the parole denial  
24 becomes final, see Redd, 343 F.3d at 1084.

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26 Prisoners in state custody who wish to challenge collaterally in federal habeas proceedings

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<sup>1</sup> A prisoner challenging an administrative decision does however receive statutory tolling for  
the period when state habeas petitions are pending. Redd, 343 F.3d at 1084.

1 either the fact or length of their confinement are first required to exhaust state judicial remedies,  
2 either on direct appeal or through collateral proceedings, by presenting the highest state court  
3 available with a fair opportunity to rule on the merits of each and every claim they seek to raise in  
4 federal court. See 28 U.S.C. § 2254(b), (c); Rose v. Lundy, 455 U.S. 509, 515-16 (1982);  
5 Duckworth v. Serrano, 454 U.S. 1, 3 (1981); McNeeley v. Arave, 842 F.2d 230, 231 (9th Cir. 1988).

6 The state's highest court must be given an opportunity to rule on the claims even if review is  
7 discretionary. See O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999) (Petitioner must invoke "one  
8 complete round of the state's established appellate review process.").

9         The Board denied Petitioner parole on October 20, 2004, but the decision did not become  
10 final until February 17, 2005. Petitioner does not dispute that he received timely notice that the  
11 Board's parole denial would become final on February 17, 2005, and he offers no evidence to the  
12 contrary. Therefore, the limitations period began running on February 17, 2005.<sup>2</sup> Thus, Petitioner  
13 had until February 17, 2006 to file his federal habeas petition. The instant petition was not filed until  
14 March 30, 2007, which was more than one year after the expiration of the limitations period.  
15 Therefore, the instant petition is untimely absent tolling.

16         The one-year statute of limitations is tolled under section 2244(d)(2) for the "time during  
17 which a properly filed application for state post-conviction or other collateral review with respect to  
18 the pertinent judgment or claim is pending . . . ." 28 U.S.C. § 2244(d)(2). An application for  
19 collateral review is "pending" in state court "as long as the ordinary state collateral review process is  
20 'in continuance' -- i.e., 'until the completion of' that process." Carey v. Saffold, 536 U.S. 214, 219-20  
21 (2002). In other words, until the application has achieved final resolution through the state's post-  
22 conviction procedures, by definition it remains "pending." Id. at 220. In California, this means that  
23 the statute of limitations is tolled from the time the first state habeas petition is filed until the  
24 California Supreme Court rejects the petitioner's final collateral challenge, as long as the petitioner  
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27 <sup>2</sup> Petitioner argues he did not receive the hearing transcripts until ninety-five days after the  
28 Board's decision. His argument does not affect the timeliness of the instant petition. As mentioned  
above, the limitations period began to run 120 days after the hearing, and he received his hearing  
transcripts before the statute began to run.

1 did not "unreasonably delay" in seeking review. Id. at 221-23; accord Nino v. Galaza, 183 F.3d  
2 1003, 1006 (9th Cir. 1999). Thus, the Court must determine whether a petitioner "delayed  
3 'unreasonably' in seeking [higher state court] review." Carey, 536 U.S. at 225. If a petition is  
4 deemed unreasonably delayed, the application would no longer have been "pending" during the  
5 period at issue. Id. If the state court does not clearly rule on a petitioner's delay, as is the case here,  
6 the federal court must evaluate all "relevant circumstances" and independently determine whether  
7 the delay was "unreasonable." Id. at 226.

8 In the instant case, the limitations period ran from February 17, 2005 to June 9, 2005, for 112  
9 days, before Petitioner filed his superior court petition. Pursuant to Carey, Petitioner is entitled to  
10 statutory tolling of the limitations period for the entire time he was pursuing state collateral relief.  
11 In sum, the statute resumed running on August 16, 2006, the date the California Supreme Court's  
12 denial was final, and ran until March 30, 2007, the date his federal petition was deemed filed, which  
13 is 226 additional days. A total of 338 days (112 days plus 226 days) had elapsed before Petitioner  
14 filed his federal petition. Therefore, if statutory tolling applies, Petitioner's federal petition would be  
15 timely because it was filed twenty-seven days (365 days minus 338 days) before the limitations  
16 period expired. However, Respondent's position is that the sixty-nine day gap between the superior  
17 court's denial and the filing of Petitioner's appellate court petition was a period of "unreasonable  
18 delay" and thus the limitations period should not be tolled for that period. (Mot. to Dismiss at 6-7.)

19 "In most States a statute sets out the number of days for filing a timely notice of appeal,  
20 typically a matter of a few days. California, however, has a special system . . . . Under that  
21 system . . . a notice of appeal is timely if filed within a 'reasonable time'." Evans v. Chavis, 546 U.S.  
22 189, 192-93 (2006) (citing In re Harris, 5 Cal. 4th 813, 828 n.7 (1993); Carey, 536 U.S. at 221).  
23 "The fact that California's timeliness standard is general rather than precise may make it more  
24 difficult for . . . courts to determine . . . when a review application . . . comes too late." Evans, 546  
25 U.S. at 193 (quoting Carey, 536 U.S. at 223). "Nonetheless, the [Court] must undertake that task."  
26 Evans, 546 U.S. at 193. "California's system is sufficiently analogous to appellate systems in other  
27 States to treat it similarly." Id. (citing Carey, 536 U.S. at 222). "[I]n most states a prisoner who  
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1 seeks review of an adverse . . . decision must file a notice of appeal . . . and the timeliness . . . is  
2 measured in terms of a determinate time period, such as 30 or 60 days." Evans, 546 U.S. at 192. In  
3 other words, "California's 'reasonable time' standard [should] not lead to filing delays substantially  
4 longer than those in States with determinate timeliness rules." Id. at 200 (citing Carey, 536 U.S. at  
5 222-23). It is clear that six months is not reasonable, because in Evans the Supreme Court noted that  
6 six months is far longer than the thirty to sixty days that most states provide for filing an appeal, and  
7 held that an unjustified or unexplained six-month delay between post-conviction applications in  
8 California is not "reasonable" and so does not fall within Carey's definition of the term "pending."  
9 Id.; see Gaston v. Palmer, 447 F.3d 1163, 1167 (9th Cir. 2006) (after Evans, revising original  
10 opinion in 417 F.3d 1030, 1040 (9th Cir. 2005), and finding no gap tolling during delays of ten,  
11 fifteen and eighteen months between California habeas petitions). It can also be fairly inferred from  
12 the Supreme Court's reference to the usual thirty or sixty day periods provided by states with  
13 determinate deadlines that a delay of sixty days would not be unreasonable. Thus, the extremes of  
14 "reasonable time" have been set fairly clearly -- sixty days and six months.

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16 The language in Evans referred to above -- that most states find thirty to sixty days to be  
17 reasonable -- seems to imply that delays are reasonable only if they are of roughly that magnitude,  
18 thirty to sixty days. More conclusive is the Supreme Court's statement that in determining whether a  
19 delay is reasonable "the [Ninth] Circuit must keep in mind that, in Saffold, we held that timely  
20 filings in California (as elsewhere) fell within the federal tolling provision on the assumption that  
21 California law in this respect did not differ significantly from the laws of other states, i.e., that  
22 California's 'reasonable time' standard would not lead to filing delays substantially longer than those  
23 in States with determinate timeliness rules." Evans, 546 U.S. at 199-200 (citing Carey, 536 U.S. at  
24 222-223). "California, of course, remains free to tell us if, in this respect, we were wrong." Evans,  
25 546 U.S. at 200.<sup>3</sup>

26 In the instant case, the Court finds that the delay of sixty-nine days to seek higher state court  
27 review could still be considered within the "reasonable" delay of thirty to sixty days in Evans.

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<sup>3</sup> No California case has held that the Supreme Court was wrong.

1 Applying Evans, other California federal district courts, including this Court, have held that delays  
2 longer than the sixty-nine day delay in the instant case were unreasonable. See Livermore v.  
3 Watson, 556 F. Supp. 2d 1112, 1117 (E.D. Cal. 2008) (finding seventy-eight day delay  
4 unreasonable), Bridges v. Runnels, 2007 WL 2695177, at \*2 (E.D. Cal. Sept. 11, 2007) (finding  
5 seventy-six day delay unreasonable); Dorthick v. Hamlet, 2007 WL 1430041, at \*3 (N.D. Cal. May  
6 14, 2007) (97 day and 174 day delays were unreasonable); Forrister v. Woodford, 2007 WL 809991,  
7 at \*2-3 (E.D. Cal. Mar. 15, 2007) (finding eighty-eight day delay unreasonable). Therefore, the  
8 Court finds that Petitioner is entitled to statutory tolling during the sixty-nine day period that he  
9 waited before seeking higher court review.

10 Accordingly, Petitioner's federal habeas petition was filed within the one-year limitations  
11 period because he is entitled to statutory tolling of the entire period that he was pursuing state  
12 collateral relief. As mentioned above, Petitioner filed his federal petition twenty-seven days before  
13 the limitations period expired. Therefore, the statute of limitations in 28 U.S.C. § 2244(d)(1) does  
14 not bar the instant petition. Thus, Respondent's motion to dismiss the petition as untimely is  
15 DENIED.

## 16 **II. Failure to State a Claim Based on Federal Law**

17 Respondent claims that Petitioner fails to allege violations of federal law or the federal  
18 constitution as to his claims regarding: (1) the standard of review used by California courts in  
19 reviewing parole consideration hearings; (2) the standard of evidence used by the Board; and (3) the  
20 state courts' and the Board's interpretation of In re Dannenberg, 34 Cal. 4th 1061 (2005), as applied to  
21 parole hearings. (Mot. to Dismiss at 3.)

22 Petitioner's claims regarding the standard of review used by California courts in reviewing  
23 parole consideration hearings and their interpretation of In re Dannenberg are not cognizable under  
24 § 2254, because errors in the state post-conviction review process are not addressable through federal  
25 habeas corpus proceedings. See Ortiz v. Stewart, 149 F.3d 923, 939 (9th Cir. 1998); Gerlaugh v.  
26 Stewart, 129 F.3d 1027, 1045 (9th Cir. 1997); Villafuerte v. Stewart, 111 F.3d 616, 632 n.7 (9th Cir.  
27 1997); Franzen v. Brinkman, 877 F.2d 26, 26 (9th Cir.), cert. denied, 493 U.S. 1012 (1989). Such  
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1 errors do not generally represent an attack on the prisoner's detention and therefore are not proper  
2 grounds for habeas relief. See id. They instead generally pertain to the review process itself and not  
3 to the constitutionality of a state conviction. See, e.g., 28 U.S.C. § 2254(I) (claims of ineffective  
4 assistance of state or federal post-conviction counsel not cognizable on federal habeas review);  
5 Franzen, 877 F.2d at 26 (delay in state habeas proceeding not addressable in federal habeas).  
6 Therefore, Petitioner's claims regarding the state courts' standard of review and their interpretation of  
7 In re Dannenberg fail to state a basis for federal habeas review. Thus, Respondent's motion to  
8 dismiss these claims is GRANTED because Petitioner fails to allege violations of federal law or the  
9 federal constitution.

10           The Court finds the remaining two claims Respondent challenges sufficiently state a  
11 cognizable basis for federal habeas relief. Petitioner claims that the Board's application of the "some  
12 evidence" standard was the wrong evidence standard and violated his federal due process rights.  
13 (Pet. Attach. at 1.) Petitioner also challenged the Board's interpretation of In re Dannenberg. (Id.)  
14 Although In re Dannenberg is a California state case, a citation to a state case analyzing a federal  
15 constitutional issue serves the same purpose as a citation to a federal case analyzing such an issue.  
16 Roberts v. Dicarlo, 296 F. Supp. 2d. 1182, 1186 (C.D. Cal. 2003) (citing Peterson v. Lampert, 319  
17 F.3d 1153, 1158 (9th Cir. 2003) (en banc)). Petitioner challenges the Board's application of In re  
18 Dannenberg in relation to the evidentiary standards used at parole hearings. (Pet. Attach. at 4.)  
19 Therefore, these claims present a cognizable basis for federal habeas relief. Thus, the Court DENIES  
20 Respondent's motion to dismiss these claims for failing to allege violations of federal law or the  
21 federal constitution.  
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### 23 **III. Exhaustion**

24           Respondent contends that the petition should be dismissed because it includes both exhausted  
25 and unexhausted claims. Because the Court has dismissed certain claims for failing to state a basis  
26 for federal habeas relief, the remaining claims that Respondent argues are unexhausted only include:  
27 (1) Petitioner's challenge to the standard of evidence used by the Board, i.e., his "some evidence"  
28 claim; (2) his challenge to the Board's interpretation of In re Dannenberg, as applied to parole  
consideration hearings; and (3) his claim that the Board failed to recognize Petitioner's federally

1 protected liberty interest in parole.<sup>4</sup> (Mot. to Dismiss at 4.)

2 Prisoners in state custody who wish to challenge collaterally in federal habeas proceedings  
3 either the fact or length of their confinement are first required to exhaust state judicial remedies,  
4 either on direct appeal or through collateral proceedings, by presenting the highest state court  
5 available with a fair opportunity to rule on the merits of each and every claim they seek to raise in  
6 federal court. See 28 U.S.C. § 2254(b), (c); Rose v. Lundy, 455 U.S. 509, 515-16 (1982); Duckworth  
7 v. Serrano, 454 U.S. 1, 3 (1981); McNeeley v. Arave, 842 F.2d 230, 231 (9th Cir. 1988).

8 A petition that contains both exhausted and unexhausted claims is referred to as a "mixed" petition.  
9 See Rhines v. Weber, 544 U.S. 269, 277 (2005). A federal district court cannot adjudicate the merits  
10 of a habeas petition containing any claim as to which state remedies have not been exhausted, such as  
11 a mixed petition. See Rose, 455 U.S. at 522.

12 Petitioner's claim relating to his liberty interest in parole, although true,<sup>5</sup> is not a ground for  
13 relief. Therefore, whether it is exhausted or not is irrelevant. This claim is summarily dismissed.

14 As to Respondent's two remaining arguments, the Court finds that Petitioner's state supreme  
15 court petition contains references to the "some evidence" standard and citations to In re Dannenberg.  
16 Section II-A of that petition is entitled "The Parole Board's Decision Was Not Support [sic] By Any  
17 Evidence." (Resp't Ex. C. at 15-16.) This section contains citations to all of the relevant cases  
18 dealing with the "some evidence" standard and the application of their rules to Petitioner's case,  
19 including: In re Dannenberg and In re Rosencrantz, 29 Cal. 4th 616 (2002). (Resp't Ex. C. at 15-18.)  
20 For example, Petitioner cites to In re Dannenberg as support for his assertion that "the Board abuses  
21 its discretion if it makes factual findings that are not supported by the record." (Id. at 15.)  
22 Furthermore, Petitioner argues that "[w]hen the facts of Petitioner's offense are considered in relation  
23 to the time served and performance in prison, continual confinement based solely on the nature of  
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26 <sup>4</sup> Petitioner also claims that his federal due process rights were violated when the Board denied  
27 him parole. However, Respondent does not argue that this claim is unexhausted. (Mot. to Dismiss at 4.)

28 <sup>5</sup> The argument that California statute does not create a liberty interest in parole has been rejected  
by the United States Court of Appeals for the Ninth Circuit. See Sass v. Cal. Bd. of Prison Terms, 461  
F.3d 1123, 1125 (9th Cir. 2006) ("California inmates continue to have a liberty interest in parole after  
[In re Dannenberg].").

1 Petitioner's offense is constitutionally excessive." (Id. at 26.) While Petitioner does allege the Board  
2 should be estopped from relying upon the same evidence to support a different decision, he claims the  
3 Board's 2004 decision was not supported by "some evidence." (Id.) Therefore, the Court concludes  
4 Petitioner exhausted his "some evidence" claim as well as his claim challenging the Board's  
5 interpretation of In re Dannenberg. Thus, the Court DENIES Respondent's motion to dismiss these  
6 claims as unexhausted.

### 7 CONCLUSION

8 For the foregoing reasons,

- 9 1. Respondent's motion to dismiss (docket no. 4) is GRANTED in part and DENIED in  
10 part.
- 11 2. Petitioner's claims regarding the state courts' standard of review and interpretation of  
12 In re Dannenberg are DISMISSED without leave to amend.
- 13 3. Petitioner's claim relating to his liberty interest in parole is summarily DISMISSED.
- 14 4. Respondent is directed to SHOW CAUSE why the petition should not be granted as to  
15 the remaining claims and the parties shall abide by the scheduling order below:
  - 16 a. Respondent shall file with the Court and serve upon Petitioner, no later than  
17 **sixty (60) days** of the date of this Order, an Answer conforming in all respects to Rule 5 of the Rules  
18 Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be issued.  
19 Respondent shall file with the Answer a copy of all portions of the relevant parole suitability hearing  
20 records and any other state records that have been transcribed previously and that are relevant to a  
21 determination of the issues presented by the petition.
  - 22 b. If Petitioner wishes to respond to the Answer, he shall do so by filing a  
23 Traverse with the Court and serving it on Respondent no later than **forty-five (45) days** of his receipt  
24 of the Answer. Should Petitioner fail to do so, the petition will be deemed submitted and ready for  
25 decision **forty-five (45) days** after the date Petitioner is served with Respondent's Answer.
- 26 5. It is Petitioner's responsibility to prosecute this case. Petitioner must keep the court  
27 informed of any change of address by filing a separate paper with the Clerk of the Court headed  
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1 "NOTICE OF CHANGE OF ADDRESS," and comply with any orders of the Court within the time  
2 allowed or ask for an extension of that time. Failure to do so may result in the dismissal of this action  
3 for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b). See Martinez v. Johnson,  
4 104 F.3d 769, 772 (5th Cir. 1997) (Rule 41(b) applicable in habeas cases).

5 6. Petitioner is reminded that all communications with the Court, whether by way of  
6 formal legal motions or informal letters, must be served on Respondent by mailing a true copy of the  
7 document to Respondent's counsel.

8 7. Extensions of time are not favored, though reasonable extensions will be granted.  
9 However, the party making a motion for an extension of time is not relieved from his or her duty to  
10 comply with the deadlines set by the Court merely by having made a motion for an extension of time.  
11 The party making the motion must still meet the deadlines set by the Court until an order addressing  
12 the motion for an extension of time is issued. Any motion for an extension of time must be filed no  
13 later than **ten (10) days** prior to the deadline sought to be extended.

14 8. This Order terminates Docket no. 4.

15 IT IS SO ORDERED.

16 DATED: September 30, 2008

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18 SAUNDRA BROWN ARMSTRONG  
19 United States District Judge

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UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

LESLIE PILTZ,  
Plaintiff,

Case Number: CV07-02175 SBA

**CERTIFICATE OF SERVICE**

v.

CALIFORNIA PAROLE BOARD  
COMMISSIONER et al,  
Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on October 1, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Leslie Piltz D58060  
Correctional Training Facility  
P.O. Box 689  
Soledad, CA 93960-0689

Dated: October 1, 2008

Richard W. Wieking, Clerk  
By: LISA R CLARK, Deputy Clerk