

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SEBASTIAN H. JIMINEZ,

Petitioner-Appellant.

v.

BERTRAM RICE, Warden,

Respondent-Appellee.

No. 99-15574

D.C. No.

CV-97-01450-CAL

ORDER

Filed April 24, 2001

Before: Mary M. Schroeder, Chief Judge, and
Robert R. Beezer and Stephen S. Trott, Circuit Judges

ORDER; Dissent by Chief Judge Schroeder

ORDER

The petition for rehearing is GRANTED and the suggestion for rehearing en banc is DENIED. The opinion filed on August 22, 2000, published at 222 F.3d 1210 (9th Cir. 2000) is WITHDRAWN. Submission of this case is DEFERRED pending a decision by the United States Supreme Court in Artuz v. Walker, 208 F.3d 357 (2d Cir.), cert. granted sub nom Duncan v. Walker, 121 S. Ct. 480 (Nov. 13, 2000), or until further order of this court.

SCHROEDER, Chief Judge, dissenting in part,

I agree that the petition for rehearing should be granted and the original opinion withdrawn. Waiting for the United States Supreme Court to decide whether a federal habeas petition

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tolls the year limitation period is useful, because it will let Jiminez know whether he will have any time to file a new or

amended petition after he exhausts state remedies. It is not necessary to wait for Walker, however, to review the district court's dismissal of this petition, since it was filed before the year period expired. Because it contained unexhausted claims, it should have been dismissed without prejudice. See Slack v. McDaniel, 120 S. Ct. 1595, 1605-06 (2000).