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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

SOTERO SOTO,)	1:08-cv-01677-LJO-JLT HC
)	
Petitioner,)	FINDINGS AND RECOMMENDATION RE:
)	RESPONDENT’S MOTION TO DISMISS
v.)	THE AMENDED PETITION (Doc. 21)
)	
)	ORDER DIRECTING OBJECTIONS TO BE
PEOPLE OF THE STATE OF)	FILED WITHIN TWENTY DAYS
CALIFORNIA,)	
)	
Respondent.)	

PROCEDURAL HISTORY

____ Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The instant federal petition for writ of habeas corpus was filed on October 29, 2008,¹ challenging his November 30, 2004 conviction in the Superior Court of Tulare

¹In Houston v. Lack, the United States Supreme Court held that a pro se habeas petitioner's notice of appeal is deemed filed on the date of its submission to prison authorities for mailing, as opposed to the date of its receipt by the court clerk. Houston v. Lack, 487 U.S. 166, 276, 108 S.Ct. 2379, 2385 (1988). The rule is premised on the pro se prisoner's mailing of legal documents through the conduit of "prison authorities whom he cannot control and whose interests might be adverse to his." Miller v. Sumner, 921 F.2d 202, 203 (9th Cir. 1990); see, Houston, 487 U.S. at 271, 108 S.Ct. at 2382. The Ninth Circuit has applied the "mailbox rule" to state and federal petitions in order to calculate the tolling provisions of the AEDPA. Saffold v. Neland, 250 F.3d 1262, 1268-1269 (9th Cir. 2000), *amended* May 23, 2001, *vacated and remanded on other grounds sub nom.* Carey v. Saffold, 536 U.S. 214, 226 (2002). The date the petition is signed may be considered the

1 County following a plea of no contest to first degree burglary and assault by means of force. (Doc.
2 22, Lodged Documents (“LD”) 1, 2; Doc. 16, pp. 1-2). Petitioner was sentenced to a prison term of
3 seventeen years and eight months. (Id.). On April 20, 2009, Petitioner filed an amended petition
4 raising two claims: (1) that the trial court abused its discretion by denying his motion to withdraw his
5 no contest pleas; and (2) that the evidence was insufficient to prove Petitioner committed a crime to
6 facilitate other criminal activity. (Doc. 16). On May 14, 2009, the Court ordered Respondent to file
7 a response. (Doc. 17). On July 13, 2009, Respondent filed the instant motion to dismiss the petition,
8 arguing that the petition is untimely. (Doc. 21). To date, Petitioner has not filed an opposition to the
9 motion to dismiss.

10 DISCUSSION

11 A. Procedural Grounds for Motion to Dismiss

12 As mentioned, Respondent has filed a Motion to Dismiss the petition as being filed outside
13 the one year limitations period prescribed by Title 28 U.S.C. § 2244(d)(1). Rule 4 of the Rules
14 Governing Section 2254 Cases allows a district court to dismiss a petition if it “plainly appears from
15 the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the
16 district court” Rule 4 of the Rules Governing Section 2254 Cases.

17 The Ninth Circuit has allowed Respondent’s to file a Motion to Dismiss in lieu of an Answer
18 if the motion attacks the pleadings for failing to exhaust state remedies or being in violation of the
19 state’s procedural rules. See, e.g., O’Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990) (using Rule
20 4 to evaluate motion to dismiss petition for failure to exhaust state remedies); White v. Lewis, 874
21 F.2d 599, 602-03 (9th Cir. 1989) (using Rule 4 as procedural grounds to review motion to dismiss for
22 state procedural default); Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n.12 (E.D. Cal. 1982) (same).
23 Thus, a Respondent can file a Motion to Dismiss after the court orders a response, and the Court
24 should use Rule 4 standards to review the motion. See Hillery, 533 F. Supp. at 1194 & n. 12.

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26 _____
27 earliest possible date an inmate could submit his petition to prison authorities for filing under the mailbox rule. Jenkins v.
28 Johnson, 330 F.3d 1146, 1149 n. 2 (9th cir. 2003). Accordingly, for all of Petitioner’s state petitions and for the instant federal
petition, the Court will consider the date of signing of the petition (or the date of signing of the proof of service if no signature
appears on the petition) as the earliest possible filing date and the operative date of filing under the mailbox rule for
calculating the running of the statute of limitation. Petitioner signed the original petition on October 29, 2008. (Doc. 1, p.
9).

1 In this case, Respondent's Motion to Dismiss is based on a violation of 28 U.S.C. §
2 2244(d)(1)'s one-year limitation period. Because Respondent's Motion to Dismiss is similar in
3 procedural standing to a Motion to Dismiss for failure to exhaust state remedies or for state
4 procedural default, and because Respondent has not yet filed a formal Answer, the Court will review
5 Respondent's Motion to Dismiss pursuant to its authority under Rule 4.

6 B. Limitation Period for Filing a Petition for Writ of Habeas Corpus

7 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of
8 1996 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas
9 corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063
10 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc), *cert. denied*, 118 S.Ct. 586
11 (1997). The instant petition was filed on October 29, 2008, and thus, it is subject to the provisions
12 of the AEDPA.

13 The AEDPA imposes a one year period of limitation on petitioners seeking to file a federal
14 petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As amended, § 2244, subdivision (d)
15 reads:

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

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

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

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

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

25 (2) The time during which a properly filed application for State post-conviction or
26 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.

27 28 U.S.C. § 2244(d).

28 In most cases, the limitation period begins running on the date that the petitioner's direct

1 review became final. Here, the Petitioner was convicted on November 30, 2004. Petitioner then
2 commenced his direct review of his conviction in the California appellate courts, including a petition
3 for review in the California Supreme Court that was denied on October 11, 2006. (LD 3-4). Thus,
4 direct review would have concluded on January 9, 2007, when the ninety day period for seeking
5 review in the United States Supreme Court expired. Barefoot v. Estelle, 463 U.S. 880, 887 (1983);
6 Bowen v. Roe, 188 F.3d 1157, 1159 (9th Cir.1999); Smith v. Bowersox, 159 F.3d 345, 347 (8th
7 Cir.1998). Petitioner would then have one year from the following day, January 10, 2007, or until
8 January 9, 2008, absent applicable tolling, within which to file his federal petition for writ of habeas
9 corpus.

10 As mentioned, the instant petition was filed on October 29, 2008, almost ten months after the
11 date the one-year period would have expired. Thus, unless Petitioner is entitled to either statutory or
12 equitable tolling, the instant petition is untimely and should be dismissed.

13 C. Tolling of the Limitation Period Pursuant to 28 U.S.C. § 2244(d)(2)

14 Under the AEDPA, the statute of limitations is tolled during the time that a properly filed
15 application for state post-conviction or other collateral review is pending in state court. 28 U.S.C.
16 § 2244(d)(2). A properly filed application is one that complies with the applicable laws and rules
17 governing filings, including the form of the application and time limitations. Artuz v. Bennett, 531
18 U.S. 4, 8, 121 S. Ct. 361 (2000). An application is pending during the time that ‘a California
19 petitioner completes a full round of [state] collateral review,’ so long as there is no unreasonable
20 delay in the intervals between a lower court decision and the filing of a petition in a higher court.
21 Delhomme v. Ramirez, 340 F. 3d 817, 819 (9th Cir. 2003), abrogated on other grounds as recognized
22 by Waldrip v. Hall, 548 F. 3d 729 (9th Cir. 2008)(per curium)(internal quotation marks and citations
23 omitted); see Evans v. Chavis, 546 U.S. 189, 193-194, 126 S. Ct. 846 (2006); see Carey v. Saffold,
24 536 U.S. 214, 220, 222-226, 122 S. Ct. 2134 (2002); see also, Nino v. Galaza, 183 F.3d 1003, 1006
25 (9th Cir. 1999).

26 Nevertheless, there are circumstances and periods of time when no statutory tolling is
27 allowed. For example, no statutory tolling is allowed for the period of time between finality of an
28 appeal and the filing of an application for post-conviction or other collateral review in state court,

1 because no state court application is “pending” during that time. Nino, 183 F.3d at 1006-1007.
2 Similarly, no statutory tolling is allowed for the period between finality of an appeal and the filing of
3 a federal petition. Id. at 1007. In addition, the limitation period is not tolled during the time that a
4 federal habeas petition is pending. Duncan v. Walker, 563 U.S. 167, 181-182, 121 S.Ct. 2120
5 (2001); see also, Fail v. Hubbard, 315 F. 3d 1059, 1060 (9th Cir. 2001)(as amended on December 16,
6 2002). Further, a petitioner is not entitled to statutory tolling where the limitation period has already
7 run prior to filing a state habeas petition. Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003)
8 (“section 2244(d) does not permit the reinitiation of the limitations period that has ended before the
9 state petition was filed.”); Jiminez v. White, 276 F. 3d 478, 482 (9th Cir. 2001). Finally, a petitioner
10 is not entitled to continuous tolling when the petitioner’s later petition raises unrelated claims. See
11 Gaston v. Palmer, 447 F.3d 1165, 1166 (9th Cir. 2006).

12 Here, the record establishes that Petitioner filed a single state court habeas petition, on
13 December 4, 2007, in the California Supreme Court, that was denied on June 11, 2008. (LD 5, 6).

14 As can be seen from the foregoing chronology, the one-year period commenced on January
15 10, 2007, and ran unabated until Petitioner filed his lone state habeas petition on December 4, 2007.
16 At that point, 328 of Petitioner’s 365 days had elapsed, leaving Petitioner with only 37 days
17 remaining within which to file his federal habeas petition. Assuming, without deciding, that
18 Petitioner’s single state court petition was “properly filed” within the meaning of the AEDPA such
19 that Petitioner would be entitled to statutory tolling during the pendency of that petition, the one-year
20 period would have re-commenced on the day following the California Supreme Court’s denial of that
21 petition on June 11, 2008, i.e., on June 12, 2008, and would have run unabated until the one-year
22 period expired 37 days later, on July 19, 2008. As discussed, the instant petition was not filed until
23 October 29, 2008, over three months after the one-year period had expired. Thus, unless Petitioner is
24 entitled to equitable tolling, the petition should be dismissed as untimely.

25 D. Equitable Tolling

26 The limitation period is subject to equitable tolling when “extraordinary circumstances
27 beyond a prisoner’s control make it impossible to file the petition on time.” Shannon v. Newland,
28 410 F. 3d 1083, 1089-1090 (9th Cir. 2005)(internal quotation marks and citations omitted). “When

1 external forces, rather than a petitioner’s lack of diligence, account for the failure to file a timely
2 claim, equitable tolling of the statute of limitations may be appropriate.” Miles v. Prunty, 187 F.3d
3 1104, 1107 (9th Cir. 1999). “Generally, a litigant seeking equitable tolling bears the burden of
4 establishing two elements: “(1) that he has been pursuing his rights diligently, and (2) that some
5 extraordinary circumstance stood in his way.” Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct.
6 1807 (2005). “[T]he threshold necessary to trigger equitable tolling under AEDPA is very high, lest
7 the exceptions swallow the rule.” Miranda v. Castro, 292 F. 3d 1062, 1066 (9th Cir. 2002)(citation
8 omitted). As a consequence, “equitable tolling is unavailable in most cases.” Miles, 187 F. 3d at
9 1107.

10 Here, Petitioner has made no express or implied claim of entitlement to equitable tolling.
11 Moreover, after reviewing the record now before this Court, the Court perceives no basis for
12 entitlement to equitable tolling. Therefore, the petition is untimely by more than three months and
13 should be dismissed.²

14 **RECOMMENDATION**

15 Accordingly, the Court HEREBY RECOMMENDS that Respondent’s motion to dismiss
16 (Doc. 21), be GRANTED, and the amended habeas corpus petition (Doc. 16), be DISMISSED for
17 Petitioner’s failure to comply with 28 U.S.C. § 2244(d)’s one-year limitation period.

18 This Findings and Recommendation is submitted to the United States District Court Judge
19 assigned to this case, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304 of
20 the Local Rules of Practice for the United States District Court, Eastern District of California.

21 Within twenty (20) days after being served with a copy, any party may file written objections with
22 the court and serve a copy on all parties. Such a document should be captioned “Objections to
23 Magistrate Judge’s Findings and Recommendation.” Replies to the objections shall be served and
24 filed within ten (10) court days (plus three days if served by mail) after service of the objections.
25 The Court will then review the Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The
26 parties are advised that failure to file objections within the specified time may waive the right to

27
28 ²Given the Court’s analysis of the timeliness issue and its Recommendation to dismiss the amended petition, the Court need not address Respondent’s additional ground for dismissal, i.e., that Ground Two, relating to insufficiency of the evidence, has not been exhausted in the California Supreme Court.

1 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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3 IT IS SO ORDERED.

4 Dated: January 29, 2010

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/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE