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

MILFORD JAY PETERSON,

Petitioner,

No. CIV S-09-1524 JAM DAD P

vs.

MIKE McDONALD¹,

Respondent.

ORDER AND

FINDINGS AND RECOMMENDATIONS

_____ /

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Before the court is respondent’s motion to dismiss this action on the ground that the habeas petition was filed beyond the one-year statute of limitations under 28 U.S.C. § 2244(d). Petitioner has filed an opposition to the motion and respondent has filed a reply.

BACKGROUND

Petitioner was convicted in the San Joaquin County Superior Court of assault with a firearm and of being a felon in possession of a firearm. (Lod. Doc. 1) (filed August 28, 2009).

¹ Counsel for respondent has advised the court that the current warden of High Desert State Prison, where petitioner is incarcerated, is Mike McDonald. Accordingly, the court will direct the Clerk of the Court to substitute Mike McDonald as the respondent in this action.

1 Sentencing enhancement allegations were found to be true. (Id.) On October 11, 2002,
2 petitioner was sentenced to an indeterminate prison term of twenty-five years to life, plus
3 enhancements. (Id.) On September 27, 2004, the California Court of Appeal for the Third
4 Appellate District affirmed the judgment of conviction. (Lod. Doc. 2.) On September 19, 2008,
5 petitioner filed a petition for writ of habeas corpus with the California Supreme Court. (Lod.
6 Doc. 3.) That petition was denied on May 20, 2009. (Lod. Doc. 4.) On June 3, 2009, petitioner
7 filed his federal habeas petition with this court.

8 **RESPONDENT’S MOTION TO DISMISS**

9 I. Respondent’s Motion

10 Respondent asserts that because the pending petition was filed on June 3, 2009,
11 the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applies. (MTD at 2.)
12 According to respondent, because petitioner did not file a petition for review with the California
13 Supreme Court, his judgment of conviction became final on November 6, 2004, forty days after
14 the time for filing a petition for review had expired. (Id.) The one year AEDPA statute of
15 limitations began to run the following day on November 7, 2004. (Id.) Thus, respondent argues,
16 the last day for petitioner to timely file a federal habeas petition was on November 6, 2005,
17 unless he was entitled to any tolling of the applicable statute of limitations. (Id. at 3.)

18 Respondent contends that petitioner is not entitled to statutory tolling under 28
19 U.S.C. §2244(d)(2) since he did not file any post-conviction collateral attacks on his conviction
20 in state court within the one-year AEDPA statute of limitations period. (Id.) Therefore,
21 respondent asserts, the statute of limitations for the filing of a federal habeas petition commenced
22 on November 7, 2004, and expired on November 6, 2005. (Id.) Since petitioner did not file his
23 federal habeas petition until over three years after the statute of limitations expired, respondent
24 argues that this federal habeas action is time barred. (Id.)

25 Respondent also notes that the habeas petition filed by petitioner with the
26 California Supreme Court on September 19, 2008, cannot operate to toll the AEDPA statute of

1 limitations because that petition was rejected as untimely as indicated by the California Supreme
2 Court's citation to In re Robbins, 18 Cal. 4th 770, 780 (1998) in denying the petition.

3 Respondent contends that Robbins stands for the proposition that delayed claims will not be
4 condoned. (Id.) Therefore, according to respondent, the belated habeas petition filed by
5 petitioner with the California Supreme Court cannot serve to toll the AEDPA statute of
6 limitations because it was not properly filed. (Id.)

7 II. Petitioner's Opposition

8 In opposing the pending motion to dismiss petitioner contends that on or about
9 October 22, 2004, he filed a petition for review with the California Supreme Court. (Opp'n at 3.)
10 Petitioner states that the petition for review was prepared by his appellate counsel and was
11 mailed to petitioner on October 18, 2004, so that petitioner could file it with the California
12 Supreme Court on his own behalf. (Id.) Petitioner contends that on or about October 22, 2004,
13 he mailed the petition for review to the California Supreme Court from Mule Creek State Prison.
14 (Id.) Petitioner has submitted a copy of the prison mail log to verify his contention that mail was
15 sent to the California Supreme Court on October 22, 2004. (Id., Ex. C at 3.)

16 Petitioner argues that, believing that the petition for review was pending in the
17 California Supreme Court, he waited for that court's ruling in response to the petition. (Id. at 4.)
18 Petitioner represents that on March 16, 2008, he filed a "Request for Case Status Update and
19 Legal Status Summary Sheet" with the California Supreme Court and that on March 19, 2008,
20 the court sent him a letter stating that it could not locate a case related to petitioner's inquiry.
21 (Id.)

22 Petitioner explains that on April 17, 2008, he wrote to the litigation coordinator at
23 High Desert State Prison and requested a copy of the incoming and outgoing legal mail to
24 determine if his petition for review had in fact been mailed to the California Supreme Court. (Id.
25 at 4-5.) Petitioner claims that he was told to contact the mailroom at Mule Creek State Prison.
26 (Id. at 5.) He states that on May 14, 2008, he finally received the record of the incoming and

1 outgoing legal mail at Mule Creek State Prison which shows that he forwarded legal mail to the
2 California Supreme Court on October 22, 2004. (Id., Ex. C at 3.) Petitioner argues that the fact
3 that his petition for review did not arrive at the California Supreme Court, or was lost or
4 misplaced, was a circumstance beyond his control and that he is therefore entitled to statutory
5 tolling of the AEDPA statute of limitations. (Id. at 5.)

6 Petitioner also argues that he is entitled to equitable tolling of the applicable
7 statute of limitations. (Id. at 6.) In this regard, he contends that he acted diligently and that his
8 petition for review was submitted for mailing to the California Supreme Court in a timely matter.
9 (Id.) In addition, petitioner claims, these were external forces beyond his control that prevented
10 him from filing his federal petition sooner. (Id.) Petitioner concludes:

11 Upon discovering that the California Supreme Court had not
12 received the Petition for Review, Petitioner embarked on an
13 extensive investigation to determine the cause of the matter, he
14 diligently filed a Petition for Writ of Habeas Corpus in place and
15 stead of the Petition for Review, and thereupon exhausted
16 additional claims in the state habeas petition to the California
17 Supreme Court, and thereafter filed the instant federal Petition for
18 Writ of Habeas Corpus.

16 (Id. at 6-7.)

17 III. Respondent's Reply

18 Respondent points out that petitioner does not contest the fact that the California
19 Court of Appeals affirmed his conviction on November 6, 2004, and that petitioner's only post-
20 conviction collateral challenge to that conviction was filed in the California Supreme on
21 September 19, 2008, over three years after the AEDPA statute of limitations had expired. (Reply
22 at 2.) Respondent argues that there is no authority that would allow for statutory or equitable
23 tolling based on petitioner's contention that he submitted a petition for review to the California
24 Supreme Court, that was apparently lost and was never filed by that Court. (Id.)

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1 ANALYSIS

2 I. The AEDPA Statute of Limitations

3 On April 24, 1996, Congress enacted AEDPA which amended 28 U.S.C. § 2244
4 by adding the following provision:

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

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

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

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

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

23 (2) The time during which a properly filed application for State
24 post-conviction or other collateral review with respect to the
25 pertinent judgment or claim is pending shall not be counted toward
26 any period of limitation under this subsection.

19 The one-year AEDPA statute of limitations applies to all federal habeas corpus petitions filed
20 after the statute was enacted and therefore applies to the pending petition. See Lindh v. Murphy,
21 521 U.S. 320, 322-23 (1997). Since, petitioner filed his federal habeas petition in 2009, the
22 AEDPA statute of limitations applies to this action.

23 II. Application of § 2244(d)(1)(A)

24 The statute of limitations begins to run from the date that petitioner’s judgment of
25 conviction became final by the conclusion of direct review or the expiration of the time for
26 seeking such review. It is undisputed that petitioner filed an appeal with the California Court of

1 Appeal and that his judgement of conviction was affirmed on September 27, 2004. The time for
2 filing a petition for review with the California Supreme court is forty days after the decision of
3 the California Court of Appeals is rendered. See California Rules of Court, Rule 8.264(b) and
4 8.500(e). Therefore, petitioner’s judgment became final on November 6, 2004, absent the filing
5 of a petition for review.

6 III. Tolling of Statute of Limitations

7 On May 31, 2009, petitioner signed and placed his federal habeas petition in the
8 mail. That is the date which is designated as the filing date for his federal habeas petition. See
9 Houston v. Lack, 487 U.S. 266, 276 (1988) (announcing the so-called mailbox rule). Therefore,
10 the federal habeas petition before the court was not filed within the AEDPA one-year limitations
11 period and is untimely unless the statute of limitations is properly subject to tolling. As noted
12 above, petitioner argues that he is entitled to statutory and equitable tolling under the facts of his
13 case.

14 A. Statutory Tolling

15 Under 28 U.S.C. § 2244(d)(2), “[t]he time during which a properly filed
16 application for State post-conviction or other collateral review with respect to the pertinent
17 judgment or claim is pending shall not be counted toward any period of limitation under this
18 subsection.”

19 The United States Supreme Court has held:

20 An application is “filed,” as the term is commonly understood,
21 when it is delivered to, and accepted by, the appropriate court
22 officer for placement into the official record. See, e.g., United
23 States v. Lombardo, 241 U.S. 73, 76, 36, S. Ct. 508, 60 L.Ed. 897
24 (1916) (“A paper is filed when it is delivered to the proper official
25 and by him received and filed”); Black’s Law Dictionary 642 (7th
26 ed. 1999) (defining “file” as “[t]o deliver a legal document to the
court clerk or record custodian for placement into the official
record”). And an application is “*properly* filed” when its delivery
and acceptance are in compliance with the applicable laws and
rules governing filings. These usually prescribe, for example, the
form of the document, the time limits upon its delivery, the court
and office in which it must be lodged, and the requisite filing fee.

1 Artuz v. Bennett, 531 U.S. 4, 8 (2000). Here, petitioner’s petition for review was never filed by
2 the California Supreme Court. The petition for review was not accepted and placed in the official
3 record of that court. Because no petition was “properly filed” with the California Supreme
4 Court, petitioner is not entitled to statutory tolling of the AEDPA statute of limitations.

5 B. Equitable Tolling

6 Next, the court turns to petitioner’s contention that he is entitled to equitable
7 tolling of the statute of limitations under the facts of his case. The United States Supreme Court
8 has held that, “a litigant seeking equitable tolling bears the burden of establishing two elements:
9 (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance
10 stood in his way.” Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005). See also Lawrence v.
11 Florida, 549 U.S. 327, 328 (2007) (assuming without deciding that equitable tolling applies to
12 the statute of limitations set forth in § 2244(d)). The Ninth Circuit has stated that “the purpose of
13 equitable tolling ‘is to soften the harsh impact of technical rules which might otherwise prevent a
14 good faith litigant from having a day in court.’” Harris v. Carter, 515 F.3d 1051, 1055 (9th Cir.
15 2008). Nonetheless, it has been recognized that equitable tolling of the AEDPA statute of
16 limitations will be unavailable in most cases. See Corjasso v. Ayers, 278 F.3d 874, 877 (9th Cir.
17 2002); Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999). Moreover, a habeas petitioner
18 seeking equitable tolling must show that the extraordinary circumstances alleged were the “but
19 for” and proximate cause of the untimely filing of his federal habeas petition. Bryant v. Ariz.
20 Atty. Gen., 499 F.3d 1056, 1061 (9th Cir. 2007); Allen v. Lewis, 255 F.3d 798, 800-01 (9th Cir.
21 2001).

22 Here, petitioner seeks equitable tolling for the entire period of time (almost 41
23 months) he mistakenly thought his petition for review was pending before the California
24 Supreme Court. In this regard, petitioner states: “Believing that the Petition was pending in the
25 California Supreme Court, petitioner waited for the court to rule on the Petition, but never
26 received a response.” (Opp’n at 4.) However, equitable tolling requires that petitioner pursue his

1 rights diligently. Waiting for over three years before inquiring about the status of a petition for
2 review which he claims to have mailed to the California Supreme Court, does not demonstrate
3 diligence on the part of petitioner. See Rodriguez v. Marshall, No. 1:05-CV-0230 GSA HC,
4 2009 WL 1424260 at *6 (E.D. Cal. May 20, 2009) (finding that petitioner did not exercise
5 reasonable diligence by waiting over a year and a half to contact his attorney regarding the status
6 of his petition for review); Pena v. Sisto, No. C 09-1583 SI (pr), 2010 WL 144815 at *4 (N.D.
7 Cal. Jan. 11, 2010) (waiting 20 months to contact appellate counsel about the status of his case is
8 not reasonable and does not show diligence and noting that Rule 8.512(b)² of the California
9 Rules of Court requires the California Supreme Court to act within sixty days of the filing of a
10 petition for review); Perez v. Cate, No. 09cv0414-H (BLM), 2009 WL 5199409, at *15 (S.D.
11 Cal. Dec. 23, 2009) (“Common sense suggests that if Petitioner was pursuing his federal habeas
12 claims diligently he would not have waited over a year to send the second letter [to his appellate
13 counsel to obtain his trial transcripts].”).

14 Here, petitioner has not satisfied his burden of establishing either that he has been
15 pursuing his rights diligently or that some extraordinary circumstance stood in the way of his
16 filing a timely federal habeas petition. See Pace, 544 U.S. at 418. Moreover, petitioner has not

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18 ² In October 2004, when petitioner allegedly attempted to file his petition for review with
the California Supreme Court, Rule 28.2(b) of the California Rules of Court provided as follows:

19 (1) The court may order review within 60 days after the last
20 petition for review is filed. Before the 60-day period or any
extension expires, the court may order one or more extensions to a
21 date not later than 90 days after the last petition is filed.

22 (2) An order granting review must be signed by at least four
23 justices; an order denying review may be signed by the Chief
Justice alone.

24 (3) If the court does not rule on the petition within the time allowed
by (1), the petition is deemed denied.

25 “The reorganization of the California Rules of Court, adopted June 30, 2006, effective Jan. 1,
26 2007, renumbered this rule without change to the text.” (Cal. Rules of Court, Rule 8.512
Historical Notes.) At that time Rule 28.2 was renumbered as Rule 8.512.

1 shown that the extraordinary circumstances he alleges were the “but for” and proximate cause of
2 the untimely filing of his federal habeas petition. See Bryant, 499 F.3d at 1061; Allen, 255 F.3d
3 at 800-01. Therefore, petitioner is not entitled to equitable tolling.

4 CONCLUSION

5 Accordingly, IT IS HEREBY ORDERED that the Clerk of the Court is directed to
6 substitute Mike McDonald for Tipton as the Respondent in this action.

7 Also, IT IS HEREBY RECOMMENDED that:

- 8 1. Respondent’s August 28, 2009, motion to dismiss this habeas action as time
9 barred be granted (Doc. No. 11); and
10 2. This action be dismissed on the grounds that it was filed beyond the applicable
11 one-year statute of limitations.

12 These findings and recommendations are submitted to the United States District
13 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
14 one days after being served with these findings and recommendations, any party may file written
15 objections with the court and serve a copy on all parties. Such a document should be captioned
16 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
17 shall be served and filed within seven days after service of the objections. The parties are
18 advised that failure to file objections within the specified time may waive the right to appeal the
19 District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

20 DATED: February 12, 2010.

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22 
23 _____
24 DALE A. DROZD
25 UNITED STATES MAGISTRATE JUDGE
26

DAD:4
pete1524.mtd