

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

CHARLES SHELDON McGEE, Jr.,

Petitioner,

No. CIV S-09-2127 MCE DAD P

vs.

JAMES A. YATES¹,

ORDER AND

Respondent.

FINDINGS AND RECOMMENDATIONS

_____ /
Petitioner is a state prisoner proceeding pro se with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Before the court is respondent’s motion to dismiss the petition as untimely under the applicable one-year statute of limitations.

RESPONDENT’S MOTION

In moving to dismiss, respondent provides the following chronology of events surrounding petitioner’s conviction, state court appeals and post-conviction collateral challenges to his judgment of conviction.

_____ /
¹ Respondent has informed the court that petitioner was transferred from Mule Creek State Prison to Pleasant Valley State Prison on December 1, 2009. James A. Yates is the current warden at Pleasant Valley State Prison. The court will direct the Clerk of the Court to substitute James A. Yates as the proper respondent in this action and to update petitioner’s address of record.

1 On April 25, 2003, petitioner was convicted following a jury trial in the Yolo
2 County Superior Court of second degree robbery, assault with a deadly weapon, and failure to
3 register as a sex offender. On August 4, 2003, petitioner was sentenced to thirty years to life in
4 state prison. (Lodg. Doc. 1.)

5 On April 15, 2005, the California Court of Appeal for the Third Appellate
6 District, reversed petitioner's judgment of conviction on the charge of failing to register as a sex
7 offender and struck the related prison term enhancements. (Lodg. Doc. 2.) The judgment of
8 conviction was affirmed in all other respects. (Id.) No petition for review was filed on
9 petitioner's behalf in the California Supreme Court.

10 Several years later, on January 9, 2009, petitioner filed a habeas petition with the
11 California Supreme Court. On June 24, 2009, that petition was denied as untimely as indicated
12 by the California Supreme Court's citation to In re Robbins, 18 Cal. 4th 770, 780 (1998) in
13 denying relief.

14 In moving to dismiss the pending federal petition, respondent argues that pursuant
15 to California Rules of Court 8.264 and 8.500 a petition for review to the California Supreme
16 Court must be filed within forty-days of the decision by the California Court of Appeals.
17 Respondent observes that since no petition for review was filed on petitioner's behalf, the state
18 court judgment became final on May 25, 2005, forty-days after the decision of the Court of
19 Appeals was issued. According to respondent, the statute of limitations for petitioner's filing of
20 a federal habeas petition therefore began to run on May 26, 2005, and would have expired on
21 May 25, 2006, absent any tolling. Respondent argues that because petitioner did not file any
22 post-conviction collateral challenges to his conviction in state court within the one-year
23 limitations period, there can be no statutory tolling of the federal statute of limitations.
24 Respondent also contends that because petitioner's habeas petition filed with the California
25 Supreme Court was denied with a citation to Robbins, that petition was not properly filed for
26 purposes of 28 U.S.C. § 2244(d)(2). Accordingly, respondent argues, the untimely state court

1 the statute of limitations for the filing of a federal petition had expired. Once the federal statute
2 of limitations has expired, a subsequently filed state habeas petition cannot revive the statute of
3 limitations and has no tolling effect. Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir.) (“[W]e
4 hold that section 2244(d) does not permit the reinitiation of the limitations period that has ended
5 before the state petition was filed.”); Jiminez v. Rice, 276 F.3d 478, 482 (9th Cir. 2001) (holding
6 that where petitioner filed his state post-conviction relief proceeding “after the AEDPA statute of
7 limitations ended . . . [t]hat delay resulted in an absolute time bar”); see also Rashid v.
8 Khulmann, 991 F. Supp. 254, 259 (S.D. N.Y., 1998) (“The tolling provision does not . . .
9 “revive” the limitations period (i.e., restart the clock at zero); it can only serve to pause a clock
10 that has not yet fully run. Once the limitations period is expired, collateral petitions can no
11 longer serve to avoid a statute of limitations.”).

12 Therefore, petitioner’s federal habeas petition is untimely and respondent’s
13 motion to dismiss that petition should be granted.

14 CONCLUSION

15 In accordance with the above, IT IS HEREBY ORDERED that:

16 1. The Clerk of the Court is directed to substitute James A. Yates in place of
17 “Warden, Mule Creek State Prison,” as the respondent in this action; and

18 2. The Clerk of the Court is directed to change petitioner’s address of record to
19 Pleasant Valley State Prison.

20 Also, IT IS HEREBY RECOMMENDED that:

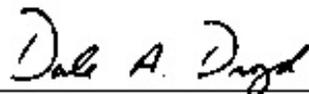
21 1. Respondent’s January 14, 2010 motion to dismiss this action as filed beyond
22 the one-year statute of limitations (Doc. No. 12) be granted; and

23 2. This action be dismissed.

24 These findings and recommendations are submitted to the United States District
25 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
26 one days after being served with these findings and recommendations, any party may file written

1 objections with the court and serve a copy on all parties. Such a document should be captioned
2 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
3 shall be served and filed within seven days after service of the objections. The parties are
4 advised that failure to file objections within the specified time may waive the right to appeal the
5 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

6 DATED: May 25, 2010.

7
8 
9 _____
10 DALE A. DROZD
11 UNITED STATES MAGISTRATE JUDGE

9 DAD:4
10 mcge2127.mtd

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26