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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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DANIEL D. WILKINS,
Petitioner,

NO. S-09-3357-FCD-CMK-P

v.

MATTHEW CATE,
Respondent.

MEMORANDUM AND ORDER

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This matter is before the court on review of the findings and recommendations ("F&R") of the magistrate judge,¹ filed September 28, 2010, addressing petitioner Daniel D. Wilkins' ("Wilkins" or "Petitioner") petition for a writ of habeas corpus challenging the denial of his parole in 2007 by the California Board of Prison Terms² ("BPT" or "Board"). The magistrate judge found that petitioner's writ was untimely and recommended that

¹ This matter was referred to a United States magistrate judge pursuant to 28 U.S.C. section 636(b)(1)(B) and Eastern District Local Rule 72-302.

² The BPT is now known as the Board of Parole Hearings.

1 the instant action be dismissed. Petitioner filed objections to
2 the magistrate judge's findings and recommendations. For the
3 reasons set forth below, the court declines to adopt the findings
4 and recommendations of the magistrate judge.

5 **BACKGROUND**

6 The court adopts the factual and procedural background set
7 forth by the magistrate judge in his findings and
8 recommendations. (See F&R, filed Sept. 28, 2010, at 1-2).

9 **STANDARD**

10 When timely objections to findings by a magistrate judge are
11 filed, the district court must conduct a *de novo* determination of
12 the findings and recommendations as to issues of law. 28 U.S.C.
13 § 636(b)(1). The district court may adopt, reject, or modify in
14 part or in full the findings and recommendations. 28 U.S.C. §
15 636(b)(1)(C).

16 **ANALYSIS**

17 Petitioner objects to the findings and recommendations set
18 forth by the magistrate judge and argues that he filed his claim
19 in federal court within the one year statute of limitations
20 period. Specifically, petitioner asserts that the statute of
21 limitations began to run 120 days after the BPT denied his parol,
22 when the decision became final. Respondent asserts that the
23 claims contained in Wilkins' habeas petition now pending before
24 this court are untimely because the statute of limitations began
25 to run on June 13, 2007, the day Wilkins' parole was initially
26 denied by the BPT.

27 The Antiterrorism and Effective Death Penalty Act of 1996
28 ("AEDPA") imposed a one year statute of limitation on the filing
of federal habeas corpus petitions. 28 U.S.C. § 2244(d)(1). The

1 statute of limitations for habeas petitions challenging parole
2 suitability hearings is based on § 2244(d)(1)(D): the date on
3 which the factual predicate of the claim or claims could have
4 been discovered through the exercise of due diligence. See Redd
5 v. McGrath, 343 F.3d 1077, 1079 (9th Cir. 2003). "Courts
6 ordinarily deem the factual predicate to have been discovered the
7 day the decision becomes final, i.e., 120 days after the Board
8 finds a petitioner not suitable for parole." Wilson v. Sisto,
9 No. Civ. S-07-0733 MCE EFB P, 2008 WL 4218487, at *2 (E.D. Cal.
10 Sept. 5, 2008) (citing Nelson v. Clark, No. 1:08-cv-00114 OWW SMS
11 HC, 2008 WL 2509509, at *4 (E.D. Cal. June 23, 2009)). See also
12 Stotts v. Sisto, No. CIV. S-08-1178-MCE-CMK-P, 2009 WL 2591029,
13 at *4 (E.D. Cal. Aug. 20, 2009); Van Houton v. Davison, No. CV
14 07-05256 AG (AN), 2009 WL 811596, at *9 (C.D. Cal. March 26,
15 2009); Woods v. Salazar, No. CV 07-7197 GW (CW), 2009 WL 2246237,
16 at *5 & n.9(C.D. Cal. Mar. 23, 2009) (citing cases); Perez v.
17 Sisto, No. Civ. S-07-0544 LKK DAD P, 2007 WL 3046006, at *4 (E.D.
18 Cal. Oct.18, 2007); Cal. Code Regs., tit. 15, § 2041(h) (Board
19 decisions are final 120 days after the hearing); Cal. Penal Code
20 § 3041(b) (same). Contra McGuire v. Mendoza-Powers, No. 1:07-CV-
21 00086 OWW GSA HC, 2008 WL 1704089, at *10 (E.D. Cal. April 10,
22 2008) (deeming factual predicate to have been discovered on the
23 date of the Board decision).

24 The statute of limitations is tolled during the time a
25 properly filed application for post-conviction relief is pending
26 in state court. A state court application for post-conviction
27 relief is "pending" during the entire time the petitioner is
28 attempting, through proper use of state court procedures, to
present his claims. Nino v. Galaza, 183 F.3d 1003, 1006 (9th

1 Cir. 1999) (holding that "the statute of limitations is tolled
2 from the time the first state habeas petition is filed until the
3 California Supreme Court rejects the petitioner's final
4 collateral challenge."). The word "pending" covers the time
5 period between a lower state court's decision and the filing of a
6 notice of appeal with a higher state court, as well as the time
7 period in California's unique collateral review system - where
8 there is no notice of appeal, but a party must file an original
9 state habeas petition in a higher court within a reasonable time.
10 Carey v. Saffold, 536 U.S. 214, 227 (2002). However, a petition
11 is not "pending" during an unreasonable delay between state court
12 applications. See id. at 225.

13 Like the majority of district courts that have considered
14 this issue, the court concludes that the factual predicate of a
15 petitioner's claim becomes "discoverable" 120 days after the
16 board hearing, when the decision is final. Accordingly, in this
17 case, the statute of limitations began to run on October 11, 2007
18 - 120 days after the date that the Board denied parole. Less
19 than two months later, December 5, 2007, petitioner filed his
20 first state habeas petition in Superior Court. Petitioner
21 subsequently filed a habeas petition in the California Court of
22 Appeal and then with the California Supreme Court. The
23 California Supreme Court denied petitioner relief on February 11,
24 2009 and petitioner filed the instant federal petition nine
25 months later on November 21, 2009. Therefore, assuming that the
26 time between when he filed his first state habeas petition and
27 when the California Supreme Court denied his relief is subject to
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1 statutory tolling,³ petitioner's claim was filed in federal court
2 approximately eleven months after the statute of limitations
3 began to run, and within the timely filing requirements set forth
4 in the AEDPA. Therefore, the court does not adopt the magistrate
5 judge's recommendation that the petition was untimely based upon
6 his conclusion that the statute of limitations began on the date
7 parole was denied, not on the date that the decision became
8 final.

9 **CONCLUSION**

10 For the foregoing reasons, the court declines to adopt the
11 magistrate judge's recommendations and his findings.

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13 IT IS SO ORDERED.

14 DATED: November 22, 2010



15 FRANK C. DAMRELL, JR.
16 UNITED STATES DISTRICT JUDGE
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28 ³ The court notes that the magistrate judge did not conclusively determine whether the delays in petitioner's state filings were reasonable and therefore subject to statutory tolling.