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

RICHARD CORDERO,

Petitioner,

No. 2:10-cv-1899-GEB-DAD (HC)

vs.

MICHAEL D. McDONALD,

Respondent.

FINDINGS AND RECOMMENDATIONS

_____ /

Petitioner is a state prisoner proceeding pro se with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges a judgment of conviction entered against him in the Tehama County Superior Court in 2007 on charges of leaving the scene of an accident, driving under the influence causing injury, and reckless driving with great bodily injury. This matter is before the court on respondent’s motion to dismiss this federal habeas action on the grounds that it is barred by the applicable statute of limitations.

Petitioner did not timely file an opposition to the motion. On April 4, 2011, this court issued findings and recommendations recommending that the motion be granted. On May 16, 2011, after receiving an extension of time to do so, petitioner filed objections to those findings and recommendations along with a proposed opposition to the motion to dismiss. By order filed May 26, 2011, the April 4, 2011 findings and recommendations were vacated,

1 petitioner was granted twenty-one days in which to file evidence in support of his assertions
2 concerning lockdowns at High Desert State Prison (High Desert) and the effect of said
3 lockdowns on his access to the prison law library and legal materials, and respondent was granted
4 fourteen days thereafter in which to file and serve a reply brief in support of the motion to
5 dismiss. The parties have now filed their respective briefs and evidence in support of their
6 respective positions.

7 Section 2244(d)(1) of title 28 of the United States Code provides:

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

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

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

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

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

25 28 U.S.C. § 2244(d)(1). Section 2244(d)(2) provides that “the time during which a properly filed
26 application for State post-conviction or other collateral review with respect to the pertinent
27 judgment or claim is pending shall not be counted toward” the limitations period. 28 U.S.C. §
28 2244(d)(2).

29 For purposes of the statute of limitations analysis, the relevant chronology of this
30 case is as follows:

31 1. On February 26, 2007, petitioner was sentenced by the Tehama County
32 Superior Court to twenty three years in state prison following his January 30, 2007 conviction on

1 the charges listed above.

2 2. On March 13, 2008, the California Court of Appeal for the Third Appellate
3 District deleted a fine that had been imposed as part of petitioner's sentence and otherwise
4 affirmed the judgment on appeal.

5 3. On May 13, 2008, petitioner filed a petition for writ of habeas corpus in the
6 Tehama County Superior Court. That petition was denied by order filed May 16, 2008.

7 6. On March 11, 2009¹, petitioner filed another petition for writ of habeas corpus
8 in the Tehama County Superior Court. That petition was denied by order filed April 3, 2009.

9 7. On June 9, 2009, petitioner filed a petition for writ of habeas corpus in the
10 California Court of Appeal for the Third Appellate District. That petition was denied by order
11 filed June 18, 2009.

12 8. On July 2, 2009, petitioner filed a petition for writ of habeas corpus in the
13 California Supreme Court. That petition was denied on November 19, 2009.

14 9. On March 27, 2010, petitioner filed another petition for writ of habeas corpus
15 in the California Supreme Court.

16 10. The federal habeas petition pending before this court was filed on July 12,
17 2010.

18 Petitioner's judgment of conviction became final on April 22, 2008, forty days
19 after the California Court of Appeal affirmed petitioner's judgment of conviction on appeal. See
20 Waldrip v. Hall, 548 F.3d 729, 735 (9th Cir. 2008). The one year limitations period for the filing
21 of a federal habeas petition began to run the next day. See Patterson v. Stewart, 251 F.3d 1243,
22 1246 (9th Cir. 2001). The limitation period ran for twenty days until May 13, 2008, when
23 petitioner filed his first state habeas petition in the Tehama County Superior Court. It was tolled
24

25 ¹ Under the mailbox rule, where a state petition shows the date on which it was signed by
26 petitioner, the court deems that date the filing date of the petition. See Houston v. Lack, 487
U.S. 266 (1988).

1 for three days during the pendency of that petition. Thereafter, petitioner did not file another
2 state habeas petition for three hundred days. Petitioner is not entitled to statutory tolling for the
3 period between the filing of these two petitions. See Evans v. Chavis, 546 U.S. 189, 198 (2006)
4 (unexplained delay of six months between rounds of habeas filings was too long to permit tolling
5 of the federal limitations period on the ground that state court proceedings were “pending”); .
6 Velasquez v. Kirkland, 639 F.3d 964, 968 (9th Cir. 2011) (81 and 91 days of unexplained delay
7 between habeas filings found to be unreasonable); Banjo v. Ayers, 614 F.3d 964, 970 (9th Cir.
8 2010) (146-day unexplained delay between habeas filings found to be unreasonable); Chaffer v.
9 Prosper, 592 F.3d 1046, 1048 (9th Cir. 2010) (petitioner not entitled to statutory tolling during
10 unexplained delays of 115 and 101 days between state court petitions).

11 The limitation period for petitioner’s filing of a federal habeas petition was
12 arguably tolled again from March 11, 2009 through November 19, 2009, during the pendency of
13 his second state habeas petition filed in the Tehama County Superior Court through disposition
14 of the first petition for writ of habeas corpus filed in the California Supreme Court. Even with
15 this period tolled, however, the statute of limitations for petitioner’s filing of a federal habeas
16 petition expired approximately forty-five days later, on January 3, 2010. This action was not
17 filed for more than six months after the limitation period for doing so had expired.² Accordingly,
18 unless petitioner is entitled to equitable tolling this action is barred by the statute of limitations
19 and should be dismissed.

20 The statute of limitations codified at § 2244(d) “is subject to equitable tolling in
21 appropriate cases.” Holland v. Florida, ___ U.S. ___, ___ 130 S.Ct. 2549, 2560 (2010). A
22 habeas corpus petitioner “is ‘entitled to equitable tolling’ only if he shows ‘(1) that he has been
23 //”

24
25 ² The March 2010 habeas petition filed by petitioner with the California Supreme Court
26 did not revive the expired limitation period. See Jiminez v. Rice, 276 F.3d 478, 482 (9th Cir.
2001).

1 pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and
2 prevented timely filing." Id. at 2562.

3 Petitioner contends that the limitations period for the filing of a federal habeas
4 petition in his case should be equitably tolled due to "excessive lockdowns and being denied
5 access to the law library." Petitioner's Opposition to Respondents Motion to Dismiss (Doc. No.
6 24), filed May 16, 2011, at 1. Petitioner contends that the prison facility in which he is housed
7 has "been on lockdown status for over 1 year out of the last 2 years" and "on a modified program
8 when off lockdown and had no access to the law library, legal research, copies, typewriters or
9 material necessary to adequately respond and defend this writ." Id. at 2. The evidence tendered
10 by petitioner in support of this assertion consists of his own declaration and the declaration of
11 four other inmates. Each declaration attests generally to lockdowns at High Desert and to the
12 "modified program" at the prison since November 2010, with extremely limited access to the
13 prison law library. In response, respondent has presented evidence that petitioner accessed the
14 law library twenty-one times from January 2008 through January 2010. See Declaration of J.
15 Flaherty, filed July 29, 2011, at ¶ 8. Respondent's evidence shows that petitioner did not go to
16 the prison law library between September 10, 2009 and February 24, 2010. Petitioner did access
17 the prison law library four times between February 25, 2010 and July 10, 2010.

18 This record supports a finding that petitioner's access to the prison law library
19 may have been limited during relevant periods, particularly from May 16, 2008 through the end
20 of 2008, a period during which petitioner only accessed the law library once, and from November
21 20, 2009 through February 24, 2010, when petitioner did not access the law library at all. The
22 record does not, however, support a finding that this limited access constituted an "extraordinary
23 circumstance" that prevented petitioner from timely filing a federal habeas corpus petition.

24 The petition filed in this action is a handwritten petition that sets forth the same
25 three claims raised by petitioner in his petition for writ of habeas corpus filed in the California
26 Supreme Court on July 2, 2009 and denied by that court on November 19, 2009. See Lodged

1 Document No. 9, filed October 4, 2010. Petitioner has not demonstrated that he made a request
2 for law library access during this period that was unreasonably denied, nor has he demonstrated
3 either that his access to the law library was required in order to file the instant federal habeas
4 action within the forty-five days that remained in the limitation period after the California
5 Supreme Court rejected his claims or that the absence of such access prevented him from timely
6 filing this action. Finally, petitioner has presented no evidence that would entitle him to
7 equitable tolling of the statute of limitations for the more than six months that would be required
8 to render timely his federal habeas petition filed with this court.

9 For the foregoing reasons, this court finds that petitioner is not entitled to
10 equitable tolling of the statute of limitations and that this action should be dismissed as time-
11 barred.

12 Pursuant to Rule 11 of the Rules Governing Section 2254 Cases in the United
13 States District Courts, “[t]he district court must issue or a deny a certificate of appealability when
14 it enters a final order adverse to the applicant.” Rule 11, 28 U.S.C. foll. § 2254. A certificate of
15 appealability may issue under 28 U.S.C. § 2253 “only if the applicant has made a substantial
16 showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The court must either
17 issue a certificate of appealability indicating which issues satisfy the required showing or must
18 state the reasons why such a certificate should not issue. Fed. R. App. P. 22(b).

19 Where, as here, the petition should be dismissed on procedural grounds, a
20 certificate of appealability “should issue if the prisoner can show: (1) ‘that jurists of reason
21 would find it debatable whether the district court was correct in its procedural ruling’; and (2)
22 ‘that jurists of reason would find it debatable whether the petition states a valid claim of the
23 denial of a constitutional right.’” Morris v. Woodford, 229 F.3d 775, 780 (9th Cir. 2000)
24 (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)).

25 After review of the entire record herein, this court finds that petitioner has not
26 satisfied the first requirement for issuance of a certificate of appealability in this case.

1 Specifically, there is no showing that jurists of reason would find it debatable whether this action
2 is barred by the statute of limitations. Accordingly, the district court should not issue a certificate
3 of appealability.

4 CONCLUSION

5 In accordance with the above, IT IS HEREBY RECOMMENDED that

- 6 1. Respondent's September 21, 2010 motion to dismiss be granted;
7 2. This action be dismissed as barred by the statute of limitations; and
8 3. The district court decline to issue a certificate of appealability.

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

17 DATED: August 5, 2011.

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20 _____
21 DALE A. DROZD
22 UNITED STATES MAGISTRATE JUDGE
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