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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

KEITH R. STOKES,)	
)	
Petitioner,)	CIV 08-02362 PHX DGC (MEA)
)	
v.)	REPORT AND RECOMMENDATION
)	
CHARLES L. RYAN, TERRY GODDARD,)	
MRS. DAIELL,)	
)	
Respondent.)	
_____)	

TO THE HONORABLE DAVID G. CAMPBELL:

On or about December 29, 2008, Petitioner filed a *pro se* petition seeking a writ of habeas corpus pursuant to 42 U.S.C. § 2254. Petitioner filed an amended petition on April 30, 2009. See Docket No. 5. Respondents filed an Answer to Petition for Writ of Habeas Corpus ("Answer") (Docket No. 12) on October 1, 2009. Respondents contend the action for habeas relief may be denied and dismissed because Petitioner failed to file his action within the applicable statute of limitations. Petitioner filed a two-page pleading on October 8, 2009, which is titled as an amended petition but which provides an argument in reply to the response to his petition. See Docket No. 13.

I Procedural History

In April of 2003, a jury found Petitioner guilty of one count of second-degree murder, two counts of attempted

1 In his amended habeas petition Petitioner contends he
2 is entitled to federal habeas relief because, he asserts,
3 perjured testimony was presented to the grand jury in violation
4 of his right to due process of law. Petitioner further contends
5 his conviction for murder violates his right to due process
6 because the victim's death, ten months after he was shot by
7 Petitioner, was not the result of Petitioner's actions.
8 Petitioner also maintains his Eighth Amendment rights were
9 violated because he was charged with attempted first degree
10 murder and convicted of second degree murder. Additionally,
11 Petitioner contends his sentence violates the separation of
12 powers doctrine because the trial court's application of
13 Arizona's sentencing statutes was "manifest injustice."
14 Petitioner also alleges his trial counsel was unconstitutionally
15 ineffective.

16 **II Analysis**

17 The petition seeking a writ of habeas corpus is barred
18 by the applicable statute of limitations found in the
19 Antiterrorism and Effective Death Penalty Act ("AEDPA"). The
20 AEDPA imposed a one-year statute of limitations on prisoners
21 seeking federal habeas relief from their state convictions.
22 See, e.g., Lott v. Mueller, 304 F.3d 918, 920 (9th Cir. 2002).
23 The AEDPA provides that a petitioner is entitled to tolling of
24 the statute of limitations during the pendency of a "properly
25 filed application for state post-conviction or other collateral
26 review with respect to the pertinent judgment or claim." 28
27 U.S.C. § 2244(d)(2)(2006 & Supp. 2009). See also Artuz v.

1 Bennet, 531 U.S. 4, 8, 121 S. Ct. 361, 363-64 (2000); Harris v.
2 Carter, 515 F.3d 1051, 1053 (9th Cir.), cert. denied, 129 S. Ct.
3 397 (2008).

4 Petitioner's conviction became "final" at the
5 conclusion of his direct appeal proceedings, at which time
6 Petitioner had a properly-filed petition for post-conviction
7 relief pending in the state trial court. The Arizona Court of
8 Appeals denied review of the decision dismissing Petitioner's
9 first action for post-conviction relief on August 14, 2006.
10 Answer, Exh. E. Petitioner had thirty days to appeal that
11 decision to the Arizona Supreme Court. See Ariz. R. Crim. P.
12 (2009). Therefore, the statute of limitations on Petitioner's
13 federal habeas action began to run on September 15, 2006, and
14 expired on or about September 16, 2007. See Tillema v. Long,
15 253 F.3d 494, 498 (9th Cir. 2001); Bowen v. Roe, 188 F.3d 1157,
16 1159 (9th Cir. 1999). Compare Hemmerle v. Schriro, 495 F.3d
17 1069, 1077 (9th Cir. 2007); Riddle v. Kemna, 523 F.3d 850, 855
18 (8th Cir. 2008).

19 Petitioner did not file his federal habeas action until
20 April 30, 2009, approximately nineteen months after the statute
21 of limitations expired.

22 The Ninth Circuit Court of Appeals has recently stated
23 that the Court should still determine whether a section 2254
24 petitioner is entitled to equitable tolling of the statute of
25 limitations. See Waldron-Ramsey v. Pacholke, 556 F.3d 1008,
26 1011 & n.2 (9th Cir. 2009). A petitioner seeking equitable
27 tolling of the AEDPA's statute of limitations must establish two
28

1 The second page states:

2 Petitioner was tried, convicted and
3 sentence[d] in violation of Arizona
4 legislative statutes (sic) 13-110 (13-111) 13-
5 1150 CB) and 13-116. Prosecution created his
6 own interpretation of charges before trial
7 court, and persuaded courts to apply its
8 interpretation beyond legislative intent as
9 afermented (aforementioned?) statutes (sic)
10 plainly state manifest injust has occured in
11 this cause (sic).

12 Docket No. 13.

13 Petitioner has not established that he is entitled to
14 equitable tolling of the statute of limitations because he has
15 not presented evidence of due diligence or a factor outside the
16 defense which resulted in his failure to timely file his habeas
17 action. Even if the "fundamental miscarriage of justice"
18 standard for excusing procedural default of habeas claims were
19 applicable as a reason for tolling the statute of limitations,
20 Petitioner has not established that the failure to consider his
21 habeas claims on their merits would result in a fundamental
22 miscarriage of justice. Cf. Hayman v. Pennsylvania, 624 F.
23 Supp. 2d 378, 394 (E.D. Pa. 2009) (discussing case law on when
24 equitable tolling is warranted).

25 **III Conclusion**

26 The federal habeas petition was not filed within the
27 one-year statute of limitations and Petitioner has not provided
28 a basis for equitable tolling of the statute of limitations.

29 **IT IS THEREFORE RECOMMENDED** that Mr. Stokes' Petition
30 for Writ of Habeas Corpus be **denied and dismissed with**
31 **prejudice.**

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