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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOHN WALSH,
Petitioner,
v.
JAMES HARTLEY, Warden,
Respondent.

NO. CV 11-3018-JST (AGR)

ORDER TO SHOW CAUSE

On April 11, 2011, Petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody ("Petition") pursuant to 28 U.S.C. § 2254. For the reasons discussed below, it appears that the one-year statute of limitations has expired and Petitioner has failed to exhaust his state remedies.

The Court, therefore, orders Petitioner to show cause, on or before **May 23, 2011**, why this Court should not recommend dismissal with prejudice based on expiration of the one-year statute of limitations or dismissal without prejudice based on failure to exhaust state remedies.

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I.

PROCEDURAL BACKGROUND

On April 12, 2007, Petitioner pled guilty to failure to register in Case No. NA067745.¹ (Petition at 2.) He was sentenced to six years in state prison. (*Id.*) Petitioner did not appeal. (*Id.* at 2-3.)

On July 16, 2007, Petitioner filed a petition for writ of habeas corpus before the California Court of Appeal. The petition was denied without prejudice because he had not shown that he first sought relief in the Los Angeles County Superior Court. *Walsh v. The People*, Case No. B200548 (online docket).

On February 7, 2008, Petitioner filed a petition for writ of habeas corpus before the California Court of Appeal. On March 6, 2008, the petition was denied. *Walsh v. The People*, Case No. B205539 (online docket).

On May 23, 2008, Petitioner filed a petition for writ of mandate before the California Court of Appeal. The petition was denied without prejudice because Petitioner had not shown that he first sought relief in the Los Angeles County Superior Court. *Walsh v. Superior Court*, Case No. B208039 (online docket).

On August 13, 2008, Petitioner filed a petition for writ of habeas corpus before the California Court of Appeal. The petition was denied on August 22, 2008. (Petition at 4-5 & attachment, Case No. B209929.)

On April 30, 2010, Petitioner filed a petition for writ of habeas corpus in Los Angeles County Superior Court. That petition was denied on February 17, 2011. (Petition at 3-4 & attachment.)

On March 30, 2011, Petitioner signed the Petition before this court. (Petition at 8 & Proof of Service.) Petitioner asserts one ground based on the

¹ In Case No. VA019757, Petitioner's parole was revoked in 2006, and he was re-released to parole in 2007. (Attachment to Petition.) Petitioner filed a petition for writ of habeas corpus in that matter, which was denied on February 1, 2008. (Attachment to Petition.) The Petition does not challenge his parole revocation.

1 Double Jeopardy Clause. He appears to contend that double jeopardy precludes
2 him from being convicted and sentenced for absconding from parole and failing to
3 register after his parole was revoked in another criminal matter. (Petition at 5).
4 Petitioner states he has not previously raised this claim to the California Supreme
5 Court. (*Id.*)

6 II.

7 STATUTE OF LIMITATIONS

8 The Petition was filed after enactment of the Antiterrorism and Effective
9 Death Penalty Act of 1996 (“AEDPA”). Therefore, the Court applies the AEDPA
10 in reviewing the petition. *Lindh v. Murphy*, 521 U.S. 320, 336, 117 S. Ct. 2059,
11 138 L. Ed. 2d 481 (1997).

12 The AEDPA contains a one-year statute of limitations for a petition for writ
13 of habeas corpus filed in federal court by a person in custody pursuant to a
14 judgment of a state court. 28 U.S.C. § 2244(d)(1). The one-year period starts
15 running on the latest of either the date when a conviction becomes final under 28
16 U.S.C. § 2244(d)(1)(A) or on a date set in § 2244(d)(1)(B)-(D).

17 **A. The Date on Which Conviction Became Final**

18 The Petition states that, on April 12, 2007, Petitioner pled guilty to failure to
19 register in Case No. NA067745. Because Petitioner did not appeal, his
20 conviction became final 60 days later on June 11, 2007. California Rules of Court
21 8.308(a) (formerly Rule 30.1). Accordingly, based on § 2244(d)(1)(A), the one-
22 year statute of limitations expired on June 11, 2008.

23 **B. Statutory Tolling**

24 The statute of limitations is tolled during the time “a properly filed
25 application for State post-conviction or other collateral review with respect to the
26 pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2). However, the
27 statute of limitations is not tolled during the interval between the time a conviction
28 becomes final on direct review and the time the first state habeas petition is filed

1 because there is no case “pending” during that interval. *Thorson v. Palmer*, 479
2 F.3d 643, 646 (9th Cir. 2007).

3 Petitioner does not provide any information as to the constructive filing
4 dates of his state habeas petitions. Therefore, for purposes of analyzing the
5 statute of limitations, this court will give Petitioner the benefit of the doubt and
6 assume that the entire time from April 12, 2007 through August 22, 2008 is
7 statutorily tolled. Using this assumption, the one-year statute of limitations
8 expired on August 22, 2009.

9 Petitioner indicates he filed a petition for writ of habeas corpus before the
10 Los Angeles County Superior Court on April 30, 2010. (Petition at 3-4 &
11 Attachment.) Petitioner does not provide the date on which he handed over this
12 petition to the prison for mailing. Even assuming a reasonable period of one
13 week for mailing, this petition was filed approximately eight months after the
14 statute of limitations had expired. A state habeas petition filed after the limitations
15 period has expired does not toll or revive the expired limitations period. *Welch v.*
16 *Carey*, 350 F.3d 1079, 1081-84 (9th Cir. 2003).

17 **C. Equitable Tolling**

18 “[T]he timeliness provision in the federal habeas corpus statute is subject to
19 equitable tolling.” *Holland v. Florida*, 130 S. Ct. 2549, 2554, 177 L. Ed. 2d 130
20 (2010). “[A] ‘petitioner’ is ‘entitled equitable tolling’ only if he shows ‘(1) that he
21 has been pursuing his rights diligently, and (2) that some extraordinary
22 circumstance stood in his way’ and prevented timely filing.” *Id.* at 2562 (quoting
23 *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669
24 (2005)). “The diligence required for equitable tolling purposes is “reasonable
25 diligence,” not “maximum feasible diligence.” *Id.* at 2565 (citations and quotation
26 marks omitted). The extraordinary circumstances must have been the cause of
27 an untimely filing. *Pace*, 544 U.S. at 418. “[E]quitable tolling is available for this
28 reason only when “extraordinary circumstances beyond a prisoner’s control

1 make it *impossible* to file a petition on time” and “the extraordinary
2 circumstances” were the *cause* of [the prisoner’s] untimeliness.” *Bills v. Clark*,
3 628 F.3d 1092, 1097 (9th Cir. 2010) (citations omitted; emphasis in original).

4 The Petition does not contain any basis for equitable tolling.

5 **III.**

6 **EXHAUSTION**

7 The AEDPA provides that a petition for writ of habeas corpus brought by a
8 person in state custody “shall not be granted unless it appears that – (A) the
9 applicant has exhausted the remedies available in the courts of the State; or (b)(I)
10 there is an absence of available State corrective process; or (ii) circumstances
11 exist that render such process ineffective to protect the rights of the applicant.”
12 28 U.S.C. § 2254(b)(1).

13 Exhaustion requires that Petitioner’s contentions be fairly presented to the
14 state’s highest court, in this case the California Supreme Court. *James v. Borg*,
15 24 F.3d 20, 24 (9th Cir. 1994). Petitioner bears the burden of demonstrating that
16 he described to the California Supreme Court both the operative facts and the
17 federal legal theory on which his claim is based. *Duncan v. Henry*, 513 U.S. 364,
18 365-66, 115 S. Ct. 887, 130 L. Ed. 2d 865 (1995).

19 The Petition states that the sole ground for relief was not presented to the
20 California Supreme Court. (Petition at 5.) The online docket confirms that
21 Petitioner has not filed a petition before the California Supreme Court.

22 Thus, the petition appears to be completely unexhausted and is subject to
23 dismissal without prejudice on that basis. See *Rasberry v. Garcia*, 448 F.3d
24 1150, 1154 (9th Cir. 2006).

25 **IV.**

26 **ORDER TO SHOW CAUSE**

27 IT IS THEREFORE ORDERED that, on or before **May 23, 2011**, Petitioner
28 shall show cause, if there be any, why this Court should not recommend

1 dismissal with prejudice of the Petition based on expiration of the one-year
2 statute of limitations or dismissal without prejudice based on failure to exhaust
3 state remedies.

4 ***Petitioner is also advised that if he fails to timely respond to this***
5 ***Order to Show Cause, the Magistrate Judge will recommend that the***
6 ***District Court dismiss the Petition, with prejudice, based on expiration of***
7 ***the one-year statute of limitations.***

8
9 DATED: April 20, 2011



ALICIA G. ROSENBERG
United States Magistrate Judge