

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
27
28

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

DAVID WAYNE SPIVEY, JR.,)	No. CV 16-1619 FFM
)	
Plaintiff,)	ORDER TO SHOW CAUSE WHY
v.)	THE PETITION SHOULD NOT BE
)	DISMISSED AS UNTIMELY
NEIL McDOWELL, WARDEN,)	
)	
Respondent.)	
)	

On March 8, 2016, Petitioner David Wayne Spivey, Jr. (“Petitioner”), a California prisoner proceeding pro se, filed a Petition for Writ of Habeas Corpus by a Person in State Custody (“Petition”), pursuant to 28 U.S.C. § 2254. The Petition challenges Petitioner’s 2010 sentence for first degree murder and other crimes.

1. LIMITATIONS PERIOD FOR FEDERAL HABEAS PETITIONS

The present proceedings were initiated after the April 24, 1996 effective date of the Antiterrorism and Effective Death Penalty Act (“AEDPA”). Accordingly, the AEDPA’s timeliness provisions apply, including a one-year limitations period which is subject to both statutory and equitable tolling. See 28 U.S.C. § 2244(d)(1). For those prisoners whose convictions became final post-AEDPA, the one-year period starts running from the latest of four alternative dates set forth in 28 U.S.C. § 2244(d)(1)(A)-

1 (D). See, *Patterson v. Stewart*, 251 F.3d 1243, 1245–47 (9th Cir. 2001). Where, as here,
2 the challenged judgment was affirmed by the state’s highest court, the period of direct
3 review ends either when the petitioner failed to file a certiorari petition in the United
4 States Supreme Court and the 90-day period for doing so has expired, or when the
5 Supreme Court has ruled on a filed petition. See *Clay v. United States*, 537 U.S. 522,
6 527–32 and nn.3–4 (2003); *Wixom v. Washington*, 264 F.3d 894, 897 (9th Cir. 2001).

7 In this case, Petitioner does not appear to have filed a petition for certiorari in the
8 United States Supreme Court. (See Petition at 5). Thus, under section 2244(d)(1)(A),
9 Petitioner’s conviction became final 90 days after the denial of the petition for review by
10 the California Supreme Court. See *Clay*, 537 U.S. at 527–32 and nn.3, 4; 28 U.S.C. §
11 2101(d); Sup. Ct. R. 13.1. Therefore, Petitioner’s conviction became final on November
12 20, 2012. Accordingly, the one-year limitations period expired on November 20, 2013.
13 See *Patterson*, 251 F.3d at 1245–47. Because Petitioner did not initiate the current
14 proceedings until March 8, 2016, the present action is untimely, absent statutory or
15 equitable tolling. See 28 U.S.C. § 2244(d)(1); Fed. R. Civ. Proc. 6(a).

16 **2. STATUTORY TOLLING**

17 Title 28 U.S.C. § 2244(d)(2) provides that “[t]he time during which a properly
18 filed application for state post-conviction or other collateral review with respect to the
19 pertinent judgment or claim is pending shall not be counted toward any period of
20 limitation under this subsection.”

21 The statute of limitations is not tolled between the date on which a judgment
22 becomes final and the date on which the petitioner filed his first state collateral challenge
23 because there is no case “pending.” *Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir.
24 1999), overruled on other grounds by *Harris v. Carter*, 515 F.3d 1051, 1053 (9th Cir.
25 2008). Once an application for post-conviction review commences, it is “pending” until
26 a petitioner “complete[s] a full round of [state] collateral review.” *Delhomme v.*
27 *Ramirez*, 340 F.3d 817, 819 (9th Cir. 2003) (per curiam) (citing *Biggs v. Duncan*, 339
28 F.3d 1045, 1048 (9th Cir. 2003)), abrogated on other grounds by *Evans v. Chavis*, 546

1 U.S. 189 (2006). “One full round” generally means that the statute of limitations is
2 tolled while a petitioner is properly pursuing post-conviction relief, from the time a
3 California prisoner files his first state habeas petition until the California Supreme Court
4 rejects his final collateral challenge. *Carey v. Saffold*, 536 U.S. 214, 219–20 (2002); see
5 also *Nino*, 183 F.3d at 1006; *Delhomme*, 340 F.3d at 819. The period tolled includes the
6 time between a lower court decision and the filing of a new petition in a higher court, as
7 long as the intervals between the filing of those petitions are “reasonable.” *Delhomme*,
8 340 F.3d at 819 (citing *Biggs*, 339 F.3d at 1048 n.1).

9 Here, Petitioner’s conviction became final on November 20, 2012. He filed his
10 initial state habeas petition in the Los Angeles County Superior Court on January 11,
11 2013, 52 days later. (Petition at 3). This filing started tolling the one-year limitations
12 period. The Superior Court denied the petition on June 10, 2013. (Petition at 4).
13 Petitioner subsequently filed a petition in the California Court of Appeal, which denied
14 his petition on July 11, 2013. (Petition at 4). Petitioner then filed a petition in the
15 California Supreme Court, which denied him relief on January 29, 2014, thereby ending
16 the statutory tolling period. See <http://appellatecases.courtinfo.ca.gov/index.html> (last
17 visited March 10, 2016). From that date, Petitioner had 313 days remaining to file a
18 federal habeas petition. Accordingly, the one-year limitations period expired on
19 December 8, 2014. Therefore, the Petition is untimely even with added statutory tolling.

20 **3. EQUITABLE TOLLING**

21 The AEDPA limitations period also may be subject to equitable tolling, if the
22 petitioner shows that extraordinary circumstances beyond the petitioner’s control made
23 timely filing of a federal habeas petition impossible and the petitioner has acted
24 diligently in pursuing his rights. *Holland v. Florida*, 560 U.S. 631, 649 (2010). The
25 petitioner bears the burden of showing that equitable tolling is appropriate. *Miranda v.*
26 *Castro*, 292 F.3d 1063, 1065 (9th Cir. 2002).

27 Petitioner has not made any allegation suggesting that equitable tolling is
28 appropriate. Petitioner has made no showing of extraordinary circumstances or of

