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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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|--------------------------------|---|---------------------------------|
| JAMES LUDLOW, |) | 1:05-CV-01286 LJO JMD HC |
| |) | |
| Petitioner, |) | FINDINGS AND RECOMMENDATION |
| |) | DISMISSING PETITION FOR WRIT OF |
| v. |) | HABEAS CORPUS |
| |) | |
| WARDEN OF FOLSOM STATE PRISON, |) | |
| |) | |
| Respondent. |) | |

Petitioner James Ludlow (“Petitioner”) is a state prisoner proceeding pro se with a petition for writ of habeas corpus under 28 U.S.C. § 2254.

BACKGROUND

Petitioner is currently in the custody of the California Department of Corrections and Rehabilitation at Folsom State Prison, pursuant to a judgement of the Kern County Superior Court. (Pet. at 2). Judgement was entered against Petitioner on September 27, 1989, on a charge of second degree murder. (Answer Ex. 1). Petitioner was sentenced to a term of fifteen years to life. (Pet at 2; Answer at 1).

Petitioner does not challenge his conviction in the instant habeas corpus proceeding. Rather, Petitioner challenge the decision by the former Governor to deny him parole. On June 12, 2003, Petitioner appeared before the California Board of Parole Hearing (the “Board”) for a parole consideration hearing. (Answer at 1). The Board found Petitioner suitable for parole.

On November 5, 2003, then Governor Gray Davis reversed the Board’s decision, finding Petitioner unsuitable for parole. (Answer Ex. 4). The cover letter attached to the Governor’s decision was dated November 6, 2003. (Id).

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1 *Jeffries v. Wood*, 114 F.3d 1484, 1499 (9th Cir. 1997) (*en banc*), *cert. denied*, 118 S.Ct. 586 (1997).

2 In this case, the petition was filed in 2005, and therefore, it is subject to the provisions of the
3 AEDPA. The AEDPA imposes a one-year period of limitation on petitioners seeking to file a federal
4 petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As amended, § 2244, subdivision (d)
5 states:

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

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

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

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

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

19 (2) The time during which a properly filed application for State post-conviction or
20 other collateral review with respect to the pertinent judgment or claim is pending shall
21 not be counted toward any period of limitation under this subsection.

22 In most cases, the limitations period begins running on the date that the petitioner’s direct
23 review became final. *See* 28 U.S.C. § 2244(d)(1)(A). In situations similar to the instant case, where
24 Petitioner is challenging a parole decision, the Ninth Circuit has held that direct review is concluded
25 and the statute of limitations commences when the final administrative appeal is denied. *See Redd v.*
26 *McGrath*, 343 F.3d 1077, 1079 (9th Cir. 2003) (holding that § 2241(d)(1)(D) applies in the context
27 of parole decisions and that the Board of Prison Term’s denial of an inmate’s administrative appeal
28 is the “factual predicate” of the inmate’s claim that triggers the commencement of the limitations
period). As the Governor’s authority to reverse a grant of parole is not subject to an administrative
appeal, the factual predicate of the inmate’s claim triggering the limitation period was the November
6, 2003 decision.¹ *See* Cal. Const., art. V, § 8(b); *see also Molina v. Curry*, 2008 WL 2383163, *3

¹While the Governor’s decision is dated November 5, 2003, the cover letter attached to the decision is dated
November 6, 2003.

1 (N.D. Cal. 2008). Thus, the one year statute of limitations began running on November 7, 2003, the
2 day after the Governor’s reversal. *See Shelby v. Bartlett*, 391 F.3d 1061, 1066 (9th Cir. 2004).
3 Petitioner did not file the instant petition until October 7, 2005.²

4 Seven hundred (700) days have passed since statute of limitations began running to when
5 Petitioner filed his habeas corpus petition in federal court, far exceeding the one year statute of
6 limitations.

7 **B. Tolling of the Limitation Period Pursuant to 28 U.S.C. § 2244(d)(2)**

8 Title 28 U.S.C. § 2244(d)(2) states that the “time during which a properly filed application
9 for State post-conviction or other collateral review with respect to the pertinent judgment or claim is
10 pending shall not be counted toward” the one year limitation period. 28 U.S.C. § 2244(d)(2). In
11 *Carey v. Saffold*, 536 U.S. 214, 215 (2002), the United States Supreme Court held the statute of
12 limitations is tolled where a petitioner is properly pursuing post-conviction relief, and the period is
13 tolled during the intervals between one state court's disposition of a habeas petition and the filing of
14 a habeas petition at the next level of the state court system. *See also Nino v. Galaza*, 183 F.3d 1003,
15 1006 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 1846 (2000). Nevertheless, state petitions will only toll
16 the one-year statute of limitations under § 2244(d)(2) if the state court explicitly states that the post-
17 conviction petition was timely or was filed within a reasonable time under state law. *Pace v.*
18 *DiGuglielmo*, 544 U.S. 408 (2005); *Evans v. Chavis*, 546 U.S. 189 (2006). Claims denied as
19 untimely or determined by the federal courts to have been untimely in state court will not satisfy the
20 requirements for statutory tolling. *Id.* Respondent does not claim that any of the petitions for writ of
21 habeas corpus submitted to the state courts were untimely.

22 However, Respondent and Petitioner dispute the filing dates for the instant petition as well as
23 the petitions submitted to the California Court of Appeal and Supreme Court. Even applying the
24 dates provided by Petitioner, the instant petition would still be untimely.

25
26 ²In *Houston v. Lack*, 487 U.S. 266, 276 (1988), the United States Supreme Court held that a *pro se* habeas petitioner's
27 notice of appeal is deemed filed on the date of its submission to prison authorities for mailing, as opposed to the date of its
28 receipt by the court clerk. The Ninth Circuit has applied the rule to assess the timeliness of federal habeas filings under the
AEDPA limitations period. *Huizar v. Carey*, 273 F.3d 1220, 1222 (9th Cir. 2001) (citing *Lack*, 487 U.S. at 276). Therefore
under the mailbox rule, the Court deems the petitions filed on the date Petitioner signed them and presumably handed them
to prison authorities for mailing.

1 Petitioner filed a petition for writ of habeas corpus on January 20, 2004 with the state
2 superior court. That petition was denied on April 5, 2004, resulting in a tolling period of eighty-six
3 (86) days. Petitioner filed a petition for writ of habeas corpus on August 10, 2004 with the
4 California Court of Appeal. The petition was denied on September 16, 2004, resulting in a tolling of
5 thirty-seven (37) days. Petitioner also submitted a petition for writ of habeas corpus to the California
6 Supreme Court on December 6, 2004 . The petition was denied on June 8, 2005, tolling one hundred
7 and eighty-four (184) days.

8 Petitioner argues that the Court should also toll the thirty day period in which Petitioner could
9 have filed a writ of certiorari with the United States Supreme Court. (Traverse at 3-4). Petitioner's
10 contention is misguided as evidenced by the high court's decision in *Lawrence v. Florida*, 549 U.S.
11 327, 333-334 (2007). In *Lawrence*, the Supreme Court held that 28 U.S.C. § 2244(d)(2) provision,
12 tolling time for pending applications of collateral review in State courts, does not apply to the period
13 in which a petitioner may file a writ of certiorari.

14 The total tolled period from Petitioner's state habeas petitions equals three hundred and seven
15 (307) days. Subtracting this time from the seven hundred (700) days that have passed from the
16 beginning of the statute of limitations period to when Petitioner filed the instant petition, Petitioner
17 has waited a total of three hundred and ninety-three (393) days to file his federal petition for writ of
18 habeas corpus. Consequently, the instant petition is barred by the one year statute of limitations
19 contained in 28 U.S.C. § 2244(d).

20 **C. Equitable Tolling**

21 The limitations period is subject to equitable tolling if the petitioner demonstrates: "(1) that
22 he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his
23 way." *Pace*, 544 U.S. at 418; *see also Irwin v. Department of Veteran Affairs*, 498 U.S. 89, 96
24 (1990); *Calderon v. U.S. Dist. Ct. (Kelly)*, 163 F.3d 530, 541 (9th Cir. 1998) (*citing Alvarez-*
25 *Machain v. United States*, 107 F.3d 696, 701 (9th Cir. 1996), *cert denied*, 522 U.S. 814 (1997)).
26 Petitioner bears the burden of alleging facts that would give rise to tolling. *Pace*, 544 U.S. at 418;
27 *Smith v. Duncan*, 297 F.3d 809 (9th Cir. 2002); *Hinton v. Pac. Enters.*, 5 F.3d 391, 395 (9th Cir.
28 1993).

