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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

JEFFERS PATRICK DICKEY,	)	1:08-CV-01198 AWI GSA HC
Petitioner,	)	
v.	)	FINDINGS AND RECOMMENDATION REGARDING RESPONDENT’S MOTION TO DISMISS
MICHAEL A. SMELOSKY, Warden,	)	[Doc. #16]
Respondent.	)	

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Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

**BACKGROUND**

Petitioner is currently in the custody of the California Department of Corrections pursuant to a judgment of the Superior Court of California, County of Fresno, Hon. Lawrence J. O’Neill presiding, following his conviction by jury trial on August 26, 1996, of assault on a peace officer with a firearm, discharge of a firearm at an occupied motor vehicle, vehicle theft, willful flight from a pursuing peace officer, possession of a stolen vehicle, felon in possession of a firearm, and resisting arrest. See Lodged Doc. No. 1.<sup>1</sup> On September 26, 1996, Petitioner was sentenced to serve

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<sup>1</sup>“Lodged Document” refers to the documents lodged by Respondent in support of his motion to dismiss.

1 an indeterminate term of life with the possibility of parole, plus a consecutive term of fourteen years  
2 and four months. Id.

3 Petitioner appealed the conviction to the California Court of Appeals, Fifth Appellate  
4 District. On December 3, 1997, the appellate court affirmed the judgment. See Lodged Doc. No. 2.  
5 Petitioner then filed a petition for review in the California Supreme Court. See Lodged Doc. No. 3.  
6 On February 18, 1998, the petition was summarily denied. See Lodged Doc. No. 4.

7 Petitioner also filed three post-conviction collateral challenges with respect to the judgment  
8 in the state courts, all petitions for writ of habeas corpus, as follows:

- 9 1. Fresno County Superior Court  
10 Filed: March 7, 2007<sup>2</sup>;  
Denied: March 20, 2007;
- 11 2. California Court of Appeals, Fifth Appellate District  
12 Filed: March 29, 2007;  
Denied: May 3, 2007;
- 13 3. California Supreme Court  
14 Filed: May 22, 2007;  
Denied: October 10, 2007.

15 See Lodged Docs. Nos. 5-11.

16 On August 2, 2008, Petitioner filed the instant federal petition for writ of habeas corpus in  
17 this Court. On October 16, 2008, Respondent filed a motion to dismiss the petition as being filed  
18 outside the one-year limitations period prescribed by 28 U.S.C. § 2244(d)(1). Petitioner filed an  
19 opposition to Respondent's motion to dismiss on November 6, 2008. On December 17, 2008,  
20 Respondent filed a reply to Petitioner's opposition.

## 21 **DISCUSSION**

### 22 A. Procedural Grounds for Motion to Dismiss

23 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a  
24 petition if it "plainly appears from the petition and any attached exhibits that the petitioner is not

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26 <sup>2</sup>In Houston v. Lack, the Court held that a pro se habeas petitioner's notice of appeal is deemed filed on the date of  
27 its submission to prison authorities for mailing, as opposed to the date of its receipt by the court clerk. Houston v. Lack, 487  
28 U.S. 266, 276, 108 S.Ct. 2379, 2385 (1988). 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, (9<sup>th</sup> Cir. 2001), *citing* Houston v. Lack,  
487 U.S. 266, 276, 108 S.Ct. 2379, 2385 (1988). Therefore under the mailbox rule, the Court deems the petitions filed on  
the dates Petitioner presumably handed his petitions to prison authorities for mailing as opposed to the actual dates of filing.

1 entitled to relief in the district court . . . .” Rule 4 of the Rules Governing Section 2254 Cases.

2 The Ninth Circuit has allowed respondents to file a motion to dismiss in lieu of an answer if  
3 the motion attacks the pleadings for failing to exhaust state remedies or being in violation of the  
4 state’s procedural rules. See, e.g., O’Bremski v. Maass, 915 F.2d 418, 420 (9<sup>th</sup> Cir. 1990) (using Rule  
5 4 to evaluate motion to dismiss petition for failure to exhaust state remedies); White v. Lewis, 874  
6 F.2d 599, 602-03 (9<sup>th</sup> Cir. 1989) (using Rule 4 as procedural grounds to review motion to dismiss for  
7 state procedural default); Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n.12 (E.D. Cal. 1982) (same).  
8 Thus, a respondent can file a motion to dismiss after the court orders a response, and the Court  
9 should use Rule 4 standards to review the motion. See Hillery, 533 F. Supp. at 1194 & n. 12.

10 In this case, Respondent's motion to dismiss is based on a violation of 28 U.S.C. 2244(d)(1)'s  
11 one-year limitations period. Because Respondent's motion to dismiss is similar in procedural  
12 standing to a motion to dismiss for failure to exhaust state remedies or for state procedural default  
13 and Respondent has not yet filed a formal answer, the Court will review Respondent’s motion to  
14 dismiss pursuant to its authority under Rule 4.

15 B. Limitation Period for Filing a Petition for Writ of Habeas Corpus

16 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of  
17 1996 (hereinafter “AEDPA”). The AEDPA imposes various requirements on all petitions for writ of  
18 habeas corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059,  
19 2063 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9<sup>th</sup> Cir. 1997) (en banc), *cert. denied*, 118 S.Ct.  
20 586 (1997).

21 In this case, the petition was filed on August 2, 2008, and therefore, it is subject to the  
22 provisions of the AEDPA. The AEDPA imposes a one-year period of limitation on petitioners  
23 seeking to file a federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As amended,  
24 § 2244, subdivision (d) reads:

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

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

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

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

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

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

9 28 U.S.C. § 2244(d).

10 In most cases, the limitations period begins running on the date that the petitioner's direct  
11 review became final. In this case, the petition for review was denied by the California Supreme  
12 Court on February 18, 1998. Thus, direct review concluded on May 19, 1998, when the ninety (90)  
13 day period for seeking review in the United States Supreme Court expired. Barefoot v. Estelle, 463  
14 U.S. 880, 887 (1983); Bowen v. Roe, 188 F.3d 1157, 1159 (9<sup>th</sup> Cir.1999); Smith v. Bowersox, 159  
15 F.3d 345, 347 (8<sup>th</sup> Cir.1998). Petitioner had one year commencing on May 20, 1998, absent  
16 applicable tolling, in which to file his federal petition for writ of habeas corpus. However, Petitioner  
17 delayed filing the instant petition until August 2, 2008, almost ten years beyond the due date. Absent  
18 any applicable tolling, the instant petition is barred by the statute of limitations.

19 C. Later Start Date of Limitations Period Pursuant to 28 U.S.C. § 2244(d)(1)(C)

20 In his opposition, Petitioner contends that pursuant to 28 U.S.C. § 2244(d)(1)(C), the  
21 limitations period should not commence until January 22, 2007, the date the Supreme Court decided  
22 Cunningham v. California, 549 U.S. 270 (2007). Section 2244(d)(1)(C) states the limitations period  
23 commences on “the date on which the constitutional right asserted was initially recognized by the  
24 Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively  
25 applicable to cases on collateral review.” As argued by Respondent, however, this section is not  
26 applicable because Cunningham does not qualify under § 2244(d)(1)(C). In Butler v. Curry, 528 F.3d  
27 624, 639 (9<sup>th</sup> Cir.2008), the Ninth Circuit held that Cunningham did not announce a new rule of  
28 constitutional law.

1 Assuming the applicability of Apprendi v. New Jersey, 530 U.S. 466 (2000) and Blakely v.  
2 Washington, 542 U.S. 296 (2004), Petitioner is still not entitled to a later start date. Although these  
3 cases have been held to be new rules of constitutional law, neither one has been held to be  
4 retroactively applicable. United States v. Sanchez-Cervantes, 282 F.3d 664, 666-67 (9<sup>th</sup> Cir.2002);  
5 United States v. Cruz, 423 F.3d 1119 (9<sup>th</sup> Cir.2005). Therefore, § 2244(d)(1)(C) is inapplicable.

6 D. Tolling of the Limitation Period Pursuant to 28 U.S.C. § 2244(d)(2)

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

20 As stated above, the statute of limitations began to run on May 20, 1998, and expired on  
21 May 19, 1999. However, Petitioner did not file his first state habeas petition until March 7, 2007,  
22 long after the limitations period had already expired. Therefore, the collateral challenge had no  
23 tolling consequence. Green v. White, 223 F.3d 1001, 1003 (9<sup>th</sup> Cir.2000) (Petitioner is not entitled  
24 to tolling where the limitations period has already run); see also Webster v. Moore, 199 F.3d 1256  
25 (11th Cir.2000); Rendall v. Carey, 2002 WL 1346354 (N.D.Cal.2002). Likewise, the subsequent  
26 petitions did not operate to toll the statute of limitations.

27 E. Equitable Tolling

28 The limitations period is subject to equitable tolling if the petitioner demonstrates: “(1) that

1 he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his  
2 way.” Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005); see also Irwin v. Department of Veteran  
3 Affairs, 498 U.S. 89, 96 (1990); Calderon v. U.S. Dist. Ct. (Kelly), 163 F.3d 530, 541 (9<sup>th</sup> Cir. 1998),  
4 *citing* Alvarez-Machain v. United States, 107 F.3d 696, 701 (9<sup>th</sup> Cir. 1996), *cert denied*, 522 U.S.  
5 814 (1997). Petitioner bears the burden of alleging facts that would give rise to tolling. Pace, 544  
6 U.S. at 418; Smith v. Duncan, 297 F.3d 809 (9<sup>th</sup> Cir.2002); Hinton v. Pac. Enters., 5 F.3d 391, 395  
7 (9<sup>th</sup> Cir.1993). Here, the Court finds no reason to equitably toll the limitations period.

8 **RECOMMENDATION**

9 Accordingly, the Court HEREBY RECOMMENDS that the motion to dismiss be  
10 GRANTED and the habeas corpus petition be DISMISSED with prejudice for Petitioner’s failure to  
11 comply with 28 U.S.C. § 2244(d)’s one year limitation period.

12 This Findings and Recommendation is submitted to the assigned District Court Judge,  
13 pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 72-304 of the Local Rules of  
14 Practice for the United States District Court, Eastern District of California.

15 Within thirty (30) days after being served with a copy of this Findings and Recommendation,  
16 any party may file written objections with the Court and serve a copy on all parties. Such a  
17 document should be captioned “Objections to Magistrate Judge’s Findings and Recommendation.”  
18 Replies to the Objections shall be served and filed within ten (10) court days (plus three days if  
19 served by mail) after service of the Objections. The Finding and Recommendation will then be  
20 submitted to the District Court for review of the Magistrate Judge’s ruling pursuant to 28 U.S.C. §  
21 636 (b)(1)(C). The parties are advised that failure to file objections within the specified time may  
22 waive the right to appeal the Order of the District Court. Martinez v. Ylst, 951 F.2d 1153 (9<sup>th</sup> Cir.  
23 1991).

24  
25 IT IS SO ORDERED.

26 Dated: January 8, 2009

/s/ Gary S. Austin  
UNITED STATES MAGISTRATE JUDGE