

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
EASTERN DISTRICT OF CALIFORNIA

WILBERT DALE RUSS,)	1:08-cv-01735 AWI YNP [DLB] (HC)
)	
Petitioner,)	FINDINGS AND RECOMMENDATION
)	REGARDING RESPONDENT’S MOTION
v.)	TO DISMISS
)	[Doc. #10]
)	
JAMES A. YATES, Warden,)	
)	
Respondent.)	
)	

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 was placed in administrative segregation on June 6, 2006, when he was found in possession of an inmate manufactured weapon. (Pet. Ex. 1, Administrative Segregation Unit Placement Notice, June 6, 2006.) On July 16, 2006, a disciplinary hearing was held and Petitioner was found guilty of “possession of inmate manufactured weapon.” (Pet. Ex. 2, Rules Violation Report - Part C, July 16, 2006.) On January 8, 2007, Petitioner’s second level appeal was denied. (Pet. Ex. 6, Second Level Appeal Response, January 8, 2007.) On April 4, 2007, Petitioner’s Director’s level appeal was denied. (Pet. Ex. 6, Director’s Level Appeal Decision, April 4, 2007.)

State habeas petitions

On June 9, 2008, Petitioner filed a petition for writ of habeas corpus with the Solano County Superior Court alleging insufficient evidence to support his conviction and violation of due process. (Pet., 7-8, 10.) The petition was denied in a reasoned decision on August 13, 2008. (Id. at 7-8.)

1 Next, Petitioner filed a petition for writ of habeas corpus with the California Court of
2 Appeal, First Appellate District, which summarily denied the petition on September 3, 2008. (Id. at
3 4.)

4 On September 25, 2008, Petitioner filed a petition for writ of habeas corpus with the
5 California Supreme Court. (Id. at 11-16.) The court summarily denied the petition on October 22,
6 2008. (Id. at 3.)

7 Federal habeas petition

8 On November 8, 2008, Petitioner filed the instant petition in the U.S. District Court. (Doc.
9 #1.) On March 16, 2009, Respondent filed a motion to dismiss claiming that the petition was
10 untimely and that Petitioner failed to state a claim upon which relief could be granted. (Doc. #10.)
11 Petitioner did not file any opposition to the motion. It is Respondent's motion to dismiss that will
12 be considered herein.

13 **DISCUSSION**

14 **I. Jurisdiction**

15 Relief by way of a petition for writ of habeas corpus extends to a person in custody pursuant
16 to the judgment of a state court if the custody is in violation of the Constitution or laws or treaties of
17 the United States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); Williams v. Taylor, 529 U.S. 362,
18 375 n.7 (2000). Petitioner asserts that he suffered violations of his rights as guaranteed by the U.S.
19 Constitution. In addition, prisoner filed this petition while housed at Kern Valley State Prison, in
20 Delano, California, which is within the jurisdiction of this Court. 28 U.S.C. § 2254(a); 28 U.S.C. §
21 2241(d). Accordingly, the Court has jurisdiction over the action.

22 On April 24, 1996, Congress enacted the AEDPA, which applies to all petitions for writ of
23 habeas corpus filed after its enactment. Lindh v. Murphy, 521 U.S. 320 (1997); Jeffries v. Wood,
24 114 F.3d 1484, 1499 (9th Cir. 1997), *quoting* Drinkard v. Johnson, 97 F.3d 751, 769 (5th Cir. 1996),
25 *cert. denied*, 520 U.S. 1107 (1997), *overruled on other grounds by* Lindh v. Murphy, 521 U.S. 320
26 (1997) (holding AEDPA only applicable to cases filed after statute's enactment). The instant petition
27 was filed after the enactment of the AEDPA; thus, it is governed by its provisions.

28 **II. Procedural Grounds for Motion to Dismiss**

1 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition
2 if it “plainly appears from the petition . . . that the petitioner is not entitled to relief.” See Hendricks
3 v. Vasquez, 908 F.2d 490 (9th Cir. 1990).

4 The Ninth Circuit has allowed respondents to file a motion to dismiss in lieu of an answer if
5 the motion attacks the pleadings for failing to exhaust state remedies or being in violation of the
6 state’s procedural rules. See, e.g., O’Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990) (using
7 Rule 4 to evaluate motion to dismiss petition for failure to exhaust state remedies); White v. Lewis,
8 874 F.2d 599, 602-03 (9th Cir. 1989) (using Rule 4 as procedural grounds to review motion to
9 dismiss for state procedural default); Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n.12 (E.D. Cal.
10 1982) (same). Thus, a respondent can file a motion to dismiss after the court orders a response, and
11 the Court should use Rule 4 standards to review the motion. See Hillery, 533 F. Supp. at 1194 & n.
12 12. Because the arguments in the motion to dismiss are procedural in nature and Respondent has not
13 yet filed a formal answer, the Court will review Respondent’s motion to dismiss pursuant to its
14 authority under Rule 4.

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

16 The AEDPA imposes various requirements on all petitions for writ of habeas corpus filed after
17 the date of its enactment. Lindh v. Murphy, 521 U.S. at 117; Jeffries v. Wood, 114 F.3d at 1499. As
18 noted above, the instant petition is subject to the requirements laid out in the AEDPA. The AEDPA
19 imposes a one-year period of limitation on petitioners seeking to file a federal petition for writ of
20 habeas corpus. 28 U.S.C. § 2244(d)(1). As amended, § 2244, subdivision (d) reads:

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

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

25 (B) the date on which the impediment to filing an application created by
26 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;

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

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

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

6 28 U.S.C. § 2244(d).

7 The Ninth Circuit has held that ““§ 2244's one-year limitation period applies to all habeas
8 petitions filed by persons in custody pursuant to the judgment of a State Court’ even if the petition
9 challenges an administrative decision rather than a state court judgment.” Eric v. Shelby, 391 F.3d
10 1061, 1062 (9th Cir. 2004).

11 In most cases, the limitation period begins running on the day the petitioner’s direct review
12 became final. Petitioner’s judgment became final when he exhausted his direct review process, i.e.,
13 the day that the Director’s level denied his appeal. The statute of limitations began to run the next
14 day, on April 5, 2007. Accordingly, absent any applicable tolling, Petitioner had until April 4, 2008
15 to file a petition for writ of habeas corpus in the federal court.

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

17 Title 28 U.S.C. § 2244(d)(2) states that the “time during which a properly filed application for
18 state post-conviction or other collateral review with respect to the pertinent judgment or claim is
19 pending shall not be counted toward” the one year limitation period. 28 U.S.C. § 2244(d)(2). In
20 Carey v. Saffold, the Supreme Court held the statute of limitations is tolled where a petitioner is
21 properly pursuing post-conviction relief, and the period is tolled during the intervals between one
22 state court's disposition of a habeas petition and the filing of a habeas petition at the next level of the
23 state court system. Carey v. Saffold, 122 S.Ct. 2134, 2135-36 (2002); see also Nino v. Galaza, 183
24 F.3d 1003, 1006 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 1846 (2000); Welch v. Newland, 267 F.3d
25 1013, 1016 (9th Cir. 2001) (“tolled period includes intervals between the disposition of a state court
26 petition and the filing of a subsequent petition at the next state appellate level”); Patterson v. Stewart,
27 251 F.3d 1243, 1247 (9th Cir. 2001) (stating that the "AEDPA's one-year grace period is tolled
28 during the pendency of properly filed state petitions challenging the judgment or claim at issue."); cf.
Dils v. Small, 260 F.3d 984, 986 (9th Cir. 2001) (Court found no tolling between consecutive filings

1 at the same level); Lewis v. Mitchell, 173 F.Supp.2d 1057, 1061 (C.D. Cal.2001) (holding that the
2 interval between a motion for sentence modification in the state superior court and a habeas petition
3 in the superior court was not tolled pursuant to 28 U.S.C. § 2244(d)(2)).

4 The limitation period is tolled while a “properly filed application for state post-conviction or
5 other collateral review with respect to the pertinent judgment or claim is pending.” Pace v.
6 DiGuglielmo, 544 U.S. 408, 410 (2005). “A state post conviction petition rejected by the state court
7 as untimely” cannot be considered “properly filed.” Id.

8 Petitioner did not filed his first State habeas petition until June 9, 2008, two months after the
9 statute of limitations had already run out. Because Petitioner did not file a State petition until after
10 the limitation period was over, none of Petitioner’s State petitions can serve to toll the limitation
11 period. The one-year limitation period ended long before Petitioner filed a petition for writ of habeas
12 corpus in federal court, thus, the petition must be dismissed as untimely.

13 Equitable Tolling

14 The federal court is not bound by California law regarding statute of limitations, however, the
15 federal habeas courts do recognize that the limitation period can be subject to equitable tolling if
16 “extraordinary circumstances beyond a prisoner’s control” have made it impossible for the petition to
17 be filed on time. Calderon v. U.S. Dist. Ct. (Kelly), 163 F.3d 530, 541 (9th Cir. 1998) (citing
18 Alvarez-Machain v. United States, 107 F.3d 696, 701 (9th Cir. 1996), *cert denied*, 522 U.S. 814
19 (1997)); Calderon v. U.S. Dist. Ctourt for the Cent. Dist. Of Cal.(Beeler), 128 F.3d 1283, 1288 (9th
20 Cir. 1997) (noting that “[e]quitable tolling will not be available in most cases, as extensions of time
21 will only be granted if 'extraordinary circumstances' beyond a prisoner's control make it impossible to
22 file a petition on time”), *overruled on other grounds by* Calderon v. U.S. Dist. Court for Cent. Dist.
23 Of California, 163 F.3d 530, 539 (9th Cir. 1998), *abrogated by* Woodford v. Garceau, 538 U.S. 202
24 (2003). “When external forces, rather than a petitioner's lack of diligence, account for the failure to
25 file a timely claim, equitable tolling of the statute of limitations may be appropriate.” Miles v. Prunty,
26 187 F.3d 1104, 1107 (9th Cir. 1999). Petitioner bears the burden of alleging facts that would give
27 rise to tolling. Smith v. Duncan, 297 F.3d 809 (9th Cir.2002); Hinton v. Pac. Enters., 5 F.3d 391,
28 395 (9th Cir.1993).

1 Petitioner makes no argument as to why he waited so long before filing his first petition for
2 writ of habeas corpus. Furthermore, after reviewing the petition, this Court finds no extraordinary
3 circumstances present, thus, Petitioner cannot receive equitable tolling.

4 Because the petition is clearly untimely, the Court will not consider Respondent's argument
5 that Petitioner failed to state a claim upon which relief could be granted.

6 **CONCLUSION**

7 The instant petition must be dismissed as untimely because it was filed after the AEDPA's
8 one-year statute of limitations ended.

9 **RECOMMENDATION**

10 It is hereby RECOMMENDED that:

- 11 1) Respondent's motion to dismiss is GRANTED and
12 2) the petition for writ of habeas corpus is DISMISSED with prejudice.

13 These Findings and Recommendations are submitted to the Honorable Anthony W. Ishii,
14 United States District Court Judge, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Rule
15 72-304 of the Local Rules of Practice for the United States District Court, Eastern District of
16 California. Within thirty (30) days after being served with a copy, any party may file written
17 objections with the court and serve a copy on all parties. Such a document should be captioned
18 "Objections to Magistrate Judge's Findings and Recommendations." Replies to the objections shall
19 be served and filed within ten (10) court days (plus three days if served by mail) after service of the
20 objections. The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636
21 (b)(1)(C). The parties are advised that failure to file objections within the specified time may waive
22 the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

23
24 IT IS SO ORDERED.

25 **Dated: February 11, 2010**

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE