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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MICHAEL LUCAS,)	1:08-cv-01806 OWW MJS HC
)	
Petitioner,)	
)	FINDINGS AND RECOMMENDATION
v.)	REGARDING RESPONDENT’S MOTION
)	TO DISMISS
)	
JOHN SALAZAR, Warden,)	[Doc. #19]
)	
Respondent.)	

Petitioner is a state prisoner proceeding pro se on a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent, JOHN SALAZAR¹, is represented in this action by Brian G. Smiley, Esq., of the Office of the Attorney General for the State of California.

BACKGROUND

Petitioner is in the custody of the California Department of Corrections pursuant to a judgment of the Superior Court of California, County of Los Angeles. On April 12 Petitioner pled guilty to first degree murder in violation of Cal. Penal Code § 187(a). (See LD No. 1.²) On May 16, 1990, he was sentenced to serve a term of 25 years to life in state prison. (Id.)

¹Originally, James Hartley was named Respondent in this action as he was then the Warden of Chuckawalla Valley State Prison where Petitioner is incarcerated. Respondent’s motion to dismiss reveals that John Salazar has since replaced Mr. Hartley as Warden. Accordingly, John Salazar is hereby substituted as respondent in this matter pursuant to Fed. R. Civ. Proc. § 25(d)(1).

² “LD” refers to the documents lodged by Respondent in support of his motion to dismiss.

1 Since 2004 Petitioner has filed nine post-conviction collateral challenges, all petitions for
2 writ of habeas corpus, to the state court judgment:

- 3 1. Los Angeles County Superior Court
4 Filed: February 14, 2004³;
5 Denied: March 2, 2004;
- 6 2. California Court of Appeals, Second Appellate District
7 Filed: March 24, 2004;
8 Denied: May 27, 2004;
- 9 3. California Supreme Court
10 Filed: June 30, 2004;
11 Denied: November 2, 2005;
- 12 4. Los Angeles County Superior Court
13 Filed: Mach 21, 2005;
14 Denied: May 27, 2005;
- 15 5. California Court of Appeals, Second Appellate District
16 Filed: June 30, 2005⁴;
17 Denied: July 28, 2005;
- 18 6. Los Angeles County Superior Court
19 Filed: December 31, 2007;
20 Denied: February 5, 2008;
- 21 7. California Court of Appeals, Second Appellate District
22 Filed: March 18, 2008⁵;
23 Denied: April 17, 2008;
- 24 8. California Supreme Court
25 Filed: May 22, 2008⁶;

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³ In Houston v. Lack, the Court held that a pro se habeas petitioner's notice of appeal is deemed filed on the date of its submission to prison authorities for mailing, as opposed to the date of its receipt by the court clerk. 487 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, (9th Cir. 2001), *citing* Houston, 487 U.S. 266, 276, 108 S.Ct. at 2385. Adopting the "mailbox rule", the Court determines that a petition will be considered filed on the date Petitioner presumably handed it to prison authorities for mailing. See also Rule 3(d) of the Rules Governing Section 2254 Cases. In the instant case, the Court does not have the petitions Petitioner filed with the Los Angeles County Superior Court. Application of the mailbox rule may be of benefit to him, but it does not impact the Court's ruling in this matter.

⁴ Although the petition was filed on July 14, 2005, applying the mailbox rule leads the Court to deem the petition filed on June 30, 2005, the date Petitioner signed the petition.

⁵ Although the petition was filed on March 28, 2008, pursuant to the mailbox rule the Court considers the petition filed on March 18, 2008, the date Petitioner signed the petition.

⁶ Although the petition was filed on May 29, 2008, pursuant to the mailbox rule the Court considers the petition filed on May 22, 2008, the date Petitioner signed the petition.

1 Denied: October 28, 2008;

2 9. Los Angeles County Superior Court
3 Filed: June 19, 2009;
4 Denied: July 1, 2009.

5 See LD Nos. 2-12.

6 On November 21, 2008,⁷ Petitioner filed in this Court the instant petition for writ of habeas
7 corpus. On September 30, 2009, Respondent filed a motion to dismiss the petition on the ground that
8 it had been filed outside the one-year limitations period prescribed by 28 U.S.C. § 2244(d).
9 Petitioner filed an opposition to Respondent's motion to dismiss on October 23, 2009. On December
10 9, 2009, Respondent filed a reply to Petitioner's opposition.

11 **DISCUSSION**

12 A. Procedural Grounds for Motion to Dismiss

13 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a
14 petition if it "plainly appears from the petition and any attached exhibits that the petitioner is not
15 entitled to relief in the district court" Rule 4 of the Rules Governing Section 2254 Cases.

16 The Ninth Circuit has allowed respondents to file a motion to dismiss in lieu of an answer if
17 the motion attacks the pleadings for failing to exhaust state remedies or for being in violation of the
18 state's procedural rules. See, e.g., O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990) (using
19 Rule 4 to evaluate motion to dismiss petition for failure to exhaust state remedies); White v. Lewis,
20 874 F.2d 599, 602-03 (9th Cir. 1989) (using Rule 4 as procedural grounds to review motion to
21 dismiss for state procedural default); Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n. 12 (E.D. Cal.
22 1982) (same). Thus, a respondent can file a motion to dismiss after the court orders a response, and
23 the Court should use Rule 4 standards to review the motion. See Hillery, 533 F. Supp. at 1194 & n.
24 12.

25 In this case, Respondent's motion to dismiss is based on a failure to file within the one-year
26 limitations period of 28 U.S.C. § 2244(d)(1). Because Respondent's motion to dismiss is similar in
27 procedural standing to a motion to dismiss for failure to exhaust state remedies or for state

28 ⁷Although the petition was filed on November 25, 2008, under the mailbox rule the Court will consider the petition
filed on November 21, 2008, the date Petitioner signed the petition.

1 procedural default and Respondent has not yet filed a formal answer, the Court will review
2 Respondent's motion to dismiss pursuant to its authority under Rule 4.

3 B. Commencement of Limitations Period Under 28 U.S.C. § 2244(d)(1)(A)

4 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of
5 1996 (hereinafter "AEDPA"). The AEDPA imposes various requirements on all petitions for writ of
6 habeas corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059,
7 2063 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc), *cert. denied*, 118
8 S.Ct. 586 (1997).

9 In this case, the petition was filed on November 21, 2008, and therefore is subject to the
10 provisions of the AEDPA. The AEDPA imposes a one-year period of limitation on petitioners
11 seeking to file a federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As amended,
12 § 2244, subdivision (d) reads:

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

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

16 (B) the date on which the impediment to filing an application created by
17 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;

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

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

22 (2) The time during which a properly filed application for State post-conviction or
23 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.

24 28 U.S.C. § 2244(d).

25 In most cases, the limitations period begins running on the date that the petitioner's direct
26 review became final. In this case, Petitioner did not appeal his May 16, 1990 sentence. Accordingly,
27 his conviction became final 60 days after sentencing, i.e., on July 15, 1990. Cal. Rules of Court
28 8.308(a); Mendoza v. Carey, 449 F.3d 1065, 1067 (9th Cir. 2006). Because Petitioner's conviction

1 became final prior to the enactment of AEDPA, his one-year period for filing a habeas petition in
2 federal court began on AEDPA's effective date of April 24, 1996. Ford v. Pliler, 590 F.3d 782, 784
3 (9th Cir. 2009); see Patterson v. Stewart, 251 F.3d 1243, 1245 (9th Cir. 2001).

4 Petitioner would have one year from April 24, 1996, absent applicable tolling, in which to
5 file his federal petition for writ of habeas corpus. Petitioner delayed filing the instant petition until
6 November 21, 2008, more than eleven years after expiration of the statute of limitations period.
7 Absent grounds for commencing the statute of limitations later or for tolling it, the instant petition
8 is barred by the statute of limitations.

9 C. Later Commencement of Limitations Period Under 28 U.S.C. § 2244(d)(1)(D)

10 28 U.S.C. § 2244(d)(1)(D) states that the limitations period shall run from "the date on which
11 the factual predicate of the claim or claims presented could have been discovered through the
12 exercise of due diligence." The objective standard in determining when time begins to run under
13 Section 2244(d)(1)(D) is "when the prisoner knows (or through diligence could discover) the
14 important facts, not when the prisoner recognizes their legal significance." Hasan v. Galaza, 254
15 F.3d 1150 (9th Cir.2001), (quoting, Owens v. Boyd, 235 F.3d 356, 359 (7th Cir. 2000)). In his
16 opposition, Petitioner states that he "did not know his plea agreement was not what he thought it
17 was, until he was not released on the day he agreed he would be released, October 8, 2003." (Court
18 Doc. 21, p. 2.)

19 The federal courts have duty to construe pro se pleadings liberally. Hamilton v. United States,
20 67 F.3d 761, 764 (9th Cir.1995) (citing Hughes v. Rowe, 449 U.S. 5, 9 (1980) (quotation omitted)).
21 Accordingly, this Court shall consider if the limitation period should run from October 8, 2003, the
22 date Petitioner alleges the factual predicate for action was presented or could have been discovered.

23 Petitioner argues that statements of the trial judge regarding the acceptance of his guilty plea
24 gave him reason to believe he would be released on that date. In this regard, the record reflects that
25 the trial judge made several statements in an attempt to explain to Petitioner that his plea could leave
26 him eligible for parole and possible release from prison. (LD No. 1, pp. 3-4, 9, 11, and 16 (stating,
27 "Now, what happens if you go away for 25 years to life is that after – I don't know – 12, 13 years;
28 I'm not sure exactly what the time – exact time is, somewhere after 12, maybe up to 15, years, you

1 start having parole hearings.” Id. at 3. “You are looking at the possibility of getting out when you are
2 still like 35, 36, maybe 37 years old.” Id. at 4. “So we’re talking about your looking to the possibility
3 of getting out when you are 35, 36 years old.” Id. at 9. And, “...with the custody credits you have, it’s
4 likely that you would be considered for parole in about 14 years and seven months... about 15 years.”
5 Id. at 16.)) “And at the parole hearings... and they would decide whether you should get out before
6 the 25 years or whether – I mean if you are a real bad member in the prison, you could stay there for
7 a lot longer than the 25 years.” (LD No. 1, p. 3.)

8 These comments could give Petitioner reason to believe that he would be subject to parole
9 hearings, but no specific date was given as to when the hearings might occur. Certainly nothing was
10 said to cause Petitioner reasonably to believe he would actually be released on a given date. The
11 trial court explained that even though eligible for parole, Petitioner would not necessarily be entitled
12 to release.

13 Petitioner knew the terms of his sentence at the time of sentencing. The trial court described
14 the parole process to Petitioner sufficiently to make it unreasonable for Petitioner to conclude that he
15 would be released on parole on October 8, 2003, or any other date certain. Petitioner knew his
16 release date would be dependent upon the results of parole hearings.

17 For these reasons, Petitioner is not entitled to a later commencement of the limitations period
18 under 28 U.S.C. § 2244(d)(1)(D). Petitioner knew or should have been aware prior to October 8,
19 2003, that he was not entitled to release on that date.

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

21 28 U.S.C. § 2244(d)(2) states that the “time during which a properly filed application for
22 State post-conviction or other collateral review with respect to the pertinent judgment or claim is
23 pending shall not be counted toward” the one year limitation period. 28 U.S.C. § 2244(d)(2). In
24 Carey v. Saffold, the Supreme Court held the statute of limitations is tolled where a petitioner is
25 properly pursuing post-conviction relief, and the period is tolled during the intervals between one
26 state court's disposition of a habeas petition and the filing of a habeas petition at the next level of the
27 state court system. 536 U.S. 214, 216 (2002); see also Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir.
28 1999), *cert. denied*, 120 S.Ct. 1846 (2000). Nevertheless, state petitions will only toll the one-year

1 statute of limitations under § 2244(d)(2) if the state court explicitly states that the post-conviction
2 petition was timely or was filed within a reasonable time under state law. Pace v. DiGuglielmo, 544
3 U.S. 408 (2005); Evans v. Chavis, 546 U.S. 189 (2006). Claims denied as untimely or determined by
4 the federal courts to have been untimely in state court will not satisfy the requirements for statutory
5 tolling. Id.

6 1. Tolling Based on AEDPA's effective date of April 24, 1996

7 As stated, the statute of limitations began to run on April 24, 1996, the date upon which
8 AEDPA was enacted. Petitioner did not file his first state habeas petition until February 14, 2004.
9 He did not file for relief in the state courts during the one year period of limitations. Accordingly,
10 the statute of limitations expired on April 25, 1997, and Petitioner's subsequent state filings did not
11 act to resurrect and then toll the expired limitations period. Green v. White, 223 F.3d 1001, 1003
12 (9th Cir.2000) (Petitioner is not entitled to tolling where the limitations period has already run);
13 Jiminez v. Rice, 276 F.3d 478, 482 (9th Cir. 2001); Ferguson v. Palmateer, 321 F.3d 820 (9th Cir.
14 2003) ("section 2244(d) does not permit the reinitiation of the limitations period that has ended
15 before the state petition was filed.").

16 2. Tolling Based on Alleged Discovery of Factual Predicate on October 8, 2003

17 Even if it were assumed, solely for the sake of discussion, that the Petitioner could not
18 reasonably have discovered the factual predicate for his claim until October 8, 2003, and hence that
19 the one year statute of limitations did not begin to run until October 8, 2003, the federal petition
20 would remain untimely.

21 Petitioner filed his first state habeas petition on February 14, 2004, in the Los Angeles
22 County Superior Court. At that point, using the October 8, 2003 date, 129 days of the limitations
23 period had elapsed. Assuming the state petition was properly filed, the statute of limitations would
24 have been tolled during the time it was pending. The petition was denied on March 2, 2004.
25 Petitioner next filed a state habeas petition in the California Court of Appeal, Second Appellate
26 District on March 24, 2004. It was denied on May 27, 2004. Petitioner then filed a state habeas
27 petition in the California Supreme Court on June 30, 2004. It was denied on November 2, 2005.
28

1 Accordingly, under this scenario, the statute of limitations would have been tolled during the period
2 between February 14, 2004 and November 2, 2005.⁸

3 As 129 days had expired prior to Petitioner filing his first round of state habeas petitions, 236
4 days of the limitations period remained as of November 2, 2005, and so the extended period would
5 have expired on June 26, 2006. Petitioner's sixth petition was filed on December 31, 2007, over a
6 year after the expiration of the statute of limitations period including all potential tolling.

7 Because the limitations period had already expired, subsequent collateral challenges had no
8 tolling consequence. Green, 223 F.3d at 1003; Jiminez, 276 F.3d at 482; Ferguson, 321 F.3d at 820.
9 Accordingly, the instant federal petition remains untimely.

10 E. Equitable Tolling

11 The limitations period is subject to equitable tolling if the petitioner demonstrates: "(1) that
12 he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his
13 way." Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005); see also Irwin v. Department of Veteran
14 Affairs, 498 U.S. 89, 96 (1990); Calderon v. U.S. Dist. Ct. (Kelly), 163 F.3d 530, 541 (9th Cir.
15 1998), *citing* Alvarez-Machain v. United States, 107 F.3d 696, 701 (9th Cir. 1996), *cert denied*, 522
16 U.S. 814 (1997). Petitioner bears the burden of alleging facts that would give rise to tolling. Pace,
17 544 U.S. at 418; Hinton v. Pac. Enters., 5 F.3d 391, 395 (9th Cir. 1993). Here, Petitioner delayed
18 more than eleven years in filing the instant petition. He does not allege any extraordinary
19 circumstance stood in the way of his filing or otherwise pursuing relief. The Court finds no reason
20 to equitably toll the limitations period.

21 ///

23 **RECOMMENDATION**

24 Accordingly, the Court HEREBY RECOMMENDS that the motion to dismiss be
25 GRANTED and the habeas corpus petition be DISMISSED with prejudice due to Petitioner's failure

26 ⁸ Petitioner's fourth and fifth petitions were filed March 21, 2005 and June 30, 2005 respectively, and the fifth
27 petition was denied on July 28, 2005. As the fourth and fifth petitions were filed and resolved before the third petition was
28 denied on November 2, 2005, the statute of limitations was already tolled during that period.

1 to comply with 28 U.S.C. § 2244(d)'s one year limitation period.

2 This Findings and Recommendation is submitted to the Honorable Oliver W. Wanger, United
3 States District Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule
4 304 of the Local Rules of Practice for the United States District Court, Eastern District of California.

5 Within thirty (30) days after the date of service of this Findings and Recommendation, any
6 party may file written objections with the Court and serve a copy on all parties. Such a document
7 should be captioned "Objections to Magistrate Judge's Findings and Recommendation." Replies to
8 the Objections shall be served and filed within fourteen (14) days after service of the Objections.
9 The Finding and Recommendation will then be submitted to the District Court for review of the
10 Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(c). The parties are advised that failure
11 to file objections within the specified time may waive the right to appeal the Order of the District
12 Court. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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IT IS SO ORDERED.

Dated: May 25, 2010

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE