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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LOUIS TURNER JACKSON, II,)	1:08-cv-01808 YNP (DLB) (HC)
)	
Petitioner,)	ORDER GRANTING RESPONDENT'S
)	MOTION TO DISMISS
v.)	[Doc. #14]
)	
)	ORDER DISMISSING PETITION
TOM FELKER, Warden,)	
)	ORDER DIRECTING CLERK TO ENTER
Respondent.)	JUDGMENT
)	
)	ORDER DENYING CERTIFICATE OF
)	APPEALABILITY

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

BACKGROUND

On October 16, 1996, Petitioner was sentenced by the Kern County Superior Court to an indeterminate state prison term of twenty-five years to life after being convicted of possession of a weapon by a prisoner and several sentencing enhancements were found true. (Mot. to Dismiss, 2; Lodged Doc. 1.)

On January 22, 1999, the California Court of Appeal, Fifth Appellate District, affirmed the judgment. (Lodged Doc. 2.)

On April 28, 1999, the California Supreme Court denied review. (Lodged Docs. 4.)

1 State Petitions for Writ of Habeas Corpus

2 On September 17, 2000,¹ Petitioner filed a petition for writ of habeas corpus in the Kern
3 County Superior Court. (Lodged Doc. 5.) The petition was denied on October 23, 2000. (Lodged
4 Doc. 6.)

5 On May 14, 2001, Petitioner filed a second petition for writ of habeas corpus in the Kern
6 County Superior Court. (Lodged Doc. 7.) The petition was denied on June 19, 2001. (Lodged Doc.
7 8.)

8 On July 1, 2007, Petitioner filed a third petition for writ of habeas corpus with the Kern
9 County Superior Court. (Lodged Doc. 9.) The petition was denied on September 4, 2007. (Lodged
10 Doc. 10.)

11 On September 19, 2007, Petitioner filed a petition for writ of habeas corpus with the
12 California Court of Appeal, Fifth Appellate District. (Lodged Doc. 11.) The Petition was summarily
13 denied on October 4, 2007. (Lodged Doc. 12.)

14 On October 14, 2007, Petitioner filed a petition for writ of habeas corpus with the California
15 Supreme Court. (Lodged Doc. 13.) The petition was summarily denied on April 9, 2008. (Lodged
16 Doc. 14.)

17 Federal Petition for Writ of Habeas Corpus

18 On November 13, 2008, Petitioner filed a petition for writ of habeas corpus in the U.S.
19 District Court. (Doc. #1.)

20 The parties consented to the jurisdiction of the federal Magistrate Judge pursuant to 28
21 U.S.C. § 636(c), including final disposition. (Docs. #5, 13.)

22 On April 2, 2009, Respondent filed a motion to dismiss claiming that Petitioner's federal
23 petition was untimely. (Doc. #14.) Petitioner filed objections to the motion on May 14, 2009. (Doc.
24 #19.) It is Respondent's motion to dismiss that will be considered herein.

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¹ Unless otherwise specified, all petitions are deemed filed on the date on which they are signed pursuant to the
28 prison mailbox rule. See Rule 3(d) for the Federal Rules Governing Section 2254 Cases; see also Houston v. Lack, 487 U.S.
266 (1988).

1 **DISCUSSION**

2 **I. Jurisdiction**

3 Relief by way of a petition for writ of habeas corpus extends to a person in custody pursuant
4 to the judgment of a state court if the custody is in violation of the Constitution or laws or treaties of
5 the United States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); Williams v. Taylor, 529 U.S. 362,
6 375 n.7 (2000). Petitioner asserts that he suffered violations of his rights as guaranteed by the U.S.
7 Constitution. In addition, the conviction challenged arises out of the Kern County Superior Court,
8 which is located within the jurisdiction of this Court. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(d).
9 Accordingly, the Court has jurisdiction over the action.

10 On April 24, 1996, Congress enacted the Anti-terrorism and Effective Death Penalty Act
11 (AEDPA), which applies to all petitions for writ of habeas corpus filed after its enactment. Lindh v.
12 Murphy, 521 U.S. 320 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997), *quoting*
13 Drinkard v. Johnson, 97 F.3d 751, 769 (5th Cir. 1996), *cert. denied*, 520 U.S. 1107 (1997),
14 *overruled on other grounds by Lindh v. Murphy*, 521 U.S. 320 (1997) (holding AEDPA only
15 applicable to cases filed after statute's enactment). The instant petition was filed after the enactment
16 of the AEDPA; thus, it is governed by its provisions.

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

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

21 The Ninth Circuit has allowed respondents to file a motion to dismiss in lieu of an answer if
22 the motion attacks the pleadings for failing to exhaust state remedies or being in violation of the
23 state’s procedural rules. *See, e.g.,* O’Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990) (using
24 Rule 4 to evaluate motion to dismiss petition for failure to exhaust state remedies); White v. Lewis,
25 874 F.2d 599, 602-03 (9th Cir. 1989) (using Rule 4 as procedural grounds to review motion to
26 dismiss for state procedural default); Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n.12 (E.D. Cal.
27 1982) (same). Thus, a respondent can file a motion to dismiss after the court orders a response, and
28 the Court should use Rule 4 standards to review the motion. *See* Hillery, 533 F. Supp. at 1194 & n.

1 12.

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

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

8 The AEDPA imposes various requirements on all petitions for writ of habeas corpus filed after
9 the date of its enactment. Lindh v. Murphy, 521 U.S. at 326-27; Jeffries v. Wood, 114 F.3d at 1499.
10 As noted above, the instant petition is subject to the requirements laid out in the AEDPA. The
11 AEDPA imposes a one-year period of limitation on petitioners seeking to file a federal petition for
12 writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As amended, § 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
16 review or the expiration of the time for seeking such review;

17 (B) the date on which the impediment to filing an application created by
18 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;

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

21 (D) the date on which the factual predicate of the claim or claims presented
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 limitation period begins running on the date that the petitioner's direct
26 review became final. When a petitioner fails to seek a writ of certiorari from the United States
27 Supreme Court, the State court judgement becomes final when the 90 day period in which to file a
28 petition for writ of certiorari has expired. Bowen v. Roe, 188 F.3d 1157, 1159 (1999); Sup. Ct. R.

1 13. The State supreme court denied review on April 28, 1999, at that point, Petitioner had 90 days in
2 which to file a petition for writ of certiorari with the United States Supreme Court. When Petitioner
3 failed to file a petition for writ of certiorari by July 27, 1999, the State judgement became final and
4 the one-year limitation period began to run the next day, on July 28, 1999. Absent any applicable
5 tolling, Petitioner had until July 27, 2000, by which to file a petition for writ of habeas corpus in the
6 federal court.

7 **IV. 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 for
9 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, the Supreme Court held the statute of limitations is tolled where a petitioner is
12 properly pursuing post-conviction relief, and the period is tolled during the intervals between one
13 state court's disposition of a habeas petition and the filing of a habeas petition at the next level of the
14 state court system. Carey v. Saffold, 536 U.S. 214 (2002); see also Nino v. Galaza, 183 F.3d 1003,
15 1006 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 1846 (2000); Welch v. Newland, 267 F.3d 1013, 1016
16 (9th Cir. 2001) (“tolled period includes intervals between the disposition of a state court petition and
17 the filing of a subsequent petition at the next state appellate level”); Patterson v. Stewart, 251 F.3d
18 1243, 1247 (9th Cir. 2001) (stating that the "AEDPA's one-year grace period is tolled during the
19 pendency of properly filed state petitions challenging the judgment or claim at issue."); cf. Dils v.
20 Small, 260 F.3d 984, 986 (9th Cir. 2001) (Court found no tolling between consecutive filings at the
21 same level); Lewis v. Mitchell, 173 F.Supp.2d 1057, 1061 (C.D. Cal. 2001) (holding that the interval
22 between a motion for sentence modification in the state superior court and a habeas petition in the
23 superior court was not tolled pursuant to 28 U.S.C. § 2244(d)(2)).

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

28 Petitioner filed his first petition for writ of habeas corpus on September 17, 2000—52 days

1 after the one-year limitation period had already ended. Because all State court petitions were filed
2 after the statute of limitations had run, none of those petitions can act to toll the already expired
3 limitation period. Jiminez v. Rice, 276 F.3d 478, 482 (9th Cir. 2001). Because no tolling can be had
4 in this matter, the one-year limitation period ended on July 27, 2000. Petitioner did not file his
5 petition in federal court until November 13, 2008—more than eight years after the limitation period
6 had expired. Because Petitioner did not file a federal petition within the statute of limitations, his
7 petition is not timely.

8 **V. Equitable Tolling**

9 The limitation period is subject to equitable tolling if “extraordinary circumstances beyond a
10 prisoner’s control” have made it impossible for the petition to be filed on time. Calderon v. U.S. Dist.
11 Ct. (Kelly), 163 F.3d 530, 541 (9th Cir. 1998) (citing Alvarez-Machain v. United States, 107 F.3d
12 696, 701 (9th Cir. 1996), *cert denied*, 522 U.S. 814 (1997)); Calderon v. U.S. Dist. Ctourt for the
13 Cent. Dist. Of Cal.(Beeler), 128 F.3d 1283, 1288 (9th Cir. 1997) (noting that “[e]quitable tolling will
14 not be available in most cases, as extensions of time will only be granted if 'extraordinary
15 circumstances' beyond a prisoner's control make it impossible to file a petition on time”), *overruled on*
16 *other grounds by* Calderon v. U.S. Dist. Court for Cent. Dist. Of California, 163 F.3d 530, 539 (9th
17 Cir. 1998), *abrogated by* Woodford v. Garceau, 538 U.S. 202 (2003). “When external forces, rather
18 than a petitioner's lack of diligence, account for the failure to file a timely claim, equitable tolling of
19 the statute of limitations may be appropriate.” Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999).
20 Petitioner bears the burden of alleging facts that would give rise to tolling. Smith v. Duncan, 297
21 F.3d 809 (9th Cir.2002); Hinton v. Pac. Enters., 5 F.3d 391, 395 (9th Cir.1993).

22 The extraordinary circumstances that Petitioner asserts as grounds to receive equitable tolling
23 are identical to the claims in his actual petition. The constitutionality of Petitioner’s sentence does
24 not impact his ability to file a timely federal petition. Petitioner does not present to the Court any
25 extraordinary circumstances that prevented him from filing his petition within the one-year limitation
26 period; therefore, Petitioner cannot receive equitable tolling.

27 **CONCLUSION**

28 Petitioner did not file his federal petition for writ of habeas corpus within the one-year

1 limitation period. Petitioner cannot receive statutory or equitable tolling to bring his filing within the
2 limitation period. Because Petitioner’s federal filing was untimely, it must be dismissed with
3 prejudice.

4 **CERTIFICATE OF APPEALIBILITY**

5 A state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a
6 district court’s denial of his petition, and an appeal is only allowed in certain circumstances. Miller-El
7 v. Cockrell, 123 S.Ct. 1029, 1039 (2003). The controlling statute in determining whether to issue a
8 certificate of appealability is 28 U.S.C. § 2253, which provides as follows:

9 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a
10 district judge, the final order shall be subject to review, on appeal, by the court
of appeals for the circuit in which the proceeding is held.

11 (b) There shall be no right of appeal from a final order in a proceeding to test the
12 validity of a warrant to remove to another district or place for commitment or trial
of a person charged with a criminal offense against the United States, or to test the
13 validity of such person’s detention pending removal proceedings.

14 (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an
appeal may not be taken to the court of appeals from–

15 (A) the final order in a habeas corpus proceeding in which the
16 detention complained of arises out of process issued by a State
court; or

17 (B) the final order in a proceeding under section 2255.

18 (2) A certificate of appealability may issue under paragraph (1) only if the
19 applicant has made a substantial showing of the denial of a constitutional right.

20 (3) The certificate of appealability under paragraph (1) shall indicate which
specific issue or issues satisfy the showing required by paragraph (2).

21 If a court denies a petitioner’s petition, the court may only issue a certificate of appealability
22 “if jurists of reason could disagree with the district court’s resolution of his constitutional claims or
23 that jurists could conclude the issues presented are adequate to deserve encouragement to proceed
24 further.” Miller-El, 123 S.Ct. at 1034; Slack v. McDaniel, 529 U.S. 473, 484 (2000). While the
25 petitioner is not required to prove the merits of his case, he must demonstrate “something more than
26 the absence of frivolity or the existence of mere good faith on his . . . part.” Miller-El, 123 S.Ct. at
27 1040.

28 In the present case, the Court finds that reasonable jurists would not find the Court’s

1 determination that Petitioner is not entitled to federal habeas corpus relief debatable, wrong, or
2 deserving of encouragement to proceed further. Petitioner has not made the required substantial
3 showing of the denial of a constitutional right. Accordingly, the Court hereby DENIES Petitioner
4 certificate of appealability.

5 **ORDER**

- 6 1. Respondent’s Motion to Dismiss is hereby GRANTED;
7 2. Petitioner’s petition for writ of habeas corpus is hereby DENIED;
8 3. The clerk of the court is hereby DIRECTED to enter judgment; and
9 4. Certificate of appealability is hereby DENIED.

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11 IT IS SO ORDERED.

12 **Dated: February 24, 2010**

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE

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