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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DARIUS EUGENE KIRVIN,)	1:09-CV-00265 LJO GSA HC
)	
Petitioner,)	FINDINGS AND RECOMMENDATION
)	REGARDING RESPONDENT’S MOTION
)	TO DISMISS
v.)	
)	[Doc. #14]
)	
IVAN D. CLAY, 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 is currently in the custody of the California Department of Corrections pursuant to a judgment of the Superior Court of California, County of Stanislaus, following his conviction by jury trial on March 26, 1996, of first degree murder, attempted voluntary manslaughter, and assault with a deadly weapon by means likely to cause great bodily injury. (LD 1.¹) The jury also found true enhancements for use of a deadly weapon and for intentionally inflicting great bodily injury. (LD 1.) On April 23, 1996, he was sentenced to serve an indeterminate term of thirty-three years, six months to life in state prison. (LD 1.)

¹“LD” refers to the documents lodged by Respondent with his motion to dismiss.

1 Petitioner appealed the judgment to the California Court of Appeals, Fifth Appellate District.
2 On March 20, 1997, the appellate court affirmed the judgment. (LD 2.) Petitioner did not petition
3 for review in the California Supreme Court.

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

- 6 1. Stanislaus County Superior Court
7 Filed: April 22, 2007²;
8 Denied: May 3, 2007;
- 9 2. California Court of Appeals, Fifth Appellate District
10 Filed: June 17, 2007;
11 Denied: July 16, 2007;
- 12 3. California Supreme Court
13 Filed: August 29, 2007;
14 Denied: February 20, 2008.

15 (LD 3-8.)

16 On February 3, 2009, Petitioner filed the instant federal petition for writ of habeas corpus in
17 the Sacramento Division of this Court. The petition was ordered transferred to the Fresno Division
18 on February 11, 2009. On April 23, 2009, Respondent filed a motion to dismiss the petition as being
19 filed outside the one-year limitations period prescribed by 28 U.S.C. § 2244(d)(1) and for failing to
20 exhaust state remedies.³ Petitioner did not file an 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
25 entitled to relief in the district court” Rule 4 of the Rules Governing Section 2254 Cases.

26 The Ninth Circuit has allowed respondents to file a motion to dismiss in lieu of an answer if

27 ²Pursuant to the mailbox rule set forth in Houston v. Lack, the Court deems the several habeas petitions filed on the
28 date Petitioner signed them and presumably handed them to prison authorities for mailing, as opposed to the date of their
receipt by the court clerk. Huizar v. Carey, 273 F.3d 1220, 1222, (9th Cir. 2001), *citing* Houston v. Lack, 487 U.S. 266, 276,
108 S.Ct. 2379, 2385 (1988).

³Because the petition is untimely and should be dismissed with prejudice, the Court does not find it necessary to
address the exhaustion issue.

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

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

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

14 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of
15 1996 (hereinafter "AEDPA"). The AEDPA imposes various requirements on all petitions for writ of
16 habeas corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059,
17 2063 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc), *cert. denied*, 118 S.Ct.
18 586 (1997).

19 In this case, the petition was filed on February 3, 2009, and therefore, it is subject to the
20 provisions of the AEDPA. The AEDPA imposes a one-year period of limitation on petitioners
21 seeking to file a federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As amended,
22 § 2244, subdivision (d) reads:

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

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

27 (B) the date on which the impediment to filing an application created by
28 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;

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

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

5 (2) The time during which a properly filed application for State post-conviction or
6 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.

7 28 U.S.C. § 2244(d).

8 In most cases, the limitations period begins running on the date that the petitioner's direct
9 review became final. In this case, the California Court of Appeals affirmed Petitioner's conviction
10 on March 20, 1997. Petitioner did not file a petition for review. According to the Rules of Court, a
11 decision becomes final thirty (30) days after filing, and an appeal must be taken to the California
12 Supreme Court within ten (10) days of finality. Rule 24(a), 28(b), Cal.R.Ct. Thus, direct review
13 concluded on April 29, 1997. Petitioner had one year until April 29, 1998, absent applicable tolling,
14 in which to file his federal petition for writ of habeas corpus. However, Petitioner delayed filing the
15 instant petition until February 3, 2009, nearly 11 years beyond the due date. Absent any applicable
16 tolling, the instant petition is barred by the statute of limitations.

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

18 Title 28 U.S.C. § 2244(d)(2) states that the "time during which a properly filed application
19 for State post-conviction or other collateral review with respect to the pertinent judgment or claim is
20 pending shall not be counted toward" the one year limitation period. 28 U.S.C. § 2244(d)(2). In
21 Carey v. Saffold, the Supreme Court held the statute of limitations is tolled where a petitioner is
22 properly pursuing post-conviction relief, and the period is tolled during the intervals between one
23 state court's disposition of a habeas petition and the filing of a habeas petition at the next level of the
24 state court system. 536 U.S. 214, 215 (2002); see also Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir.
25 1999), *cert. denied*, 120 S.Ct. 1846 (2000). Nevertheless, state petitions will only toll the one-year
26 statute of limitations under § 2244(d)(2) if the state court explicitly states that the post-conviction
27 petition was timely or was filed within a reasonable time under state law. Pace v. DiGuglielmo, 544
28 U.S. 408 (2005); Evans v. Chavis, 546 U.S. 189 (2006). Claims denied as untimely or determined by

1 the federal courts to have been untimely in state court will not satisfy the requirements for statutory
2 tolling. Id.

3 As stated above, the statute of limitations began to run on April 30, 1997, and expired on
4 April 29, 1998. Petitioner did not file his first state habeas petition until April 22, 2007. At that
5 point, the limitations period had already expired. Therefore, the state habeas petitions had no tolling
6 consequences. Green v. White, 223 F.3d 1001, 1003 (9th Cir.2000) (Petitioner is not entitled to
7 tolling where the limitations period has already run); see also Webster v. Moore, 199 F.3d 1256
8 (11th Cir.2000); Rendall v. Carey, 2002 WL 1346354 (N.D.Cal.2002). The instant petition is
9 untimely.

10 D. 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. 1998),
15 citing Alvarez-Machain v. United States, 107 F.3d 696, 701 (9th Cir. 1996), *cert denied*, 522 U.S.
16 814 (1997). Petitioner bears the burden of alleging facts that would give rise to tolling. Pace, 544
17 U.S. at 418; Smith v. Duncan, 297 F.3d 809 (9th Cir.2002); Hinton v. Pac. Enters., 5 F.3d 391, 395
18 (9th Cir.1993). In this case, the Court finds no reason to equitably toll the limitations period.

19 **RECOMMENDATION**

20 Accordingly, the Court hereby RECOMMENDS that Respondent’s motion to dismiss be
21 GRANTED, and the petition for writ of habeas corpus be DISMISSED WITH PREJUDICE for
22 violating the statute of limitations.

23 These Findings and Recommendations are submitted to the Honorable Lawrence J. O’Neill,
24 United States District Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and
25 Rule 72-304 of the Local Rules of Practice for the United States District Court, Eastern District of
26 California.

27 Within thirty (30) days after being served with a copy, any party may file written objections
28 with the court and serve a copy on all parties. Such a document should be captioned “Objections to

1 Magistrate Judge’s Findings and Recommendations.” Replies to the objections shall be served and
2 filed within ten (10) court days (plus three days if served by mail) after service of the objections.
3 The Court will then review the Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The
4 parties are advised that failure to file objections within the specified time may waive the right to
5 appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

6
7 IT IS SO ORDERED.

8 **Dated: August 6, 2009**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE

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