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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CARLETHA A. STEWART,	}	1:09-cv-00965 LJO MJS HC
Petitioner,		
v.		FINDINGS AND RECOMMENDATION REGARDING RESPONDENT'S MOTION TO DISMISS
M. LATTIMORE, Warden	}	[Doc. 18]
Respondent.		

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

I. BACKGROUND

Petitioner is currently in the custody of the California Department of Corrections pursuant to a March 29, 1983 judgment of the Superior Court of California, County of Los Angeles, finding the Petitioner guilty of murder in violation of Cal. Penal Code Section 187. (Mot. to Dismiss, Ex. 2, p. 2., ECF No. 18-1.) Petitioner was sentenced to serve a term of 25 years to life in state prison. (*Id.*) In the present Petition, Petitioner challenges the Board of Parole Hearings' ("Board") May 3, 2006 decision finding her unsuitable for parole. (Pet., p. 6,

1 ECF No. 1.)

2 Starting in September 2007, Petitioner filed three collateral challenges with respect to
3 the decision of the Board finding her unsuitable for parole in the state courts, all petitions for
4 writ of habeas corpus, as follows:

- 5 1. Los Angeles County Superior Court
6 Filed: August 23, 2007¹;
7 Denied: November 13, 2007;
- 8 2. California Court of Appeals, Second Appellate District
9 Filed: December 28, 2007²;
10 Denied: March 6, 2008;
- 11 3. California Supreme Court
12 Filed: March 27, 2008³;
13 Denied: December 23, 2008;

14 See Mot., Exs. 2-7.

15 On May 26, 2009⁴, Petitioner filed the instant federal petition for writ of habeas corpus
16 in this Court. On August 3, 2010, Respondent filed a motion to dismiss the petition as being
17 filed outside the one-year limitations period prescribed by 28 U.S.C. § 2244(d). Petitioner filed
18 an opposition to Respondent's motion to dismiss on August 26, 2010. On August 30, 2010,
19 Respondent filed a reply to Petitioner's opposition.

20 **II. DISCUSSION**

21 **A. Procedural Grounds for Motion to Dismiss**

22 ¹ In Houston v. Lack, the Court held that a pro se habeas petitioner's notice of appeal is deemed filed on
23 the date of its submission to prison authorities for mailing, as opposed to the date of its receipt by the court clerk.
24 487 U.S. 266, 276, 108 S.Ct. 2379, 2385 (1988). The Ninth Circuit has applied the rule to assess the timeliness
25 of federal habeas filings under the AEDPA limitations period. Huizar v. Carey, 273 F.3d 1220, 1222, (9th Cir.
26 2001), *citing* Houston, 487 U.S. 266, 276, 108 S.Ct. at 2385. Under the mailbox rule, the Court deems petitions
27 filed on the date Petitioner presumably handed her petition to prison authorities for mailing. See also Rule 3(d)
28 of the Rules Governing Section 2254 Cases. Although the petition was filed on September 24, 2007, pursuant to
the mailbox rule the Court considers the petition filed on August 23, 2007, the date Petitioner signed the petition.

²Although the petition was filed on January 11, 2008, pursuant to the mailbox rule the Court considers the
petition filed on December 28, 2007, the date Petitioner signed the petition.

³Although the petition was filed on May 15, 2008, pursuant to the mailbox rule the Court considers the
petition filed on March 27, 2008, the date Petitioner signed the petition.

⁴Petitioner did not sign or date the petition. As there is no date on which to presume that Petitioner
handed the petition to prison authorities for mailing, Petitioner cannot benefit from the mailbox rule with regard
to this petition.

1 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a
2 petition if it “plainly appears from the petition and any attached exhibits that the petitioner is
3 not entitled to relief in the district court” Rule 4 of the Rules Governing Section 2254
4 Cases.

5 The Ninth Circuit has allowed respondents to file a motion to dismiss in lieu of an
6 answer if the motion attacks the pleadings for failing to exhaust state remedies or being in
7 violation of the state’s procedural rules. See, e.g., O’Bremski v. Maass, 915 F.2d 418, 420 (9th
8 Cir. 1990) (using Rule 4 to evaluate motion to dismiss petition for failure to exhaust state
9 remedies); White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (using Rule 4 as procedural
10 grounds to review motion to dismiss for state procedural default); Hillery v. Pulley, 533 F.Supp.
11 1189, 1194 & n. 12 (E.D. Cal. 1982) (same). Thus, a respondent can file a motion to dismiss
12 after the court orders a response, and the Court should use Rule 4 standards to review the
13 motion. See Hillery, 533 F. Supp. at 1194 & n. 12.

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

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

20 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act
21 of 1996 (hereinafter “AEDPA”). The AEDPA imposes various requirements on all petitions for
22 writ of habeas corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117
23 S.Ct. 2059, 2063 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997).

24 In this case, the petition was filed on May 26, 2009, and therefore, it is subject to the
25 provisions of the AEDPA. The AEDPA imposes a one-year period of limitation on petitioners
26 seeking to file a federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As
27 amended, § 2244, subdivision (d) reads:

28 (1) A 1-year period of limitation shall apply to an application for a writ of

1 habeas corpus by a person in custody pursuant to the judgment of a State court.
2 The limitation period shall run from the latest of –

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

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

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

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

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

18 28 U.S.C. § 2244(d).

19 In most cases, the limitations period begins running on the date that the Petitioner's
20 direct review became final. In a situation such as this where the Petitioner is challenging a
21 parole board decision, the Ninth Circuit has held that direct review is concluded and the statute
22 of limitations commences when the final administrative appeal is denied. See Redd v.
23 McGrath, 343 F.3d 1077, 1079 (9th Cir. 2003) (holding that § 2244(d)(1)(D) applies in the
24 context of parole decisions and that the Board's denial of an inmate's administrative appeal
25 is the "factual predicate" of the inmate's claim that triggers the commencement of the
26 limitations period).

27 With respect to the discovery of the factual predicate of a claim alleging an
28 unconstitutional denial of parole, the Ninth Circuit Court of Appeals has not decided whether
the triggering event is the initial decision denying parole or the point at which the decision
becomes final. In Redd, the Ninth Circuit held that the factual predicate occurred on the date
the administrative decision to deny parole became final. 343 F.3d at 1083-1084. This occurred
after an administrative appeal taken by the petitioner was denied. Id.

At the time the Redd decision was rendered, September 11, 2003, California prisoners

1 could contest the Board's adverse parole decision by filing an administrative appeal from the
2 final decision of the Board. See Cal. Code Regs. tit. 15, § 2050 et seq. (2003). However, on
3 May 1, 2004, the administrative appeal process was repealed and abolished. See Cal. Code
4 Regs. tit. 15, § 2050 et seq. (2004).

5 Now, a parole consideration hearing decision, such as the May 3, 2006 decision in this
6 instance, is considered a proposed decision until it passes through a decision review process.
7 Cal. Pen. Code § 3041(a), (b); Cal. Code Regs., tit. 15, § 2041(h). All proposed decisions
8 become final within 120 days unless the Board finds an error of law, the decision was based
9 on an error of fact, or if new information when corrected or considered by the Board has a
10 substantial likelihood of resulting in a substantially different decision on rehearing. Id.; Cal.
11 Penal Code § 3041(b) ("any decision of the parole panel finding an inmate suitable for parole
12 shall become final within 120 days of the date of the hearing. During that period, the board
13 may review the panel's decision.")

14 Generally, it is not knowledge of some facts pertinent to a claim that constitutes
15 discovery of a factual predicate within the meaning of § 2244(d)(1)(D); rather, it is knowledge
16 of facts constituting reasonable grounds for asserting all elements of a claim in good faith.
17 Hasan v. Galaza, 254 F.3d 1150, 1154-55 (9th Cir. 2001). The time begins to run when the
18 petitioner knows, or through diligence could discover, the important facts, and not when the
19 petitioner recognizes their legal significance. It is not necessary for a petitioner to understand
20 the legal significance of the facts themselves before the obligation to exercise due diligence
21 commences and the statutory period starts running. Id. at 1154 n. 3.

22 Here, the parole decision itself stated that it would not be final for 120 days. At all
23 pertinent times, the state statute that provides for the parole suitability hearing and decision
24 has also expressly provided for review of the decision before finality. Cal. Pen. Code §
25 3041(a), (b). The state statute has also stated that any decision granting parole becomes final
26 within 120 days of the date of the hearing. Cal. Pen. Code § 3041(b). The pertinent regulations
27 have provided that parole decisions of the board after a hearing "are proposed decisions and
28 shall be reviewed prior to their effective date in accordance with" specified procedures. Cal.

1 Code Regs. tit. 15, § 2041(a) (2010). It is expressly provided that "[a]ny proposed decision
2 granting, modifying, or denying a parole date for a life prisoner... shall become final no later
3 than 120 days after the hearing at which the proposed decision was made." Cal. Code Regs.
4 tit. 15, § 2043 (2010); see, Cal. Code Regs. tit. 15, § 2041(h). Under these circumstances, the
5 initial, proposed decision cannot logically constitute all the facts constituting reasonable
6 grounds for asserting a claim challenging a parole decision because the parole decision has
7 yet to be made.

8 This Court then concludes that the date on which the factual predicate of a decision on
9 Petitioner's parole could have been discovered through the exercise of reasonable diligence
10 was upon the decision's finality one hundred twenty (120) days after the decision was
11 rendered on May 3, 2006. Here, the Board's adverse decision rendered on May 3, 2006, was
12 merely a proposed decision and it did not become final until 120 days thereafter, on August
13 31, 2006. (See Mot. To Dismiss, Ex. 1 at 71.) The statute of limitations began to run the next
14 day, September 1, 2006, and Petitioner had one-year thereafter to file a timely petition. 28
15 U.S.C. § 2244(d)(1)(D); Shelby v. Bartlett, 391 F.3d 1061, 1066 (9th Cir. 2004).

16 Petitioner would have one year from September 1, 2006, absent applicable tolling, in
17 which to file her federal petition for writ of habeas corpus. However, Petitioner delayed in filing
18 the instant petition until May 26, 2009, over a year and a half after the statute of limitations
19 period expired. Absent the later commencement of the statute of limitations or any applicable
20 tolling, the instant petition is barred by the statute of limitations. Petitioner has made no
21 showing that the statute of limitations should commence at a later date under § 2244(d)(1)(B)-
22 (D). Accordingly, Petitioner may only rely on tolling to attempt to show that her petition is not
23 barred by the statute of limitations.

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

25 28 U.S.C. § 2244(d)(2) states that the "time during which a properly filed application for
26 State post-conviction or other collateral review with respect to the pertinent judgment or claim
27 is pending shall not be counted toward" the one year limitation period. 28 U.S.C. § 2244(d)(2).
28 In Carey v. Saffold, the Supreme Court held the statute of limitations is tolled where a

1 petitioner is properly pursuing post-conviction relief, and the period is tolled during the intervals
2 between one state court's disposition of a habeas petition and the filing of a habeas petition
3 at the next level of the state court system. 536 U.S. 214, 216 (2002); see also Nino v. Galaza,
4 183 F.3d 1003, 1006 (9th Cir. 1999). Nevertheless, state petitions will only toll the one-year
5 statute of limitations under § 2244(d)(2) if the state court explicitly states that the post-
6 conviction petition was timely or was filed within a reasonable time under state law. Pace v.
7 DiGuglielmo, 544 U.S. 408 (2005); Evans v. Chavis, 546 U.S. 189 (2006). Claims denied as
8 untimely or determined by the federal courts to have been untimely in state court will not
9 satisfy the requirements for statutory tolling. Id.

10 As stated above, the statute of limitations period began on September 1, 2006.
11 Petitioner filed her first state habeas petition on August 23, 2007, in the Los Angeles County
12 Superior Court. At that point, 356 days of the limitations period had elapsed. Assuming that
13 all of Petitioner's state habeas petitions were properly filed, the statute of limitations period is
14 tolled from August 23, 2007, the date the first petition was filed, until December 23, 2008, the
15 date the California Supreme Court denied Petitioner's final petition.

16 As 356 days had expired prior to Petitioner filing her first round of state habeas
17 petitions, nine days of the limitations period remained as of December 23, 2008. Accordingly,
18 the limitations period expired nine days later on January 1, 2009. As January 1, 2009 is a legal
19 holiday, Petitioner had until the next day that was not a Saturday, Sunday or legal holiday to
20 file the present petition. In this case, Petitioner had until Friday January 2, 2009 to file a
21 petition. The present petition was filed on May 26, 2009, almost five months after the
22 expiration of the year statute of limitations period including applicable tolling. Accordingly, the
23 instant federal petition is barred by the statute of limitations.

24 Petitioner argues in her opposition that all Saturdays, Sundays and legal holidays
25 should be excluded from the statute of limitations calculation. (Opp'n, ECF No. 21.) Time
26 calculations for petitions for writs of habeas corpus are governed by the Federal Rules of Civil
27 Procedure. See Rule 12, Rules Governing Section 2254 Cases ("The Federal Rules of Civil
28 Procedure, to the extent that they are not inconsistent with any statutory provisions or these

1 rules, may be applied to a proceeding under these rules.”) Federal Rule of Civil Procedure 6
2 governs calculations of time. Under Rule 6(a)(1), “when the period of time is stated in days or
3 a longer period of time, every intermediate day, including Saturdays, Sundays, and legal
4 holidays are counted.” Fed. R. Civ. P. 6(a). In this case, the statute of limitations period is a
5 year, and therefore intermediate weekend and holiday days are included. As the last day of
6 the statute of limitations was New Years Day, a legal holiday, Petitioner was granted an
7 additional day under Rule 6 to file her federal petition. Despite gaining an additional day to
8 file her petition, the petition was filed almost five months after the limitations period expired.

9 Petitioner also asserts that the dates upon which her state filings were adjudicated are
10 unclear. (Opp’n at 11-12, 25.) Further, Petitioner asserts that the Saturdays, Sundays, and
11 legal holidays during the period of the filing of her state petitions should be subtracted. (Id. at
12 29.) As described above, even assuming that the entire period during which Petitioner was
13 pursuing state habeas relief is tolled (including all Saturdays, Sundays, and legal holidays
14 during that period) her federal petition was filed nearly five months after the expiration of the
15 statute of limitations. Therefore, the petition remains untimely.

16 **D. Equitable Tolling**

17 The limitations period is subject to equitable tolling if the petitioner demonstrates: “(1)
18 that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance
19 stood in his way.” Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005); see also Irwin v.
20 Department of Veteran Affairs, 498 U.S. 89, 96 (1990); Calderon v. U.S. Dist. Ct. (Kelly), 163
21 F.3d 530, 541 (9th Cir. 1998), citing Alvarez-Machain v. United States, 107 F.3d 696, 701 (9th
22 Cir. 1996). Petitioner bears the burden of alleging facts that would give rise to tolling. Pace,
23 544 U.S. at 418; Hinton v. Pac. Enters., 5 F.3d 391, 395 (9th Cir.1993). Petitioner has not
24 presented any evidence regarding equitable tolling. Accordingly, Petitioner is not entitled to
25 the benefit of equitable tolling and her petition remains untimely.

26 **III. CONCLUSION**

27 As explained above, Petitioner failed to file the instant petition for habeas corpus within
28 the one year limitation period required by 28 U.S.C. § 2244(d). While Petitioner is entitled to

1 the benefit of statutory tolling, the Petition was still not timely filed. Finally, Petitioner is not
2 excused from timely filing due to equitable tolling. Based on the foregoing, this Court
3 recommends that Respondent's motion to dismiss be granted.

4 **IV. RECOMMENDATION**

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

8 This Findings and Recommendation is submitted to the Honorable Lawrence J. O'Neill,
9 United States District Court Judge, pursuant to the provisions of 28 U.S.C. section 636
10 (b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court,
11 Eastern District of California. Within thirty (30) days after the date of service of this Findings
12 and Recommendation, any party may file written objections with the Court and serve a copy
13 on all parties. Such a document should be captioned "Objections to Magistrate Judge's
14 Findings and Recommendation." Replies to the Objections shall be served and filed within
15 fourteen (14) days after service of the Objections. The Finding and Recommendation will then
16 be submitted to the District Court for review of the Magistrate Judge's ruling pursuant to 28
17 U.S.C. § 636 (b)(1)(c). The parties are advised that failure to file objections within the
18 specified time may waive the right to appeal the Order of the District Court. Martinez v. Ylst,
19 951 F.2d 1153 (9th Cir. 1991).

20
21 IT IS SO ORDERED.

22 Dated: September 10, 2010

1s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE