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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

HEKIMA T. PERRY,)	1:09-CV-01278 GSA HC
)	
Petitioner,)	ORDER GRANTING RESPONDENT’S
)	MOTION TO DISMISS
v.)	[Doc. #12]
)	
M. S. EVANS,)	ORDER DISMISSING PETITION FOR WRIT
)	OF HABEAS CORPUS
Respondent.)	ORDER DIRECTING CLERK OF COURT
)	TO ENTER JUDGMENT

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The parties have voluntarily consented to exercise of Magistrate Judge jurisdiction pursuant to 28 U.S.C. § 636(c)(1).

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 Kern, following his conviction by jury trial on June 16, 2005, of second degree robbery for the benefit of or in association with a criminal street gang. (LD 1¹.) It was also found true that he personally used a firearm during commission of

¹“LD” refers to the documents lodged by Respondent in support of his motion to dismiss.

1 the offense. (LD 1.) Allegations that he suffered a prior serious felony and served a prior prison term
2 within the meaning of Cal. Penal Code §§ 667(c)-(j), 667.5(b) were found to be true. (LD 2:2.)
3 Petitioner was sentenced to serve a determinate term of 25 years in state prison. (LD 2:2.)

4 Petitioner appealed the conviction to the California Court of Appeals, Fifth Appellate
5 District. On October 11, 2006, the appellate court reversed the true findings on the prior serious
6 felony and prior strike conviction allegations and vacated the sentence. (LD 2.) Petitioner then
7 sought a petition for review in the California Supreme Court. (LD 3.) On January 17, 2007, the
8 petition was denied. (LD 4.) On March 14, 2007, Petitioner was resentenced to a determinate prison
9 term of 14 years. (LD 1.) He did not file any post-conviction collateral challenges with respect to the
10 judgment in the state courts.

11 On July 14, 2009,² Petitioner filed the instant federal petition for writ of habeas corpus in this
12 Court. On November 23, 2009, Respondent filed a motion to dismiss the petition as being filed
13 outside the one-year limitations period prescribed by 28 U.S.C. § 2244(d)(1). Petitioner did not file
14 an opposition.

15 DISCUSSION

16 A. Procedural Grounds for Motion to Dismiss

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

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

27 ²Although the petition was filed in this Court on July 22, 2009, pursuant to the mailbox rule and Rule 3(d) of the
28 Rules Governing Section 2254 Cases, the Court will consider the petition filed on July 14, 2009, the date Petitioner signed
the proof of service and presumably handed the petition to prison authorities for filing.

1 Thus, a respondent can file a motion to dismiss after the court orders a response, and the Court
2 should use Rule 4 standards to review the motion. See Hillery, 533 F. Supp. at 1194 & n. 12.

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

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

9 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of
10 1996 (hereinafter "AEDPA"). The AEDPA imposes various requirements on all petitions for writ of
11 habeas corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059,
12 2063 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc), *cert. denied*, 118 S.Ct.
13 586 (1997).

14 In this case, the petition was filed on July 14, 2009, and therefore, it is subject to the
15 provisions of the AEDPA. The AEDPA imposes a one-year period of limitation on petitioners
16 seeking to file a federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As amended,
17 § 2244, subdivision (d) reads:

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

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

22 (B) the date on which the impediment to filing an application created by
23 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;

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

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

27 (2) The time during which a properly filed application for State post-conviction or
28 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.

1 28 U.S.C. § 2244(d).

2 In most cases, the limitations period begins running on the date that the petitioner's direct
3 review became final. In this case, Petitioner was resentenced by the superior court on March 14,
4 2007. Thus, direct review concluded on May 13, 2007, when the sixty (60) day period for filing a
5 direct appeal expired. Cal. Rules of Court, rule 8.308. Petitioner had one year from May 14, 2007,
6 until May 13, 2008, in which to file his federal petition for writ of habeas corpus. However,
7 Petitioner delayed filing the instant petition until July 14, 2009, over a year beyond the due date.
8 Absent any applicable tolling, the instant petition is barred by the statute of limitations.

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

10 Title 28 U.S.C. § 2244(d)(2) states that the "time during which a properly filed application
11 for State post-conviction or other collateral review with respect to the pertinent judgment or claim is
12 pending shall not be counted toward" the one year limitation period. 28 U.S.C. § 2244(d)(2). In this
13 case, Petitioner did not file any application for post-conviction or other collateral relief in the state
14 courts. Therefore, he is not entitled to statutory tolling and the petition remains untimely.

15 D. Equitable Tolling

16 The limitations period is subject to equitable tolling if the petitioner demonstrates: "(1) that
17 he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his
18 way." Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005); see also Irwin v. Department of Veteran
19 Affairs, 498 U.S. 89, 96 (1990); Calderon v. U.S. Dist. Ct. (Kelly), 163 F.3d 530, 541 (9th Cir. 1998),
20 *citing* Alvarez-Machain v. United States, 107 F.3d 696, 701 (9th Cir. 1996), *cert denied*, 522 U.S.
21 814 (1997). Petitioner bears the burden of alleging facts that would give rise to tolling. Pace, 544
22 U.S. at 418; Smith v. Duncan, 297 F.3d 809 (9th Cir.2002); Hinton v. Pac. Enters., 5 F.3d 391, 395
23 (9th Cir.1993). Here, the Court finds no reason to equitably toll the limitations period. Therefore, the
24 instant petition remains untimely.

25 E. Certificate of Appealability

26 A state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a
27 district court's denial of his petition, and an appeal is only allowed in certain circumstances. Miller-
28 El v. Cockrell, 123 S.Ct. 1029, 1039 (2003). The controlling statute in determining whether to issue

1 a certificate of appealability is 28 U.S.C. § 2253, which provides as follows:

2 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a
3 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.

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

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

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

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

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

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

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

21 In the present case, the Court finds that reasonable jurists would not find the Court’s
22 determination that Petitioner is not entitled to federal habeas corpus relief debatable, wrong, or
23 deserving of encouragement to proceed further. Petitioner has not made the required substantial
24 showing of the denial of a constitutional right. Accordingly, the Court hereby **DECLINES** to issue a
25 certificate of appealability.

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ORDER

Accordingly, IT IS HEREBY ORDERED that:

- 1. Respondent’s motion to dismiss the petition is GRANTED;
- 2. The petition for writ of habeas corpus is DISMISSED with prejudice;
- 3. The Clerk of Court is DIRECTED to enter judgment; and
- 4. The Court DECLINES to issue a certificate of appealability.

IT IS SO ORDERED.

Dated: January 14, 2010

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE