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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LUIS MURATALLA-LUA,	}	1:09-cv-01281 MJS HC
Petitioner,	}	
v.	}	ORDER GRANTING RESPONDENT'S MOTION TO DISMISS
CATE, Director,	}	[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 Brian G. Smiley, Esq., of the Office of the Attorney General for the State of California. Both parties have consented to Magistrate Judge jurisdiction under 28 U.S.C. § 636(c).

I. BACKGROUND

Petitioner is currently in the custody of the California Department of Corrections pursuant to a January 19, 1994 judgment by the Superior Court of California, County of Fresno, entered after his conviction in a jury trial of attempted murder and assault with a

1 deadly weapon. (L.D.¹ No. 1.) Petitioner was sentenced to serve an indeterminate term of life
2 with the possibility of parole, plus three years. (Id.) On January 11, 1995, the California Court
3 of Appeal, Fifth Appellate District, modified the judgment to reduce the restitution fine, and
4 affirmed the judgment in all other respects. (L.D. No. 2.) In the present petition, Petitioner
5 challenges his underlying conviction on various grounds. (Pet., ECF No. 1.)

6 Starting in July 2007, Petitioner filed six post-conviction collateral challenges with the
7 state courts, all petitions for writ of habeas corpus, as follows:

- 8 1. Fresno County Superior Court
9 Filed: July 11, 2007²;
Denied: August 7, 2007;
- 10 2. Fresno County Superior Court
11 Filed: August 1, 2007³;
Denied: August 23, 2007;
- 12 3. California Court of Appeals, Fifth Appellate District
13 Filed: September 26, 2007⁴;
Denied: October 5, 2007;
- 14 4. California Supreme Court
15 Filed: March 18, 2008⁵;
Denied: September 10, 2008;
- 16 5. California Court of Appeals, Fifth Appellate District

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19 ¹“L.D.” refers to documents lodged with Court by Respondent in support of his motion to dismiss.

20 ² In Houston v. Lack, the Court held that a pro se habeas petitioner's notice of appeal is deemed filed on
21 the date of its submission to prison authorities for mailing, as opposed to the date of its receipt by the court clerk.
22 487 U.S. 266, 276, 108 S.Ct. 2379, 2385 (1988). The Ninth Circuit has applied the rule to assess the timeliness
23 of federal habeas filings under the AEDPA limitations period. Huizar v. Carey, 273 F.3d 1220, 1222, (9th Cir.
24 2001), *citing* Houston, 487 U.S. 266, 276, 108 S.Ct. at 2385. Under the mailbox rule, the Court deems petitions
filed on the date Petitioner presumably handed her petition to prison authorities for mailing. See also Rule 3(d)
of the Rules Governing Section 2254 Cases. While the petition was filed with the court on July 17, 2007,
Petitioner signed and dated the petition on July 11, 2007. Accordingly, the petition shall be considered filed on
July 11, 2007.

25 ³ While the petition was filed with the court on August 6, 2007, Petitioner signed and dated the petition
on August 1, 2007. Accordingly, the petition shall be considered filed on August 1, 2007.

26 ⁴ While the petition was filed with the court on October 2, 2007, Petitioner signed and dated the petition
27 on September 26, 2007. Accordingly, the petition shall be considered filed on September 26, 2007.

28 ⁵ While the petition was filed with the court on April 4, 2008, Petitioner signed and dated the petition on
March 18, 2008. Accordingly, the petition shall be considered filed on March 18, 2008.

1 Filed: July 25, 2008⁶;
2 Denied: October 9, 2008;

3 6. California Court of Appeals, Fifth Appellate District
4 Filed: July 25, 2008⁷;
5 Denied: October 10, 2008;

6 See L.D. Nos. 3-14.

7 On June 24, 2009⁸, Petitioner filed the instant federal petition for writ of habeas corpus
8 in this Court. On October 6, 2009, Respondent filed a motion to dismiss the petition as being
9 filed outside the one-year limitations period prescribed by 28 U.S.C. § 2244(d). Petitioner did
10 not file an opposition to the motion to dismiss.

11 **II. 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
15 not entitled to relief in the district court” Rule 4 of the Rules Governing Section 2254
16 Cases.

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

25 ⁶ While the petition was filed with the court on October 1, 2008, Petitioner signed and dated the petition
on July 25, 2008. Accordingly, the petition shall be considered filed on July 25, 2008.

26 ⁷ While the petition was filed with the court on October 2, 2008, Petitioner signed and dated the petition
27 on July 25, 2008. Accordingly, the petition shall be considered filed on July 25, 2008.

28 ⁸ While the petition was filed with the court on July 23, 2009, Petitioner signed and dated the petition on
June 24, 2009. Accordingly, the petition shall be considered filed on June 24, 2009.

1 motion. See Hillery, 533 F. Supp. at 1194 & n. 12.

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

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

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

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

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

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

20 (B) the date on which the impediment to filing an application created by
21 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;

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

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

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

28 28 U.S.C. § 2244(d).

1 Under § 2244(d)(1)(A), the limitations period begins running on the date that the
2 petitioner's direct review became final or the date of the expiration of the time for seeking such
3 review. In this case, Petitioner filed an appeal with the California Court of Appeal, Fifth
4 Appellate District. The Court of Appeal affirmed the conviction on January 11, 1995. (LD No.
5 2.) The Court of Appeal's decision became final on February 10, 1995, thirty days after filing.
6 See Cal. Rules of Court 8.264 (formerly Rule 24). Petitioner did not seek review in the
7 California Supreme Court. Accordingly, for purposes of § 2244(d)(1)(A), Petitioner's judgment
8 of conviction became final on February 20, 1995, upon expiration of the ten-day period within
9 which to file and serve a petition for review with the California Supreme Court. See Cal. Rules
10 of Court 8.500 (formerly Rule 28). Because Petitioner's conviction became final prior to the
11 enactment of AEDPA, his one-year period for filing a habeas petition in federal court began
12 on AEDPA's effective date of April 24, 1996. Ford v. Pliker, 590 F.3d 782, 784 (9th Cir. 2009);
13 see Patterson v. Stewart, 251 F.3d 1243, 1245 (9th Cir. 2001).

14 Petitioner would have one year from April 24, 1996, absent applicable tolling, in which
15 to file his federal petition for writ of habeas corpus. However, Petitioner delayed in filing the
16 instant petition until June 24, 2009, over twelve years after the statute of limitations period
17 expired. Absent the later commencement of the statute of limitations or applicable tolling, the
18 instant petition is barred by the statute of limitations. Petitioner has made no showing that the
19 statute of limitations should commence at a later date under § 2244(d)(1)(B)-(D). Accordingly,
20 Petitioner may only rely on tolling to attempt to show that his petition is not barred by the
21 statute of limitations.

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

23 28 U.S.C. § 2244(d)(2) states that the "time during which a properly filed application for
24 State post-conviction or other collateral review with respect to the pertinent judgment or claim
25 is pending shall not be counted toward" the one year limitation period. 28 U.S.C. § 2244(d)(2).
26 In Carey v. Saffold, the Supreme Court held the statute of limitations is tolled where a
27 petitioner is properly pursuing post-conviction relief, and the period is tolled during the intervals
28 between one state court's disposition of a habeas petition and the filing of a habeas petition

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

8 As stated above, the statute of limitations period began on April 24, 1996. Petitioner
9 filed his first state habeas petition on July 11, 2007. At that point, the statute of limitations
10 period had elapsed over ten years earlier. State petitions filed after the expiration of the statute
11 of limitations period have no tolling effect. Ferguson v. Palmateer, 321 F.3d 820 (9th Cir.
12 2003) ("section 2244(d) does not permit the reinitiation of the limitations period that has ended
13 before the state petition was filed.").

14 Accordingly, the limitations period began on April 24, 1996 and expired one year later
15 on April 25, 1997. The present petition was filed on June 23, 2009, twelve years after the
16 expiration of the year statute of limitations period. Accordingly, the instant federal petition is
17 untimely.

18 **D. Equitable Tolling**

19 The limitations period is subject to equitable tolling if the petitioner demonstrates: "(1)
20 that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance
21 stood in his way." Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005); see also Irwin v.
22 Department of Veteran Affairs, 498 U.S. 89, 96 (1990); Calderon v. U.S. Dist. Ct. (Kelly), 163
23 F.3d 530, 541 (9th Cir. 1998), *citing Alvarez-Machain v. United States*, 107 F.3d 696, 701 (9th
24 Cir. 1996). Petitioner bears the burden of alleging facts that would give rise to tolling. Pace,
25 544 U.S. at 418; Hinton v. Pac. Enters., 5 F.3d 391, 395 (9th Cir.1993).

26 Petitioner has not presented any evidence regarding equitable tolling. Accordingly,
27 Petitioner is not entitled to the benefit of equitable tolling and his petition remains untimely.

28 **III. CONCLUSION**

1 As explained above, Petitioner failed to file the instant petition for Habeas Corpus within
2 the one year limitation period required by 28 U.S.C. § 2244(d). Petitioner is not entitled to the
3 benefit of statutory or equitable tolling. Based on the foregoing, Respondent's motion to
4 dismiss shall be GRANTED.

5 **IV. CERTIFICATE OF APPEALABILITY**

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

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

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

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

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

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

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

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

If a court denies a petitioner's petition, the court may only issue a certificate of
appealability "if jurists of reason could disagree with the district court's resolution of his
constitutional claims or that jurists could conclude the issues presented are adequate to
deserve encouragement to proceed further." Miller-El, 123 S.Ct. at 1034; Slack v. McDaniel,

1 529 U.S. 473, 484 (2000). While the Petitioner is not required to prove the merits of his case,
2 he must demonstrate "something more than the absence of frivolity or the existence of mere
3 good faith on his . . . part." Miller-El, 123 S.Ct. at 1040.

4 In the present case, the Court finds that reasonable jurists would not find debatable or
5 wrong the Court's determination that Petitioner is not entitled to federal habeas corpus relief
6 nor would they find him deserving of encouragement to proceed further. Petitioner has not
7 made the required substantial showing of the denial of a constitutional right. Accordingly, the
8 Court hereby DECLINES to issue a certificate of appealability.

9 **ORDER**

10 Accordingly, IT IS HEREBY ORDERED that:

- 11 1. The Petition for Writ of Habeas Corpus is DISMISSED with prejudice;
- 12 2. The Clerk of Court is DIRECTED to enter judgment; and
- 13 3. The Court DECLINES to issue a certificate of appealability.

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17 IT IS SO ORDERED.

18 Dated: November 24, 2010

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE