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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

VIRGIL PRICE MCCURLEY,)	1:09-cv-01300-JLT HC
)	
Petitioner,)	ORDER DISMISSING PETITION FOR WRIT
)	OF HABEAS CORPUS FOR VIOLATION OF
v.)	THE ONE-YEAR STATUTE OF
)	LIMITATIONS (Doc. 1)
)	
DEPARTMENT OF CORRECTIONS)	ORDER DIRECTING CLERK OF COURT
AND REHABILITATION, et al.,)	TO ENTER JUDGMENT AND CLOSE FILE
)	
Respondents.)	ORDER DECLINING TO ISSUE A
)	CERTIFICATE OF APPEALABILITY

PROCEDURAL HISTORY

____ Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The instant federal petition for writ of habeas corpus was filed on July 24, 2009.¹ (Doc. 1). On August 24, 2009, Petitioner filed his written consent to the jurisdiction of the United States Magistrate Judge for all purposes. (Doc. 5). On November 13, 2009, when a

¹The United States Supreme Court has held that a pro se habeas petitioner's notice of appeal is deemed filed on the date of its submission to prison authorities for mailing, as opposed to the date of its receipt by the court clerk. Houston v. Lack, 487 U.S. 166, 276, 108 S.Ct. 2379, 2385 (1988). The rule is premised on the pro se prisoner's mailing of legal documents through the conduit of "prison authorities whom he cannot control and whose interests might be adverse to his." Miller v. Sumner, 921 F.2d 202, 203 (9th Cir. 1990); *see*, Houston, 487 U.S. at 271, 108 S.Ct. at 2382. The Ninth Circuit has applied the "mailbox rule" to state and federal petitions in order to calculate the tolling provisions of the AEDPA. Saffold v. Neland, 250 F.3d 1262, 1268-1269 (9th Cir. 2000), *amended* May 23, 2001, *vacated and remanded on other grounds sub nom.* Carey v. Saffold, 536 U.S. 214, 226 (2002). The date the petition is signed may be considered the earliest possible date an inmate could submit his petition to prison authorities for filing under the mailbox rule. Jenkins v. Johnson, 330 F.3d 1146, 1149 n. 2 (9th cir. 2003). Accordingly, for purposes of analyzing the application of the AEDPA's one-year statute of limitations, the Court will consider the date Petitioner signed the Petition, i.e., July 24, 2009, as the operative filing date.

1 preliminary review of the Petition revealed that the petition may be untimely, the Court issued an
2 Order to Show Cause why the petition should not be dismissed pursuant to 28 U.S.C. § 2244(d)(1).
3 Petitioner was permitted thirty days to file a response; however, to date, no response has been
4 forthcoming.

5 DISCUSSION

6 A. Preliminary Review of Petition

7 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition
8 if it “plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is
9 not entitled to relief in the district court” Rule 4 of the Rules Governing Section 2254 Cases.
10 The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of
11 habeas corpus, either on its own motion under Rule 4, pursuant to the respondent’s motion to
12 dismiss, or after an answer to the petition has been filed. Herbst v. Cook, 260 F.3d 1039 (9th
13 Cir.2001).

14 The Ninth Circuit, in Herbst v. Cook, concluded that a district court may dismiss *sua sponte* a
15 habeas petition on statute of limitations grounds so long as the court provides the petitioner adequate
16 notice of its intent to dismiss and an opportunity to respond. 260 F.3d at 1041-42. Here, the Court’s
17 Order to Show Cause issued on November 13, 2009, provided Petitioner with the “adequate notice”
18 required by the Ninth Circuit in Herbst.

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

20 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of
21 1996 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas
22 corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063
23 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc), *cert. denied*, 118 S.Ct. 586
24 (1997). The instant petition was filed on July 24, 2009, and thus, it is subject to the provisions of
25 the AEDPA.

26 The AEDPA imposes a one-year period of limitation on petitioners seeking to file a federal
27 petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As amended, § 2244, subdivision (d)
28 reads:

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

3 (A) the date on which the judgment became final by the conclusion of direct
4 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 removed, if
the applicant was prevented from filing by such State action;

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

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

10 (2) The time during which a properly filed application for State post-conviction or
11 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.

12 28 U.S.C. § 2244(d).

13 In most cases, the limitation period begins running on the date that the petitioner’s direct
14 review became final. Here, the Petitioner was convicted in the Fresno County Superior Court.
15 Although Petitioner does not provide the date of his conviction--indeed Petitioner provides no dates
16 whatsoever--the Court, by accessing the California court system’s electronic database,² has
17 determined that Petitioner pursued his direct appeal in case no. F044299 in the California Court of
18 Appeal, Fifth Appellate District, and in case no. S132094, in the California Supreme Court.
19 Petitioner filed a petition for review that was denied by the California Supreme Court on April 19,
20 2005. Thus, direct review would have concluded on July 18, 2005, when the ninety-day period for
21 seeking review in the United States Supreme Court expired. Barefoot v. Estelle, 463 U.S. 880, 887
22 (1983); Bowen v. Roe, 188 F.3d 1157, 1159 (9th Cir.1999); Smith v. Bowersox, 159 F.3d 345, 347

23 _____
24 ²The court may take notice of facts that are capable of accurate and ready determination by resort to sources whose
25 accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b); United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th Cir.
26 1993). The record of state court proceeding is a source whose accuracy cannot reasonably be questioned, and judicial notice
27 may be taken of court records. Mullis v. United States Bank, Ct., 828 F.2d 1385, 1388 n.9 (9th Cir. 1987); Valerio v. Boise
28 Cascade Corp., 80 F.R.D. 626, 635 n. 1 (N.D.Cal.1978), *aff’d*, 645 F.2d 699 (9th Cir.); see also Colonial Penn Ins. Co. v.
Coil, 887 F.2d 1236, 1239 (4th Cir. 1989); Rodic v. Thistledown Racing Club, Inc., 615 F.2d 736, 738 (6th. Cir. 1980). As
such, the internet website for the California Courts, containing the court system’s records for filings in the Court of Appeal
and the California Supreme Court are subject to judicial notice.

1 (8th Cir.1998). Petitioner would then have had one year from the following day, July 19, 2005, or
2 until July 18, 2006, absent applicable tolling, within which to file his federal petition for writ of
3 habeas corpus. As mentioned, the instant petition was not filed until July 24, 2009, over three years
4 *after* the one-year limitation period would have expired. Thus, unless Petitioner is entitled to either
5 statutory or equitable tolling, the petition is untimely and should be dismissed.

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

7 Under the AEDPA, the statute of limitations is tolled during the time that a properly filed
8 application for state post-conviction or other collateral review is pending in state court. 28 U.S.C.
9 § 2244(d)(2). A properly filed application is one that complies with the applicable laws and rules
10 governing filings, including the form of the application and time limitations. Artuz v. Bennett, 531
11 U.S. 4, 8, 121 S. Ct. 361 (2000). An application is pending during the time that ‘a California
12 petitioner completes a full round of [state] collateral review,’ so long as there is no unreasonable
13 delay in the intervals between a lower court decision and the filing of a petition in a higher court.
14 Delhomme v. Ramirez, 340 F. 3d 817, 819 (9th Cir. 2003), abrogated on other grounds as recognized
15 by Waldrip v. Hall, 548 F. 3d 729 (9th Cir. 2008)(per curium)(internal quotation marks and citations
16 omitted); see Evans v. Chavis, 546 U.S. 189, 193-194, 126 S. Ct. 846 (2006); see Carey v. Saffold,
17 536 U.S. 214, 220, 222-226, 122 S. Ct. 2134 (2002); see also, Nino v. Galaza, 183 F.3d 1003, 1006
18 (9th Cir. 1999).

19 Nevertheless, there are circumstances and periods of time when no statutory tolling is
20 allowed. For example, no statutory tolling is allowed for the period of time between finality of an
21 appeal and the filing of an application for post-conviction or other collateral review in state court,
22 because no state court application is “pending” during that time. Nino, 183 F.3d at 1006-1007.
23 Similarly, no statutory tolling is allowed for the period between finality of an appeal and the filing of
24 a federal petition. Id. at 1007. In addition, the limitation period is not tolled during the time that a
25 federal habeas petition is pending. Duncan v. Walker, 563 U.S. 167, 181-182, 121 S.Ct. 2120
26 (2001); see also, Fail v. Hubbard, 315 F. 3d 1059, 1060 (9th Cir. 2001)(as amended on December 16,
27 2002). Further, a petitioner is not entitled to statutory tolling where the limitation period has already
28 run prior to filing a state habeas petition. Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003)

1 (“section 2244(d) does not permit the reinitiation of the limitations period that has ended before the
2 state petition was filed.”); Jiminez v. White, 276 F. 3d 478, 482 (9th Cir. 2001). Finally, a petitioner
3 is not entitled to continuous tolling when the petitioner’s later petition raises unrelated claims. See
4 Gaston v. Palmer, 447 F.3d 1165, 1166 (9th Cir. 2006).

5 Here, Petitioner has not alleged that he has filed any state habeas proceedings entitling him to
6 statutory tolling sufficient to make the instant petition timely. Moreover, the Court’s review of the
7 California courts’ database does not indicate any further filings by Petitioner subsequent to the denial
8 of his petition for review on April 19, 2005. Thus, unless Petitioner is entitled to equitable tolling,
9 the petition is untimely.

10 D. Equitable Tolling

11 The limitation period is subject to equitable tolling when “extraordinary circumstances
12 beyond a prisoner’s control make it impossible to file the petition on time.” Shannon v. Newland,
13 410 F. 3d 1083, 1089-1090 (9th Cir. 2005)(internal quotation marks and citations omitted). “When
14 external forces, rather than a petitioner’s lack of diligence, account for the failure to file a timely
15 claim, equitable tolling of the statute of limitations may be appropriate.” Miles v. Prunty, 187 F.3d
16 1104, 1107 (9th Cir. 1999). “Generally, a litigant seeking equitable tolling bears the burden of
17 establishing two elements: “(1) that he has been pursuing his rights diligently, and (2) that some
18 extraordinary circumstance stood in his way.” Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct.
19 1807 (2005). “[T]he threshold necessary to trigger equitable tolling under AEDPA is very high, lest
20 the exceptions swallow the rule.” Miranda v. Castro, 292 F. 3d 1062, 1066 (9th Cir. 2002)(citation
21 omitted). As a consequence, “equitable tolling is unavailable in most cases.” Miles, 187 F. 3d at
22 1107.

23 Here, Petitioner has made no claim for entitlement to equitable tolling, and the Court, in
24 reviewing the record in this case, perceives no basis for such a claim in any event. Thus, the petition
25 is untimely and must be dismissed.

26 E. The Court Declines To Issue A Certificate Of Appealability.

27 Moreover, the Court declines to issue a certificate of appealability in this case. The
28 requirement that a petitioner seek a certificate of appealability is a gate-keeping mechanism that

1 protects the Court of Appeals from having to devote resources to frivolous issues, while at the same
2 time affording petitioners an opportunity to persuade the Court that, through full briefing and
3 argument, the potential merit of claims may appear. Lambright v. Stewart, 220 F.3d 1022, 1025 (9th
4 Cir. 2000). However, a state prisoner seeking a writ of habeas corpus has no absolute entitlement to
5 appeal a district court’s denial of his petition, and an appeal is only allowed in certain circumstances.
6 Miller-El v. Cockrell, 537 U.S. 322, 335-336 (2003). The controlling statute, 28 U.S.C. § 2253,
7 provides as follows:

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

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

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

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

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

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

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

24 Accordingly, final orders issued by a federal district court in habeas corpus proceedings are
25 reviewable by the circuit court of appeals, and, in order to have final orders reviewed, a petitioner
26 must obtain a certificate of appealability. 28 U.S.C. § 2253. This Court will issue a certificate of
27 appealability when a petitioner makes a substantial showing of the denial of a constitutional right.
28 28 U.S.C. § 2253(c)(2). To make a substantial showing, the petitioner must establish that
“reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been
resolved in a different manner or that the issues presented were ‘adequate to deserve encouragement
to proceed further’.” Slack v. McDaniel, 529 U.S. 473, 484 (2000) (*quoting* Barefoot v. Estelle, 463
U.S. 880, 893 (1983)).

In the present case, the Court finds that Petitioner has not made the required substantial

1 showing of the denial of a constitutional right to justify the issuance of a certificate of appealability.
2 Reasonable jurists would not find it debatable that Petitioner has not shown an entitlement to federal
3 habeas corpus relief. Accordingly, the Court hereby ORDERS that Petitioner's request for a
4 certificate of appealability is DENIED.

5 **ORDER**

6 Accordingly, the Court HEREBY ORDERS as follows:

- 7 1. The petition for writ of habeas corpus filed on July 24, 2009 (Doc. 1), is DISMISSED as
8 being in violation of 28 U.S.C. § 2244(d)(1);
9 2. The Clerk of the Court is DIRECTED to enter judgment and close the file; and,
10 3. The Court DECLINES to issue a certificate of appealability.

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14 IT IS SO ORDERED.

15 Dated: January 7, 2010
16 _____

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE