

1 Section 487(a). (See LD No. 1.¹) Based on the offense and prior convictions, Petitioner was
2 sentenced to serve a term of 25 years to life in state prison on December 9, 1998. (Id.) On
3 June 14, 2000, the California Court of Appeal, Fifth Appellate District, affirmed the judgment.
4 (See LD No. 2.) Petitioner did not seek review from the California Supreme Court.

5 Starting in May 2009, Petitioner filed three post-conviction collateral challenges with
6 respect to the judgment in the state courts, all petitions for writ of habeas corpus, as follows:

- 7 1. Merced County Superior Court
8 Filed: May 23, 2009²;
9 Denied: August 4, 2009;
- 10 2. California Court of Appeals, Fifth Appellate District
11 Filed: September 13, 2009³;
12 Denied: September 24, 2009;
- 13 3. California Supreme Court
14 Filed: October 14, 2009⁴;
15 Denied: March 30, 2010;

16 See LD Nos. 3-8.

17 On April 13, 2010⁵, Petitioner filed the instant federal petition for writ of habeas corpus
18 in this Court. On October 8, 2010, 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). Petitioner filed
20 an opposition to Respondent's motion to dismiss on October 22, 2010. On October 29, 2010,
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22 ¹ "LD" refers to the documents lodged by Respondent in support of his motion to dismiss.

23 ² In Houston v. Lack, the Court held that a pro se habeas petitioner's notice of appeal is deemed filed on
24 the date of its submission to prison authorities for mailing, as opposed to the date of its receipt by the court clerk.
25 487 U.S. 266, 276, 108 S.Ct. 2379, 2385 (1988). The Ninth Circuit has applied the rule to assess the timeliness
26 of federal habeas filings under the AEDPA limitations period. Huizar v. Carey, 273 F.3d 1220, 1222, (9th Cir.
27 2001), *citing* Houston, 487 U.S. 266, 276, 108 S.Ct. at 2385. Under the mailbox rule, the Court deems petitions
28 filed on the date Petitioner presumably handed his petition to prison authorities for mailing. See also Rule 3(d)
of the Rules Governing Section 2254 Cases. Although the petition was filed on June 22, 2009, pursuant to the
mailbox rule the Court considers the petition filed on May 23, 2009, the date Petitioner signed the petition.

³ Although the petition was filed on September 18, 2009, pursuant to the mailbox rule the Court considers
the petition filed on September 13, 2009, the date Petitioner signed the petition.

⁴ Although the petition was filed on October 19, 2009, pursuant to the mailbox rule the Court considers the
petition filed on October 14, 2009, the date Petitioner signed the petition.

⁵ Although the petition was filed on April 23, 2010, under the mailbox rule the Court will consider the
petition filed on April 13, 2010, the date Petitioner signed the petition.

1 Respondent filed a reply to Petitioner’s opposition

2 **II. DISCUSSION**

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

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

8 The Ninth Circuit has allowed respondents to file a motion to dismiss in lieu of an
9 answer if the motion attacks the pleadings for failing to exhaust state remedies or being in
10 violation of the state’s procedural rules. See, e.g., O’Bremski v. Maass, 915 F.2d 418, 420 (9th
11 Cir. 1990) (using Rule 4 to evaluate motion to dismiss petition for failure to exhaust state
12 remedies); White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (using Rule 4 as procedural
13 grounds to review motion to dismiss for state procedural default); Hillery v. Pulley, 533 F.Supp.
14 1189, 1194 & n. 12 (E.D. Cal. 1982) (same). Thus, a respondent can file a motion to dismiss
15 after the Court orders a response, and the Court should use Rule 4 standards to review the
16 motion. See Hillery, 533 F. Supp. at 1194 & n. 12.

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

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

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

27 In this case, the petition was filed on April 13, 2010, and therefore, it is subject to the
28 provisions of the AEDPA. The AEDPA imposes a one-year period of limitation on petitioners

1 seeking to file a federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As
2 amended, § 2244, subdivision (d) reads:

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

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

7 (B) the date on which the impediment to filing an application created by
8 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;

9 (C) the date on which the constitutional right asserted was initially
10 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

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

13 (2) The time during which a properly filed application for State post-conviction
14 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.

15 28 U.S.C. § 2244(d).

16 Under § 2244(d)(1)(A), the limitations period begins running on the date that the
17 Petitioner's direct review became final or the date of the expiration of the time for seeking such
18 review. In this case, Petitioner filed an appeal with the California Court of Appeal, Fifth
19 Appellate District. The court issued a decision affirming the judgment on June 14, 2000. (LD
20 No. 2.) The Court of Appeal's decision became final on July 14, 2000, thirty days after filing.
21 See Cal. Rules of Court 8.264 (formerly Rule 24). Petitioner did not seek review in the
22 California Supreme Court. Accordingly, for purposes of § 2244(d)(1)(A), Petitioner's judgment
23 of conviction became final on July 24, 2000, upon expiration of the ten-day period within which
24 to file and serve a petition for review with the California Supreme Court. See Cal. Rules of
25 Court 8.500 (formerly Rule 28). The AEDPA statute of limitations began to run the following
26 day, on July 25, 2000. Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001).

27 Petitioner would have one year from July 25, 2000, absent applicable tolling, in which
28 to file his federal petition for writ of habeas corpus. However, Petitioner delayed in filing the

1 instant petition until April 13, 2010, over nine years after the statute of limitations period
2 expired. Absent the later commencement of the statute of limitations or any applicable tolling,
3 the instant petition is barred by the statute of limitations. Petitioner has made no showing that
4 the statute of limitations should commence at a later date under § 2244(d)(1)(B)-(D).
5 Accordingly, Petitioner may only rely on tolling to attempt to show that his petition is not barred
6 by the statute of limitations.

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

8 28 U.S.C. § 2244(d)(2) states that the “time during which a properly filed application for
9 State post-conviction or other collateral review with respect to the pertinent judgment or claim
10 is pending shall not be counted toward” the one year limitation period. 28 U.S.C. § 2244(d)(2).
11 In Carey v. Saffold, the Supreme Court held the statute of limitations is tolled where a
12 petitioner is properly pursuing post-conviction relief, and the period is tolled during the intervals
13 between one state court's disposition of a habeas petition and the filing of a habeas petition
14 at the next level of the state court system. 536 U.S. 214, 216 (2002); see also Nino v. Galaza,
15 183 F.3d 1003, 1006 (9th Cir. 1999). Nevertheless, state petitions will only toll the one-year
16 statute of limitations under § 2244(d)(2) if the state court explicitly states that the post-
17 conviction petition was timely or was filed within a reasonable time under state law. Pace v.
18 DiGuglielmo, 544 U.S. 408 (2005); Evans v. Chavis, 546 U.S. 189 (2006). Claims denied as
19 untimely or determined by the federal courts to have been untimely in state court will not
20 satisfy the requirements for statutory tolling. Id.

21 As stated above, the statute of limitations period began on July 25, 2000. Petitioner filed
22 his first state habeas petition on May 23, 2009. At that point, the statute of limitations period
23 had elapsed over seven years earlier. State petitions filed after the expiration of the statute
24 of limitations period shall have no tolling effect. Ferguson v. Palmateer, 321 F.3d 820 (9th
25 Cir. 2003) (“section 2244(d) does not permit the reinitiation of the limitations period that has
26 ended before the state petition was filed.”).

27 Accordingly, the limitations period began on July 25, 2000 and expired one year later
28 on July 25, 2001. The present petition was filed on April 23, 2010, nine years after the

1 expiration of the year statute of limitations period. Accordingly, the instant federal petition is
2 untimely.

3 **D. Equitable Tolling**

4 The limitations period is subject to equitable tolling if the petitioner demonstrates: "(1)
5 that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance
6 stood in his way." Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005); see also Irwin v.
7 Department of Veteran Affairs, 498 U.S. 89, 96 (1990); Calderon v. U.S. Dist. Ct. (Kelly), 163
8 F.3d 530, 541 (9th Cir. 1998), citing Alvarez-Machain v. United States, 107 F.3d 696, 701 (9th
9 Cir. 1996), cert denied, 522 U.S. 814 (1997). Petitioner bears the burden of alleging facts that
10 would give rise to tolling. Pace, 544 U.S. at 418; Hinton v. Pac. Enters., 5 F.3d 391, 395 (9th
11 Cir.1993). Petitioner has not presented any evidence regarding equitable tolling. Accordingly,
12 Petitioner is not entitled to the benefit of equitable tolling and his petition remains untimely.

13 **E. Actual Innocence**

14 In his opposition to the motion to dismiss, Petitioner asserts that the petition should be
15 viewed under the "actual innocence" standard. However, Petitioner's claims of "actual
16 innocence" are of no assistance with regard to his failure to file the petition within the statute
17 of limitations period. The Ninth Circuit has recently held that "there is no 'actual innocence'
18 exception to the one-year statute of limitation for filing an original petition for habeas corpus
19 relief." See Lee v. Lampert, 610 F.3d 1125, 1136 (9th Cir. 2010). This Court is bound by that
20 decision.

21 **III. CONCLUSION**

22 As explained above, Petitioner failed to file the instant petition for Habeas Corpus within
23 the one year limitation period required by 28 U.S.C. § 2244(d). Petitioner does not benefit
24 from statutory tolling, equitable tolling, or his alleged actual innocence claim. Accordingly, the
25 petition was not timely filed. Based on the foregoing, Respondent's motion to dismiss shall be
26 granted.

27 **IV. RECOMMENDATION**

28 The Court HEREBY RECOMMENDS that the motion to dismiss be GRANTED and the

1 habeas corpus petition be DISMISSED with prejudice for Petitioner's failure to comply with 28
2 U.S.C. § 2244(d)'s one year limitation period.

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

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17 IT IS SO ORDERED.

18 Dated: November 27, 2010

1s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE

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