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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

PHILLIP ADAMS,)	1:10-cv-01325-AWI-JLT HC
)	
Petitioner,)	FINDINGS AND RECOMMENDATIONS TO
)	DISMISS PETITION FOR VIOLATION OF
v.)	THE ONE-YEAR STATUTE OF
)	LIMITATIONS AND LACK OF
)	EXHAUSTION (Doc. 1)
KEN CLARK,)	
)	ORDER DIRECTING THAT OBJECTIONS
Respondent.)	BE FILED WITHIN TWENTY DAYS

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 20, 2010.¹ A preliminary review of the Petition, however, revealed that the petition may be

¹In Houston v. Lack, the United States Supreme Court 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 all of Petitioner's state petitions and for the instant federal petition, the Court will consider the date of signing of the petition (or the date of signing of the proof of service if no signature appears on the petition) as the earliest possible filing date and the operative date of filing under the mailbox rule for calculating the running of the statute of limitation. Petitioner signed the instant petition on July 20, 2010. (Doc. 1, pp. 31-

1 untimely as well as unexhausted and should therefore be dismissed. Accordingly, the Court, on
2 August 17, 2010, issued an Order to Show Cause why the petition should not be dismissed as
3 untimely. (Doc. 5). That Order to Show Cause gave Petitioner thirty days in which to file a
4 response. More than thirty days have passed, and Petitioner has failed to file a response.

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. By issuing the
17 Order to Show Cause, the Court afforded Petitioner the notice required by the Ninth Circuit in
18 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 20, 2010, and thus, it is subject to the provisions of the
25 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)

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32).

1 reads:

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

5 (A) the date on which the judgment became final by the conclusion of direct
6 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
9 the applicant was prevented from filing by such State action;

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

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

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

18 28 U.S.C. § 2244(d).

19 Here, Petitioner is challenging the Board of Parole Hearings’ (“BPH”) May 6, 2008 decision
20 that Petitioner was not suitable for parole. (Doc. 1, Ex. A). The AEDPA’s one-year statute of
21 limitations, as embodied in § 2244(d)(1), applies to habeas petitions challenging an administrative
22 decision in the context of a parole board determination. Shelby v. Bartlett, 391 F.3d 1061, 1063 (9th
23 Cir. 2004); see Redd v. McGrath, 343 F.3d 1077, 1080 n. 4 (9th Cir. 2003). Under subsection (d), the
24 limitation period begins to run on “the date on which the factual predicate of the claim or claims
25 presented could have been discovered through the exercise of due diligence.” In the context of a
26 parole board decision, the factual basis is the parole board’s denial of a petitioner’s administrative
27 appeal. Shelby, 391 F.3d at 1066; Redd, 343 F.3d at 1082-1083. Here, the transcript of the BPH
28 hearing indicates that the decision was to become final on September 3, 2008. (Doc. 1, Ex. A, p.
119). Thus, the statute of limitations would have begun on the following day, i.e., September 4,
2008, and would have expired 365 days later on September 3, 2009, absent applicable tolling. Here,
as mentioned, the petition was filed on July 20, 2010, approximately ten months after the one-year
period expired. Thus, unless Petitioner is entitled to either statutory or equitable tolling, the petition
is untimely and should be dismissed.

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

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

14 Nevertheless, there are circumstances and periods of time when no statutory tolling is
15 allowed. For example, no statutory tolling is allowed for the period of time between finality of an
16 appeal and the filing of an application for post-conviction or other collateral review in state court,
17 because no state court application is “pending” during that time. Nino, 183 F.3d at 1006-1007.
18 Similarly, no statutory tolling is allowed for the period between finality of an appeal and the filing of
19 a federal petition. Id. at 1007. In addition, the limitation period is not tolled during the time that a
20 federal habeas petition is pending. Duncan v. Walker, 563 U.S. 167, 181-182, 121 S.Ct. 2120
21 (2001); see also, Fail v. Hubbard, 315 F. 3d 1059, 1060 (9th Cir. 2001)(as amended on December 16,
22 2002). Further, a petitioner is not entitled to statutory tolling where the limitation period has already
23 run prior to filing a state habeas petition. Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003)
24 (“section 2244(d) does not permit the reinitiation of the limitations period that has ended before the
25 state petition was filed.”); Jiminez v. White, 276 F. 3d 478, 482 (9th Cir. 2001). Finally, a petitioner
26 is not entitled to continuous tolling when the petitioner’s later petition raises unrelated claims. See
27 Gaston v. Palmer, 447 F.3d 1165, 1166 (9th Cir. 2006).

28 Here, the petition does not allege that Petitioner has ever filed any state habeas petitions

1 seeking to exhaust his state court remedies regarding the BPH's May 6, 2008 decision. Therefore,
2 the Court finds preliminarily that Petitioner is not entitled to statutory tolling.

3 D. Equitable Tolling

4 The running of the one-year limitation period under 28 U.S.C. § 2244(d) is subject to
5 equitable tolling in appropriate cases. Holland v. Florida, __ U.S. __, 130 S.Ct. 2549, 2561 (2010);
6 Calderon v. United States Dist. Ct., 128 F.3d 1283, 1289 (9th Cir. 1997). The limitation period is
7 subject to equitable tolling when "extraordinary circumstances beyond a prisoner's control make it
8 impossible to file the petition on time." Shannon v. Newland, 410 F. 3d 1083, 1089-1090 (9th Cir.
9 2005)(internal quotation marks and citations omitted). "When external forces, rather than a
10 petitioner's lack of diligence, account for the failure to file a timely claim, equitable tolling of the
11 statute of limitations may be appropriate." Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999).
12 "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: "(1)
13 that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in
14 his way." Holland, 2010 WL 2346549 at *12; Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct.
15 1807 (2005). "[T]he threshold necessary to trigger equitable tolling under AEDPA is very high, lest
16 the exceptions swallow the rule." Miranda v. Castro, 292 F. 3d 1062, 1066 (9th Cir. 2002)(citation
17 omitted). As a consequence, "equitable tolling is unavailable in most cases." Miles, 187 F. 3d at
18 1107.

19 Here, Petitioner has made no express claim of entitlement to equitable tolling and, based on
20 the record now before the Court, the Court sees no basis for such a claim. However, in his petition,
21 Petitioner apparently acknowledges that his petition is untimely, but nevertheless requests that the
22 Court accept and review his claims because he has been subjected to prison lockdowns and law
23 library closures that have "made it hard" for Petitioner to research and file his petition.

24 Unpredictable lockdowns or library closures do not constitute extraordinary circumstances
25 warranting equitable tolling. See, United States v. Van Poyck, 980 F.Supp. 1108, 1111
26 (C.D.Cal.1997) (inability to secure copies of transcripts from court reporters and lockdowns at prison
27 lasting several days and allegedly eliminating access to law library were not extraordinary
28 circumstances and did not equitably toll one-year statute of limitations); Atkins v. Harris, 1999 WL

1 13719, *2 (N.D.Cal. Jan.7, 1999) ("lockdowns, restricted library access and transfers do not
2 constitute extraordinary circumstances sufficient to equitably toll the [AEDPA] statute of limitations.
3 Prisoners familiar with the routine restrictions of prison life must take such matters into account
4 when calculating when to file a federal [habeas] petition.... Petitioner's alleged lack of legal
5 sophistication also does not excuse the delay."); Giraldes v. Ramirez-Palmer, 1998 WL 775085, *2
6 (N. D.Cal.1998) (holding that prison lockdowns do not constitute extraordinary circumstances
7 warranting equitable tolling). The fact that Petitioner is subject to prison lockdowns and limited law
8 library access are circumstances that Petitioner shares with the majority of incarcerated prisoners
9 attempting to file petitions for writ of habeas corpus in this Court. Therefore, such circumstances are
10 not extraordinary and do not justify equitable tolling. Accordingly, the Court finds that Petitioner is
11 not entitled to equitable tolling. Thus, the petition is untimely and should be dismissed.

12 E. Lack of Exhaustion.

13 A petitioner who is in state custody and wishes to collaterally challenge his conviction by a
14 petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The
15 exhaustion doctrine is based on comity with the state court and gives the state court the initial
16 opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501
17 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982); Buffalo v. Sunn, 854 F.2d 1158,
18 1163 (9th Cir. 1988).

19 A petitioner can satisfy the exhaustion requirement by providing the highest state court with a
20 full and fair opportunity to consider each claim before presenting it to the federal court. Duncan v.
21 Henry, 513 U.S. 364, 365 (1995); Picard v. Connor, 404 U.S. 270, 276 (1971); Johnson v. Zenon, 88
22 F.3d 828, 829 (9th Cir. 1996). A federal court will find that the highest state court was given a full
23 and fair opportunity to hear a claim if the petitioner has presented the highest state court with the
24 claim's factual and legal basis. Duncan, 513 U.S. at 365 (legal basis); Kenney v. Tamayo-Reyes, 504
25 U.S. 1, 112 S.Ct. 1715, 1719 (1992) (factual basis).

26 Additionally, the petitioner must have specifically told the state court that he was raising a
27 federal constitutional claim. Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666, 669
28 (9th Cir. 2000), *amended*, 247 F.3d 904 (2001); Hiiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir.

1 1999); Keating v. Hood, 133 F.3d 1240, 1241 (9th Cir. 1998). In Duncan, the United States
2 Supreme Court reiterated the rule as follows:

3 In Picard v. Connor, 404 U.S. 270, 275 . . . (1971), we said that exhaustion of state
4 remedies requires that petitioners “fairly presen[t]” federal claims to the state courts in order
5 to give the State the “opportunity to pass upon and correct alleged violations of the prisoners’
6 federal rights” (some internal quotation marks omitted). If state courts are to be given the
7 opportunity to correct alleged violations of prisoners’ federal rights, they must surely be
8 alerted to the fact that the prisoners are asserting claims under the United States Constitution.
9 If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied
10 him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not
11 only in federal court, but in state court.

12 Duncan, 513 U.S. at 365-366. The Ninth Circuit examined the rule further, stating:

13 Our rule is that a state prisoner has not “fairly presented” (and thus exhausted) his federal
14 claims in state court *unless he specifically indicated to that court that those claims were
15 based on federal law*. See Shumway v. Payne, 223 F.3d 982, 987-88 (9th Cir. 2000). Since
16 the Supreme Court’s decision in Duncan, this court has held that the *petitioner must make the
17 federal basis of the claim explicit either by citing federal law or the decisions of federal
18 courts, even if the federal basis is “self-evident,”* Gatlin v. Madding, 189 F.3d 882, 889 (9th
19 Cir. 1999) (citing Anderson v. Harless, 459 U.S. 4, 7 . . . (1982), or the underlying claim
20 would be decided under state law on the same considerations that would control resolution of
21 the claim on federal grounds. Hiiivala v. Wood, 195 F3d 1098, 1106-07 (9th Cir. 1999);
22 Johnson v. Zenon, 88 F.3d 828, 830-31 (9th Cir. 1996);

23 In Johnson, we explained that the petitioner must alert the state court to the fact that the
24 relevant claim is a federal one without regard to how similar the state and federal standards
25 for reviewing the claim may be or how obvious the violation of federal law is.

26 Lyons v. Crawford, 232 F.3d 666, 668-669 (9th Cir. 2000) (italics added).

27 Here, Petitioner does not allege that he has ever filed a state habeas petition in the California
28 Supreme Court presenting a federal claim regarding the BPH’s May 6, 2008 denial of parole
suitability. In the Order to Show Cause, Petitioner was advised of this deficiency and afforded an
opportunity in his response to provide the Court with additional information should it be the case
that he had actually exhausted his claims and simply neglected to inform the Court of that fact. As
mentioned, however, Petitioner has not responded in any way to the Order to Show Cause.
Accordingly, the Court finds that the petition is not exhausted. Failure to exhaust provides an
additional and alternative ground for dismissal of the petition.

RECOMMENDATION

For the foregoing reasons, the Court HEREBY RECOMMENDS that the petition for writ of
habeas corpus (Doc. 1), be dismissed for violation of the one-year statute of limitations in 28 U.S.C.

1 § 2244(d) and for lack of exhaustion.

2 This Findings and Recommendation is submitted to the United States District Court Judge
3 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the
4 Local Rules of Practice for the United States District Court, Eastern District of California.

5 Within twenty (20) days after being served with a copy, any party may file written objections
6 with the court and serve a copy on all parties. Such a document should be captioned “Objections to
7 Magistrate Judge’s Findings and Recommendation.” Replies to the objections shall be served and
8 filed within ten (10) court days (plus three days if served by mail) after service of the objections.
9 The Court will then review the Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The
10 parties are advised that failure to file objections within the specified time may waive the right to
11 appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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13 IT IS SO ORDERED.

14 Dated: September 22, 2010

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE

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