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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

TERRENCE ANDREW HARPER,)	1:10-cv-01670-JLT HC
)	
Petitioner,)	ORDER TO SHOW CAUSE WHY THE
)	PETITION SHOULD NOT BE DISMISSED
v.)	FOR VIOLATION OF THE ONE-YEAR
)	STATUTE OF LIMITATIONS (Doc. 1)
)	
KEN CLARK,)	ORDER DIRECTING RESPONSE TO BE
)	FILED WITHIN THIRTY DAYS
Respondent.)	

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 30, 2010,¹ challenging a December 26, 2007 decision by the Board of Parole Hearings (“BPH”)

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); Stillman v. LaMarque, 319 F.3d 1199, 1201 (9th cir. 2003); Smith v. Ratelle, 323 F.3d 813, 816 n. 2 (9th Cir. 2003). 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

1 to deny parole suitability for Petitioner. (Doc. 1, Attach. 1). A preliminary review of the Petition,
2 however, reveals that the petition may be untimely and should therefore be dismissed.

3 **DISCUSSION**

4 **A. Preliminary Review of Petition**

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

12 The Ninth Circuit, in Herbst v. Cook, concluded that a district court may dismiss *sua sponte* a
13 habeas petition on statute of limitations grounds so long as the court provides the petitioner adequate
14 notice of its intent to dismiss and an opportunity to respond. 260 F.3d at 1041-42. By issuing this
15 Order to Show Cause, the Court is affording Petitioner the notice required by the Ninth Circuit in
16 Herbst.

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

18 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of
19 1996 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas
20 corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063
21 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc), *cert. denied*, 118 S.Ct. 586
22 (1997). The instant petition was filed on July 30, 2010, and thus, it is subject to the provisions of
23 the AEDPA.

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

27 (1) A 1-year period of limitation shall apply to an application for a writ of habeas

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running of the statute of limitation. Petitioner signed the instant petition on July 30, 2010. (Doc. 1, p. 21).

1 corpus by a person in custody pursuant to the judgment of a State court. The
2 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
7 the applicant was prevented from filing by such State action;

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

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

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

16 28 U.S.C. § 2244(d).

17 The AEDPA’s one-year statute of limitations, as embodied in § 2244(d)(1), applies to habeas
18 petitions challenging an administrative decision in the context of a parole board determination.

19 Shelby v. Bartlett, 391 F.3d 1061, 1063 (9th Cir. 2004); see Redd v. McGrath, 343 F.3d 1077, 1080
20 n. 4 (9th Cir. 2003). Under subsection (d), the limitation period begins to run on “the date on which
21 the factual predicate of the claim or claims presented could have been discovered through the
22 exercise of due diligence.” In the context of a parole board decision, the factual basis is the parole
23 board’s denial of a petitioner’s administrative appeal. Shelby, 391 F.3d at 1066; Redd, 343 F.3d at
24 1082-1083.

25 While an inmate is not permitted to lodge an administrative appeal of his parole decisions,
26 see Cal. Code Regs., tit. 15, § 2050 (repealed May 1, 2004), pursuant to California regulations,
27 decisions of the BPH following a hearing are considered “*proposed* decisions and shall be reviewed
28 prior to their effective date in accordance with” specified procedures. Cal. Code Regs., tit. 15, §
2041(a) (2010)(Emphasis supplied). In keeping with this state regulation, the BPH decision in this
case indicated that it would not be final for 120 days, i.e., until April 24, 2008. (Doc. 1, Attach. 2, p.
33). See Cal. Pen. Code § 3041(a), (b); Cal. Code Regs., tit. 15, § 2041 (f)(inmates sentenced under
the Indeterminate Sentencing Law). Thus, although the “factual basis” for Petitioner’s claim would

1 have been readily discoverable following the BPH hearing on December 26, 2007, since that
2 decision was only a proposed decision and did not become final until 120 days later, i.e., on April 24,
3 2008, the one-year period would have commenced the following day, i.e., on April 25, 2008. Such a
4 view is consistent with the majority of federal courts in this district who have addressed the problem.
5 See, e.g., Anderson v. Cate, 2010 WL 2793736, * 6 (E.D. Cal. July 14, 2010); Reid v. Haviland,
6 2010 WL 2889757, *2 (E.D. Cal. July 21, 2010); Riley v. Hartley, 2010 WL 2556832, *3-5 (E.D.
7 Cal. June 21, 2010); Stotts v. Sisco, 2009 WL 2591029, *4 (E. D. Cal. Aug. 20, 2009); Nelson v.
8 Clark, 2008 WL 2509509, *7-9 (E.D. Cal. June 23, 2008); Wilson v. Sisto, 2008 WL 4218487, *2
9 (E.D. Cal. Sept. 5, 2008). The one-year period would thus have commenced on April 25, 2008, and
10 would have continued to run, absent applicable statutory or equitable tolling, until it expired 365
11 days later on April 24, 2009.

12 Here, as mentioned, the instant petition was not filed until July 30, 2010, over fifteen months
13 after the one-year period had expired. Therefore, unless Petitioner is entitled to either statutory or
14 equitable tolling, the petition is untimely and must be dismissed.

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

16 Under the AEDPA, the statute of limitations is tolled during the time that a properly filed
17 application for state post-conviction or other collateral review is pending in state court. 28 U.S.C.
18 § 2244(d)(2). A properly filed application is one that complies with the applicable laws and rules
19 governing filings, including the form of the application and time limitations. Artuz v. Bennett, 531
20 U.S. 4, 8, 121 S. Ct. 361 (2000). An application is pending during the time that ‘a California
21 petitioner completes a full round of [state] collateral review,’ so long as there is no unreasonable
22 delay in the intervals between a lower court decision and the filing of a petition in a higher court.
23 Delhomme v. Ramirez, 340 F. 3d 817, 819 (9th Cir. 2003), abrogated on other grounds as recognized
24 by Waldrip v. Hall, 548 F. 3d 729 (9th Cir. 2008)(per curium)(internal quotation marks and citations
25 omitted); see Evans v. Chavis, 546 U.S. 189, 193-194, 126 S. Ct. 846 (2006); see Carey v. Saffold,
26 536 U.S. 214, 220, 222-226, 122 S. Ct. 2134 (2002); see also, Nino v. Galaza, 183 F.3d 1003, 1006
27 (9th Cir. 1999).

28 Nevertheless, there are circumstances and periods of time when no statutory tolling is

1 allowed. For example, no statutory tolling is allowed for the period of time between finality of an
2 appeal and the filing of an application for post-conviction or other collateral review in state court,
3 because no state court application is “pending” during that time. Nino, 183 F.3d at 1006-1007;
4 Raspberry v. Garcia, 448 F.3d 1150, 1153 n. 1 (9th Cir. 2006). Similarly, no statutory tolling is
5 allowed for the period between finality of an appeal and the filing of a federal petition. Id. at 1007.
6 In addition, the limitation period is not tolled during the time that a federal habeas petition is
7 pending. Duncan v. Walker, 563 U.S. 167, 181-182, 121 S.Ct. 2120 (2001); see also, Fail v.
8 Hubbard, 315 F. 3d 1059, 1060 (9th Cir. 2001)(as amended on December 16, 2002). Further, a
9 petitioner is not entitled to statutory tolling where the limitation period has already run prior to filing
10 a state habeas petition. Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (“section 2244(d)
11 does not permit the reinitiation of the limitations period that has ended before the state petition was
12 filed.”); Jiminez v. White, 276 F. 3d 478, 482 (9th Cir. 2001). Finally, a petitioner is not entitled to
13 continuous tolling when the petitioner’s later petition raises unrelated claims. See Gaston v. Palmer,
14 447 F.3d 1165, 1166 (9th Cir. 2006).

15 Here, Petitioner alleges that he filed three state habeas petitions: (1) filed in the Superior
16 Court for the County of Marin on July 24, 2009, and denied on October 13, 2009; (2) filed in the
17 California Court of Appeal, First Appellate District, on November 6, 2009, and denied on November
18 19, 2009; and (3) filed in the California Supreme Court on December 21, 2009, and denied on June
19 9, 2010. (Doc. 1, pp. 4-8; p. 31). Assuming, without deciding, that all three petitions were “properly
20 filed” within the meaning of the AEDPA, none of these state court petitions entitles Petitioner to
21 statutory tolling.

22 A petitioner is not entitled to tolling where the limitations period has *already run* prior to
23 filing a state habeas petition. Green v. White, 223 F.3d 1001, 1003 (9th Cir. 2000); Jiminez v. Rice,
24 276 F.3d 478 (9th Cir. 2001); see Webster v. Moore, 199 F.3d 1256, 1259 (11th Cir. 2000)(same);
25 Ferguson v. Palmateer, 321 F.3d 820 (9th Cir. 2003)(“section 2244(d) does not permit the reinitiation
26 of the limitations period that has ended before the state petition was filed.”); Jackson v. Dormire, 180
27 F.3d 919, 920 (8th Cir. 1999) (petitioner fails to exhaust claims raised in state habeas corpus filed
28 after expiration of the one-year limitations period). Here, as mentioned, the limitations period

1 expired on April 24, 2009, approximately three months *before* Petitioner filed his *first* state habeas
2 petition. Accordingly, he cannot avail himself of the statutory tolling provisions of the AEDPA.
3 Therefore, unless Petitioner is entitled to equitable tolling, the petition must be dismissed as
4 untimely.

5 D. Equitable Tolling

6 The running of the one-year limitation period under 28 U.S.C. § 2244(d) is subject to
7 equitable tolling in appropriate cases. See Holland v. Florida, __ U.S. __, 130 S.Ct. 2549, 2561
8 (2010); Calderon v. United States Dist. Ct., 128 F.3d 1283, 1289 (9th Cir. 1997). The limitation
9 period is subject to equitable tolling when “extraordinary circumstances beyond a prisoner’s control
10 make it impossible to file the petition on time.” Shannon v. Newland, 410 F. 3d 1083, 1089-1090
11 (9th Cir. 2005)(internal quotation marks and citations omitted). “When external forces, rather than a
12 petitioner’s lack of diligence, account for the failure to file a timely claim, equitable tolling of the
13 statute of limitations may be appropriate.” Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999).
14 “Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: “(1)
15 that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in
16 his way.” Holland, 2010 WL 2346549 at *12; Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct.
17 1807 (2005). “[T]he threshold necessary to trigger equitable tolling under AEDPA is very high, lest
18 the exceptions swallow the rule.” Miranda v. Castro, 292 F. 3d 1062, 1066 (9th Cir. 2002)(citation
19 omitted). As a consequence, “equitable tolling is unavailable in most cases.” Miles, 187 F. 3d at
20 1107.

21 Here, Petitioner has made no express claim of entitlement to equitable tolling and, based on
22 the record now before the Court, the Court sees no basis for such a claim. Accordingly, the Court’s
23 preliminary finding is that Petitioner is not entitled to equitable tolling. Thus, it appears that the
24 petition is untimely and should be dismissed.

25 **ORDER**

26 For the foregoing reasons, the Court HEREBY ORDERS:

- 27 1. Petitioner is ORDERED TO SHOW CAUSE within thirty (30) days of the date of service
28 of this Order why the Petition should not be dismissed for violation of the one-year

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statute of limitations in 28 U.S.C. § 2244(d).

Petitioner is forewarned that his failure to comply with this order may result in a Recommendation that the Petition be dismissed pursuant to Local Rule 110.

IT IS SO ORDERED.

Dated: September 24, 2010

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE