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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ULISES OROZCO,

Petitioner,

v.

F. FOULK, Warden,

Respondent.

Case No. 1:13-cv-02011 MJS (HC)
**ORDER GRANTING RESPONDENT’S
MOTION TO DISMISS**
[Doc. 10]

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 Kathleen McKenna 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). (ECF Nos. 8, 12.)

I. BACKGROUND

Petitioner is currently in the custody of the California Department of Corrections pursuant to a judgment of the Superior Court of California, County of Fresno, upon being convicted by a jury on July 27, 2010 of second degree murder along with an enhancement for using a deadly or dangerous weapon during the commission of the crime. (See Lodged Doc. 1.) On August 24, 2010, Petitioner was sentenced to an

1 indeterminate state prison term of sixteen (16) years to life. (Id.)

2 Petitioner filed a direct appeal with the California Court of Appeal, Fifth Appellate
3 District. The court affirmed the judgment of the lower court on September 14, 2011.
4 (Lodged Doc. 2.) Petitioner then filed a petition for review with the Supreme Court of
5 California. The petition was denied on December 21, 2011. (Lodged Docs. 3-4.)

6 Petitioner sought collateral review of his conviction by way of a petition for writ of
7 habeas corpus filed with the California Supreme Court on August 9, 2011.¹ The Petition
8 was denied on December 21, 2011.

9 Petitioner filed the instant federal habeas petition on November 27, 2013.² (Pet.)
10 On February 6, 2014, Respondent filed a Motion to Dismiss the petition as being filed
11 outside the one-year limitations period prescribed by 28 U.S.C. § 2244(d). (Mot. to
12 Dismiss, ECF No. 12.) Petitioner did not file a response to the motion to dismiss.

13 **II. DISCUSSION**

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

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

19 The Ninth Circuit has allowed respondents to file a motion to dismiss in lieu of an
20 answer if the motion attacks the pleadings for failing to exhaust state remedies or being
21 in violation of the state’s procedural rules. See, e.g., O’Bremski v. Maass, 915 F.2d 418,
22 420 (9th Cir. 1990) (using Rule 4 to evaluate motion to dismiss petition for failure to

24 ¹ Under the mailbox rule, the Court deems petitions filed on the date Petitioner handed a petition
25 to prison authorities for mailing. Houston v. Lack, 487 U.S. 266, 276, 108 S.Ct. 2379, 2385, 101 L. Ed. 2d
26 245 (1988); Campbell v. Henry, 614 F.3d 1056 (9th Cir. 2010); see also Rule 3(d) of the Rules Governing
Section 2254 Cases. Although the petition was filed with the court on August 15, 2011, Petitioner signed
the petition on August 9, 2011. Accordingly the Court considers the petition to be filed on August 9, 2011.

27 ² Although the petition was filed with the court on December 21, 2013, Petitioner signed the
28 petition on November 27, 2013. Accordingly the Court considers the petition to be filed on November 27,
2013.

1 exhaust state remedies); White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (using
2 Rule 4 as procedural grounds to review motion to dismiss for state procedural default);
3 Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n. 12 (E.D. Cal. 1982) (same). Thus, a
4 respondent can file a motion to dismiss after the court orders a response, and the Court
5 should use Rule 4 standards to review the motion. See Hillery, 533 F. Supp. at 1194 &
6 n. 12.

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

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

14 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death
15 Penalty Act of 1996 (hereinafter "AEDPA"). AEDPA imposes various requirements on all
16 petitions for writ of habeas corpus filed after the date of its enactment. Lindh v. Murphy,
17 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th
18 Cir. 1997).

19 In this case, the petition was filed on November 27, 2013, and is subject to the
20 provisions of AEDPA. AEDPA imposes a one-year period of limitation on petitioners
21 seeking to file a federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As
22 amended, § 2244, subdivision (d) reads:

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

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

27 (B) the date on which the impediment to filing an application
28 created by State action in violation of the Constitution or laws of the
United States is removed, if the applicant was prevented from filing

1 by such State action;

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

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

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

13 28 U.S.C. § 2244(d).

14 Under § 2244(d)(1)(A), the limitations period begins running on the date that the
15 petitioner's direct review became final or the date of the expiration of the time for seeking
16 such review. In this case, the California Supreme Court denied review on December 21,
17 2011. (Lodged Docs. 3-4.) The state appeal process became final ninety days later, on
18 March 20, 2012, when the time for seeking certiorari with the United States Supreme
19 Court expired. U.S. Supreme Court rule 13; Bowen v. Rowe, 188 F.3d 1157 (9th Cir.
20 1999). The AEDPA statute of limitations began to run the following day, on March 21,
21 2012. Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001).

22 Petitioner would have one year from March 21, 2012, absent applicable tolling, in
23 which to file his federal petition for writ of habeas corpus. However, Petitioner delayed in
24 filing the instant petition until November 27, 2013, eight months after the statute of
25 limitations period expired. Absent the later commencement of the statute of limitations
26 or any applicable tolling, the instant petition is barred by the statute of limitations.

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

28 28 U.S.C. § 2244(d)(2) states that the "time during which a properly filed
application for State post-conviction or other collateral review with respect to the
pertinent judgment or claim is pending shall not be counted toward" the one year
limitation period. 28 U.S.C. § 2244(d)(2). In Carey v. Saffold, the Supreme Court held
the statute of limitations is tolled where a petitioner is properly pursuing post-conviction

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

10 Petitioner filed a petition for writ of habeas corpus on August 9, 2011 that was
11 denied on December 21, 2011. As the petition was denied before the statute of
12 limitations period began, Petitioner is not entitled to tolling during his collateral challenge
13 to his conviction.

14 Accordingly, the limitations period expired one year after its commencement on
15 March 21, 2012. Petitioner filed the instant petition on November 27, 2013, eight months
16 after the limitations period expired. Accordingly, the petition is untimely.

17 **D. Equitable Tolling**

18 The limitations period is subject to equitable tolling if the petitioner demonstrates:
19 “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary
20 circumstance stood in his way.” Holland v. Florida, 130 S. Ct. 2549, 2560-62 (2010);
21 quoting Pace v. DiGuglielmo. Petitioner bears the burden of alleging facts that would
22 give rise to tolling. Pace, 544 U.S. at 418; Hinton v. Pac. Enters., 5 F.3d 391, 395 (9th
23 Cir.1993). Petitioner has not presented any evidence regarding equitable tolling.
24 Accordingly, Petitioner is not entitled to the benefit of equitable tolling and his petition
25 remains untimely.

26 **III. CONCLUSION**

27 As explained above, Petitioner failed to file the instant petition for Habeas Corpus
28 within the one year limitation period required by 28 U.S.C. § 2244(d). Petitioner is neither

1 entitled to the benefit of statutory or equitable tolling. Based on the foregoing, this Court
2 recommends that Respondent's motion to dismiss be GRANTED.

3 **IV. ORDER**

4 Accordingly, IT IS HEREBY ORDERED that:

- 5 1. Respondent's Motion to Dismiss (Doc. 10) is GRANTED;
- 6 2. The Petition for Writ of Habeas Corpus is DISMISSED with prejudice as
7 untimely; and
- 8 3. The Court DECLINES to issue a Certificate of Appealability. 28 U.S.C. §
9 2253(c); Slack v. McDaniel, 529 U.S. 473, 484 (2000) (in order to obtain a
10 COA, petitioner must show: (1) that jurists of reason would find it debatable
11 whether the petition stated a valid claim of a denial of a constitutional right;
12 and (2) that jurists of reason would find it debatable whether the district
13 court was correct in its procedural ruling. Slack, 529 U.S. 484. In the
14 present case, jurists of reason would not find debatable whether the
15 petition was properly dismissed with prejudice as time-barred under 28
16 U.S.C. § 2244(d)(1). Petitioner has not made the required substantial
17 showing of the denial of a constitutional right.

18
19 IT IS SO ORDERED.

20 Dated: March 17, 2014

21 */s/ Michael J. Seng*
22 UNITED STATES MAGISTRATE JUDGE
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