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8 **UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**
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11 JOHN SCOTT CHANDLER,

12 Petitioner,

13 v.

14 R.L. GOWER,

15 Respondent.

Case No. 1:14-cv-00915-SAB-HC

ORDER GRANTING RESPONDENT'S
MOTION TO DISMISS THE PETITION
(ECF No. 11)

ORDER DIRECTING CLERK OF COURT
TO ENTER JUDGMENT AND CLOSE
CASE

ORDER DECLINING ISSUANCE OF
CERTIFICATE OF APPEALABILITY

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18 Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus
19 pursuant to 28 U.S.C. § 2254. Respondent is represented in this action by Brian Smiley, Esq., of
20 the Attorney General of California. Both parties have consented to the jurisdiction of the
21 Magistrate Judge pursuant to 28 U.S.C. § 636(c).

22 **I.**

23 **BACKGROUND**

24 Petitioner is currently in the custody of the California Department of Corrections and
25 Rehabilitation at California Correctional Center in Susanville, California. Petitioner challenges
26 his 2010 conviction in Fresno County Superior Court for Assault with a Semi-Automatic Firearm
27 and Criminal Threat. (Pet., Ex. B, ECF No. 1). On November 30, 2011, the California Court of
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1 Appeal Fifth Appellate District affirmed the judgment. (Pet. at 1).¹ Petitioner did not file a
2 petition for review in the California Supreme Court.

3 Petitioner filed several collateral challenges in the state courts. On September 4, 2012,
4 Petitioner filed a petition for writ of habeas corpus in the Fresno County Superior Court. (Pet.,
5 Ex. L). The Superior Court denied the petition on November 14, 2012. (Pet., Ex. L). Petitioner
6 then filed a petition for writ of habeas corpus in the California Court of Appeal Fifth Appellate
7 District on January 14, 2013. (Pet., Ex. M). The petition was denied by the Fifth Appellate
8 District on May 8, 2013. (Pet., Ex. M). On June 4, 2013, Petitioner filed a petition for writ of
9 habeas corpus in the California Supreme Court. (LD² 5). The petition was denied on August 14,
10 2013. (Pet., Ex. O).

11 On June 12, 2014, Petitioner filed the instant petition for writ of habeas corpus. (ECF
12 No. 1). On April 7, 2014, the petition was transferred to this Court. (ECF No. 15). On October
13 3, 2014, Respondent filed a motion to dismiss the petition. (ECF No. 11). On October 23, 2014,
14 Petitioner filed an opposition to the motion to dismiss. (ECF No. 13). On October 30, 2014,
15 Respondent filed a reply to Petitioner's opposition. (ECF No. 14).

16 II.

17 DISCUSSION

18 A. Procedural Grounds for Motion to Dismiss

19 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a
20 petition if it "plainly appears from the petition and any attached exhibits that the petitioner is not
21 entitled to relief in the district court" Rule 4 of the Rules Governing Section 2254 Cases.

22 The Ninth Circuit has allowed respondents to file a motion to dismiss in lieu of an answer
23 if the motion attacks the pleadings for failing to exhaust state remedies or being in violation of
24 the state's procedural rules. See, e.g., O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990)
25 (using Rule 4 to evaluate motion to dismiss petition for failure to exhaust state remedies); White
26 v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (using Rule 4 as procedural grounds to review

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28 ¹ The Court will refer to the ECF pagination.

² "LD" refers to the Lodged Documents by Respondent.

1 motion to dismiss for state procedural default); Harrison v. Galaza, 1999 WL 58594 (N.D.
2 Cal.1999) (using Rule 4 to review motion to dismiss for statute of limitations violation). Thus, a
3 respondent can file a motion to dismiss after the court orders a response, and the Court should
4 use Rule 4 standards to review the motion. See Hillery, 533 F. Supp. at 1194 & n. 12.

5 In this case, Respondent's motion to dismiss is based on a violation of 28 U.S.C.
6 2254(d)(1)'s one-year limitations period. The Court will review Respondent's motion to dismiss
7 pursuant to its authority under Rule 4, because Respondent has not yet filed a formal answer.

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

9 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act
10 of 1996 (hereinafter "AEDPA"). The AEDPA imposes various requirements on all petitions for
11 writ of habeas corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320
12 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997).

13 In this case, the instant Petition was filed on June 12, 2014, and therefore, it is subject to
14 the provisions of the AEDPA. The AEDPA imposes a one-year period of limitation on
15 petitioners seeking to file a federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1).
16 As amended, § 2244, subdivision (d) reads:

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

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

22 (B) the date on which the impediment to filing an
23 application created by 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;

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

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

(2) 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 any period of limitation under this subsection.

28 U.S.C. § 2244(d).

In most cases, the limitations period begins running on the date that the petitioner's direct review became final. In this case, the California Court of Appeal Fifth Appellate District affirmed the judgment on November 30, 2011. Thus, direct review concluded on January 9, 2012, 40 days after the conviction was affirmed by the California Court of Appeal when no petition for review was filed with the California Supreme Court. See Cal. Rules of Court, rule 8.500(e)(1); Waldrip v. Hall, 548 F.3d 729, 735 (9th Cir. 2008). The one-year limitations period commenced running the following day, January 10, 2012, and absent tolling, was set to expire on January 9, 2013. Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001) (citing Fed. R. Civ. P. 6(a)).

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

Title 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 relief, and the period is tolled during the intervals between one state court's disposition of a habeas petition and the filing of a habeas petition at the next level of the state court system. 536 U.S. 214, 215 (2002); see also Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). Nevertheless, state petitions will only toll the one-year statute of limitations under § 2244(d)(2) if the state court explicitly states that the post-conviction petition was timely filed or was filed within a reasonable time under state law. Evans v. Chavis, 546 U.S. 189, 191-92 (2006); Pace v. DiGuglielmo, 544 U.S. 408 (2005). Claims denied as untimely or determined by the federal courts to have been untimely in state court will not satisfy the requirements for statutory tolling. Chavis, 546 U.S. at 198.

1. Time Elapsed Before Filing First State Petition

1 As stated above, the statute of limitations commenced on January 10, 2012, when the
2 judgment became final forty days after the conviction was affirmed by the California Court of
3 Appeal when no petition for review was filed with the California Supreme Court. Because the
4 statute of limitations commenced running on January 10, 2012, and Petitioner filed his first state
5 petition on September 1, 2012, 235 days of the limitations period lapsed. Nino v. Galaza, 183
6 F.3d at 1006-1007 (no tolling during period of time between final decision issued on direct
7 appeal and filing of first state collateral petition).

8 **2. Tolling During Period State Petitions were Pending**

9 Petitioner is entitled to tolling during the time his petitions were pending in the state
10 courts, from September 1, 2012 (date petition filed in Fresno Superior Court) through August 14,
11 2013 (date petition was denied in California Supreme Court), for a total of . (LDs 3-8). See
12 Pace v. DiGuglielmo, 544 U.S. at 410 (stating that the limitations period is tolled while “a
13 properly filed application for state post-conviction or other collateral review with respect to the
14 pertinent judgment or claim is pending”).

15 **3. End of Limitations Period**

16 As explained, the statute of limitations period commenced running on January 10, 2012,
17 and with the benefit of two hundred thirty-five (235) days of tolling during the pendency of his
18 state petitions for habeas corpus, the limitations period expired on December 23, 2013. Thus,
19 absent equitable tolling, the instant petition, filed on June 12, 2014, is untimely by over six (6)
20 months.

21 **D. Equitable Tolling**

22 The AEDPA’s limitations period is subject to equitable tolling if the petitioner
23 demonstrates: “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary
24 circumstance stood in his way.” Holland v. Florida, 130 S.Ct.2549, 2562 (2010); Pace v.
25 DiGuglielmo, 544 U.S. 408, 418 (2005). Petitioner bears the burden of alleging facts that would
26 give rise to tolling. Pace, 544 U.S. at 418; Smith v. Duncan, 297 F.3d 809 (9th Cir.2002);
27 Hinton v. Pac. Enters., 5 F.3d 391, 395 (9th Cir.1993). Equitable tolling is “unavailable in most
28 cases.” Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999). Thus, “the threshold necessary to

1 trigger equitable tolling [under AEDPA] is very high, lest exceptions swallow the rule.”
2 Miranda v. Castro, 292 F.3d 1063, 1066 (9th Cir. 2002).

3 It appears that Petitioner is arguing that he is entitled to equitable tolling on the basis that
4 he did not receive the Fifth Appellate District’s decision until approximately three months after
5 the decision was issued, and by then it was too late to file a petition for review in the California
6 Supreme Court. (Opp’n at 2-3). Petitioner also argues that his delay should be excused because
7 the legal library in the California prison system is inadequate. (Opp’n at 3).

8 Petitioner argues that his appellate attorney’s failure to promptly send him the California
9 Court of Appeal’s order justifies equitable tolling. The Court does not agree. Petitioner’s claim
10 of attorney negligence is akin to an attorney who is negligent and miscalculates a filing deadline,
11 and does not constitute an extraordinary circumstance warranting equitable tolling. See
12 Lawrence v. Florida, 127 S.Ct. 1079, 1085 (2007) (“[a]ttorney miscalculation simply not
13 sufficient to warrant equitable tolling, particularly in the postconviction context where prisoners
14 have no constitutional right to counsel”); Miranda v. Castro, 292 F.3d 1063, 1067 (9th Cir. 2002)
15 (attorney’s miscalculation of limitations period did not constitute extraordinary circumstances);
16 Frye v. Hickman, 273 F.3d 1144, 1146 (9th Cir. 2001) (holding that an attorney’s general
17 negligence and miscalculation of limitations deadline did not constitute extraordinary
18 circumstances that warranted equitable tolling in a non-capital habeas case). Petitioner’s claim
19 of negligence is not analogous to the professional negligence that was present in Holland v.
20 Florida, 130 S.Ct. 2549. In Holland, equitable tolling was granted after the petitioner repeatedly
21 asked his attorney to file his federal petition in a timely manner, wrote several letters to the state
22 bar indicating that his attorney had abandoned him, and the attorney had grossly miscalculated
23 the limitations deadline. Id. at 2564.

24 Here, Petitioner alleges that his appellate counsel did not promptly send him the
25 California Court of Appeal’s order and record. However, Petitioner fails to show how appellate
26 counsel’s negligence prevented him from timely filing his federal petition. Petitioner admits that
27 he received the California Court of Appeal’s order and the record on February 13, 2012. (Opp’n
28 at 2). The statute of limitations period had commenced only one month earlier, on January 10,

1 2012, and therefore, Petitioner still had three hundred thirty (330) days to file his federal petition
2 from the date that he received all of the materials from his appellate attorney. Thus, Petitioner
3 has failed to show how the delayed receipt of the appellate order and record prevented him from
4 timely filing his federal petition for writ of habeas corpus.

5 Furthermore, even if this Court were to commence the statute of limitations from the day
6 after Petitioner received the appellate record and order, February 14, 2012, instead of the day
7 after Petitioner's direct review became final, January 10, 2012, the instant petition would still be
8 untimely. (Opp'n at 2). Although the time period for the statute of limitations would have
9 commenced thirty-five (35) days later, the statute of limitations would have expired on January
10 27, 2014, including the time period for statutory tolling while Petitioner's state habeas petitions
11 were pending. Therefore, even if the Court commenced the time period for the statute of
12 limitations on February 14, 2012, Petitioner's instant federal petition would still have been
13 untimely by more than four (4) months.

14 Petitioner also claims that the inadequacy of the prison law library justifies equitable
15 tolling. In Ramirez v. Yates, 571 F.3d 998 (9th Cir. 2009), petitioner's four-month stay in
16 administrative segregation with limited access to the law library and a copier did not justify
17 equitable tolling because "[o]rdinary prison limitations on [one's] access to the law library and
18 copier (quite unlike the denial altogether of access to his personal legal papers) were neither
19 'extraordinary' nor made it 'impossible' for him to file his petition in a timely manner."
20 Petitioner fails to set forth how the prison law library was inadequate and what necessary legal
21 resources he was denied access to. Moreover, the fact that Petitioner was able to file three state
22 habeas petitions in a timely manner suggests that the prison law library is adequate. Therefore,
23 Petitioner is not entitled to equitable tolling.

24 **E. Evidentiary Hearing**

25 In the alternative, Petitioner requests an evidentiary hearing. There is no basis for the
26 Court to conduct an evidentiary hearing. With regard to deadlines and statute of limitations, the
27 Supreme Court has acknowledged:

28 If 1-day late filings are acceptable, 10-day later filings might be

1 equally acceptable, and so on in a cascade of exceptions that would
2 engulf the rule erected by the filing deadline; yet regardless of
3 where the cutoff line is set, some individuals will always fall just
4 on the other side of it. Filing deadlines, like statutes of limitations,
5 necessarily operate harshly and arbitrarily with respect to
6 individuals who fall just on the other side of them, but if the
7 concept of a filing deadline is to have any content the deadline
8 must be enforced.

9 United States v. Locke, 471 U.S. 84, 101 (1985).

10 Because the Court has found that the evidence submitted by Petitioner does not justify
11 equitable tolling, an evidentiary hearing is unnecessary. See Roy v. Lampert, 465 F.3d 964, 969
12 (9th Cir. 2006) (“A habeas petitioner ... should receive an evidentiary hearing when [she] makes
13 “a good-faith allegation that would, if true, entitle [her] to equitable tolling.” (quoting Laws v.
14 Lamarque, 351 F.3d 919, 919 (9th Cir. 2003). In this instance, it is undisputed that Petitioner
15 received the appellate record on or before February 13, 2012, filed his first state habeas petition
16 on September 1, 2012, and filed the instant federal habeas petition on June 12, 2014. Therefore,
17 Respondent’s motion to dismiss should be granted on the ground that the instant petition for writ
18 of habeas corpus was filed beyond the one-year statute of limitations.

19 **III.**

20 **CERTIFICATE OF APPEALABILITY**

21 Rule 11(a) of the Rules Governing Section 2254 cases requires the district court to issue
22 or deny a certificate of appealability when it enters a final order adverse to the petitioner. The
23 requirement that a petitioner seek a certificate of appealability is a gate-keeping mechanism that
24 protects the Court of Appeals from having to devote resources to frivolous issues, while at the
25 same time affording petitioners an opportunity to persuade the Court that, through full briefing
26 and argument, the potential merit of claims may appear. Lambright v. Stewart, 220 F.3d 1022,
27 1025 (9th Cir. 2000). However, a state prisoner seeking a writ of habeas corpus has no absolute
28 entitlement to appeal a district court’s denial of his petition, and an appeal is only allowed in
certain circumstances. Miller-El v. Cockrell, 537 U.S. 322, 335-336 (2003). The controlling
statute, 28 U.S.C. § 2253, provides as follows:

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

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

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

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

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

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

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

18 This Court will issue a certificate of appealability when a petitioner makes a substantial
19 showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To make a substantial
20 showing, the petitioner must establish that “reasonable jurists could debate whether (or, for that
21 matter, agree that) the petition should have been resolved in a different manner or that the issues
22 presented were ‘adequate to deserve encouragement to proceed further’.” Slack v. McDaniel,
23 529 U.S. 473, 484 (2000) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 (1983)).

24 In the present case, the Court finds that Petitioner has not made the required substantial
25 showing of the denial of a constitutional right to justify the issuance of a certificate of
26 appealability. Reasonable jurists would not find it debatable that the instant petition for writ of
27 habeas corpus is barred by the one-year statute of limitations. Accordingly, the Court declines to
28 issue a certificate of appealability.

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1 IV.
2 ORDER
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4 Accordingly, IT IS HEREBY ORDERED that:

- 5 1. Respondent's motion to dismiss the instant petition for writ of habeas corpus with
6 prejudice as untimely is GRANTED;
7 2. The Clerk of Court is directed to enter judgment; and
8 3. The Court declines to issue a certificate of appealability.

9 IT IS SO ORDERED.
10

11 Dated: November 10, 2014


UNITED STATES MAGISTRATE JUDGE