UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DANNY MOLLINA RODRIGUEZ, Petitioner, v. T. PEREZ, Warden, Respondent.	)	Case No.: 1:14-cv-00917-AWI-JLT FINDINGS AND RECOMMENDATIONS TO GRANT RESPONDENT'S MOTION TO DISMISS (Doc. 15) ORDER DIRECTING OBJECTIONS TO BE FILED WITHIN TWENTY-ONE DAYS

Petitioner is a state prisoner proceeding in propria persona with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

PROCEDURAL HISTORY

The instant petition was filed on June 3, 2014.[1] On June 18, 2014, the Court ordered Respondent to file a response. (Doc. 5). On September 26, 2014, Respondent filed the instant motion

[1] In Houston v. Lack, the United States Supreme Court held 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 (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. The Ninth Circuit 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); Stillman v. LaMarque, 319 F.3d 1199, 1201 (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 running of the statute of limitation. Petitioner signed the instant petition on June 3, 2014. (Doc. 1, p. 43).

to dismiss, contending that the petition is untimely and that it is successive. (Doc. 15). On November 14, 2014, Petitioner filed his opposition.[2] (Doc. 19).

DISCUSSION

A. Procedural Grounds for Motion to Dismiss

As mentioned, Respondent has filed a Motion to Dismiss the petition as being filed outside the one year limitations period prescribed by Title 28 U.S.C. § 2244(d)(1) and as successive. Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition if it "plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court . . . ." Rule 4 of the Rules Governing Section 2254 Cases.

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

In this case, Respondent's Motion to Dismiss is based on a violation of 28 U.S.C. 2244(d)(1)'s one year limitation period and his contention that the petition is successive. Because Respondent's Motion to Dismiss is similar in procedural standing to a Motion to Dismiss for failure to exhaust state remedies or for state procedural default and Respondent has not yet filed a formal Answer, the Court will review Respondent's Motion to Dismiss pursuant to its authority under Rule 4.

B. Successive Petitions.

Respondent points out that Petitioner challenged this same Kern County conviction in a federal habeas petition in this Court filed in case no. 1:99-cv-05521-AWI-LJO. (LD 13). In that earlier case, Findings and Recommendations to deny the petition on its merits were filed on March 20, 2002 and

[2] On November 21, 2014, Respondent filed a request for a 30-day extension of time within which to file his reply. (Doc. 20) However, the Court finds a reply to be unnecessary and **DENIES** the request.

adopted by the District Judge on Julye 26, 2002. Judgment was entered on July 29, 2002. Petitioner subsequently appealed the denial to the Ninth Circuit, which, on March 21, 2003, denied issuance of a certificate of appealability.[3]

A federal court must dismiss a second or successive petition that raises the same grounds as a prior petition. 28 U.S.C. § 2244(b)(1). The Court must also dismiss a second or successive petition raising a *new ground* unless the petitioner can show that (1) the claim rests on a new, retroactive, constitutional right or (2) the factual basis of the claim was not previously discoverable through due diligence, and these new facts establish by clear and convincing evidence that but for the constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense. 28 U.S.C. § 2244(b)(2)(A)-(B).

However, it is not the district court that decides whether a second or successive petition meets these requirements that allow a petitioner to file a second or successive petition, but rather the Ninth Circuit.[4] Section 2244 (b)(3)(A) provides: "Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." In other words, a petitioner must obtain leave from the Ninth Circuit before he can file a second or successive petition in district court. See Felker v. Turpin, 518 U.S. 651, 656-657 (1996). This Court must dismiss any second or successive petition unless the Court of Appeals has given Petitioner leave to file the petition because a district court lacks subject-matter jurisdiction over a second or successive petition. Pratt v. United States, 129 F.3d 54, 57 (1st Cir. 1997); Greenawalt v. Stewart, 105 F.3d 1268, 1277 (9th Cir. 1997), *cert. denied*, 117 S.Ct. 794 (1997); Nunez v. United States, 96 F.3d 990, 991 (7th Cir. 1996).

[3] The court may take notice of facts that are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b); United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th Cir. 1993). The record of state court proceeding is a source whose accuracy cannot reasonably be questioned, and judicial notice may be taken of court records. Mullis v. United States Bank. Ct., 828 F.2d 1385, 1388 n.9 (9th Cir. 1987); Valerio v. Boise Cascade Corp., 80 F.R.D. 626, 635 n. 1 (N.D.Cal.1978), *aff'd*, 645 F.2d 699 (9th Cir.); see also Colonial Penn Ins. Co. v. Coil, 887 F.2d 1236, 1239 (4th Cir. 1989); Rodic v. Thistledown Racing Club, Inc., 615 F.2d 736, 738 (6th. Cir. 1980). Accordingly, the Court hereby takes judicial notice of its own docket in case no. 1:99-cv-05521-AWI-LJO.

[4] In his opposition, Petitioner appears to argue that the petition is not successive because it raises new issues never raised before. However, as explained herein, the only determination this Court needs to make is that the petition itself is successive, not whether Petitioner is justified in raising new issues. That latter determination is the exclusive province of the Ninth Circuit.

1 Because the current petition was filed after April 24, 1996, the provisions of the Antiterrorism
2 and Effective Death Penalty Act of 1996 (AEDPA) apply to Petitioner's current petition. Lindh v.
3 Murphy, 521 U.S. 320, 327 (1997). Based on the foregoing chronology, it is obvious that Petitioner
4 has previously filed a petition challenging this same conviction. Although Petitioner raised different
5 claims in that case than those raised in the instant case, the determination whether he may proceed on a
6 successive petition lies with the Ninth Circuit, not this Court. Petitioner has made no showing that he
7 has obtained prior leave from the Ninth Circuit to file this successive petition attacking his conviction.
8 That being so, this Court has no jurisdiction to consider Petitioner's renewed application for relief from
9 that conviction under § 2254 and must dismiss the petition. See Greenawalt, 105 F.3d at 1277; Nunez,
10 96 F.3d at 991. If Petitioner desires to proceed in bringing this petition for writ of habeas corpus, he
11 must first file for leave to do so with the Ninth Circuit. See 28 U.S.C. § 2244 (b)(3).
12 C. Limitation Period For Filing Petition For Writ Of Habeas Corpus
13 However, even were it not the case that this Court lacks jurisdiction because the petition is
14 successive, it would nevertheless have to dismiss the petition as untimely. On April 24, 1996, Congress
15 enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The AEDPA imposes
16 various requirements on all petitions for writ of habeas corpus filed after the date of its enactment.
17 Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499
18 (9th Cir. 1997) (en banc), *cert. denied,* 118 S.Ct. 586 (1997). The instant petition was filed on June 3,
19 2014, and thus, it is subject to the provisions of the AEDPA.
20 The AEDPA imposes a one year period of limitation on petitioners seeking to file a federal
21 petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As amended, § 2244, subdivision (d) reads:
22 (1) A 1-year period of limitation shall apply to an application for a writ of habeas
corpus by a person in custody pursuant to the judgment of a State court. The
23 limitation period shall run from the latest of –
24 (A) the date on which the judgment became final by the conclusion of direct
review or the expiration of the time for seeking such review;
25
(B) the date on which the impediment to filing an application created by
26 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;
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(C) the date on which the constitutional right asserted was initially
28 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

(D) the date on which the factual predicate of the claim or 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 limitation period begins running on the date that the petitioner's direct review became final. Here, the Petitioner was convicted on March 26, 1996 and sentenced to an indeterminate term of forty-one years to life. (Lodged Document ("LD") 1). The California Court of Appeal, Fifth Appellate District ("5th DCA") affirmed the judgment, reversed the sentence, and remanded the matter to the trial court to determine whether the sentence on second degree burglary should be stayed or should run concurrently. (LD 2). The California Supreme Court denied review on August 26, 1998. (LD 3, 4).

On November 4, 1998, the trial court determined that the second degree burglary conviction should be stayed. (LD 5). Petitioner did not appeal that determination. California state law governs the period within which prisoners have to file an appeal and, in turn, that law governs the date of finality of convictions. See, e.g., Mendoza v. Carey, 449 F.3d 1065, 1067 (9th Cir. 2006); Lewis v. Mitchell, 173 F.Supp.2d 1057, 1060 (C.D. Cal. 2001)(California conviction becomes final 60 days after the superior court proceedings have concluded, citing prior Rule of Court, Rule 31(d)). Pursuant to California Rules of Court, Rule 8.308(a), a criminal defendant convicted of a felony must file his notice of appeal within sixty days of the rendition of judgment. See People v. Mendez, 19 Cal.4th 1084, 1086, 969 P.2d 146, 147 (1999)(citing prior Rule of Court, Rule 31(d)). Because Petitioner did not file a notice of appeal from the re-sentencing order on remand, his direct review concluded on January 3, 1999, when the sixty-day period for filing a notice of appeal expired. The one-year period under the AEDPA would have commenced the following day, on January 4, 1999, and Petitioner would have had one year from that date, or until January 3, 2000, within which to file his federal petition for writ of habeas corpus. See Patterson v. Stewart, 251 F.3d 1243, 1245 (9th Cir.2001).

As mentioned, the instant petition was filed on June 3, 2014, over fourteen years after the date the one-year period would have expired. Thus, unless Petitioner is entitled to either statutory or equitable tolling, the instant petition is untimely and should be dismissed.

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

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

Nevertheless, there are circumstances and periods of time when no statutory tolling is allowed. For example, no statutory tolling is allowed for the period of time between finality of an appeal and the filing of an application for post-conviction or other collateral review in state court, because no state court application is "pending" during that time. Nino, 183 F.3d at 1006-1007; Raspberry v. Garcia, 448 F.3d 1150, 1153 n. 1 (9th Cir. 2006). Similarly, no statutory tolling is allowed for the period between finality of an appeal and the filing of a federal petition. Id. at 1007. In addition, the limitation period is not tolled during the time that a federal habeas petition is pending. Duncan v. Walker, 563 U.S. 167, 181-182, 121 S.Ct. 2120 (2001); see also, Fail v. Hubbard, 315 F. 3d 1059, 1060 (9th Cir. 2001)(as amended on December 16, 2002). Further, a petitioner is not entitled to statutory tolling where the limitation period has already run prior to filing a state habeas petition. Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) ("section 2244(d) does not permit the reinitiation of the limitations period that has ended before the state petition was filed."); Jiminez v. White, 276 F. 3d 478, 482 (9th Cir. 2001).

1 Finally, a petitioner is not entitled to continuous tolling when the petitioner's later petition raises
2 unrelated claims. See Gaston v. Palmer, 447 F.3d 1165, 1166 (9th Cir. 2006).

3 Here, Petitioner alleges that he filed the following state habeas petitions: (1) petition filed in
4 the Superior Court of Kern County on October 15, 2013, and denied on January 17, 2014 (LD 6, 7);[5]
5 (2) petition filed in the 5th DCA on February 3, 2014, and denied on February 20, 2014 (LD 8, 9); and
6 (3) petition filed in the California Supreme Court on March 12, 2014, and denied on May 14, 2014.
7 (LD 10, 11).

8 None of these three petitions, however, afford Petitioner any basis for statutory tolling. A
9 petitioner is not entitled to tolling where the limitations period has already run prior to filing a state
10 habeas petition. Green v. White, 223 F.3d 1001, 1003 (9th Cir. 2000); Jiminez v. Rice, 276 F.3d 478
11 (9th Cir. 2001); see Webster v. Moore, 199 F.3d 1256, 1259 (11th Cir. 2000)(same); Ferguson v.
12 Palmateer, 321 F.3d 820 (9th Cir. 2003)("section 2244(d) does not permit the reinitiation of the
13 limitations period that has ended before the state petition was filed."); Jackson v. Dormire, 180 F.3d
14 919, 920 (8th Cir. 1999) (petitioner fails to exhaust claims raised in state habeas corpus filed after
15 expiration of the one-year limitations period). Here, as mentioned, the limitations period expired in
16 2000, almost fourteen years *before* Petitioner filed his first state habeas petition. Accordingly, he
17 cannot avail himself of the statutory tolling provisions of the AEDPA.

18 E. Equitable Tolling.

19 The running of the one-year limitation period under 28 U.S.C. § 2244(d) is subject to equitable
20 tolling in appropriate cases. See Holland v. Florida, 560 U.S. 631, 651-652, 130 S.Ct. 2549, 2561
21 (2010); Calderon v. United States Dist. Ct., 128 F.3d 1283, 1289 (9th Cir. 1997). The limitation period
22 is subject to equitable tolling when "extraordinary circumstances beyond a prisoner's control make it
23 impossible to file the petition on time." Shannon v. Newland, 410 F. 3d 1083, 1089-1090 (9th Cir.
24 2005)(internal quotation marks and citations omitted). "When external forces, rather than a petitioner's
25 lack of diligence, account for the failure to file a timely claim, equitable tolling of the statute of
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[5] In computing the running of the statute of limitations, the day an order or judgment becomes final is excluded and time begins to run on the day after the judgment becomes final. See Patterson v. Stewart, 251 F.3d 1243, 1247 (9th Cir. 2001) (Citing Rule 6 of the Federal Rules of Civil Procedure).

limitations may be appropriate." Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999). "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." Holland, 560 U.S. at 651-652; Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807 (2005). "[T]he threshold necessary to trigger equitable tolling under AEDPA is very high, lest the exceptions swallow the rule." Miranda v. Castro, 292 F. 3d 1062, 1066 (9th Cir. 2002) (citation omitted). As a consequence, "equitable tolling is unavailable in most cases." Miles, 187 F. 3d at 1107.

Here, Petitioner has made no express claim of entitlement to equitable tolling and, based on the record now before the Court, the Court sees no basis for such a claim. Accordingly, Petitioner is not entitled to equitable tolling. Thus, the petition is untimely and should be dismissed.

RECOMMENDATION

Accordingly, the Court HEREBY RECOMMENDS that the motion to dismiss (Doc. 15), be GRANTED and the habeas corpus petition be DISMISSED for Petitioner's failure to comply with 28 U.S.C. § 2244(d)'s one year limitation period and as a successive petition.

This Findings and Recommendation is submitted to the United States District Court Judge assigned to this case, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within 21 days after being served with a copy, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendation." Replies to the objections shall be served and filed within ten court days (plus three days if served by mail) after service of the objections. The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: **November 21, 2014** **/s/ Jennifer L. Thurston**
UNITED STATES MAGISTRATE JUDGE