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

**ABEL VALENCIA,**  
  
Petitioner,  
  
**v.**  
  
**C.E. DUCART, Warden,**  
  
Respondent.

Case No. 1:14-cv-01144 MJS (HC)  
**ORDER GRANTING RESPONDENT'S  
MOTION TO DISMISS**  
**[Doc. 9]**

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 Brian G. Smiley 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. 7, 8.)

**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 Kings, upon being convicted by a jury on July 7, 2010 of possession of heroin while confined in prison. (See Lodged Doc. 1.) On the same date, Petitioner was sentenced to a determinate state prison term of six years to run consecutive to his prior term of eleven years. (Id.)

1 Petitioner filed a notice of appeal with the California Court of Appeal, Fifth  
2 Appellate District. (Lodged Doc. 2.) However, as Petitioner did not file an opening brief,  
3 the matter was dismissed on December 16, 2010. (Id.)

4 Petitioner sought collateral review of his conviction by way of filing eight petitions  
5 for relief with the California courts starting in October 2012. (Lodged Docs 3-17.) All of  
6 the petitions were denied.

7 Petitioner filed the instant federal habeas petition on July 20, 2014.<sup>1</sup> (Pet.) On  
8 September 23, 2014, Respondent filed a Motion to Dismiss the petition as having been  
9 filed outside the one-year limitations period prescribed by 28 U.S.C. § 2244(d). (Mot. to  
10 Dismiss, ECF No. 9.) Petitioner did not file a response to the motion to dismiss.

## 11 **II. DISCUSSION**

### 12 **A. Procedural Grounds for Motion to Dismiss**

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

17 The Ninth Circuit has allowed respondents to file a motion to dismiss in lieu of an  
18 answer if the motion attacks the pleadings for failing to exhaust state remedies or being  
19 in violation of the state’s procedural rules. See, e.g., O’Bremski v. Maass, 915 F.2d 418,  
20 420 (9th Cir. 1990) (using Rule 4 to evaluate motion to dismiss petition for failure to  
21 exhaust state remedies); White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (using  
22 Rule 4 as procedural grounds to review motion to dismiss for state procedural default);  
23 Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n. 12 (E.D. Cal. 1982) (same). Thus, a  
24 respondent can file a motion to dismiss after the court orders a response, and the Court  
25 should use Rule 4 standards to review the motion. See Hillery, 533 F. Supp. at 1194 &  
26 n. 12.

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27 <sup>1</sup> Although the petition was filed with the court on July 23, 2014, Petitioner signed the petition on  
28 July 20, 2014. Accordingly, the Court considers the petition to be filed on July 20, 2014.

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

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

8 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death  
9 Penalty Act of 1996 (hereinafter "AEDPA"). AEDPA imposes various requirements on all  
10 petitions for writ of habeas corpus filed after the date of its enactment. Lindh v. Murphy,  
11 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th  
12 Cir. 1997).

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

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

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

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

24 (C) the date on which the constitutional right asserted was initially  
25 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

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

28 (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).

Under § 2244(d)(1)(A), the limitations period begins running on the date that the petitioner's direct review became final or the date of the expiration of the time for seeking such review. In this case, Petitioner filed an appeal with the California Court of Appeal, Fifth Appellate District. The court dismissed the petition on December 16, 2010. The Court of Appeal's decision became final the same day. See Cal. Rules of Court 8.264(b)(2)(B); 8.387(b)(2). Petitioner did not seek review in the California Supreme Court. Accordingly, for purposes of § 2244(d)(1)(A), Petitioner's judgment of conviction became final on December 26, 2010, upon expiration of the ten-day period within which to file and serve a petition for review with the California Supreme Court. 8.500(e)(1). The AEDPA statute of limitations began to run the following day, on December 27, 2010. Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001).

Absent applicable tolling, Petitioner had one year from December 27, 2010, in which to file his federal petition for writ of habeas corpus. However, Petitioner delayed in filing the instant petition until July 20, 2014, nearly two and a half years after the statute of limitations period expired. Accordingly, the instant petition is barred by the statute of limitations unless the statute was tolled or its commencement was delayed. Petitioner has made no showing that the statute of limitations should commence at a later date under § 2244(d)(1)(B)-(D). Accordingly, Petitioner may only rely on tolling to attempt to show that the petition is not barred by the statute of limitations.

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

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 As stated above, the statute of limitations period began on December 27, 2010.  
11 According to the state court records provided by Respondent, Petitioner filed his first  
12 petition for collateral relief, in the form of a petition for writ of habeas corpus, on October  
13 29, 2012 nearly ten months after the statute of limitations period had expired. (Lodged  
14 Doc. 3.) State petitions filed after the expiration of the statute of limitations period have  
15 no tolling effect. Ferguson v. Palmateer, 321 F.3d 820 (9th Cir. 2003) ("section 2244(d)  
16 does not permit the reinitiation of the limitations period that has ended before the state  
17 petition was filed.")

18 Accordingly, the limitations period expired one year after its commencement on  
19 December 27, 2010. Petitioner filed the instant petition on July 20, 2014, two and a half  
20 years after the limitations period expired. Accordingly, the petition is untimely.

21 **D. Equitable Tolling**

22 The limitations period is subject to equitable tolling if the petitioner demonstrates:  
23 "(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, 2560-62 (2010);  
25 quoting Pace v. DiGuglielmo. Petitioner bears the burden of alleging facts that would  
26 give rise to tolling. Pace, 544 U.S. at 418; Hinton v. Pac. Enters., 5 F.3d 391, 395 (9th  
27 Cir.1993).

28 Petitioner has not presented any evidence regarding equitable tolling.

1 Accordingly, Petitioner is not entitled to the benefit of equitable tolling and his petition  
2 remains untimely.

3 **III. CONCLUSION**

4 As explained, Petitioner failed to file the instant petition for Habeas Corpus within  
5 the one year limitation period required by 28 U.S.C. § 2244(d). Petitioner is neither  
6 entitled to the benefit of statutory or equitable tolling. Based on the foregoing, this Court  
7 recommends that Respondent's motion to dismiss be GRANTED.

8 **IV. ORDER**

9 Accordingly, IT IS HEREBY ORDERED that:

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

23  
24 IT IS SO ORDERED.

25 Dated: November 4, 2014 /s/ Michael J. Seng  
26 UNITED STATES MAGISTRATE JUDGE  
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