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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

VERNON STEWARD, JR.,) Case No.: 1:15-cv-00288-LJO-JLT
)
) Petitioner,) FINDINGS AND RECOMMENDATIONS TO
) GRANT RESPONDENT’S MOTION TO DISMISS
) FIRST AMENDED PETITION AS UNTIMELY
)
) v.)
) J. SOTO,)
) ORDER DIRECTING OBJECTIONS TO BE FILED
) WITHIN TWENTY-ONE DAYS
) Respondent.)

The instant petition was filed on January 28, 2015, in the U.S. District Court for the Central District of California¹ (Doc. 1, p. 8) and later transferred to this Court. (Doc. 4). On February 26, 2015, the Court issued an Order to Show Cause why the petition should not be dismissed as untimely. (Doc. 9). On March 16, 2015, Petitioner filed the first amended petition (Doc. 10) and filed his response to the Order to Show Cause. (Doc. 11) In it he disputed the Court’s timeliness analysis based upon facts

¹ In Houston v. Lack, the Supreme Court held that a pro se habeas petitioner’s notice of appeal is deemed filed on the date of submission to prison authorities for mailing, as opposed to the actual date of its receipt by the court clerk. Id., 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 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); 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). Thus, 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 and dated it January 28, 2014. (Doc. 1, p. 8). However, the Court, as did Respondent, will assume this was an error and that Petitioner intended to date the petition as of January 28, 2015, since the California Supreme Court denied his state habeas petition on January 14, 2015. (Id., p. 9).

1 that could not be verified, given the state of the record at that time. Id. Accordingly, the Court ordered
2 Respondent to file a response. (Doc. 14). On June 5, 2015, Respondent filed the instant motion to
3 dismiss, contending that the petition is untimely and lodging documents with the Court in support of
4 that contention. (Docs. 18; 21). Petitioner has not filed an opposition to the motion to dismiss.

5 DISCUSSION

6 A. Procedural Grounds for Motion to Dismiss

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

12 The Ninth Circuit has allowed Respondent’s to file a Motion to Dismiss in lieu of an Answer if
13 the motion attacks the pleadings for failing to exhaust state remedies or being in violation of the state’s
14 procedural rules. See, e.g., O’Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990) (using Rule 4 to
15 evaluate motion to dismiss petition for failure to exhaust state remedies); White v. Lewis, 874 F.2d 599,
16 602-03 (9th Cir. 1989) (using Rule 4 as procedural grounds to review motion to dismiss for state
17 procedural default); Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n.12 (E.D. Cal. 1982) (same).

18 B. Limitation Period For Filing Petition For Writ Of Habeas Corpus

19 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996
20 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas corpus filed
21 after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997); Jeffries
22 v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc), *cert. denied*, 118 S.Ct. 586 (1997). The instant
23 petition was filed on January 28, 2015, and thus, it is subject to the provisions of 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) reads:

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

28 (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;

1 (B) the date on which the impediment to filing an application created by
2 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;

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

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

8 (2) The time during which a properly filed application for State post-conviction or
9 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.

10 28 U.S.C. § 2244(d).

11 In most cases, the limitation period begins running on the date that the petitioner's direct review
12 became final. Here, the Petitioner was convicted of seven counts of second degree robbery and one
13 count of participating in a criminal street gang and sentenced to a determinate state prison sentence of
14 25 years, 8 months. (Lodged Document ("LD") 1). Petitioner filed a petition for review that was
15 denied by the California Supreme Court on August 22, 2001. (LD 4). Thus, direct review would have
16 concluded on November 20, 2001, when the ninety day period for seeking review in the United States
17 Supreme Court expired. Barefoot v. Estelle, 463 U.S. 880, 887 (1983); Bowen v. Roe, 188 F.3d 1157,
18 1159 (9th Cir.1999); Smith v. Bowersox, 159 F.3d 345, 347 (8th Cir.1998). Petitioner would then have
19 one year from the following day, November 21, 2001, or until November 20, 2002, absent applicable
20 tolling, within which to file his federal petition for writ of habeas corpus.

21 As mentioned, the instant petition was filed on January 28, 2015, over twelve years after the
22 date the one-year period would have expired. Thus, unless Petitioner is entitled to either statutory or
23 equitable tolling, the instant petition is untimely and should be dismissed.

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

25 Under the AEDPA, the statute of limitations is tolled during the time that a properly filed
26 application for state post-conviction or other collateral review is pending in state court. 28 U.S.C. §
27 2244(d)(2). A properly filed application is one that complies with the applicable laws and rules
28 governing filings, including the form of the application and time limitations. Artuz v. Bennett, 531

1 U.S. 4, 8 (2000). An application is pending during the time that ‘a California petitioner completes a
2 full round of [state] collateral review,’ so long as there is no unreasonable delay in the intervals
3 between a lower court decision and the filing of a petition in a higher court. Delhomme v. Ramirez,
4 340 F. 3d 817, 819 (9th Cir. 2003), abrogated on other grounds as recognized by Waldrip v. Hall, 548
5 F. 3d 729 (9th Cir. 2008)(per curium)(internal quotation marks and citations omitted); see Evans v.
6 Chavis, 546 U.S. 189, 193-194 (2006); see Carey v. Saffold, 536 U.S. 214, 220, 222-226 (2002); see
7 also, Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999).

8 Nevertheless, there are circumstances and periods of time when no statutory tolling is allowed.
9 For example, no statutory tolling is allowed for the period of time between finality of an appeal and the
10 filing of an application for post-conviction or other collateral review in state court, because no state
11 court application is “pending” during that time. Nino, 183 F.3d at 1006-1007; Raspberry v. Garcia, 448
12 F.3d 1150, 1153 n. 1 (9th Cir. 2006). Similarly, no statutory tolling is allowed for the period between
13 finality of an appeal and the filing of a federal petition. Id. at 1007. In addition, the limitation period
14 is not tolled during the time that a federal habeas petition is pending. Duncan v. Walker, 563 U.S. 167,
15 181-182, 121 S.Ct. 2120 (2001); see also, Fail v. Hubbard, 315 F. 3d 1059, 1060 (9th Cir. 2001)(as
16 amended on December 16, 2002). Further, a petitioner is not entitled to statutory tolling where the
17 limitation period has already run prior to filing a state habeas petition. Ferguson v. Palmateer, 321 F.3d
18 820, 823 (9th Cir. 2003) (“section 2244(d) does not permit the reinitiation of the limitations period that
19 has ended before the state petition was filed.”); Jiminez v. White, 276 F. 3d 478, 482 (9th Cir. 2001).
20 Finally, a petitioner is not entitled to continuous tolling when the petitioner’s later petition raises
21 unrelated claims. See Gaston v. Palmer, 447 F.3d 1165, 1166 (9th Cir. 2006).

22 Here, Respondent has lodged documents with the Court establishing that Petitioner filed the
23 following state habeas petitions: (1) petition filed in the Superior Court of Kern County on September
24 20, 2007, and denied on November 29, 2007 (LD 5; 6); (2) petition filed in the 5th DCA on December
25 16, 2007, and denied on January 10, 2008)(LD 7; 8); and (3) petition filed in the California Supreme
26 Court on September 17, 2014 and denied on January 14, 2015 (LD 9; 10).

27 None of these state habeas petitions, however, entitle Petitioner to statutory tolling under the
28 AEDPA. A petitioner is not entitled to tolling where the limitations period has already run prior to

1 filing a state habeas petition. Green v. White, 223 F.3d 1001, 1003 (9th Cir. 2000); Jiminez v. Rice, 276
2 F.3d 478 (9th Cir. 2001); see Webster v. Moore, 199 F.3d 1256, 1259 (11th Cir. 2000)(same); Ferguson
3 v. Palmateer, 321 F.3d 820 (9th Cir. 2003)(“section 2244(d) does not permit the reinitiation of the
4 limitations period that has ended before the state petition was filed.”); Jackson v. Dormire, 180 F.3d
5 919, 920 (8th Cir. 1999) (petitioner fails to exhaust claims raised in state habeas corpus filed after
6 expiration of the one-year limitations period). Here, as mentioned, the limitations period expired on
7 November 20, 2002, approximately five years *before* Petitioner filed his first state habeas petition.
8 Accordingly, he cannot avail himself of the statutory tolling provisions of the AEDPA. Hence, unless
9 Petitioner is entitled to equitable tolling, the petition is untimely and should be dismissed.

10 D. Equitable Tolling.

11 The running of the one-year limitation period under 28 U.S.C. § 2244(d) is subject to equitable
12 tolling in appropriate cases. See Holland v. Florida, 560 U.S. 631, 651-652, 130 S.Ct. 2549, 2561
13 (2010); Calderon v. United States Dist. Ct., 128 F.3d 1283, 1289 (9th Cir. 1997). The limitation period
14 is subject to equitable tolling when “extraordinary circumstances beyond a prisoner’s control make it
15 impossible to file the petition on time.” Shannon v. Newland, 410 F. 3d 1083, 1089-1090 (9th Cir.
16 2005)(internal quotation marks and citations omitted). “When external forces, rather than a petitioner’s
17 lack of diligence, account for the failure to file a timely claim, equitable tolling of the statute of
18 limitations may be appropriate.” Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999). “Generally, a
19 litigant seeking equitable tolling bears the burden of establishing two elements: “(1) that he has been
20 pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.”
21 Holland, 560 U.S. at 651-652; Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807 (2005). “[T]he
22 threshold necessary to trigger equitable tolling under AEDPA is very high, lest the exceptions swallow
23 the rule.” Miranda v. Castro, 292 F. 3d 1062, 1066 (9th Cir. 2002)(citation omitted). As a
24 consequence, “equitable tolling is unavailable in most cases.” Miles, 187 F. 3d at 1107.

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

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1 **CONCLUSION**

2 The burden of demonstrating that the AEDPA’s one-year limitation period was sufficiently
3 tolled, whether statutorily or equitable, rests with the petitioner. See, e.g., Pace v. DiGuglielmo, 544
4 U.S. 408, 418 (2005); Gaston v. Palmer, 417 F.3d 1030, 1034 (9th Cir. 2005); Smith v. Duncan, 297
5 F.3d 809, 814 (9th Cir. 2002); Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002). Here,
6 Respondent notes that Petitioner also filed a prior federal habeas petition that was dismissed due to lack
7 of exhaustion. (LD 11). As Respondent correctly points out, however, petitioners are not entitled to
8 statutory tolling for the pendency of federal petitions. E.g., Duncan v. Walker, 533 U.S. 167, 181-182
9 (2001).

10 Accordingly, and for the reasons discussed above, the Court finds and concludes that Petitioner
11 has not met his burden with respect to the tolling issue. Accordingly, the petition is late and should
12 therefore be dismissed.

13 **RECOMMENDATION**

14 Accordingly, the Court HEREBY RECOMMENDS that the motion to dismiss be GRANTED
15 and the first amended habeas corpus petition be DISMISSED for Petitioner’s failure to comply with 28
16 U.S.C. § 2244(d)’s one-year limitation period.

17 This Findings and Recommendation is submitted to the United States District Court Judge
18 assigned to this case, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304 of the
19 Local Rules of Practice for the United States District Court, Eastern District of California. **Within 21**
20 **days** after being served with a copy, any party may file written objections with the court and serve a
21 copy on all parties. Such a document should be captioned “Objections to Magistrate Judge’s Findings
22 and Recommendation.” Replies to the objections shall be served and filed **within 10 days** (plus three
23 days if served by mail) after service of the objections. The Court will then review the Magistrate
24 Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(C).

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1 The parties are advised that failure to file objections within the specified time may waive the
2 right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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4 IT IS SO ORDERED.

5 Dated: July 28, 2015

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE

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