

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

CESAR O. CERVANTES,
Petitioner,

v.

KIM HOLLAND,
Respondent.

Case No. 1:15-cv-00623 AWI MJS (HC)

**FINDINGS AND RECOMMENDATION
REGARDING RESPONDENT'S MOTION
TO DISMISS**

[Doc. 11]

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 Maria G. Chan, of the Office of the Attorney General for the State of California.

I. BACKGROUND

On April 16, 2015, Petitioner filed the instant petition challenging a March 10, 2012 prison disciplinary proceeding finding Petitioner guilty of indecent exposure with masturbation triggering a loss of ninety days of good time credits. (See Mot. to Dismiss, Ex. 1, ECF No. 11-1, p. 12-15.) Petitioner challenges the disciplinary violation in the instant proceeding claiming that the investigatory officer did not perform his assigned duties and that there was insufficient evidence to support finding him guilty of the rule violation. (See Pet.)

1 Starting on March 18, 2013, Petitioner filed three collateral challenges with
2 respect to the administrative decision in the state courts, all petitions for writ of habeas
3 corpus, as follows:

- 4 1. Kings County Superior Court
5 Filed: March 18, 2013¹;
6 Denied: September 3, 2013;
- 7 2. California Court of Appeal, Fifth Appellate District
8 Filed: October 20, 2013²;
9 Denied: January 9, 2014;
- 10 3. California Supreme Court
11 Filed: January 19, 2014³;
12 Denied: April 23, 2014;

13 (Mot. to Dismiss, Exs. 1-9.)

14 On April 16, 2015⁴, Petitioner filed the instant federal Petition for Writ of Habeas
15 Corpus in this Court. On June 29, 2015, Respondent filed a Motion to Dismiss the
16 petition for failure to exhaust state judicial remedies, procedural default, and for being
17 filed outside the one-year limitations period prescribed by 28 U.S.C. § 2244(d). (Mot. to
18 Dismiss, ECF No. 11.) Over thirty days have passed and Petitioner has not filed an
19 opposition to the motion to dismiss. Accordingly, the motion stands ready for
20 adjudication.

21 **II. DISCUSSION**

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

23 Rule 4 of the Rules Governing Section 2254 Cases allows a district court 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 (1988); Campbell v. Henry, 614 F.3d
26 1056 (9th Cir. 2010); see also Rule 3(d) of the Rules Governing Section 2254 Cases. Although the petition
27 was filed on March 21, 2013, pursuant to the mailbox rule the Court considers the petition filed on March
28 18, 2013, the date Petitioner signed the petition.

² Although the petition was filed on November 8, 2013, pursuant to the mailbox rule the Court
considers the petition filed on October 20, 2013, the date Petitioner signed the petition.

³ Although the petition was filed on February 14, 2014, pursuant to the mailbox rule the Court
considers the petition filed on January 19, 2014, the date Petitioner signed the petition.

⁴ Although the petition was filed on April 22, 2015, pursuant to the mailbox rule the Court
considers the petition filed on April 16, 2015, the date Petitioner signed the petition.

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

4 The Ninth Circuit has allowed respondents to file a motion to dismiss in lieu of an
5 answer if the motion attacks the pleadings for failing to exhaust state remedies or being
6 in violation of the state’s procedural rules. See, e.g., O’Bremski v. Maass, 915 F.2d 418,
7 420 (9th Cir. 1990) (using Rule 4 to evaluate motion to dismiss petition for failure to
8 exhaust state remedies); White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (using
9 Rule 4 as procedural grounds to review motion to dismiss for state procedural default);
10 Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n. 12 (E.D. Cal. 1982) (same). Thus, a
11 respondent can file a motion to dismiss after the court orders a response, and the Court
12 should use Rule 4 standards to review the motion. See Hillery, 533 F. Supp. at 1194 &
13 n. 12.

14 For the sake of judicial efficiency, the Court shall review Respondent’s motion to
15 dismiss based on a violation of the one-year limitations period under 28 U.S.C. §
16 2244(d)(1). Because Respondent’s claim is similar in procedural standing to a motion to
17 dismiss for failure to exhaust state remedies or for state procedural default and
18 Respondent has not yet filed a formal answer, the Court will review Respondent’s motion
19 to dismiss pursuant to its authority under Rule 4.

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

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

26 In this case, the petition was filed on April 16, 2015, and is subject to the
27 provisions of AEDPA. AEDPA imposes a one-year period of limitation on petitioners
28 seeking to file a federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As

1 amended, § 2244, subdivision (d) reads:

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

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

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

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

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

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

23 28 U.S.C. § 2244(d).

24 The provisions of § 2244(d)(1)(D), rather than § 2244(d)(1)(A), apply to habeas
25 corpus actions challenging decisions of administrative bodies. Shelby v. Bartlett, 391
26 F.3d 1061, 1066 (9th Cir. 2004); Redd v. McGrath, 343 F.3d 1077, 1084 (9th Cir. 2003).
27 In such cases, the limitation period begins when the petitioner receives notice of denial
28 of the final administrative appeal from the administrative decision at issue. Id.; see also,
Mardesich v. Cate, 668 F.3d 1164, 1172 (9th Cir. 2012) (generally, state agency's denial
of an administrative appeal constitutes the "factual predicate" for habeas claims
challenging state administrative actions affecting "fact or duration of . . . confinement").

In this case, Petitioner's administrative appeal was denied at the third and final
level on July 27, 2012. (See Mot. to Dismiss, Ex. 1, ECF No. 11-1, p. 27.) The limitations
period began to run the following day, on July 28, 2012. See Patterson v. Stewart, 251
F.3d 1243, 1247 (9th Cir.2001).

1 Petitioner would have one year from July 28, 2012, absent applicable tolling, in
2 which to file his federal petition for writ of habeas corpus. However, Petitioner delayed in
3 filing the instant petition until April 16, 2015, well after the statute of limitations period
4 expired. Absent the later commencement of the statute of limitations or any applicable
5 tolling, the instant petition is barred by the statute of limitations.

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

7 28 U.S.C. § 2244(d)(2) states that the “time during which a properly filed
8 application for State post-conviction or other collateral review with respect to the
9 pertinent judgment or claim is pending shall not be counted toward” the one year
10 limitation period. 28 U.S.C. § 2244(d)(2). In Carey v. Saffold, the Supreme Court held
11 the statute of limitations is tolled where a petitioner is properly pursuing post-conviction
12 relief, and the period is tolled during the intervals between one state court's disposition of
13 a habeas petition and the filing of a habeas petition at the next level of the state court
14 system. 536 U.S. 214, 216 (2002); see also Nino v. Galaza, 183 F.3d 1003, 1006 (9th
15 Cir. 1999). Nevertheless, state petitions will only toll the one-year statute of limitations
16 under § 2244(d)(2) if the state court explicitly states that the post-conviction petition was
17 timely or was filed within a reasonable time under state law. Pace v. DiGuglielmo, 544
18 U.S. 408 (2005); Evans v. Chavis, 546 U.S. 189 (2006). Claims denied as untimely or
19 determined by the federal courts to have been untimely in state court will not satisfy the
20 requirements for statutory tolling. Id.

21 Here, the statute of limitations began to run on July 27, 2012, the date Petitioner's
22 administrative appeal was denied. Petitioner filed state habeas petitions beginning on
23 March 18, 2013, in the Kings County Superior Court. As of March 18, 2013, 233 days of
24 the limitations period had elapsed. Respondent does not challenge Petitioner's right to
25 tolling during the pendency of Petitioner's state petitions and the interval between the
26 filing of the petitions. Accordingly, Petitioner is entitled to tolling from March 18, 2013,
27 until the date the petition filed in the California Supreme Court was denied on April 23,
28 2014. As 233 days of the limitations period already elapsed, 132 days remained as of

1 March 18, 2013.

2 Accordingly, the statute of limitations expired 132 days later on July 28, 2014.
3 Petitioner filed the present petition on April 16, 2015, over eight months after the
4 expiration of the year statute of limitations period. The instant federal petition is untimely.

5 **D. Equitable Tolling**

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

14 **E. Exhaustion and Procedural Default**

15 Respondent, in her motion to dismiss, asserts alternative grounds for dismissal
16 based on failure to exhaust state remedies and the procedural default rule. (See Mot. to
17 Dismiss at 4-6.) As the petition is untimely and subject to dismissal, in an exercise of
18 judicial efficiency, the Court will not address Respondent's claims regarding failure to
19 exhaust and procedural default.

20 **III. CONCLUSION**

21 As explained above, Petitioner failed to file the instant petition for habeas corpus
22 within the one year limitation period required by 28 U.S.C. § 2244(d). Furthermore, while
23 Petitioner is entitled to the benefit of statutory tolling, the petition remains untimely.
24 Moreover, Petitioner is not entitled to equitable tolling. Based on the foregoing, this Court
25 recommends that Respondent's motion to dismiss be GRANTED.

26 **IV. RECOMMENDATION**

27 Accordingly, the Court HEREBY RECOMMENDS that the motion to dismiss for
28 Petitioner's failure to comply with 28 U.S.C. § 2244(d)'s one year limitation period be

1 GRANTED.

2 This Findings and Recommendation is submitted to the assigned United
3 States District Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B)
4 and Rule 304 of the Local Rules of Practice for the United States District Court, Eastern
5 District of California. Within thirty (30) days after the date of service of this Findings and
6 Recommendation, any party may file written objections with the Court and serve a copy
7 on all parties. Such a document should be captioned "Objections to Magistrate Judge's
8 Findings and Recommendation." Replies to the Objections shall be served and filed
9 within fourteen (14) days after service of the Objections. The Finding and
10 Recommendation will then be submitted to the District Court for review of the Magistrate
11 Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(c). The parties are advised that failure
12 to file objections within the specified time may waive the right to appeal the District
13 Court's order. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014).

14
15 IT IS SO ORDERED.

16 Dated: August 5, 2015

17 /s/ Michael J. Seng
18 UNITED STATES MAGISTRATE JUDGE

19
20
21
22
23
24
25
26
27
28