

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

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

BRETT RONALD MATTESON,)	Case No.: 1:15-cv-01015-LJO-JLT
)	
Petitioner,)	FINDINGS AND RECOMMENDATIONS TO
)	GRANT RESPONDENT’S MOTION TO DISMISS
v.)	(Doc. 14)
)	
JOE LIZZARAGA, Warden,)	ORDER DIRECTING THAT OBJECTIONS BE
)	FILED WITHIN TWENTY-ONE DAYS
Respondent.)	

Respondent filed the instant motion to dismiss the petition as untimely. (Doc. 14). The Court granted Petitioner thirty days within which to file an opposition but he has not done so. (Doc. 16). Because the Court concludes the petition was not filed within the one-year period, it recommends that it be **DISMISSED**.

I. Procedural Grounds for Motion to Dismiss

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 ...”

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,

1 602-03 (9th Cir. 1989) (using Rule 4 as procedural grounds to review motion to dismiss for state
2 procedural default); Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n.12 (E.D. Cal. 1982) (same). Thus, a
3 Respondent can file a Motion to Dismiss after the court orders a response, and the Court should use
4 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. 2244(d)(1)'s
6 one-year limitation period. Because Respondent's Motion to Dismiss is similar in procedural standing
7 to a Motion to Dismiss for failure to exhaust state remedies or for state procedural default and
8 Respondent has not yet filed a formal Answer, the Court will review Respondent's Motion to Dismiss
9 pursuant to its authority under Rule 4.

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

11 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996
12 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas corpus filed
13 after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997); Jeffries v.
14 Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc), *cert. denied*, 118 S.Ct. 586 (1997). The instant
15 petition was filed on June 30, 2015, and thus, it is subject to the provisions of the AEDPA.

16 The AEDPA imposes a one year period of limitation on petitioners seeking to file a federal
17 petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As amended, § 2244, subdivision (d) reads:

18 (1) A 1-year period of limitation shall apply to an application for a writ of habeas
19 corpus by a person in custody pursuant to the 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 conclusion of direct
21 review or the expiration of the time for seeking such review;

22 (B) the date on which the impediment to filing an application created by
23 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 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 presented
could have been discovered through the exercise of due diligence.

27 (2) The time during which a properly filed application for State post-conviction or
28 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.

1 28 U.S.C. § 2244(d).

2 In most cases, the limitation period begins running on the date that the petitioner's direct review
3 became final. Here, the Petitioner was convicted on January 29, 2010, and sentenced to a determinate
4 state prison term of 37 years and 8 months. (Lodged Document ("LD") 1; 2). Petitioner filed a direct
5 appeal with the California Court of Appeal, Fifth Appellate District ("5th DCA"), which remanded
6 count 47 for re-sentencing but, in all other respects, affirmed the convictions and sentence. (LD 2).
7 Petitioner filed a petition for review in the California Supreme Court that was denied on December 14,
8 2011. (LD 4). Petitioner was re-sentenced by the Superior Court on April 24, 2013. (LD 5).
9 Petitioner did not appeal his re-sentencing.

10 California state law governs the period within which prisoners have to file an appeal and, in
11 turn, that law governs the date of finality of convictions. See, e.g., Mendoza v. Carey, 449 F.3d 1065,
12 1067 (9th Cir. 2006); Lewis v. Mitchell, 173 F.Supp.2d 1057, 1060 (C.D. Cal. 2001)(California
13 conviction becomes final 60 days after the superior court proceedings have concluded, citing prior Rule
14 of Court, Rule 31(d)). Pursuant to California Rules of Court, Rule 8.308(a), a criminal defendant
15 convicted of a felony must file his notice of appeal within sixty days of the rendition of judgment. See
16 People v. Mendez, 19 Cal.4th 1084, 1086, 969 P.2d 146, 147 (1999)(citing prior Rule of Court, Rule
17 31(d)). Because Petitioner did not file a notice of appeal in the 5th DCA, his direct review concluded on
18 June 23, 2013, when the sixty-day period for filing a notice of appeal expired. The one-year period
19 under the AEDPA would have commenced the following day, on June 24, 2013, and Petitioner would
20 have had one year from that date, or until June 23, 2014, within which to file his federal petition for
21 writ of habeas corpus. See Patterson v. Stewart, 251 F.3d 1243, 1245 (9th Cir.2001).

22 The instant petition was filed on June 30, 2015, over a year after the date the one-year period
23 would have expired. Thus, unless Petitioner is entitled to either statutory or equitable tolling, the
24 instant petition is untimely and should be dismissed.

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

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

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

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

23 Here, Respondent has lodged documents with the Court establishing that Petitioner filed a
24 single state habeas petition in the California Supreme Court on April 15, 2015¹ (LD 6), and that this
25

26 ¹ In Houston v. Lack, the Supreme Court held that a pro se petitioner’s notice of appeal is deemed filed on the date of its
27 submission to prison authorities for mailing, as opposed to the actual date of its receipt by the court clerk. Id., 487 U.S. 166,
28 276, 108 S.Ct. 2379, 2385 (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 applies 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, 1268-69 (9th Cir.
2000); Stillman v. LaMarque, 319 F.3d 1199, 1201 (9th Cir. 2003). The date the petition is signed may be considered the

1 petition was denied on June 24, 2015. (LD 7).

2 However, this state petition affords Petitioner no statutory tolling under the AEDPA. A
3 petitioner is not entitled to tolling where the limitations period has already run prior to filing a state
4 habeas petition. Green v. White, 223 F.3d 1001, 1003 (9th Cir. 2000); Jiminez v. Rice, 276 F.3d 478
5 (9th Cir. 2001); see Webster v. Moore, 199 F.3d 1256, 1259 (11th Cir. 2000)(same); Ferguson v.
6 Palmateer, 321 F.3d 820 (9th Cir. 2003)(“section 2244(d) does not permit the reinitiation of the
7 limitations period that has ended before the state petition was filed.”); Jackson v. Dormire, 180 F.3d
8 919, 920 (8th Cir. 1999) (petitioner fails to exhaust claims raised in state habeas corpus filed after
9 expiration of the one-year limitations period). Here, as mentioned, the limitations period expired on
10 June 23, 2014, approximately ten months *before* Petitioner filed his first state habeas petition.
11 Accordingly, he cannot avail himself of the statutory tolling provisions of the AEDPA.

12 Nor does the prior federal habeas petition provide any relief to Petitioner since no statutory
13 tolling accrues during the pendency of a federal habeas petition. E.g., Duncan v. Walker, 533 U.S. 167,
14 181 (2001). Accordingly, unless Petitioner is entitled to equitable tolling, the petition is untimely.

15 D. Equitable Tolling.

16 The running of the one-year limitation period under 28 U.S.C. § 2244(d) is subject to equitable
17 tolling in appropriate cases. See Holland v. Florida, 560 U.S. 631, 651-652, 130 S.Ct. 2549, 2561
18 (2010); Calderon v. United States Dist. Ct., 128 F.3d 1283, 1289 (9th Cir. 1997). The limitation period
19 is subject to equitable tolling when “extraordinary circumstances beyond a prisoner’s control make it
20 impossible to file the petition on time.” Shannon v. Newland, 410 F. 3d 1083, 1089-1090 (9th Cir.
21 2005)(internal quotation marks and citations omitted). “When external forces, rather than a petitioner’s
22 lack of diligence, account for the failure to file a timely claim, equitable tolling of the statute of
23 limitations may be appropriate.” Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999). “Generally, a
24 litigant seeking equitable tolling bears the burden of establishing two elements: “(1) that he has been
25 pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.”

26
27

earliest possible date an inmate could submit his petition to prison authorities for filing under the mailbox rule. Jenkins v.
28 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 his petition on June 30, 2015. (Doc. 1, p. 15).

1 Holland, 560 U.S. at 651-652; Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807 (2005). “[T]he
2 threshold necessary to trigger equitable tolling under AEDPA is very high, lest the exceptions swallow
3 the rule.” Miranda v. Castro, 292 F. 3d 1062, 1066 (9th Cir. 2002)(citation omitted). As a
4 consequence, “equitable tolling is unavailable in most cases.” Miles, 187 F. 3d at 1107.

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

8 CONCLUSION

9 The burden of demonstrating that the AEDPA’s one-year limitation period was sufficiently
10 tolled, whether statutorily or equitable, rests with the petitioner. See, e.g., Pace v. DiGuglielmo, 544
11 U.S. 408, 418 (2005); Gaston v. Palmer, 417 F.3d 1030, 1034 (9th Cir. 2005); Smith v. Duncan, 297
12 F.3d 809, 814 (9th Cir. 2002); Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002). For the reasons
13 discussed above, the Court finds and concludes that Petitioner has not met his burden with respect to
14 the tolling issue. Hence, the petition is late and should therefore be dismissed.

15 RECOMMENDATION

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

19 This Findings and Recommendation is submitted to the United States District Court Judge
20 assigned to this case, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304 of the
21 Local Rules of Practice for the United States District Court, Eastern District of California.

22 **Within 21 days** after being served with a copy, any party may file written objections with the court and
23 serve a copy on all parties. Such a document should be captioned “Objections to Magistrate Judge’s
24 Findings and Recommendation.” Replies to the objections shall be served and filed **within 10 days**
25 (plus three days if served by mail) after service of the objections. The Court will then review the
26 Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(C).

27 ///

28 /// The parties are advised that failure to file objections within the specified time may waive the

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

right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: November 5, 2015

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE