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

ANTHONY MCCOY,  
Petitioner,  
v.  
JOHN SOTO,  
Respondent.

Case No. 1:15-cv-01578-LJO-EPG-HC  
FINDINGS AND RECOMMENDATION TO  
GRANT RESPONDENT’S MOTION TO  
DISMISS AND TO DISMISS PETITION  
FOR WRIT OF HABEAS CORPUS  
(ECF No. 13)

Petitioner Anthony McCoy is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 2010 convictions in the Fresno County Superior Court for robbery and criminal threats. As the instant petition was filed outside 28 U.S.C. § 2244(d)(1)’s one-year limitations period, the Court recommends granting Respondent’s motion to dismiss.

**I.**  
**BACKGROUND**

In 2010, Petitioner was convicted in the Fresno County Superior Court of two counts of second-degree robbery (counts 1, 2) and two counts of making criminal threats (counts 3, 4). Petitioner was sentenced to terms of twenty-five years to life on each of the two robbery counts, to be served consecutively. People v. McCoy, No. F061717, 2012 WL 2088660, at \*1 (Cal. Ct. App. June 11, 2012). On June 11, 2012, the California Court of Appeal, Fifth Appellate District,

1 vacated Petitioner’s sentence and remanded for resentencing. Id. at \*4. On August 13, 2012,  
2 Petitioner was resentenced to a term of twenty-five years to life plus fourteen years on count 1  
3 and a consecutive term of twenty-five years to life plus eleven years on count 2. People v.  
4 McCoy, No. F065829, 2014 WL 2157120, at \*1 (Cal. Ct. App. May 23, 2014). On May 23,  
5 2014, the California Court of Appeal, Fifth Appellate District, affirmed the judgment. Id. at \*2.  
6 Petitioner did not seek review in the California Supreme Court. (ECF No. 13 at 2).<sup>1</sup>  
7 Subsequently, Petitioner filed a state habeas petition in the California Supreme Court, which  
8 denied the petition on October 29, 2014. (LDs 5, 6).<sup>2</sup>

9 On October 16, 2015, the Court received the instant petition for writ of habeas corpus.  
10 (ECF No. 1). On January 8, 2016, Respondent filed a motion to dismiss, arguing that the petition  
11 was filed outside the one-year limitations period. (ECF No. 13). Petitioner has not filed any  
12 opposition to the motion to dismiss.

## 13 II.

### 14 DISCUSSION

15 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act  
16 of 1996 (“AEDPA”). The AEDPA imposes various requirements on all petitions for writ of  
17 habeas corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320 (1997);  
18 Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc). As the instant petition was filed  
19 after April 24, 1996, it is subject to the provisions of the AEDPA. The AEDPA imposes a one-  
20 year period of limitation on petitioners seeking to file a federal petition for writ of habeas corpus.  
21 28 U.S.C. § 2244(d)(1). Section 2244(d) provides:

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

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

27 \_\_\_\_\_  
28 <sup>1</sup> Page numbers refer to the ECF page numbers stamped at the top of the page.

<sup>2</sup> “LD” refers to the documents lodged by Respondent on January 29, 2016. (ECF No. 14).

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

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

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

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

16 28 U.S.C. § 2244(d).

17 In most cases, the limitation period begins running on the date that the petitioner's direct  
18 review became final. Since Petitioner did not appeal to the California Supreme Court, his  
19 judgment became final when his time for seeking review with the state's highest court expired.  
20 See Gonzalez v. Thaler, 132 S. Ct. 641, 653–54 (2012). The time to seek review with the  
21 California Supreme Court expired on July 2, 2014, forty days after the Court of Appeal's  
22 decision was filed. See Cal. R. Ct. 8.366(b)(1) (“[A] Court of Appeal decision . . . is final in that  
23 court 30 days after filing.”); Cal. R. Ct. 8.500(e)(1) (“A petition for review must be . . . filed  
24 within 10 days after the Court of Appeal decision is final in that court.”). The one-year  
25 limitations period commenced running the following day, July 3, 2014, and absent tolling, was  
26 set to expire on July 2, 2015. Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001) (citing  
27 Fed. R. Civ. P. 6(a)).

28 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). On August 25, 2014, the  
California Supreme Court received Petitioner's state habeas petition, which was dated July 8,  
2014. (LD 5). Pursuant to the prison mailbox rule, a *pro se* prisoner's habeas petition is filed “at  
the time . . . [it is] delivered . . . to the prison authorities for forwarding to the court clerk.”

1 Hernandez v. Spearman, 764 F.3d 1071, 1074 (9th Cir. 2014) (alteration in original) (internal  
2 quotation marks omitted) (quoting Houston v. Lack, 487 U.S. 266, 276 (1988)). According to the  
3 prison mail log, Petitioner delivered the state habeas petition to the prison authorities for mailing  
4 on August 18, 2014. (ECF No. 13-1 at 2). Thus, Petitioner’s state habeas petition was filed on  
5 August 18, 2014, and the California Supreme Court denied the petition on October 29, 2014.  
6 (LD 6). There is nothing in the record that suggests Petitioner’s state habeas petition was not  
7 properly filed, and Respondent makes no such argument. Thus, Petitioner was entitled to  
8 statutory tolling while his state habeas petition was pending.

9         On October 16, 2015, this Court received the instant federal petition for writ of habeas  
10 corpus, which was dated October 6, 2015. (ECF No. 1). Even assuming Petitioner delivered the  
11 instant petition to prison authorities for mailing on October 6, 2015, the Court finds that the  
12 petition was filed outside the one-year limitations period. Forty-six days elapsed between the  
13 date Petitioner’s state conviction became final (July 2, 2014) and the date Petitioner filed his  
14 state habeas petition in the California Supreme Court (August 18, 2014). The AEDPA’s one-year  
15 clock stopped while Petitioner’s state habeas petition was pending. Thereafter, 341 days elapsed  
16 between the California Supreme Court’s denial of his state petition (October 29, 2014) and the  
17 date Petitioner filed the instant federal petition for writ of habeas corpus (October 6, 2015). This  
18 adds up to a total of 387 days, which is more than the one-year statute of limitations. The  
19 limitations period also is subject to equitable tolling if the petitioner demonstrates ““(1) that he  
20 has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his  
21 way’ and prevented timely filing.” Holland v. Florida, 560 U.S. 631, 649 (2010) (quoting Pace v.  
22 DiGuglielmo, 544 U.S. 408, 418 (2005)). However, Petitioner has not made any showing that he  
23 is entitled to equitable tolling. Indeed, Petitioner failed to oppose this motion to dismiss in any  
24 way. Therefore, the instant petition was not timely filed, and dismissal is warranted on this  
25 ground.

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1 **III.**

2 **RECOMMENDATION**

3 Accordingly, the Court HEREBY RECOMMENDS that:

- 4 1. Respondent’s Motion to Dismiss (ECF No. 13) be GRANTED; and  
5 2. The petition for writ of habeas corpus be DISMISSED as untimely.

6 This Findings and Recommendation is submitted to the assigned United States District  
7 Court Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local  
8 Rules of Practice for the United States District Court, Eastern District of California. Within  
9 **THIRTY (30) days** after service of the Findings and Recommendation, any party may file  
10 written objections with the court and serve a copy on all parties. Such a document should be  
11 captioned “Objections to Magistrate Judge’s Findings and Recommendation.” Replies to the  
12 objections shall be served and filed within fourteen (14) days after service of the objections. The  
13 assigned United States District Court Judge will then review the Magistrate Judge’s ruling  
14 pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within  
15 the specified time may waive the right to appeal the District Court’s order. Wilkerson v.  
16 Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th  
17 Cir. 1991)).

18 IT IS SO ORDERED.

19 Dated: June 7, 2016

20 /s/ Eric P. Gray  
21 UNITED STATES MAGISTRATE JUDGE