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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RICKY TYRONE FOSTER,

 Petitioner,

 v.

DAVID DAVEY, Warden, California State
Prison, Corcoran,

 Respondent.

No. 1:16-cv-00612-DAD-SKO HC

**FINDINGS AND RECOMMENDATION
TO DISMISS PETITION AS UNTIMELY**

(Doc. 18)

Petitioner Ricky Tyrone Foster is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent David Davey, Warden, California State Prison, Corcoran, moves to dismiss the petition for having been filed beyond the one-year statute of limitations. The undersigned recommends that the Court dismiss the petition as untimely.

I. The Pending Petition Is Untimely

On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which applies to all petitions for writ of habeas corpus filed after its enactment. *Lindh v. Murphy*, 521 U.S. 320, 327 (1997). AEDPA provides a one-year period of limitation in which a petitioner may file a petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). The limitations period is measured from the latest of:

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

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

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

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

10 28 U.S.C. § 2244(d)(1).

11 The petition in this case challenges the January 4, 2010, decision of the California Board
12 of Parole Hearings that denied Petitioner parole and deferred his next parole suitability hearing
13 for ten years. The Board's decision became final on May 4, 2010. This means that the statute of
14 limitations period ran through May 4, 2011.¹ Petitioner filed the pending § 2254 petition on May
15 2, 2016. Accordingly, the petition is untimely.

16 **II. Petitioner Did Not Seek Equitable Tolling**

17 The one-year statutory period is intended to protect the federal judicial system from
18 having to address stale claims. *Guillory v. Roe*, 329 F.3d 1015, 1018 (9th Cir. 2003). To
19 effectuate that objective, the bar to achieve equitable tolling is set very high. *Id.* A habeas
20 petitioner is entitled to equitable tolling of the one-year statute of limitations only if the petitioner
21 shows (1) that he has been pursuing his rights diligently and (2) that some extraordinary
22 circumstance prevented timely filing. *See Holland v. Florida*, 560 U.S. 631, 634, 648 (2010);
23 *Ramirez v. Yates*, 571 F.3d 993, 997 (9th Cir. 2009). The petitioner bears the burden of alleging
24 facts sufficient to support equitable tolling. *Pace v. Di Guglielmo*, 544 U.S. 408, 418 (2005).
25 Petitioner neither sought equitable tolling nor presented facts establishing entitlement to equitable
26 tolling.

27 ¹ Petitioner did not initiate state court proceedings concerning the denial of parole before the conclusion of the
28 statutory limitations period. He filed his first state proceeding, a petition for writ of habeas corpus, on August 6,
2014.

1 **III. Certificate of Appealability**

2 A petitioner seeking a writ of habeas corpus has no absolute entitlement to appeal a
3 district court's denial of his petition, but may only appeal in certain circumstances. *Miller-El v.*
4 *Cockrell*, 537 U.S. 322, 335-36 (2003). The controlling statute in determining whether to issue a
5 certificate of appealability is 28 U.S.C. § 2253, which provides:

6
7 (a) In a habeas corpus proceeding or a proceeding under section 2255
8 before a district judge, the final order shall be subject to review, on appeal, by
the court of appeals for the circuit in which the proceeding is held.

9 (b) There shall be no right of appeal from a final order in a proceeding
10 to test the validity of a warrant to remove to another district or place for
11 commitment or trial a person charged with a criminal offense against the
United States, or to test the validity of such person's detention pending
removal proceedings.

12 (c) (1) Unless a circuit justice or judge issues a certificate of
13 appealability, an appeal may not be taken to the court of appeals from—

14 (A) the final order in a habeas corpus proceeding in which the
15 detention complained of arises out of process issued by a State court; or

16 (B) the final order in a proceeding under section 2255.

17 (2) A certificate of appealability may issue under paragraph (1)
18 only if the applicant has made a substantial showing of the denial of a
constitutional right.

19 (3) The certificate of appealability under paragraph (1) shall
20 indicate which specific issues or issues satisfy the showing required by
21 paragraph (2).

22 If a court denies a habeas petition, the court may only issue a certificate of appealability
23 "if jurists of reason could disagree with the district court's resolution of his constitutional claims
24 or that jurists could conclude the issues presented are adequate to deserve encouragement to
25 proceed further." *Miller-El*, 537 U.S. at 327; *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).
26 Although the petitioner is not required to prove the merits of his case, he must demonstrate

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1 "something more than the absence of frivolity or the existence of mere good faith on his . . .
2 part." *Miller-El*, 537 U.S. at 338.

3 Reasonable jurists would not find the Court's determination that Petitioner is not entitled
4 to federal habeas corpus relief to be debatable or wrong, or conclude that the issues presented
5 required further adjudication. Accordingly, the Court declines to issue a certificate of
6 appealability.
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8 **IV. Conclusion and Recommendation**

9 The undersigned recommends that the Court dismiss the Petition for writ of habeas corpus
10 as untimely and decline to issue a certificate of appealability.

11 These Findings and Recommendations will be submitted to the United States District
12 Judge assigned to the case, pursuant to the provisions of 28 U.S.C § 636(b)(1). Within **thirty**
13 **(30) days** after being served with these Findings and Recommendations, either party may file
14 written objections with the Court. The document should be captioned "Objections to Magistrate
15 Judge's Findings and Recommendations." Replies to the objections, if any, shall be served and
16 filed within **fourteen (14) days** after service of the objections. The parties are advised that failure
17 to file objections within the specified time may constitute waiver of the right to appeal the District
18 Court's order. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 ((9th Cir. 2014) (citing *Baxter v.*
19 *Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).
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23 IT IS SO ORDERED.

24 Dated: November 18, 2016

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE