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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

LLOYD KILLEBREW,
Petitioner,

v.

KELLY SANTORO,¹
Respondent.

Case No. 1:18-cv-00886-DAD-SAB-HC

FINDINGS AND RECOMMENDATION TO
GRANT RESPONDENT’S MOTION TO
DISMISS AND DISMISS PETITION FOR
WRIT OF HABEAS CORPUS

ORDER DIRECTING CLERK OF COURT
TO AMEND CAPTION

(ECF No. 12)

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

I.

BACKGROUND

On February 8, 2013, Petitioner was convicted by a jury in Kern County Superior Court of inflicting corporal injury, using force of violence to inflict serious bodily injury, felony threat of death or great bodily harm, and dissuading a witness by force or threat. Petitioner was sentenced to an imprisonment term of twenty-five years. (LD² 1). On May 7, 2014, the

¹ Kelly Santoro is the current Warden of North Kern State Prison, where Petitioner is currently housed. (ECF No. 12 at 1 n.1). Accordingly, Kelly Santoro is substituted as Respondent in this matter. See Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996).

² “LD” refers to the documents electronically filed by Respondent on September 6, 2018. (ECF No. 13).

1 California Court of Appeal, Fifth Appellate District affirmed the judgment. (LD 2). On July 16,
2 2014, the California Supreme Court denied the petition for review. (LDs 3, 4). Thereafter,
3 Petitioner filed seven state post-conviction collateral challenges, which were all denied. (LDs 5–
4 18).

5 On June 27, 2018,³ Petitioner constructively filed the instant federal petition for writ of
6 habeas corpus. (ECF No. 1). On August 30, 2018, Respondent filed a motion to dismiss the
7 petition as untimely. (ECF No. 12). Petitioner filed an opposition to the motion to dismiss. (ECF
8 No. 14).

9 II.

10 DISCUSSION

11 A. Statute of Limitations

12 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act
13 of 1996 (“AEDPA”). AEDPA imposes various requirements on all petitions for writ of habeas
14 corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320 (1997); Jeffries v.
15 Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc). The instant petition was filed after the
16 enactment of AEDPA and is therefore governed by its provisions.

17 AEDPA imposes a one-year period of limitation on petitioners seeking to file a federal
18 petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). Section 2244(d) provides:

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

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

24 (B) the date on which the impediment to filing an application
25 created by 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;

26 ³ Pursuant to the mailbox rule, a pro se prisoner’s habeas petition is filed “at the time . . . [it is] delivered . . . to the
27 prison authorities for forwarding to the court clerk.” Hernandez v. Spearman, 764 F.3d 1071, 1074 (9th Cir. 2014)
(alteration in original) (internal quotation marks omitted) (quoting Houston v. Lack, 487 U.S. 266, 276 (1988)). The
28 mailbox rule applies to both federal and state habeas petitions. Campbell v. Henry, 614 F.3d 1056, 1059 (9th Cir.
2010). Respondent applies the mailbox rule in the motion to dismiss. (ECF No. 12 at 2 n.2).

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

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

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

12 28 U.S.C. § 2244(d).

13 In most cases, the limitation period begins running on the date that the petitioner’s direct
14 review became final or the expiration of the time for seeking such review. Here, the judgment
15 became final on October 14, 2014, when the ninety-day period to file a petition for writ of
16 certiorari in the United States Supreme Court expired. See Bowen v. Roe, 188 F.3d 1157, 1159
17 (9th Cir. 1999). The one-year limitation period commenced running the following day, October
18 15, 2014, and absent tolling, was set to expire on October 14, 2015. See Patterson v. Stewart, 251
19 F.3d 1243, 1246 (9th Cir. 2001) (citing Fed. R. Civ. P. 6(a)).

20 **B. Statutory Tolling**

21 The “time during which a properly filed application for State post-conviction or other
22 collateral review with respect to the pertinent judgment or claim is pending shall not be counted
23 toward” the one-year limitation period. 28 U.S.C. § 2244(d)(2). In the instant case, the limitation
24 period expired before Petitioner filed his first state habeas petition on July 19, 2016, and
25 § 2244(d) “does not permit the reinitiation of the limitations period that has ended before the
26 state petition was filed.” Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003). Accordingly,
27 the instant federal petition is untimely unless Petitioner establishes that equitable tolling is
28 warranted.

29 **C. Equitable Tolling**

30 The limitations period also is subject to equitable tolling if the petitioner demonstrates
31 “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary
32 circumstance stood in his way’ and prevented timely filing.” Holland v. Florida, 560 U.S. 631,

1 649 (2010) (quoting Pace, 544 U.S. at 418). Petitioner bears the burden of alleging facts that
2 would give rise to tolling. Holland, 560 U.S. at 649; Pace, 544 U.S. at 418. However, Petitioner
3 has not made any showing that he is entitled to equitable tolling. Therefore, the instant federal
4 petition was not timely filed, and dismissal is warranted on this ground.

5 **III.**

6 **RECOMMENDATION**

7 Accordingly, IT IS HEREBY RECOMMENDED that:

- 8 1. Respondent’s motion to dismiss (ECF No. 12) be GRANTED; and
9 2. The petition for writ of habeas corpus be DISMISSED as untimely.

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

22 IT IS SO ORDERED.

23 Dated: October 16, 2018

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25 _____
26 UNITED STATES MAGISTRATE JUDGE
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