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7 **UNITED STATES DISTRICT COURT**
8 **EASTERN DISTRICT OF CALIFORNIA**
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10 ROBEY HAIRSTON,

11 Petitioner,

12 v.

13 STUART SHERMAN,¹

14 Respondent.

Case No. 1:18-cv-01633-AWI-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 SUBSTITUTE RESPONDENT

(ECF No. 10)

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

19 **I.**

20 **BACKGROUND**

21 On July 5, 2017, Petitioner was convicted in the Kern County Superior Court of battery
22 by a prisoner and sentenced to a determinate imprisonment term of four years. (LD² 1).
23 Petitioner did not file an appeal or any state post-conviction collateral challenges. On November
24 9, 2018,³ Petitioner constructively filed the instant federal petition for writ of habeas corpus. On

25 ¹ Petitioner is currently housed at the California Substance Abuse Treatment Facility, where Stuart Sherman is the
26 Warden. (ECF No. 10 at 1 n.1). Accordingly, the Court substitutes Stuart Sherman as Respondent in this matter. See
Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996).

27 ² "LD" refers to the document lodged by Respondent on February 1, 2019. (ECF No. 12).

28 ³ Pursuant to the 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." 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)). See
also Rule 3(d), Rules Governing Section 2254 Cases. Respondent applied the mailbox rule in the motion to dismiss.

1 February 1, 2019, Respondent filed a motion to dismiss the petition was untimely and
2 unexhausted. (ECF No. 10). Petitioner has not filed an opposition, and the time for doing so has
3 passed.

4 II.

5 DISCUSSION

6 A. Statute of Limitations

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

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

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

19 (B) the date on which the impediment to filing an application
20 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;

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

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

26 28 U.S.C. § 2244(d)(1).

27 (ECF No. 10 at 2 n.2). The habeas petition itself was dated November 8, 2018. (ECF No. 1 at 6). However, attached
28 to the petition were an application for restoration of credits and a request for certificate of probable cause dated
November 9, 2018. (ECF No. 1 at 8, 10).

1 In most cases, the limitation period begins running on the date that the petitioner’s direct
2 review became final or the expiration of the time for seeking such review. Here, Petitioner was
3 sentenced on July 5, 2017, and did not file any appeal. Therefore, the judgment became final
4 when Petitioner’s time for seeking review expired on September 5, 2017,⁴ sixty days after
5 Petitioner was sentenced. See Cal. R. Ct. 8.308. The one-year limitation period commenced
6 running the following day, September 6, 2017, and absent tolling, was set to expire on
7 September 5, 2018. See Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001) (citing Fed. R.
8 Civ. P. 6(a)).

9 The “time during which a properly filed application for State post-conviction or other
10 collateral review with respect to the pertinent judgment or claim is pending shall not be counted
11 toward” the one-year limitation period. 28 U.S.C. § 2244(d)(2). Here, however, Petitioner did not
12 file any state post-conviction challenges to the pertinent judgment.

13 The limitation period also is subject to equitable tolling if the petitioner demonstrates
14 ““(1) that he has been pursuing his rights diligently, and (2) that some extraordinary
15 circumstance stood in his way’ and prevented timely filing.” Holland v. Florida, 560 U.S. 631,
16 649 (2010) (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)). Petitioner bears the burden
17 of alleging facts that would give rise to tolling. Holland, 560 U.S. at 649; Pace, 544 U.S. at 418.
18 However, Petitioner has not made any showing that he is entitled to equitable tolling. Indeed,
19 Petitioner failed to oppose this motion to dismiss in any way.

20 Petitioner constructively filed his federal habeas petition on November 9, 2018,
21 approximately one month after the one-year limitation period expired on September 5, 2018.
22 Accordingly, the instant federal habeas petition was not timely filed, and dismissal is warranted
23 on this ground.

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26 ⁴ Sixty days after Petitioner was sentenced was Sunday, September 3, 2017, which fell on a Sunday. The following
27 Monday was Labor Day. Accordingly, the time for seeking review was extended to the next business day. See Cal.
28 R. Ct. I.10(a) (“The time in which any act provided by these rules is to be performed is computed by excluding the
first day and including the last, unless the last day is a Saturday, Sunday, or other legal holiday, and then it is also
excluded.”).

1 pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within
2 the specified time may waive the right to appeal the District Court's order. Wilkerson v.
3 Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th
4 Cir. 1991)).

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6 IT IS SO ORDERED.

7 Dated: March 22, 2019


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UNITED STATES MAGISTRATE JUDGE