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EDDIE CHARLES SPIVEY,) Case No. 2:07-cv-01080-MSB
)
 Petitioner,) **ORDER**
)
 vs.)
)
 MIKE KNOWLES, Warden,)
)
 Respondent.)

I. Background

On January 16, 2004, Petitioner filed a state petition for writ of habeas corpus in the Sacramento County Superior Court challenging a 2003 decision by the California Board of Parole Hearings (BPH) that Petitioner was not suitable for parole. (Dkt. #18, Ex. 7). Petitioner alleged that the BPH violated state law “by failing to set his term using the matrix in Title 15 Division 2.” (*Id.*).

1 The Superior Court denied the petition on March 9, 2004, holding that “Petitioner . . . has failed to
2 show that, under current law, the [BPH] must apply a matrix analysis before denying a parole date.”
3 (*Id.*). Rather, the court held, the BPH is required to set a parole date only if it determines that the
4 prisoner is suitable for parole, and here the BPH determined that Petitioner was not. (*Id.*). The court
5 could not “otherwise evaluate petitioner’s hearing because he failed to provide transcripts of the
6 proceedings or of the denial.” (*Id.*).

7 On February 23, 2004, Petitioner filed a second state habeas petition in the Sacramento
8 County Superior Court challenging the findings of a 2001 disciplinary proceeding and the adequacy
9 of the prison grievance procedures. (Dkt. #18, Ex. 1). Specifically, in March 2001, Petitioner was
10 found guilty of attempting to introduce narcotics into the prison and assessed a 180-day credit loss.
11 (Dkt. #1, Ex. A). That finding of guilt was modified to “possession” in May 2001 and the credit loss
12 was “disallowed.” (*Id.*). Petitioner alleged that his federal due process rights were violated because
13 (1) there was no evidence to support the March 2001 finding of guilt, and (2) the prison grievance
14 procedures are “deficient” and he did not receive an impartial review of his administrative appeals.
15 (Dkt. #18, Ex. 1). The Superior Court denied the petition on March 22, 2004, for failure to exhaust
16 administrative remedies and, as to the second claim, for failure to demonstrate “bias against
17 petitioner or intentional obstruction of the appeals process” or “any consequences from the loss of
18 the appeal.” (*Id.*).

19 Petitioner appealed the denials of his state habeas petitions on April 12, 2004. (Dkt. #18, Ex.
20 2, 6). In his appeals, Petitioner included a claim that the Superior Court “abused its discretion when
21 it failed to comply with clearly established Rule 260(a) of the California Rules of Court.” (*Id.*). The
22 California Court of Appeal for the Third District summarily denied Petitioner’s appeals on April 22.
23 (*Id.*).

24 On June 21, 2004, Petitioner appealed the California Court of Appeal’s denial of his first
25 state habeas petition challenging the BPH’s failure to set a parole date and claiming that the Superior
26 Court abused its discretion by failing to comply with the California Rules of Court. (Dkt. #18, Ex.
27 5). The California Supreme Court summarily denied Petitioner’s habeas petition on June 8, 2005.
28 (*Id.*).

1 Petitioner filed a federal petition for writ of habeas corpus in the U.S. District Court for the
2 Eastern District of California on November 3, 2005. *See* Petition for Writ of Habeas Corpus, *Spivey*
3 *v. Kernan*, No. 2:05-cv-2223 (E.D. Cal. filed Nov. 3, 2005). Petitioner alleged (1) that his federal
4 due process rights were violated in connection with the 2001 disciplinary proceeding and (2) that
5 the BPH violated state law by failing to set a parole date at his 2003 parole hearing. *Id.* Petitioner
6 subsequently moved to voluntarily dismiss his habeas petition, *see Spivey*, No. 2:05-cv-2223, Dkt.
7 #10, and the district court dismissed the petition without prejudice on May 21, 2007. *See id.*, Dkt.
8 #14.

9 On April 24, 2007, Petitioner filed a habeas petition in the California Supreme Court alleging
10 (1) that his federal due process rights were violated in connection with the 2001 disciplinary
11 proceeding and (2) that the BPH violated state law by failing to set a parole date at his 2003 parole
12 hearing. (Dkt. #18, Ex. 3). The California Supreme Court denied the petition on May 16, 2007,
13 citing *In re Robbins*, 18 Cal. 4th 770, 780 (Cal. 1998); *In re Clark*, 5 Cal. 4th 750 (Cal. 1993); *In*
14 *re Miller*, 17 Cal. 2d 734 (Cal. 1941); and *People v. Duvall*, 9 Cal. 4th 464, 474 (Cal. 1995). (Dkt.
15 #1, Ex. D).

16 On June 6, 2007, Petitioner this petition for writ of habeas corpus. (Dkt. #1). Petitioner
17 contends that (1) his federal due process rights were violated because there was no evidence to
18 support the March 2001 finding of guilt with regard to the disciplinary proceeding (*id.* at 3); (2) the
19 Sacramento County Superior Court abused its discretion by failing to comply with the California
20 Rules of Court in denying Petitioner's challenge to the BPH's 2003 decision that he was not suitable
21 for parole (*id.* at 4);¹ and (3) the prison grievance procedures are "deficient" and Petitioner did not
22 receive an impartial review of his administrative appeals (*id.* at 5). Respondent filed an Answer on
23 December 24, 2008, admitting that Petitioner's first and second claims for relief are exhausted but
24 arguing that they are untimely, and arguing that Petitioner's third claim is both unexhausted and
25 untimely. (Dkt. #18 at 3-4, ¶¶ 20-21, 23-24, 26-27). In the alternative, Respondent argues that
26 Petitioner's claims are not cognizable on federal habeas review and fail on the merits. (*Id.* at 3-4,
27

28 ¹The petition does not challenge the BPH's decision that Petitioner was not suitable
for parole.

¶¶ 22, 25, 28–30). Petitioner did not file a Reply, although he was informed by the Court he could do so. (Dkt. #14).

III. Discussion

A. Claims 1 & 3 – 2001 Prison Disciplinary Proceeding

The Antiterrorism and Effective Death Penalty Act (AEDPA) imposes a one-year statute of limitations on federal habeas petitions challenging prison administrative decisions. 28 U.S.C. § 2244(d)(1); *see Shelby v. Bartlett*, 391 F.3d 1061, 1064 (9th Cir. 2004); *Redd v. McGrath*, 343 F.3d 1077, 1081–83 (9th Cir. 2003). A properly filed state habeas petition tolls AEDPA’s one-year limitations period, 28 U.S.C. § 2244(d)(2), but a federal petition does not, *Duncan v. Walker*, 533 U.S. 167, 172 (2001).

AEDPA’s one-year limitations period for habeas petitions challenging administrative decisions begins to run when the petitioner receives timely notice of the denial of his administrative appeal. *Shelby*, 391 F.3d at 1066. Respondent argues that “the limitations period [for Petitioner’s due process challenges to the 2001 disciplinary procedure and grievance process] were triggered in February 2001, when the disciplinary hearing that [he] is challenging was held. Alternatively, it began to run no later than March 3, 2003, the last date [Petitioner] purportedly pursued his administrative remedies.” (Dkt. #18 at 7). Petitioner, on the other hand, argues that he did not receive notice of the denial of his administrative appeal; he contends that his Third Level of Review appeal, which he allegedly filed on March 15, 2002, was either “misplaced” by prison officials or they “deliberately discarded” it, preventing him from exhausting his claim through the prison grievance process.

The prison disciplinary proceeding at issue took place in February 2001. (Dkt. #1, Ex. A). Petitioner was found guilty of “Attempting to Introduce Narcotics into The Institution” in violation of California Code of Regulations § 3016(c) and “[a]ssessed 180 days Credit Forfeiture under a Division ‘A-2’ offense” in a Serious CDC-115, Rules Violation Report (RVR), on March 12, 2001. (*Id.*). Petitioner’s administrative appeal was denied at the Second Level Review on April 12, 2001. (*Id.*, Ex. B). On May 2, 2001, Petitioner’s disciplinary charge was reduced to a possession and the

1 credit loss was vacated.² (*Id.*, Ex. A). Petitioner alleges that he submitted an appeal to the Third
2 Level of Review (or Director’s Level of Review) on March 15, 2002, but never received a response.
3 (*Id.* at 6). On December 9, 2002, Petitioner wrote a letter inquiring into the status of his appeal.
4 (*Id.*, Exh. 1). On December 30, 2002, the Inmate Appeals Branch of the California Department of
5 Corrections and Rehabilitation (CDCR) informed Petitioner that there was “no record that [his]
6 appeal ha[d] been accepted for a Director’s Level of Review.” (*Id.*, Ex. C). Petitioner wrote to an
7 attorney on January 23 and March 22, 2003, seeking assistance in locating his Third Level of
8 Review appeal. (*Id.*). Petitioner filed his state habeas petition on February 23, 2004. (Dkt. #18, Ex.
9 1).

10 It is undisputed that Petitioner’s appeal was denied at the Second Level of Review on April
11 12, 2001. Petitioner had 15 days thereafter to file an appeal with the Third Level of Review. *See*
12 15 Cal Code Regs. § 3084.6(c). According to Petitioner, however, he did not submit his appeal to
13 the Third Level of Review until March 15, 2002, almost one year later. His appeal was thus
14 untimely.³ *See id.* at §3084.3(c)(6). The CDCR Inmate Appeals Branch did not deny Petitioner’s
15 appeal as untimely, however. Instead, on December 30, 2002, after Petitioner inquired into the
16 status of his appeal, the Inmate Appeals Branch informed Petitioner that there was no record that
17 his March 15, 2002 appeal had ever been accepted for a Third Level of Review. Thus, the
18 limitations period began to run at the latest on December 31, 2002, the day after the Inmate Appeals
19 Branch informed Petitioner that no appeal from the previous decision was available, and expired one
20 year later on December 31, 2003. *See Redd*, 343 at 1084 (“[T]he date of the factual predicate for
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22 ²Because the credit loss associated with the disciplinary proceeding was vacated, it
23 is not clear that this matter is within the province of habeas corpus. *See Muhammad v. Close*,
24 540 U.S. 749, 750 (2004) (“Challenges to the validity of any confinement or to particulars
25 affecting its duration are the province of habeas corpus[.]”). As the claim is barred by the
26 statute of limitations even if habeas is an appropriate vehicle for the reasons discussed in the
text, however, the Court does not decide whether habeas is indeed an available remedy for
the claim.

27 ³Petitioner does not allege he was unable to file the appeal within the prescribed time
28 limits. Thus, the limitations period may have begun to run on April 28, 2001, the day after the
administrative decision at the Second Level of Review became final, and expired one year later, on
April 28, 2002.

1 [Petitioner's] claim under § 2244(d)(1)(D) is not determined by asking when [Petitioner] satisfied
2 AEDPA's exhaustion requirement; rather it is determined independently of the exhaustion
3 requirement by inquiring when [Petitioner] could have learned of the factual basis for his claim
4 through the exercise of due diligence."'). Petitioner did not file this habeas petition until June 6,
5 2007, more than three years after the limitations period expired. Petitioner's claims regarding the
6 2001 disciplinary proceeding are therefore time-barred unless Petitioner is entitled to statutory or
7 equitable tolling.

8 Statutory tolling is available under AEDPA while a "properly-filed" application for
9 post-conviction or other collateral review is "pending" in state court. 28 U.S.C. § 2244(d)(2). Here,
10 Petitioner did not file his habeas petition challenging the 2001 disciplinary proceeding in state court
11 until February 24, 2004, almost two months after the one-year limitations period expired on
12 December 31, 2003. Moreover, even if the limitations period had not run before Petitioner filed his
13 state habeas petition, because Petitioner did not seek review in the California Supreme Court the
14 California Court of Appeal's decision became final on June 1, 2004, 40 days after the time for
15 seeking review expired, *see Smith v. Duncan*, 297 F.3d 809 (9th Cir. 2002), *abrogated on other*
16 *grounds by Pace v. DiGuglielmo*, 544 U.S. 408 (2005), and the limitations period would not have
17 been tolled for much longer. *See Carey v. Saffold*, 536 U.S. 214, (2002) (holding that AEDPA's
18 state of limitations is not tolled if the petitioner unreasonably delays in filing a habeas petition in
19 the California Supreme Court); *Evans v. Chavis*, 546 U.S. 189, 201 (2006) (holding that a six-month
20 delay in filing a habeas petition in the California Supreme Court after denial of a petition by the
21 California Court of Appeal constitutes unreasonable delay). Petitioner did not file this petition until
22 June 6, 2007, more than three years after the California Court of Appeal denied his petition. Thus,
23 despite any statutory tolling possibly available under 28 U.S.C. § 2244(d)(2), Petitioner's claims are
24 time-barred.

25 Equitable tolling is appropriate where a petitioner proves that "extraordinary circumstances"
26 beyond [his] control . . . made it impossible to file a [habeas] petition on time." *Frye v. Hickman*,
27 273 F.3d 1144, 1146 (9th Cir. 2001); *see Pace*, 544 U.S. at 418 (holding that the petitioner bears the
28 burden to establish equitable tolling). "The threshold for obtaining equitable tolling is very high,

1 but it applies where a petitioner shows that despite diligently pursuing his rights, some extraordinary
2 circumstance prevented him from timely filing.” *Townsend v. Knowles*, 562 F.3d 1200, 1205 (9th
3 Cir. 2009).

4 Here, Petitioner waited until November 3, 2005, more than one year after the California
5 Court of Appeals’s decision became final, before filing his first federal habeas petition.
6 Additionally, Petitioner did not file a state habeas petition challenging the 2001 disciplinary
7 proceeding in the California Supreme Court until April 24, 2007. Petitioner makes no argument that
8 the failure to rule on his Third Level of Review appeal prevented him from filing these petitions.
9 Additionally, even if the instant habeas petition could be construed as arguing that the delay was
10 warranted to re-exhaust Petitioner’s state remedies after the state courts denied his claim for failure
11 to exhaust available administrative remedies, Petitioner did not renew any effort to exhaust his
12 administrative remedies. Thus, he did not diligently pursue his rights, and equitable tolling is
13 unavailable. Accordingly, Petitioner’s claims related to the 2001 disciplinary proceeding are time-
14 barred.⁴

15 **B. Claim 2 – State Court Proceedings**

16 Petitioner claims that the Sacramento County Superior Court abused its discretion by failing
17 to rule on Petitioner’s state habeas petition within 60 days as required by Rule 4.551(a) of the
18 California Rules of Court.⁵ (Dkt. #1 at 4). Respondent argues that Petitioner’s claim is not
19 cognizable in a federal habeas petition and, in the alternative, that the claim is untimely. (Dkt. #18
20 at 9).

21 It is well established that “it is not the province of a federal habeas court to reexamine
22 state-court determinations on state-law questions. In conducting habeas review, a federal court is

24 ⁴To the extent Petitioner contends that the prison grievance procedures are “deficient”
25 (Dkt. #1 at 5), his claim is not cognizable on federal habeas review as he does not contend
26 that the procedures have affected the duration of his confinement. *See Muhammad*, 540 U.S.
at 750.

27 ⁵Petitioner specifically refers to Rule 260(a) of the California Rules of Court in his
28 petition. Rule 260(a), however, was renumbered as Rule 4.551 in 2002. *See Cal. R. Ct.*
4.501(a).

1 limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United
2 States.” *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Petitioner does not contend that the
3 Superior Court’s alleged failure to comply with the California Rules of Court violated the
4 Constitution, law, or treaties of the United States, and his claim is therefore not cognizable on
5 federal habeas review. Petitioner’s claim is also not cognizable on habeas review because the
6 Superior Court’s action did not affect the duration of his confinement. *See Muhammad*, 540 U.S.
7 at 750.

8 Moreover, Petitioner’s claim is time-barred. The California Supreme Court denied
9 Petitioner’s habeas petition challenging the Superior Court’s failure to comply with the California
10 Rules of Court on June 8, 2005. Petitioner did not file this petition until June 6, 2007, approximately
11 two years later. Accordingly, Petitioner’s claim is barred by AEDPA’s one-year statute of
12 limitations.⁶

13 **Accordingly,**

14 **IT IS HEREBY ORDERED** that the petition for writ of habeas corpus (Dkt. #1) is denied.

15 **IT IS FURTHER ORDERED** that the Clerk of the Court shall enter judgment accordingly.

16 DATED this 3rd day of June, 2010.

17
18 /s/ Marsha S. Berzon

19 MARSHA S. BERZON

20 United States Circuit Judge, sitting by designation
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27 ⁶Petitioner’s November 3, 2005 federal habeas petition did not challenge the Superior
28 Court’s alleged failure to comply with the California Rules of Court. Regardless, as previously
stated, a federal habeas petition does not toll AEDPA’s one-year statute of limitations. *See Duncan*,
533 U.S. at 172.