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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

PETER GOODRIDGE,

Petitioner,

No. 2:07-cv-2650 LKK KJN P

vs.

RICHARD SUBIAS,

Respondent.

FINDINGS AND RECOMMENDATIONS

I. Introduction

Petitioner is a state prisoner proceeding without counsel with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges the 2005 Board of Parole Hearings (BPH) decision that found petitioner unsuitable for parole. This action proceeds on the second amended petition. Dkt. No. 17.

Pending before the court is respondent’s October 19, 2009 motion to dismiss on the grounds that this action is barred by the statute of limitations. Dkt. No. 22. Petitioner filed an opposition and respondent filed a reply. Dkt. Nos. 23, 28. After carefully considering the entire record, the court recommends that respondent’s motion to dismiss be granted and this case closed.

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1 II. Motion to Dismiss

2 The statute of limitations for federal habeas corpus petitions is set forth in 28

3 U.S.C. § 2244(d)(1):

4 A 1-year period of limitation shall apply to an application for a writ
5 of habeas corpus by a person in custody pursuant to the judgment
6 of a State court. The limitation period shall run from the latest of—

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

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

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

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

21 The statute of limitations for habeas petitions challenging parole suitability
22 hearings is based on § 2244(d)(1)(D), i.e. the date on which the factual predicate of the claim or
23 claims could have been discovered through the exercise of due diligence. Redd v. McGrath, 343
24 F.3d 1077 (9th Cir. 2003). At the time the Ninth Circuit decided Redd, suitability decisions
25 could be administratively appealed. Id. at 1084. In Redd, the Ninth Circuit held that the factual
26 basis of the petitioner’s claims challenging a parole suitability hearing could have been
discovered through the exercise of due diligence when the BPH denied the administrative appeal.
Id.

Since Redd, the administrative review process for parole suitability hearings has
been eliminated. According to the transcript from petitioner’s May 12, 2005 suitability hearing
before the BPH, the decision finding petitioner unsuitable for parole became final on September

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1 9, 2005.¹ Petition at 509.²

2 The statute of limitations began to run the next day, on September 10, 2005.
3 Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001). Petitioner had one year, that is until
4 September 10, 2006, to file a timely federal petition, absent applicable tolling. The instant
5 federal petition, filed on December 6, 2007, is not timely unless petitioner is entitled to statutory
6 or equitable tolling.³

7 Petitioner filed six state post-conviction collateral actions:

8 First Round

9 1. October 9, 2005: First habeas petition filed in the Sacramento County Superior
10 Court. Motion to Dismiss (MTD), Exh. A at 9.⁴ The petition was denied on
December 5, 2005, with a reasoned opinion. MTD, Exh. B at 2.

11 2. March 22, 2006: Second habeas petition filed in the California Court of
12 Appeal, Third Appellate District. MTD, Exh. C, Part 1 at 12. The petition was
denied on March 30, 2006, without comment or citation. Id. at 2.

13 3. April 4, 2006: Third habeas petition filed in the California Supreme Court.
14 MTD, Exh. D, Part 1 at 16. The petition was denied on November 29, 2006,
without comment or citation. MTD, Exh. E.

15 Second Round

16 4. June 30, 2007: Fourth habeas petition filed in the Sacramento County Superior
17 Court. MTD, Exh. F at 10. The petition was denied on August 10, 2007, with a
18 reasoned opinion and a citation to In re Clark. MTD, Exh. G.

19 ¹ The stamped date is difficult to read as it is faded, but both parties state the BPH
20 decision became final on September 9, 2005. MTD at 2, Opposition at 3.

21 ² The court has referred to all page numbers as they appear on the court's electronic filing
22 system, as the petition is not numbered consecutively.

23 ³ The court affords petitioner application of the mailbox rule as to all his habeas filings in
24 state court and in this federal court. Houston v. Lack, 487 U.S. 266, 275-76 (1988) (pro se
25 prisoner filing is dated from the date prisoner delivers it to prison authorities); Stillman v.
Lamarque, 319 F.3d 1199, 1201 (9th Cir. 2003) (mailbox rule applies to pro se prisoner who
26 delivers habeas petition to prison officials for the court within limitations period).

⁴ The court has referred to all page numbers as they appear on the court's electronic filing
system, as respondent's exhibits are not numbered consecutively.

1 5. September 12, 2007: Fifth habeas petition filed in the California Court of
2 Appeal, Third Appellate District. MTD, Exh. H, Part 1 at 12. The petition was
denied on September 20, 2007, without comment or citation. Id. at 2.

3 6. September 27, 2007: Sixth habeas petition filed in the California Supreme
4 Court. MTD, Exh. I at 6. The petition was denied on March 19, 2008, with
5 citations to In re Robbins, 18 Cal. 4th 770, 780 (1998), In re Clark, 5 Cal. 4th 750
(1993), and In re Miller, 17 Cal. 2d 734 (1941). MTD, Exh. J.

6 Petitioner filed the instant petition on December 6, 2007.

7 Statutory Tolling

8 Under AEDPA, the period of limitation is tolled while a “properly filed”
9 application for state post-conviction or other collateral review is pending. 28 U.S.C. §
10 2244(d)(2). Petitions are properly filed so long as there was no unreasonable delay between the
11 petitions, and if each petition is properly filed, then a petitioner is entitled to a tolling of the
12 statute of limitations during the intervals between a lower court decision and the filing of a
13 petition in a higher court during one complete round of appellate review (“interval tolling”). See
14 Evans v. Chavis, 546 U.S. 189, 193-94 (2006).

15 The Supreme Court has explained that in order for a state habeas petition to be
16 “properly filed” for purposes of statutory tolling, the petition's delivery and acceptance must be in
17 compliance with the laws and rules governing such filings. Pace v. DiGuglielmo, 544 U.S. 408,
18 413-14 (2005). “[T]ime limits, no matter their form, are ‘filing’ conditions.” Pace v.
19 DiGuglielmo, 544 U.S. at 417. “When a post-conviction petition is untimely under state law,
20 that is the end of the matter for purposes of § 2244(d)(2).” Id. at 414. Under such circumstances,
21 the petitioner is not entitled to statutory tolling. Id. at 417.

22 Petitioner’s first state petition with the Sacramento County Superior Court was
23 filed on October 9, 2005, approximately 29 days after judgment became final. Respondent
24 concedes that petitioner is entitled to statutory tolling during the pendency of the that petition.
25 MTD at 4. Accordingly, petitioner is entitled to tolling for the period from October 9, 2005, the
26 date the petition was filed, to December 5, 2005, the date the state petition was denied, 57 days.

1 With this tolling, petitioner had until approximately November 6, 2006 to timely file his federal
2 petition.

3 The first state petition was denied on December 5, 2005, but petitioner's second
4 petition was not filed for nearly four months, approximately 107 days, until March 22, 2006, with
5 the California Court of Appeal, Third Appellate District. Petitioner is not entitled to statutory
6 tolling for the nearly four month delay between the denial of his first petition and the filing of the
7 second petition.⁵ See Evans v. Chavis, 546 U.S. at 201 (2006); see also Gaston v. Palmer, 447
8 F.3d 1165, 1167 (9th Cir. 2006) (amending 417 F.3d 1030 (9th Cir. 2005) (petitioner not entitled
9 to "gap" tolling for intervals between California state habeas filings of 15 months, 18 months,
10 and 10 months, given length of delays, lack of clear statement from California legislature or
11 courts that delays of such length were reasonable, and lack of explanation or justification for
12 delays)); Culver v. Director of Corrections, 450 F.Supp. 2d 1135, 1140-41 (C.D. Cal. 2006)
13 (unexplained, unjustified delays of 97 and 71 days between the denial of one state petition and
14 the filing of the next petition constituted unreasonable delays such that the intervals cannot be
15 tolled under Chavis).

16 The second petition filed on March 22, 2006, was denied on March 30, 2006.
17 Petitioner is entitled to 8 days of tolling while this petition was pending. Petitioner filed the third
18 petition on April 4, 2006, with the California Supreme Court. This petition was denied on
19 November 29, 2006. Petitioner is entitled to interval tolling for the 5 days between the petitions
20 and the 239 days while the petition was pending. With these 252 day of tolling, petitioner had
21 until approximately, July 16, 2007, to timely file his federal petition.

22 Rather than file a federal petition, petitioner filed another round of state habeas
23 petitions, beginning on June 30, 2007, with a petition filed in the Sacramento County Superior
24 Court. Petitioner will not receive tolling for the time between the California Supreme Court
25

26 ⁵ Petitioner's argument for equitable tolling during this time period is discussed below.

1 denial on November 29, 2006, and the filing of the new petition on June 30, 2007. This period is
2 excluded from statutory tolling because petitioner had already completed “one full round” of
3 state collateral review. Biggs v. Duncan, 339 F.3d 1045, 1048 (9th Cir. 2003).

4 The second round of state petitions that commenced with the fourth state petition
5 was filed 16 days prior to the expiration of the statute of limitations. If the petition was “properly
6 filed”, petitioner will be entitled to statutory tolling, while the petition was pending.

7 In a reasoned opinion, the Sacramento County Superior Court found that the
8 petition filed on June 30, 2007, was untimely and successive, due to petitioner’s previous petition
9 filed in the same court regarding the same 2005 BPH hearing, and petitioner had failed to provide
10 any explanation for the delay in filing the petition. MTD, Exh. G. The court also held that the
11 claims were barred by In re Clark. Id.

12 The California Court of Appeal, Third Appellate District, denied petitioner’s
13 second round petition without comment or citation⁶ while the California Supreme Court denied
14 petitioner’s second round petition with cites to In re Robbins, 18 Cal. 4th 770, 780 (1998), In re
15 Clark, 5 Cal 4th 750 (1993) and In re Miller, 17 Cal.2d 734 (1941).

16 The Sacramento Superior Court specifically noted that petitioner’s petition was
17 untimely and successive, and did not look to the merits of petitioner’s claims.⁷ The citation to
18 Clark, in the California Supreme Court decision, stands for the same proposition. A successive
19 or untimely petition is not deemed as properly filed and will not entitle petitioner to statutory
20 tolling. See In re Clark, 5 Cal.4th 750 (1993) (holding that, absent justification, successive or
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22 ⁶ The court will “look through” the Court of Appeal’s summary denial to the last reasoned
23 decision. Pham v. Terhune, 400 F.3d 740, 742 (9th Cir. 2005); Shackleford v. Hubbard, 234
24 F.3d 1072, 1079 n. 2 (9th Cir. 2000), citing Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991). The
25 second round petition before the Court of Appeal is assumed to be denied on the same grounds
26 of untimeliness and successiveness in which the Superior Court held in their reasoned opinion in
the second round petition.

⁷ The court noted that it had previously looked to the merits of petitioner’s claims in the
prior petition.

1 untimely habeas petition will be summarily denied); Allen v. Siebert, 552 U.S. 3, 7 (2007)
2 (“When a postconviction petition is untimely under state law, ‘that [is] the end of the matter’ for
3 purposes of § 2244(d)(2).” (quoting Pace, 544 U.S. at 414)).

4 The California Supreme Court generally cites Clark to indicate that a habeas
5 petition was not timely filed. See Bennett v. Mueller, 322 F.3d 573, 581-82 (9th Cir. 2003); Park
6 v. California, 202 F.3d 1146, 1152 n. 3 (9th Cir. 2000). While the citation to Clark in the
7 California Supreme Court might have been meant to indicate that petitioner's sixth state habeas
8 petition was also successive, this does not change the determination that the petition was not
9 properly filed for tolling purposes. See Gonzalez v. Runnels, 2008 WL 80744 at *4 (E.D. Cal.
10 Jan.7, 2008) (“[U]nder Pace, whether the state supreme court meant to indicate that the petition
11 was untimely or successive would be essentially a distinction without a difference in the context
12 of statutory untimeliness under AEDPA”); Delander v. Hubbard, 2008 WL 2622856 at *6 (S.D.
13 Cal. July 1, 2008) (“This citation [to Clark] demonstrates that the court is denying the petition
14 because it is either successive or untimely . . . California rules provide that a successive petition
15 is by necessity a delayed petition.”).

16 Accordingly, petitioner is not entitled to statutory tolling for the days that the
17 fourth, fifth and sixth petitions were pending. Because these petitions were not properly filed,
18 petitioner was not entitled to gap tolling for any of the days between the filing of these petitions.
19 See Bonner v. Carey, 425 F.3d 1145, 1149 (9th Cir. 2005) (“Under Pace, if a state court denies a
20 petition as untimely, none of the time before or during the court's consideration of that petition is
21 statutorily tolled.”).

22 Without the benefit of statutory tolling for the second round of state petitions,
23 petitioner had until July 16, 2007 to timely file a federal petition. The instant petition filed on
24 December 6, 2007, is not timely unless petitioner is entitled to equitable tolling.

25 Equitable Tolling

26 Petitioner’s arguments for equitable tolling are hard to discern. However,

1 petitioner does state that during the first round of state petitions the interval between the decision
2 of the Sacramento Superior Court and the filing of the next petition in the Court of Appeal was
3 caused due to a clerical error because the Sacramento Superior Court denial was not timely
4 mailed to petitioner. Petitioner did not receive statutory tolling for this 107 day period.

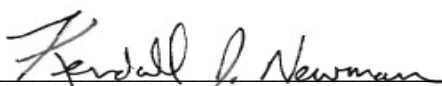
5 Petitioner has not presented sufficient facts regarding this clerical error, but even
6 if the court were to award petitioner equitable tolling for this period, the last day to timely file the
7 federal petition would have been October 31, 2007. The instant petition filed December 6, 2007,
8 would still be more than one month late. Therefore, the court need not address this argument for
9 equitable tolling.

10 This case should be dismissed for being filed after the expiration of the statute of
11 limitations.

12 Accordingly, IT IS HEREBY RECOMMENDED that respondent's October 19,
13 2009 motion to dismiss (Dkt. No. 22) be granted and this case closed.

14 These findings and recommendations are submitted to the United States District
15 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
16 one days after being served with these findings and recommendations, any party may file written
17 objections with the court and serve a copy on all parties. Such a document should be captioned
18 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
19 objections shall be filed and served within fourteen days after service of the objections. The
20 parties are advised that failure to file objections within the specified time may waive the right to
21 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

22 DATED: March 26, 2010

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24 
25 KENDALL J. NEWMAN
26 UNITED STATES MAGISTRATE JUDGE