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

JOHN A. H. EDSALL, SR.,

Petitioner,

No. 2:08-cv-1182-JFM (HC)

vs.

J. MARSHALL, Warden, et al.,

Respondents.

ORDER¹

_____/

Petitioner is a state prisoner proceeding pro se with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter is before the court on respondents' motion to dismiss this action as barred by the statute of limitations.²

¹ Both parties consented to this court's jurisdiction pursuant to 28 U.S.C. § 636(c). (Docket No. 9; Docket No. 16.)

² Respondents' motion was filed on November 10, 2008. On November 12, 2008, the parties were served a notice setting a briefing schedule for the motion, pursuant to which petitioner's opposition was due twenty-one days after the date of the notice. On December 8, 2008, petitioner filed a request for an extension of time to file an opposition to the motion. By order filed December 16, 2008, petitioner's request was granted and petitioner was granted a thirty day extension of time to file and serve his opposition. The thirty day period has passed and petitioner has neither filed an opposition nor responded further in any way to respondents' motion.

1 Section 2244(d)(1) of Title 28 of the United States Code provides:

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

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

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

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

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

19 28 U.S.C. § 2244(d)(1). Section 2244(d)(2) provides that “the time during which a properly filed
20 application for State post-conviction or other collateral review with respect to the pertinent
21 judgment or claim is pending shall not be counted toward” the limitations period. 28 U.S.C. §
22 2244(d)(2). “The time that an application for state postconviction review is ‘pending’ includes
23 the period between (1) a lower court’s adverse determination, and (2) the prisoner’s filing of a
24 notice of appeal, *provided that* the filing of the notice of appeal is timely under state law.” Evans
25 v. Chavis, 546 U.S. 189, 191 (2006)(emphasis in original).

26 In California, “a state prisoner may seek review of an adverse
lower court decision by filing an original petition (rather than a
notice of appeal) in the higher court, and that petition is timely if
filed within a ‘reasonable time.’ ” Thus, in California, “[a]s
long as the prisoner filed a petition for appellate review within a
‘reasonable time,’ he could count as ‘pending’ (and add to the
one-year time limit) the days between (1) the time the lower state
court reached an adverse decision, and (2) the day he filed a
petition in the higher state court.”

Waldrip v. Hall, 548 F.3d 729, 734 (quoting Evans, at 192-93 and 193). “An unexplained delay
of six months between the denial by one California state court and a new filing in a higher

1 California court” is “too long to permit tolling of the federal limitations period on the ground that
2 state court proceedings were ‘pending.’” Id. at 735.

3 For purposes of the statute of limitations analysis, the relevant chronology of this
4 case is as follows:

5 1. On August 29, 2000, petitioner was sentenced to seventeen years in prison
6 following his conviction on charges of first degree burglary and receiving stolen property.

7 2. On November 28, 2001, petitioner’s conviction was affirmed on direct appeal
8 by the California Court of Appeal for the Third Appellate District.

9 3. On February 13, 2002, the California Supreme Court denied petitioner’s
10 petition for review.

11 4. On May 6, 2002, a petition signed by petitioner on April 9, 2002 was filed a
12 petition for writ of habeas corpus in the Sacramento County Superior Court. See Lodged
13 Document 7, lodged November 18, 2008.³ That petition contained the claims identified as
14 Claims I, II, III, V-A, VII-A, VII-B, VIII and IX in petitioner’s federal habeas corpus petition.⁴
15 Id. On May 28, 2002, the Sacramento County Superior Court denied the petition.

16 5. On August 12, 2002, petitioner filed a petition for writ of habeas corpus in the
17 California Court of Appeals for the Third Appellate District. That petition contained the claims
18 identified as Claims I, II, III, V-A, VII-A, VII-B, VIII, IX and X of petitioner’s federal habeas
19 corpus petition. See Lodged Document 11.

20 6. On May 15, 2003, the California Court of Appeal for the Third Appellate
21 District issued an order to show cause returnable in the Sacramento County Superior Court. See
22 Lodged Document 12.

23 ³ All documents referred to as lodged documents in this order were lodged by
24 respondents on November 18, 2008.

25 ⁴ This action is proceeding on petitioner’s amended petition, filed June 19, 2008. The
26 petition was amended to name the proper respondent. See Order filed June 4, 2008. The claims
raised in the amended petition are the same as those raised in the original petition.

1 7. On June 18, 2003, the Sacramento County Superior Court ordered the matter
2 filed as a new case in that court. See Lodged Document 13.

3 8. On October 4 and 5, 2004, the Sacramento County Superior Court held an
4 evidentiary hearing on the petition filed in August 2002 in the state court of appeal. At the
5 conclusion of the hearing, the court made an oral ruling denying the petition. See Lodged
6 Document 14 at 252-254.

7 9. On March 16, 2005, petitioner delivered to prison officials for mailing a
8 petition for writ of habeas corpus directed to the Sacramento County Superior Court raising the
9 claim raised as Claim XIV in the federal petition. See Lodged Document 16. The petition was
10 filed in that court on March 24, 2005. Id. On April 28, 2005, the superior court denied the
11 petition. See Lodged Document 17.

12 10. On October 19, 2005, petitioner filed a petition for writ of habeas corpus in
13 the California Court of Appeal for the Third Appellate District. See Lodged Document 18. That
14 petition contained all of the claims raised in petitioner's August 2002 habeas corpus petition and
15 the claims raised as Claims IV, V-B, VI, XI, XII, XIII, XIV, and XV of the federal petition. Id.
16 By order filed November 23, 2005, the state court of appeal denied the petition due to
17 petitioner's failure "either to provide this court with documents related to the October 4 and 5,
18 2004 hearing on his habeas petition in the superior court . . . or to explain why some or all of
19 those documents are not reasonably available to him." Lodged Document 19.

20 11. On October 7, 2006, petitioner delivered to prison officials for mailing a
21 supplemental petition for writ of habeas corpus with exhibits attached. See Lodged Document
22 20. The petition was filed in the state court of appeal on October 11, 2006 and denied on
23 November 16, 2006. See Lodged Documents 20 and 21.

24 12. On January 24, 2007, petitioner delivered to prison officials for mailing a
25 petition for writ of habeas corpus directed to the California Supreme Court. See Lodged
26 Document 22. The petition was filed in the state supreme court on January 29, 2007. Although

1 it appears from the docket in the California Supreme Court that petitioner submitted exhibits
2 with that petition, see Lodged Document 23, the exhibits are not part of the record before this
3 court. On August 8, 2007, the California Supreme Court denied that petition.

4 13. In February 2007, petitioner filed a petition for writ of habeas corpus in the
5 Sacramento County Superior Court raising the issues presented by Claim XVII of the federal
6 petition. See Lodged Document 24. On April 19, 2007, the superior court denied the petition.
7 See Lodged Document 25.

8 14. In March 2007, petitioner filed another petition for writ of habeas corpus in
9 the Sacramento Superior Court raising the issues presented by Claim XIV of the federal petition.
10 See Lodged Document 26. Petitioner sought collateral review of that claim at each subsequent
11 level of the state court system. See Lodged Documents 28-30. His final petition was denied by
12 the California Supreme Court on April 16, 2008. See Lodged Document 31.

13 15. On or about May 26, 2008, petitioner filed the instant action.⁵

14 Petitioner's conviction became final on or about May 14, 2002, ninety days after
15 the California Supreme Court denied petitioner's petition for review. See Bowen v. Roe, 188
16 F.3d 1157, 1159-60 (9th Cir. 1999). The federal limitation period started to run the next day, on
17 May 15, 2002. See Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001).

18 At the time the limitation period commenced, petitioner had a petition for writ of
19 habeas corpus pending in the state superior court. That petition was denied on June 28, 2002,
20 and petitioner filed a new petition in the state court of appeal approximately six weeks later. The
21 latter petition was referred back to the superior court and denied on October 5, 2004, after an
22 evidentiary hearing. The limitation period was during the pendency of these two petitions, as
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24 ⁵ The action was opened on May 29, 2008, and petitioner's original petition was filed on
25 that date. The petition is dated May 26, 2008, and it appears from the declaration of service
26 appended to the petition that is the date on which the petition was delivered to prison officials for
mailing. May 26, 2008 is therefore deemed the filing date for the instant action. See Houston v.
Lack, 487 U.S. 266 (1988).

1 well as the interval between them. See Carey v. Saffold, 536 U.S. 214 (2002). Petitioner did not
2 proceed to the California Supreme Court with these or any other claims until January 24, 2007⁶,
3 more than twenty-seven months after the decision of the state superior court. The reason for that
4 delay is unexplained. Accordingly, under the rule announced in Evans v. Chavis, supra, except
5 as discussed below the limitation period was not tolled during the interval between October 5,
6 2004 and January 24, 2007.

7 The statute of limitations therefore commenced to run on October 6, 2004. It ran
8 for one hundred sixty days, until March 16, 2005, when petitioner filed a new state habeas corpus
9 petition. Within six months of the denial of that petition, petitioner filed another petition in the
10 state court of appeal, which was denied on November 23, 2005. The limitation period was tolled
11 from March 16, 2005 until November 23, 2005. Following the November 23, 2005 decision,
12 petitioner did not file another state petition for more than ten months. Under the rule announced
13 in Evans v. Chavis, supra, petitioner is not entitled to statutory tolling for any part of that ten
14 month period.

15 On November 23, 2005, petitioner had two hundred five days remaining in the
16 limitation period. The limitation period expired on or about June 16, 2006, before petitioner
17 filed any further state habeas corpus petitions.⁷ This action is therefore barred by the statute of
18 limitations and respondents' motion to dismiss should be granted.

19 For all of the foregoing reasons, IT IS HEREBY ORDERED that:

20 1. Respondents' November 10, 2008 motion to dismiss is granted; and
21

22 ⁶ As noted above, the record before the court does not show what claims were presented
23 to the California Supreme Court in the petition filed in that court in January 2007. It appears that
the petition contained ten claims, see Lodged Document 22, at 3-4.

24 ⁷ The round of state habeas petitions commenced by petitioner in March 2007 were
25 predicated on the decision of the United States Supreme Court in Cunningham v. California, 549
26 U.S. 624 (2007). The Cunningham case did not announce a "new rule", see Butler v. Curry, 528
F.3d 624, 628 (9th Cir. 2008), and therefore did not start a new period of limitation under 28
U.S.C. § 2244(d)(1)(C).

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2. This action is dismissed as barred by the statute of limitations.

DATED: January 28, 2009.


UNITED STATES MAGISTRATE JUDGE

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