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

HERBERT M. VAUGHN,

Petitioner,

No. CIV S-08-1230 MCE DAD P

vs.

D.K. SISTO, et al.,

Respondents.

FINDINGS AND RECOMMENDATIONS

_____/

Petitioner is a state prisoner proceeding pro se with an amended petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Before the court is respondents’ motion to dismiss the petition as untimely. Petitioner has not filed an opposition to the motion.¹

MOTION TO DISMISS

In moving to dismiss the pending petition, respondent provides the following background concerning petitioner’s appeals and collateral challenges in state court.

On March 19, 2001, Petitioner pled no contest to manufacturing methamphetamine and admitted two prior strike convictions. On

¹ After respondents filed their motion to dismiss, petitioner requested two extensions of time to file his opposition. First, on March 18, 2010, the court granted petitioner a 60-day extension of time to file his opposition to the pending motion. On June 7, 2010, the court granted petitioner another 30-day extension of time to oppose the motion to dismiss. Nonetheless, no opposition has been filed by petitioner.

1 September 26, 2001, Petitioner was sentenced to an indeterminate
2 state prison term of 25 years to life. (Lod. Docs. 1-2.)

3 On May 29, 2003, the California Court of Appeal, Third Appellate
4 District, affirmed the judgment. (Lod. Doc. 2.) Petitioner sought
5 review in the California Supreme Court which was denied on
6 August 13, 2003. (Lod. Docs. 3-4.)

7 Petitioner subsequently filed eight *pro se* state post-conviction
8 collateral challenges with respect to the pertinent judgment:²

9 **The First Petition:**

10 March 27, 2003: Petition for writ of habeas corpus filed in the
11 California Court of Appeal, Third Appellate District (Lod. Doc. 5);
12 May 8, 2003: Petition denied (Lod. Doc. 6);

13 **The Second Petition:**

14 May 27, 2003: Petition for writ of habeas corpus filed in the
15 California Supreme Court (Lod. Doc. 7);
16 March 3, 2004: Petition denied (Lod. Doc. 8);

17 **The Third Petition:**

18 June 28, 2004: Petition for writ of habeas corpus filed in the Sutter
19 County Superior Court (Lod. Doc. 9);
20 July 13, 2004: Petition denied (Lod. Doc. 10);

21 **The Fourth Petition:**

22 September 15, 2005: Petition for writ of habeas corpus filed in the
23 California Court of Appeal, Third Appellate District (Lod. Doc.
24 11);
25 September 30, 2005: Petition denied (Lod. Doc. 12);

26 **The Fifth Petition:**

August 14, 2006: Petition for writ of habeas corpus filed in the
California Supreme Court (Lod. Doc. 13);
March 14, 2007: Petition denied, citing *In re Robbins*, 18 Cal. 4th
770, 780 (1998); *In re Clark*, 5 Cal. 4th 750 (1993) (Lod. Doc. 14);

The Sixth Petition:

July 15, 2007: Petition for writ of habeas corpus filed in the Sutter
County Superior Court (Lod. Doc. 15);
July 20, 2007: Petition denied, citing *In re Clark*, 5 Cal. 4th 750,
764 (1993) (Lod. Doc. 16);

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² Unless otherwise noted, all petitions listed in this motion were given the benefit of the mailbox rule. See Rule 3(d) of the Federal Rules Governing Section 2254 Cases.

1 **The Seventh Petition:**

2 August 12, 2007: Petition for writ of habeas corpus filed in the
3 California Court of Appeal, Third Appellate District (Lod. Doc.
4 17);

5 September 6, 2007: Petition denied (Lod. Doc. 18);

6 **The Eighth Petition:**

7 October 15, 2007: Petition for writ of habeas corpus filed in the
8 California Supreme Court (Lod. Doc. 19);

9 April 23, 2008: Petition denied, citing *In re Clark*, 5 Cal. 4th 750
10 (1993); *In re Robbins*, 18 Cal. 4th 770, 780 (1998) (Lod. Doc. 20).

11 (Mot. to Dismiss (MTD) at 2-3.) Petitioner’s federal habeas petition was signed by him on May
12 28, 2008 and filed with this court on June 3, 2008.³

13 Respondents assert that the statute of limitations for the filing of a federal habeas
14 petition in this case began to run when petitioner’s judgment of conviction became final on
15 November 11, 2003, when the ninety-days for seeking a writ of certiorari with the United States
16 Supreme Court expired. (*Id.* at 4.) Thus, the statute of limitations for the filing of a federal
17 habeas application began to run on November 12, 2003, and expired on November 11, 2004, plus
18 any time for tolling. (*Id.*)

19 Respondents argues that there was no tolling of the federal statute of limitations
20 based on the first state habeas petition filed by petitioner because it was filed and denied before
21 his judgement of conviction became final and the statute of limitations commenced running. (*Id.*
22 at 5.)

23 As to petitioner’s second state habeas petition filed with the California Supreme
24 Court, respondents argue that it resulted in the tolling of the statute of limitations for filing a
25 federal petition only for the period from November 12, 2003, when the statute of limitations
26 commenced running, to March 3, 2004, when that second state habeas petition was denied. (*Id.*)

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28 ³ On March 11, 2009, this court granted petitioner’s request for leave to file an amended
29 petition. (Doc. No. 7.) On April 8, 2009, petitioner filed his amended petition which is now
30 before the court. (Doc. No. 8.)

1 As to the period between the denial of the second state petition by the California
2 Supreme Court and the filing of petitioner's third state habeas petition in the Sutter County
3 Superior Court, respondents argue that there is no tolling of the federal statute of limitations for
4 that period because petitioner did not ascend up the state court hierarchy when he filed his third
5 state habeas petition in the Superior Court. (Id.) In addition, respondent argues that petitioner
6 delayed 119 days between the denial of the second state habeas petition and the filing of his third
7 state habeas third petition. (Id. at 6.) Respondent contends that absent any justification, the
8 delay in filing his next state habeas petition was unreasonable and therefore petitioner does not
9 qualify for interval tolling for that period of time. (Id.)

10 Respondents concede that petitioner is entitled to statutory tolling for the period
11 that petitioner's third state habeas petition was pending before the Sutter County Superior Court
12 from June 28, 2004 when petitioner signed the petition through July 13, 2004, when relief was
13 denied. (Id. at 6-7.)

14 Respondents argue that even with the benefit of statutory tolling for 113 days in
15 connection with petitioner's second state habeas petition and 15 days of statutory tolling during
16 the pendency of the third state habeas petition, the statute of limitations for the filing of a federal
17 habeas petition expired on March 19, 2005. (Id. at 7.) Respondents note that petitioner did not
18 file his federal habeas petition with this court until May 28, 2008, over three years after the
19 statute of limitations for doing so had expired. (Id.) Accordingly, respondents argue that the
20 petition before this court should be dismissed as time-barred. (Id.)

21 As to the fourth, fifth, sixth, seventh and eighth state habeas petitions filed by
22 petitioner, respondents argue that each were filed after the statute of limitations for the filing of a
23 federal habeas petition had expired and therefore cannot revive or extend the AEDPA statute of
24 limitations. (Id.) Respondents also note that petitioner's fifth, sixth and eighth state habeas
25 petitions were explicitly found untimely by the California courts. (Id.) Respondents argue that
26 there can be no interval tolling between the denial of petitioner's third state habeas petition on

1 Pursuant to 28 U.S.C. § 2244(d)(2), “[t]he time during which a properly filed
2 application for State post-conviction or other collateral review . . . is pending shall not be
3 counted toward any period of limitation under this subsection.”

4 The statute of limitations is not tolled during the interval between the date on
5 which a decision becomes final and the date on which the petitioner files his first state collateral
6 challenge. Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). Once state collateral
7 proceedings are commenced, a state habeas petition is “pending” during a full round of review in
8 the state courts, including the time between a lower court decision and the filing of a new petition
9 in a higher court, as long as the intervals between petitions are “reasonable.” See Evans v.
10 Chavis, 546 U.S. 189, 192 (2006); Carey v. Saffold, 536 U.S. 214, 222-24 (2002).⁴

11 ANALYSIS

12 Pursuant to 28 U.S.C. § 2244(d)(1)(A), the statute of limitations for the filing of
13 an application for federal habeas relief by petitioner began to run when his judgment of
14 conviction became final on November 11, 2003. See Bowen v. Roe, 188 F.3d 1157, 1159 (9th
15 Cir. 1999) (holding that the period of direct review includes the 90-days a petition for a writ of
16 certiorari with the United States Supreme Court could be filed). Respondents are correct that
17 because petitioner filed his first state habeas petition before the statute of limitations for the filing
18 of federal petition even began to run, it has no tolling effect on the AEDPA statute of limitations.
19 In addition, because petitioner’s second state habeas petition was filed with the California
20 Supreme Court on May 27, 2003, before the AEDPA statute of limitations began to run on
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22 ⁴ When a state post-conviction petition is determined to be untimely by a state court,
23 there is no tolling of the statute of limitations under § 2244(d)(2). Bonner v. Carey, 425 F.3d
24 1145, 1148 (9th Cir. 2005) (citing Pace v. DiGuglielmo, 544 U.S. 408, 414 (2005)). See also
25 Carey, 536 U.S. at 226. However, in the absence of a clear indication that a state habeas
26 petitions were denied as untimely, the federal courts are charged with the duty of independently
determining whether petitioner filed his state habeas petitions within what California would
consider a reasonable time. Chavis, 546 U.S. at 198. Thus, the California Supreme Court’s
denial of a petition on the merits no longer means that the petition before that court was
necessarily timely for federal statute of limitations purposes .

1 November 12, 2003, tolling of the federal statute of limitations based on that filing did not
2 commence until November 12, 2003, and continued until the second state habeas petition was
3 denied by the California Supreme Court on March 3, 2004. Thus, the AEDPA statute of
4 limitations for the filing of petitioner’s federal habeas application was tolled for 112 days during
5 the time his second state habeas petition was pending before the California Supreme Court.⁵

6 Petitioner is not entitled to statutory tolling for the interval between the denial of
7 his second state habeas petition by the California Supreme Court and the filing of his third state
8 habeas petition with the Sutter County Superior Court because in pursuing his third state habeas
9 petition, petitioner did not go from a lower state court to a higher state court. See Banjo v.
10 Ayers, ___ F.3d ___, ___, 2010 WL 2403751, at *3 (9th Cir. June 17, 2010) (“Only the time
11 period during which a round of habeas review is pending tolls the statute of limitations; periods
12 between different rounds of collateral attack are not tolled.”); Delhomme v. Ramirez, 340 F.3d
13 817, 820-21 (9th Cir. 2003) (“A round of collateral review may begin at any level or even skip
14 levels, but if there is any gap between the completion of one round of review and the
15 commencement of another round of state habeas review, the petitioner is not entitled to tolling
16 during the gap.”); Biggs v. Duncan, 339 F.3d 1045, 1048 (9th Cir. 2003) (finding that petitioner
17 “kicked off a new round of collateral review” when he filed a non-ascending petition in the
18 Superior Court and was “no longer pursuing his application for habeas relief up the ladder of the
19 state court system”); see also Carey v. Stafford, 536 U.S. 214, 223 (2002) (holding that an
20 application for post conviction relief is pending during the “intervals between a lower court
21 decision and a filing of a new petition in a higher court”).

22 For purposes of argument, the court will accept respondents’ concession that
23 petitioner is nonetheless entitled to statutory tolling for the period during which his third state
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26 ⁵ Respondents assert that the statute of limitations was tolled for 113 days. See MTD at
7. This is a minor discrepancy which has no impact on the resolution of the pending motion.

