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

ANDREW A. CEJAS,

Petitioner,

No. 2:08-cv-2494 KJM EFB P

vs.

JAMES A. YATES, et al.,

Respondents.

FINDINGS AND RECOMMENDATIONS

_____ /

Petitioner is a state prisoner without counsel seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Presently before the court is respondent’s motion to dismiss the claims in the amended petition, with the exception of the single claim asserted in the original petition, upon the ground that they are untimely. For the reasons explained below, the court recommends respondent’s motion be granted.

I. Procedural History

Petitioner was convicted of first degree murder. Dckt. No. 34, Lodg. Doc. 3 at 2. The trial court found that petitioner had two prior serious felony convictions within the meaning of California’s Three Strikes Law and sentenced him to seventy-five years to life. *Id.* Petitioner appealed and the California Court of Appeal, Third Appellate District, affirmed the conviction.

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1 Dckt. No. 34, Lodg. Doc. 3. The California Supreme Court denied his request for review on
2 March 19, 2008. Dckt. No. 34, Lodg. Docs. 5-6.

3 On August 1, 2009, petitioner filed a state habeas petition in the Sacramento Superior
4 Court alleging that the imposed sentence violated the terms of a plea agreement from a prior
5 case. Dckt. No. 75, Lodg. Doc. 1. That petition was denied on September 22, 2009. *Id.*
6 Petitioner then filed a habeas petition in the California Court of Appeal, Third Appellate District,
7 which was denied on October 29, 2009. Dckt. No. 75, Lodg. Doc. 2. On November 10, 2009,
8 petitioner filed a third state petition in the California Supreme Court. That petition was denied
9 on March 30, 2010. Dckt. No. 75, Lodg. Doc. 3.

10 Petitioner initially filed a petition for writ of habeas corpus in this matter on October 14,
11 2008.¹ Dckt. No. 1. In the initial federal petition, petitioner alleged a single claim—that an
12 instructional error allowed the jury to impermissibly consider his prior bad acts in reaching a
13 verdict. *Id.* Then, on April 26, 2010, while the initial federal petition was still pending,
14 petitioner filed a second petition in this court, challenging a different aspects of the same
15 trial—that the trial court breached an earlier plea agreement by sentencing petitioner under
16 California’s Three Strikes Law. Dckt. No. 42, *see also* Case No. 2:10-cv-0995 MCE EFB P,
17 Dckt. No. 1. In both cases, petitioner sought leave to amend his petition to add additional
18 claims. Given that the two petitions challenged the same conviction and involved common
19 questions of fact and law, the undersigned consolidated the two cases and granted petitioner
20 leave to file an amended petition containing the claims raised in his initial federal petition, the
21 petition filed in Case No. 2:10-cv-0995 MCE EFB P, and those identified in petitioner’s motion
22 for leave to amend. *See* Dckt. No. 57 at 3. Plaintiff filed a first amended petition on March 17,
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24 ¹ Unless stated otherwise, the court deems the filing date for each of petitioner’s habeas
25 petitions to be the date reflected on the certificate of service for the respective petitions. *See*
26 *Houston v. Lack*, 487 U.S. 266, 276 (1988) (prisoner’s notice of appeal deemed timely filed on
the date it was delivered to prison staff for delivery to the court); *Smith v. Duncan*, 297 F.d 809,
814 (9th Cir. 2002) (applying mailbox rule to petitions filed in state court).

1 2011. Dckt. No. 65. Pending before the court is respondent’s motion to dismiss the newly
2 asserted claims contained in the amended petition on the ground that they are untimely. Dckt.
3 No. 74.

4 **II Statute of Limitations**

5 A one-year limitations period for seeking federal habeas relief begins to run from the
6 latest of the date the judgment became final on direct review, the date on which a state-created
7 impediment to filing is removed, the date the United States Supreme Court makes a new rule
8 retroactively applicable to cases on collateral review or the date on which the factual predicate of
9 a claim could have been discovered through the exercise of due diligence. 28 U.S.C.
10 § 2244(d)(1).

11 There is no statutory tolling of the limitations period “from the time a final decision is
12 issued on direct state appeal [to] the time the first state collateral challenge is filed” *Nino v.*
13 *Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999). However, once a petitioner properly files a state
14 post-conviction application the period is tolled, and remains tolled for the entire time that
15 application is “pending.” 28 U.S.C. § 2244(d)(2). “[A]n application is ‘properly filed’ when its
16 delivery and acceptance are in compliance with the applicable laws and rules governing filings.”
17 *Artuz v. Bennett*, 531 U.S. 4, 8 (2000). In California, a properly filed post-conviction application
18 is “pending” during the intervals between a lower court decision and filing a new petition in a
19 higher court. *Carey v. Saffold*, 536 U.S. 214, 223 (2002). A federal habeas application does not
20 provide a basis for statutory tolling. *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001).

21 The limitations period may also be equitably tolled where a habeas petitioner establishes
22 two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary
23 circumstance stood in his way. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). In light of this
24 pronouncement, the Ninth Circuit has reiterated that the threshold necessary to trigger equitable
25 tolling is very high, and clarified that equitable tolling only applies where a petitioner shows that
26 despite diligently pursuing his rights, some external force *caused* the untimeliness. *Waldron-*

1 *Ramsey v. Pacholke*, 556 F.3d 1008, 1011 (9th Cir. 2009).

2 Petitioner has the burden of showing facts entitling him to statutory and equitable tolling.
3 *Smith v. Duncan*, 297 F.3d 809, 814 (9th Cir. 2002); *Miranda v. Castro*, 292 F.3d 1063, 1065
4 (9th Cir. 2002).

5 **III. Analysis**

6 In this case, the statute of limitations began to run when petitioner’s conviction became
7 final on direct review. *See* 28 U.S.C. § 2244(d)(1)(A). The California Supreme Court denied
8 review on March 19, 2008. Lodg. Doc. 12. The conviction became “final” within the meaning
9 of section 2244(d)(1)(A) when the time for filing a petition for writ of certiorari expired ninety
10 days later, on June 18, 2008. Supreme Ct. R. 13; *Bowen v. Roe*, 188 F.3d 1157, 1158-59 (9th
11 Cir. 1999). The one-year limitations period commenced running the following day. *Patterson v.*
12 *Stewart*, 251 F.3d 1243, 1246 (9th Cir. 2001). Thus, petitioner had until June 18, 2009 to file his
13 federal habeas petition.

14 Petitioner’s initial federal petition was filed on October 14, 2008, which was within the
15 one year limitation period. Thus, the single claim asserted in that petition is not barred by the
16 statute of limitations. However, the petition filed in Case No. 2:10-cv-0995 MCE EFB P was not
17 filed until April 21, 2010, and the amended petition was not filed in this court until March 17,
18 2011.² Respondent contends that the new claims contained in the amended petition, including
19 those claims asserted in the petition filed in Case No. 2:10-cv-0995 MCE EFB P, are barred by
20 the statute of limitations. Specifically, respondent argues that petitioner is not entitled to tolling
21 and that the new claims do not relate back to the original petition.

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26 ² The amended petition does not contain a date of service. *See* Dckt. No. 63 at 6. As
such, the filing date is the date on which the petition was received by the court.

1 **A. Tolling**

2 Petitioner is not entitled to statutory tolling because he did not file his state petitions prior
3 to the expiration of the limitations period. *See Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th
4 Cir. 2003) (“[S]ection 2244(d) does not permit the reinitiation of the limitations period that has
5 ended before the state petition was filed.”).

6 Petitioner contends, however, that his new claims are not barred by the statute of
7 limitations because he is entitled to equitable tolling. A petitioner is entitled to equitable tolling
8 only if he shows (1) that he has been pursuing his rights diligently, and (2) that some
9 extraordinary circumstance prevented him from timely filing. *Holland v. Florida*, __ U.S. __,
10 130 S.Ct. 2549, 2562 (2010). It is petitioner’s burden to present facts showing that he is entitled
11 to equitable tolling. *Miranda*, 292 F.3d at 1065.

12 Petitioner has made no showing that he is entitled to equitable tolling. He simply cites to
13 cases discussing equitable tolling and concludes that equitable tolling is applicable in his case.
14 Dckt. No. 76 at 2-3. He does not attempt to show that he acted diligently but that some external
15 circumstance prevented him from timely filing. Thus, petitioner has failed to satisfy his burden.
16 As there is no basis for tolling of the limitations period, petitioner’s claims in the amended
17 petition are barred unless they relate back to the single claim timely asserted in his original
18 federal petition.

19 **B. Relation Back**

20 Amendments made after the statute of limitations has run can relate back to the date of
21 the original pleading where the amendments arise out of the same “conduct, transaction or
22 occurrence.” Fed. R. Civ. P. 15(c)(1)(B). However, in a habeas action, a new claim does not
23 “relate back” to the filing of an exhausted petition simply because it arises from “the same trial,
24 conviction, or sentence.” *Mayle v. Felix*, 545 U.S. 644, 662–64 (2005). Rather, a petitioner may
25 amend a new claim into a pending federal habeas petition after the expiration of the limitations
26 period, but only if the new claim shares a “common core of operative facts” with the claims in

1 the pending petition and is the same in both “time and type” from those set forth in the original
2 pleading. *Id.* at 659.

3 Here, the additional claims in the amended petition do not relate back to the single claim
4 contained in his timely filed habeas petition. The claim contained in the original petition
5 challenged a jury instruction that allegedly permitted the jury to consider defendant’s prior bad
6 acts in determining his guilt. Dckt. No. 1. In addition to that claim, the amended petition
7 contains the following claims: (1) the present conviction violates the terms of a plea agreement
8 from a prior case and his trial counsel was ineffective for not seeking enforcement of the terms
9 of the plea agreement; (2) his right to a fair trial was violated because of jury misconduct; (3) the
10 government destroyed exculpatory evidence; (4) his right to be free from illegal searches and
11 seizures was violated (including subclaims that a search of his home was without a warrant, not
12 in good faith, and without valid consent); (5) he was unconstitutionally denied funds for an
13 expert witness; and (6) he was improperly shackled in view of the jury. Dckt. No. 63.

14 The additional claims asserted in the amended petition are unrelated to petitioner’s claim
15 that the trial court erred in giving a jury instruction that permitted the jury to consider evidence
16 of his prior bad acts in determining guilt. The new claims are based on independent facts and are
17 not of the same time and type as the claim in the timely petition; they are not based on “the same
18 core facts” as petitioner’s claim that the trial court committed instructional error. *See Mayle*, 545
19 U.S. at 657-59. Since petitioner’s new claims are not timely and do not relate back to the timely
20 filed petition, those claims must be dismissed.³ Thus, the only claim remaining in the amended
21 petition is petitioner’s instructional error claim. As respondent has already filed an answer to
22 this claim, Dckt. No. 28, and petitioner has filed a traverse, Dckt. No. 36, the matter should stand

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24 ³ In addition to his equitable tolling and relation back arguments, petitioner contends that
25 the new claims should not be dismissed because he “can ask for a stay and abeyance procedure
26 until federal claims are exhausted.” Dckt. No. 80 at 3. This argument has no relevance to the
present motion because respondent moves to dismiss the amended petition on the ground that it
is untimely, not on the ground that it contains unexhausted claims. Furthermore, it appears that
petitioner may have exhausted all the claims asserted in the amended petition. *See* Dckt. No. 76.

1 submitted for decision.

2 **IV. Conclusion**

3 The court finds that the new claims asserted in the amended petition are untimely.

4 Accordingly, it is hereby RECOMMENDED that:

5 1. Respondent's motion to dismiss be granted;

6 2. All claims in the amended petition, with the exception of petitioner's instructional
7 error claim, be dismissed; and

8 3. The matter stand submitted for decision on petitioner's instructional error claim.

9 These findings and recommendations are submitted to the United States District Judge
10 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
11 after being served with these findings and recommendations, any party may file written
12 objections with the court and serve a copy on all parties. Such a document should be captioned
13 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections
14 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
15 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991). In
16 his objections petitioner may address whether a certificate of appealability should issue in the
17 event he files an appeal of the judgment in this case. *See* Rule 11, Rules Governing Section
18 2254 Cases (the district court must issue or deny a certificate of appealability when it enters a
19 final order adverse to the applicant).

20 Dated: June 28, 2012.

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22 EDMUND F. BRENNAN
23 UNITED STATES MAGISTRATE JUDGE
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