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

JOHN PHONTHACHACK,

Petitioner,

No. CIV S-09-0979 FCD DAD P

vs.

J. LIZARRAGA, Warden,

ORDER AND

Respondent.

FINDINGS AND RECOMMENDATIONS

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Petitioner, a state prisoner proceeding pro se, has filed an amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. On May 11, 2009, the undersigned ordered respondent to file and serve a response to the petition. On July 10, 2009, respondent filed the pending motion to dismiss, arguing that petitioner’s habeas petition is time-barred under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). Petitioner has not filed an opposition to the motion.¹

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¹ On August 19, 2009, the undersigned issued an order to show cause, ordering petitioner to file an opposition to respondent’s motion to dismiss within twenty days and warning petitioner that failure to do so could “be deemed a waiver of any opposition to the granting of the motion.” Petitioner has not complied with the court’s order. Accordingly, dismissal pursuant to Federal Rule of Civil Procedure 41(b) would be justified.

1 **BACKGROUND**

2 On April 28, 2004, a Sacramento County Superior Court jury convicted petitioner
3 of attempted murder. The jury also found use of a firearm and gang enhancement allegations to
4 be true. As a result, the trial court sentenced petitioner to an indeterminate term of thirty-two
5 years to life in state prison. On March 16, 2006, the California Court of Appeal for the Third
6 Appellate District affirmed the judgment of conviction. On June 14, 2006, the California
7 Supreme Court denied review. (Pet. at 2; Resp't's Lodged Docs. 1-4.)

8 Petitioner subsequently filed three petitions for writ of habeas corpus in the state
9 courts. On November 15, 2006, he filed a petition for writ of habeas corpus in the Sacramento
10 County Superior Court which was denied on February 20, 2007. On March 30, 2007, petitioner
11 filed a petition for writ of habeas corpus in the California Court of Appeal for the Third
12 Appellate District which was denied on May 17, 2007. Finally, on April 22, 2008, petitioner
13 filed a petition for writ of habeas corpus in the California Supreme Court which was denied on
14 October 1, 2008. (Resp't's Lodged Docs. 5-11.)

15 On April 8, 2009, petitioner commenced this action by filing a federal petition for
16 writ of habeas corpus. On April 28, 2009, petitioner filed an amended petition.

17 **RESPONDENT'S MOTION TO DISMISS**

18 Respondent has filed a motion to dismiss arguing that petitioner's federal habeas
19 petition is time-barred. Specifically, respondent argues that on June 14, 2006, the California
20 Supreme Court denied petitioner's petition for review, causing petitioner's judgment of
21 conviction to become "final" on September 12, 2006, after the time for filing a petition for writ
22 of certiorari with the United States Supreme Court expired. Respondent argues that the one-year
23 statute of limitations for filing a federal habeas petition began to run the following day, on
24 September 13, 2006, and expired one year later on September 12, 2007. (Resp't's Mot. to
25 Dismiss at 2-3.)

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1 Respondent acknowledges that the proper filing of a state post-conviction
2 application challenging a judgment of conviction tolls the applicable one-year statute of
3 limitations period. Respondent also concedes that petitioner is entitled to tolling for 184 days
4 under the statute of limitations for the time that his state habeas petitions were pending in the
5 Sacramento County Superior Court and before the California Court of Appeal. However,
6 respondent argues that petitioner unreasonably delayed in filing his third habeas petition with the
7 California Supreme Court and is therefore not entitled to tolling of the federal statute of
8 limitations for the 342 days between the California Court of Appeal's denial of his second
9 petition and his filing of his third petition with the California Supreme Court. (Resp't's Mot. to
10 Dismiss at 3-5.)

11 Granting petitioner the benefit of 184 days of tolling, respondent contends that the
12 one-year statute of limitations for the filing of a federal habeas petition expired on March 14,
13 2008. Respondent notes that petitioner, however, did not file his federal petition until more than
14 a year later on April 8, 2009. Finally, respondent contends that the habeas petition filed with the
15 California Supreme Court took place after the federal statute of limitations expired and does not
16 restart the clock at zero or otherwise save petitioner's claims from being time-barred.
17 Accordingly, respondent concludes that petitioner's federal petition for writ of habeas corpus is
18 untimely and should be dismissed with prejudice. (Resp't's Mot. to Dismiss at 5.)

19 ANALYSIS

20 I. The AEDPA Statute of Limitations

21 On April 24, 1996, Congress enacted AEDPA which amended 28 U.S.C. § 2244
22 by adding the following provision:

23 (d)(1) A 1-year period of limitation shall apply to an application
24 for a writ of habeas corpus by a person in custody pursuant to the
25 judgment of a State court. The limitation period shall run from the
26 latest of –

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1 (A) the date on which the judgment became final by the
2 conclusion of direct review or the expiration of the time for
3 seeking such review;

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

8 (C) the date on which the constitutional right asserted was
9 initially recognized by the Supreme Court, if the right has been
10 newly recognized by the Supreme Court and made retroactively
11 applicable to cases on collateral review; or

12 (D) the date on which the factual predicate of the claim or
13 claims presented could have been discovered through the exercise
14 of due diligence.

15 (2) The time during which a properly filed application for State
16 post-conviction or other collateral review with respect to the
17 pertinent judgment or claim is pending shall not be counted toward
18 any period of limitation under this subsection.

19 The one-year AEDPA statute of limitations applies to all federal habeas corpus petitions filed
20 after the statute was enacted and therefore applies to the pending petition. See Lindh v. Murphy,
21 521 U.S. 320, 322-23 (1997).

22 II. Application of § 2244(d)(1)(A)

23 As noted above, on April 28, 2004, in the Sacramento County Superior Court,
24 petitioner was found guilty of attempted murder and use of a firearm and gang enhancement
25 allegations were also found be true. He was sentenced to an indeterminate term of thirty-two
26 years to life in state prison. On March 16, 2006, the California Court of Appeal for the Third
Appellate District affirmed that judgment of conviction. On June 14, 2006, the California
Supreme Court denied review.

For purposes of federal habeas review, petitioner's conviction became final on
September 12, 2006, ninety days after the California Supreme Court denied his petition for
review. See Summers v. Schriro, 481 F.3d 710, 717 (9th Cir. 2007); Bowen v. Roe, 188 F.3d
1157, 1158-59 (9th Cir. 1999). The AEDPA statute of limitations period began to run the

1 following day, on September 13, 2006, and expired one year later on September 12, 2007.
2 Petitioner did not file his federal habeas petition with this court until April 8, 2009. Accordingly,
3 petitioner's federal petition for writ of habeas corpus is untimely unless he is entitled to the
4 benefit of tolling.

5 III. Application of § 2244(d)(2)

6 "The time during which a properly filed application for State post-conviction or
7 other collateral review with respect to the pertinent judgment or claim is pending shall not be
8 counted" toward the AEDPA statute of limitations. 28 U.S.C. § 2244(d)(2). The statute of
9 limitations is not tolled during the interval between the date on which a judgment becomes final
10 and the date on which the petitioner files his first state collateral challenge because there is no
11 case "pending." Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). Once a petitioner
12 commences state collateral proceedings, a state habeas petition is "pending" during a full round
13 of review in the state courts, including the time between a lower court decision and the filing of a
14 new petition in a higher court, as long as the intervals between the filing of those petitions are
15 "reasonable." Carey v. Saffold, 536 U.S. 214, 222-24 (2002).

16 In this case, sixty-three days of the AEDPA's one-year statute of limitations
17 elapsed before petitioner filed his first habeas petition in the Sacramento County Superior Court
18 on November 15, 2006. As respondent acknowledges, petitioner is entitled to 184 days of tolling
19 for the time that petitioner's habeas petitions were pending before the Superior Court and the
20 California Court of Appeal. However, petitioner is not entitled to tolling for the 342 days that
21 elapsed between the California Court of Appeal's denial of his second habeas petition and his
22 filing of this third habeas petition with the California Supreme Court. Petitioner unreasonably
23 delayed in filing his petition with the California Supreme Court and has not explained or justified
24 this delay in any way. See, e.g., Gaston v. Palmer, 447 F.3d 1165, 1167 (9th Cir. 2006)
25 (unexplained delays of eighteen, fifteen, and ten months between habeas filings are unreasonable

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1 and not subject to interval tolling). During this lengthy interval, the AEDPA statute of
2 limitations for the filing of a federal habeas petition expired.

3 In reaching this conclusion, the court has taken into account the following. In
4 Evans v. Chavis, 546 U.S. 189, 192-93 (2006), the United States Supreme Court acknowledged
5 that in California, a state prisoner may seek review of an adverse lower court decision by filing a
6 habeas petition in a higher court, and that such a petition is timely if it is filed within a
7 “reasonable time.” Id. at 192-93. In deciding in that case whether the three-year interval
8 between the California Court of Appeal’s denial and the filing of a habeas petition with the
9 California Supreme Court was reasonable, the Supreme Court concluded that in “viewing every
10 disputed issue most favorably to Chavis, there remains a totally unexplained, hence unjustified,
11 delay of at least six months.” Id. at 201. In that context, the Supreme Court stated as follows:

12 Six months is far longer than the “short period[s] of time,” 30 to 60
13 days, that most States provide for filing an appeal to the state
14 supreme court. Saffold, supra, at 219, 122 S. Ct. 2134. It is far
15 longer than the 10-day period California gives a losing party to file
16 a notice of appeal in the California Supreme Court, see Cal. App.
17 Ct. Rule 28(e)(1) (2004). We have found no authority suggesting,
18 nor found any convincing reason to believe, that California would
19 consider an unjustified or unexplained 6-month filing delay
20 “reasonable.” Nor do we see how an unexplained delay of this
21 magnitude could fall within the scope of the federal statutory word
22 “pending” as interpreted in Saffold.

18 Id. Thus, “Evans made clear that an unexplained delay of six months between the denial of one
19 California state court and a new filing in a higher California court was too long to permit tolling
20 of the federal limitations period on the ground that state court proceedings were ‘pending.’”
21 Waldrip v. Hall, 548 F.3d 729, 735 (9th Cir. 2008).²

23 ² It may be that petitioner could have provided an adequate explanation for all or part of his
24 342-day delay in proceeding from one state court to the next. As one district court has noted,
25 California courts have excused long delays “where the petitioner was uneducated, was ignorant of
26 legal rights and procedures” and “[t]he United Supreme Court has also implied that a delay may be
excused if the prisoner was unable to access the prison law library due to scheduling conflicts or
prison lockdowns.” Gutierrez v. Dexter, No. CV 07-00122-MMM (MLG), 2008 WL 4822867 at
*5 (C.D. Cal. Oct. 30, 2008). See also White v. Ollison, 530 F. Supp. 2d 1077, 1083 (C.D. Cal.
2007) (76-day delay to resubmit petition on a proper form after Clerk of the Court refused to file it

1 **CONCLUSION**

2 IT IS HEREBY ORDERED that:

3 1. Respondent's July 10, 2009 request to substitute Warden Walker as respondent
4 in this action (Doc. No. 13) is granted; and

5 2. The Clerk of the Court is directed to amend the docket to reflect that Warden
6 James Walker is the respondent in this action.

7 IT IS HEREBY RECOMMENDED that:

8 1. Respondent's July 10, 2009 motion to dismiss (Doc. No. 13) be granted; and

9 2. This action be closed.

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

18 DATED: November 12, 2009.

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21 _____
22 DALE A. DROZD
23 UNITED STATES MAGISTRATE JUDGE

22 DAD:9
23 phon0979.157