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

JAMES McELROY,

Petitioner,

No. 2:09-cv-2259 GEB KJN P

vs.

JAMES HAVILAND, Warden,

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 2007 Board of Parole Hearings (BPH) decision that found petitioner unsuitable for parole.

Pending before the court is respondent’s February 2, 2010 motion to dismiss on the grounds that this action is barred by the statute of limitations. Dkt. No. 10. Petitioner filed an opposition and respondent filed a reply. Dkt. Nos. 12, 13. After carefully considering the entire record, the court recommends that respondent’s motion to dismiss be denied.

II. Motion to Dismiss

The statute of limitations for federal habeas corpus petitions is set forth in 28 U.S.C. § 2244(d)(1):

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

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

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

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

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

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

20 Since Redd, the administrative review process for parole suitability hearings has
21 been eliminated. According to the transcript from petitioner’s March 23, 2007, suitability
22 hearing before the BPH, the decision finding petitioner unsuitable for parole became final on July
23 21, 2007. Petition at 178.¹

24 Respondent argues that the statute of limitations ran from the date of the hearing,

25 ¹ The court has referred to all page numbers as they appear on the court’s electronic filing
26 system, as plaintiff’s petition is not numbered consecutively.

1 i.e. March 23, 2007, rather than from the date it became final on July 21, 2007. The undersigned
2 does not agree. The BPH decision explicitly stated, "This decision will be final on JUL 21 2007.
3 You will be promptly notified if, prior to that date, the decision is modified." Petition at 178.
4 Therefore, it was entirely reasonable for petitioner to rely on July 21, 2007, to be the date that the
5 decision was final. In fact, petitioner was notified that the decision could be modified before that
6 date. Id.

7 "Under the rationale of Redd, petitioner could not have known the factual
8 predicate of his claim unless and until the decision becomes final. See Redd v. McGrath, 343
9 F.3d at 1084 (statute of limitations begins to run when administrative decision becomes final).
10 The decision became final on July 21, 2007, 120 days after the hearing, pursuant to Cal. Pen. §
11 3041(b). See also Tidwell v. Marshall, 620 F.Supp.2d 1098 (C.D. Cal. 2009); Clark v. Sisto,
12 No. 2:09-cv-3057 FCD GGH P (E.D. Cal. March 12, 2010); Faatiliga v. Hartley, No. 2:09-cv-
13 2039 LJO DLB P, 2010 WL 728552 at *3 (E.D. Cal. March 1, 2010); Banks v. Kramer, 2009
14 WL 256449 *1 (E.D. Cal. 2009); Ramirez-Salgado v. Scribner, 2009 WL 211117 *5 (S.D. Cal.
15 2009).

16 Thus, the statute of limitations began to run the next day, on July 22, 2007.
17 Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001). Petitioner had one year, that is until
18 July 22, 2008, to file a timely federal petition. The instant federal petition, filed on July 28,
19 2009, is not timely unless petitioner is entitled to statutory or equitable tolling.²

20 Petitioner filed three state post-conviction collateral actions:

- 21 1. May 9, 2008: First habeas petition filed in the San Bernadino County Superior
22 Court. MTD, Exh. 1 at 52. The petition was denied on November 5, 2008.
23 MTD, Exh. 2 at 1.

24 ² The court affords petitioner application of the mailbox rule as to all his habeas filings in
25 state court and in this federal court. Houston v. Lack, 487 U.S. 266, 275-76 (1988) (pro se
26 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
delivers habeas petition to prison officials for the court within limitations period).

1 2. December 1, 2008: Second habeas petition filed in the California Court of
2 Appeal, Fourth Appellate District. MTD, Exh. 3 at 52. The petition was denied
on December 18, 2008. MTD, Exh. 4 at 1.

3 3. January 12, 2009: Third habeas petition filed in the California Supreme Court.
4 MTD, Exh. 5 at 52. The petition was denied on July 8, 2009. MTD, Exh. 6 at 1.

5 Petitioner filed the instant petition on July 28, 2009.

6 Statutory Tolling

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

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

21 The court initially notes that after reviewing the decisions of all three state
22 petitions, the petitions were “properly filed” for purposes of statutory tolling. See Pace.
23 Petitioner’s first state petition was filed on May 9, 2008, approximately 292 days after judgment
24 became final. Petitioner is entitled to tolling for the period from May 9, 2008, the date the
25 petition was filed, to November 5, 2008, the date the state petition was denied, 180 days. With
26 this tolling, petitioner had until approximately January 18, 2009 to timely file his federal petition.

1 The first state petition was denied on November 5, 2008, by the San Bernadino
2 County Superior Court and petitioner filed his second petition on December 1, 2008, with the
3 California Court of Appeal. Petitioner will receive interval tolling for the 26 days, as this was a
4 reasonable time period and the petition was filed in a higher court. Evans v. Chavis, 546 U.S. at
5 193-94. Petitioner will also receive statutory tolling for the pendency of the second petition,
6 from December 1, 2008 to December 18, 2008, 17 days. With both of these tolling allotments
7 equaling 43 days petitioner had until March 2, 2009, to file his federal petition.

8 The second petition was denied by the California Court of Appeal on December
9 18, 2008, and petitioner filed his next petition with the California Supreme Court on January 12,
10 2009. Petitioner will receive interval tolling for the 25 days between the denial and filing of this
11 petition. See Evans. Petitioner will also receive tolling for the pendency of this petition which
12 was denied by the California Supreme Court on July 8, 2009, another 177 days. Petitioner
13 receives another 202 days of tolling. With these additions, petitioner had until approximately
14 September 20, 2009, to file his federal petition.

15 Therefore, petitioner's federal petition filed on July 28, 2009 is timely.

16 Accordingly, IT IS HEREBY RECOMMENDED that respondent's February 2,
17 2010 motion to dismiss (Dkt. No. 10) be denied and respondent be ordered to file an answer to
18 the petition.

19 These findings and recommendations are submitted to the United States District
20 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
21 one days after being served with these findings and recommendations, any party may file written
22 objections with the court and serve a copy on all parties. Such a document should be captioned
23 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
24 objections shall be filed and served within fourteen days after service of the objections. The
25 parties are advised that failure to file objections within the specified time may waive the right to

26 ///


1 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

2 DATED: March 24, 2010

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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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