

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

MICHAEL AARON WITKIN,

Petitioner,

No. CIV S-10-0091 GEB DAD P

vs.

JAMES A. YATES, Warden,

Respondent.

FINDINGS AND RECOMMENDATIONS

_____ /

Petitioner, a state prisoner proceeding pro se, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner has paid the filing fee.

PRELIMINARY SCREENING

Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition if it “plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court. . . .” Rule 4, Rules Governing Section 2254 Cases. The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of habeas corpus at several stages of a case, including “summary dismissal under Rule 4; a dismissal pursuant to a motion by the respondent; a dismissal after the answer and petition are considered; or a dismissal after consideration of the pleadings and an expanded record.”

1 ANALYSIS

2 I. The AEDPA Statute of Limitations

3 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death
4 Penalty Act (“AEDPA”). AEDPA amended 28 U.S.C. § 2244 by adding the following provision:

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

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

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

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

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

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

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

II. Application of §§ 2244(d)(1)(A)

As noted above, on June 29, 2005, a Sacramento County Superior Court jury
convicted petitioner of felony battery and resisting arrest. The trial court sentenced petitioner to
forty-eight months in state prison. On May 11, 2007, the California Court of Appeal affirmed his

1 conviction. That decision became final on June 10, 2007, thirty days after filing. See Cal. Rules
2 of Court 8.264 (formerly Rule 24). Petitioner did not seek review in the California Supreme
3 Court.

4 For purposes of federal habeas review, petitioner’s conviction became final on
5 June 20, 2007, after the ten-day period for seeking direct review in the California Supreme Court
6 expired. See Cal. Rules of Court 8.500 (formerly Rule 28). The AEDPA statute of limitations
7 period began to run the following day, on June 21, 2007, and expired one year later on June 20,
8 2008. Under the mailbox rule, petitioner did not file his federal habeas petition in the United
9 States District Court for the Central District of California until December 9, 2009. Accordingly,
10 petitioner’s federal petition for writ of habeas corpus is untimely unless he is entitled to the
11 benefit of tolling.

12 III. Application of § 2244(d)(2)

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

23 In this case, petitioner filed two petitions for writ of habeas corpus in the
24 California Supreme Court challenging his judgment of conviction. However, petitioner did not
25 file the first of his state habeas petitions until October 24, 2008, well after the AEDPA statute of
26 limitations for the filing of a federal habeas petition had expired. It is well established that

1 “section 2244(d) does not permit the reinitiation of the limitations period that has ended before
2 the state petition was filed.” Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003).

3 Accordingly, by the time petitioner signed his original federal petition and submitted it for filing
4 in federal court on December 9, 2009, more than one year had run on the statute of limitations,
5 rendering his federal habeas petition time-barred.

6 **CONCLUSION**

7 Accordingly, IT IS HEREBY RECOMMENDED that:

- 8 1. Petitioner’s application for a writ of habeas corpus (Doc. No. 1) be dismissed
9 as barred by the statute of limitations; and
10 2. This action be closed.

11 These findings and recommendations are submitted to the United States District
12 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
13 one days after being served with these findings and recommendations, petitioner may file written
14 objections with the court. The document should be captioned “Objections to Magistrate Judge's
15 Findings and Recommendations.” Petitioner is advised that failure to file objections within the
16 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
17 F.2d 1153 (9th Cir. 1991).

18 DATED: January 29, 2010.

19
20 
21 _____
22 DALE A. DROZD
23 UNITED STATES MAGISTRATE JUDGE

21 DAD:9
22 witk0091.156