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

KENNETH A. FULLER,

Petitioner,

No. CIV S-10-0842 DAD P

vs.

RICK HILL, Warden,

Respondent.

ORDER AND

FINDINGS AND RECOMMENDATIONS

_____ /

Petitioner, a state prisoner proceeding pro se, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. On April 26, 2010, the undersigned ordered respondent to file and serve a response to the petition. On December 28, 2010, 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 April 4, 2011, the undersigned issued an order to show cause, ordering petitioner to file an opposition to respondent’s motion to dismiss within twenty-one days and warning petitioner that failure to do so could “be deemed a waiver of any opposition to the granting of the motion.” Nonetheless, petitioner still has not filed an opposition to respondent’s motion. Accordingly, dismissal pursuant to Federal Rule of Civil Procedure 41(b) would be justified.

1 **BACKGROUND**

2 On June 4, 2007, petitioner pleaded no contest to a misdemeanor charge of
3 driving under the influence in the Solano County Superior Court. On the same day, that court
4 suspended imposition of sentence and placed petitioner on probation for three years. According
5 to his petition filed with this court, petitioner did not appeal the conviction. On November 30,
6 2009, however, petitioner did file a petition for writ of habeas corpus attacking his misdemeanor
7 conviction in the California Supreme Court. On February 3, 2010, the California Supreme Court
8 denied the petition. (Resp't's Mot. to Dismiss Exs. 1 & 2.)

9 Under the mailbox rule², on April 7, 2010, petitioner commenced this action by
10 filing a federal petition for writ of habeas corpus with this court.

11 **RESPONDENT'S MOTION TO DISMISS**

12 Respondent moves to dismiss the pending petition, arguing that it is time-barred.
13 Specifically, respondent argues that petitioner's judgment of conviction became final on August
14 3, 2007, after the time for filing a direct appeal had expired. The statute of limitations for the
15 filing of a federal habeas petition began running the following day on August 4, 2007, and
16 expired one year later on August 3, 2008. (Resp't's Mot. to Dismiss at 2.)

17 Respondent acknowledges that the proper filing of a state post-conviction
18 application challenging a judgment of conviction tolls the one-year statute of limitations period.
19 However, respondent contends that petitioner is not entitled to statutory tolling because he did
20 not file his sole state habeas petition with the California Supreme Court until after the statute of
21 limitations for the filing of a federal petition had expired. Accordingly, respondent maintains
22 that the pending petition is untimely and must be dismissed with prejudice. (Resp't's Mot. to
23 Dismiss at 2-3.)

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25 _____
26 ² See Houston v. Lack, 487 U.S. 266, 276 (1988).

1 ANALYSIS

2 I. The AEDPA Statute of Limitations

3 On April 24, 1996, Congress enacted AEDPA which amended 28 U.S.C. § 2244
4 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.

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 June 4, 2007, petitioner pleaded no contest to a misdemeanor
24 charge of driving under the influence in the Solano County Superior Court. On the same day,
25 that court suspended imposition of sentence and placed petitioner on probation for three years.
26 Petitioner did not appeal from that judgment of conviction.

1 For purposes of federal habeas review, petitioner’s conviction became final on
2 August 3, 2007, when the sixty-day period for filing a direct appeal expired. See Cal. Rules of
3 Court, Rule 8.308. The AEDPA one-year statute of limitations period began to run the following
4 day, on August 4, 2007, until it expired one year later on August 3, 2008. Petitioner filed his
5 federal habeas petition more than a year and eight months later, on April 7, 2010. Accordingly,
6 petitioner’s federal petition for writ of habeas corpus is untimely unless he is entitled to the
7 benefit of tolling.

8 III. Application of § 2244(d)(2)

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

19 In this case, petitioner filed only one petition seeking habeas corpus relief in state
20 court. However, he did not file his sole petition with the California Supreme Court until
21 November 30, 2009, long after the statute of limitations for the filing of a federal habeas petition
22 had expired. “[S]ection 2244(d) does not permit the reinitiation of the limitations period that has
23 ended before the state petition was filed.” Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir.
24 2003). Accordingly, petitioner is not entitled to statutory tolling of the AEDPA statute of
25 limitations.

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1 In short, by the time petitioner filed his federal habeas petition on April 7, 2010,
2 the AEDPA statute of limitations for doing so had expired, rendering his pending federal habeas
3 petition time-barred. Accordingly, respondent's motion to dismiss the pending petition should be
4 granted.

5 **CONCLUSION**

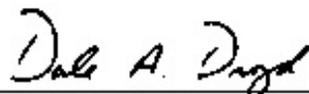
6 IT IS HEREBY ORDERED that the Clerk of the Court is directed to randomly
7 assign a United States District Judge to this action.

8 IT IS HEREBY RECOMMENDED that:

- 9 1. Respondent's December 28, 2010 motion to dismiss (Doc. No. 18) be granted;
10 and
11 2. This action be closed.

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

20 DATED: May 9, 2011.

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23 _____
24 DALE A. DROZD
25 UNITED STATES MAGISTRATE JUDGE
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