IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CROSSAN D. HOOVER, JR.,

Petitioner, No. 2: 10-cv-1447 WBS KJN P

vs.

G. SWARTHOUT,

Respondent. FINDINGS AND RECOMMENDATIONS

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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 his 2008 prison disciplinary conviction for possession of contraband (a cell phone) in violation of Cal. Code Regs. tit. 15, § 3006. This action is proceeding on the original petition filed, pursuant to the mail box rule, on May 6, 2010.

In the answer, respondent argues that the petition is barred by the statute of limitations and that the claims are procedurally barred. Respondent also argues that the claims should be denied on the merits.

These arguments would have been more appropriately raised in a motion to dismiss. Nevertheless, petitioner had an opportunity to oppose these arguments (Docket ("Dkt.")

No. 20), respondent filed a reply (Dkt. No. 220, and petitioner filed a response (Dkt. No. 23). Accordingly, the issues have been fully briefed.

After carefully considering the record, the undersigned recommends that the petition be dismissed on grounds that this action is barred by the statute of limitations and that the claims are procedurally barred. For these reasons, the undersigned does not reach the merits of petitioner's claims.

II. Statute of Limitations

28 U.S.C. § 2244(d)(1) sets forth the relevant statute of limitations:

> A 1-year period of limitation shall apply to an application for a writ 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 –
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> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
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> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
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> (C) the date on which the constitutional right asserted was initially 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
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> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

Triggering Date for Statute of Limitations

In most cases, the limitations period begins running on the date that the petitioner's direct review became final, pursuant to subsection (d)(1)(A). In a situation such as this, however, where the petitioner is challenging a prison disciplinary conviction, the Ninth Circuit has held that direct review is concluded and the statute of limitations commences, pursuant to subsection (d)(1)(D), *when the final administrative appeal is denied*. Redd v.

McGrath, 343 F.3d 1077, 1079 (9th Cir. 2003) (holding that the Board of Parole Hearing's denial of an inmate's administrative appeal was the "factual predicate" of the inmate's claim that triggered the commencement of the limitations period); Shelby v. Bartlett, 391 F.3d 1061, 1066 (9th Cir. 2004) (holding that the statute of limitation does not begin to run until a petitioner's administrative appeal has been denied).

Respondent contends that petitioner exhausted his administrative appeals only through the second level of administrative review. Accordingly, respondent contends, the triggering event for the statute of limitations is the date that petitioner received his second level administrative appeal response, i.e. November 12, 2008.

In his opposition, petitioner argues that his attempts to administratively exhaust his claims to the final level of review, i.e. Director's Level, were impeded by prison officials. Petitioner argues that the triggering date for the statute of limitations should be the date he made his final attempt to obtain a Director's Level response to his administrative appeal challenging the at-issue prison disciplinary, i.e. May 20, 2009.

The background to petitioner's argument is as follows. On November 12, 2008, petitioner's second level appeal was denied. (Dkt. No. 1, at 43.) This appeal response identified the *appeal log number* as "SOL 08-03411." (Id.) This appeal response identified the *rules violation report log number* as "S3-08-07-0493." (Id.)

On December 22, 2008, petitioner filed an appeal to the Director's Level from the Second Level administrative appeal response. (Id., at 62.) On January 15, 2009, the Director's Level appeal was returned to petitioner on grounds that it was incomplete because he did not attach a copy of the "CDC Form 115-A, Serious Rules Violation Report (final copy)." (Id., at 53.)

On January 23, 2009, petitioner submitted a Trust Account Withdrawal form in order to obtain a copy of the CDC Form 115-A for "SOL 08-3411." (Id., at 55.) On February 9, 2009, the appeal's office advised petitioner to request the form from his correctional counselor.

(Id.) On February 13, 2009, petitioner requested from his correctional counselor a copy of CDC Form 115-A for "SOL 08-3411." (Id., at 57.) The correctional counselor responded that there was no 115A matching this log number. (Id.) On March 7, 2009, petitioner sent a letter to the N. Grannis, the Director of the Inmate Appeals Branch. (Id., at 59.) In this letter, petitioner stated that the January 15, 2009, memorandum "screening out" his Director's Level appeal was in error because no CDC Form 115-A existed for his conviction. (Id.) Petitioner made additional attempts to exhaust his administrative remedies at the Director's Level until May 20, 2009.

After reviewing the record, it appears that in his request to his correctional counselor for a copy of the CDC Form 115-A Report, petitioner incorrectly wrote down the *appeals log number* rather than the *log number for the disciplinary conviction*. As discussed above, the log number for the conviction was contained in the Second Level Appeal decision.

Although petitioner did not exhaust his administrative remedies to the Director's Level due to an apparently innocent mistake, the undersigned must find that the triggering date for the statute of limitations is the date of the Second Level Appeal. The Second Level Appeal decision was the "final" administrative decision addressing petitioner's appeal.

Petitioner had one year from November 12, 2008, to file a timely federal petition. The instant action, filed May 6, 2010, is not timely unless petitioner is entitled to statutory or equitable tolling.

Statutory Tolling

The AEDPA statute of limitations is tolled during the time a properly filed application for post-conviction relief is pending in state court. 28 U.S.C. § 2244(d)(2). The statute of limitations is not tolled during the interval between the date on which a decision becomes final and the date on which the petitioner files his first state collateral challenge. Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). Once state collateral proceedings are commenced, a state habeas petition is "pending" during a full round of review in the state courts, including the time between a lower court decision and the filing of a new petition in a higher

court, as long as the intervals between petitions are "reasonable." See Evans v. Chavis, 546 U.S. 189, 192 (2006); Carey v. Saffold, 536 U.S. 214, 222-24 (2002).

In reviewing habeas petitions from California, the Ninth Circuit formerly employed a rule that where California courts did not explicitly dismiss a habeas petition for lack of timeliness, the petition was presumed timely. The Supreme Court rejected this approach and now requires the lower federal courts to determine whether a state habeas petition was filed within what California would consider a reasonable period of time. Chavis, 546 U.S. 189. When a state post-conviction petition is determined to be untimely by a state court, that is the end of the matter for purposes of § 2244(d)(2). Bonner v. Carey, 425 F.3d 1145, 1148 (9th Cir. 2005) (citing Pace v. DiGuglielmo, 544 U.S. 408, 414 (2005)). However, in the absence of a clear indication that a petitioner's state habeas petition was denied as untimely, courts are now charged with the duty of independently determining whether a petitioner filed his state habeas petitions within what California would consider a reasonable time. Chavis, 546 U.S. at 198.

Of note, in the answer respondent claims that petitioner filed his first state habeas petition challenging the at-issue prison disciplinary conviction in the California Court of Appeal on March 3, 2009. Respondent claims that this petition was summarily denied on March 12, 2009. Respondent argues that petitioner is not entitled to statutory tolling for this petition because it is presumptively untimely as it was filed 112 days after the conclusion of petitioner's administrative appeal.

Respondent did not file a copy of the habeas corpus petition filed by petitioner in the California Court of Appeal on March 3, 2009. Instead, respondent filed a copy of the docket from the California Court of Appeal reflecting when petitioner filed this petition and when it was denied. (Dkt. No. 17-1, at 33.) Respondent also filed a copy of the order by the California Court of Appeal denying the petition. (Dkt. No. 17-1, at 35.) This order reflects that petitioner had previously filed a related habeas corpus petition in the Marin County Superior Court, number FCR261452. (Id.)

Significantly, in his response to the answer, petitioner states that the petition he filed in the California Court of Appeal on March 3, 2009, was not related to his challenge to the at-issue prison disciplinary conviction, which occurred at California State Prison-Solano. (Id., at 23.) Instead, as discussed below, it wasn't until June 2009 that petitioner filed a habeas corpus petition in the Solano Superior Court challenging the at-issue prison disciplinary conviction.

The circumstances discussed above support petitioner's argument that the petition filed in the California Court of Appeal on March 3, 2009, was unrelated to the instant action. Accordingly, the undersigned finds that respondent has not met his burden of demonstrating that the March 3, 2009 petition filed in the California Court of Appeal is relevant to this action. See Fleming v. Evans, 481 F.3d 1249, 1257 (10th Cir. 2007) (under AEDPA, respondent "bears the burden of proving that the AEDPA limitations period has expired."); Gildon v. Bowen, 384 F.3d 883, 886 (7th Cir. 2004) ("Since the period of limitations is an affirmative defense, the state has the burden of showing that the petition is untimely."); Griffin v. Rogers, 308 F.3d 647, 653 (6th Cir. 2002) ("[T]he party asserting statute of limitations as an affirmative defense has the burden of demonstrating that the statute has run.").

More accurately, respondent next contends that petitioner filed a habeas petition challenging the at-issue prison disciplinary on June 10, 2009, in the Solano County Superior. A copy of this petition and the August 11, 2009 order by the Superior Court are attached as exhibits to the answer. (Dkt. No. 17-1 at 2, 29.) This petition does not contain a proof of service indicating when petitioner gave it to prison officials for mailing. However, petitioner signed the petition on May 20, 2009. (Id., at 13.) The Superior Court denied this petition in a reasoned decision on the merits. (Id., at 29.) For this reason, the undersigned presumes that the superior court would have expressly stated that the petition was untimely had it found so. Accordingly, petitioner is entitled to statutory tolling for this petition.

Respondent also contends that petitioner next filed a habeas corpus petition in the California Court of Appeal challenging the at-issue prison disciplinary on August 10, 2010,

which was summarily denied on August 16, 2010.

However, in his reply to the answer, petitioner claims that the petition he filed in the California Court of Appeal on August 10, 2010, concerned challenges to decisions by the California Board of Parole Hearings. Instead, petitioner claims that on August 25, 2010, he filed a habeas corpus petition in the California Court of Appeal challenging the at-issue prison disciplinary which was denied on October 1, 2010.

Neither party filed copies of the petitions filed by petitioner in the California Court of Appeal in August 2010. However, a copy of the August 16, 2010 order by the California Court of Appeal indicates that it addressed a matter previously raised in the Marin County Superior Court, (Dkt. No. 17-1, at 39), supporting petitioner's claim that this petition did not address the at-issue prison disciplinary conviction.

On February 24, 2011, the undersigned issued an order stating that he must review the October 1, 2010 order by the California Court of Appeal denying the habeas petition allegedly filed by petitioner on August 25, 2010, in order to determine whether it qualified for statutory tolling. Respondent was ordered to file a copy of this order within fourteen days.

In the response to the February 24, 2011 order, respondent states that the California Appellate Court Case Information System does not show a habeas corpus petition filed by petitioner on August 25, 2010 or an order denying that petition on October 1, 2010. The undersigned also observes that California Supreme Court records from the habeas corpus petition filed by petitioner in that court in January 2010 challenging the at-issue prison disciplinary conviction state that there is "no data" found regarding any previous habeas corpus petition filed by petitioner in the California Court of Appeal. (Dkt. No. 17-1, at 63.) For these reasons, the undersigned concludes that petitioner did not file a habeas corpus petition in the California Court of Appeal challenging the at-issue prison disciplinary conviction.

On January 19, 2010, petitioner filed a habeas corpus petition in the California Supreme Court challenging the at-issue prison disciplinary conviction which was denied on

February 18, 2010, by order citing In re Dexter, 25 Cal.3d 921 (1979). A copy of this petition and the order by the California Supreme Court are attached as exhibits to the answer. (Dkt. No. 17-1 at 41, 64.) This petition does not contain a proof of service indicating when petitioner delivered it to prison officials for mailing. However, the petition was signed by petitioner on December 15, 2009. (Id., at 51.) For the reasons discussed herein, petitioner is not entitled to statutory tolling for this petition because it was not timely filed.

The California Supreme Court denied the petition by order citing In re Dexter, 25 Cal.3d 921 (1979), indicating that it found that petitioner failed to exhaust administrative remedies.[1] As discussed above, where a state court denies a habeas petition without a clear indication that the petition was timely or untimely, a federal court must examine the delay to determine what the state court would have held with respect to timeliness. Chavis, 546 U.S. at 198.

Assuming petitioner gave his petition to prison officials on the date he signed it, i.e. giving petitioner the benefit of the mailbox rule, petitioner filed his habeas corpus petition in the California Supreme Court 126 days after the order by the Solano County Superior Court denying petitioner's habeas petition. This unexplained delay in the filing of the habeas corpus petition in the California Supreme Court renders it presumptively untimely. See Evans v. Chavis, 546 U.S. 189, 201 (2006) (holding that delay of six months was unreasonable under California law); Chaffer v. Prosper, 592 F.3d 1046, 1047-48 (9th Cir. 2010) (per curiam) (holding that gaps of 115 days and 100 days rendered California state habeas petitions untimely). Accordingly, petitioner is not entitled to statutory tolling as to the habeas corpus petition filed in the California Supreme Court.

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[1] Failure to exhaust administrative remedies does not mean the petition was improperly filed pursuant to 28 U.S.C. § 2244(d)(2). Procedural deficiencies do not render a petition improperly filed so long as its "delivery and acceptance are in compliance with the applicable laws and rules governing filings." Atruz v. Bennett, 531 U.S. 4, 8 (2000).

Conclusion

Significantly, petitioner makes no argument for equitable tolling. He is entitled to statutory tolling only for the time his petition was pending in the Superior Court. Assuming petitioner filed his petition in the Superior Court on the day he signed it, i.e. giving petitioner the benefit of the mailbox rule, petitioner is entitled to statutory tolling for 83 days. The instant petition is still untimely even adding these additional days to the limitations period. Accordingly, for the reasons discussed above, the petition should be dismissed on grounds that it is barred by the statute of limitations.

III. Procedural Default

Based on concerns of comity and federalism, federal courts will not review a habeas petitioner's claims if the state court decision denying relief rests on a state law ground that is independent of federal law and adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722 (1991); Harris v. Reed, 489 U.S. 255, 260-62 (1989). Generally, the only state law grounds meeting these requirements are state procedural rules. However, the procedural basis of the ruling must be clear. Ambiguous reference to procedural rules is insufficient for invocation of procedural bar. Calderon v. United States District Court (Bean), 96 F.3d 1126, 1131 (9th Cir. 1996). Similarly, where the procedural and merits analysis are intermixed, it cannot be said that the procedural bar is independent of federal law, i.e., there is no plain statement of reliance on procedural bar. Harris v. Reed, supra.

If there is an independent and adequate state ground for the decision, the federal court may still consider the claim if the petitioner demonstrates: (1) cause for the default and actual prejudice resulting from the alleged violation of federal law; or (2) a fundamental miscarriage of justice. Harris, 489 U.S. at 262. The existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule. McCleskey v. Zant, 499 U.S. 467, 493-94 (1991). Examples of cause include showings "that the factual or

legal basis for a claim was not reasonably available to counsel," "that some interference by officials made compliance impracticable," or "of ineffective assistance of counsel." Murray, 477 U.S. at 488. Prejudice is difficult to demonstrate:

> The showing of prejudice required under Wainwright v. Sykes is significantly greater than that necessary under "the more vague inquiry suggested by the words 'plain error.'" Engle, 456 U.S., at 135, 102 S. Ct., at 1575; Frady, supra, 456 U.S., at 166, 102 S. Ct., at 1593. See also Henderson v. Kibbe, 431 U.S. 145, 154, 97 S. Ct. 1730, 1736, 52 L.Ed.2d 203 (1977). The habeas petitioner must show "not merely that the errors at ... trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Frady, supra, at 170, 102 S. Ct., at 1596.

Murray v Carrier, 477 U.S. at 493-494 (1986).

Although different phraseology is used in the default context from that used in the ineffective assistance of counsel prejudice inquiry, as stated above, the ultimate application of the two prejudice inquiries is essentially similar—that is, whether the prejudice is sufficient to have undermined the reviewer's confidence in the result of the trial.

As discussed above, the California Supreme Court denied petitioner's habeas petition by order citing In re Dexter, 25 Cal.3d 921 (1979), indicating that it found that petitioner failed to exhaust administrative remedies. In order for a claim to be procedurally defaulted for federal habeas corpus purposes, the opinion of the last state court rendering a judgment in the case must clearly and expressly state that its judgment rests on a state procedural bar. Harris v. Reed, 489 U.S. 255, 263 (1989); Morales v. Calderon, 85 F.3d 1387, 1392 (9th Cir. 1996). The order by the California Supreme Court indicated that it's decision rested on a state procedural bar. Carter v. Giurbino, 385 F.3d 1194, 1197 (9th Cir. 2004) (one-sentence summary denial of petition incorporating unelaborated case citation sufficient for procedural default.)

The rule in California that inmates must exhaust administrative remedies is well established and has been applied since 1941. See Abelleira v. District Court of Appeal, 17 Cal.2d 280, 292 (1941). The rule was firmly established at the time of petitioner's default, and

has been consistently applied. See Dexter, 25 Cal.3d at 925; In re Muszalski, 52 Cal.App.3d 500 (1975); In re Serna, 76 Cal.App.3d 1010 (1978); Wright v. State, 122 Cal.App.4th 659 (2004). In addition, Dexter is based on state law and is independent of federal law. See Carter v. Giurbino, 385 F.3d 1194, 1197-98 (9th Cir. 2004) (a state rule is independent where "[n]o federal analysis enters into the [rule's] equation"). Thus, the rule in Dexter is an adequate and independent state ground that bars the undersigned from reaching the merits of petitioner's claims.

The undersigned next considers cause and prejudice. As discussed above, petitioner's failure to exhaust administrative remedies was apparently based on his inadvertent failure to write down the correct log number in his request for a copy of the rules violation report. While the undersigned may be sympathetic to petitioner's inadvertence, because no external factor impeded petitioner's ability to exhaust administrative remedies he has not demonstrated cause. Because petitioner has not demonstrated cause, there is no need to reach the issue of prejudice.

After reviewing the entire record, the undersigned finds no fundamental miscarriage of justice if petitioner's claims are not considered. Accordingly, for the reasons discussed above, this action should be dismissed on grounds that the claims are procedurally barred.

IV. Conclusion

Accordingly, IT IS HEREBY RECOMMENDED that petitioner's application for a writ of habeas corpus be dismissed on grounds that it is barred by the statute of limitations and on grounds that the claims are procedurally barred.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty-one days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned

"Objections to Magistrate Judge's Findings and Recommendations." If petitioner files objections, he shall also address whether a certificate of appealability should issue and, if so, why and as to which issues. A certificate of appealability may issue under 28 U.S.C. § 2253 "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(3). Any response to the objections shall be filed and served within fourteen days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: April 8, 2011

KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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