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

RICHARD CORDERO,

Petitioner,

No. 2:10-cv-1899-GEB-DAD (HC)

vs.

MICHAEL D. McDONALD,

Respondent.

FINDINGS AND RECOMMENDATIONS

_____ /

Petitioner is a state prisoner proceeding pro se with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 2007 conviction on charges of leaving the scene of an accident, driving under the influence causing injury, and reckless driving with great bodily injury. This matter is before the court on respondent’s motion to dismiss this action on the grounds that it is barred by the applicable statute of limitations. Petitioner has not opposed the motion.¹

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¹ Petitioner’s opposition was due on or about October 21, 2010. See Order filed July 23, 2010. By order filed November 3, 2010, petitioner was directed to file an opposition or statement of non-opposition within thirty days. On December 2, 2010, petitioner filed a motion for extension of time to file an opposition. That motion was granted by order filed January 3, 2011, pursuant to which petitioner’s opposition was due on or about February 3, 2011. Petitioner has filed nothing in this action since the January 3, 2011 order was issued.

1 Section 2244(d)(1) of title 28 of the United States Code provides:

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

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

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

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

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

19 28 U.S.C. § 2244(d)(1). Section 2244(d)(2) provides that “the time during which a properly filed
20 application for State post-conviction or other collateral review with respect to the pertinent
21 judgment or claim is pending shall not be counted toward” the limitations period. 28 U.S.C. §
22 2244(d)(2).

23 For purposes of the statute of limitations analysis, the relevant chronology of this
24 case is as follows:

25 1. On February 26, 2007, petitioner was sentenced by the Tehama County
26 Superior Court to twenty three years in state prison following his January 30, 2007 conviction on
the charges listed above.

2. On March 13, 2008, the California Court of Appeal for the Third Appellate
District deleted a fine that had been imposed as part of petitioner’s sentence and otherwise
affirmed the judgment on appeal.

3. On May 13, 2008, petitioner filed a petition for writ of habeas corpus in the
Tehama County Superior Court. That petition was denied by order filed May 16, 2008.

1 6. On March 11, 2009², petitioner filed another petition for writ of habeas corpus
2 in the Tehama County Superior Court. That petition was denied by order filed April 3, 2009.

3 7. On June 9, 2009, petitioner filed a petition for writ of habeas corpus in the
4 California Court of Appeal for the Third Appellate District. That petition was denied by order
5 filed June 18, 2009.

6 8. On July 2, 2009, petitioner filed a petition for writ of habeas corpus in the
7 California Supreme Court. That petition was denied on November 19, 2009.

8 9. On March 27, 2010, petitioner filed another petition for writ of habeas corpus
9 in the California Supreme Court.

10 10. The instant action was filed on July 12, 2010.

11 Petitioner’s judgment of conviction became final on April 22, 2008, forty days
12 after the California Court of Appeal affirmed petitioner’s judgment of conviction on appeal. See
13 Waldrip v. Hall, 548 F.3d 729, 735 (9th Cir. 2008). The one year limitations period for the filing
14 of a federal habeas petition began to run the next day. See Patterson v. Stewart, 251 F.3d 1243,
15 1246 (9th Cir. 2001). The limitation period ran for twenty days until May 13, 2008, when
16 petitioner filed his first state habeas petition in the Tehama County Superior Court. It was tolled
17 for three days during the pendency of that petition. Thereafter, petitioner did not file another
18 state habeas petition for three hundred days. He is not entitled to statutory tolling for the period
19 between the filing of these two petitions. See Evans v. Chavis, 546 U.S. 189, 198 (2006)
20 (unexplained delay of six months between rounds of habeas filings was too long to permit tolling
21 of the federal limitations period on the ground that state court proceedings were “pending”);
22 Banjo v. Ayers, 614 F.3d 964, 970 (9th Cir. 2010) (146-day unexplained delay between habeas
23 filings found to be unreasonable); Chaffer v. Prosper, 592 F.3d 1046, 1048 (9th Cir. 2010)
24 (petitioner not entitled to statutory tolling during unexplained delays of 115 and 101 days

25 ² Where a state petition shows the date on which it was signed by petitioner, the court
26 deems that date the filing date of said petition. See Houston v. Lack, 487 U.S. 266 (1988).

1 between state court petitions). The limitation period for petitioner’s filing of a federal habeas
2 petition was arguably tolled again from March 11, 2009 through November 19, 2009, during the
3 pendency of petitioner’s second state habeas petition filed in the Tehama County Superior Court
4 through disposition of the first petition for writ of habeas corpus filed in the California Supreme
5 Court. Even with this period tolled, the statute of limitations for petitioner’s filing of a federal
6 habeas petition expired approximately forty-five days later, on January 3, 2010. This action was
7 therefore not filed for more than six months after the AEDPA limitation period for doing so had
8 expired.³ Accordingly, this action is barred by the statute of limitations and should therefore be
9 dismissed.

10 Pursuant to Rule 11 of the Rules Governing Section 2254 Cases in the United
11 States District Courts, “[t]he district court must issue or a deny a certificate of appealability when
12 it enters a final order adverse to the applicant.” Rule 11, 28 U.S.C. foll. § 2254. A certificate of
13 appealability may issue under 28 U.S.C. § 2253 “only if the applicant has made a substantial
14 showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The court must either
15 issue a certificate of appealability indicating which issues satisfy the required showing or must
16 state the reasons why such a certificate should not issue. Fed. R. App. P. 22(b).

17 Where, as here, the petition should be dismissed on procedural grounds, a
18 certificate of appealability “should issue if the prisoner can show: (1) ‘that jurists of reason
19 would find it debatable whether the district court was correct in its procedural ruling’; and (2)
20 ‘that jurists of reason would find it debatable whether the petition states a valid claim of the
21 denial of a constitutional right.’” Morris v. Woodford, 229 F.3d 775, 780 (9th Cir. 2000)
22 (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)).

23 //

25 ³ The March 2010 habeas petition filed by petitioner with the California Supreme Court
26 did not revive the expired limitation period. See Jiminez v. Rice, 276 F.3d 478, 482 (9th Cir.
2001).

1 After careful review of the entire record herein, this court finds that petitioner has
2 not satisfied the first requirement for issuance of a certificate of appealability in this case.
3 Specifically, there is no showing that jurists of reason would find it debatable whether this action
4 is barred by the statute of limitations. Accordingly, the district court should not issue a certificate
5 of appealability.

6 In accordance with the above, IT IS HEREBY RECOMMENDED that

- 7 1. Respondent's September 21, 2010 motion to dismiss be granted;
- 8 2. This action be dismissed as barred by the statute of limitations; and
- 9 3. The district court decline to issue a certificate of appealability.

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 fourteen
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 response to the
15 objections shall be filed and served within fourteen days after service of the objections. The
16 parties are advised that failure to file objections within the specified time may waive the right to
17 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

18 DATED: April 1, 2011.

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

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