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

WALTER LEE COLE,

Petitioner,

No. CIV S-10-2042 FCD CKD P

vs.

G. SWARTHOUT,

Respondent.

ORDER AND

FINDINGS AND RECOMMENDATIONS

_____ /

Petitioner is a California prisoner proceeding pro se with a petition for writ of habeas corpus under 28 U.S.C. § 2254. Petitioner was convicted in the Superior Court of Solano County for committing several offenses against a correctional officer at California State Prison, Solano in October of 2006 including assault with a deadly weapon. Petitioner is serving a sentence of 29-years-to-life imprisonment. Pet. at 8.¹ Respondent has filed a motion requesting that this matter be dismissed as time-barred. On the last page of petitioner’s habeas petition, petitioner indicates, under the penalty of perjury, he submitted his petition to prison officials for
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_____ ¹ When referencing petitioner’s application for writ of habeas corpus, the page numbers identified are those assigned by the court’s electronic docketing system.

1 mailing on June 12, 2010.² The court deems this action commenced as of that date. See Houston
2 v. Lack, 487 U.S. 266, 270 (1988).

3 Title 28 U.S.C. § 2244(d)(1) provides as follows:

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

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

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

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

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

21 Petitioner appealed his convictions and sentences to the California Court of
22 Appeal. A decision was rendered with respect to the appeal on November 4, 2008. Mot. To
23 Dismiss, Ex. A. Petitioner sought review of that decision in the California Supreme Court. Mot.
24 To Dismiss, Ex. B. The petition for review was denied January 14, 2009. Mot. To Dismiss, Ex.
25 D. Direct review with respect to the convictions at issue in this action became final for purposes
26 of § 2244(d)(1)(A) 90 days later on April 14, 2009 when time expired for petitioner to seek a writ
of certiorari with respect to the California Supreme Court’s denial of petitioner’s request for
review. See Bowen v. Roe, 188 F.3d 1157, 1158-59 (9th Cir. 1999) (“We hold that the period of

² The court finds it strange that petitioner’s habeas petition did not actually arrive in this court until August 2, 2010. However, respondent does not challenge the fact that petitioner did give his petition to prison officials on June 12, 2010.

1 'direct review' in 28 U.S.C. § 2244(d)(1)(A) includes the period within which a petitioner can
2 file a petition for a writ of certiorari from the United States Supreme Court, whether or not the
3 petitioner actually files such a petition.”). Absent tolling, the limitations period applicable to this
4 action began running the next day on April 15, 2009.

5 Title 28 U.S.C. §2244(d)(2) provides that “the time during which a properly filed
6 application for State post-conviction or other collateral review with respect to the pertinent
7 judgment or claim is pending shall not be counted toward any period of limitation under this
8 subsection.” Respondent concedes and points to evidence indicating that the limitations period
9 was tolled under § 2244(d)(2) between April 15 and June 10, 2009 while a petition for collateral
10 review was pending in the California Supreme Court. Respondent argues that because there is no
11 basis to toll the limitations period beyond June 10, 2009, the limitations period began to run the
12 next day and ran out one year later on June 10, 2010.

13 Petitioner agrees that the limitations period commenced on June 11, 2009. He
14 asserts his petition is saved because it was filed on June 11, 2010.³ However, even if the court
15 agrees, petitioner still filed one day late.

16 The court notes that on April 18, 2011, petitioner filed a sur-reply with respect to
17 the pending motion to dismiss. Sur-replies are generally not permitted. See Local Rule 230.
18 Because petitioner did not obtain leave to file a sur-reply, his sur-reply will be stricken. Even if
19 the court considered the arguments raised in the sur-reply, petitioner would fare no better.
20 Petitioner asserts the court should waive the limitations period applicable to this action because it
21 would promote “the interests of justice.” However, petitioner fails to elaborate why that would
22 be so and fails to point to any authority suggesting the court, under any circumstance, may waive
23 the limitations period. Also, petitioner asserts that this action should be deemed timely-filed
24 because mail is not collected by correctional officers at his prison on Fridays or Saturdays.

25 ³ While it is not entirely clear why petitioner believes he filed his petition on June 11,
26 2010, the court notes that is the day he signed his petition. Pet. at 6.

1 However, this is a matter of no consequence since the last day petitioner could submit his
2 petition to prison officials for mailing was June 10, 2010, a Thursday.

3 Because there is no basis to toll the limitations period applicable to this action
4 beyond June 10, 2009, the limitations actions applicable to this action ran out on June 10, 2010,
5 two days before petitioner commenced this action. Therefore, the court will recommend that
6 respondent's motion to dismiss be granted and this case be closed.

7 Accordingly, IT IS HEREBY ORDERED that the sur-reply filed by petitioner on
8 April 18, 2011 is stricken.

9 IT IS HEREBY RECOMMENDED that:

- 10 1. Respondent's January 11, 2011 motion to dismiss be granted; and
- 11 2. This case 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." In his objections petitioner
17 may address whether a certificate of appealability should issue in the event he files an appeal of
18 the judgment in this case. See Rule 11, Federal Rules Governing Section 2254 Cases (the district
19 court must issue or deny a certificate of appealability when it enters a final order adverse to the
20 applicant). Any reply to the objections shall be served and filed within fourteen days after
21 service of the objections. The parties are advised that failure to file objections within the

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

3 Dated: August 11, 2011

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5 CAROLYN K. DELANEY
6 UNITED STATES MAGISTRATE JUDGE

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