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

D. DUSTIN,

Petitioner,

No. 2:10-cv-2107 JFM (HC)

vs.

RAUL LOPEZ, Warden,

Respondent.

ORDER AND

FINDINGS & RECOMMENDATIONS

_____ /

Petitioner, a state prisoner proceeding pro se, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, together with a request to proceed in forma pauperis.

Examination of the affidavit reveals petitioner is unable to afford the costs of this action. Accordingly, leave to proceed in forma pauperis is granted. 28 U.S.C. § 1915(a).

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 of the Rules Governing Section 2254 Cases. The court must summarily dismiss a petition “[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court....” Habeas Rule 4; O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990); see also Hendricks v. Vasquez, 908 F.2d 490 (9th Cir. 1990). Habeas Rule 2(c) requires that a petition

1 (1) specify all grounds of relief available to the Petitioner; (2) state the facts supporting each
2 ground; and (3) state the relief requested. Notice pleading is not sufficient; rather, the petition
3 must state facts that point to a real possibility of constitutional error. Rule 4, Advisory
4 Committee Notes, 1976 Adoption; O'Bremski, 915 F.2d at 420. Allegations in a petition that are
5 vague, conclusory, or palpably incredible are subject to summary dismissal. Hendricks, 908 F.2d
6 at 491.

7 Further, the Advisory Committee Notes to Rule 8 indicate that the court may
8 dismiss a petition for writ of habeas corpus, either on its own motion under Rule 4, pursuant to
9 the respondent's motion to dismiss, or after an answer to the petition has been filed. Advisory
10 Committee Notes to Habeas Rule 8, 1976 Adoption; see Herbst v. Cook, 260 F.3d 1039 (9th Cir.
11 2001).

12 BACKGROUND

13 Petitioner, who is currently incarcerated at Corcoran State Prison (“CSP”), was
14 sentenced in June 1995 to a term of 39 years, 4 months, and assessed a restitution fine. See Pet.
15 at 11. Although the precise nature of the petition is unclear¹, it appears that petitioner is
16 contesting the imposition of the restitution fine, as well as his conviction for, inter alia, alleged
17 violations of the Fifth, Sixth and Fourteenth Amendments. Petitioner also requests a photocopy
18 of the entire state court record because he asserts that his copy was improperly disposed of by
19 CSP staff on January 8, 2003. See Doc. No. 1 at 46. Lastly, petitioner seeks appointment of
20 counsel.

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23 ¹ Petitioner has filed multiple complaints pursuant to 42 U.S.C. § 1983 and petitions for
24 habeas relief pursuant to 28 U.S.C. § 2254 in this court. Repeatedly, the court has addressed the
25 illegibility of the pleadings, the vagueness of the claims and the disorganized formatting, making it
26 difficult for the court to read and understand petitioner’s claims. See, e.g., 1:03-cv-5626-AWI-LJO,
Doc. No. 10; 1:05-cv-0697-AWI-DLB, Doc. No. 24; 2:08-cv-0995-GEB-DAD, Doc. No. 31. Upon
review of the petition and the attached documents, the court has deciphered the petition as best as
it can.

1 § 2244(d)(1)(A). The Ninth Circuit Court of Appeals has held that the “time for seeking direct
2 review” under 28 U.S.C. § 2244(d)(1)(A) includes the ninety-day period within which a
3 petitioner can file a petition for a writ of certiorari from the United States Supreme Court under
4 Supreme Court Rule 13, whether or not the petitioner actually files such a petition. Bowen v.
5 Roe, 188 F.3d 1157, 1159 (9th Cir. 1999).

6 In the present case, petitioner’s conviction and sentence became “final” within the
7 meaning of AEDPA either in 1996 or 1997. Even without knowing the precise date, it is clear
8 that the instant petition is untimely, having been filed in 2010, at least thirteen years later. While
9 the statute of limitations may be tolled to account for a petitioner’s applications for post-
10 conviction relief or collateral review in the state courts, see 28 U.S.C. § 2244(d)(2), and can be
11 equitably tolled under “extraordinary circumstances,” see Laws v. Lamarque, 351 F.3d 919, 922
12 (9th Cir. 2003), no such grounds for tolling exist here. Therefore, the petition should be
13 dismissed as untimely.

14 Insofar as petitioner contends that his legal documents were improperly disposed
15 of by CSP correctional officers and, as relief, seeks a photocopy of those documents, those
16 claims are properly brought pursuant to 42 U.S.C. § 1983. Those claims, however, are also
17 barred by the statute of limitations.

18 The statute of limitations for claims brought under 42 U.S.C. § 1983 is governed
19 by the forum state’s statute of limitations for personal injury actions. Wilson v. Garcia, 471 U.S.
20 261, 277 (1985). The statute of limitations in the instant case is one year. Cal. Code of Civ. Pro.
21 § 340(3). The Ninth Circuit has also held that the appropriate statute of limitations for § 1983
22 claims in California is one year. McDougal v. County of Imperial, 942 F.2d 668, 672 (9th Cir.
23 1991).

24 Where a federal court borrows a state’s statute of limitations, federal law
25 determines when the period begins to run. Mosesian v. Peat, Marwick, Mitchell & Co., 727 F.2d
26 873 (9th Cir.), cert. denied, 469 U.S. 932 (1984). Under federal law, the limitation period begins

1 to run when the plaintiff knows or has reason to know of the injury that is the basis for the action.
2 Trotter v. International Longshoreman's and Warehousemen's Union, Local 13, 704 F.2d 1141,
3 1143 (9th Cir. 1983).

4 Here, petitioner was aware of the loss of his legal property as early as September
5 5, 2003, as evidenced by the informal response to his inmate appeal addressing this matter. See
6 Doc. No. 1 at 46. This action commenced on August 9, 2010. Thus, petitioner was aware of the
7 facts underlying his claim at least more than one year prior to filing suit (indeed, petitioner was
8 aware of it for nearly seven years prior to filing). As such, petitioner's claims are time-barred.

9 B. Appointment of Counsel

10 Petitioner has also requested the appointment of counsel. There currently exists
11 no absolute right to appointment of counsel in habeas proceedings. See Nevius v. Sumner, 105
12 F.3d 453, 460 (9th Cir. 1996). However, 18 U.S.C. § 3006A authorizes the appointment of
13 counsel at any stage of the case "if the interests of justice so require." See Rule 8(c), Fed. R.
14 Governing § 2254 Cases. In the present case, the court does not find that the interests of justice
15 would be served by the appointment of counsel at the present time.

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

23 Where, as here, the petition is dismissed on procedural grounds, a certificate of
24 appealability "should issue if the prisoner can show: (1) 'that jurists of reason would find it
25 debatable whether the district court was correct in its procedural ruling'; and (2) 'that jurists of
26 reason would find it debatable whether the petition states a valid claim of the denial of a

1 constitutional right.” Morris v. Woodford, 229 F.3d 775, 780 (9th Cir. 2000) (quoting Slack v.
2 McDaniel, 529 U.S. 473, 484 (2000)).

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

8 Therefore, IT IS HEREBY ORDERED that:

- 9 1. Petitioner is granted leave to proceed in forma pauperis;
10 2. Petitioner’s motion for copies of transcripts is denied;
11 3. Petitioner’s request for appointment of counsel is denied;
12 4. The Clerk of the Court assign a district judge to this matter; and

13 IT IS HEREBY RECOMMENDED that:

- 14 1. The petition for writ of habeas corpus be dismissed; and
15 2. The court decline to issue a certificate of appealability.

16 These findings and recommendations are submitted to the United States District
17 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
18 days after being served with these findings and recommendations, any party may file written
19 objections with the court and serve a copy on all parties. Such a document should be captioned
20 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the
21 objections shall be filed and served within fourteen days after service of the objections. The

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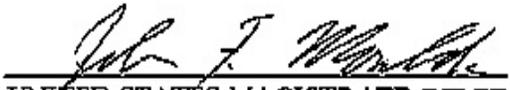
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1 parties are advised that failure to file objections within the specified time may waive the right to
2 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: May 13, 2011.

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6 UNITED STATES MAGISTRATE JUDGE

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