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

CHRISTINA B. SHUKRY,

Petitioner,

No. CIV S-10-2724 WBS DAD P

vs.

WALTER MILLER,

Respondent.

FINDINGS AND RECOMMENDATIONS

_____/

Petitioner is a state prisoner proceeding pro se with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Therein, petitioner challenges a 2007 judgement of conviction and twenty year prison sentence entered against her in the Sacramento County Superior Court following her plea of no contest to carjacking, burglary, robbery and related offenses. Before the court is respondent’s motion to dismiss the petition on the grounds that it was filed beyond the applicable one-year statute of limitations. Petitioner has filed an opposition to the motion and respondent has filed a reply.

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1 **BACKGROUND**

2 On February 2, 2007, petitioner appeared in the Sacramento County Superior
3 Court and was sentenced to a determinate state prison term of twenty years. (Lod. Doc. 1.¹)
4 Petitioner did not appeal her judgment or conviction and sentence. However, petitioner filed the
5 following four post-conviction petitions seeking habeas relief in state court:

6 **First Petition**

7 March 3, 2008² Petition for writ of habeas corpus filed with the Sacramento
8 County Superior Court. (Lod. Doc. 2.) Therein, petitioner claimed
9 that she received ineffective assistance of counsel due to the
10 frequent substitutions of counsel and due to her counsel’s failure to
provide the court with hospital records which would have
supported her placement in a substance abuse program rather than
in state prison.

11 July 21, 2008 Petition denied. (Lod. Doc. 3.)

12 **Second Petition**

13 February 23, 2009 Petition for writ of habeas corpus filed with the California
14 Court of Appeal for the Third Appellate District. (Lod. Doc. 4.)
Therein, petitioner claimed that her counsel failed “to introduce
15 critical mitigating evidence at sentencing hearing.” (Id. at 3.)

16 March 5, 2009 Petition denied. (Lod. Doc. 5.)

17 **Third Petition**

18 April 6, 2009³ Petition for review filed with the California Supreme Court. (Lod.
19 Doc. 6.)

20 June 10, 2009 The petition for review was summarily denied. (Lod. Doc. 7.)

21 ¹ Respondent’s documents in support of the motion to dismiss were lodged with the court
22 on January 7, 2011.

23 ² With respect to each of the state habeas petitions filed by petitioner, the court has
24 applied the mailbox rule, using the date the petition was signed by petitioner as the filing date.
See Houston v. Lack, 487 U.S. 266, 276 (1988); Porter v. Ollison, 620 F.3d 952, 958 (9th Cir.
2010).

25 ³ This is the date the petition for review was filed in the California Supreme Court. The
26 one-page petition was not dated by petitioner and there is no proof of service attached to the copy
of the petition for review lodges with this court.

1 limitations for the filing of a federal habeas petition expired. (Id.) Respondent contends that
2 petitioner's filing of her second through fourth state habeas petitions after the statute of
3 limitations for seeking federal habeas relief had expired does not restart the clock or save her
4 claims from being time-barred. (Id.) According to respondent, the petitioner's second through
5 fourth state habeas petitions fail to extend the statute of limitations because they were filed after
6 the federal statute of limitations expired. (Id.)

7 II. Petitioner's Opposition (Doc. No. 16)

8 Petitioner agrees with the filing dates respondent has provided with respect to her
9 state habeas petitions, except for the filing date of her the third petition with the California
10 Supreme Court. With respect to that petition, petitioner clarifies that her petition for review was
11 filed with the California Supreme Court on April 6, 2009, not February 23, 2009. (Opp'n at 2.)
12 Regarding statutory tolling of the limitations period for seeking federal habeas relief, petitioner
13 argues that because her state petitions were properly filed and the first petition was filed before
14 the statute of limitations for the filing of a federal habeas petition had expired, the entire period
15 of time from the filing of her first habeas petition in the Sacramento County Superior Court to
16 the date the California Supreme Court issued its decision denying relief (presumably June 10,
17 2009) should be tolled. (Id. at 4-5.)

18 III. Respondent's Amended Reply (Doc. No. 18)

19 Respondent argues that petitioner is not entitled to tolling for the entire period that
20 she had petitions pending in the state courts. Specifically, respondent contends that petitioner is
21 not entitled to statutory tolling for the interval of time between the denial of her first state habeas
22 petition by the Sacramento County Superior Court on July 21, 2008, and the filing of her second
23 state habeas petition with the California Court of Appeal on February 23, 2009, because the
24 approximately seven month interval between those dates constitutes unreasonable delay on
25 petitioner's part. (Reply at 3.) Respondent also notes that petitioner has failed to adequately
26 explain her delay in seeking habeas relief from the state courts but instead has made only vague

1 (A) the date on which the judgment became final by the
2 conclusion of direct review or the expiration of the time for
3 seeking such review;

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

8 (C) the date on which the constitutional right asserted was
9 initially recognized by the Supreme Court, if the right has been
10 newly recognized by the Supreme Court and made retroactively
11 applicable to cases on collateral review; or

12 (D) the date on which the factual predicate of the claim or
13 claims presented could have been discovered through the exercise
14 of due diligence.

15 (2) The time during which a properly filed application for State
16 post-conviction or other collateral review with respect to the
17 pertinent judgment or claim is pending shall not be counted toward
18 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 Petitioner's judgment of conviction became final on April 3, 2007, sixty days after
24 she was sentenced and the time for seeking review of the judgment had expired. See Cal. Rules
25 of Court, Rule 8.308 ("[A] notice of appeal and any statement required by Penal Code section
26 1237.5 must be filed within 60 days after the rendition of the judgment[.]"). Therefore, the
statute of limitations for petitioner's filing of a federal habeas petition began to run the next day
or April 4, 2007, and expired on April 3, 2008, plus any time for tolling. Patterson v. Stewart,
251 F.3d 1243, 1246 (9th Cir. 2001).

26 III. Application of § 2244(d)(2)

As noted above, the AEDPA statute of limitations began to run on April 4, 2007,
the day after the judgment became final, and continue to run until March 3, 2008, when petitioner

1 filed her first state petition in the Sacramento County Superior Court. There is no statutory
2 tolling for this period of time since there was no state habeas petition “pending” before a state
3 court. Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). Thus, 334 days of AEDPA’s one-
4 year statute of limitations had expired before petitioner first sought collateral revue in state court,
5 leaving her with only 31 additional days to file her federal petition not including any additional
6 time for tolling.

7 In his reply respondent accurately states that even if petitioner were awarded
8 continuous tolling of the AEDPA statute of limitations for the entire period from the filing of her
9 first state habeas petition in the Sacramento County Superior Court on March 3, 2008 to the date
10 the California Supreme Court denied her petition for review on June 10, 2009, a total of 464 days
11 of tolling, her federal habeas petition is still time-barred. The 464 days of tolling would merely
12 extend the statute of limitations for the filing of a federal habeas petition to July 11, 2009.⁴
13 However, petitioner’s federal habeas petition was not filed until September 13, 2010, over
14 fourteen months after the limitations period for doing so had expired even under the most
15 generous tolling calculation.⁵ Moreover, petitioner’s filing of her fourth state petition in the
16 Sacramento County Superior Court on May 25, 2010, long after the statute of limitations for
17 seeking federal habeas relief had expired, cannot revive that statute of limitations. Ferguson v.

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19 ⁴ The one-year AEDPA statute of limitations would have expired on April 3, 2008,
20 without any tolling. If 464 days of tolling are added to the one-year statute of limitations, the
21 deadline for petitioner to seek federal habeas relief would be extended to July 11, 2009.

22 ⁵ It appears clear that petitioner would not, in fact, be entitled to such a generous tolling
23 calculation, since the Ninth Circuit has now held that unexplained delays of 81, 91, 101, 115 and
24 146 days by California prisoners in seeking state habeas relief from the next highest state court is
25 unreasonable for purposes of statutory tolling of the AEDPA statute of limitations. Velasquez v.
26 Kirkland, 639 F.3d 964, 968 (9th Cir. 2011); Banjo v. Ayers, 614 F.3d 964, 970 (9th Cir. 2010);
Chaffer v. Prosper, 592 F.3d 1046, 1048 & n.1 (9th Cir. 2010) (noting that the California
Supreme Court denied certification of the question when the Ninth Circuit sought guidance on
the issue under California law). The gap between the Sacramento County Superior Court’s
denial of petitioner’s first state habeas petition on July 21, 2008 and her filing of her next habeas
petition with the California Court of Appeal on February 23, 2009, was over seven months.

1 Palmateer, 321 F.3d 820, 823 (9th Cir. 2003); Jiminez v. Rice, 276 F.3d 478, 482 (9th Cir.
2 2001).

3 Finally, petitioner has not satisfied her burden of showing that she is entitled to
4 any equitable tolling of the AEDPA statute of limitations. See Holland v. Florida, ___ U.S. ___,
5 ___, 130 S. Ct. 2549, 2562 (2010) (“[A] ‘petitioner’ is ‘entitled to equitable tolling’ only where
6 he shows ‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary
7 circumstance stood in his way’ and prevented timely filing.”) (quoting Pace v. DiGuglielmo, 544
8 U.S. 408, 418 (2005)). As respondent points out, petitioner has made only vague references to
9 hardships common to all prisoners in claiming she was impeded from timely filing her federal
10 habeas petition. Such conclusory assertions, which fail to link the claimed extraordinary
11 circumstances to the failure to timely file a petition, are insufficient. See Ramirez v. Yates, 571
12 F.3d 993, 997-98 (9th Cir. 2009).

13 CONCLUSION

14 Accordingly, IT IS HEREBY RECOMMENDED that:

- 15 1. Respondent’s December 17, 2010 motion to dismiss (Doc. No. 14) be granted;
16 and
17 2. This action be dismissed as time-barred under the one-year statute of
18 limitations provided in 28 U.S.C. § 2244(d).

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

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

3 DATED: June 13, 2011.

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7 DALE A. DROZD
8 UNITED STATES MAGISTRATE JUDGE

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