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

MOHAMMAD ABEDI,

Petitioner,

No. CIV S-10-3184 DAD P

vs.

GROUND S, Warden,

Respondent.

ORDER AND

FINDINGS AND RECOMMENDATIONS

_____ /

Petitioner is a state prisoner proceeding pro se and in forma pauperis. In accordance with the court’s December 22, 2010 order, petitioner has filed an amended petition.

PRELIMINARY SCREENING

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, Rules Governing Section 2254 Cases. The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of habeas corpus at several stages of a case, including “summary dismissal under Rule 4; a dismissal pursuant to a motion by the respondent; a dismissal after the answer and petition are considered; or a dismissal after consideration of the pleadings and an expanded record.”

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

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

9 (D) the date on which the factual predicate of the claim or
10 claims presented could have been discovered through the exercise
11 of due diligence.

12 (2) The time during which a properly filed application for State
13 post-conviction or other collateral review with respect to the
14 pertinent judgment or claim is pending shall not be counted toward
15 any period of limitation under this subsection.

16 The AEDPA one-year statute of limitations applies to all federal habeas corpus petitions filed
17 after the statute was enacted and therefore applies to the pending petition. See Lindh v. Murphy,
18 521 U.S. 320, 322-23 (1997).

19 II. Application of § 2244(d)(1)(D)

20 The AEDPA one-year statute of limitations “applies to all habeas petitions filed
21 by persons in ‘custody pursuant to the judgment of a State court,’ even if the petition challenges
22 an administrative decision rather than a state court judgment.” Shelby v. Bartlett, 391 F.3d 1061,
23 1062 (9th Cir. 2004) (citation omitted). See also Redd v. McGrath, 343 F.3d 1077, 1080-83 (9th
24 Cir. 2003) (assuming without deciding that the AEDPA statute of limitations applies to collateral
25 attacks on parole board decisions). When a habeas petitioner challenges an administrative
26 decision, § 2244(d)(1)(D) governs the date on which the statute of limitations begins to run.
Shelby, 391 F.3d at 1066; Redd, 343 F.3d at 1081-83. Under § 2244(d)(1)(D), the limitation
period commences on “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)(D).

In this case, petitioner challenged the RVR at issue in this action by pursuing an
administrative grievance through the inmate appeals process. According petitioner’s exhibits, he

1 exhausted his administrative remedies on May 7, 2007, when he was denied relief at the highest
2 level of administrative review. (Am. Pet. Attachs.) For purposes of federal habeas review, the
3 court finds that March 7, 2007, the day petitioner received the response from the highest level of
4 administrative review was the “date on which the factual predicate of the claim or claims
5 presented could have been discovered.” 28 U.S.C. § 2244(d)(1)(D). Based on this chronology,
6 the statute of limitations for the filing of a federal habeas petition began to run on March 8, 2007,
7 and expired one year later on March 7, 2008. Cf. Shelby, 391 F.3d at 1066 (limitation period
8 began running day after petitioner received notice of denial of appeal); Redd, 343 F.3d at 1082
9 (same). However, petitioner did not file his original federal habeas petition in this action until
10 November 20, 2010, more than two years after the statute of limitations for doing so had expired.
11 Accordingly, petitioner’s federal petition for writ of habeas corpus is untimely unless he is
12 entitled to the benefit of tolling.

13 III. Application of § 2244(d)(2)

14 “The time during which a properly filed application for State post-conviction or
15 other collateral review with respect to the pertinent judgment or claim is pending shall not be
16 counted” toward the AEDPA statute of limitations. 28 U.S.C. § 2244(d)(2). The statute of
17 limitations is not tolled during the interval between the date on which a judgment becomes final
18 and the date on which the petitioner files his first state collateral challenge because there is no
19 case “pending.” Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). Once a petitioner
20 commences state collateral proceedings, a state habeas petition is “pending” during a full round
21 of review in the state courts, including the time between a lower court decision and the filing of a
22 new petition in a higher court, as long as the intervals between the filing of those petitions are
23 “reasonable.” Carey v. Saffold, 536 U.S. 214, 222-24 (2002).

24 In this case, petitioner filed three petitions for writ of habeas corpus challenging
25 his prison RVR conviction for engaging in mutual combat. First, petitioner filed a petition for
26 writ of habeas corpus in the Sacramento County Superior Court. On December 11, 2007, the

1 Superior Court denied that petition as untimely. Petitioner then filed a petition for writ of habeas
2 corpus in the California Court of Appeal for the Third Appellate District. On March 5, 2009, the
3 Court of Appeal summarily denied that petition. Finally, petitioner filed a petition for writ of
4 habeas corpus in the California Supreme Court. On September 30, 2009, the California Supreme
5 Court denied his petition as untimely. (Am. Pet. Attachs.)

6 It is well established that when a state court determines that a postconviction
7 petition is untimely, the petitioner is not entitled to statutory tolling of the AEDPA statute of
8 limitations for the time the state petition in question was pending because it was not properly
9 filed for purposes of § 2244(d)(2). See Bonner v. Carey, 425 F.3d 1145, 1148 (9th Cir. 2005)
10 (citing Pace v. DiGuglielmo, 544 U.S. 408[, 414] (2005)); Thorson v. Palmer, 479 F.3d 643, 645
11 (9th Cir. 2007) (a state habeas corpus petition denied with citation to “the very page of Robbins
12 that sets forth ‘the basic analytical framework’ governing California’s timeliness determinations
13 in habeas corpus proceedings” is a clear ruling that the state petition was untimely and therefore
14 not properly filed). Moreover, as noted above, in this case the California Supreme Court denied
15 petitioner’s final petition for writ of habeas corpus on September 30, 2009. More than a year
16 lapsed after that date before petitioner filed his original petition in this court on November 20,
17 2010. Statutory tolling of the AEDPA statute of limitations is not available when no habeas
18 petition is pending in state court. See Roy v. Lampert, 465 F.3d 964, 968 (9th Cir. 2006) (“The
19 statute of limitations period is also not tolled after state post-conviction proceedings are final and
20 before federal habeas proceedings are initiated.”); Nino, 183 F.3d at 1006. Accordingly, even if
21 petitioner’s state habeas petitions been properly and timely filed, by the time petitioner filed his
22 federal habeas petition the AEDPA statute of limitations had long since expired, rendering his
23 federal petition time-barred.

24 **OTHER MATTERS**

25 Also pending before the court is petitioner’s motion for appointment of counsel.
26 There currently exists no absolute right to appointment of counsel in habeas proceedings. See

1 Nevius v. Sumner, 105 F.3d 453, 460 (9th Cir. 1996). However, 18 U.S.C. § 3006A authorizes
2 the appointment of counsel at any stage of the case “if the interests of justice so require.” See
3 Rule 8(c), Fed. R. Governing § 2254 Cases. In light of these findings and recommendations, the
4 court does not find that the interests of justice would be served by the appointment of counsel.
5 Accordingly, the court will deny petitioner’s motion.

6 **CONCLUSION**

7 IT IS HEREBY ORDERED that:

- 8 1. Petitioner’s January 12, 2011 motion for appointment of counsel (Doc. No. 8)
9 is denied; and
10 2. The Clerk of the Court is directed to randomly assign a United States District
11 Judge to this action.

12 IT IS HEREBY RECOMMENDED that:

- 13 1. Petitioner’s application for a writ of habeas corpus (Doc. No. 1) be dismissed
14 as barred by the statute of limitations; and
15 2. This action be closed.

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 twenty-
18 one days after being served with these findings and recommendations, petitioner may file written
19 objections with the court. The document should be captioned “Objections to Magistrate Judge's
20 Findings and Recommendations.” Petitioner is advised that failure to file objections within the
21 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
22 F.2d 1153 (9th Cir. 1991).

23 DATED: March 16, 2011.

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25 DAD:9
26 abed3184.156



DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE