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

ALAREN L. FRAZIER,

Petitioner,

No. 2:12-cv-0932 MCE KJN P

vs.

W.J. SULLIVAN, Warden,

Respondent.

FINDINGS AND RECOMMENDATIONS

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I. Introduction

Petitioner is a state prisoner, proceeding without counsel, with an application for petition of writ of habeas corpus pursuant to 28 U.S.C. § 2254. Before the court is respondent’s motion to dismiss the pending habeas petition as barred by the statute of limitations. Petitioner did not file a timely opposition. On July 26, 2012, the court directed petitioner to show cause why his failure to oppose the motion should not be deemed a waiver of opposition to the motion, and provided petitioner an additional thirty days in which to file an opposition. Petitioner did not respond to the order to show cause or file an opposition to the motion. For the reasons set forth below, the undersigned finds that respondent’s motion to dismiss should be granted.

II. Statutory Filing Deadlines

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act

1 (“AEDPA”) was enacted. Section 2244(d)(1) of Title 8 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. Petitioner was convicted on January 18, 2007, of first degree robbery, first
26 degree residential burglary, felon in possession of a firearm, possession of a controlled substance,
two counts of vehicle theft, and five counts of receiving stolen property. (Respondent’s Lodged
Document (“LD”) No. 1.) Petitioner was sentenced to 36 years to life in state prison. (Id.)

2. Petitioner filed a timely appeal of the conviction. On January 30, 2009, the
California Court of Appeal for the Third Appellate District reversed one of the receiving stolen
property convictions, reversed the sentence imposed for the two vehicle theft convictions, and
remanded the case for re-sentencing. (LD No. 2.) Petitioner’s conviction was affirmed in all

1 other respects. (Id.)

2 3. Petitioner did not seek review in the California Supreme Court.

3 4. On April 14, 2010, a second amended abstract of judgment was filed, updating
4 the number of days petitioner was credited with time served and good conduct credits, which
5 were not credited in the first amended abstract of judgment. (LD Nos. 3-4.)

6 5. On July 27, 2010, the California Court of Appeal for the Third Appellate
7 District issued its opinion affirming the judgment. (LD No. 5.)

8 6. Petitioner did not seek direct review in the California Supreme Court.

9 7. On January 23, 2010,¹ petitioner filed a petition for writ of habeas corpus in the
10 San Joaquin County Superior Court. (LD No. 6.) The San Joaquin County Superior Court
11 denied the petition in a reasoned decision issued March 10, 2010. (LD No. 7.)

12 8. On April 22, 2010, petitioner filed a petition for writ of habeas corpus in the
13 California Court of Appeal for the Third Appellate District. (LD No. 8.) On June 3, 2010, the
14 Court of Appeal denied the petition without comment. (LD No. 9.)

15 9. On June 30, 2010, petitioner filed a petition for writ of habeas corpus in the
16 California Supreme Court.² (LD No. 10.) On February 16, 2011, the California Supreme Court
17 denied the petition without comment. (LD No. 11.)

18 10. Pursuant to Rule 3(d) of the Federal Rules Governing Section 2254 Cases, the
19 instant action was constructively filed on March 1, 2012. (Dkt. No. 1.)

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22 ¹ Petitioner's first and second state petitions were given benefit of the mailbox rule. See
23 Campbell v. Henry, 614 F.3d 1056, 1059 (9th Cir. 2010) (under the mailbox rule, the petition is
deemed filed when handed to prison authorities for mailing, and applies to both state and federal
filings by incarcerated parties).

24 ² This filing was not given benefit of the mailbox rule because the date set forth on the
25 petition is cut off and not fully legible. (LD No. 10.) The date appears to be June 10, 2010, but it
26 could also be June 18 or 16, 2010. However, as discussed below, the difference in filing date is
of no consequence because this filing was made prior to the commencement of the federal statute
of limitations period.

1 On July 27, 2010, the California Court of Appeal for the Third Appellate District
2 affirmed the conviction. (LD No. 5.) Petitioner did not seek review in the California Supreme
3 Court. Thus, the state appeal process became final within the meaning of section 2244(d)(1)(A)
4 when the time for filing a petition for review expired on September 5, 2010, forty days after the
5 California Court of Appeal filed its decision. See Cal. Ct. R. 8.264(b)(1), 8.500(e); Waldrip v.
6 Hall, 548 F.3d 729, 735 (9th Cir. 2008). The one-year limitations period commenced running the
7 following day. Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001). Thus, petitioner had
8 until September 6, 2011, to file his federal habeas petition. However, he did not file the instant
9 petition until March 1, 2012. Absent tolling, the federal petition is more than five months late.

10 Here, petitioner is not entitled to statutory tolling for his first two habeas petitions
11 filed in state court because each was filed and concluded prior to the commencement of the
12 federal statute of limitations period. In other words, the federal statute of limitations period did
13 not commence until September 6, 2010, and the Court of Appeal for the Third Appellate District
14 denied petitioner's second state habeas petition on June 3, 2010, before the statute of limitations
15 period began. A collateral challenge filed prior to the commencement of the federal statute of
16 limitations period has no tolling effect. Waldrip, 548 F.3d at 735. Therefore, petitioner's first
17 two habeas petitions filed in state court offer petitioner no statutory tolling.

18 The third habeas petition filed in the California Supreme Court is entitled to
19 partial tolling. Because the petition was filed on June 30, 2010, prior to the commencement of
20 the limitations period, petitioner is not entitled to tolling from June 30, 2010, until September 5,
21 2010. Waldrip, 548 F.3d at 735. However, petitioner is entitled to statutory tolling from
22 September 6, 2010, the date the federal limitations period commenced, and February 16, 2011,
23 the date the California Supreme Court denied the petition. Therefore, the statute of limitations
24 period is extended 163 days.

25 However, the limitations period is not tolled between the denial by the California
26 Supreme Court and the filing of the federal habeas petition. 28 U.S.C. § 2244(d)(2); see also

1 Banjo v. Ayers, 614 F.3d 964, 968 (9th Cir. 2010) (“[o]nly the time period during which a round
2 of habeas review is pending tolls the statute of limitation.”) Because the statute of limitations
3 period was partially tolled during the pendency of the habeas petition in the California Supreme
4 Court, the statute of limitations period began running on February 17, 2011, the day after the
5 California Supreme Court denied the state habeas petition. The federal limitations period
6 expired one year later, on February 17, 2012. Petitioner filed the instant petition on March 1,
7 2012, thirteen days after the limitations period expired. Accordingly, this action is time-barred
8 unless petitioner can demonstrate he is entitled to equitable tolling.

9 III. Equitable Tolling

10 Neither party addressed the issue of equitable tolling.

11 In Holland v. Florida, 130 S. Ct. 2549, 2560, 2562, 2564 (2010), the Supreme
12 Court recognized that the AEDPA statute of limitations “may be tolled for equitable reasons”
13 when the petitioner has made a showing of “extraordinary circumstances.” Id. To be entitled to
14 equitable tolling, petitioner must demonstrate “(1) that he has been pursuing his rights diligently,
15 and (2) that some extraordinary circumstance stood in his way.” Pace v. DiGuglielmo, 544 U.S.
16 408, 418 (2005). It is petitioner’s burden to show that he is entitled to equitable tolling.

17 Espinoza-Matthews v. People of the State of California, 432 F.3d 1021, 1026 (9th Cir. 2005).
18 “The high threshold of extraordinary circumstances is necessary lest the exceptions swallow the
19 rule.” Lakey v. Hickman, 633 F.3d 782, 786 (9th Cir. 2011) (citations and internal quotation
20 marks omitted).

21 Despite being granted an extension of time in which to oppose respondent’s
22 motion, petitioner failed to file an opposition or otherwise respond to the court’s order. In the
23 petition, petitioner failed to allege any facts demonstrating he is entitled to equitable tolling.
24 (Dkt. No. 1.) Thus, petitioner failed to meet his burden.

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1 IV. Conclusion

2 Accordingly, IT IS HEREBY RECOMMENDED that respondent's June 25, 2012
3 motion to dismiss (dkt. no. 16) be granted, and this action be dismissed as barred by the statute of
4 limitations.

5 These findings and recommendations are submitted to the United States District
6 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
7 days after being served with these findings and recommendations, any party may file written
8 objections with the court and serve a copy on all parties. Such a document should be captioned
9 "Objections to Magistrate Judge's Findings and Recommendations." If petitioner files
10 objections, he shall also address whether a certificate of appealability should issue and, if so, why
11 and as to which issues. A certificate of appealability may issue under 28 U.S.C. § 2253 "only if
12 the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §
13 2253(c)(3). Any response to the objections shall be filed and served within fourteen days after
14 service of the objections. The parties are advised that failure to file objections within the
15 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
16 F.2d 1153 (9th Cir. 1991).

17 DATED: September 7, 2012

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20 KENDALL J. NEWMAN
21 UNITED STATES MAGISTRATE JUDGE

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