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

PRESTON ALONZO HOWELL,

No. 2:12-CV-1901-KJM-CMK-P

Petitioner,

vs.

FINDINGS AND RECOMMENDATIONS

RICKY HILL,

Respondent.

_____ /

Petitioner, a state prisoner proceeding pro se, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pending before the court is respondent’s motion to dismiss (Doc. 12) the petition as second or successive and also as untimely.

I. BACKGROUND

Petitioner was convicted of assault with a deadly weapon and two counts of forcible rape on May 21, 1998. Petitioner was sentenced to a determinate term of 18 years plus an indeterminate life term with the possibility of parole after 15 years. Petitioner’s conviction and sentence were affirmed on direct appeal on August 5, 1999. The California Supreme Court denied direct review on October 20, 1999.

1 Petitioner then filed twelve pro se post-conviction actions:¹

2 1st Petition Sacramento County Superior Court
3 Filed January 13, 2000
4 Denied February 9, 2000

5 2nd Petition Sacramento County Superior Court
6 Filed March 29, 2000
7 Denied May 1, 2000

8 3rd Petition California Court of Appeal
9 Filed May 30, 2000
10 Denied June 15, 2000

11 4th Petition California Supreme Court
12 Filed June 22, 2000
13 Denied October 25, 2000

14 5th Petition Sacramento County Superior Court
15 Filed August 15, 2001
16 Denied September 19, 2001

17 6th Petition California Court of Appeal
18 Filed October 31, 2001
19 Denied November 8, 2001

20 7th Petition California Supreme Court
21 Filed November 30, 2001
22 Denied May 15, 2002

23 8th Petition Sacramento County Superior Court
24 Filed March 19, 2007
25 Denied April 23, 2007

26 9th Petition California Court of Appeal
Filed May 27, 2007
Denied May 31, 2007

10th Petition California Supreme Court
Filed June 11, 2007

¹ In Houston v. Lack, 487 U.S. 266 (1988), the Supreme Court held that a pro se prisoner's notice of appeal is deemed "filed" at the moment he delivers it to prison officials for mailing to the court. The so-called "prison mailbox rule" has been extended to apply to other legal documents submitted to the court by prisoners. See e.g. Stillman v. LaMarque, 319 F.3d 1199, 1201 (9th Cir. 2003) (applying rule to prisoner's habeas corpus petition); see also Huizar v. Carey, 273 F.3d 1220, 1223 (9th Cir. 2001) (discussing rule in context of "prisoner who delivers a document to prison authorities"); Lott v. Mueller, 304 F.3d 918, 921 (9th Cir. 2002) (stating rule in terms of any "legal document" submitted by a pro se prisoner). Wherever possible, the mailbox rule has been applied to all filing dates in this case.

1 Denied November 14, 2007

2 11th Petition California Court of Appeal
3 Filed December 20, 2011
4 Denied December 29, 2011

5 12th Petition California Supreme Court
6 Filed January 10, 2012
7 Denied May 9, 2012

8 Petitioner has also filed a prior federal petition challenging the May 21, 1998,
9 conviction, Howell v. Lamarque, E. Dist. Cal. case no. 2:02-CV-1376-GEB-JFM-P. That case
10 was denied on the merits on March 13, 2006, and the Ninth Circuit Court of Appeals denied a
11 certificate of appealability on August 13, 2007. The current petition was filed on July 17, 2012.

12 II. APPLICABLE LEGAL PRINCIPLES

13 A. Second or Successive Petitions

14 Under 28 U.S.C. § 2244(b)(1), “[a] claim presented in a second or successive
15 habeas corpus application . . . that was presented in a prior application shall be dismissed.”
16 Under § 2244(b)(2), “[a] claim presented in a second or successive habeas corpus application . . .
17 that was not presented in a prior application shall be dismissed. . . .” unless one of two
18 circumstances exist. Either the newly raised claim must rely on a new rule of constitutional law,
19 or the factual predicate of the new claim could not have been discovered earlier through the
20 exercise of due diligence and the new claim, if proven, establishes actual innocence. See id.
21 Before a second or successive petition potentially permissible under § 2244(b)(2) can be filed,
22 the petitioner must first obtain leave of the Court of Appeals. See 28 U.S.C. § 2244(b)(3). In the
23 absence of proper authorization from the Court of Appeals, the district court lacks jurisdiction to
24 consider a second or successive petition and must dismiss it. See Cooper v. Calderon, 274 F.3d
25 1270 (9th Cir. 2001) (per curiam).

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1 A second petition can only be successive of a prior petition which has been
2 decided on the merits. Woods v. Carey, 525 F.3d 886, 888 (9th Cir. 2008). A decision on the
3 merits occurs if the district court either considers and rejects the claims or determines that the
4 claims will not be considered by a federal court. See Howard v. Lewis, 905 F.2d 1318, 1322-23
5 (9th Cir. 1990). Where a prior petition has been dismissed without prejudice for failure to
6 exhaust state court remedies, the dismissal does not result in an adjudication on the merits
7 because the possibility of returning to court following exhaustion exists and a habeas petition
8 filed in the district court after the initial petition was dismissed is not second or successive. See
9 Slack v. McDaniel, 529 U.S. 473, 485-86 (2000). The dismissal of a petition as untimely,
10 however, does constitute a decision on the merits because such a dismissal is a determination that
11 the claims will not be considered. See McNabb v. Yates, 576 F.3d 1028, 1029-30 (9th Cir.
12 2009). Likewise, the denial of a petition on procedural default grounds is also a determination
13 on the merits. See Henderson v. Lampert, 396 F.3d 1049, 1053 (9th Cir. 2005) (citing Howard,
14 905 F.2d at 1322-23, and stating that the denial of a petition on procedural default grounds is a
15 determination that the claims will not be considered by the federal court).

16 **B. Statute of Limitations**

17 Federal habeas corpus petitions must be filed within one year from the later of: (1)
18 the date the state court judgment became final; (2) the date on which an impediment to filing
19 created by state action is removed; (3) the date on which a constitutional right is newly-
20 recognized and made retroactive on collateral review; or (4) the date on which the factual
21 predicate of the claim could have been discovered through the exercise of due diligence. See 28
22 U.S.C. § 2244(d). Typically, the statute of limitations will begin to run when the state court
23 judgment becomes final by the conclusion of direct review or expiration of the time to seek direct
24 review. See 28 U.S.C. § 2244(d)(1).

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1 Where a petition for review by the California Supreme Court is filed and no
2 petition for certiorari is filed in the United States Supreme Court, the one-year limitations period
3 begins running the day after expiration of the 90-day time within which to seek review by the
4 United States Supreme Court. See Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001).
5 Where a petition for writ of certiorari is filed in the United States Supreme Court, the one-year
6 limitations period begins to run the day after certiorari is denied or the Court issued a merits
7 decision. See Wixom v. Washington, 264 F.3d 894, 897 (9th Cir. 2001). Where no petition for
8 review by the California Supreme Court is filed, the conviction becomes final 40 days following
9 the Court of Appeal’s decision, and the limitations period begins running the following day. See
10 Smith v. Duncan, 297 F.3d 809 (9th Cir. 2002). If no appeal is filed in the Court of Appeal, the
11 conviction becomes final 60 days after conclusion of proceedings in the state trial court, and the
12 limitations period begins running the following day. If the conviction became final before April
13 24, 1996 – the effective date of the statute of limitations – the one-year period begins to run the
14 day after the effective date, or April 25, 1996. See Miles v. Prunty, 187 F.3d 1104, 1105 (9th
15 Cir. 1999).

16 The limitations period is tolled, however, for the time a properly filed application
17 for post-conviction relief is pending in the state court. See 28 U.S.C. § 2244(d)(2). To be
18 “properly filed,” the application must be authorized by, and in compliance with, state law. See
19 Artuz v. Bennett, 531 U.S. 4 (2000); see also Allen v. Siebert, 128 S.Ct. 2 (2007); Pace v.
20 DiGuglielmo, 544 U.S. 408 (2005) (holding that, regardless of whether there are exceptions to a
21 state’s timeliness bar, time limits for filing a state post-conviction petition are filing conditions
22 and the failure to comply with those time limits precludes a finding that the state petition is
23 properly filed). A state court application for post-conviction relief is “pending” during all the
24 time the petitioner is attempting, through proper use of state court procedures, to present his
25 claims. See Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). It is not, however, considered
26 “pending” after the state post-conviction process is concluded. See Lawrence v. Florida, 549

1 It is also clear that the current petition is untimely. Regardless of whether
2 petitioner is entitled to interval tolling anywhere along the line between various state court
3 petitions while moving up the various levels of state court, it is absolutely certain that the one-
4 year limitations period expired during (if not prior to) the nearly five-year period between the
5 California Supreme Court's denial of petitioner's 7th post-conviction action and the filing of the
6 8th post-conviction action.

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8 **IV. CONCLUSION**

9 Based on the foregoing, the undersigned recommends that respondent's motion to
10 dismiss (Doc. 12) be granted.

11 These findings and recommendations are submitted to the United States District
12 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days
13 after being served with these findings and recommendations, any party may file written
14 objections with the court. Responses to objections shall be filed within 14 days after service of
15 objections. Failure to file objections within the specified time may waive the right to appeal.

16 See *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

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18 DATED: March 13, 2013

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20 **CRAIG M. KELLISON**
21 UNITED STATES MAGISTRATE JUDGE
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