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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CION ADONIS PERALTA,
Petitioner,
v.
GARY S. SANDOR,
Respondent.

No. 2:12-cv-2571 MCE CKD P

FINDINGS AND RECOMMENDATIONS

Petitioner, a state prisoner proceeding pro se and in forma pauperis, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. He asserts that a 2010 disciplinary conviction violated his due process rights. (ECF No. 1.) Before the court is respondent's March 29, 2013 motion to dismiss the petition on the grounds that it is untimely and contains claims not cognizable in federal habeas. (ECF No. 14.) Petitioner has filed an opposition to the motion (ECF No. 15), and respondent has filed a reply (ECF No. 16). For the reasons set forth below, the court will recommend that respondent's motion be granted.

ANALYSIS

I. Facts

On May 8, 2010, following a disciplinary hearing at Mule Creek State Prison, petitioner was found guilty of possession of inmate-manufactured alcohol in violation of California Code of

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1 Regulations tit. 15, § 3016(a). (ECF No. 14, Ex. 1 at 26-27.¹) Petitioner filed an administrative
2 appeal of the conviction on due process grounds, Log No. MCSP-10-00804, which was denied at
3 the third and final level of administrative review on November 18, 2010. See Cal. Code Regs. tit.
4 15, §§ 3084.1, 3084.7 (inmate administrative appeal process). (ECF No. 14, Ex. 1 at 20-21.)

5 On May 7, 2011, petitioner filed a petition in the Amador County Superior Court
6 challenging the disciplinary conviction. (ECF No. 14, Ex. 1.) The petition was denied June 15,
7 2011. (Id., Ex. 2.) Petitioner subsequently filed petitions in the state appellate court and
8 California Supreme Court, the latter of which was denied on December 14, 2011. (Id., Exs. 3-4.)

9 On October 15, 2012, petitioner filed the instant federal petition. (ECF No. 1.)

10 II. Statute of Limitations Under the AEDPA

11 Because this action was filed after April 26, 1996, the provisions of the Antiterrorism and
12 Effective Death Penalty Act of 1996 (“AEDPA”) are applicable. See Lindh v. Murphy, 521 U.S.
13 320, 336 (1997); Clark v. Murphy, 331 F.3d 1062, 1067 (9th Cir. 2003). The AEDPA imposed a
14 one-year statute of limitations on the filing of federal habeas petitions. Title 28 U.S.C. § 2244
15 provides as follows:

16 (d)(1) A 1-year period of limitation shall apply to an application
17 for a writ of habeas corpus by a person in custody pursuant to the
18 judgment of a State court. The limitation period shall run from the
latest of –

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

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

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

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

28 ¹ Citations refer to page numbers assigned by the court’s docketing system.

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

4 The AEDPA statute of limitations is tolled during the time a properly filed application for
5 post-conviction relief is pending in state court. 28 U.S.C. § 2244(d)(2). The statute of limitations
6 is not tolled during the interval between the date on which a decision becomes final and the date
7 on which the petitioner files his first state collateral challenge. Nino v. Galaza, 183 F.3d 1003,
8 1006 (9th Cir. 1999). Once state collateral proceedings are commenced, a state habeas petition is
9 “pending” during a full round of review in the state courts, including the time between a lower
10 court decision and the filing of a new petition in a higher court, as long as the intervals between
11 petitions are “reasonable.” See Evans v. Chavis, 546 U.S. 189, 192 (2006); Carey v. Saffold, 536
12 U.S. 214, 222-24 (2002).

13 III. Discussion

14 Where, as here, habeas petitioners challenge administrative decisions, AEDPA’s one-year
15 limitations period commences on “the date on which the factual predicate of the claim or claims
16 presented could have been discovered through the exercise of due diligence.” 28 U.S.C.A.
17 §2244(d)(1)(D). “As a general rule, the state agency’s denial of an administrative appeal is the
18 ‘factual predicate’ for such habeas claims.” Mardesich v. Cate, 668 F.3d 1164, 1172 (9th Cir.
19 2012), citing Redd v. McGrath, 343 F.3d 1077, 1085 (9th Cir. 2003). As petitioner’s third-level
20 administrative appeal was denied on November 18, 2010, the limitations period began on
21 November 19, 2010 and, absent statutory tolling, expired on November 19, 2011.

22 After the AEDPA clock began running on November 19, 2010, 169 days passed before
23 petitioner filed a petition challenging the administrative decision in the Amador Superior Court.
24 Title 28 U.S.C. §2244(d)(2) states that the “time during which a properly filed application for
25 State post-conviction or other collateral review with respect to the pertinent judgment or claim is
26 pending shall not be counted toward” the one-year limitation period. 28 U.S.C. § 2244(d)(2).
27 Respondent concedes that the limitations period was tolled during the pendency of petitioner’s
28 three state habeas petitions, specifically between May 7, 2011 and December 14, 2011.

1 In opposition to the motion, petitioner argues that the petition was timely because it was
2 filed within one year of the California Supreme Court's denial of his petition on December 14,
3 2011. As this calculation does not account for the 169 days of the limitations period that ran
4 before he filed his first state petition for post-conviction review, it is incorrect. Rather, petitioner
5 had until June 28, 2012 to file a timely federal petition, but did not commence this action until
6 October 15, 2012.

7 The limitations period is subject to equitable tolling if the petitioner demonstrates: "(1)
8 that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood
9 in his way." Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005). Petitioner bears the burden of
10 alleging facts that would give rise to tolling. Id. at 418; Smith v. Duncan, 297 F.3d 809 (9th Cir.
11 2002). Petitioner asserts that he is entitled to equitable tolling, but fails to allege any facts
12 suggesting that the high bar for equitable tolling of the AEDPA tolling was met here.

13 Thus the undersigned will recommend that the petition be dismissed for untimeliness and
14 need not reach respondent's alternative argument that the petition fails to state a cognizable claim.

15 Accordingly, IT IS HEREBY RECOMMENDED THAT:

- 16 1. Respondent's motion to dismiss the petition (ECF No. 14) be granted; and
- 17 2. This case be closed.

18 These findings and recommendations are submitted to the United States District Judge
19 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
20 after being served with these findings and recommendations, any party may file written
21 objections with the court and serve a copy on all parties. Such a document should be captioned
22 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
23 objections shall be served and filed within fourteen days after service of the objections. The
24 parties are advised that failure to file objections within the specified time may waive the right to
25 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

26 Dated: January 9, 2014

27 
28 CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE