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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RASHAD DELRICO MACK,
Petitioner,
v.
J.N. KATAVICH,
Respondent.

No. 2:13-cv-01110 TLN DAD P

FINDINGS AND RECOMMENDATIONS

I. Introduction

Petitioner is a state prisoner proceeding pro se and in forma pauperis in this habeas corpus action filed pursuant to 28 U.S.C. § 2254. Petitioner challenges his 2009 judgment of conviction for first degree murder with a special circumstance upon which he was sentenced to life imprisonment without the possibility of parole.

Pending before the court is respondent’s motion to dismiss the petition on the ground that petitioner commenced this action beyond the one-year statute of limitations established by the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2244(d).

For the reasons that follow, the undersigned recommends that respondent’s motion to dismiss be granted.

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1 II. Legal Standards

2 Respondent has moved to dismiss this action on the ground that it was commenced after
3 expiration of AEDPA’s one-year statute of limitations, without any entitlement to statutory or
4 equitable tolling.

5 AEDPA provides in pertinent part:

6 A 1-year period of limitation shall apply to an application for a writ
7 of habeas corpus by a person in custody pursuant to the judgment of
8 a State court. The limitation period shall run from the latest of –

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

10 28 U.S.C. § 2244(d)(1)(A).

11 This limitations period is statutorily tolled during the pendency of “a properly filed
12 application for State post-conviction or other collateral review with respect to the pertinent
13 judgment or claim” 28 U.S.C. § 2244(d)(2). A state petition is “properly filed,” and thus
14 qualifies for statutory tolling, if “its delivery and acceptance are in compliance with the applicable
15 laws and rules governing filings.” Artuz v. Bennett, 531 U.S. 4, 8 (2000). “The period between a
16 California lower court’s denial of review and the filing of an original petition in a higher court is
17 tolled -- because it is part of a single round of habeas relief -- so long as the filing is timely under
18 California law.” Banjo v. Ayers, 614 F.3d 964, 968 (9th Cir. 2010). See also Carey v. Saffold,
19 536 U.S. 214, 220 (2002).

20 In addition, the limitations period may be equitably tolled if a petitioner establishes that he
21 diligently pursued his rights but some extraordinary circumstance stood in his way. See Pace v.
22 DiGuglielmo, 544 U.S. 408, 418 (2005); Raspberry v. Garcia, 448 F.3d 1150, 1153 (9th Cir.
23 2006). “The high threshold of extraordinary circumstances is necessary ‘lest the exceptions
24 swallow the rule.’” Lakey v. Hickman, 633 F.3d 782, 786 (9th Cir. 2011) (quoting Mendoza v.
25 Carey, 449 F.3d 1065, 1068 (9th Cir. 2006)).

26 III. Relevant Chronology

27 The following is the chronology of relevant events in assessing application of the AEDPA
28 statute of limitations in this case.

1 1. Petitioner was convicted on May 4, 2009, and sentenced on July 9, 2009, in the
2 Sacramento County Superior Court. (ECF No. 1 (Petition) at 1.)

3 2. On June 7, 2011, the California Court of Appeal for the Third Appellate District,
4 affirmed that judgment of conviction. See People v. Mack, Case No. C062717, 2011 WL
5 2306011 (Cal. App. 3d. 2011).

6 3. On August 17, 2011, the California Supreme Court denied petitioner's petition for
7 review. (Resp't's MTD (ECF No. 13), Ex. A; Pet'r's Opp'n (ECF No. 16), Ex. A.)

8 4. On August 27, 2012,¹ petitioner filed a petition for writ of habeas corpus in the
9 Sacramento County Superior Court. (ECF No. 13, Ex. B.) The petition was denied on October
10 22, 2012, as untimely and on the merits. (ECF No. 13, Exh. C; ECF No. 16, Ex. B.)

11 5. On December 10, 2012, petitioner filed a petition for writ of habeas corpus in the
12 California Court of Appeal for the Third Appellate District (ECF No. 13, Ex. D), which was
13 denied without comment or citation on December 20, 2012. (ECF No. 13, Ex. E; ECF No. 16,
14 Ex. C.)

15 6. On January 14, 2013, petitioner filed a petition for writ of habeas corpus in the
16 California Supreme Court (ECF No. 13, Ex. F), which the court denied without comment or
17 citation on April 10, 2013 (ECF No. 13, Ex. G; ECF No. 16, Ex. D.)

18 7. On June 3, 2013, petitioner filed the instant federal petition for writ of habeas corpus
19 (ECF No. 1).

20 IV. Analysis

21 Following the California Supreme Court's denial of the petition for review on August 17,
22 2011, petitioner had ninety days (or until November 15, 2011)² to file a petition for writ of
23 certiorari in the United States Supreme Court. See Rule 13, Supreme Court Rules. However,
24 petitioner did not file a petition for writ of certiorari. The AEDPA's limitation period for

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26 ¹ This is the file-stamp date which appears on the petition. The operative filing date, however, is
27 the date petitioner signed and delivered the petition to prison authorities for mailing under the so-
called "mailbox rule." See Houston v. Lack, 487 U.S. 266, 276 (1988).

28 ² Respondent miscalculates this date as November 9, 2011. (See ECF No. 13 at 3.)

1 petitioner's filing of a federal habeas petition therefore commenced on November 16, 2011, the
2 day after expiration of the period for his filing of a petition for writ of certiorari. See Bowen v.
3 Roe, 188 F.3d 1157 (9th Cir. 1999) (The "period of 'direct review' in 28 U.S.C. § 2244(d)(1)(A)
4 includes the period within which a petitioner can file a petition for a writ of certiorari from the
5 United States Supreme Court, whether or not the petitioner actually files such a petition.");
6 Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001) (applying Fed. R. Civ. P. 6(a) in
7 determining that the commencement of AEDPA's limitations period excludes the last day of the
8 period allowed for seeking direct review). Therefore, absent statutory or equitable tolling,
9 AEDPA's statute of limitations for petitioner's filing of a federal habeas petition expired one year
10 later, on November 16, 2012.

11 Respondent contends that the one-year limitations period was not statutorily tolled by the
12 filing of any of petitioner's state habeas petitions because the first such petition was untimely
13 filed and the subsequent petitions were denied on that basis. Petitioner challenges this procedural
14 default argument by respondent on the following grounds: (1) California's standards for
15 assessing the timeliness of habeas petitions are impermissibly vague; (2) the reasons for the
16 denial of petitioner's subsequently-filed state habeas petitions are unclear because those petitions
17 were denied without citation or comment by the state courts; and (3) petitioner was delayed in
18 filing his habeas petitions, although he "worked diligently investigating potential claims,"
19 because (a) he was required to seek post-conviction discovery, and (b) was "transferred and
20 relocated twice to separate institutions with limited resources and inadequate access to law
21 materials." (ECF No. 16 at 4-7.)³

22 Petitioner's threshold arguments are without merit. It is clear that each of the state habeas
23 petitions filed by petitioner was denied as untimely. In this regard, it is well established that this
24 court must "look through" to the last reasoned state court decision to assess the rationale
25 underlying a subsequent summary denial of the petition by the California Court of Appeal or
26 California Supreme Court. As the Ninth Circuit has recently observed:

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28 ³ Respondent did not file a reply in support of the motion to dismiss.

1 Under AEDPA, we review the last reasoned state-court decision.
2 Barker v. Fleming, 423 F.3d 1085, 1091 (9th Cir. 2005). When a
3 state court does not explain the reason for its decision, we ‘look
4 through’ to the last state-court decision that provides a reasoned
5 explanation capable of review. Shackleford v. Hubbard, 234 F.3d
6 1072, 1079 n.2 (9th Cir. 2000).

7 Murray v. Schriro, 745 F.3d 984, 996 (9th Cir. 2014).

8 In the present case, the last reasoned state court decision was issued by the Sacramento
9 County Superior Court on October 22, 2012. (Resp. Exh. C.) That court initially noted that,
10 “[o]ne year and three days after the judgment in Sacramento County Superior Court Case No.
11 07F05278 became final, petitioner signed and had mailed the instant habeas corpus petition to
12 challenge that judgment.” (ECF No. 13 at 10, Ex. C.) See n.1, supra. The Sacramento County
13 Superior Court then expressly found that the habeas petition before it was untimely filed, and that
14 each specific claim brought by petitioner was “barred by Robbins/Clark.” (See ECF No. 13, Ex.
15 C) (citing In re Clark, 5 Cal. 4th 750, 774-75, 787-98 (1993) and In re Robbins, 18 Cal.4th 770,
16 811-12, 812 n.32 (1998).) The Sacramento County Superior Court’s express denial of
17 petitioner’s habeas petition on timeliness grounds is underscored by the Supreme Court’s
18 observation that “California courts signal that a petition is denied as untimely by citing the
19 controlling decisions, i.e., Clark and Robbins.” Walker v. Martin, ___ U.S. ___, 131 S. Ct. 1120,
20 1124 (2011). Although the Sacramento County Superior Court here also addressed the merits of
21 petitioner’s claims, it did so to assess whether petitioner had demonstrated any exception to the
22 timeliness bar,⁴ and found that he had not. “A state court’s application of a procedural rule is not
23 undermined where, as here, the state court simultaneously rejects the merits of the claim.”

24 Bennett v. Mueller, 322 F.3d 573, 580 (9th Cir. 2003).

25 Because it is clear that petitioner’s first state habeas petition was denied as untimely, the
26 summary denials of petitioner’s subsequently-filed state habeas petitions are similarly construed.

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28 ⁴ The Superior Court noted that an untimely habeas petition is barred from review “unless (1) it
alleges facts which, if proven, would establish that a fundamental miscarriage of justice occurred
as a result of the proceedings leading to conviction, (2) the petitioner is presenting newly
discovered claims after demonstrating due diligence, or (3) the petitioner is claiming that the
sentence is unauthorized” (ECF No. 13 at 10, Ex. C; ECF No. 16 at 11, Ex. B.)

1 See Murray, 745 F.3d at 996 (this court must “look through” to the last reasoned state court
2 decision). Moreover, because the state courts found that none of petitioner’s habeas petitions
3 were “properly filed,” none of them served to statutorily tolled AEDPA’s limitation period. See
4 28 U.S.C. § 2244(d)(2)(statutory tolling authorized only during the pendency of “a properly
5 filed” application for state court review); Artuz, 531 U.S. at 8 (a state petition is “properly filed,”
6 and qualifies for statutory tolling only if “its delivery and acceptance are in compliance with the
7 applicable laws and rules governing filings”); Pace, 544 U.S. at 417 (time limits are “filing
8 conditions,” and a state court’s rejection of a petition as untimely means that it was not “properly
9 filed” and not entitled to statutory tolling under § 2244(d)(2)). For these reasons, the undersigned
10 finds no basis for statutory tolling of the statute of limitations in this case.

11 Petitioner contends, more broadly, that California’s open-ended method for assessing the
12 timeliness of a habeas petition is so vague as to render it “inadequate” to support the denial of
13 petitioner’s state habeas petitions and preclude federal habeas review. Petitioner asserts that
14 California’s timeliness procedures lack “clear and certain” guidelines, and thereby fail to provide
15 petitioners with adequate notice to achieve compliance. Plaintiff’s contention is framed by the
16 rule that federal habeas courts “will not review a question of federal law decided by a state court
17 if the decision of that court rests on a state law ground that is independent of the federal question
18 and adequate to support the judgment.” Coleman v. Thompson, 501 U.S. 722, 726-29 (1991).
19 “[T]he independent and adequate state ground doctrine . . . applies to bar federal habeas when a
20 state court declined to address a prisoner’s federal claims because the prisoner had failed to meet
21 a state procedural requirement.” Id. at 729-30. See also Martinez v. Ryan, ___U.S. ___, 132 S. Ct.
22 1309, 1316 (2012) (“a federal court will not review the merits of claims, including constitutional
23 claims, that a state court declined to hear because the prisoner failed to abide by a state procedural
24 rule”); Murray, 745 F.3d at 1015 (the doctrine of procedural default is grounded in federalism).

25 The Supreme Court has ruled that a discretionary rule for assessing the timeliness of a
26 state habeas petition, like that applied in California, may qualify as an “adequate” state law
27 ground precluding federal review. Beard v. Kindler, 558 U.S. 53, 60-1 (2009). Moreover, the
28 Supreme Court has specifically considered California’s procedures for assessing the timeliness of

1 a habeas petition,⁵ and rejected challenges nearly identical to those raised by petitioner here. See
2 Walker, 131 S. Ct. 1120. In Walker, the Supreme Court found “no basis for concluding that
3 California’s timeliness rule operates to the particular disadvantage of petitioners asserting federal
4 rights,” and, therefore, there was “no inadequacy in California’s timeliness rule generally or as
5 applied” to the petitioner. Walker, 131 S. Ct. at 1131. This holding by the Supreme Court
6 mandates the rejection of petitioner’s arguments in this case that California’s timeliness rules are
7 generally “vague” and “uncertain,” and fail to provide adequate notice to petitioners. See
8 Branner v. Chappell, No. C–90–3219 DLJ, 2014 WL 582811, at *4 (N.D. Cal. Feb. 13, 2014)
9 (finding that, because petitioner’s defaults occurred in 2000, “long after Clark and Robbins were
10 decided,” the holding of Martin confirmed that “California’s untimeliness default was both
11 independent and adequate to bar federal review”).

12 Petitioner further argues that California’s timeliness rules, as applied to him, failed to
13 allow for equitable considerations premised on his “due diligence,” as allegedly demonstrated by
14 his “need for discovery,”⁶ and the lack of continuous access to legal materials due to institutional

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16 ⁵ The Supreme Court summarized California’s timeliness procedures with respect to habeas
actions as follows:

17 California does not employ fixed statutory deadlines to determine
18 the timeliness of a state prisoner’s petition for habeas corpus.
19 Instead, California directs petitioners to file known claims “as
20 promptly as the circumstances allow.” In re Clark, 5 Cal. 4th 750,
65 n.5 (1993). Petitioners are further instructed to state when they
21 first learned of the asserted claims and to explain why they did not
22 seek postconviction relief sooner. In re Robbins, 18 Cal. 4th 770,
780 (1998). Claims substantially delayed without justification may
23 be denied as untimely. Ibid.; Clark, 5 Cal. 4th, at 765 n.5
24 While most States set determinate time limits for collateral relief
applications, in California, neither statute nor rule of court does so.
25 Instead, California courts “appl[y] a general ‘reasonableness’
26 standard” to judge whether a habeas petition is timely filed. Carey
v. Saffold, 536 U.S. 214, 222 (2002).

25 Walker, 131 S. Ct. at 1124-25.

26 ⁶ In support of his argument for equitable tolling, petitioner has submitted copies of orders issued
27 by the Sacramento County Superior Court addressing his discovery requests prior to his filing of
28 his first state habeas petition on August 27, 2012. Those orders indicate as follows. On
September 8, 2011, the court denied petitioner’s request for free copies of the Clerk’s Transcript
and the Reporter’s Transcript from his trial on the ground that free copies had already been

1 transfers.⁷ However, both of these alleged grounds for equitable tolling impacted the timing and
2 timeliness of petitioner's initial habeas filing in state court and should, therefore, have been
3 directed to the state courts.

4 Nevertheless, the court liberally construes these asserted grounds for equitable tolling as
5 alleged "causes" excusing petitioner's procedural default.

6 In all cases in which a state prisoner has defaulted his federal
7 claims in state court pursuant to an independent and adequate state
8 procedural rule, federal habeas review of the claims is barred unless
9 the prisoner can demonstrate cause for the default and actual
prejudice as a result of the alleged violation of federal law, or
demonstrate that failure to consider the claims will result in a
fundamental miscarriage of justice.

10 Coleman, 501 U.S. at 750. In general, "cause" means "some objective factor external to the
11 defense" that impeded petitioner's efforts to comply with the state procedural requirement,
12 McCleskey v. Zant, 499 U.S. 467, 493 (1991), while "prejudice" means that "there is a reasonable
13 probability that, but for [the asserted cause], the result of the proceeding would have been
14 different," and the "probability [is] sufficient to undermine confidence in the outcome,"

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16 provided to petitioner's appointed appellate counsel and denied without prejudice his request for
17 an order directing the prosecutor to turn over petitioner's case file, discovery and police reports
18 on the ground that petitioner could renew his motion pursuant to California Penal Code § 1054.9).
19 (ECF No. 16 at 19-22, Ex. E.) On October 13, 2011, the court established a discovery and
20 briefing schedule in response to petitioner's motion for post-conviction discovery from the
21 prosecution brought pursuant to California Penal Code § 1054.9. (ECF No. 16 at 23-5, Ex. F.)
22 On November 16, 2011, the court extended that discovery and briefing schedule. (ECF No. 16 at
23 26-7, Ex. G.) On January 5, 2012, the court noted a declaration from petitioner's counsel
24 indicating that he had provided a complete copy of all discovery to petitioner, ordered petitioner
25 to reimburse the prosecution for providing duplicate discovery to him, and denied petitioner's
26 motion for further post-conviction discovery. (ECF No. 16 at 28-30, Ex. H.) On February 16,
27 2012, the court directed the prosecution to respond to petitioner's motion to compel discovery.
28 (ECF No. 16 at 33-4, Ex. J.) Finally, on February 22, 2012, the court denied petitioner's request
to compel further post-conviction discovery. (ECF No. 16 at 31-2, Ex. I.)

⁷ This court's docket reflects no institutional transfers since petitioner commenced this federal
action on June 3, 2013. Petitioner has not specified the dates or locations associated with his
institutional transfers. However, available information indicates that these transfers occurred
prior to his filing of his initial state court petition. Specifically, it appears that petitioner was
transferred from Deuel Vocational Institution to Pelican Bay State Prison (PBSP) in February
2010 and was transferred from PBSP to California State Prison-Corcoran (CSP-COR) sometime
between February and August 2012.

1 Strickland v. Washington, 466 U.S. 668, 694 (1984).

2 Construing petitioner’s arguments in a manner consistent with these principles, the
3 undersigned is not persuaded that either asserted “cause” significantly impeded petitioner’s ability
4 to timely file his initial state petition. Review of the Sacramento County Superior Court’s
5 discovery orders indicates that petitioner received all available discovery no later than October
6 19, 2011. See n.6, above. Review of petitioner’s institutional transfers, to the extent discernable
7 since petitioner has failed to provide specific supporting information, suggests that petitioner was
8 incarcerated at PBSP from February 2010 to at least February 2012, and was transferred to CSP-
9 COR sometime between February and August 2012. See n.7, above. The undersigned finds that
10 neither of these alleged “causes” was of sufficient duration to excuse the delayed filing of
11 petitioner’s initial state court petition in August 2012. Thus, while a petitioner can overcome a
12 state court procedural default by demonstrating cause for the default as well as actual prejudice,
13 the undersigned here finds that petitioner has failed to demonstrate either. Nor has petitioner
14 demonstrated that this court’s resulting failure to consider his habeas claims will result in a
15 fundamental miscarriage of justice. See Bennett v. Mueller, 322 F.3d 573, 580 (9th Cir. 2003);
16 Hurles v. Ryan, ___F.3d___, ___, 2014 WL 1979307, at *6 (9th Cir. May 16, 2014).

17 Having reviewed each of petitioner’s arguments in opposition to respondent’s motion to
18 dismiss, the court finds that the federal habeas petition pending before this court was untimely
19 filed. The filing of the instant petition on June 3, 2013, was approximately six and one half
20 months after the AEDPA statute of limitations had expired on November 16, 2012. As a result,
21 this court is precluded from considering the merits of petitioner’s federal claims. See Martinez,
22 132 S. Ct. at 1316 (procedural default precludes federal review).

23 V. Conclusion

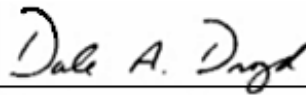
24 For the foregoing reasons, IT IS HEREBY RECOMMENDED that:

- 25 1. Respondent’s motion to dismiss (ECF No. 13), be granted; and
26 2. This action be closed.

27 These findings and recommendations are submitted to the United States District Judge
28 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days

1 after being served with these findings and recommendations, any party may file written
2 objections with the court and serve a copy on all parties. Such a document should be captioned
3 “Objections to Magistrate Judge's Findings and Recommendations.” In his objections, petitioner
4 may address whether a certificate of appealability should issue in the event he files an appeal of
5 the judgment in this case. See 28 U.S.C. 2253(c) (absent a certificate of appealability, an appeal
6 may not be taken from the final decision of a district judge in a habeas corpus proceeding or a
7 proceeding under 28 U.S.C. § 2255). Any response to the objections shall be served and filed
8 within seven days after service of the objections. Failure to file objections within the specified
9 time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153
10 (9th Cir. 1991).

11 Dated: June 20, 2014



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14 DALE A. DROZD
15 UNITED STATES MAGISTRATE JUDGE

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