

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DONALD ROOTS,
Petitioner,
v.
ELVIN VALENZUELA,
Respondent.

No. 2:14-cv-0030 KJM CKD P

FINDINGS AND RECOMMENDATIONS

Petitioner is a California prisoner proceeding pro se with a petition for writ of habeas corpus under 28 U.S.C. § 2254. He is serving a sentence of 18 years and 4 months imprisonment for three firearm related offenses and making criminal threats. Respondent has filed a motion to dismiss.

Respondent argues that petitioner has failed to exhaust state court remedies with respect to all of his claims. The exhaustion of state court remedies is a prerequisite to the granting of a petition for writ of habeas corpus. 28 U.S.C. § 2254(b)(1). A petitioner satisfies the exhaustion requirement by providing the highest state court with a full and fair opportunity to consider all claims before presenting them to the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971).

After reviewing all of the material in the record, it appears petitioner has exhausted state court remedies only with respect to the claim identified as “Ground three” in his petition for writ of habeas corpus. In that claim, petitioner challenges evidence presented at his sentencing

1 hearing. Petitioner presented this claim to the California Supreme Court in a state petition for
2 writ of habeas corpus filed on August 16, 2013. Resp't's Lodged Doc. No. 10. The claim was
3 rejected on November 20, 2013. Resp't's Lodged Doc. No. 11. It does not appear petitioner has
4 presented either "Ground one" or "Ground two" to the California Supreme Court.¹ Accordingly,
5 at this point, petitioner cannot obtain relief pursuant to "Ground one or "Ground two."

6 As for the only claim where state court remedies have been exhausted, respondent argues
7 petitioner cannot obtain relief as to that claim because the applicable limitations period has been
8 violated. Title 28 U.S.C. § 2244(d)(1) provides:

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

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

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

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

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

26 On September 8, 2011, petitioner filed a petition for review in the California Supreme
27 Court of the California Court of Appeal's denial of petitioner's appeal of his conviction and
28 sentence. Resp't's Lodged Doc. # 13. The petition for review was denied October 12, 2011.
Resp't's Lodged Doc. # 14. Petitioner's conviction became final for purposes of § 2244(d)(1)(A)
on January 10, 2012 when time expired for petitioner to seek a writ of certiorari with respect to

¹ In "Ground one," petitioner asserts he was subjected to ineffective assistance of counsel in violation of the Sixth Amendment because trial counsel advised him not to testify. In his California Supreme Court petition for writ of habeas corpus, petitioner asserts he was subjected to ineffective assistance of counsel in several respects, but he does not present any claims related to petitioner not testifying.

1 the California Supreme Court’s denial of petitioner’s direct appeal request for review. See
2 Bowen v. Roe, 188 F.3d 1157, 1158 59 (9th Cir. 1999) (“We hold that the period of ‘direct
3 review’ in 28 U.S.C. § 2244(d)(1)(A) includes the period within which a petitioner can file a
4 petition for a writ of certiorari from the United States Supreme Court, whether or not the
5 petitioner actually files such a petition.”).

6 On December 11, 2011 (before time expired for petitioner to file a petition for writ of
7 certiorari), petitioner filed a petition for writ of habeas corpus with the Superior Court of
8 Sacramento County.² Resp’t’s Lodged Doc. No. 1. Title 28 U.S.C. § 2244(d)(2) provides that
9 “the time during which a properly filed application for State post-conviction or other collateral
10 review with respect to the pertinent judgment or claim is pending shall not be counted toward any
11 period of limitation under this subsection.” 28 U.S.C. § 2244(d)(2). Respondent concedes that
12 petitioner is entitled to tolling of the applicable limitations period while his first state habeas
13 petition was pending. The petition was denied on February 3, 2012 (Resp’t’s Lodged Doc. No.
14 1), and the limitation period began running for the first time the next day.

15 Petitioner filed a second petition for writ of habeas corpus in the Superior Court of
16 Sacramento County on September 19, 2012 (Resp’t’s Lodged Doc. No. 4) which tolled the
17 applicable limitations period a second time. At that point, 228 days of the limitations period had

18 ////

19 ////

20 ////

21 ////

22 ////

23 ////

24 ////

25 ////

26

27 ² Documents are “filed” in courts by prisoners on the day they give their documents to prison
28 officials for mailing. See Houston v. Lack, 487 U.S. 266, 270 (1988).

1 elapsed.³ The petition was denied October 16, 2012. Resp't's Lodgd Doc. No. 5. The limitations
2 period commenced a second time the next day and ran out on March 2, 2013 well before this
3 action was commenced in January of this year.⁴

4 Because there appear to be no claims upon which petitioner may proceed, the court will
5 recommend that petitioner's application for writ of habeas corpus be dismissed, and this case be
6 closed.

7 Accordingly, IT IS HEREBY RECOMMENDED that:

- 8 1. Respondent's motion to dismiss (ECF No. 16) be granted; and
- 9 2. This case be closed.

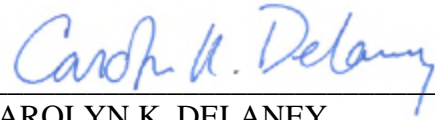
10 These findings and recommendations are submitted to the United States District Judge
11 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
12 after being served with these findings and recommendations, any party may file written
13 objections with the court and serve a copy on all parties. Such a document should be captioned
14 "Objections to Magistrate Judge's Findings and Recommendations." In his objections petitioner
15

16 ³ Respondent argues that petitioner is also entitled to tolling between April 10, and May 29, 2012
17 while a motion to amend petitioner's first Superior Court of Sacramento County petition for writ
18 of habeas corpus was pending. A motion to amend a petition which has already been denied is
19 not, by itself, "[a]n application for State post-conviction or other collateral review." A different
20 conclusion might be appropriate had the Superior Court granted the motion and elected to
21 proceed on an amended petition. However, the Superior Court denied the motion to amend
22 because petitioner sought to bring additional claims. The Superior Court informed petitioner that
23 the correct course of action was to commence a second habeas action, which petitioner did. So,
24 to the extent the court could construe petitioner's motion to amend as "[a]n application for State
25 post-conviction or other collateral review," petitioner would still not be entitled to tolling under
26 28 U.S.C. § 2244(d)(2) because it was not "properly filed" in the Superior Court.

27 ⁴ After the limitations period expired, petitioner filed a third petition for writ of habeas corpus in
28 the Superior Court of Sacramento County on May 6, 2013 (Resp't's Lodgd Doc. No. 6) and the
petition was denied June 13, 2013 (Resp't's Lodgd Doc. No. 7). The Ninth Circuit has held that
under certain circumstances, the limitations period applicable to § 2254 actions will be tolled
during the intervals of time between pending Superior Court petitions. See Stancle v. Clay, 692
F.3d 948, 953 (9th Cir. 2012). However, because petitioner raised claims not raised in his first
petition in his second petition, and then raised claims not raised in his second petition in his third
petition, he is not entitled to interval tolling. See id. (Interval of time between pending petitions
for collateral relief filed in the same court may be tolled if the subsequent petition is "limited to
an elaboration of the facts relating to the claims in the first petition.")

1 may address whether a certificate of appealability should issue in the event he files an appeal of
2 the judgment in this case. See Rule 11, Federal Rules Governing Section 2254 Cases (the district
3 court must issue or deny a certificate of appealability when it enters a final order adverse to the
4 applicant). Any response to the objections shall be served and filed within fourteen days after
5 service of the objections. The parties are advised that failure to file objections within the
6 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
7 F.2d 1153 (9th Cir. 1991).

8 Dated: June 4, 2014



CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
root0030.mtd