

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

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

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

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

10 On July 9, 2008, the California Supreme Court granted petitioner's request for review of
11 the denial of his appeal by the California Court of Appeal. Resp't's Lodged Doc. No. 4. On
12 June 21, 2012, the California Supreme Court affirmed the court of appeal. Id. Petitioner's
13 conviction became final for purposes of § 2244(d)(1)(A) on September 19, 2012 when time
14 expired for petitioner to seek a writ of certiorari with respect to the California Supreme Court's
15 decision. See Bowen v. Roe, 188 F.3d 1157, 1158 59 (9th Cir. 1999) ("We hold that the period of
16 'direct review' in 28 U.S.C. § 2244(d)(1)(A) includes the period within which a petitioner can file
17 a petition for a writ of certiorari from the United States Supreme Court, whether or not the
18 petitioner actually files such a petition."). The limitations period applicable to this action began
19 running the next day on September 20, 2012. This action was not commenced until September
20 11, 2014 when petitioner submitted his habeas petition to prison officials for mailing. See
21 Houston v. Lack, 487 U.S. 266 270-71 (1988). Therefore, the limitations period ran out on
22 September 19, 2013 unless there is any basis for tolling.

23 Title 28 U.S.C. § 2244(d)(2) provides that "the time during which a properly filed
24 application for State post-conviction or other collateral review with respect to the pertinent
25 judgment or claim is pending shall not be counted toward any period of limitation under this
26 subsection." 28 U.S.C. § 2244(d)(2). A review of the record before the court reveals that

27 ////

28 ////

1 petitioner had no actions for collateral relief pending in California courts while the limitations
2 period was running.²

3 Because there does not appear to be any basis to toll the limitations period before it ran
4 out on September 19, 2013, respondent's motion to dismiss should be granted, and this case
5 should be closed.

6 In accordance with the above, IT IS HEREBY RECOMMENDED that:

- 7 1. Respondent's motion to dismiss (ECF No. 16) be granted;
- 8 2. Petitioner's petition for writ of habeas corpus be dismissed as time-barred; and
- 9 3. 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 may address whether a certificate of appealability should issue in the event he files an appeal of
16 the judgment in this case. See Rule 11, Federal Rules Governing Section 2254 Cases (the district
17 court must issue or deny a certificate of appealability when it enters a final order adverse to the
18 applicant). Any response to the objections shall be served and filed within fourteen days after
19 service of the objections. The parties are advised that failure to file objections within the

20 ////

21 ////

22 ² Shortly after the California Supreme Court issued its decision affirming the California Court of
23 Appeal, petitioner filed what he called a "notice of appeal" concerning the California Supreme
24 Court's decision in this court. See 2:12-cv-2189 GEB EFB P. The "notice of appeal" was
25 dismissed for lack of jurisdiction on November 6, 2012. ECF Nos. 9 & 11. Petitioner then
26 appealed the dismissal to the Ninth Circuit and the appeal was dismissed on April 25, 2013. ECF
27 Nos. 13 & 17. Finally, petitioner filed a petition for writ of certiorari regarding the Ninth
28 Circuit's dismissal of his appeal. Resp't's Lodged Doc. No. 15. The petition, assigned docket
number 13-5893, was denied on October 21, 2013. While petitioner is entitled to tolling under
28 U.S.C. § 2244(d)(2) while petitions for state collateral relief are pending, petitioner is not
entitled to tolling for actions filed in federal court. See Duncan v. Walker, 533 U.S. 167, 181-82
(2001).

1 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
2 F.2d 1153 (9th Cir. 1991).

3 Dated: March 24, 2015



CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

4
5
6
7
8 1
9 corr2160.mtd

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