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

HARRISON L. BURTON,

No. 2:14-cv-2602-WBS-CMK-P

Petitioner,

vs.

FINDINGS AND RECOMMENDATION

DANIEL PARAMA,

Respondent.

_____ /

Petitioner, a state prisoner proceeding with counsel, 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. 10), petitioner’s opposition to the motion (Doc. 12), and respondent’s reply (Doc. 13).

I. BACKGROUND

Petitioner is challenging a 2012 prison disciplinary action. On June 26, 2012, petitioner was issued a rules violation report for assault on a peace officer. (Pet., Doc. 1 at 68). A hearing was held on July 26, 2012, petitioner was found guilty and was assessed 90 days loss of credit. (Pet., Doc. 1 at 90, 94). Petitioner filed an inmate grievance challenging the findings, and exhausted his administrative remedies on January 9, 2013. (Pet., Doc. 1 at 152-53).

1 Petitioner then filed a petition for writ of habeas corpus in the Lassen County Superior Court on
2 June 24, 2014. (Motion, Doc. 10, Ex. 1). The Lassen County Court denied the petition on July
3 15, 2014. Petitioner then filed a second petition with the Lassen County Court on July 2, 2014,
4 which was denied on July 24, 2014. Petitioner then filed a petition in the California Court of
5 Appeal, which was similarly denied, and then a petition for review with the California Supreme
6 Court, which was denied on October 15, 2014.

7 Prior to filing the petition for writ of habeas corpus in this court on November 6,
8 2014, petitioner had filed a civil rights action pursuant to 42 U.S.C. § 1983, in 2013. That action,
9 Burton v. Barnes, case no. 2:13-cv-0167 DAD, was filed on January 28, 2013 and dismissed
10 without prejudice on February 14, 2014, as barred by Heck v. Humphrey, 512 U.S. 477 (1994).¹

11 II. MOTION TO DISMISS

12 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to
13 dismiss a petition if it “plainly appears from the petition and any attached exhibits that the
14 petitioner is not entitled to relief in the district court” Rule 4 of the Rules Governing
15 Section 2254 Cases. The Ninth Circuit has allowed respondents to file a motion to dismiss in
16 lieu of an answer if the motion attacks the pleadings for failing to exhaust state remedies or being
17 in violation of the state's procedural rules. See, e.g., O'Bremski v. Maass, 915 F.2d 418, 420 (9th
18 Cir. 1990) (using Rule 4 to evaluate motion to dismiss petition for failure to exhaust state
19 remedies); White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (using Rule 4 as procedural
20 grounds to review motion to dismiss for state procedural default); Hillery v. Pulley, 533 F. Supp.
21 1189, 1194 & n. 12 (E.D. Cal. 1982) (same). Thus, a respondent can file a motion to dismiss
22 after the court orders a response, and the Court should use Rule 4 standards to review the motion.

23
24 ¹ The court may take judicial notice pursuant to Federal Rule of Evidence 201 of
25 matters of public record. See U.S. v. 14.02 Acres of Land, 530 F.3d 883, 894 (9th Cir. 2008).
26 Thus, this court may take judicial notice of state court records, see Kasey v. Molybdenum Corp.
of America, 336 F.2d 560, 563 (9th Cir. 1964), as well as its own records, see Chandler v. U.S.,
378 F.2d 906, 909 (9th Cir. 1967).

1 See Hillery, 533 F. Supp. at 1194 & n.12. The petitioner bears the burden of showing that he has
2 exhausted state remedies. See Cartwright v. Cupp, 650 F.2d 1103, 1104 (9th Cir. 1981).

3 Respondent brings this motion to dismiss Petitioner’s habeas corpus petition as
4 filed beyond the one-year statute of limitations, pursuant to 28 U.S.C. § 2244(d). Petitioner
5 asserts that he is entitled to statutory and equitable tolling.

6 Federal habeas corpus petitions must be filed within one year from the later of:
7 (1) the date the state court judgment became final; (2) the date on which an impediment to filing
8 created by state action is removed; (3) the date on which a constitutional right is newly-
9 recognized and made retroactive on collateral review; or (4) the date on which the factual
10 predicate of the claim could have been discovered through the exercise of due diligence. See 28
11 U.S.C. § 2244(d). Typically, the statute of limitations will begin to run when the state court
12 judgment becomes final by the conclusion of direct review or expiration of the time to seek direct
13 review. See 28 U.S.C. § 2244(d)(1). In cases challenging prison disciplinary proceedings, the
14 limitation period begins to run the day after the petitioner receives notice of the final denial of his
15 administrative appeals. See Shelby v. Bartlett, 391 F.3d 1061, 1066 (9th Cir. 2004). There is a
16 presumption, which the petitioner may rebut, that notice was received the day the denial was
17 issued. See Valdez v. Horel, 2007 WL 2344899 (E.D. Cal. 2007).

18 The limitations period is tolled, however, for the time a properly filed application
19 for post-conviction or other collateral relief is pending in the state court. See 28 U.S.C. §
20 2244(d)(2). To be “properly filed,” the application must be authorized by, and in compliance
21 with, state law. See Artuz v. Bennett, 531 U.S. 4 (2000); see also Allen v. Siebert, 552 U.S. 3
22 (2007); Pace v. DiGuglielmo, 544 U.S. 408 (2005) (holding that, regardless of whether there are
23 exceptions to a state’s timeliness bar, time limits for filing a state post-conviction petition are
24 filing conditions and the failure to comply with those time limits precludes a finding that the state
25 petition is properly filed). A state court application for post-conviction or other collateral relief
26 is “pending” during all the time the petitioner is attempting, through proper use of state court

1 procedures, to present his claims. See Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). It is
2 not, however, considered “pending” after the state post-conviction or other collateral process is
3 concluded. See Lawrence v. Florida, 549 U.S. 327 (2007) (holding that federal habeas petition
4 not tolled for time during which certiorari petition to the Supreme Court was pending). Where
5 the petitioner unreasonably delays between state court applications, however, there is no tolling
6 for that period of time. See Carey v. Saffold, 536 U.S. 214 (2002). If the state court does not
7 explicitly deny a post-conviction application as untimely, the federal court must independently
8 determine whether there was undue delay. See id. at 226-27.

9 There is no tolling for the interval of time between post-conviction or other
10 collateral applications where the petitioner is not moving to the next higher appellate level of
11 review. See Nino, 183 F.3d at 1006-07; see also Dils v. Small, 260 F.3d 984, 986 (9th Cir.
12 2001). There is also no tolling for the period between different sets of post-conviction or other
13 collateral applications. See Biggs v. Duncan, 339 F.3d 1045 (9th Cir. 2003). The period
14 between the conclusion of direct review and the filing of a state post-conviction application does
15 not toll the limitations period. See Nino, 183 F.3d at 1006-07. Similarly, a prior 42 U.S.C. §
16 1983 action does not toll the limitations period. See Quoc Xuong Luu v. Singh, 411 Fed. Appx.
17 963, 2011 WL 219686, at *1 (9th Cir. 2011).

18 Here, petitioner is challenging his 2012 disciplinary action. The disciplinary
19 adjudication became final, for purposes of the limitations period, on January 9, 2013, and his
20 limitations period commenced running the next day. Thus, absent any tolling, petitioner had
21 until January 11, 2014 to file his petition for collateral review. Petitioner filed his first² state
22 habeas petition on June 24, 2014, almost six months past the statute of limitations. The
23 California Supreme Court denied petitioner’s state habeas petition on October 15, 2014. He then

24 ² Petitioner filed a second state habeas petition on July 2, 2014, which was denied
25 as successive. Petitioner contends that determination was in error. However, regardless of
26 whether the state court properly found his second habeas petition was successive, the statute of
limitations had expired prior to the filing of either state petition.

1 filed his federal petition in this court on November 6, 2014. However, even if he was eligible for
2 tolling of the statute during the time the state petitions were pending, that statute of limitations
3 expired prior to the filing of his first state habeas petition.

4 Petitioner does include another administrative appeal as an exhibit to his petition.
5 In this second administrative appeal, petitioner challenges the staff conduct relating to the
6 incident for which he was found guilty of assault. In that appeal, which is not a direct challenge
7 to the disciplinary action, he also requested dismissal of the rules violation report. (Pet., Doc. 1
8 at 110-11). Even if the court were to construe this second administrative appeal as controlling
9 for the purposes of the statute of limitations, the appeal was denied on June 14, 2013. The
10 limitations period then commenced the following day, June 15, 2013, and expired on June 15,
11 2014. As discussed above, he filed his first state petition on June 24, 2014, which was still nine
12 days after the expiration of the statute of limitations.

13 Petitioner also contends that the time during which his 42 U.S.C. § 1983 action
14 was pending in this court tolls the statute of limitations. He filed his § 1983 action on January
15 28, 2013, and the case was dismissed on February 14, 2014. However, as stated above, a § 1983
16 action does not toll the statute of limitations under 28 U.S.C. § 2244(d)(1)(D).

17 Accordingly, absent any potential equitable tolling, petitioner's petition for writ of
18 habeas corpus is untimely and barred by the statute of limitations.

19 The Supreme Court has determined the statute of limitations under 28 U.S.C. §
20 2244(d) is subject to equitable tolling principles. See Holland v. Florida, 560 U.S. 631, 645
21 (2010). To be entitled to equitable tolling, the petitioner must demonstrate that: (1) he has been
22 diligent in pursuing his rights; and (2) extraordinary circumstances prevented him from filing on
23 time. See Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005). In a case where the petitioner is
24 alleging a mental impairment as the basis for his equitable tolling claim, "the petitioner must
25 meet a two-part test:

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1 (1) First, a petitioner must show his mental impairment was an
2 'extraordinary circumstance' beyond his control by demonstrating
3 the impairment was so severe that either
4 (a) petitioner was unable rationally or factually to
5 personally understand the need to timely file, or
6 (b) petitioner's mental state rendered him unable personally
7 to prepare a habeas petition and effectuate its filing.
8 (2) Second, the petitioner must show diligence in pursuing the
9 claims to the extent he could understand them, but that the mental
10 impairment made it impossible to meet the filing deadline under
11 the totality of the circumstances, including reasonably available
12 access to assistance."

13 Bills v. Clark, 628 F.3d 1092, 1099-1100 (9th Cir. 2010) (*quoting* Holland, 130 S.Ct. at 2562).

14 Here, petitioner states in his opposition that he is entitled to equitable tolling due
15 to a mental impairment. Specifically, he claims that since April 2014 he has been in the EOP
16 mental health program. He also documents mental incapacity in 2008, wherein a court found
17 him incapable of making health care decisions. However, the time frame at issue in this case is
18 January 2013 through June 2014. The court ruling in 2008 that he was incapable of making
19 health care decision was vacated in 2010. (See Opp., Doc. 12 at 180). In addition, the prison
20 evaluated petitioner in 2012, at the time of the administrative hearing on the rules violation
21 report, and determined that while petitioner's mental disorder may have contributed to his
22 behavior, he was found capable of understanding the disciplinary process and representing his
23 interest at the hearing. (See Opp., Doc. 12 at 135). Similarly, being referred to the EOP in April
24 2014, does not cover the relevant time period needed to justify a delay in filing his habeas
25 petition. As discussed above, the statute of limitations expired in January 2014. Petitioner has
26 not provided any support for his contention that he was incapable of understanding that he
needed to file his habeas petition, or that he was incapable of filing his habeas petition within the
one-year statute of limitations.

Further, petitioner provides no showing of due diligence in pursuing his claims. In
fact, petitioner fails to address his diligence at all in his assertion of equitable tolling. The only
potential diligence assertion he makes is his mistaken belief that filing a § 1983 action was the
proper method for challenging a prison disciplinary proceeding. However, that he was capable of

