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

EARL BRADLEY,

No. 2:16-cv-2702-KJM-CMK-P

Petitioner,

vs.

FINDINGS AND RECOMMENDATION

JOSIE GASTELO,

Respondent.

_____ /

Petitioner, a state prisoner proceeding pro se, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pending before the court is respondent’s unopposed motion to dismiss the petition as barred by the statute of limitations (Doc. 12).

I. BACKGROUND

Petitioner is challenging his 2014 conviction out of the Sacramento County Superior Court. Petitioner was sentenced on October 22, 2014, and an Abstract of Judgment was filed on November 6, 2014. Petitioner did not attempt to appeal his conviction until 2016. On June 13, 2016, petitioner filed a late notice of appeal in the California Court of Appeal, which was denied on June 16, 2016. Petitioner then filed a petition for writ of habeas corpus in the California Supreme Court on August 11, 2016, which was denied on October 12, 2016.

1 Petitioner filed his federal habeas petition in this court on November 6, 2016.¹

2 **II. MOTION TO DISMISS**

3 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to
4 dismiss a petition if it “plainly appears from the petition and any attached exhibits that the
5 petitioner is not entitled to relief in the district court” Rule 4 of the Rules Governing
6 Section 2254 Cases. The Ninth Circuit has allowed respondents to file a motion to dismiss in
7 lieu of an answer if the motion attacks the pleadings for failing to exhaust state remedies or being
8 in violation of the state's procedural rules. See, e.g., O'Bremski v. Maass, 915 F.2d 418, 420 (9th
9 Cir. 1990) (using Rule 4 to evaluate motion to dismiss petition for failure to exhaust state
10 remedies); White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (using Rule 4 as procedural
11 grounds to review motion to dismiss for state procedural default); Hillery v. Pulley, 533 F. Supp.
12 1189, 1194 & n. 12 (E.D. Cal. 1982) (same). Thus, a respondent can file a motion to dismiss
13 after the court orders a response, and the Court should use Rule 4 standards to review the motion.
14 See Hillery, 533 F. Supp. at 1194 & n.12. The petitioner bears the burden of showing that he has
15 exhausted state remedies. See Cartwright v. Cupp, 650 F.2d 1103, 1104 (9th Cir. 1981).

16 Respondent brings this motion to dismiss Petitioner’s habeas corpus petition as
17 filed beyond the one-year statute of limitations, pursuant to 28 U.S.C. § 2244(d).

18 The Antiterrorism and Effective Death Penalty Act (AEDPA) requires federal
19 habeas corpus petitions to be filed within one year from the later of: (1) the date the state court
20 judgment became final; (2) the date on which an impediment to filing created by state action is
21 removed; (3) the date on which a constitutional right is newly-recognized and made retroactive
22 on collateral review; or (4) the date on which the factual predicate of the claim could have been
23 discovered through the exercise of due diligence. See 28 U.S.C. § 2244(d). Typically, the statute
24 of limitations will begin to run when the state court judgment becomes final by the conclusion of

25 ¹ The dates noted provide plaintiff with the benefits of the prison mailbox rule. See
26 Houston v. Lack, 487 U.S. 266 (1988); Lott v. Mueller, 304 F.3d 918, 921 (9th Cir. 2002)

1 direct review or expiration of the time to seek direct review. See 28 U.S.C. § 2244(d)(1).

2 Where a petition for review by the California Supreme Court is filed and no
3 petition for certiorari is filed in the United States Supreme Court, the one-year limitations period
4 begins running the day after expiration of the 90-day time within which to seek review by the
5 United States Supreme Court. See Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001).

6 Where a petition for writ of certiorari is filed in the United States Supreme Court, the one-year
7 limitations period begins to run the day after certiorari is denied or the Court issued a merits
8 decision. See Wixom v. Washington, 264 F.3d 894, 897 (9th Cir. 2001). Where no petition for
9 review by the California Supreme Court is filed, the conviction becomes final 40 days following
10 the Court of Appeal’s decision, and the limitations period begins running the following day. See
11 Smith v. Duncan, 297 F.3d 809 (9th Cir. 2002). If no appeal is filed in the Court of Appeal, the
12 conviction becomes final 60 days after conclusion of proceedings in the state trial court, and the
13 limitations period begins running the following day.

14 The limitations period is tolled, however, for the time a properly filed application
15 for post-conviction relief is pending in the state court. See 28 U.S.C. § 2244(d)(2). To be
16 “properly filed,” the application must be authorized by, and in compliance with, state law. See
17 Artuz v. Bennett, 531 U.S. 4 (2000); see also Allen v. Siebert, 552 U.S. 3 (2007); Pace v.
18 DiGuglielmo, 544 U.S. 408 (2005) (holding that, regardless of whether there are exceptions to a
19 state’s timeliness bar, time limits for filing a state post-conviction petition are filing conditions
20 and the failure to comply with those time limits precludes a finding that the state petition is
21 properly filed). A state court application for post-conviction relief is “pending” during all the
22 time the petitioner is attempting, through proper use of state court procedures, to present his
23 claims. See Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). It is not, however, considered
24 “pending” after the state post-conviction process is concluded. See Lawrence v. Florida, 549
25 U.S. 327 (2007) (holding that federal habeas petition not tolled for time during which certiorari
26 petition to the Supreme Court was pending). Where the petitioner unreasonably delays between

1 state court applications, however, there is no tolling for that period of time. See Carey v. Saffold,
2 536 U.S. 214 (2002). If the state court does not explicitly deny a post-conviction application as
3 untimely, the federal court must independently determine whether there was undue delay. See id.
4 at 226-27. Because “California courts had not provided authoritative guidance on this issue,”
5 the Supreme Court in Chavis “made its own conjecture... ‘that California’s “reasonable time”
6 standard would not lead to filing delays substantially longer than’ between 30 and 60 days.”
7 Robinson v. Lewis, 795 F.3d 926, 929 (9th Cir. 2015) (quoting Evans v. Chavis, 546 U.S. 189,
8 199 (2006)).

9 There is no tolling for the interval of time between post-conviction applications
10 where the petitioner is not moving to the next higher appellate level of review. See Nino, 183
11 F.3d at 1006-07; see also Dils v. Small, 260 F.3d 984, 986 (9th Cir. 2001). There is also no
12 tolling for the period between different sets of post-conviction applications. See Biggs v.
13 Duncan, 339 F.3d 1045 (9th Cir. 2003). Finally, the period between the conclusion of direct
14 review and the filing of a state post-conviction application does not toll the limitations period.
15 See Nino, 1983 F.3d at 1006-07.

16 Here, petitioner is challenging his 2014 conviction. Petitioner had sixty days after
17 sentencing to seek direct review. Petitioner did not file a notice of appeal with the California
18 Court of Appeal until June 16, 2016, two years after sentencing. His request to file a late notice
19 was denied. Late filings do not toll the statute of limitations. See e.g., DiGuglielmo, 544 U.S. at
20 413. Thus, the Court of Appeal’s denial of petitioner’s late notice of appeal had no effect on the
21 statute of limitation. See v. Crawford, 604 F.3d 1047, 1054-55 (9th Cir. 2010). The statute of
22 limitations therefore commenced sixty days after his time for seeking direct review of his
23 conviction. See § 2244(d)(1). Petitioner was convicted on September 8, 2014, was sentenced on
24 October 22, 2014, and the abstract of judgment was filed on November 5, 2014. As petitioner
25 was sentenced on October 22, 2014, petitioner had until December 22, 2014 to file his direct
26 appeal. Since no timely appeal was filed in the Court of Appeal, the statute of limitations

1 commenced the following day, or December 23, 2014. Petitioner then had one year to file his
2 federal habeas petition, or until December 23, 2015. Petitioner did not file his federal habeas
3 petition until November 6, 2016, almost a year after the statute of limitations expired.

4 As stated above, petitioner's request to file a late notice of appeal was denied by
5 the California Court of Appeal. It therefore had no effect on the running of the statute of
6 limitations. See Randle, 604 F.3d at 1054-55 . Similarly, petitioner's state habeas petition, filed
7 in the California Supreme Court on August 11, 2016, does not toll the statute of limitations as it
8 had expired prior to the filing of the state habeas petition. See Nino, 1983 F.3d at 1006-07.

9 **III. CONCLUSION**

10 The undersigned finds the petitioner's federal habeas petition was filed beyond the
11 statute of limitations, and there is no available statutory tolling for his federal habeas petition.

12 Based on the foregoing, the undersigned recommends respondent's motion to
13 dismiss (Doc. 12) be granted and petitioner's untimely petition be dismissed.

14 These findings and recommendations are submitted to the United States District
15 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days
16 after being served with these findings and recommendations, any party may file written
17 objections with the court. Responses to objections shall be filed within 14 days after service of
18 objections. Failure to file objections within the specified time may waive the right to appeal.

19 See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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21 DATED: July 11, 2018

22 
23 **CRAIG M. KELLISON**
24 UNITED STATES MAGISTRATE JUDGE
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