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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LEWIS DALE BANKSTON,

No. C 07-01819 CRB

Petitioner,

ORDER

v.

BEN CURRY, Warden,

Respondent.

In 1986 petitioner was convicted by a jury of second-degree murder and was sentenced to 15 years to life with a two-year consecutive enhancement for use of a firearm. He filed this petition for habeas corpus after the California Board of Parole Hearings denied him parole in March 2005. Now pending is Respondent's second motion to dismiss. The Court previously granted Respondent's motion to dismiss for failure to exhaust administrative remedies. Petitioner then filed a first amended petition which the Court ordered Respondent to answer. Respondent has now moved to dismiss the amended petition on the ground that it is barred by the one-year statute of limitations.

PROCEDURAL HISTORY

On February 24, 2005, the Superior Court of the State of California in and for the County of Madera granted a petition for habeas corpus of petitioner Lewis Dale Bankston ("Bankston"). The court ordered the California Board of Parole Hearings ("the Board") to

1 conduct a new parole suitability hearing for Bankston and to render a decision that conforms
2 with certain requirements.

3 The Board conducted a subsequent parole consideration hearing on March 23, 2005.
4 The Board again found Bankston not suitable for parole and issued a three-year denial.
5 Bankston then filed an Application for an Order to Show Cause Re Contempt in the Madera
6 Superior Court. Bankston argued that the Board had violated the Superior Court’s February
7 24, 2005 Order granting Bankston’s habeas petition.

8 The Superior Court ruled that to establish contempt Bankston must show the
9 following: (1) a valid order, (2) knowledge of the order, (3) ability to comply with the order,
10 and (4) willful failure to comply with the order. The court reviewed the Board’s decision and
11 found that Bankston had not established that the Board had willfully violated the habeas
12 order and therefore denied Bankston’s Application for an Order to Show Cause Re
13 Contempt.

14 Bankston subsequently filed a petition for writ of habeas corpus in the California
15 Court of Appeal. The Court of Appeal denied the petition “without prejudice to file a habeas
16 petition in the superior court.” The California Supreme Court summarily denied Bankston’s
17 petition for review.

18 On December 13, 2006, Bankston filed a petition for habeas corpus in Madera County
19 Superior Court alleging that the Board violated his due process rights in denying him parole
20 at the March 2005 parole hearing. While that petition was still pending, Bankston filed the
21 petition currently pending before this Court. After he filed this petition, the Superior Court
22 denied the Madera County Superior Court petition and Bankston filed a petition in the Court
23 of Appeals. After asking for supplementation of the record, the Court of Appeals, 5th
24 District, denied the petition and the California Supreme Court denied review on May 28,
25 2008.

26 Respondent moved to dismiss the petition on the grounds that (1) Bankston’s petition
27 challenges the Superior Court’s denial of his Application for an Order to Show Cause Re
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1 In light of this conclusion, the amended petition is timely. The Court will assume that
2 the statute ran from July 21, 2005 (the date Respondent contends the Board's parole denial
3 became final) until May 19, 2006 (the date of filing the first petition in the Court of Appeals),
4 for a total of 302 days. Respondent contends that the 86 days between the superior court's
5 denial of the petition for habeas corpus on April 17, 2007 and the appellate court filing on
6 July 12, 2007 is unreasonable "because it exceeded the time normally provided by state
7 courts to file an appeal and far exceeded the time allowed by California to file a petition for
8 review." Even if the Court assumes that 86 days is unreasonable, however, it does not follow
9 that the entire period should be excluded; rather, the statute should be tolled for at least 30
10 days. See Evans v. Chavis, 546 U.S. 189, 201 (2006) (noting that most states provide
11 defendants 30 to 60 days to file an appeal to the state supreme court). Accordingly, the
12 statute ran for an additional 56 days. The 302 days plus the 56 untolled days is less than a
13 year and the First Amended Petition is therefore timely.

14 **CONCLUSION**

15 Respondent's motion to dismiss is DENIED. Respondent shall file an answer to the
16 First Amended Petition within 30 days of the filing of this Order. Bankston's traverse, if
17 any, shall be filed within 30 days of the filing of the answer.

18 **IT IS SO ORDERED.**

19 Dated: March 30, 2009



20 CHARLES R. BREYER
21 UNITED STATES DISTRICT JUDGE