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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

YEWHALA ESHET ABEBE,
Petitioner,

No. C 09-3644 MHP (pr)

ORDER OF DISMISSAL

v.

JERRY BROWN, Attorney General
Of The State Of California,
Respondent.

_____ /

INTRODUCTION

Yewhala Eshet Abebe, an inmate at the Florence Detention Center in Florence, Arizona, filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Now before the court for consideration is respondent’s motion to dismiss the petition as untimely or for lack of jurisdiction. Abebe has opposed the motion. The court finds that the petition was not timely filed and dismisses it.

BACKGROUND

In 1992, Abebe pled guilty in Santa Clara County Superior Court to two counts of lewd and lascivious conduct upon a child, and was placed on probation that included one year in county jail and a requirement that Abebe register as a sex offender. Abebe did not appeal his conviction. On February 9, 1993, Abebe filed a motion with the Santa Clara County Superior Court to withdraw his guilty pleas. On May 7, 1993, the court heard and denied his motion. The California Court of Appeal affirmed the trial court’s denial of his motion on June 15, 1994.

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1 Abebe filed numerous unsuccessful state habeas petitions in 2009 with the Santa Clara
2 County Superior Court, California Court of Appeal, and California Supreme Court. His first
3 petition was filed on June 24, 2009 in the California Court of Appeal. The California Court
4 of Appeal issued the most recent denial of his habeas petition on April 6, 2010.

5 Abebe's federal petition originally was filed in the U.S. District Court for the Central
6 District of California, and later was transferred to this court. His federal petition was signed
7 on July 11, 2009, and was stamped "filed" in the Central District on July 16, 2009. For
8 purposes of the present motion, the court assumes that Abebe put the petition in the prison
9 mail the day he signed it and uses that as the filing date under the prisoner mailbox rule. See
10 generally Houston v. Lack, 487 U.S. 266, 276 (1988).

11 **DISCUSSION**

12 Petitions filed by prisoners challenging non-capital state convictions or sentences
13 must be filed within one year of the latest of the date on which: (1) the judgment became
14 final after the conclusion of direct review or the time passed for seeking direct review; (2) an
15 impediment to filing an application created by unconstitutional state action was removed, if
16 such action prevented petitioner from filing; (3) the constitutional right asserted was
17 recognized by the Supreme Court, if the right was newly recognized by the Supreme Court
18 and made retroactive to cases on collateral review; or (4) the factual predicate of the claim
19 could have been discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1).
20 For cases in which the convictions became final before the April 24, 1996 enactment of the
21 Antiterrorism and Effective Death Penalty Act ("AEDPA"), the petitioners had a one-year
22 grace period so that their petitions were due by April 24, 1997. See Patterson v. Stewart, 251
23 F.3d 1243, 1245-46 (9th Cir. 2001).

24 Abebe receives the benefit of the one-year grace period because his conviction
25 became final in 1992, before the AEDPA was enacted. The presumptive deadline for Abebe
26 to file his federal petition therefore was April 24, 1997. He missed that deadline by over
27 twelve years, so unless he is entitled to significant tolling, his petition was very untimely.
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1 The one-year limitations period will be tolled for the “time during which a properly
2 filed application for State post-conviction or other collateral review with respect to the
3 pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2). By the time Abebe’s first
4 state petition was filed in 2009, the limitations period had already ended so he receives no
5 statutory tolling for the state habeas petitions. See Ferguson v. Palmateer, 321 F.3d 820, 823
6 (9th Cir. 2003) (“[S]ection 2244(d) does not permit the reinitiation of the limitations period
7 that has ended before the state petition was filed”).

8 The one-year limitations period can be equitably tolled because § 2244(d) is not
9 jurisdictional. Holland v. Florida, 130 S. Ct. 2549, 2560 (2010). ““A litigant seeking
10 equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing
11 his rights diligently, and (2) that some extraordinary circumstance stood in his way.” Id. at
12 2562 (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)); see also Rasberry v. Garcia,
13 448 F.3d 1150, 1153 (9th Cir. 2006) (quoting Pace).

14 Abebe seems to argue that the limitations period should be equitably tolled because he
15 is actually innocent. See Opposition Brief (Docket # 12), pp. 2, 5-7. This reason does not
16 warrant equitable tolling to make his petition filed over twelve years after the presumptive
17 deadline timely. The actual innocence gateway through limitations on second habeas
18 petitions and procedurally defaulted petitions established in Schlup v. Delo, 513 U.S. 298
19 (1995), is not available to a petitioner whose original petition is otherwise barred by
20 AEDPA’s limitations period. See Lee v. Lampert, 610 F.3d 1125, 1136 (9th Cir. 2010)
21 (reversing and remanding to dismiss habeas petition as untimely upon concluding “there is
22 no ‘actual innocence’ exception to the one-year statute of limitations for filing an original
23 petition for habeas corpus relief”). Abebe also argues in his opposition that he received
24 ineffective assistance of counsel in the trial court and felt pressured to plead guilty. These
25 arguments concern the merits of his claims and do not show a reason to equitably toll the
26 limitations period. Abebe has not shown that it was impossible for him to file his federal
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1 petition on time. Abebe's federal petition was filed over twelve years after the deadline for
2 filing a federal habeas petition to challenge the conviction. The petition is time-barred.

3 The court has not been provided with enough information to decide whether Abebe
4 satisfies the custody requirement. A habeas petitioner must be in custody under the
5 conviction or sentence under attack at the time the petition is filed. See 28 U.S.C. § 2254(a);
6 Maleng v. Cook, 490 U.S. 488, 490-91 (1989). A person who has fully served his sentence
7 and who is not subject to court supervision is not "in custody." See DeLong v. Hennessey,
8 912 F.2d 1144, 1146 (9th Cir. 1990). And a person who currently is detained by the federal
9 immigration authority and facing removal on the basis of an expired state-court conviction is
10 not in custody pursuant to the judgment of a state court and therefore may not file a habeas
11 petition under 28 U.S.C. § 2254. See Resendiz v. Kovensky, 416 F.3d 952, 958 (9th Cir.
12 2005). On the other hand, a person who currently is incarcerated for failing to comply with a
13 sex offender registration requirement may satisfy the custody requirement. See Zichko v.
14 Idaho, 247 F.3d 1015, 1019-20 (9th Cir. 2001) (holding that "a habeas petitioner is in
15 custody for the purposes of challenging an earlier, expired rape conviction, when he is
16 incarcerated for failing to comply with a state sex offender registration law[,] because the
17 earlier rape conviction is a necessary predicate to the failure to register charge"). Neither
18 party has explained why Abebe currently is housed in the Florence Detention Center, e.g.,
19 due to new criminal charges or awaiting removal. Thus, the court cannot determine whether
20 Abebe satisfies the custody requirement to challenge his California conviction.

21 CONCLUSION

22 Respondent's motion to dismiss is GRANTED. (Docket # 11.) The petition is
23 dismissed because it was not filed before the expiration of the statute of limitations period.
24 The clerk shall close the file.

25 IT IS SO ORDERED.

26 DATED: November 4, 2010

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Marilyn Hall Patel
United States District Judge