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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

STEVEN BLAKE HARRIS,
Petitioner,

No. C 11-1557 SI (pr)

ORDER OF DISMISSAL

v.

RANDY GROUNDS, warden,
Respondent.

INTRODUCTION

Steven Blake Harris, a *pro se* prisoner, filed this action for a writ of habeas corpus to challenge his 2008 conviction in Santa Clara County Superior Court. Respondent has moved to dismiss the petition as untimely, and Harris has opposed the motion. For the reasons discussed below, the court finds the petition to be barred by the statute of limitations and dismisses it.

BACKGROUND

Harris pled no contest in Santa Clara County Superior Court to charges of rape, digital penetration and robbery. On September 19, 2008, he was sentenced to eight years in state prison. Harris did not appeal his conviction.

He did, however, seek collateral relief in state courts. First, he filed a declaration on April 27, 2009 in the Santa Clara County Superior Court, which the court construed to be a habeas petition and denied it on June 11, 2009. Second, he filed a habeas petition in the Santa Clara County Superior Court on July 12, 2009; that petition was denied on September 8, 2009.

1 Third, he filed a habeas petition in the California Court of Appeal on December 6, 2009; that
2 petition was denied on January 5, 2010. Fourth, he filed a habeas petition in the California
3 Supreme Court on January 18, 2010; that petition was denied on July 14, 2010.

4 Harris then filed his federal petition in which he asserted a single claim for relief, i.e., that
5 his attorney provided ineffective assistance in that he assured Harris that he would receive a
6 sentence of 3-6 years if he entered a plea of guilty or no contest. His federal petition was signed
7 on March 20, 2011, and stamped "filed" on March 30, 2011. The postmark on the envelope
8 containing the petition is not legible. For present purposes, the court assumes the federal petition
9 was given to prison officials on the date it was signed.

10 As a prisoner proceeding *pro se*, Harris receives the benefit of the prisoner mailbox rule,
11 which deems most documents filed when the prisoner gives them to prison officials to mail to
12 the court. *See Stillman v. Lamarque*, 319 F.3d 1199, 1201 (9th Cir. 2003). The mailbox rule
13 applies to the filing of the federal petition as well as the state petitions for purposes of
14 calculating compliance with the AEDPA. *See id.*; *Saffold v. Newland*, 250 F.3d 1262, 1268
15 (9th Cir. 2001), *vacated and remanded on other grounds*, *Carey v. Saffold*, 536 U.S. 214 (2002).
16 Where the mailing date is in the record, that is used as the filing date.

17 18 **DISCUSSION**

19 Before turning to the merits of respondent's motion, it is necessary to address Harris'
20 argument that the motion was improper because the order to show cause directed respondent to
21 answer the petition. Respondent's motion to dismiss was permissible. *See White v. Lewis*, 874
22 F.2d 599, 600, 602-03 (9th Cir. 1989). The court is receptive to a respondent raising threshold
23 problems (such as lack of jurisdiction, failure to exhaust, improper venue, lack of custody,
24 mootness, and untimeliness) by motion rather than in the answer because it often is a more
25 efficient process for the litigants and the court. When the court sees a procedural problem in its
26 initial review of a habeas petition, it often invites a motion to dismiss rather than an answer.
27 However, as here, there often is not enough information in the petition to alert the court to the
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1 existence of a potential procedural problem and the court issues an order to show cause why the
2 writ should not be granted. By doing so, the court does not intend to preclude respondent from
3 moving to dismiss the petition for a threshold procedural problem.

4 Petitions filed by prisoners challenging non-capital state convictions or sentences must
5 be filed within one year of the latest of the date on which: (1) the judgment became final after
6 the conclusion of direct review or the time has passed for seeking direct review; (2) an
7 impediment to filing an application created by unconstitutional state action was removed, if such
8 action prevented petitioner from filing; (3) the constitutional right asserted was recognized by
9 the Supreme Court, if the right was newly recognized by the Supreme Court and made
10 retroactive to cases on collateral review; or (4) the factual predicate of the claim could have been
11 discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1).

12 Here, the judgment became final and the limitations period began on November 18, 2008,
13 sixty days after Harris was sentenced because he did not appeal his conviction. The one-year
14 period may start running from "the expiration of the time for seeking [direct] review." 28 U.S.C.
15 § 2244(d)(1)(A). If a petitioner could have sought review by the state court of appeals or the
16 state supreme court, but did not, the limitations period begins the day after the date on which the
17 time to seek such review expired. *See* Cal. Rule of Court 8.308(a) (appeal from criminal
18 judgment must be filed within sixty days after rendition of judgment or making of order being
19 appealed); *see generally Smith v. Duncan*, 297 F.3d 809, 812-13 (9th Cir. 2002) (limitations
20 period began running day after time to seek discretionary review of California Court of Appeal's
21 decision in the Supreme Court of California expired, which was forty days after the Court of
22 Appeal filed its opinion). The presumptive deadline for Harris to file his federal petition was
23 November 18, 2009. He missed that deadline by more than sixteen months, so unless he
24 qualifies for substantial tolling, the petition is untimely.

25 The one-year limitations period is tolled for the "time during which a properly filed
26 application for State post-conviction or other collateral review with respect to the pertinent
27 judgment or claim is pending." 28 U.S.C. § 2244(d)(2). A state habeas petition is considered
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1 pending not only for the time the case is open on the docket in a court, but also for the time
2 period between state habeas petitions provided that the petitioner files the later state habeas
3 petition at a higher level court and does so “within what California would consider a ‘reasonable
4 time.’” *Evans v. Chavis*, 546 U.S. 189, 197-98 (2006); *Carey v. Saffold*, 536 U.S. at 219-20.

5 By the time Harris filed his first state habeas petition on April 27, 2009, 160 days of the
6 one-year limitations period had passed. Harris receives tolling for the period during which the
7 first and second state habeas petitions actually were pending in the Santa Clara County Superior
8 Court, but not for the 31 days between them because they were filed in the same level court.
9 Harris receives no *statutory* tolling for the 89-day gap between the denial of his second habeas
10 petition by the superior court and the filing of his third habeas petition in the California Court
11 of Appeal because the latter was not filed within what California would consider a reasonable
12 time. *See, e.g., Evans*, 546 U.S. at 197 (noting that six months is far longer than the 30 to 60
13 days that most states provide for filing an appeal, the Court held that an unjustified or
14 unexplained 6-month delay between post-conviction applications in California is not
15 “reasonable” and does not fall within *Carey*’s definition of the term “pending”); *Velasquez v.*
16 *Kirkland*, 639 F.3d 964, 968 (9th Cir. 2011) (finding 91-day and 81-day delays between state
17 habeas petitions were “unreasonable” with no indications from the California courts to the
18 contrary); *Banjo v. Ayers*, 614 F.3d 964, 970 (9th Cir. 2010) (delay of 146 days between
19 successive petitions not reasonable, so later petition not “timely filed”); *Chaffer v. Prosper*, 592
20 F.3d 1046, 1048 (9th Cir. 2010) (no tolling for 101-day and 115-day gaps between state habeas
21 petitions where those petitions offered no justification for the delays as required under California
22 law).

23 By the time Harris had finished with his state court habeas petitions, 280 days (160 + 31
24 + 89 = 280) of the 365-day limitations period had passed. Harris did not file his federal habeas
25 petition for another 249 days, by which time 529 days had passed. Unless he is entitled to
26 equitable tolling, the federal petition is untimely.

27 The § 2244(d) limitations period can be equitably tolled for a petitioner who shows (1)
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1 that he pursued his rights with reasonable diligence and (2) that some extraordinary circumstance
2 stood in his way and prevented timely filing. *See Holland v. Florida*, 130 S. Ct. 2549, 2562
3 (2010). Harris asserts three reasons for equitable tolling.

4 First, Harris argues that equitable tolling is warranted because counsel failed to appeal
5 the conviction and sentence. The court disagrees. Harris knew the factual basis of his claim at
6 the time he entered his plea or, at the latest, when he was sentenced, as he knew then that he did
7 not receive the term he allegedly had been promised.¹ Harris stated under penalty of perjury in
8 his petition to the California Supreme Court that, "once he was sentenced, he notified his
9 attorney his desire to appeal the sentence. Counsel ignored petitioner's desire to appeal wholly."
10 Petition (docket # 1), Ex. 2, p. 3.² Assuming for purposes of argument that Harris *did* tell
11 counsel he wanted to appeal, Harris provides no evidence as to when he learned that counsel had
12 not taken steps to appeal and provides no evidence that he made inquiries to find out the status
13 of the appeal he requested. He makes no showing of diligence to protect his rights. *Cf. Holland*,
14 130 S. Ct. at 2565. "Counsel's failure to perfect an appeal simply meant that [the petitioner] had
15 one year from the expiration of his time to file a notice of appeal in which to initiate a federal
16 habeas action—it did not prevent him from filing the petition." *See Randle v. Crawford*, 604 F.3d
17 1047, 1058 (9th Cir. 2010). The alleged negligence of counsel in not filing an appeal has "little
18 to no bearing" on Harris' ability to timely file his federal petition. *See id.*; *cf. Doe v. Busby*, No.
19 08-55165, slip op. 19213, 19227-34 (9th Cir. Oct. 24, 2011) (finding extraordinary
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21 ¹In his declaration filed in Santa Clara County Superior Court, Harris stated that, having
22 been assured he would not receive more than 3-6 years, "I 'plead out' to a seventeen year max.
23 To my surprise, I was sentenced to eight (8) years in prison." Docket # 1-2, p. 4 (Petition, Exs.
at Decl. 1) (error in source).

24 ²The truthfulness of Harris' assertion is at the very least doubtful. In his second state
25 habeas petition (i.e., in Case No. CC762263 in Santa Clara County Superior Court) Harris stated
26 under oath that he "was not advised of his const. right to appeal." Docket # 12-1, p. 35 (Resp.
27 Ex. 1); *see also id.* at 36 ("Petitioner's attorney failed to advise him of his right to appeal the
28 sentence.") The Santa Clara County Superior Court denied that petition, explaining that there
was no absolute right to appeal following a guilty plea, and finding that "Petitioner has not
demonstrated that he had any desire to appeal or that he conveyed any such desire to his attorney
after his guilty plea." *Id.* at 41. Only then did Harris begin stating that he told counsel he
wanted to appeal.

1 circumstances where attorney failed to file a timely petition despite numerous promises to the
2 contrary; petitioner's three-and-a-half year delay in eventually filing a pro se petition attributable
3 to having been deceived, bullied and lulled by apparently inept and unethical lawyer); *Porter v.*
4 *Ollison*, 620 F.3d 952, 959-61 (9th Cir. 2010) (attorney's misconduct and eventual resignation
5 after facing disciplinary proceedings for running habeas corpus "writ mill" constitutes
6 extraordinary circumstances; remanding on issue of whether petitioner is or is not entitled to
7 equitable tolling because of lack of diligence or because attorney's egregious conduct did not
8 prevent petitioner from filing timely petition). Harris does not show the sort of egregious
9 misconduct by counsel that warrants equitable tolling. The failure to file the requested appeal
10 does not warrant equitable tolling.

11 Second, Harris argues that there is a "newly discovered IAC-weighted fact" that came to
12 his attention on March 27, 2010. Opposition, p. 9; Response To Reply, Ex.2. Specifically, he
13 contends that he was visited in prison by Grant and Donna Garber on March 27, 2010, and
14 during that visit he learned that defense counsel told defense witnesses at the sentencing hearing
15 that Harris was guilty of the charged offense. Opposition, p. 9. This event was irrelevant to
16 Harris' habeas petition, even assuming as true that the attorney did express to witnesses his belief
17 in his client's guilt and that Harris did not learn of that until March 27, 2010. The evidence does
18 not support a new claim for habeas relief. Because Harris' conviction rests on his plea of no
19 contest to the criminal charges, the only challenges left open to him are about the voluntary and
20 intelligent character of the plea and the nature of the advice of counsel to plead. *See Hill v.*
21 *Lockhart*, 474 U.S. 52, 56-57 (1985); *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). Also, the
22 statement just is not as shocking as Harris suggests: the attorney allegedly made the statement
23 at the sentencing hearing, which meant that it would have followed the client's entry of a no
24 contest plea.³ Further, this evidence was not obtained until well after Harris filed his fourth and
25 final state habeas petition, which shows that the evidence did not preclude him from filing his

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27 ³ Under California law, a "plea of nolo contendere 'is the functional equivalent of a guilty
28 plea.'" *United States v. Anderson*, 625 F.3d 1219, 1220 (9th Cir. 2010) (per curiam) (quoting
People v. Whitfield, 54 Cal. Rptr. 2d 370, 377 (Cal. Ct. App. 1996)); Cal. Penal Code §1016.

1 state habeas petitions nor did it prompt him to file another state habeas petition raising the claim.
2 The "newly discovered IAC weighted fact" does not warrant equitable tolling.

3 Third, Harris argues that he should receive equitable tolling for the 89-day gap between
4 the denial of the second state habeas petition and the filing of the third state habeas petition
5 because he had no law library access during that time due to the closure and relocation of the law
6 library facilities and escort factors related to his protective custody status. No evidence was
7 offered on this point. The court will not require development of the evidence because, even if
8 tolling was allowed for these 89 days, it would not be enough to make the federal petition timely.

9 Harris has not shown that he pursued his rights with reasonable diligence and that some
10 extraordinary circumstance stood in his way and prevented timely filing. The limitations period
11 will not be equitably tolled. Harris' federal petition was deemed filed on March 20, 2011, more
12 than five months after the limitations period had expired. The petition must be dismissed
13 because it was not filed before the expiration of the habeas statute of limitations period.

14 A certificate of appealability will not issue because this is not a case in which "jurists of
15 reason would find it debatable whether the petition states a valid claim of the denial of a
16 constitutional right and that jurists of reason would find it debatable whether the district court
17 was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).


18
19 **CONCLUSION**

20 Respondent's motion to dismiss is GRANTED. (Docket # 12.) The petition for writ
21 of habeas corpus is dismissed because it was not filed before the expiration of the limitations
22 period in 28 U.S.C. § 2244(d)(1).

23 The clerk will close the file.

24 IT IS SO ORDERED.

25 DATED: November 16, 2011

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27 _____
28 SUSAN ILLSTON
United States District Judge