

United States District Court
For the Northern District of California

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E-Filed 11/23/11

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

D. OTTINGER,

Petitioner,

v.
JAMES D. HARTLEY, Warden,

Respondent.

No. C 11-1813 RS (PR)
ORDER OF DISMISSAL

INTRODUCTION

This is a federal habeas petition filed pursuant to 28 U.S.C. § 2254 by a *pro se* state prisoner. For the reasons discussed herein, respondent’s unopposed motion to dismiss the petition as untimely (Docket No. 17) is GRANTED. The petition is DISMISSED.

DISCUSSION

A. Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which applies to every federal habeas petition filed on or after April 24, 1996, contains a statute of limitations codified at 28 U.S.C. § 2244(d). Federal habeas petitions must be filed within

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1 one year of the latest of the date on which: (1) the judgment became final after the
2 conclusion of direct review or the time passed for seeking direct review; (2) an impediment
3 to filing an application created by unconstitutional state action was removed, if such action
4 prevented petitioner from filing; (3) the constitutional right asserted was recognized by the
5 Supreme Court, if the right was newly recognized by the Supreme Court and made
6 retroactive to cases on collateral review; or (4) the factual predicate of the claim could have
7 been discovered through the exercise of due diligence. *See* 28 U.S.C. § 2244(d)(1). “[W]hen
8 a petitioner fails to seek a writ of certiorari from the United States Supreme Court, the
9 AEDPA’s one-year limitations period begins to run on the date the ninety-day period defined
10 by Supreme Court Rule 13 expires.” *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999).

11 **B. Timeliness of the Petition**

12 The following facts are undisputed. Petitioner was sentenced on December 5, 2003 in
13 the Santa Clara Superior Court. The state appellate court affirmed his conviction on January
14 21, 2005. Petitioner did not appeal his conviction to the state supreme court. Therefore, his
15 conviction became final on March 22, 2005, that is, 60 days after his sentence was affirmed.
16 *See* Cal. Rule of Court 8.308(a). Petitioner, then, had until March 23, 2006 to file a timely
17 federal habeas petition. The instant petition was filed on March 7, 2011, well after the March
18 2006 deadline. On this record, absent tolling, the petition is barred by AEDPA’s statute of
19 limitations.

20 **1. Statutory Tolling**

21 Petitioner filed his first post-appellate decision document on November 7, 2008,
22 which was a motion for a modification of his sentence. This motion was denied by the
23 superior and appellate courts, whose decisions were not appealed to the state supreme court.
24 Petitioner filed a habeas petition with the state supreme court on November 4, 2010, which
25 that court denied as untimely in December 2010.

26 For purposes of statutory tolling, the time during which a properly filed application for
27 state post-conviction or other collateral review is pending is excluded from the one-year
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1 limitations period. *See* § 2244(d)(2). Petitioner is not entitled to statutory tolling. A state
2 habeas petition filed after AEDPA’s statute of limitations ended, such as the May 1, 2009
3 state habeas petition, cannot toll the limitation period. *See Ferguson v. Palmateer*, 321 F.3d
4 820, 823 (9th Cir. 2003). Section 2244(d)(2) cannot “revive” the limitation period once it
5 has run (i.e., restart the clock to zero); it can only serve to pause a clock that has not yet fully
6 run. “Once the limitations period is expired, collateral petitions can no longer serve to avoid
7 the statute of limitations.” *Rashid v. Kuhlmann*, 991 F. Supp. 254, 259 (S.D.N.Y. 1998).

8 Petitioner’s first filing after the state appellate court rendered its decision on direct
9 review was filed on November 7, 2010, which was well after the March 23, 2006 deadline.
10 Because the limitations period expired prior to the filing of what might be construed as the
11 first state habeas petition, petitioner is not entitled to statutory tolling. Accordingly, absent
12 equitable tolling, the petition is untimely and must be dismissed.

13 **2. Equitable Tolling**

14 Petitioner has not filed an opposition, and therefore he has not provided any basis on
15 which equitable tolling can be granted. Accordingly, the motion to dismiss will be granted.

16 **CONCLUSION**

17 Respondent’s motion to dismiss the petition as untimely (Docket No. 17) is
18 GRANTED. Accordingly, the petition is DISMISSED. Judgment will be entered in favor of
19 respondent. A certificate of appealability will not issue. Petitioner has not shown “that
20 jurists of reason would find it debatable whether the petition states a valid claim of the denial
21 of a constitutional right and that jurists of reason would find it debatable whether the district
22 court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).
23 The Clerk shall enter judgment in favor of respondent, terminate Docket No. 17, and close
24 the file.

25 **IT IS SO ORDERED.**

26 DATED: November 23, 2011

27 
28 RICHARD SEEBORG
United States District Judge