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

JOHNNY L. SMITH,)	No. C 08-04604 CW (PR)
)	
Petitioner,)	ORDER GRANTING RESPONDENT'S
)	MOTION TO DISMISS
v.)	
)	(Docket nos. 4, 5)
B. CURRY, Warden,)	
)	
Respondent.)	
_____)	

INTRODUCTION

Petitioner Johnny L. Smith, a state prisoner incarcerated at the Correctional Training Facility, filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging the denial of parole by the California Board of Parole Hearings (Board).¹ In an Order dated June 16, 2009, the Court ordered Respondent to show cause why the petition should not be granted.

Respondent has filed a motion to dismiss the instant petition as untimely under 28 U.S.C. § 2244(d), the statute of limitations established by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Petitioner opposes Respondent's motion to dismiss. Respondent has filed a reply to Petitioner's opposition. For the reasons discussed below, the Court GRANTS Respondent's motion to dismiss.

PROCEDURAL BACKGROUND

In 1989, Petitioner was convicted of second degree murder. He was sentenced to a term of fifteen years to life in state prison. On December 14, 1994, the California Court of Appeal affirmed the conviction. Petitioner challenges the Board's denial of parole on

¹ The Board of Prison Terms was abolished effective July 1, 2005, and replaced with the Board of Parole Hearings. Cal. Penal Code § 5075(a).

1 January 6, 2006.

2 The following facts are taken from Petitioner's opposition.
3 Petitioner fails to attach any exhibits substantiating some of the
4 dates below; the dates that are substantiated will be indicated as
5 such.

6 Petitioner claims he filed his "first" state habeas petition
7 in the Alameda County Superior Court on June 13, 2006. (Opp'n at
8 3.) On July 25, 2007, his mother went to "said Court house and
9 received the notice that her sons [sic] Johnny Lee Smith's Writ of
10 Habeas Corpus had been denied about 11 ½ months prior." (Id.)
11 Thus, based on Petitioner's assertion, his first state habeas
12 petition was denied on approximately August 15, 2006.

13 On August 30, 2007, Petitioner alleges "the Court exercised
14 their power to permit Petitioner to re-submitted [sic] his Writ of
15 Habeas to the Superior Court," (Id.)

16 On August 30, 2007, Petitioner claims he filed his "second"
17 state habeas petition in the Santa Clara County Superior Court.²
18 (Id.) On December 10, 2007, because Santa Clara County was not the
19 proper venue for habeas review, the Santa Clara County Superior
20 Court transferred Petitioner's habeas petition to the Alameda
21 County Superior Court.³ (Reply, Ex. 1.) According to Petitioner,
22 after the transfer, the Alameda County Superior Court denied his
23 state habeas petition "at the end of 2008." (Opp'n at 3.)
24 However, Respondent has attached a copy of the Alameda County
25 Superior Court's denial, which is dated December 14, 2007. (Mot.

26 _____
27 ² Respondent concedes that August 30, 2007 is the date on
28 which Petitioner filed a state habeas petition in the Santa Clara
County Superior Court. (Reply at 2.)

³ The date of the transfer is substantiated by the transfer
order. (Reply, Ex. 1.)

1 to Dismiss, Ex. 1.) The Alameda County Superior Court based its
2 denial on grounds of untimeliness, noting:

3 [T]he petition is untimely and petitioner has not
4 demonstrated good cause for the delay of almost two
5 years since the parole board's decision became final.
In addition, petitioner has not explained why the
petition is exempt from the timeliness requirements.

6 (Id.)

7 On February 6, 2008, Petitioner alleges, "the Sixth Appellate
8 Court transferred his Writ to the First Appellate District being
9 denied on 4/5/08."⁴ (Opp'n at 3.) Petitioner filed his state
10 habeas petition in the California Supreme Court on March 20, 2008.⁵
11 His petition was denied on August 20, 2008. (Id. at 4.)

12 On September 24, 2008,⁶ Petitioner filed the instant federal
13 habeas petition. (Pet. at 1.)

14 DISCUSSION

15 The AEDPA, which became law on April 24, 1996, imposes a
16 statute of limitations on petitions for a writ of habeas corpus
17 filed by state prisoners. Prisoners challenging non-capital state
18

19 ⁴ There is nothing in the record indicating when Petitioner
20 filed his state habeas petition in the appellate court.

21 ⁵ While Petitioner asserts that he filed his habeas petition
22 in the state supreme court on May 20, 2008, the official website of
the California Supreme Court indicates March 20, 2008 as the filing
date.

23 ⁶ A pro se federal or state habeas petition is deemed filed
24 on the date it is delivered to prison authorities for mailing. See
25 Saffold v. Newland, 250 F.3d 1262, 1268 (9th Cir. 2001), vacated
26 and remanded on other grounds, Carey v. Saffold, 536 U.S. 214
(2002) (holding that a federal or state habeas petition is deemed
27 filed on the date the prisoner submits it to prison authorities for
filing, rather than on the date it is received by the court).
28 September 24, 2008 is the date the state petition was signed and
the earliest date that the petition could have been delivered to
prison authorities for mailing. For the purposes of this
discussion, the Court deems that the petition was filed on that
date.

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

12 The AEDPA limitations period also applies when a prisoner is
13 challenging an administrative decision such as the revocation of
14 good time credit or denial of parole. Redd v. McGrath, 343 F.3d
15 1077, 1084 (9th Cir. 2003); Shelby v. Bartlett, 391 F.3d 1061, 1063
16 (9th Cir. 2004). However, administrative decisions are not
17 governed by section 2244(d)(1)(A) because the word "judgment" in
18 that section refers to a judgment of conviction and sentence, and
19 the phrase "direct review" refers to the direct appellate review of
20 that judgment. Id. at 1081. Instead, administrative decisions are
21 governed by section 2244(d)(1)(D).

22 Section 2244(d)(1)(D) states that the limitations period to
23 file a federal habeas petition will begin to run on "the date on
24 which the factual predicate of the claim . . . presented could have
25 been discovered through the exercise of due diligence." When the
26 petition is directed to a denial of parole, as here, the date the
27 statute of limitations begins to run is determined under subsection
28 (D) of 2244(d)(1), i.e., it is the date when the factual predicate

1 of the claim could have been discovered through the exercise of due
2 diligence, and in parole cases that usually will be the date the
3 parole denial became final. See Redd v. McGrath, 343 F.3d 1077,
4 1079 (9th Cir. 2003) (limitations period began to run when Board
5 denied prisoner's administrative appeal challenging the Board's
6 decision that he was unsuitable for parole).

7 Once a petitioner is notified that his petition is subject to
8 dismissal based on AEDPA's statute of limitations and the record
9 indicates that the petition falls outside the one-year time period,
10 the petitioner bears the burden of demonstrating that the
11 limitations period was sufficiently tolled under statutory and/or
12 equitable principles. See Smith v. Duncan, 297 F.3d 809, 814 (9th
13 Cir. 2002).

14 In this case, the Board's parole denial became final on
15 January 6, 2006. (Pet., Ex. D at 50:23-24.) The limitations
16 period began to run the following day, on January 7, 2006.
17 Accordingly, Petitioner was required to file his federal habeas
18 petition no later than January 7, 2007. See 28 U.S.C. § 2244(d).
19 Therefore, his petition filed on September 24, 2008, more than one
20 year and eight months after the limitations period had expired, is
21 untimely absent either statutory or equitable tolling.

22 I. Statutory Tolling

23 The present petition may be timely if the limitations period
24 was tolled under 28 U.S.C. § 2244(d)(2) for a substantial period of
25 time. As noted earlier, AEDPA's one-year limitations period is
26 tolled under § 2244(d)(2) for "[t]he time during which a properly
27 filed application for state post-conviction or other collateral
28 review with respect to the pertinent judgment or claim is pending."

1 28 U.S.C. § 2244(d)(2). The limitations period is also tolled
2 during the time between a lower state court's decision and the
3 filing of a notice of appeal to a higher state court. Carey v.
4 Saffold, 536 U.S. 214, 223 (2002). In California, where prisoners
5 generally use the state's original writ system,⁷ this means that
6 the limitations period remains tolled during the intervals between
7 a state court's disposition of an original state habeas petition
8 and the filing of the next original state habeas petition in a
9 higher court, provided the prisoner did not delay unreasonably in
10 seeking review in the higher court. See id. at 220-25.

11 Here, Petitioner has the burden of proving that he filed his
12 "first" state habeas petition in the Alameda County Superior Court
13 on June 13, 2006 before the limitations period can be tolled under
14 § 2244(d)(2). However, he did not attach any exhibits supporting
15 his claim that he filed the 2006 petition. (Opp'n at 3.) The
16 record supports Petitioner's allegation that the superior court
17 considered his "second" habeas petition after it was transferred
18 from the Santa Clara County Superior Court in 2007. In its
19 December 14, 2007 denial, the Alameda County Superior Court based
20 its decision on the fact that the petition was untimely and
21 Petitioner had not demonstrated good cause for the delay of almost
22 two years since the parole board's decision became final. (Mot. to

23
24 ⁷ In California, the supreme court, intermediate courts of
25 appeal, and superior courts all have original habeas corpus
26 jurisdiction. Nino v. Galaza, 183 F.3d 1003, 1006 n.2 (9th Cir.
27 1999). Although a superior court order denying habeas corpus
28 relief is non-appealable, a state prisoner may file a new habeas
corpus petition in the appellate court. Id. If the appellate
court denies relief, the petitioner may seek review in the
California Supreme Court by way of a petition for review, or may
instead file an original habeas petition in the supreme court. Id.
at 1006 n.3.

1 Dismiss, Ex. 1.) There is no mention of a prior habeas action
2 filed in the Alameda County Superior Court on June 13, 2006.
3 Accordingly, Petitioner did not prove he filed the 2006 petition,
4 and he has failed to meet his burden of proof under Smith.

5 Because Petitioner has failed to prove that the 2006 petition
6 was filed, the limitations period ran unabated from January 6,
7 2006, the date the denial of parole was finalized, until it expired
8 on January 6, 2007. A state habeas petition filed after the
9 AEDPA's statute of limitations ended cannot toll the limitations
10 period. See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir.
11 2003) ("[S]ection 2244(d) does not permit the reinitiation of the
12 limitations period that has ended before the state petition was
13 filed," even if the state petition was timely filed). Section
14 2244(d)(2) cannot "revive" the limitations period once it has run
15 (i.e., restart the clock to zero); it can only serve to pause a
16 clock that has not yet fully run. Accordingly, Petitioner's August
17 30, 2007 habeas petition filed in the Santa Clara Superior Court
18 does not revive the limitations period that has already run.
19 Petitioner does not present any grounds for equitable tolling
20 during this period.

21 Even if Petitioner could prove that he filed the 2006
22 petition, his federal petition would still be untimely. Prior to
23 June 13, 2006, the date Petitioner alleges he filed his "first"
24 state petition, the limitations period ran unabated for a total of
25 157 days (from January 7, 2006 through June 13, 2006). Petitioner
26 would have been entitled to statutory tolling during the two-month
27 period during which his state habeas petition was pending in the
28 Alameda County Superior Court. However, Petitioner would not have

1 been entitled to statutory tolling during the 380-day period
2 between the Alameda County Superior Court's denial on December 14,
3 2007 and the filing of his "second" habeas petition in the Santa
4 Clara County Superior Court on August 30, 2007. Nino concluded
5 that the limitation period "remains tolled during the intervals
6 between the state court's disposition of a state habeas petition
7 and the filing of a petition at the next state appellate level."
8 Nino, 183 F.3d at 1005 (emphasis added). Petitioner alleges he
9 filed two state habeas petitions at the state superior court level;
10 therefore, there is no tolling of the limitations period during the
11 gap between the two superior court state habeas petitions. Thus,
12 the limitations period would have began to run the day after his
13 "first" state habeas petition was denied on approximately August
14 15, 2006. Petitioner would have then had 208 days (365 days minus
15 157 days) to file his federal habeas petition before the
16 limitations period would have expired on March 11, 2007.
17 Petitioner's "second" state habeas petition filed in the Santa
18 Clara Superior Court on August 30, 2007 would not have revived the
19 limitations period because it had already run. See Ferguson, 321
20 F.3d at 823.

21 Petitioner was not eligible for statutory tolling during the
22 time his state habeas petitions were pending in the state appellate
23 and supreme courts because "[o]nce the limitations period is
24 expired, collateral petitions can no longer serve to avoid the
25 statute of limitations." Rashid v. Kuhlmann, 991 F. Supp. 254, 259
26 (S.D.N.Y. 1998).

27 Thus, even if Petitioner had met his burden of proving that he
28

1 filed the 2006 petition, the present petition would still be
2 untimely unless he showed he is entitled to equitable tolling.

3 II. Equitable Tolling

4 The one-year limitations period can be equitably tolled
5 because § 2244(d) is a statute of limitation and not a
6 jurisdictional bar. Calderon v. United States District Court
7 (Beeler), 128 F.3d 1283, 1288 (9th Cir. 1997), overruled in part on
8 other grounds by Calderon v. United States District Court (Kelly),
9 163 F.3d 530 (9th Cir. 1998) (en banc). "When external forces,
10 rather than a petitioner's lack of diligence, account for the
11 failure to file a timely claim, equitable tolling of the statute of
12 limitations may be appropriate." Miles v. Prunty, 187 F.3d 1104,
13 1107 (9th Cir. 1999). Equitable tolling will not be available in
14 most cases because extensions of time should be granted only if
15 "extraordinary circumstances beyond [a] prisoner's control make it
16 impossible to file a petition on time." Beeler, 128 F.3d at 1288
17 (citation and internal quotation marks omitted)(brackets in
18 original). The prisoner must show that "the 'extraordinary
19 circumstances' were the cause of his untimeliness." Spitsyn v.
20 Moore, 345 F.3d 796, 799 (9th Cir. 2003) (citations omitted).

21 Another statement of the standard is that a litigant seeking
22 equitable tolling bears the burden of establishing two elements:
23 "(1) that he has been pursuing his rights diligently, and (2) that
24 some extraordinary circumstance stood in his way," preventing
25 timely filing. Pace v. DiGuiglielmo, 544 U.S. 408, 418 (2005).

26 As mentioned above, the petitioner "bears the burden of
27 showing that this extraordinary exclusion should apply to him."
28 Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002). Indeed,

1 "'the threshold necessary to trigger equitable tolling [under
2 AEDPA] is very high, lest the exceptions swallow the rule.'" Id.
3 at 1066 (quoting United States v. Marcello, 212 F.3d 1005, 1010
4 (7th Cir.), cert. denied, 531 U.S. 878 (2000)).

5 The grounds for granting equitable tolling are "highly fact
6 dependant." Lott v. Mueller, 304 F.3d 918, 923 (9th Cir. 2002).
7 Where a prisoner fails to show "any causal connection" between the
8 grounds upon which he asserts a right to equitable tolling and his
9 inability to file a timely federal habeas application, the
10 equitable tolling claim will be denied. Gaston v. Palmer, 417 F.3d
11 1030, 1034-35 (9th Cir. 2005), amended, 447 F.3d 1165 (9th Cir.
12 2006).

13 To invoke equitable tolling, Petitioner would have the burden
14 of proving that he is entitled to such tolling of the 208 days
15 between August 15, 2006 (the date he claims his 2006 petition was
16 denied) and July 25, 2007 (the date on which his mother allegedly
17 discovered that the denial had been issued). (Opp'n at 3.)
18 According to Petitioner, this 208-day period should be equitably
19 tolled because after he filed his 2006 petition, "the Court failed
20 to respond to written inquiries or send any kind of written notice
21 as to the status of the 6/13/06 writ." (Opp'n at 3.) However,
22 Petitioner fails to substantiate these alleged written inquiries in
23 any manner. Furthermore, California law requires a state court to
24 "rule on a petition for writ of habeas corpus within 60 days after
25 the petition is filed." Cal. R. Ct. 4.551(a)(3)(A). Petitioner
26 had constructive notice that he should have received a decision
27 from the superior court on or about sixty days after he filed the
28 2006 petition. Accordingly, the limitations period would not be

1 equitably tolled, even if Petitioner could prove that he filed a
2 first habeas petition in 2006.

3 Accordingly, the petition is dismissed because it was not
4 timely filed under 28 U.S.C. § 2244(d)(1).

5 CONCLUSION

6 For the foregoing reasons, Respondent's motion to dismiss the
7 petition as untimely (docket no. 4) is GRANTED. The Clerk of the
8 Court shall enter judgment in favor of Respondent, terminate as
9 moot all pending motions, including Petitioner's motion entitled,
10 "Motion of the Could Have Admit, Denials and Allegations to
11 Petition of Habeas Corpus" (docket no. 5), and close the file.

12 This Order terminates Docket nos. 4 and 5.

13 IT IS SO ORDERED.

14 DATED: 2/23/10



15 CLAUDIA WILKEN

16 United States District Judge
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1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4 JOHNNY L. SMITH,

5 Plaintiff,

6 v.

7 B. CURRY et al,

8 Defendant.

Case Number: CV08-04604 CW

CERTIFICATE OF SERVICE

9
10 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

11 That on February 23, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
13 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle
14 located in the Clerk's office.

15 Johnny L. Smith E-20392
16 CTF Central
17 Soledad State Prison
18 P.O. Box 689
19 Soledad, CA 93960-0689

20 Dated: February 23, 2010

Richard W. Wieking, Clerk
By: Sheilah Cahill, Deputy Clerk

United States District Court
For the Northern District of California