

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

3 BENJYMAN A. HOLLOMAN,)

No. C 09-1868 SBA (PR)

4 Petitioner,)

**ORDER GRANTING RESPONDENT'S
MOTION TO DISMISS AS UNTIMELY**

5 v.)

(Docket no. 10)

6 FRANCISCO JACQUEZ, WARDEN,)

7 Respondent.)
8

9 **INTRODUCTION**

10 Petitioner Benjyman Hollomon, a former state prisoner, filed a pro se petition for a writ of
11 habeas corpus pursuant to 28 U.S.C. § 2254. In an Order dated October 19, 2009, the Court
12 ordered Respondent to show cause why the petition should not be granted. Respondent has filed a
13 motion to dismiss the present petition as untimely under 28 U.S.C. § 2244(d), the statute of
14 limitations established by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).
15 Petitioner did not file an opposition to Respondent's motion.

16 For the reasons discussed below, the Court GRANTS Respondent's motion to dismiss.

17 **PROCEDURAL BACKGROUND**

18 On April 24, 2006, the trial court sentenced Petitioner to eight years and four months in
19 prison for multiple drug related offenses. (Resp't Ex. 1.) On May 16, 2007, the California Court
20 of Appeal affirmed the judgment in an unpublished opinion. (Id.) Petitioner did not seek
21 discretionary review of the appellate court's decision in the California Supreme Court..

22 On October 1, 2008, Petitioner filed a state habeas petition in the California Supreme
23 Court. (Resp't Ex. 3.) On March 25, 2009, the California Supreme Court denied the petition. (Id.)

24 On April 23, 2009, Petitioner filed the instant federal habeas petition.¹
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27 ¹ A pro se federal habeas petition is deemed filed on the date it is delivered to prison
28 authorities for mailing. See Saffold v. Newland, 250 F.3d 1262, 1268 (9th Cir. 2001), vacated and
remanded on other grounds, Carey v. Saffold, 536 U.S. 214 (2002) (holding that a federal or state
habeas petition is deemed filed on the date the prisoner submits it to prison authorities for filing,
rather than the date it is received by the courts). April 23, 2009 is the date the present petition was
signed and the earliest date that the petition could have been delivered to prison authorities for
mailing. The Court assumes for the purposes of this discussion that the petition was delivered to
prison authorities on that date.

DISCUSSION

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2 AEDPA imposes a statute of limitations on petitions for a writ of habeas corpus filed by
3 state prisoners. Petitions filed by prisoners challenging non-capital state convictions or sentences
4 generally must be filed within one year of the date on which the judgment became final after the
5 conclusion of direct review or the time passed for seeking direct review. 28 U.S.C.
6 § 2244(d)(1)(A). If a petitioner could have sought review by the state appellate or the state
7 supreme court, but did not, the limitation period will begin running against him the day after the
8 date on which the time to seek such review expired. See Smith v. Duncan, 297 F.3d 809, 812-13
9 (9th Cir. 2002) (limitation period began running day after time to seek discretionary review of
10 California Court of Appeal's decision in the Supreme Court of California expired, which was forty
11 days after the Court of Appeal filed its opinion) (citing Cal. Rules of Court 24(a), 28(b), 45(a);
12 Cal. Civ. Proc. Code § 12a).

13 In the present case, the California Court of Appeal affirmed Petitioner's conviction on May
14 16, 2007. (Resp't Ex. 2.) The judgment became final for purposes of the AEDPA statute of
15 limitations forty days later, on June 25, 2007. Accordingly, Petitioner was required to file a
16 federal habeas corpus petition no later than June 25, 2008. See 28 U.S.C. § 2244(d). Because
17 Petitioner did not file the present petition until April 23, 2009 -- 303 days after the limitations
18 period had expired -- the petition is untimely unless he can show that he is entitled to tolling.

19 **I. Statutory Tolling**

20 AEDPA's one-year limitations period is tolled for "[t]he time during which a properly filed
21 application for State post-conviction or other collateral review with respect to the pertinent
22 judgment or claim is pending" 28 U.S.C. § 2244(d)(2). The limitations period is also tolled
23 during the time between a lower state court's decision and the filing of a notice of appeal to a
24 higher state court. Carey, 536 U.S. at 223. In California, where prisoners generally use the State's
25 original writ system, this means that the limitations period remains tolled during the intervals
26 between a state court's disposition of an original state habeas petition and the filing of the next
27 original state habeas petition in a higher court, provided the prisoner did not delay unreasonably in
28 seeking review in the higher court. See id. at 220-25.

1 Petitioner's state habeas petition was filed on October 1, 2008, ninety-nine days after the
2 limitations period expired on June 25, 2008 . However, a state habeas petition filed after the
3 AEDPA's statute of limitations ended cannot toll the limitations period. See Ferguson v.
4 Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) ("[S]ection 2244(d) does not permit the reinitiation
5 of the limitations period that has ended before the state petition was filed," even if the state petition
6 was timely filed) (holding that Oregon's two-year limitations period for the filing of state habeas
7 petitions does not alter the operation of the AEDPA, even though prisoners who take full
8 advantage of the two-year period will forfeit their right to federal habeas review). Section
9 2244(d)(2) cannot "revive" the limitations period once it has run (i.e., restart the clock to zero); it
10 can only serve to pause a clock that has not yet fully run. Once the limitations period has expired,
11 "collateral petitions can no longer serve to avoid a statute of limitations." Rashid v. Kuhlmann,
12 991 F. Supp. 254, 259 (S.D.N.Y. 1998).

13 Accordingly, Petitioner's state habeas petition, which was filed on October 1, 2008, does
14 not revive the limitations period that has already run. Therefore, the instant federal habeas petition
15 is untimely because statutory tolling does not apply.

16 **II. Equitable Tolling**

17 The one-year limitations period can be equitably tolled because § 2244(d) is a statute of
18 limitations and not a jurisdictional bar. Calderon v. United States District Court (Beeler), 128 F.3d
19 1283, 1288 (9th Cir. 1997). "When external forces, rather than a petitioner's lack of diligence,
20 account for the failure to file a timely claim, equitable tolling of the statute of limitations may be
21 appropriate." Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999). Equitable tolling will not be
22 available in most cases because extensions of time should be granted only if "extraordinary
23 circumstances beyond [a] prisoner's control make it impossible to file a petition on time." Beeler,
24 128 F.3d at 1288 (citation and internal quotation marks omitted). The prisoner must show that
25 "the 'extraordinary circumstances' were the cause of his untimeliness." Spitsyn v. Moore, 345 F.3d
26 796, 799 (9th Cir. 2003) (citations omitted). The Ninth Circuit has said that the petitioner "bears
27 the burden of showing that this extraordinary exclusion should apply to him." Miranda v. Castro,
28 292 F.3d 1063, 1065 (9th Cir. 2002). Whether equitable tolling is in order turns on an examination

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of detailed facts. Lott v. Mueller, 304 F.3d 918, 923 (9th Cir. 2002). Petitioner has not alleged individual facts warranting equitable tolling. Therefore, Petitioner has not demonstrated that he is entitled to equitable tolling.

CONCLUSION

For the foregoing reasons, the Court GRANTS Respondent's motion to dismiss the petition as untimely; the petition is hereby DISMISSED with prejudice. The Clerk of the Court shall terminate all pending motions, enter judgment and close the file.

This Order terminates Docket no. 10.

IT IS SO ORDERED.

DATED: 6/1/10


SAUNDRA BROWN ARMSTRONG
United States District Judge

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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

BENJYMAN A HOLLOMON,
Plaintiff,

Case Number: CV09-01868 SBA

CERTIFICATE OF SERVICE

v.

FRANCISCO JACQUEZ et al,
Defendant.

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

That on June 2, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Benjyman Anthony Hollomon
156 N. Claremont Street
San Mateo, CA 94401

Dated: June 2, 2010

Richard W. Wieking, Clerk
By: LISA R CLARK, Deputy Clerk