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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

MICHAEL IZELL SEALS,

Petitioner,

No. C 10-3707 PJH (PR)

vs.

WARDEN FRANCISCO JAQUEZ,

Respondent.

**ORDER GRANTING
RESPONDENT'S MOTION TO
DISMISS AND GRANTING
CERTIFICATE OF
APPEALABILITY**

This is a habeas case brought pro se by a state prisoner under 28 U.S.C. § 2254. This case proceeds on the second amended petition with one claim of ineffective assistance of counsel. Respondent has filed a motion to dismiss on the grounds that petitioner has failed to exhaust his state court remedies and the petition is barred by the statute of limitations. Petitioner has filed an opposition and respondent has replied. The motion will be granted for the reasons set out below.

DISCUSSION

Statute of Limitations

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which became law on April 24, 1996, imposed for the first time a statute of limitations on petitions for a writ of habeas corpus filed by state prisoners. Petitions filed by prisoners challenging non-capital state convictions or sentences must be filed within one year of the latest of the date on which: (A) the judgment became final after the conclusion of direct review or the time passed for seeking direct review; (B) an impediment to filing an application created by unconstitutional state action was removed, if such action prevented petitioner from filing; (C) the constitutional right asserted was recognized by the Supreme Court, if the right was

1 newly recognized by the Supreme Court and made retroactive to cases on collateral
2 review; or (D) the factual predicate of the claim could have been discovered through the
3 exercise of due diligence. 28 U.S.C. § 2244(d)(1). Time during which a properly filed
4 application for state post-conviction or other collateral review is pending is excluded from
5 the one-year time limit. *Id.* § 2244(d)(2). The one-year period generally will run from "the
6 date on which the judgment became final by the conclusion of direct review or the
7 expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A).

8 Petitioner was sentenced in Lake County Superior Court on April 29, 2005. Motion
9 to Dismiss (MTD), Ex. 1. Petitioner appealed and the California Court of Appeal affirmed
10 the judgment on June 13, 2006. MTD, Exh. 2; *People v. Seals*, 2006 WL 1613986 (Cal.
11 App. 1 Dist, 2006). Petitioner filed an untimely petition for review with the California
12 Supreme Court on August 1, 2006. MTD, Exh. 4; See Cal. Rules of Court 8.366(b),
13 8.500(e), *Waldrip v. Hall*, 548 F.3d 729, 735 (9th Cir. 2008) (petitioner has 40 days from the
14 time the Court of Appeal issues an opinion to file a petition for review). Petitioner also filed
15 an application for relief from default to the California Supreme Court on August 1, 2006,
16 that the court denied on August 2, 2006, and closed the case. MTD, Exh. 4.

17 Petitioner's conviction became final on July 23, 2006, when the time to file a petition
18 with the California Supreme Court expired. Thus, the statute of limitations expired one year
19 later on July 23, 2007. See 28 U.S.C. § 2244(d)(1). Several years later, petitioner filed a
20 petition for writ of habeas corpus in the Lake County Superior Court on February 2, 2010,
21 that was denied on February 5, 2010, in a reasoned decision. MTD, Exhs. 5, 6. Petitioner
22 filed the original federal petition in this case on July 29, 2010.¹

23 Petitioner will not receive statutory tolling for the Lake County Superior Court petition
24 as it was filed several years after the expiration of the statute of limitations. See *Ferguson*

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26 ¹ The court affords petitioner application of the mailbox rule as to all his habeas filings
27 in state court and in this federal court. *Houston v. Lack*, 487 U.S. 266, 275-76, 108 S.Ct. 2379,
28 101 L.Ed.2d 245 (1988) (pro se prisoner filing is dated from the date prisoner delivers it to
prison authorities); *Stillman v. LaMarque*, 319 F.3d 1199, 1201 (9th Cir. 2003) (mailbox rule
applies to pro se prisoner who delivers habeas petition to prison officials for the court within
limitations period).

1 *v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003) ("[S]ection 2244(d) does not permit the
2 reinitiation of the limitations period that has ended before the state petition was filed," even
3 if the state petition was timely filed). Thus, this petition is untimely by three years.

4 Petitioner makes no arguments for equitable tolling and his opposition is difficult to
5 follow. Petitioner discusses several state and federal civil rights cases he filed over the last
6 eight years. It seems that petitioner argues because his petition for review to the California
7 Supreme Court was untimely, the only way he could exhaust his claims was by way of civil
8 rights cases in state and federal court. Opposition at 4. Petitioner is incorrect.

9 An application for a federal writ of habeas corpus filed by a prisoner who is in state
10 custody pursuant to a judgment of a state court may not be granted unless the prisoner has
11 first exhausted state judicial remedies, either by way of a direct appeal or in collateral
12 proceedings, by presenting the highest state court available with a fair opportunity to rule
13 on the merits of each and every issue he or she seeks to raise in federal court. See 28
14 U.S.C. § 2254(b),(c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987).

15 A petitioner fully and fairly presents a claim to the state courts, "if he presents the
16 claim (1) to the correct forum; (2) through the proper vehicle; and (3) by providing the
17 factual and legal basis for the claim. Full and fair presentation additionally requires a
18 petitioner to present the substance of his claim to the state courts, including a reference to
19 a federal constitutional guarantee and a statement of facts that entitle the petitioner to
20 relief." *Scott v. Schriro*, 567 F.3d 573, 582 (9th Cir. 2009) (citations omitted).

21 Of course, petitioner's arguments about proper exhaustion have little impact on the
22 untimeliness of his petition. To the extent petitioner seeks some type of tolling for the filing
23 of these civil rights cases, any such request is denied. Petitioner references three federal
24 civil rights cases, *Seals v. Mitchell*, No. C 04-3764 NJV, *Seals v. Cardoza*, No. C 05-0496
25 SBA and *Seals v. Mitchell*, No. C 05-1863 SBA.² These cases generally involved
26 allegations with respect to his arrest, presumably the arrest of the crime for the underlying

27 _____
28 ² Petitioner never indicates why he chose to file federal civil rights cases as opposed
to a federal habeas petition in the years before and after his conviction became final.

1 case. Case No. 04-3764 NJV, involved allegations of excessive force, went to trial and
2 resulted in a verdict for defendants.³ Case No. 05-0496 involved other claims apparently
3 related to his arrest but was dismissed for failure to state a claim and was affirmed on
4 appeal by the Ninth Circuit. Case No. 05-1863 involved allegations of retaliation related to
5 his arrest and was dismissed for failure to exhaust. None of these cases warrant any type
6 of tolling that would aid this habeas petition that was filed three years after the expiration of
7 the statute of limitations. The AEDPA contains no statutory tolling provision for the
8 pendency of a federal civil rights lawsuit. Indeed, even a properly filed federal habeas
9 petition does not toll the AEDPA's one-year limitations period. *See Duncan v. Walker*, 533
10 U.S. 167, 181-182 (2001) (under 28 U.S.C. § 2244(d)(2), the one-year statute of limitations
11 does not toll for the time a federal application for writ of habeas corpus is pending in federal
12 court).

13 While it would seem that petitioner was confused as to the proper way to exhaust a
14 claim prior to filing a federal habeas petition, a pro se petitioner's lack of legal sophistication
15 is not, by itself, an extraordinary circumstance warranting equitable tolling. *Rasberry v.*
16 *Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006). For all these reasons, this petition is
17 untimely.⁴

18 **CONCLUSION**

19 Respondent's motion to dismiss (Docket No. 13) is **GRANTED** as discussed above.
20 The petition is **DISMISSED**. The clerk shall close the file.

21 **APPEALABILITY**

22 The federal rules governing habeas cases brought by state prisoners require a
23 district court that enters a final order adverse to the petitioner to grant or deny a certificate
24 of appealability in the order. *See* Rule 11(a), Rules Governing § 2254 Cases, 28 U.S.C.
25 foll. § 2254.

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³ The court appointed counsel to represent petitioner at trial.

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⁴ As the petition is untimely, the court need not address the exhaustion argument.

1 A petitioner may not appeal a final order in a federal habeas corpus proceeding
2 without first obtaining a certificate of appealability. See 28 U.S.C. § 2253(c); Fed. R. App.
3 P. 22(b). Section 2253(c)(1) applies to an appeal of a final order entered on a procedural
4 question antecedent to the merits, for instance a dismissal on statute of limitations grounds,
5 as here. See *Slack v. McDaniel*, 529 U.S. 473, 483 (2000).


6 “Determining whether a COA should issue where the petition was dismissed on
7 procedural grounds has two components, one directed at the underlying constitutional
8 claims and one directed at the district court’s procedural holding.” *Id.* at 484-85. “When the
9 district court denies a habeas petition on procedural grounds without reaching the
10 prisoner’s underlying constitutional claim, a COA should issue when the prisoner shows, at
11 least, that jurists of reason would find it debatable whether the petition states a valid claim
12 of the denial of a constitutional right and that jurists of reason would find it debatable
13 whether the district court was correct in its procedural ruling.” *Id.* at 484. As each of these
14 components is a “threshold inquiry,” the federal court “may find that it can dispose of the
15 application in a fair and prompt manner if it proceeds first to resolve the issue whose
16 answer is more apparent from the record and arguments.” *Id.* at 485. Supreme Court
17 jurisprudence “allows and encourages” federal courts to first resolve the procedural issue,
18 as was done here. See *id.*

19 Here, the court concludes that reasonable jurists could find it debatable whether
20 petitioner received ineffective assistance of counsel. The court therefore GRANTS a COA.
21 The court declines to issue a COA regarding the procedural holding that the petition was
22 untimely.

23 Accordingly, the clerk shall forward the file, including a copy of this order, to the
24 Court of Appeals. See Fed. R. App. P. 22(b); *United States v. Asrar*, 116 F.3d 1268, 1270
25 (9th Cir. 1997).

26 **IT IS SO ORDERED.**

27 Dated: August 27, 2013.

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PHYLLIS J. HAMILTON
United States District Judge