

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
Appendix 'A'

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ERIC JOHNSON,

Petitioner,

v.

SECRETARY OF CORRECTIONS,

Respondent.

No. 1:21-cv-01560-JLT-SAB-HC

ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS, DISMISSING
PETITION FOR WRIT OF HABEAS
CORPUS, DIRECTING CLERK OF COURT
TO CLOSE CASE, AND DECLINING TO
ISSUE CERTIFICATE OF APPEALABILITY

(Doc. 6)

Petitioner is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. This matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On December 29, 2021, the magistrate judge issued findings and recommendations recommending that the petition for writ of habeas corpus be as untimely. (Doc. 6.) The findings and recommendations were served petitioner and contained notice that any objections were to be filed within 30 days of the date of service of the findings and recommendations. On January 12, 2022, petitioner filed timely objections. (Doc. 9.)

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), the Court has conducted a *de novo* review of the case. Having carefully reviewed the entire file, including petitioner's objections, the Court concludes that the findings and recommendation are supported by the record and proper analysis. Petitioner's objections repeat arguments that were properly rejected in the

1 findings and recommendations.

2 Having found that petitioner is not entitled to habeas relief, the Court now turns to
3 whether a certificate of appealability should issue. A petitioner seeking a writ of habeas corpus
4 has no absolute entitlement to appeal a district court's denial of his petition, and an appeal is only
5 allowed in certain circumstances. *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003); 28 U.S.C.
6 § 2253. Where, as here, the court denies habeas relief on procedural grounds without reaching
7 the underlying constitutional claims, the court should issue a certificate of appealability "if jurists
8 of reason would find it debatable whether the petition states a valid claim of the denial of a
9 constitutional right and that jurists of reason would find it debatable whether the district court was
10 correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "Where a plain
11 procedural bar is present and the district court is correct to invoke it to dispose of the case, a
12 reasonable jurist could not conclude either that the district court erred in dismissing the petition or
13 that the petitioner should be allowed to proceed further." *Id.*

14 In the present case, the Court finds that reasonable jurists would not find the Court's
15 determination that the petition should be dismissed debatable or wrong, or that petitioner should
16 be allowed to proceed further. Therefore, the Court declines to issue a certificate of appealability.
17 Accordingly,

- 18 1. The findings and recommendations issued on December 29, 2021 (Doc. 6) are adopted
19 in full.
- 20 2. The petition for writ of habeas corpus is dismissed.
- 21 3. The Clerk of Court is directed to close the case; and
- 22 4. The Court declines to issue a certificate of appealability.

23
24 IT IS SO ORDERED.

25 Dated: February 15, 2022


26 UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

ERIC JOHNSON,

CASE NO: 1:21-CV-01560-JLT-SAB

v.

SECRETARY OF CORRECTIONS,

Decision by the Court. This action came before the Court. The issues have been tried, heard or decided by the judge as follows:

IT IS ORDERED AND ADJUDGED

**THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE
COURT'S ORDER FILED ON 02/15/2022**

Keith Holland
Clerk of Court

ENTERED: February 15, 2022

by: /s/ C. Maldonado
Deputy Clerk

Appendix 'B'

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AUG 24 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ERIC E. JOHNSON,

Petitioner-Appellant,

v.

SECRETARY OF CORRECTIONS,

Respondent-Appellee.

No. 22-15686

D.C. No.

1:21-cv-01560-JLT-SAB

Eastern District of California,
Fresno

ORDER

Before: SCHROEDER, O'SCANNLAIN, and FORREST, Circuit Judges.

The district court entered judgment on February 15, 2022. On May 2, 2022, appellant filed a notice of appeal, which was signed and dated April 19, 2022. Appellant's notice of appeal was not filed or delivered to prison officials within 30 days after entry of the judgment, *see* 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1), but stated that appellant had "promptly filed a motion for reconsideration" after receiving the district court's judgment. No motion for reconsideration is reflected on the district court's docket.

We have received and reviewed appellant's response to this court's June 9, 2022 order directing appellant to file a statement attesting to the date on which the motion for reconsideration was deposited in the institution's internal mail system for delivery to the district court, and to provide a copy of the motion. Appellant's response to the June 9, 2022 order attaches a copy of his prison mail log that

documents a mailing to the district court on February 22, 2022, which does not appear on the district court's docket. The response states that appellant did not retain a copy of the motion for reconsideration sent to the district court.

Assuming that the February 22, 2022 mailing was a motion that would have tolled the time to appeal from the February 15, 2022 judgment, had it been received by the district court, we now review this appeal pursuant to the prefiling review order entered in No. 12-80065. *See Fed. R. App. P. 4(a)(4), 4(c).* Because we conclude that the appeal is so insubstantial as to not warrant further review, it will not be permitted to proceed. *See In re Thomas*, 508 F.3d 1225 (9th Cir. 2007). Appeal No. 22-15686 is therefore dismissed.

This order, served on the district court for the Eastern District of California, will constitute the mandate of this court.

No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions will be entertained.

DISMISSED.

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**

10
11 ERIC JOHNSON,

12 Petitioner,

13 v.

14 SECRETARY OF CORRECTIONS,

15 Respondent.

Case No. 1:21-cv-01560-SAB-HC

FINDINGS AND RECOMMENDATION TO
DISMISS PETITION FOR WRIT OF
HABEAS CORPUS

ORDER DIRECTING CLERK OF COURT
TO RANDOMLY ASSIGN DISTRICT
JUDGE

16
17 Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus
18 pursuant to 28 U.S.C. § 2254.

19 I.

20 **BACKGROUND**

21 On October 22, 2021, Petitioner filed the instant petition for writ of habeas corpus. (ECF
22 No. 1). Petitioner is currently housed at the California Substance Abuse Treatment Facility. (ECF
23 No. 1 at 1).¹ Petitioner alleges that in 1993 he was sentenced to an imprisonment term of one
24 year and four months for his indecent exposure conviction in the San Francisco County Superior
25 Court. Petitioner contends that his parole date was December 24, 1993, and that prison officials
26 at California State Prison, Sacramento conspired to arbitrarily revoke Petitioner's parole by
27 falsely asserting that Petitioner was required to register as a sex offender. (Id. at 4). In 1994,

28 ¹ Page numbers refer to the ECF page numbers stamped at the top of the page.

1 Petitioner was charged with indecent exposure and on October 21, 1994, Petitioner was
2 sentenced in the Sacramento County Superior Court. (ECF No. 1 at 5).

3 On November 10, 2021, the undersigned issued an order to show cause why the petition
4 should not be dismissed as untimely. (ECF No. 2). On November 22, 2021, Petitioner filed a
5 response. (ECF No. 3).

6 **II.**

7 **DISCUSSION**

8 Rule 4 of the Rules Governing Section 2254 Cases requires preliminary review of a
9 habeas petition and allows a district court to dismiss a petition before the respondent is ordered
10 to file a response, if it “plainly appears from the petition and any attached exhibits that the
11 petitioner is not entitled to relief in the district court.”

12 **A. Statute of Limitations**

13 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act
14 of 1996 (“AEDPA”). AEDPA imposes various requirements on all petitions for writ of habeas
15 corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320 (1997); Jeffries v.
16 Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc). The instant petition was filed after the
17 enactment of AEDPA and is therefore governed by its provisions.

18 AEDPA imposes a one-year period of limitation on petitioners seeking to file a federal
19 petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). Section 2244(d) provides:

20 (1) A 1-year period of limitation shall apply to an application for a
21 writ of habeas corpus by a person in custody pursuant to the
22 judgment of a State court. The limitation period shall run from the
23 latest of --

24 (A) the date on which the judgment became final by the
25 conclusion of direct review or the expiration of the time for
26 seeking such review;

27 (B) the date on which the impediment to filing an application
28 created by State action in violation of the Constitution or laws
of the United States is removed, if the applicant was prevented
from filing by such State action;

(C) the date on which the constitutional right asserted was
initially recognized by the Supreme Court, if the right has been

1 newly recognized by the Supreme Court and made
2 retroactively applicable to cases on collateral review; or

3 (D) the date on which the factual predicate of the claim or
4 claims presented could have been discovered through the
5 exercise of due diligence.

6 (2) The time during which a properly filed application for State
7 post-conviction or other collateral review with respect to the
8 pertinent judgment or claim is pending shall not be counted toward
9 any period of limitation under this subsection.

10 28 U.S.C. § 2244(d).

11 In his response to the order to show cause, Petitioner asserts that AEDPA's one-year
12 limitation period only applies to state criminal convictions. Petitioner contends that as he is
13 challenging his unlawful confinement because his parole was arbitrarily revoked rather than a
14 criminal conviction, AEDPA's one-year limitation period is inapplicable. (ECF No. 3 at 1).
15 However, the Ninth Circuit has held "that § 2244's one-year limitation period applies to all
16 habeas petitions filed by persons in 'custody pursuant to the judgment of a State court,' 28
17 U.S.C. § 2244(d)(1), even if the petition challenges a pertinent administrative decision rather
18 than a state court judgment." Shelby v. Bartlett, 391 F.3d 1061, 1063 (9th Cir. 2004). Therefore,
19 "AEDPA's statute of limitations applies to challenges to the revocation of parole and the denial
20 of parole." Solorio v. Hartley, 591 F. Supp. 2d 1127, 1129 (C.D. Cal. 2008). "[F]or prisoners
21 challenging administrative decisions such as the denial of parole . . . , AEDPA's statute of
22 limitations begins running under § 2244(d)(1)(D) on the date the administrative decision became
23 final." Redd v. McGrath, 343 F.3d 1077, 1084 (9th Cir. 2003) (citations omitted); accord Shelby,
24 391 F.3d at 1066.

25 Here, the pertinent administrative decision is the alleged arbitrary revocation of
26 Petitioner's parole on December 24, 1993. Petitioner states that in 1994 he filed a Board of
27 Parole Hearings appeal. (ECF No. 3 at 2). It appears that both the revocation and appeal occurred
28 prior to AEDPA's enactment. The Ninth Circuit has held "that AEDPA's one-year time limit did
not begin to run against any state prisoner prior to the statute's date of enactment." Calderon v.
United States Dist. Court, 128 F.3d 1283, 1287 (9th Cir. 1997). Thus, state prisoners "had a one-
year grace period in which to file their petitions" that "ended on April 24, 1997 in the absence of

1 . . . tolling." Patterson v. Stewart, 251 F.3d 1243, 1245, 1246 (9th Cir. 2001). Petitioner had until
2 April 24, 1997 to file a timely federal habeas petition. The instant petition was filed
3 approximately twenty-four and a half years after AEDPA's one-year grace period ended.
4 Accordingly, the instant federal petition is untimely unless Petitioner establishes that statutory
5 and/or equitable tolling is warranted.

6 The "time during which a properly filed application for State post-conviction or other
7 collateral review with respect to the pertinent judgment or claim is pending shall not be counted
8 toward" the one-year limitation period. 28 U.S.C. § 2244(d)(2). The limitation period also is
9 subject to equitable tolling if the petitioner demonstrates "(1) that he has been pursuing his
10 rights diligently, and (2) that some extraordinary circumstance stood in his way" and prevented
11 timely filing." Holland v. Florida, 560 U.S. 631, 649 (2010) (quoting Pace v. DiGuglielmo, 544
12 U.S. 408, 418 (2005)). Petitioner bears the burden of alleging facts that would give rise to
13 tolling. Holland, 560 U.S. at 649; Pace, 544 U.S. at 418.

14 In the response to the order to show cause, Petitioner only argued that AEDPA's
15 limitation period did not apply to his petition. Although given the opportunity, Petitioner did not
16 provide the Court with information regarding any state collateral review of his parole revocation
17 or any extraordinary circumstance that prevented Petitioner from filing the petition earlier.
18 Accordingly, as Petitioner has not demonstrated that statutory or equitable tolling is warranted,
19 the petition is untimely and should be dismissed.

20 **III.**

21 **RECOMMENDATION & ORDER**

22 Based on the foregoing, the undersigned HEREBY RECOMMENDS that the petition for
23 writ of habeas corpus be DISMISSED.

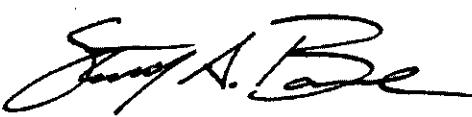
24 Further, the Clerk of Court is DIRECTED to randomly assign this action to a District
25 Judge.

26 This Findings and Recommendation is submitted to the assigned United States District
27 Court Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local
28 Rules of Practice for the United States District Court, Eastern District of California. Within

1 **THIRTY (30) days** after service of the Findings and Recommendation, Petitioner may file
2 written objections with the court and serve a copy on all parties. Such a document should be
3 captioned "Objections to Magistrate Judge's Findings and Recommendation." Replies to the
4 objections shall be served and filed within fourteen (14) days after service of the objections. The
5 assigned United States District Court Judge will then review the Magistrate Judge's ruling
6 pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within
7 the specified time may waive the right to appeal the District Court's order. Wilkerson v.
8 Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th
9 Cir. 1991)).

10 IT IS SO ORDERED.
11

12 Dated: December 28, 2021



13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES MAGISTRATE JUDGE

General Docket

United States Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 22-15686**Docketed:** 05/05/2022**Nature of Suit:** 3530 Habeas Corpus**Termed:** 08/24/2022

Eric Johnson v. Secretary of Corrections

Appeal From: U.S. District Court for Eastern California, Fresno**Fee Status:** IFP**Case Type Information:**

- 1) prisoner
- 2) state
- 3) 2254 habeas corpus

Originating Court Information:**District:** 0972-1 : 1:21-cv-01560-JLT-SAB**Trial Judge:** Jennifer L. Thurston, District Judge**Date Filed:** 10/22/2021

Date Order/Judgment:	Date Order/Judgment EOD:	Date NOA Filed:	Date Rec'd COA:
02/15/2022	02/15/2022	05/02/2022	05/03/2022

Prior Cases:

12-80065 **Date Filed:** 03/20/2012 **Date Disposed:** 06/13/2012 **Disposition:** Dismissed – Judge Order

Current Cases:

None

ERIC E. JOHNSON (–: H-67820)
Petitioner – Appellant,

Eric E. Johnson
[NTC Pro Se]
HDSP – HIGH DESERT STATE PRISON (SUSANVILLE)
P.O. Box 3030
Susanville, CA 96127-3030

v.

SECRETARY OF CORRECTIONS
Respondent – Appellee,

05/05/2022 1 DOCKETED CAUSE AND ENTERED APPEARANCE OF PRO SE APPELLANT AND NO APPEARANCE FOR APPELLEE. This appeal is subject to a pre-filing review order in case number 12-80065. The appeal will be reviewed by the Court to determine whether it will be allowed to proceed. No briefing schedule will be set until/unless the Court determines that the appeal should be allowed to proceed. [12439444] (RT) [Entered: 05/05/2022 04:00 PM]

05/23/2022 2 Received notice of change of address dated 05/18/2022 from Eric E. Johnson. New address: High Desert State Prison, P.O. Box 3030, Susanville, CA 96127-3030. [12453977] —[Edited: Updated Address. 05/23/2022 by TYL] (NAC) [Entered: 05/23/2022 02:16 PM]

06/09/2022 3 Filed clerk order (Deputy Clerk: DA): The district court's final order and judgment were entered on February 15, 2022, and the district declined to issue a certificate of appealability. Appellant's notice of appeal from the February 15, 2022 judgment was dated April 19, 2022, and received by the district court on May 2, 2022. Thus, the notice of appeal was not filed within 30 days after entry of the judgment. See 28 U.S.C § 2107(a); Fed. R. App. P. 4(a)(1). The notice of appeal states that appellant filed a motion for reconsideration in the district court after receiving the judgment. However, no motion for reconsideration appears on the district court's docket. Within 35 days after the date of this order, appellant must file with this court a signed declaration or notarized statement attesting to the date on which the motion for reconsideration was deposited in the institution's internal mail system for delivery to the district court, and whether first-class postage was prepaid, or otherwise show cause why this appeal should not be dismissed for lack of jurisdiction. See Fed. R. App. P. 4(c)(1); Douglas v. Noelle, 567 F.3d 1103 (9th Cir. 2009). Along with the declaration, appellant must provide a copy of his prison mail log reflecting the mailing of the motion for reconsideration and, if possible, a copy of the motion. See Fed. R. App. P. 4(c)(1); Houston v. Lack, 487 U.S. 266, 270 (1988). If appellant does not comply with this order, the Clerk will dismiss this request for a certificate of appealability pursuant to Ninth Circuit Rule 42-1. Briefing is suspended pending further order of this court. [12467702] (JMR) [Entered: 06/09/2022 02:26 PM]

06/21/2022 4 Filed Appellant Eric E. Johnson response to order to show cause. [12477092] (NAC) [Entered: 06/22/2022 12:37 PM]

08/24/2022 5 Filed order (MARY M. SCHROEDER, DIARMUID F. O'SCANLAIN and DANIELLE J. FORREST) The district court entered judgment on February 15, 2022. On May 2, 2022, appellant filed a notice of appeal, which was signed and dated April 19, 2022. Appellant's notice of appeal was not filed or delivered to prison officials within 30 days after entry of the judgment, see 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1), but stated that appellant had "promptly filed a motion for reconsideration" after receiving the district court's judgment. No motion for reconsideration is reflected on the district court's docket. We have received and reviewed appellant's response to this court's June 9, 2022 order directing appellant to file a statement attesting to the date on which the motion for reconsideration was deposited in the institution's internal mail system for delivery to the district court, and to provide a copy of the motion. Appellant's response to the June 9, 2022 order attaches a copy of his prison mail log that documents a mailing to the district court on February 22, 2022, which does not appear on the district court's docket. The response states that appellant did not retain a copy of the motion for reconsideration sent to the district court. Assuming that the February 22, 2022 mailing was a motion that would have tolled the time to appeal from the February 15, 2022 judgment, had it been received by the district court, we now review this appeal pursuant to the prefiling review order entered in No. 12-80065. See Fed. R. App. P. 4(a)(4), 4(c). Because we conclude that the appeal is so insubstantial as to not warrant further review, it will not be permitted to proceed. See In re Thomas, 508 F.3d 1225 (9th Cir. 2007). Appeal No. 22-15686 is therefore dismissed. This order, served on the district court for the Eastern District of California, will constitute the mandate of this court. No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions will be entertained. DISMISSED. [12525583] (JMR) [Entered: 08/24/2022 03:02 PM]

09/08/2022 6 Filed Appellant Eric E. Johnson motion to reconsider (document titled: suggestion for rehearing en banc). Deficiencies: No further filings per 8/24/22 order. Served on 08/04/2022. (Sent copy of docket

ERIC E. JOHNSON,

Petitioner – Appellant,

v.

SECRETARY OF CORRECTIONS,

Respondent – Appellee.

sheet & 8/24/22 order) [12537853] (RL) [Entered: 09/12/2022 09:56 AM]