

OCT 19 2009

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JERAD HITE,

Petitioner - Appellant,

v.

E. EVANS, Warden,

Respondent - Appellee.

No. 07-56078

D.C. No. CV-07-00146-R

MEMORANDUM *

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted October 7, 2009
Pasadena, California

Before: KLEINFELD and TALLMAN, Circuit Judges, and TRAGER, ** District
Judge.

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The Honorable David G. Trager, Senior United States District Judge
for the Eastern District of New York, sitting by designation.

Jerad Hite (“Petitioner”) is currently serving an indeterminate prison term after being convicted of one count of assault with a deadly weapon in violation of section 245 of the California Penal Code. Petitioner appeals the district court’s denial of his petition for a federal writ of habeas corpus as untimely based on a finding that Petitioner failed to “diligently follow[] up” as required by *Huizar v. Carey*, 273 F.3d 1220, 1223 (9th Cir. 2001). We have jurisdiction under 28 U.S.C. § 2253. We reverse the district court’s dismissal of the petition and remand with instructions to adjudicate the habeas petition on the merits.

Petitioner sent three pieces of mail to the California Supreme Court on January 16, 2004, and he alleges that these mailings constituted a state habeas petition. The California Supreme Court received these mailings and responded by letter on January 15, 2005, informing Petitioner that his habeas petition needed to be filed on Form MC-275 pursuant to California Rule of Court 8.380. Petitioner refiled his state habeas petition on the correct form ten days after receiving this letter. Thus, Petitioner diligently followed up with his state habeas petition.

Petitioner is entitled to statutory tolling under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) because although the 2004 mailings were not on the required form, California Rule of Court 8.380 allows petitioners not represented by an attorney to file a petition without the form for good cause. This

exception permits a finding that Petitioner's 2004 mailings were "properly filed" under *Artuz v. Bennett*, 531 U.S. 4, 8 (2000). Consequently, Petitioner is entitled to statutory tolling for the time the California Supreme Court had Petitioner's 2004 mailings, making his federal habeas petition timely under AEDPA by thirteen days. The district court erred in dismissing Petitioner's federal habeas petition as untimely. The district court should proceed to adjudicate the federal habeas petition on its merits.

REVERSED and REMANDED with instructions.