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

DONALD RAYE RANDOLPH,

Petitioner,

No. CIV-S- 09-1788 FCD KJM P

vs.

JAMES WALKER, Warden,

ORDER AND

Respondent.

FINDINGS AND RECOMMENDATIONS

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Petitioner is a state prison inmate proceeding pro se with a petition for a writ of habeas corpus challenging the manner in which the credits against his sentence have been calculated. He has also filed a motion for discovery of a number of documents. Respondent has filed a motion to dismiss, arguing that the petition was filed outside the statute of limitations.

I. Background

Petitioner sought administrative review of the calculation of his sentence credits, which culminated in the February 5, 2007 Director’s Level Decision rejecting his claims. Mot. to Dismiss, Ex. 1 (Docket No. 17-2) at 34.¹

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¹ Page references are to those assigned by the court’s CM/ECF system.

1 On March 17, 2008, petitioner signed the certificate of service for a petition for a
2 writ of habeas corpus, which was filed in Solano County Superior Court on April 8, 2008. Id.,
3 Ex. 1 at 2, 7. The Superior Court denied the writ on June 3, 2008. Id., Ex. 2 (Docket No. 17-3)
4 at 2. Petitioner waited until October 30, 2008 to give prison authorities his next challenge, which
5 was filed in the state Court of Appeal on November 10, 2008. Id., Ex. 3 (Docket No. 17-4) at 2,
6 7. This petition was denied on December 23, 2008. Id., Ex. 7 (Docket No. 17-8) at 2.

7 On March 5, 2009, petitioner mailed a writ to the California Supreme Court,
8 where it was filed on March 6, 2009. Id., Ex. 8 (Docket No. 17-9) at 2, 6. It was denied on May
9 13, 2009. Id., Ex. 9 (Docket No. 17-10) at 2.

10 II. Analysis

11 A. The Statute Of Limitations

12 One of the changes the Antiterrorism and Effective Death Penalty Act (AEDPA)
13 made to the habeas statutes was to add a statute of limitations for filing a habeas petition:

14 (d)(1) A 1-year period of limitation shall apply to an application for
15 a writ of habeas corpus by a person in custody pursuant to the
16 judgment of a State court. The limitation period shall run from the
latest of—

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

19 (B) the date on which the impediment to filing an application
20 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;

21 (C) the date on which the constitutional right asserted was initially
22 recognized by the Supreme Court, if the right has been newly
recognized by the Supreme Court and made retroactively
23 applicable to cases on collateral review; or

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

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

4 28 U.S.C. § 2244.

5 The statute of limitations applies whether a petitioner is challenging his
6 underlying state conviction or some administrative action, such as the denial of parole or a
7 disciplinary finding. Shelby v. Bartlett, 391 F.3d 1061, 1062 (9th Cir. 2004). In these cases, the
8 limitations period is governed by § 2244(d)(1)(D) and the event triggering the running of the
9 statute is the date petitioner learns of the administrative decision. Redd v. McGrath, 343 F.3d
10 1077, 1082-83 (9th Cir. 2003). In this case, the administrative decision was issued on February
11 5, 2007, so the statute of limitations period began to run on February 6, 2007, and expired
12 February 8, 2008. Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002) (Fed. R. Civ. P. 6(a)
13 governs AEDPA time calculations; it excludes the day of the event from which the time period
14 begins to run from calculation of that time period).

15 Petitioner suggests, however, that he did not receive the Director’s Level Decision
16 on February 5. Opp’n (Docket No. 19) at 3. He argues that these decisions are delivered by
17 courier and so do not have a postmark, only a date stamped by the institution’s mailroom to show
18 the date of receipt. In support he offers three envelopes from the Inmate Appeals Branch, which
19 do bear institutional stamps. Id. at 18-19. Two of the stamps are illegible, but one shows a date
20 of 2009 and the envelopes themselves have a small “4/08” at the bottom, suggesting the latter is
21 an issue date for the form. Accordingly, although they may be used for purposes of illustration,
22 these envelopes throw little light on the statute of limitations question presented here.

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1 In Shelby, the Ninth Circuit relied on petitioner’s concession that he had timely
2 received notice of the administrative denial when it determined the triggering date for the statute
3 of limitations. It also appears to have established a presumption that an inmate will in fact
4 receive notice on the day the denial is issued, a presumption petitioner must rebut:

5 Here, as in *Redd*, Shelby does not dispute that he received timely
6 notice of the denial of his administrative appeal on July 12, 2001,
7 and he offers no evidence to the contrary. Therefore, the limitation
8 period began running the next day.

8 Shelby, 391 F.3d at 1066. Although the petitioner in this case does not concede that he received
9 notification on February 5, he has presented no evidence to the contrary. Accordingly, the court
10 concludes that the statute of limitations began to run on February 6, 2007.

11 Petitioner also argues he is entitled to the benefit of the mailbox rule in a
12 calculation of when his initial state habeas petition was filed. Under the prison mailbox rule of
13 Houston v. Lack, 487 U.S. 266, 276 (1988), a document is filed when it is given to prison
14 authorities for mailing. See also Patterson v. Stewart, 251 F.3d 1243, 1245 n.2 (9th Cir. 2001).
15 Application of that rule does not render the instant petition timely, for it merely changes the
16 filing date of petitioner’s superior court writ to March 17, 2008, which is still after the statute of
17 limitations expired. Although the statute of limitations is tolled during the pendency of any
18 “properly filed” state collateral attack, a state petition filed after the limitations period has run
19 will neither revive nor toll the statute of limitations Nino v. Galaza, 183 F.3d 1003, 1006-07 (9th
20 Cir. 1999); Jimenez v. Rice, 276 F.3d 478, 481 (9th Cir. 2001).

21 B. Impediment To Filing

22 Petitioner argues that the statute of limitations question should be evaluated under
23 § 2244(d)(1)(B), because institutional restrictions on his access to the law library were an
24 impediment that prevented his timely filing of his state petitions. He attaches a grievance in
25 which he complains that his access to the law library was restricted in January 2007 after he met
26 a variety of deadlines in a case pending in the Northern District of California. Opp’n at 21. In

1 his formal level appeal he says he is unable to “effectively prosecute the matter pending before
2 the U.S. District Court,” without mentioning a state habeas petition. Id. The second level
3 decision in response to the grievance, dated March 7, 2007, reports that the law librarian was
4 interviewed on that date and “provided records to show when Appellant registered his court
5 deadlines and the times he was ducated to the Law Library (copies of these records are
6 attached).” Id. at 24. Petitioner has not, however, attached the records of his law library
7 attendance and makes nothing but an unsupported claim that the impediment was removed in
8 May 2007. Id. at 6. He has not shown there was an impediment, much less addressed how the
9 impediment prevented him from filing his federal habeas petition. Bryant v. Arizona Attorney
10 General, 499 F.3d. 1056, 1060 (9th Cir. 2007) (petitioner must demonstrate causal connection
11 between inadequate law library and inability to file); Ferguson v. Sisto, 2010 WL 378050 at 3-4
12 (E.D. Cal. 2010) (no causal connection shown between library restrictions and filing).

13 Even if the court deems the restrictions to have been an impediment, the instant
14 petition still is not timely. If the court assumes that petitioner’s access to the law library was
15 restored on May 1, 2007, the statute of limitations began to run on May 2, 2007. The superior
16 court petition filed on March 17, 2008, was filed on day 320 of the limitations period. The time
17 was tolled through June 3, 2008, began to run again on June 4 and expired on July 21, 2008.²
18 Petitioner did not file his petition in the Court of Appeal until October 30, 2008, after the statute
19 of limitations period expired.

20 In Carey v. Saffold, 536 U.S. 214, 218-21 (2002), the Supreme Court held that the
21 AEDPA statute of limitations is tolled not only between the actual filing and decision on a writ,
22 but also during those periods between filings as a petitioner works his or her way “up the ladder”
23 through higher courts to complete “one full round” of state court review of claims. Id. at 217,
24 219-20. However, in Evans v. Chavis, 546 U.S. 189, 201 (2006), the Supreme Court directed the

25 ² The time actually expired on July 19, 2008, but as that day was a Saturday, it is
26 excluded from the computation. Fed. R. Civ. P. 6(a)(1)(C).

1 federal courts to determine whether a “gap” petition was delayed unreasonably, even when a state
2 court did not deny the petition as untimely. The court suggested that a gap longer than the thirty
3 to sixty days permitted in states with written rules for filing might be reasonable, while six
4 months would not be. Id. at 854. Recently, the Ninth Circuit has determined that gaps of 115
5 and 101 days, with no justification for delays, were “substantially longer” than the “30 to 60
6 days” referenced in Evans, precluding eligibility for statutory tolling. Chaffer v. Prosper, 592
7 F.3d 1046, 1048 (9th Cir. 2010). In this case, petitioner is not entitled to “gap” tolling because
8 he waited over four months – more than 120 days – to file his second state petition in the
9 appellate court, and has not justified the delay. Accordingly, even assuming that the statute of
10 limitations began to run on May 1, 2007, the petition is not timely.

11 C. Equitable Tolling

12 Petitioner also argues that the limitations on his access to the law library
13 constitute grounds for equitable tolling.

14 The Ninth Circuit has held:

15 We will permit equitable tolling of AEDPA's limitations period
16 only if extraordinary circumstances beyond a prisoner's control
17 make it impossible to file a petition on time. When external forces,
18 rather than a petitioner's lack of diligence, account for the failure to
file a timely claim, equitable tolling of the statute of limitations
may be appropriate.

19 Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999) (internal quotations, citations omitted). It
20 is petitioner’s burden to show he is entitled to equitable tolling. Espinoza-Matthews v. People of
21 the State of California, 432 F.3d 1021, 1026 (9th Cir. 2005). To meet his burden, he must
22 demonstrate "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary
23 circumstance stood in his way." Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005). Several courts
24 have rejected the impact of restrictions on law library access as bases for equitable tolling unless
25 the petitioner can show actual harm. Wilson v. Bennett, 188 F. Supp. 2d 347, 353 (S.D.N.Y.

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1 2002) (limited access to library); Lindo v. Lefever, 193 F. Supp. 2d 659, 663 (E.D.N.Y. 2002)
2 (same).

3 Once again, even if the court considers the restrictions to provide a basis for
4 equitable tolling, petitioner concedes that those restrictions were lifted in May 2007. He has not
5 explained why he was unable to file during the nine months that remained at that point in the
6 limitations period. He is not entitled to equitable tolling.

7 III. Discovery Motion

8 Because the petition is not timely, petitioner is not entitled to pursue discovery.

9 IT IS THEREFORE ORDERED that petitioner's motion for discovery (docket no.
10 10) is denied.

11 IT IS HEREBY RECOMMENDED that respondent's motion to dismiss (docket
12 no. 17) be granted.

13 These findings and recommendations are submitted to the United States District
14 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
15 one days after being served with these findings and recommendations, any party may file written
16 objections with the court and serve a copy on all parties. Such a document should be captioned
17 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
18 shall be served and filed within fourteen days after service of the objections. The parties are
19 advised that failure to file objections within the specified time may waive the right to appeal the
20 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

21 DATED: June 23, 2010.

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24 
25 U.S. MAGISTRATE JUDGE
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