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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DORIAN D. BAILEY,)	Case No. 2:10-CV-0084 JAM-CKD P
)	
Petitioner,)	
)	<u>ORDER ADOPTING IN PART AND</u>
v.)	<u>REJECTING IN PART THE MAGISTRATE</u>
)	<u>JUDGE'S FINDINGS AND</u>
)	<u>RECOMMENDATIONS</u>
GREG LEWIS,)	
)	
Respondent.)	

Petitioner, Dorian D. Bailey ("Petitioner"), a state prisoner represented by counsel, has filed this application for a writ of habeas corpus pursuant to 28 U.S.C. Section 2254. The matter was referred to United States Judge Carolyn Delaney pursuant to 28 U.S.C. Section 636(b)(1)(B) and Local Rule 302.

On March 16, 2012, Magistrate Judge Delaney issued Findings and Recommendations (Doc. #51) recommending the Court grant Respondent Greg Lewis's ("Respondent") Motion to Dismiss (Doc. #20). Petitioner filed Objections to Magistrate Judge's Findings and Recommendations (Doc. #57). In accordance with the provisions of 28 U.S.C. Section 636(b)(1)(C) and Local Rule 304, this court has conducted a de novo review of this case.

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I. FACTUAL AND PROCEDURAL BACKGROUND

In 2004, a jury convicted Petitioner of thirteen counts charging various sex offenses and one count of first degree robbery. On July 9, 2004, the Sacramento County Superior Court imposed an aggregate unstayed sentence of two consecutive terms of 25 years to life plus 54 years.

Since his 2004 conviction, Petitioner has sought review through the California appellate courts, in addition to the United States Supreme Court. After seeking and being denied review in the California Supreme Court on October 31, 2007, Petitioner subsequently filed one state post-conviction collateral challenge. On January 29, 2009, he filed an application for writ of habeas corpus in the Sacramento County Superior Court. On March 6, 2009, the Superior Court denied the petition as untimely.

Petitioner filed the instant federal writ of habeas corpus petition (Doc. #1) on January 11, 2010.¹ Applying the mailbox rule, the Magistrate Judge found that because petitioner signed the petition on November 16, 2009, the petition was constructively filed on November 16, 2009. See Huizar v. Carey, 273 F.3d 1220, 1222 (9th Cir. 2001) (holding that a pro se habeas petition is "deemed filed when [the petitioner] hands it over to prison authorities for mailing to the district court.").

Respondent moves to dismiss the pending habeas petition (Doc.

¹ Petitioner filed his Petition for Writ of Habeas Corpus pro se. Due to mental health concerns, on April 5, 2010, the Magistrate Judge previously presiding over the case ordered an attorney from the Federal Defenders Office to represent Petitioner (Doc. #4). On May 6, 2010, Petitioner substituted that attorney for Mark Eibert, Petitioner's current counsel (Doc. #12).

1 #20). Respondent argues that the petition is time-barred under the
2 Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28
3 U.S.C. § 2244. Under AEDPA, Petitioner had one year to file a writ
4 of habeas corpus running from the date on which the judgment became
5 final by conclusion of direct review. 8 U.S.C. § 2244(d)(1)(A).
6

7 In the Findings and Recommendations, the Magistrate Judge
8 finds that Petitioner's direct review concluded when his second
9 petition for review was denied by the California Supreme Court and
10 that the limitations period began to run on January 30, 2008 and
11 concluded one year later on January 29, 2009. Thus, because the
12 petition in the instant case was not constructively filed until
13 November 16, 2009, the Magistrate Judge finds that absent tolling,
14 the petition is time-barred.

15 Petitioner does not challenge the Respondent's or the
16 Magistrate Judge's AEDPA analysis, but instead argues that the
17 limitations period should be equitably tolled due to his lifelong
18 mental illness and the strong medications he was taking during the
19 relevant time period. The limitations period is subject to
20 equitable tolling if the petitioner demonstrates: "(1) that he has
21 been pursuing his rights diligently, and (2) that some
22 extraordinary circumstance stood in his way." Pace v. DiGuglielmo,
23 544 U.S. 408, 418 (2005); Bills v. Clark, 628 F.3d 1092 (9th Cir.
24 2010) (applying the Pace standard to petitioners with mental
25 impairments). Petitioner argues that his mental illness rendered
26 him unable to prepare his federal habeas petition or to timely
27 assist in its preparation and filing.

28 The Magistrate Judge conducted an evidentiary hearing on

1 February 21, 2012 to resolve the issue of whether the statute of
2 limitations should be equitably tolled. Both parties lodged
3 documents containing Petitioner's mental health records in advance
4 of the hearing and Petitioner produced his mother, J. Yvonne
5 Heriveaux, as a witness. Ms. Heriveaux testified that she prepared
6 the habeas petition "because he wasn't able to." Tr. of
7 Proceedings Before the Honorable Carolyn K. Delaney U.S. Mag. J
8 (Doc. #56) at 25 [hereinafter "Tr."]. Ms. Heriveaux testified that
9 Petitioner "wasn't talking right, he wasn't remembering anything,
10 he was just like in another space in another world." Id. Ms.
11 Heriveaux stated that in about May 2008, she sent Petitioner the
12 petition to sign and return to her for filing, but Petitioner
13 repeatedly denied receiving it. Ms. Heriveaux stated that when she
14 reminded him about signing the petition, he would reply "[w]hat
15 paper, mom? What paper are you talking about? That sort of thing.
16 He just could not remember what I was talking about." Id. at 27,
17 28. Ms. Heriveaux testified that she sent the petition to him a
18 second time in about November or December 2008, and reminded him to
19 sign and return it every time she talked to him. Id. at 27-29, 38.
20 In sum, Ms. Heriveaux testified that Petitioner was unable to sign
21 the petition because his mental state was "just horrific." Id. at
22 37.

23 Respondent presented evidence to cast doubt on Petitioner's
24 claim that he was incapable of functioning during the relevant
25 period. For example, progress notes from February 2008 indicate
26 that Petitioner "had legal questions" and was directed to the law
27 library, and that he "reported he has reviewed his medical records
28 and they are to be mailed to his mother." Tr. at 45.

1 the filing deadline under the totality of the
2 circumstances, including reasonably available access to
3 assistance.

628 F.3d at 1100 (internal citations omitted).

4 C. Analysis

5 Petitioner argues that the Court should equitably toll the
6 statute of limitations. First, Petitioner argues he satisfies
7 Bills' first requirement because his mental illness was an
8 extraordinary circumstance beyond his control. Petitioner argues
9 that the evidence before the Court leaves room for no other
10 conclusion than that he satisfied the first, "extraordinary
11 circumstance" prong of the Bills test. The Court agrees. During
12 the relevant period, Petitioner consistently
13 (1) was diagnosed with schizophrenia and depression,
14 (2) experienced audio and visual hallucinations, and (3) was being
15 administered multiple psychotropic drugs. Petitioner also spent
16 much of 2009 in a mental health crisis bed in Salinas Valley
17 Prison. In March 2009, a psychologist noted that Petitioner's
18 "fund of information, intellectual functioning, concentration,
19 attention, and memory" were "all compromised" and that petitioner
20 had a "poor memory" and was a "poor historian." Tr. 5-7.
21 Petitioner's GAF score was assessed at 33.² Id. at 6. In addition
22

23 ² "GAF" is an acronym for "Global Assessment of Functioning," a
24 scale used by clinicians to assess an individual's overall level of
25 functioning, including the "psychological, social, and occupational
26 functioning on a hypothetical continuum of mental health-illness."
27 Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental
28 Disorders with Text Revisions 32 (4th ed. 2004). A GAF score of
31-40 indicates: "Some impairment in reality testing or
communication (e.g., speech is at times illogical, obscure, or
irrelevant) OR major impairment in several areas, such as work or
school, family relations, judgment, thinking, or mood (e.g.,
depressed man avoids friends, neglects family, and is unable to
work; child frequently beats up younger children, is defiant at

1 to the numerous reports detailing Petitioner's mental illness, the
2 Court is persuaded by Ms. Heriveax's testimony in which she states
3 that she sent him the petition twice, but due to his mental illness
4 and the psychotropic drugs, he was unable to sign it. For those
5 reasons, the Court finds that Petitioner's "mental impairment made
6 him unable to take steps to effectuate [the filing of the
7 petition]." Bills, 628 F.3d at 1100 n. 2.

8 As to the second Bills prong requiring diligence, Petitioner
9 argues that the issue is not whether he was capable of signing his
10 name, the issue is whether he was able to remember that he needed
11 to sign his name and return the documents in the prison mail,
12 whether his psychotically disorganized thinking made him able to
13 understand the need to timely file, and whether he was mentally
14 capable of doing that at the right time and place. Petitioner
15 argues that everything in the record, and especially the testimony
16 of his mother at the hearing, supports the conclusion that he was
17 mentally unable to cooperate with the assistance he had to sign his
18 name and mail the papers back to her.

19 The Ninth Circuit explained that the diligence prong requires
20 a

21 'totality of the circumstances' inquiry . . . [as to]
22 whether the petitioner's impairment was a but-for
23 cause of any delay. Thus, a petitioner's mental
24 impairment might justify equitable tolling if it
25 interferes with the ability to understand the need for
assistance, the ability to secure it, or the ability
to cooperate with or monitor assistance the petitioner
does secure.

26 Bills, 628 F.3d at 1100.

27 Here, the Magistrate Judge reasoned that since it could have
28 home, and is failing at school.)" Id.

1 been possible for Petitioner to physically sign his name during the
2 relevant time period, he does not satisfy the diligence
3 requirement. However, the Ninth Circuit clarifies that

4 Despite the unequivocal 'impossibility' language in
5 our standard, we have not insisted that it be
6 literally impossible for a petitioner to file a
7 federal habeas petition on time as a condition of
8 granting equitable tolling. We have granted equitable
9 tolling in circumstances where it would have
10 technically been possible for a prisoner to file a
11 petition, but a prisoner would have likely been unable
12 to do so.

13 Id. at 1100 n.3 (quoting Harris v. Carter, 515 F.3d 1051, 1055 n.5
14 (9th Cir. 2008)).

15 The record shows that Petitioner's mental illness made it
16 impossible for him to cooperate with Ms. Heriveaux and get his
17 petition filed in time. During the entire relevant time period,
18 Petitioner was continually administered psychotropic drugs and, for
19 almost half of the relevant time period, he was restricted to a
20 mental health crisis bed in prison. Furthermore, Ms. Heriveaux's
21 testimony illustrates that, despite her assistance, Petitioner's
22 mental illness prevented him from completing the simple task of
23 signing his habeas petition. Ms. Heriveaux testified that despite
24 numerous reminders to sign the petition, Petitioner could not
25 remember what she was talking about. Tr. at 27. She testified
26 that he was incoherent, had slurred speech, and talked to people
27 who were not there, including spirits. Id. at 27-30. Based on the
28 documented severity of Petitioner's mental illness, his continual
use of psychotropic medications, his numerous stays at the mental
health crisis bed, and his mother's testimony about his mental
condition and the difficulty of getting him to merely sign his

1 petition, the Court finds that petitioner's "mental impairment made
2 it impossible [for him] to meet the filing deadline under the
3 totality of the circumstances[.]" Bills, 628 F.2d 1100. Thus, the
4 Court finds that Petitioner satisfies the diligence prong under
5 Bills and that the statute of limitations should be equitably
6 tolled.

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8 III. ORDER

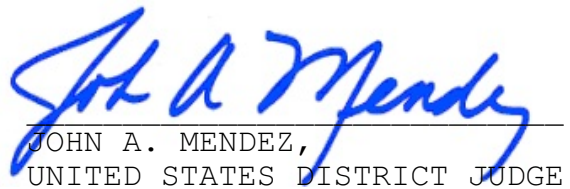
9 For the reasons set forth above,

10 1. The Findings and Recommendations filed March 16, 2012 are
11 adopted in part and rejected in part. The Court adopts the
12 Magistrate Judge's summation of the legal and factual background of
13 the case, the application of the mailbox rule, the findings of the
14 relevant time period for the statute of limitations under AEDPA,
15 and the synopsis of the evidentiary hearing. The Court rejects the
16 Magistrate Judge's finding that Petitioner failed to show diligence
17 under Bills and the Court rejects the recommendation that
18 Respondent's Motion to Dismiss should be granted.

19 2. Respondent's September 13, 2010 Motion to Dismiss is
20 DENIED.

21 IT IS SO ORDERED.

22 Dated: August 17, 2012

23 
JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE