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

HUNG T. LY,

Petitioner,

No. 2:10-cv-1236 KJM JFM (HC)

vs.

KENNETH CLARK,

Respondent.

FINDINGS AND RECOMMENDATIONS

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Petitioner is a state prisoner proceeding pro se with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 2005 conviction on charges of first degree murder with special circumstances. Petitioner is serving a sentence of life in prison without possibility of parole plus twenty-five years to life, imposed on March 24, 2006. This matter is before the court on respondent’s motion to dismiss the action as unexhausted and barred by the statute of limitations, and on petitioner’s motion for stay and abeyance.

I. Statute of Limitations

Section 2244(d) of Title 28 of the United States Court contains a statute of limitations for filing a habeas petition in federal court:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the

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1 judgment of a State court. The limitation period shall run from the  
2 latest of-

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

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

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

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

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

21 28 U.S.C. § 2244. The following facts are relevant to the statute of limitations analysis.

22 1. On September 6, 2005, petitioner was convicted by a jury of first degree  
23 murder with special circumstances.

24 2. On March 24, 2006, petitioner was sentenced to life in prison without  
25 possibility of parole plus twenty-five years to life in prison.

26 3. On September 23, 2008, petitioner's conviction was affirmed on direct appeal  
by the California Court of Appeal for the Third Appellate District as, with the exception of a  
minor sentencing correction, was his sentence.

4. On January 14, 2009, the California Supreme Court denied review.

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1           5. On March 10, 2010, petitioner filed<sup>1</sup> a petition for writ of habeas corpus in the  
2 Sacramento County Superior Court. On April 26, 2010, the superior court denied the petition as  
3 untimely. The court also found petitioner's claims were without merit.

4           7. On May 9, 2010, petitioner filed a motion for reconsideration in the  
5 Sacramento County Superior Court. On May 25, 2010, the superior court denied the request.

6           8. On May 17, 2010, petitioner filed the instant action.

7           9. On June 7, 2010, petitioner filed a motion for stay and abeyance of this action.  
8 On the same date, a petition for writ of habeas corpus signed and dated by petitioner on June 1,  
9 2010 was filed in the California Court of Appeal for the Third Appellate District. On June 17,  
10 2010, the state court of appeal denied the petition in an order containing no statement of reasons  
11 or citation to authority.

12           10. On August 2, 2010, petitioner filed a habeas corpus petition in the California  
13 Supreme Court. As of the date of respondent's motion to dismiss, that petition was still pending  
14 and no party has filed any order from the California Supreme Court resolving that petition.

15           The statute of limitations started to run on petitioner's federal habeas corpus  
16 claims on April 15, 2009, following expiration of the time for seeking direct review in the United  
17 States Supreme Court. See Bowen v. Roe, 188 F.3d 1157, 1160 (9<sup>th</sup> Cir. 1999). Three hundred  
18 twenty-nine days elapsed before petitioner filed his first petition for habeas corpus in the state  
19 court system. However, that petition was denied as untimely. It was not, therefore, "properly  
20 filed" within the meaning of 28 U.S.C. §2244(d)(2) and did not toll the one year limitation  
21 period. See Pace v. DiGuglielmo, 544 U.S. 408, 414 (2005); Bonner v. Carey, 425 F.3d 1145,  
22 1146 (9<sup>th</sup> Cir. 2005). This action was filed on May 17, 2010, approximately one month after the  
23 one year limitation period expired.

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25           <sup>1</sup> The petition is signed and dated March 10, 2010. As a general rule, pleadings filed by a  
26 prisoner are deemed filed on the date they are delivered to prison officials for mailing to the  
court. See Houston v. Lack, 487 U.S. 266, 276 (1988). All such filing dates referred to in these  
findings and recommendations are in accordance with that rule.

1           Petitioner claims that he is entitled to equitable tolling of the statute of limitations  
2 because (1) English is his second language and it took “extreme time” for him to review the  
3 voluminous trial transcript and to gain an understanding of the relevant legal issues; and (2) his  
4 appellate attorney was ineffective in failing to raise all issues on direct appeal, which left  
5 petitioner in the position of having to file an exhaustion petition in propria persona.

6           The habeas corpus statute of limitations is “not jurisdictional and is subject to  
7 equitable tolling.” Souliotes v. Evans, 622 F.3d 1173, 1180 (9<sup>th</sup> Cir. 2010) (citing Holland v.  
8 Florida, \_\_ U.S. \_\_, 130 S.Ct. 2549 (2010)).

9           “[A] litigant seeking equitable tolling [of the one-year AEDPA  
10 limitations period] bears the burden of establishing two elements:  
11 (1) that he has been pursuing his rights diligently, and (2) that some  
12 extraordinary circumstance stood in his way.” Pace v.  
13 DiGuglielmo, 544 U.S. 408, 125 S.Ct. 1807, 1814, 161 L.Ed.2d  
14 669 (2005). “[T]he threshold necessary to trigger equitable tolling  
15 under [the] AEDPA is very high, lest the exceptions swallow the  
16 rule.” Miranda v. Castro, 292 F.3d 1063, 1066 (9<sup>th</sup> Cir.2002)  
17 (internal quotation marks and citation omitted). This high bar is  
18 necessary to effectuate the “AEDPA’s statutory purpose of  
19 encouraging prompt filings in federal court in order to protect the  
20 federal system from being forced to hear stale claims.” Guillory v.  
21 Roe, 329 F.3d 1015, 1018 (9<sup>th</sup> Cir.2003) (internal quotation marks  
22 and citation omitted). Equitable tolling determinations are “highly  
23 fact-dependent.” Whalem/Hunt v. Early, 233 F.3d 1146, 1148 (9<sup>th</sup>  
24 Cir.2000) (en banc) (per curiam). Accord Lott v. Mueller, 304 F.3d  
25 918, 923 (9<sup>th</sup> Cir.2002) (observing that equitable tolling  
26 determinations “turn[ ] on an examination of detailed facts”).

19 Mendoza v. Carey, 449 F.3d 1065, 1068-69 (9<sup>th</sup> Cir. 2006).

20           In Mendoza, the United States Court of Appeals for the Ninth Circuit held that a  
21 limited category of non-English-speaking habeas corpus petitioners might qualify for equitable  
22 tolling of the limitation period. However, to qualify, the non-English-speaking petitioner “must,  
23 at a minimum, demonstrate that during the running of the AEDPA time limitation, he was  
24 unable, despite diligent efforts, to procure either legal materials in his own language or  
25 translation assistance from another inmate, library personnel, or other source.” Id. at 1070.  
26 Petitioner has made neither that showing nor the threshold on which it rests. He is not “non-

1 English-speaking”, rather, English is his second language. Petitioner’s asserted language  
2 difficulties do not qualify him for equitable tolling.

3 Nor does petitioner’s claim that his appellate counsel was ineffective in failing to  
4 raise on direct appeal all the claims petitioner now seeks to bring in this action entitle him to  
5 equitable tolling. The fact that petitioner’s appellate counsel did not raise certain issues on direct  
6 appeal may explain why petitioner was required to seek collateral review of those claims in state  
7 court, but it is not an extraordinary circumstance sufficient to support equitable tolling of the  
8 statute of limitations.

9 For the foregoing reasons, this action is barred by the one-year statute of  
10 limitations and should be dismissed.

11 Respondent also contends that the petition must be dismissed because petitioner’s  
12 first two claims for relief are unexhausted. Petitioner concedes that these two claims are  
13 unexhausted. As a general rule, a federal district court may not entertain a petition for habeas  
14 corpus unless the petitioner has exhausted state remedies with respect to each of the claims  
15 raised, and a mixed petition containing both exhausted and unexhausted claims must be  
16 dismissed. Rose v. Lundy, 455 U.S. 509 (1982). As noted above, petitioner filed a motion to  
17 hold these proceedings in abeyance pending exhaustion of state court remedies. However,  
18 because even the exhausted claims were not timely filed, the entire action must be dismissed.  
19 Accordingly, petitioner’s motion for stay and abeyance should be denied.

20 For all of the foregoing reasons, petitioner’s application for a writ of habeas  
21 corpus should be dismissed. Pursuant to Rule 11 of the Rules Governing Section 2254 Cases in  
22 the United States District Courts, “[t]he district court must issue or deny a certificate of  
23 appealability when it enters a final order adverse to the applicant.” Rule 11, 28 U.S.C. foll. §  
24 2254. A certificate of appealability may issue under 28 U.S.C. § 2253 “only if the applicant has  
25 made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The

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1 court must either issue a certificate of appealability indicating which issues satisfy the required  
2 showing or must state the reasons why such a certificate should not issue. Fed. R. App. P. 22(b).

3           Where, as here, the petition should be dismissed on procedural grounds, a  
4 certificate of appealability “should issue if the prisoner can show: (1) ‘that jurists of reason  
5 would find it debatable whether the district court was correct in its procedural ruling’; and (2)  
6 ‘that jurists of reason would find it debatable whether the petition states a valid claim of the  
7 denial of a constitutional right.’” Morris v. Woodford, 229 F.3d 775, 780 (9th Cir. 2000)  
8 (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)).

9           After careful review of the entire record herein, this court finds that petitioner has  
10 not satisfied the first requirement for issuance of a certificate of appealability in this case.  
11 Specifically, jurists of reason would not find it debatable whether this action is barred by the  
12 statute of limitations. Accordingly, a certificate of appealability should not issue in this action.

13           Accordingly, IT IS HEREBY RECOMMENDED that:

- 14           1. Respondent’s September 7, 2010 motion to dismiss be granted;
- 15           2. This action be dismissed as barred by the statute of limitations;
- 16           3. Petitioner’s June 7, 2010 motion for stay and abeyance be denied; and
- 17           4. The district court decline to issue a certificate of appealability.

18           These findings and recommendations are submitted to the United States District  
19 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen  
20 days after being served with these findings and recommendations, any party may file written  
21 objections with the court and serve a copy on all parties. Such a document should be captioned  
22 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the  
23 objections shall be filed and served within fourteen days after service of the objections. The

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1 parties are advised that failure to file objections within the specified time may waive the right to  
2 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: February 9, 2011.

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6 UNITED STATES MAGISTRATE JUDGE

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