

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

EMANUEL MARTIN
SANCHEZ-GONZALEZ,

Petitioner,

No. 2:11-cv-0637 KJN

vs.

MICHAEL McDONALD, Warden,¹

ORDER and

Respondent.

FINDINGS & RECOMMENDATIONS

_____ /

I. Introduction

Petitioner is a state prisoner, proceeding without counsel, with an application for petition of writ of habeas corpus pursuant to 28 U.S.C. § 2254. Before the court is respondent’s motion to dismiss the pending habeas petition as barred by the statute of limitations. Petitioner has filed an opposition to the motion and respondent has filed a reply. For the reasons set forth below, the undersigned recommends that respondent’s motion be granted.

////

////

¹ Pursuant to respondent’s request, Michael McDonald, the current Warden of High Desert State Prison, is substituted as respondent in place of T. Felker. Fed. R. Civ. P. 25(d).

1 II. Statutory Filing Deadlines

2 On April 24, 1996, the Antiterrorism and Effective Death Penalty Act
3 (“AEDPA”) was enacted. Section 2244(d)(1) of Title 8 of the United States Code provides:

4 A 1-year period of limitation shall apply to an application for a writ
5 of habeas corpus by a person in custody pursuant to the judgment
6 of a State court. The limitation period shall run from the latest of –

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

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

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

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

21 28 U.S.C. § 2244(d)(1). Section 2244(d)(2) provides that “the time during which a properly filed
22 application for State post-conviction or other collateral review with respect to the pertinent
23 judgment or claim is pending shall not be counted toward” the limitations period. 28 U.S.C.
24 § 2244(d)(2).

25 For purposes of the statute of limitations analysis, the relevant chronology of this
26 case is as follows:

1. Petitioner was convicted on February 29, 2008, of one count of attempted
murder, and the following enhancements were found true: petitioner personally used a deadly
weapon and inflicted great bodily injury under circumstances involving domestic violence.

(Respondent’s Lodge Document (“LD”) 1.) Petitioner was sentenced to life with the possibility
of parole. (LD 1-2.)

////

1 2. Petitioner filed a timely appeal of the conviction. On August 4, 2009, the
2 California Court of Appeal for the Third Appellate District affirmed petitioner's judgment. (LD
3 2.)

4 3. On September 15, 2009, petitioner filed a petition for review in the California
5 Supreme Court, which was denied without comment on October 22, 2009. (LD 3-4.)

6 4. No post-conviction collateral challenges were filed in state court.

7 5. Pursuant to Rule 3(d) of the Federal Rules Governing Section 2254 Cases, the
8 instant action was constructively filed on February 25,² 2011. (Dkt. No. 1.)

9 The California Supreme Court denied the petition for review on October 22, 2009.
10 (LD 4.) Petitioner's conviction became final ninety days later, on January 20, 2010, when the
11 time for seeking certiorari with the United States Supreme Court expired. Bowen v. Roe, 188
12 F.3d 1157 (9th Cir. 1999). The AEDPA statute of limitations period began to run the following
13 day, on January 21, 2010. Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001). Absent
14 tolling, petitioner's last day to file his federal petition was on January 20, 2011.

15 Petitioner filed no state post-conviction collateral challenges to his conviction.
16 Therefore, the statute of limitations period expired on January 21, 2011. Petitioner filed the
17 instant action on February 25, 2011, over one month after the limitations period expired.
18 Accordingly, this action is time-barred unless petitioner can demonstrate he is entitled to
19 equitable tolling.

20 III. Equitable Tolling

21 Petitioner alleges that he is entitled to equitable tolling because High Desert State
22 Prison, where petitioner is incarcerated, was locked down seven different times between the
23 California Supreme Court's denial of the petition for review on October 22, 2009, and the
24 February 25, 2011 filing of the instant petition. Petitioner also contends that he has little

25 ² Although the proof of service is signed on February 27, 2011, petitioner states that he
26 served the petition on February 25, 2011. (Dkt. No. 1 at 15.)

1 education and is illiterate in English.

2 In Holland v. Florida, 130 S. Ct. 2549, 2560, 2562, 2564 (2010), the Supreme
3 Court recognized that the AEDPA statute of limitations “may be tolled for equitable reasons”
4 when the petitioner has made a showing of “extraordinary circumstances.” To be entitled to
5 equitable tolling, petitioner must demonstrate "(1) that he has been pursuing his rights diligently,
6 and (2) that some extraordinary circumstance stood in his way." Pace v. DiGuglielmo, 544 U.S.
7 408, 418 (2005). The Ninth Circuit has explained:

8 To apply the doctrine in “extraordinary circumstances” necessarily
9 suggests the doctrine’s rarity, and the requirement that
10 extraordinary circumstances “stood in his way” suggests that an
11 external force must cause the untimeliness, rather than, as we have
said, merely “oversight, miscalculation or negligence on [the
petitioner’s] part, all of which would preclude the application of
equitable tolling.

12 Waldron-Ramsey v. Pacholke, 556 F.3d 1008, 1011 (9th Cir. 2009) (internal citation omitted),
13 cert. denied, 130 S. Ct. 244 (2009). It is petitioner’s burden to show he is entitled to equitable
14 tolling. Espinoza-Matthews v. People of the State of California, 432 F.3d 1021, 1026 (9th Cir.
15 2005). “[T]he threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest
16 the exceptions swallow the rule.” Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003) (citation
17 omitted).

18 The diligence prong in Pace requires the petitioner to show he engaged in
19 reasonably diligent efforts to file his § 2254 petition throughout the time the limitations period
20 was running. Mendoza v. Carey, 449 F.3d 1065, 1071 n.6 (9th Cir. 2006) (stating that equitable
21 tolling “requires both the presence of an extraordinary circumstance and the inmate’s exercise of
22 diligence”). The petitioner must also demonstrate that he exercised reasonable diligence in
23 attempting to file his habeas petition after the extraordinary circumstances began, otherwise the
24 “link of causation between the extraordinary circumstances and the failure to file [is] broken.”
25 Spitsyn, 345 F.3d at 802. The “extraordinary circumstances” prong in Pace requires the
26 petitioner to “additionally show that the extraordinary circumstances were the cause of his

1 untimeliness, and that the extraordinary circumstances made it impossible to file a petition on
2 time.” Ramirez v. Yates, 571 F.3d 993, 997 (9th Cir. 2009) (internal quotations and citations
3 omitted).

4 Petitioner argues that language and education impeded his ability to pursue his
5 rights. Petitioner provides nothing other than his verified opposition to support his claims.

6 The case of Mendoza v. Carey is instructive. The Ninth Circuit held:

7 [the] combination of (1) a prison law library’s lack of Spanish-
8 language legal materials, and (2) a petitioner’s inability to obtain
9 translation assistance before the one-year deadline, could constitute
extraordinary circumstances.

10 Id., 449 F.3d at 1069. However, the court then determined the record was insufficient to show
11 whether Mendoza had exercised the requisite diligence and remanded the case to allow the
12 district court to clarify ambiguous facts. Id., 449 F.3d at 1071 n.6. The Ninth Circuit stated that
13 “a non-English speaking petitioner seeking equitable tolling must, at a minimum, demonstrate
14 that during the running of the AEDPA time limitation, he was unable, despite diligent efforts, to
15 procure either legal materials in his own language or translation assistance from an inmate,
16 library personnel, or other source.” Id., 449 F.3d at 1070; see also Rodriguez v. Evans, 2007 WL
17 951820 at *4-5 (N.D. Cal. 2007) (Rodriguez’ allegations that he does not speak English and had
18 to get someone to help him prepare his petition³ were an inadequate basis for equitable tolling
19 because Rodriguez failed to make the detailed showing required by Mendoza).

20 In his petition for writ of habeas corpus, Mendoza “had not provided any
21 explanation for the lengthy delay in filing, other than the allegation that he had been hindered
22 because he speaks Spanish and the prison does not provide Spanish language law books.”

24 ³ In Rodriguez, there was no indication that an assistant or jailhouse lawyer prepared the
25 petition or other pleadings. Id., at *4 n.3. Here, it is similarly unclear whether petitioner had
26 assistance in filing the petition. Indeed, petitioner simply inserted the arguments from his
petition for review filed in the California Supreme Court into the court’s form for filing a federal
petition. (Compare Dkt. No. 1 at 6-8, 10-12, with LD 3).

1 Mendoza, 449 F.3d at 1067. However, in Mendoza’s response to the order to show cause,
2 Mendoza provided detailed facts concerning two different prison law libraries, and a declaration
3 concerning his efforts to obtain legal materials in Spanish, to find staff persons who spoke
4 Spanish, and to find inmates who spoke Spanish. Id. at 1067-68. Mendoza also filed 47
5 identical, form declarations signed by Spanish-speaking prisoners, confirming that the prison law
6 libraries had no books in Spanish and no librarians or clerks who spoke Spanish. Id. at 1068.

7 In the instant case, petitioner “is a Mexican national, has little education[,] and is
8 illiterate concerning the [E]nglish language.” (Dkt. No. 14 at 1.) Petitioner also notes a “lack of
9 access to adequate legal assistance and materials in Spanish,” (id. at 2), citing Mendoza.

10 However, unlike Mendoza, petitioner does not allege that despite his diligent efforts he was
11 unable to secure legal materials in his own language or to obtain translation help from other
12 inmates, library personnel, or other sources. Petitioner has provided no declarations of other
13 inmates or prison officials, and has failed to set forth what efforts he took to seek legal assistance
14 in Spanish or English. See Diaz v. Kelly, 515 F.3d 149, 154 (2d Cir. 2008), cert. denied sub
15 nom. Diaz v. Conway, 129 S. Ct. 168 (2008) (in equitable tolling context, a petitioner has “a
16 substantial obligation to obtain assistance to mitigate his language deficiency”).⁴ Petitioner has
17 made no showing of any diligence in obtaining translating and legal assistance between the
18 beginning of the statute of limitations period and February 25, 2011, when he filed the instant
19 petition. Unlike Mendoza, petitioner has failed to identify specific facts that demonstrate it was
20 his language barrier, rather than his lack of diligence, that prevented him from timely pursuing
21 this action.

22 ////

23 _____
24 ⁴ In Diaz, the Second Circuit held that prisoners are required to take steps to contact
25 someone who speaks their language outside the prison who might assist in learning about the
26 legal requirements for filing a habeas corpus petition, and to make efforts to learn of such
requirements within their places of confinement to demonstrate diligence for purposes of
equitable tolling. Id.

1 Although petitioner claims to have a limited education, petitioner fails to explain
2 what education he has, or demonstrate how his education is limited. Courts have recognized that
3 a low educational level, even to the point of illiteracy, does not automatically entitle an inmate to
4 equitable tolling. Cobas v. Burgess, 306 F.3d 441, 444 (6th Cir. 2002) (inability to understand
5 English not necessarily a basis for equitable tolling);⁵ Turner v. Johnson, 177 F.3d 390, 392 (5th
6 Cir. 1999) (unfamiliarity with the law due to illiteracy not sufficient); Adkins v. Warden, 585 F.
7 Supp. 2d 286, 298-99 (D. Conn. 2008) (educational deficits). Without more, this court cannot
8 find that it was petitioner’s limited education, rather than his lack of diligence, that prevented
9 him from pursuing this action.

10 Finally, petitioner has provided a list of dates his prison allegedly was on
11 lockdown. (Dkt. No. 14.) However, lockdowns are not an extraordinary circumstance in prison
12 that would justify or excuse petitioner’s delay. As one district court observed:

13 Lockdowns, however, and resulting restricted access to the prison
14 law library are not, by themselves, extraordinary circumstances for
15 prisoners. See e.g. Frye v. Hickman, 273 F.3d 1144, 1146 (9th Cir.
16 2002) (recognizing that the lack of access to library material does
17 not automatically qualify as grounds for equitable tolling); United
18 States v. Van Poyck, 980 F.Supp. 1108, 1111 (C.D. Cal. 1997)
19 (without demonstration of petitioner's diligence, lockdowns at
20 prison allegedly eliminating access to law library were not
21 extraordinary circumstances warranting equitable tolling); Rosati v.
22 Kernan, 417 F.Supp.2d 1128, 1132 (C.D. Cal. 2006)
23 (“[P]etitioner's complaints about limited access to the law library
24 and legal materials at various state prisons and occasional prison
25 lockdowns do not warrant equitable tolling since petitioner has not
26 shown any causal connection between these events and his failure
to timely file his habeas corpus petition.”); see also Corrigan v.
Barbery, 371 F.Supp.2d 325, 330 (W.D. N.Y. 2005) (“In general,
the difficulties attendant on prison life such as transfers between
facilities, solitary confinement, lockdowns, restricted access to the
law library, and an inability to secure court documents, do not by
themselves qualify as extraordinary circumstances.”). In sum,
Petitioner does not explain how any lockdowns constituted

⁵ The court in Cobas ultimately found that the petitioner was not entitled to tolling because the petitioner could communicate in English, as evidenced by a 1993 detailed letter to appellate counsel written in English. See Cobas, 306 F.3d at 444. No such evidence is before this court.

1 extraordinary circumstances that prevented him from timely filing
2 his federal petition.

3 Robinson v. Marshall, 2008 WL 2156745 at *3 (C.D.Cal. May 18, 2008).

4 Petitioner has not satisfied his burden of establishing that he acted diligently in
5 filing his federal petition. Other than to recite the dates of the lockdowns, petitioner failed to
6 explain how these lockdowns prevented petitioner from timely filing the instant petition.

7 Petitioner is therefore not entitled to equitable tolling, and respondent's motion to dismiss should
8 be granted as this action is time-barred.

9 IV. Conclusion

10 In accordance with the above, IT IS HEREBY ORDERED that the Clerk of the
11 Court is directed to assign a district judge to this case; and

12 IT IS RECOMMENDED that respondent's June 3, 2011 motion to dismiss (dkt.
13 no. 10) be granted.

14 These findings and recommendations are submitted to the United States District
15 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
16 one days after being served with these findings and recommendations, any party may file written
17 objections with the court and serve a copy on all parties. Such a document should be captioned
18 "Objections to Magistrate Judge's Findings and Recommendations." If petitioner files
19 objections, he shall also address whether a certificate of appealability should issue and, if so, why
20 and as to which issues. A certificate of appealability may issue under 28 U.S.C. § 2253 "only if
21 the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C.
22 § 2253(c)(3). Any reply to the objections shall be served and filed within fourteen days after
23 service of the objections. The parties are advised that failure to file objections within the

24 ///

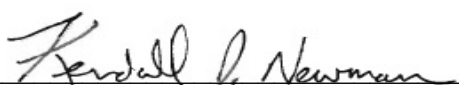
25 ///

26 ///

1 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
2 F.2d 1153 (9th Cir. 1991).

3 DATED: August 12, 2011

4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26


KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

sanc0637.mtd