

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

DANIEL PATRICK COYNE,

Petitioner,

No. 2:12-cv-1506 KJM KJN P

vs.

RANDY GROUNDS,

Respondent.

ORDER AND
FINDINGS AND RECOMMENDATIONS

I. Introduction

Petitioner is a state prisoner, proceeding without counsel, and 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. For the reasons set forth below, respondent’s motion should be granted.

II. Legal Standards

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

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 judgment of a State court. The limitation period shall run from the latest of –

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

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

6 (c) the date on which the constitutional right asserted was initially
7 recognized by the Supreme Court, if the right has been newly
8 recognized by the Supreme Court and made retroactively
9 applicable to cases on collateral review; or

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

10 28 U.S.C. § 2244(d)(1). Section 2244(d)(2) provides that “the time during which a properly
11 filed application for State post-conviction or other collateral review with respect to the pertinent
12 judgment or claim is pending shall not be counted toward” the limitations period. 28 U.S.C.
13 § 2244(d)(2).

14 III. Chronology

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

17 1. On September 22, 2005, in the Shasta County Superior Court, petitioner pled
18 guilty to kidnapping, with great bodily injury, and involuntary manslaughter. (Dkt. No. 1 at 1.)

19 On December 8, 2006, pursuant to a stipulated sentence within the plea agreement, petitioner
20 was sentenced to a determinate state prison term of twelve years. (Dkt. No. 1 at 61.)

21 2. Petitioner filed an appeal, and the conviction was affirmed by the California
22 Court of Appeal, Third Appellate District, on December 3, 2007. (Respondent’s Lodged
23 Document (“LD”) 2.)

24 3. Petitioner did not seek review in the California Supreme Court.

25 ///

26 ///

1 4. On May 12, 2011,¹ petitioner filed a petition for writ of habeas corpus in the
2 Shasta County Superior Court. (LD 3.) The petition was summarily denied on May 23, 2011,
3 and the court expressly found that petitioner’s unjustified delay in bringing his claim barred
4 consideration of the claim, citing In re Clark, 5 Cal.4th 750, 765 n.5 (1993), and In re Swain,
5 34 Cal.2d 300, 302 (1949). (LD 4.)

6 5. On July 20, 2011, petitioner filed a petition for writ of habeas corpus in the
7 California Court of Appeal, Third Appellate District. (LD 5.) On August 4, 2011, the petition
8 was denied without comment. (LD 6.)

9 6. On November 2, 2011, petitioner filed a petition for writ of habeas corpus in
10 the California Supreme Court. (LD 7.) On February 29, 2012, the California Supreme Court
11 denied the petition, citing In re Robbins, 18 Cal.4th 770, 780 (1998). (LD 8.)

12 7. On May 21, 2012, pursuant to Rule 3(d) of the Federal Rules Governing
13 Section 2254 Cases, the instant action was constructively filed. (Dkt. No. 1 at 130.)

14 IV. Statutory Tolling

15 Because petitioner did not file a petition for review in the California Supreme
16 Court, petitioner's process of direct review came to an end when the California Court of Appeal
17 denied his appeal.² Thus, petitioner’s conviction became final on January 12, 2008, forty days
18 after the California Court of Appeal issued its opinion, and when the time for filing a petition for
19 review had expired. See Gonzalez v. Thaler, 132 S. Ct. 641, 654 (2012) (holding that where a
20 state prisoner does not seek review in a state's highest court, the judgment becomes “final” under
21 § 2244(d)(1)(A) when the time for seeking such review expires); see also Rules 8.264(b)(1) &

23 ¹ Petitioner’s state court habeas petitions (LD 3, 5, & 7) are given benefit of the mailbox
24 rule. See Houston v. Lack, 487 U.S. 266, 275-76 (1988) (pro se prisoner filing is dated from the
date prisoner delivers it to prison authorities).

25 ² Petitioner's failure to petition the California Supreme Court for review of his conviction
26 precluded him from applying to the United States Supreme Court for a writ of certiorari. See
28 U.S.C. § 1257.

1 8.500(d)(1) of the Cal. Rules of Court (Court of Appeal decision becomes final thirty days after
2 the date it is issued, and a petition for review must be filed within ten days after the Court of
3 Appeal decision is final). Therefore, the AEDPA statute of limitations period in this case began
4 to run the day after petitioner's conviction became final, on January 13, 2008, and expired one
5 year later on January 13, 2009. See Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001)
6 (holding that Rule 6(a) of the Federal Rules of Civil Procedure governs the calculation of
7 statutory tolling applicable to the one year limitations period.). Petitioner did not file his federal
8 habeas petition in this case until May 21, 2012, over three years later. Accordingly, petitioner's
9 federal petition for writ of habeas corpus is time-barred unless he is entitled to the benefit of
10 tolling.

11 Petitioner filed his first state court petition for writ of habeas corpus on May 12,
12 2011, after the statute of limitations period expired. The filing of a state habeas petition after the
13 limitations period expired cannot revive the statute of limitations, and has no tolling effect.
14 Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003); Jiminez v. Rice, 276 F.3d 478, 482
15 (9th Cir. 2001) (where petitioner filed his state post-conviction relief petition after AEDPA
16 statute of limitations period expired, delay results in absolute time bar.) Therefore, none of
17 petitioner's collateral challenges serve to toll the limitations period because all were filed after
18 the limitations period expired.

19 Moreover, the three state court habeas petitions cannot provide tolling because
20 they were found untimely by the state courts. The AEDPA tolls the statute of limitations during
21 the period in which a "properly filed" application for post-conviction relief is pending. See
22 28 U.S.C. § 2244(d)(2). However, a petition cannot be considered "properly filed" for purposes
23 of the AEDPA statutory tolling when the state court denies a habeas petition as untimely. See
24 Trigueros v. Adams, 658 F.3d 983, 988-89 (9th Cir. 2011) (statutory tolling under § 2244(d)(2)
25 is unavailable where a state habeas petition is deemed untimely under California's timeliness
26 standards."); Thorson v. Palmer, 479 F.3d 643, 645 (9th Cir. 2007).

1 Here, the Shasta County Superior Court denied petitioner's habeas petition stating
2 that it was barred as untimely, citing In re Clark, 5 Cal.4th at 750. The California Supreme
3 Court denied the petition, citing In re Robbins, 18 Cal.4th at 780. The state courts' reliance on
4 Clark and Robbins was a clear ruling that the petition was denied as untimely. See Miles v.
5 Martel, 2012 WL 4490756, at *4 (9th Cir. Sept. 28, 2012) (“A summary denial citing [Clark and
6 Robbins] means that the petition is rejected as untimely.”); Thorson, 479 F.3d at 645. The
7 second habeas petition, filed in the California Court of Appeal, was denied as untimely as well
8 because, even though the summary denial was silent as to reasoning, this court must “look
9 through” the silent disposition to the last reasoned decision from the Shasta County Superior
10 Court. See Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991) (“Where there has been one reasoned
11 state judgment rejecting a federal claim, later unexplained orders upholding that judgment or
12 rejecting the same claim rest upon the same grounds.”) Accordingly, the AEDPA statute of
13 limitations was not statutorily tolled by the filing of the state habeas petitions because the
14 petitions were not “properly filed.”

15 V. Alternative Start Date for Statute of Limitations

16 In the petition,³ petitioner asserts that he received ineffective assistance of counsel
17 because trial counsel failed to object to the imposition of the upper term sentence, and appellate
18 counsel failed to appeal the upper term sentence. (Dkt. No. 1 at 13-14.) Petitioner contends that

19
20 ³ Petitioner also appears to argue that his sentence is illegal. (Dkt. No. 1 at 23.)
21 However, petitioner's upper term sentence was not based upon any factual findings made by the
22 sentencing judge. Rather, petitioner's sentence arose directly from the plea agreement. See
23 Gresham v. Martel, 2010 WL 624279, at *11 (E.D. Cal. 2010) (“given that Gresham stipulated to
24 the imposition of the upper term sentence, Blakely is not implicated.”) Once petitioner
25 stipulated to his twelve year sentence, the sentencing court had no obligation to independently
26 justify its imposition of the upper term on the kidnapping charge. The sentencing court simply
accepted the terms bargained for by the parties. The reporter's transcript of petitioner's plea
reflects that petitioner was advised of his sentence and freely agreed to it. (Dkt. No. 1 at 60-65.)
Moreover, at the plea hearing, plaintiff admitted the great bodily injury special allegation. (Dkt.
No. 1 at 64.) Furthermore, in his state habeas petitions, as well as the instant federal petition,
petitioner admitted that the plea agreement provided for petitioner to plead guilty to the upper
term of eight years for kidnapping, and that the plea agreement provided for a stipulated prison
sentence of twelve years. (LD 3, 5, 7; Dkt. No. 1.)

1 “through a fluke[,] petitioner discovered that California sentencing guidelines in effect at the
2 time of his sentencing required a jury and not the judge to find fact[s] beyond a reasonable doubt
3 to impose the upper term.” (Dkt. No. 1 at 13.) Petitioner argues that he discovered this “during
4 his imprisonment,” and that he didn’t have “any knowledge in the law at the time [of]
5 sentencing,” but it came to his attention by legal material authored by the Prison Law Office.
6 (Dkt. No. 1 at 14.)

7 A. Later Triggering Date -- New Constitutional Right

8 On January 22, 2007, the Supreme Court held that California’s Determinate
9 Sentence Law, which permitted the judge rather than the jury to make findings to support the
10 imposition of the upper term, violates a defendant’s Sixth Amendment right to trial by jury.
11 Cunningham, 549 U.S. at 293. This case cannot provide a new triggering date, however, because
12 the Supreme Court has not found its holding to be retroactive, which is a necessary predicate to
13 the application of 28 U.S.C. § 2244(d)(1)(c). See Dodd v. United States, 545 U.S. 353, 358
14 (2005) (construing identical language in section 2255 as expressing clear congressional intent
15 that delayed accrual inapplicable unless the Supreme Court itself has made the new rule
16 retroactive); see also Butler v. Curry, 528 F.3d 624, 639 (9th Cir.), cert. denied, 129 S. Ct. 767
17 (2008) (Cunningham did not create a new rule of law).

18 B. Later Triggering Date -- Factual Predicate

19 Under section 2244(d) (1)(D), “[t]ime begins when the prisoner knows (or
20 through diligence could discover) the important facts, not when the prisoner recognizes their
21 legal significance.” Hasan v. Galaza, 254 F.3d 1150, 1154 n.3 (9th Cir. 2001). Petitioner's
22 assertions demonstrate that petitioner became aware only of the legal significance of his claims
23 at a later date, not the material facts themselves. Thus, petitioner is not entitled to a deferred
24 starting date based on 28 U.S.C. § 2244(d)(1)(D).

25 Petitioner fares no better if he relies on Cunningham as a “factual predicate” for
26 his claim, because a favorable legal decision cannot be a factual predicate within the meaning of

1 § 2244(d)(1)(D). See Shannon v. Newland, 410 F.3d 1083, 1089 (9th Cir. 2005) (“state court
2 decision establishing an abstract proposition of law arguably helpful to the petitioner’s claim
3 does not constitute the ‘factual predicate’ for that claim.”); see also Singer v. Department of
4 Corrections, 2010 WL 1444479, at *3 (C.D. Cal. 2010) (Cunningham is not a factual predicate).

5 VI. Constitutionality of AEDPA

6 In his opposition to the motion to dismiss, petitioner does not contend that his
7 petition was timely filed, but argues that AEDPA is unconstitutional because AEDPA violates
8 petitioner’s right to have the court remedy his claims by unlawfully amending Article I, section
9 9, of the United States Constitution, otherwise known as the Suspension Clause.

10 However, in Duhaime v. Ducharme, 200 F.3d 597 (9th Cir. 2000), the Ninth
11 Circuit found that the 1996 amendments to 28 U.S.C. § 2254(d)(1) do not offend the
12 Constitution. Duhaime, 200 F.3d at 579. In Crater v. Galaza, 491 F.3d 1119, 1124-30 (9th Cir.
13 2007), the Ninth Circuit addressed various challenges to the constitutionality of AEDPA, and
14 found that “the operative provisions of the Act do not violate the Suspension Clause,” because
15 “Section 2254(d)(1) simply modifies the preconditions for habeas relief, and does not remove all
16 habeas jurisdiction.” Crater, 491 F.3d at 1125; 1126. The Ninth Circuit rejected Crater’s
17 argument that AEDPA impinged on judicial power. Crater, at 1127. In conclusion, the Ninth
18 Circuit stated that:

19 [o]ur holding that § 2254(d)(1) is constitutionally firm is based
20 upon the constitutional text, the Supreme Court's interpretation of
21 other statutes limiting habeas relief, and the Court's longstanding
22 application of AEDPA. These first principles, as well as the
23 doctrine of stare decisis, require us to conclude that § 2254(d)(1)
24 does not conflict with the Suspension Clause or breach the
25 constitutional separation of powers.

23 Crater, 491 F.3d at 1130.

24 Moreover, the Ninth Circuit has specifically held that the statute of limitations
25 provision of AEDPA does not violate the Suspension Clause. “[S]ection 2244(d)(1) is not a

26 ///

1 per se violation of the Suspension Clause.” Ferguson, 321 F.3d at 823. “Its one-year limitations
2 period leaves petitioners with a reasonable opportunity to have their federal claims heard.” Id.

3 Therefore, petitioner’s claim that AEDPA is unconstitutional is unavailing.

4 VII. Equitable Tolling

5 To receive equitable tolling, petitioner must demonstrate "(1) that he has been
6 pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way."

7 Pace v. DiGuglielmo, 544 U.S. 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.) (internal citation omitted),

13 cert. denied, 130 S. Ct. 244 (2009); see also Stillman v. LaMarque, 319 F.3d 1199, 1203

14 (9th Cir.2003) (petitioner must show that the external force caused the untimeliness). It is

15 petitioner’s burden to show he is entitled to equitable tolling. Espinoza-Matthews v. People of

16 the State of California, 432 F.3d 1021, 1026 (9th Cir. 2005).

17 Here, the petition provides no basis for equitable tolling. (Dkt. No. 1.) Moreover,
18 petitioner did not address the issue of equitable tolling in his opposition to the motion, and
19 alleged no facts that would support such a claim. Thus, petitioner failed to demonstrate that he is
20 entitled to equitable tolling.

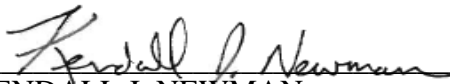
21 VIII. Conclusion

22 Because this action is barred by the statute of limitations, IT IS HEREBY
23 RECOMMENDED that respondent’s August 13, 2012 motion to dismiss (Dkt. No. 11) be
24 granted.

25 These findings and recommendations are submitted to the United States District
26 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen

1 days after being served with these findings and recommendations, any party may file written
2 objections with the court and serve a copy on all parties. Such a document should be captioned
3 “Objections to Magistrate Judge’s Findings and Recommendations.” If petitioner files
4 objections, he shall also address whether a certificate of appealability should issue and, if so,
5 why and as to which issues. A certificate of appealability may issue under 28 U.S.C. § 2253
6 “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28
7 U.S.C. § 2253(c)(3). Any reply to the objections shall be served and filed within fourteen days
8 after service of the objections. The parties are advised that failure to file objections within the
9 specified time may waive the right to appeal the District Court’s order. Martinez v. Ylst,
10 951 F.2d 1153 (9th Cir. 1991).

11 DATED: November 16, 2012

12
13
14 
15 KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

16 coyn1506.mtd