

United States District Court
For the Northern District of California

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

JOHN GREEN,
Petitioner,
v.
ANTHONY HEDGPETH, Warden,
Respondent.

No. C 10-04136 CW (PR)
ORDER GRANTING MOTION
TO DISMISS AND
GRANTING CERTIFICATE
OF APPEALABILITY

INTRODUCTION

Petitioner John Green, a state prisoner incarcerated at Salinas Valley State Prison, filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Court ordered Respondent to show cause why the writ should not be granted. Respondent filed a motion to dismiss for untimeliness. Petitioner filed an opposition, and Respondent filed a reply. Having considered the papers submitted, the Court GRANTS Respondent's motion to dismiss and grants Petitioner a certificate of appealability.

BACKGROUND

In 2005, Petitioner was convicted by an Alameda County jury of second degree murder, attempted murder and assault with a deadly weapon. The jury also found that Petitioner personally and

1 intentionally discharged a firearm which proximately caused great
2 bodily injury or death, and that he personally used a firearm and
3 inflicted great bodily injury. Petitioner waived a jury trial on
4 prior conviction allegations. The trial court found five prior
5 felony allegations, including one that constituted a strike.
6 Petitioner was sentenced to an indeterminate term of eighty years
7 to life with possibility of parole, consecutive to a determinate
8 term of nine years, eight months.

9 Petitioner filed an appeal in the California Court of Appeal,
10 claiming that (1) the trial court erred in instructing the jury on
11 the unavailability of a defense of self-defense to one who creates
12 a need for self-defense by his own conduct; (2) he received
13 ineffective assistance of counsel due to his trial counsel's
14 failure to object to a portion of the prosecutor's rebuttal
15 argument; and (3) the admission of a preliminary hearing transcript
16 during the court trial on prior conviction allegations violated his
17 rights under the confrontation clause of the Sixth Amendment. On
18 May 12, 2008, the appellate court rejected his claims.

19 Petitioner filed a petition for review in the California
20 Supreme Court. The state supreme court denied review without
21 comment on August 13, 2008. Petitioner does not allege that he
22 sought review in the United States Supreme Court, and there is no
23 evidence that he filed any other pleadings in state court to
24 challenge his convictions.

25 On September 14, 2010, Petitioner filed motions to appoint
26 counsel (Docket No. 1) and to proceed in forma pauperis (Docket No.
27 4), which were filed by the Clerk of the Court as a habeas corpus
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1 action. On the same day the action was filed, the Clerk of the
2 Court sent Petitioner a notice that he had not filed a petition and
3 that if he did not do so within thirty days his action would be
4 dismissed. On September 22, 2010, Petitioner filed a motion for an
5 extension of time to file his petition. On October 19, 2010, the
6 Court granted Petitioner's request and extended the thirty day
7 deadline to file his petition to November 18, 2010. On November
8 15, 2010, Petitioner filed his petition for a writ of habeas
9 corpus. Based upon this series of events, the Court will consider
10 September 14, 2010 as the date the present petition was filed.
11 However, as discussed below, the statute of limitations had already
12 expired by that date.

13 In response to Respondent's motion to dismiss for
14 untimeliness, Petitioner claims he was unable to file his petition
15 sooner because he did not receive requested documents from his
16 appointed appellate counsel, Mark D. Greenberg, until July 16,
17 2010. According to Petitioner, he spent nearly two years
18 attempting to contact his appellate counsel, by mail, phone and
19 through third parties, including a family member, a friend, a pro
20 bono private investigator and the First District Appellate Project.

21 In support of his opposition, Petitioner attached a copy of
22 his incoming and outgoing prison mail logs from January 2009 until
23 October 2010. See Opp. Ex. C. The outgoing log indicates that on
24 January 16, 2009, Petitioner sent mail to an unnamed Oakland
25 attorney with the zip code 94610. On April 22, 2009, Petitioner
26 sent mail to "AAL Greenburg [sic]" at Oakland zip code 94612. The
27 next relevant entry is over a year later, on May 3, 2010, when

1 Petitioner sent mail to "M Greenberg AAL" at Oakland zip code
2 94610. The log also shows Petitioner sent mail to the First
3 District Appellate Project on June 17, 2010.

4 Petitioner's incoming mail log indicates that on July 16,
5 2010, he received two boxes from Mr. Greenberg. Petitioner states
6 only that these boxes contained work product.

7 Petitioner also marked entries on his outgoing mail log
8 showing that he sent mail to "S. Strellis AAL" at Oakland zip code
9 94621 and "S.W. Strellis ATT" at Oakland zip code 94612, both on
10 July 7, 2010. Although Petitioner's brief does not explain the
11 content or significance of these entries, Petitioner previously
12 identified Spencer Strellis as his trial counsel. On September 14,
13 2010, before filing his petition, Petitioner wrote to the Court
14 requesting that a mediator be appointed to help him obtain his
15 trial counsel's work product. (Docket No. 3.) Petitioner does not
16 contend in his Opposition that the delay in obtaining records from
17 his trial counsel entitles him to equitable tolling, presumably
18 because there is no indication in his mail log of attempts to
19 contact Mr. Strellis prior to July 7, 2010, nearly nine months
20 after the expiration of the statute of limitations to file his
21 federal petition.

22 Petitioner also suggests that his phone and mail logs from
23 Kern Valley State Prison, where he resided from July 2007 until
24 January 2009, would show his efforts to obtain the materials from
25 Mr. Greenberg. These logs were not submitted by Petitioner.
26 Petitioner submits no other evidence of his or any third party's
27 efforts to obtain the files from Mr. Greenberg.

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DISCUSSION

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2 The Antiterrorism and Effective Death Penalty Act (AEDPA)
3 imposes a statute of limitations on petitions for a writ of habeas
4 corpus filed by state prisoners. Petitions filed by prisoners
5 challenging non-capital state convictions or sentences must be
6 filed within one year of the latest date on which: (A) the judgment
7 became final after the conclusion of direct review or the time
8 passed for seeking direct review; (B) an impediment to filing an
9 application created by unconstitutional state action was removed,
10 if such action prevented the petitioner from filing; (C) the
11 constitutional right asserted was recognized by the Supreme Court,
12 if the right was newly recognized by the Supreme Court and made
13 retroactive to cases on collateral review; or (D) the factual
14 predicate of the claim could have been discovered through the
15 exercise of due diligence. 28 U.S.C. § 2244(d)(1)(A)-(D).
16 However, "[t]he time during which a properly filed application for
17 state post-conviction or other collateral review with respect to
18 the pertinent judgment or claim is pending shall not be counted
19 toward any period of limitation." Id. § 2244(d)(2).

20 Although § 2244(d) states that the limitations period
21 commences on "the date on which the judgment became final by the
22 conclusion of direct review or the expiration of the time for
23 seeking such review," direct review includes the ninety-day period
24 in which a petitioner may file for a writ of certiorari in the
25 United States Supreme Court. See Bowen v. Roe, 188 F.3d 1157, 1159
26 (9th Cir. 1999). Therefore, Petitioner's state judgment became
27 final on November 11, 2008. Petitioner was required to file his
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1 federal habeas petition no later than November 11, 2009. See
2 § 2244(d). His petition, even if deemed filed on September 14,
3 2010, was filed approximately ten months after the limitations
4 period had expired. Thus, the petition is untimely absent either
5 delayed commencement of the limitations period or equitable
6 tolling.

7 Petitioner does not suggest, and the Court does not discern,
8 any basis for delayed commencement of the limitations period.
9 Petitioner does not allege any state action that prevented him from
10 filing his petition earlier. Because his claims in this petition
11 are identical to his claims before the California Court of Appeal,
12 Petitioner does not allege a violation of any right newly
13 recognized by the Supreme Court or a factual predicate of which he
14 was previously unaware.

15 Petitioner does, however, present an argument for equitable
16 tolling of the statute of limitations, based on the delay in
17 receiving documents from his appellate counsel. The one-year
18 limitations period can be equitably tolled because § 2244(d) is a
19 statute of limitations, not a jurisdictional bar. Holland v.
20 Florida, 130 S. Ct. 2549, 2560 (2010). "When external forces,
21 rather than a petitioner's lack of diligence, account for the
22 failure to file a timely claim, equitable tolling of the statute of
23 limitations may be appropriate." Miles v. Prunty, 187 F.3d 1104,
24 1107 (9th Cir. 1999). "[A] 'petitioner' is 'entitled to equitable
25 tolling' only if he shows '(1) that he has been pursuing his rights
26 diligently, and (2) that some extraordinary circumstance stood in
27 his way' and prevented timely filing." Holland, 130 S. Ct. at 2562

1 (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)). "The
2 petitioner must show that 'the extraordinary circumstances were the
3 cause of his untimeliness and that the extraordinary circumstances
4 made it impossible to file a petition on time.'" Porter v.
5 Ollison, 620 F.3d 952, 959 (2010) (quoting Ramirez v. Yates, 571
6 F.3d 993, 997 (2009)).

7 The Ninth Circuit has held that the failure of a pro se
8 petitioner's trial attorney to provide him with parts of his legal
9 file may be an extraordinary circumstance warranting equitable
10 tolling. See United States v. Battles, 362 F.3d 1195, 1197-98 (9th
11 Cir. 2004) (§ 2255 petition) (remanding to district court to
12 determine whether counsel's failure to provide petitioner with
13 trial transcript warranted equitable tolling); but see Randle v.
14 Crawford, 604 F.3d 1047, 1057-58 (9th Cir. 2010) (state-appointed
15 counsel's failure to provide petitioner his legal papers did not
16 warrant equitable tolling where petitioner sought papers for his
17 state habeas petition; delay did not prevent petitioner from filing
18 a federal habeas petition). Petitioner is entitled to equitable
19 tolling if his counsel's delay in providing the files caused his
20 untimeliness and made it impossible for him to file in time,
21 Porter, 620 F.3d at 959, and if Petitioner was "pursuing his rights
22 diligently," Holland, 130 S. Ct. at 2562.

23 Petitioner's evidence does not demonstrate his diligence in
24 seeking to obtain these files. The diligence required to establish
25 entitlement to equitable tolling is "reasonable diligence."
26 Holland, 130 S. Ct. at 2565. Although "a pro se petitioner's lack
27 of legal sophistication is not, by itself, an extraordinary
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1 circumstance warranting equitable tolling," Raspberry v. Garcia,
2 448 F.3d 1150, 1154 (9th Cir. 2006), a pro se prisoner's
3 allegations regarding diligence in filing a federal petition must
4 be construed liberally, Roy v. Lampert, 465 F.3d 964, 970 (9th Cir.
5 2006).

6 Construed liberally, Petitioner's mail log indicates that he
7 made, at most, two attempts to contact his appellate counsel by
8 mail between January 2009 and the expiration of the statute of
9 limitations in November 2009. There were no attempts at all
10 between April 2009 and November 2009. In addition, more than a
11 year passed between his April 2009 attempt and his next attempt, in
12 May 2010. The latter attempt came five months after the statute of
13 limitations had run.

14 Moreover, following receipt of the two boxes of work product
15 from his appellate counsel, Petitioner did not initiate the present
16 action for another two months. During this time he was seeking
17 files from his trial counsel Mr. Strellis. But his mail log
18 discloses no attempts to contact Mr. Strellis by mail prior to July
19 2010. The significant gaps in his own attempts to contact his
20 appellate counsel, as well as the delay in contacting his trial
21 counsel, demonstrate a lack of diligence on Petitioner's part.

22 Petitioner states that he also attempted to contact his
23 appellate counsel by telephone, and that others acting on his
24 behalf attempted to contact his appellate counsel. However,
25 Petitioner does not provide any additional information about these
26 attempts, such as the means that were employed, or the dates or
27 results of those attempts.

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1 Even if Petitioner had acted with sufficient diligence to
2 receive equitable tolling of the statute of limitations, he has not
3 shown that the delay in receiving his appellate counsel's files
4 made it impossible for him to file a timely petition. See Porter,
5 620 F.3d at 959. Petitioner states that he needed his appellate
6 counsel's work product so he "could submit a nonfrivolous[]
7 petition for writ of habeas corpus."

8 Petitioner does not identify any specific document that he
9 needed from his appellate counsel's files in order to file his
10 petition. Although he attached several documents to his petition,
11 including the California Court of Appeal opinion, the California
12 Supreme Court's order denying review, and what appears to be some
13 of the evidence from his trial, these documents were not required.
14 See Pliler v. Ford, 542 U.S. 225, 232 & n.2 (2004) (noting that
15 petitioners are not required to submit state court records unless
16 challenging sufficiency of the evidence). Indeed, Petitioner did
17 not refer to these documents anywhere in his petition. Nor has
18 Petitioner shown that he needed the records from his appellate
19 counsel to understand the basis for his claims. He was served with
20 the pleadings filed by his appellate counsel in the Court of Appeal
21 and the California Supreme Court. See Respondent's Reply, Ex. A.

22 Because Petitioner did not need his legal files in order to
23 attach unnecessary state court records to his habeas petition or to
24 understand the basis of his claims, his lack of access to the files
25 did not make it impossible for him to file a timely petition. See
26 Ford v. Pliler, 590 F.3d 782, 790 (9th Cir. 2009) (lack of access
27 to legal files not an extraordinary circumstance where record

1 showed petitioner was aware of the factual basis for his claims
2 without the files). Petitioner's claim that he needed the files is
3 further belied by his previous representations to the Court.
4 Before filing his petition but after receiving the files from his
5 appellate counsel, Petitioner stated that his lack of access to the
6 docket sheet from the trial court, the trial exhibits and his trial
7 counsel's work product made him "unable to prepare a nonfrivolous
8 petition." September 14, 2010 Letter (Docket No. 3). At that
9 time, Petitioner represented that the delay in receiving files from
10 his trial counsel prevented him from filing his petition even
11 though he had received the files from his appellate counsel.
12 Therefore, Petitioner has not shown that it was the delay in
13 receiving his appellate counsel's files that caused his
14 untimeliness, and he is not entitled to equitable tolling of the
15 statute of limitations.

16 CONCLUSION

17 For the foregoing reasons, Respondent's motion to dismiss the
18 petition (Docket no. 21) is GRANTED. This action is DISMISSED WITH
19 PREJUDICE. The Court must rule on a certificate of appealability.
20 See Rule 11(a) of the Rules Governing § 2254 Cases, 28 U.S.C. foll.
21 § 2254 (requiring district court to rule on certificate of
22 appealability in same order that denies petition). A certificate
23 of appealability should be granted "only if the applicant has made
24 a substantial showing of the denial of a constitutional right." 28
25 U.S.C. § 2253(c)(2). The Court finds that, by making a colorable
26 argument regarding equitable tolling, Petitioner has made a
27 sufficient showing of the denial of a constitutional right to

1 justify a certificate of appealability.

2 The Clerk shall terminate all pending motions, enter judgment,
3 and close the file.

4 IT IS SO ORDERED.

5 Dated: 8/12/2011



CLAUDIA WILKEN
United States District Judge

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1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4 JOHN GREEN,

5 Plaintiff,

6 v.

7 THE PEOPLE OF STATE OF CALIFORNIA et
8 al,

9 Defendant.

Case Number: CV10-04136 CW

CERTIFICATE OF SERVICE

10 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court,
11 Northern District of California.

12 That on August 12, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said
13 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
14 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located
15 in the Clerk's office.

16 John Green F11443
17 B-4-209
18 Salinas Valley State Prison
19 P.O. Box 1050
20 Soledad, CA 93960-1050

21 Dated: August 12, 2011

22 Richard W. Wieking, Clerk
23 By: Nikki Riley, Deputy Clerk
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