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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

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11 JOSEPH G. GEORGE,) Case No. EDCV 07-1680-GHK (OP)
12 Petitioner,)
13 v.) REPORT AND RECOMMENDATION OF
14 R. J. SUBIA, WARDEN,) UNITED STATES MAGISTRATE
15 Respondent.) JUDGE
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18 This Report and Recommendation is submitted to the Honorable George H.
19 King, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636
20 and General Order 194 of the United States District Court for the Central District
21 of California.

22 I.
23 **PROCEEDINGS**

24 On December 19, 2007, Joseph G. George (“Petitioner”), constructively
25 filed the current Petition for Writ of Habeas Corpus by a Person in State Custody
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1 pursuant to 28 U.S.C. § 2254 (“Petition”).¹

2 Pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United
3 States District Courts, the Court examined the Petition and found that it plainly
4 appeared from its face that Petitioner was not entitled to relief in the district court.
5 On January 17, 2008, the Court issued an Order to Show Cause (“OSC”) why the
6 Petition should not be dismissed an untimely.

7 In response to the OSC, on February 25, 2008, Petitioner filed a motion to
8 amend the Petition, along with a proposed First Amended Petition. Based on
9 Petitioner’s response to the OSC, the Court ordered the filing of the First
10 Amended Petition (“FAP”).

11 On March 25, 2008, Respondent filed a Motion to Dismiss the FAP as
12 untimely. On April 15, 2008, Petitioner filed an Opposition to the Motion to
13 Dismiss. Thus, this matter now is ready for decision.

14 II.

15 BACKGROUND

16 On August 3, 2005, Petitioner pleaded guilty in the Riverside County
17 Superior Court, case number SWF010423, to one count of sale, transportation, and
18 distribution of heroin in violation of California Health and Safety Code section
19 11352(a) and one count possession of heroin in violation of California Health and
20 Safety Code section 11350(a). (FAP at 2; Lodgment 2.) On December 8, 2005,
21 Petitioner was sentenced to a total state prison term of twelve years. (Lodgment 5

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23 ¹ The prison mailbox rule holds that a habeas petitioner’s state and federal
24 filings are constructively filed when turned over to prison officials for forwarding
25 to the Clerk of the Court. See, e.g., Smith v. Duncan, 297 F.3d 809, 814 (9th Cir.
26 2002); Huizar v. Carey, 273 F.3d 1220, 1223 (9th Cir. 2001). Unless otherwise
27 noted, the Court has utilized the signature date on the habeas petitions as the
28 relevant filing dates, since the signature date is the earliest date on which
Petitioner could have turned the petitions over to the prison authorities for
mailing.

1 at 12; Lodgment 6.) Petitioner did not file a direct appeal and did not file a
2 petition for review in the California Supreme Court. (FAP at 2, 3; Official
3 Records of California Courts².)

4 On March 5, 2007, Petitioner constructively filed a habeas corpus petition in
5 the Riverside County Superior Court. (Lodgment 7.) On March 23, 2007, the
6 superior court denied the motion. (Lodgment 8.)

7 On April 10, 2007, Petitioner constructively filed a habeas corpus petition
8 in the California Court of Appeal. (Lodgment 9.) On May 3, 2007, the court of
9 appeal denied the petition. (Lodgment 10.)

10 On May 30, 2007, Petitioner filed a habeas corpus petition in the California
11 Supreme Court. (Lodgment 11.) On October 10, 2007, the court state supreme
12 court denied the petition. (Lodgment 12.)

13 On December 19, 2007, Petitioner constructively filed the original Petition.
14 On February 16, 2008, Petitioner constructively filed the FAP. Respondent
15 contends that the current action is subject to dismissal on timeliness grounds.

16 III.

17 DISCUSSION

18 The current action was filed after the Antiterrorism and Effective Death
19 Penalty Act of 1996 (“AEDPA”) was signed into law and thus is subject to the
20 AEDPA’s one-year limitation period, as set forth at 28 U.S.C. § 2244(d). See
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24 ² The Court’s independent review of the website for the California State
25 Courts reveals that Petitioner did not file a petition for review in the California
26 Supreme Court. The Court takes judicial notice of the state appellate court records
27 which are available on the Internet at <http://appellate.courtsinfo.ca.gov>. See
28 Smith, 297 F.3d at 815 (federal courts may take judicial notice of relevant state
court records in federal habeas proceedings).

1 Calderon v. U.S. Dist. Court (Beeler), 128 F.3d 1283, 1287 n.3 (9th Cir. 1997).³

2 The relevant portion of that statute provides that:

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

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

9 28 U.S.C. § 2244(d)(1).

10 In most cases, the limitation period begins running on the date that a
11 petitioner's direct review becomes final. Here, Petitioner was sentenced on
12 December 8, 2005, and did not file a direct appeal of his conviction or sentence.
13 As a result, his conviction became final on February 6, 2006, sixty days after
14 sentencing. See Cal. R. Ct. 8.308(a) (formerly Cal. R. Ct. 30.1(a));⁴ Caspari v.
15 Bohlen, 510 U.S. 383, 390, 114 S. Ct. 948, 127 L. Ed. 2d 236 (1994) (“[a] state
16 conviction and sentence become final for purposes of retroactivity analysis when
17 the availability of direct appeal to the state courts has been exhausted and the time
18 for filing a petition for a writ of certiorari has elapsed or a timely filed petition has
19 been finally denied.”) Thus, absent applicable statutory or equitable tolling,
20 Petitioner had until February 6, 2007, to file the current action. 28 U.S.C. §
21 2244(d)(1)(A); see also Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001).

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24 ³ Beeler was overruled on other grounds in Calderon v. U.S. Dist. Court
25 (Kelly), 163 F.3d 530, 540 (9th Cir. 1998) (en banc).

26 ⁴ Former California Rules of Court 30.1(a), renumbered as Rule 8.308,
27 effective January 1, 2007, provides that, except in certain limited circumstances
28 not relevant here, “a notice of appeal must be filed within 60 days after the
rendition of the judgment or the making of the order being appealed.”

1 **A. Statutory Tolling of the Limitation Period Pursuant to 28 U.S.C. §**
2 **2244(d)(2).**

3 Title 28 U.S.C. § 2244(d)(2) provides that “[t]he time during which a
4 properly filed application for State post-conviction or other collateral review with
5 respect to the pertinent judgment or claim is pending shall not be counted toward
6 any period of limitation under this subsection.”

7 The United States Supreme Court has held that the statute of limitations is
8 tolled where a petitioner is properly pursuing post-conviction relief – the period is
9 tolled during the intervals between one state court’s disposition of a habeas
10 petition and the filing of a habeas petition at the next level of the state court
11 system. Carey v. Saffold, 536 U.S. 214, 219-21, 122 S. Ct. 2134, 153 L. Ed. 2d
12 260 (2002). In Nino v. Galaza, 183 F.3d 1003 (9th Cir. 1999), the Ninth Circuit
13 construed the foregoing tolling provision with reference to California’s post-
14 conviction procedures. The Ninth Circuit held that “the statute of limitations is
15 tolled from the time the first state habeas petition is filed until the California
16 Supreme Court rejects the petitioner’s final collateral challenge.” Id. at 1006
17 (footnote omitted). Claims denied as untimely or determined by the federal courts
18 to have been untimely in state court will not satisfy the requirements for statutory
19 tolling. Evans v. Chavis, 546 U.S. 189, 192-93, 126 S. Ct. 846, 163 L. Ed. 2d 684
20 (2006) (citing Carey, 536 U.S. at 222-23).⁵

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22 ⁵ The Court in Evans held that a California Supreme Court order silent on
23 the grounds for the court’s decision is not equivalent to a holding that the filing
24 was timely. Evans, 546 U.S. at 197-98. Thus, in the absence of clear direction or
25 explanation from the California Supreme Court about the meaning of the term
26 “reasonable time” (in which to file a habeas petition), or clear indication that a
27 particular request for appellate review was timely or untimely, the federal court
28 must itself examine the delay in each case and determine what the state courts
would have held with respect to timeliness. Id. at 198. That is, “the federal court

(continued...)

1 As previously noted, the statute of limitations began to run on February 7,
2 2006, and expired on February 6, 2007. Petitioner's first state habeas petition was
3 constructively filed in the Riverside County Superior Court on March 5, 2007, and
4 denied on March 23, 2007. (Lodgments 7, 8.) Petitioner is not entitled to
5 statutory tolling for the period this petition was pending, because 28 U.S.C. §
6 2244(d) does not permit the reinitiation of the AEDPA limitation period that has
7 ended before a state habeas petition is filed. See Ferguson v. Palmateer, 321 F.3d
8 820, 823 (9th Cir. 2003); Green v. White, 223 F.3d 1001, 1003 (9th Cir. 2000).
9 For the same reason, Petitioner is not entitled to statutory tolling for the periods
10 during which his other state habeas petitions were pending in the California Court
11 of Appeal and the California Supreme Court. Based on the foregoing, unless
12 Petitioner is entitled to equitable tolling, the original Petition was untimely by
13 over ten months.

14 **B. Equitable Tolling.**

15 The one-year AEDPA limitation period is subject to equitable tolling if a
16 petitioner demonstrates: "(1) that he has been pursuing his rights diligently, and
17 (2) that some extraordinary circumstance stood in his way." Pace v. DiGuglielmo,
18 544 U.S. 408, 418, 125 S. Ct. 1807, 1814, 161 L. Ed. 2d 669 (2005).⁶ A petitioner
19 bears the burden of alleging facts that would give rise to tolling. Id. "[T]he

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21 ⁵ (...continued)

22 must decide whether the filing of the request for state-court appellate review (in
23 state collateral review proceedings) was made within what California would
24 consider a 'reasonable time.'" Id.

25 ⁶ The Supreme Court in Pace noted that it has "never squarely addressed the
26 question whether equitable tolling is applicable to AEDPA's statute of
27 limitations." Pace, 544 U.S. at 418 n.8. The Supreme Court declined to consider
28 it in that case and assumed for the sake of argument that it did, because the
respondent assumed as much, and the petitioner was not entitled to tolling under
any standard. Id.

1 threshold necessary to trigger equitable tolling under [the] AEDPA is very high,
2 lest the exceptions swallow the rule.” Miranda v. Castro, 292 F.3d 1063, 1066
3 (9th Cir. 2002) (internal quotation marks and citation omitted). This high bar is
4 necessary to effectuate the “AEDPA’s statutory purpose of encouraging prompt
5 filings in federal court in order to protect the federal system from being forced to
6 hear stale claims.” Guillory v. Roe, 329 F.3d 1015, 1018 (9th Cir. 2003) (internal
7 quotation marks and citation omitted). Equitable tolling determinations are
8 “highly fact-dependent.” Whalem/Hunt v. Early, 233 F.3d 1146, 1148 (9th Cir.
9 2000) (en banc) (per curiam); accord Lott v. Mueller, 304 F.3d 918, 923 (9th Cir.
10 2002) (observing that equitable tolling determinations turn “on an examination of
11 detailed facts”).

12 In support of his claim for equitable tolling, Petitioner provides the
13 following explanation:

14 Petitioner has limited reading and writing skills and has no choice but
15 to rely on a “jailhouse lawyer” for assistance in preparing all of his
16 legal pleadings. . . .Petitioner respectfully submits that relying on a
17 jailhouse lawyer to always get the work done on time is not feasible
18 and is a crapshoot, and that petitioner should be excused for being
19 untimely in light of the fact that petitioner has diligently pursued [sic]
20 his rights in the only way that he could.

21 (Opp’n at 3.)

22 However, it is well-established that pro se status, lack of legal training, and
23 lack of assistance, do not constitute extraordinary circumstances warranting
24 equitable tolling. Raspberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006)
25 (finding the petitioner’s lack of legal sophistication and alleged inability to
26 calculate limitations period insufficient to warrant equitable tolling); see also
27 Hinton v. Pacific Enterprises, 5 F.3d 391, 396-97 (9th Cir. 1993) (mere ignorance
28 of the law generally is an insufficient basis to equitably toll the running of an

1 applicable statute of limitations); Hughes v. Idaho St. Bd. of Corr., 800 F.2d 905,
2 909 (9th Cir. 1986) (finding pro se prisoner's illiteracy and lack of knowledge of
3 law unfortunate but insufficient to justify equitable tolling); Ekenberg v. Lewis,
4 No. C98-1450 FMS(PR), 1999 WL 13720, at *2 (N.D. Cal. Jan. 12, 1999)
5 (ignorance of the law and lack of legal assistance do not constitute extraordinary
6 circumstances); Bolds v. Newland, No. C97-2103 VRW(PR), 1997 WL 732529, at
7 *2 (N.D. Cal. Nov. 1, 1997) (same). Thus, the Court does not find an adequate
8 basis for equitable tolling.

9 Based on the foregoing, Petitioner has failed to demonstrate any
10 extraordinary circumstance beyond his control sufficient to justify equitable
11 tolling with respect to the over ten month delay in the constructive filing of the
12 original Petition. Thus, the current action is untimely.

13 V.

14 **RECOMMENDATION**

15 IT THEREFORE IS RECOMMENDED that the District Court issue an
16 Order: (1) approving and adopting this Report and Recommendation; (2) granting
17 Respondent's Motion to Dismiss the First Amended Petition; and (3) directing that
18 Judgment be entered denying the First Amended Petition and dismissing this
19 action with prejudice.

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21 DATED: October 2, 2008


22 HONORABLE OSWALD PARADA
23 United States Magistrate Judge
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