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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

8 VICTOR MORAZA,) 1:07-cv-01226-LJO-TAG HC
9 Petitioner,)
10 v.) FINDINGS AND RECOMMENDATIONS
11 KEN CLARK,) TO GRANT RESPONDENT'S MOTION TO
12 Respondent.) DISMISS AMENDED PETITION FOR WRIT
) OF HABEAS CORPUS
) (Doc. 19)
) ORDER DIRECTING THAT OBJECTIONS
) BE FILED WITHIN 15 DAYS

PROCEDURAL HISTORY

15 Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus
16 pursuant to 28 U.S.C. § 2254. On April 23, 2007, Petitioner filed a pleading titled “Request For
17 Equitable Tolling And To File Late Petition For Writ of Habeas Corpus For A Person In State
18 Custody” in the Sacramento Division of this Court. (Doc. 1). The Clerk of Court apparently
19 interpreted the request as a petition for writ of habeas corpus and opened a case based upon that
20 filing. On June 19, 2007, the Court ordered Petitioner to file a new petition within thirty days.
21 (Doc. 8). On July 12, 2007, Petitioner filed the instant petition, which was docketed as an “amended
22 petition.” (Doc. 9). On August 23, 2007, the case was transferred to the Fresno Division. (Doc. 10).
23 The Court conducted a preliminary review of the petition and determined that it may be untimely,
24 and issued an order to show cause why the petition should not be dismissed as untimely. (Doc. 15).

25 On February 21, 2008, Petitioner filed a response to the order to show cause, in which he
26 alleged entitlement to additional statutory tolling for state habeas petitions he had filed. (Doc. 16).
27 However, Petitioner failed to provide any specific support of documentation establishing entitlement
28 to such statutory tolling. Accordingly, the Court ordered Respondent to file a response. (Doc. 17).

1 On August 22, 2008, Respondent filed the instant motion to dismiss. (Doc. 19). Petitioner did not
2 file a response to the motion.

3 DISCUSSION

4 A. Procedural Grounds for Motion to Dismiss

5 As mentioned, Respondent has filed a motion to dismiss the petition as being filed outside
6 the one-year limitation period prescribed by Title 28 U.S.C. § 2244(d)(1). Rule 4 of the Rules
7 Governing Section 2254 Cases allows a district court to dismiss a petition if it “plainly appears from
8 the face of the petition and any attached exhibits that the petitioner is not entitled to relief in the
9 district court” Rule 4 of the Rules Governing Section 2254 Cases.

10 The Ninth Circuit has allowed respondents to file a motion to dismiss in lieu of an answer if
11 the motion attacks the pleadings for failing to exhaust state remedies or being in violation of the
12 state’s procedural rules. See e.g., O’Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990)(using Rule
13 4 to evaluate motion to dismiss petition for failure to exhaust state remedies); White v. Lewis, 874
14 F.2d 599, 602-603 (9th Cir. 1989)(using Rule 4 as procedural grounds to review motion to dismiss
15 for state procedural default); Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n.12 (E.D. Cal. 1982)
16 (same). Thus, a respondent can file a motion to dismiss after the court orders a response, and the
17 court should use Rule 4 standards to review the motion.

18 Here, Respondent’s motion to dismiss is based on a violation of § 2244(d)(1)’s one-year
19 limitation period. Because Respondent’s motion is similar in procedural standing to a motion to
20 dismiss for failure to exhaust state remedies or for state procedural default and Respondent has not
21 yet filed a formal answer, the Court will review Respondent’s motion pursuant to its authority under
22 Rule 4.

23 B. Limitation Period for Filing a Petition for Writ of Habeas Corpus

24 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of
25 1996 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas
26 corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 326, 117 S.Ct. 2059
27 (1997). Because this action was commenced in 2007, the instant petition is subject to the AEDPA
28 limitation period.

1 The AEDPA imposes a one-year limitation period on petitioners seeking to file a federal
2 petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As amended, § 2244, subdivision (d)
3 reads:

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

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

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

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

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

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

20 28 U.S.C. § 2244(d).

21 In most cases, the limitation period begins running on the date that the petitioner's direct
22 review became final. Here, the Petitioner was convicted on March 30, 2004. He appealed his
23 conviction and the petition for review was denied by the California Supreme Court on November 16,
24 2005. (Doc. 19, Lodged Documents ("LD") Exh. B). Thus, direct review would have concluded on
February 15, 2006, when the ninety-day period for seeking review in the United States Supreme
Court expired. Bowen v. Roe, 188 F.3d 1157, 1159 (9th Cir.1999); Smith v. Bowersox, 159 F.3d
345, 347 (8th Cir.1998). Petitioner would then have one year from February 16, 2006, or until
February 15, 2007, absent applicable tolling, in which to file his federal petition for writ of habeas
corpus.¹

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26 ¹Respondent's motion to dismiss contends that the one-year period commenced on November 1, 2005. (Doc. 19,
27 p. 3). However, Respondent's conclusion stems from the mistaken notion that "[t]he California Supreme Court affirmed the
28 judgment on direct appeal by opinion filed August 2, 2005. Therefore the conviction became final...on the ninetieth day
following issuance of the Opinion...." (Id.)(Emphasis supplied). According to Respondent's own documents submitted in
support of the motion to dismiss, it was the *Court of Appeal's* opinion that was issued on August 2, 2005. (LD Exh. A). The
California Supreme Court did not issue an opinion on the merits of Petitioner's appeal; rather, it denied review. (Id., Exh.

1 As mentioned, Petitioner's initial pleading in this habeas action was filed on April 23, 2007,
2 sixty-seven days *after* the one-year period expired. Thus, unless Petitioner is entitled to statutory or
3 equitable tolling, the petition is untimely and must be dismissed.

4 C. Tolling of the Limitation Period Pursuant to 28 U.S.C. § 2244(d)(2)

5 Under the AEDPA, the statute of limitations is tolled during the time that a properly filed
6 application for state post-conviction or other collateral review is pending in state court. 28 U.S.C.
7 2244(d)(2). A properly filed application is one that complies with the applicable laws and rules
8 governing filings, including the form of applications and time limitations. Artuz v. Bennett, 531
9 U.S. 4, 8, 121 S. Ct. 361 (2000). An application is pending during the time that "a California
10 petitioner 'completes a full round of [state] collateral review,'" so long as there is no unreasonable
11 delay in the intervals between a lower court decision and the filing of a petition in a higher court.
12 Delhomme v. Ramirez, 340 F. 3d 817, 819 (9th Cir. 2003)(internal quotation marks and citations
13 omitted); see Evans v. Chavis, 546 U.S. 189, 193-194, 126 S. Ct. 846 (2006); see Carey v. Saffold,
14 536 U.S. 214, 220, 222-226 , 122 S. Ct. 2134 (9th Cir. 2002); see also, Nino v. Galaza, 183 F.3d
15 1003, 1006 (9th Cir. 1999).

16 Nevertheless, there are circumstances and periods of time when statutory tolling is not
17 allowed. For example, no statutory tolling is allowed for the period of time between finality of an
18 appeal and the filing of an application for post-conviction or other collateral review in state court,
19 because no state court application is "pending " during that time. Nino, 183 F. 3d at 1006-1007.
20 Similarly, no statutory toling is allowed for the period between finality of an appeal and the filing of
21 a federal petition. Id. at 1007. In addition, the limitation period is not tolled during the time that a
22 federal habeas petition is pending. Duncan v. Walker, 533 U.S. 167, 181-182, 121 S.Ct. 2120
23 (2001); see also, Fail v. Hubbard, 315 F. 3d 1059, 1060 (9th Cir. 2001). Further, a petitioner is not
24 entitled to statutory tolling where the limitation period has already run prior to filing a state habeas
25 petition. Ferguson v. Palmateer, 321 F. 3d 820, 823 (9th Cir. 2003)(“section 2244(d) does not permit
26 the reinitiation of the limitations period that has ended before the state petition was filed.”); Jiminez
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28 B). Thus, as discussed, the one-year period would commence ninety days after the California Supreme Court denied review
on November 16, 2005.

1 v. White, 276 F. 3d 478, 482 (9th Cir. 2001). Finally, a petitioner is not entitled to continuous
2 tolling when the petitioner's later petition raises unrelated claims. See Gaston v. Palmer, 447 F. 3d
3 1165, 1167 (9th Cir. 2006).

4 Here, Respondent has submitted documents indicating that Petitioner, through counsel, filed
5 a state habeas petition in the Superior Court for the County of Kings on November 21, 2005. (LD
6 Exh. C). That petition was denied on December 1, 2005. (LD Exh. D). Thus, the petition was
7 pending for a total of eleven days. However, the petition was denied *before* the one-year period even
8 commenced on February 15, 2006. A tolling provision has no applicability where the period to be
9 tolled has not commenced. See Hill v. Keane, 984 F.Supp. 157, 159 (E.D.N.Y. 1997), abrogated on
10 other grounds, Bennett v. Artuz, 199 F.3d 116, 122 (2d Cir. 1999)(state collateral action filed before
11 commencement of limitations period does not toll the limitation period), affirmed, 531 U.S. 4.

12 Subsequently, Petitioner filed a petition in the California Supreme Court, pro se, on July 10,
13 2007. (LD Exh. E).¹ The California Supreme Court denied the petition on January 8, 2008. (LD
14 Exh. F). As discussed above, a petitioner is not entitled to tolling where the limitation period has
15 already run prior to filing a state habeas petition. Jiminez, 276 F.3d at 482; see Jackson v. Dormire,
16 180 F.3d 919, 920 (8th Cir. 1999) (petitioner fails to exhaust claims raised in state habeas corpus
17 filed after expiration of the one-year limitation period). Here, as mentioned, the limitation period
18 expired on February 15, 2007, approximately five months *before* Petitioner filed his state habeas
19 petition in the California Supreme Court. By the time Petitioner filed his second state petition, he
20 had already filed the instant federal petition in this Court. Hence, even if the limitation period had
21 not already expired, thus precluding statutory tolling for later-filed state petitions, the second state
22 petition could have no legal tolling effect because his federal petition had already been filed.
23 Accordingly, he cannot avail himself of the statutory tolling provisions of the AEDPA for the latter-

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25 ¹In Houston v. Lack, the United States Supreme Court held that a pro se habeas petitioner's notice of appeal is
26 deemed filed on the date of its submission to prison authorities for mailing, as opposed to the date of its receipt by the court
27 clerk. Houston v. Lack, 487 U.S. 166, 276, 108 S.Ct. 2379 (1988). The rule is premised on the pro se prisoner's mailing
28 of legal documents through the conduit of "prison authorities whom he cannot control and whose interests might be adverse
to his." Miller v. Sumner, 921 F.2d 202, 203 (9th Cir. 1990); see, Houston, 487 U.S. at 271. Here, the Court will afford
Petitioner the benefit of the doubt by applying the "mailbox rule" to determine the filing date of his petition in the California
Supreme Court. Petitioner dated his proof of service as July 10, 2007. Thus, that would be the earliest date he could have
submitted the petition to prison authorities for filing. Accordingly, the Court will analyze this matter as though the petition
was filed on that date.

1 filed state petition either. Because Petitioner is not entitled to any statutory tolling, the petition is
2 untimely by sixty-seven days, and unless Petitioner is entitled to equitable tolling for that period of
3 time, the petition must be dismissed.

4 D. Equitable Tolling

5 The limitation period is subject to equitable tolling when “extraordinary circumstances
6 beyond a prisoner’s control make it impossible to file the petition on time.” Shannon v. Newland,
7 410 F. 3d 1083, 1089-1090 (9th Cir. 2005)(internal quotation marks and citations omitted). “When
8 external forces, rather than a petitioner’s lack of diligence, account for the failure to file a timely
9 claim, equitable tolling of the statute of limitations may be appropriate.” Miles v. Prunty, 187 F.3d
10 1104, 1107 (9th Cir. 1999). In most instances, a petitioner seeking equitable tolling has “the burden
11 of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some
12 extraordinary circumstances stood in his way.” Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct.
13 1807 (2005). “[T]he threshold necessary to trigger equitable tolling under AEDPA is very high, lest
14 the exceptions swallow the rule.” Miranda v. Castro, 292 F. 3d 1062, 1066 (9th Cir. 2002)(internal
15 quotation marks and citation omitted). As a consequence, “equitable tolling is unavailable in most
16 cases.” Miles, 187 F. 3d at 1107.

17 Petitioner addresses equitable tolling in his original filing and his amended petition. (Docs.
18 1, 9). In his original filing, Petitioner alleges that he is a layman unskilled in the law, that he does
19 not speak English well, that he was unaware of the AEDPA one-year limitation period, that he “did
20 not intentionally miss his AEDPA deadline” and that the interests of justice support equitable tolling.
21 (Doc. 1, pp. 1-4). Petitioner also contends that his prison was in “lock down” during some or all of
22 the limitation period. (Id. at p. 3). In his amended petition filed July 12, 2007, Petitioner reiterates
23 that he does not understand English well, is not an attorney, has no legal expertise, and alleges that
24 his appellate attorney “failed to inform him of his status in the courts.” (Doc. 9, p. 1).

25 Petitioner’s claims of ignorance of the law and inability to speak English fluently are
26 insufficient to justify equitable tolling. See Raspberry v. Garcia, 448 F. 3d 1150, 1154 (9th Cir.
27 2006)(“a pro se petitioner’s lack of legal sophistication is not, by itself, an extraordinary
28 circumstance warranting equitable tolling.”). In Mendoza v. Carey, the Ninth Circuit concluded that

1 “a non-English speaking petitioner seeking equitable tolling must, at a minimum, demonstrate that
2 during the running of the AEDPA time limitation, he was unable, despite diligent efforts, to procure
3 either legal materials in his own language or translations from an inmate, library personnel, or other
4 source.” Mendoza v. Carey, 449 F. 3d 1065, 1071 (9th Cir. 2006); Hughes v. Idaho State Bd. of
5 Corrections, 800 F.2d 905, 909 (9th Cir.1986) (pro se prisoner’s illiteracy and lack of knowledge of
6 law unfortunate but insufficient to establish cause); Fisher v. Johnson, 174 F.3d 710, 714 (5th Cir.
7 1999); Rose v. Dole, 945 F.2d 1331, 1335 (6th Cir.1991). Here, Petitioner has failed to make such a
8 showing. Moreover, unpredictable lockdowns or the consequent law library closures do not
9 constitute extraordinary circumstances warranting equitable tolling in this case. See United States v.
10 Van Poyck, 980 F.Supp. 1108, 1111 (C.D. Cal.1997) (inability to secure copies of transcripts from
11 court reporters and lockdowns at prison lasting several days and allegedly eliminating access to law
12 library were not extraordinary circumstances and did not equitably toll one-year statute of
13 limitations); Atkins v. Harris, 1999 WL 13719, *2 (N.D.Cal. Jan.7, 1999) (“lockdowns, restricted
14 library access and transfers do not constitute extraordinary circumstances sufficient to equitably toll
15 the [AEDPA] statute of limitations. Prisoners familiar with the routine restrictions of prison life must
16 take such matters into account when calculating when to file a federal [habeas] petition.... Petitioner's
17 alleged lack of legal sophistication also does not excuse the delay.”); Giraldez v. Ramirez-Palmer,
18 1998 WL 775085, *2 (N. D.Cal.1998) (holding that prison lockdowns do not constitute
19 extraordinary circumstances warranting equitable tolling).

20 Finally, Petitioner’s allegation that his appellate attorney “failed to inform him of his status in
21 the courts” does not justify equitable tolling, because Petitioner has failed to explain, let alone
22 establish, how his attorney’s conduct prevented Petitioner from filing a timely federal petition in any
23 event. See Lawrence v. Florida, 549 U.S. 327, 336-337, 127 S. Ct. 1079 (2007)(“Attorney
24 miscalculation is simply not sufficient to warrant equitable tolling, particularly in the post-conviction
25 context where prisoners have no constitutional right to counsel.”); see also Frye v. Hickman, 273 F.
26 3d 1144, 1145-1146 (9th Cir 2006)(attorney’s miscalculation of the limitation period and negligence
27 in general do not warrant equitable tolling); Miranda v. Castro, 292 F. 3d 1063-1068 (9th Cir.
28 2002)(same).

1 In sum, Petitioner has failed to establish that he acted diligently in pursuing federal habeas
2 relief or that an extraordinary circumstance prevented him from filing a timely federal petition.
3 Petitioner is not entitled to equitable tolling.

RECOMMENDATIONS

5 Accordingly, the Court HEREBY RECOMMENDS that Respondent's motion to dismiss
6 (Doc. 19), be GRANTED and that the amended petition for writ of habeas corpus (Doc. 9) be
7 DISMISSED as untimely under 28 U.S.C. § 2244(d).

8 These findings and recommendations are submitted to the United States District Judge
9 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 72-304 of the
10 Local Rules of Practice for the United States District Court, Eastern District of California.
11 Within fifteen (15) days after being served with a copy, any party may file written objections with the
12 court and serve a copy on all parties. Such a document should be captioned “Objections to
13 Magistrate Judge’s Findings and Recommendations.” Replies to the objections shall be served and
14 filed within ten (10) court days (plus three days if served by mail) after service of the objections.
15 The District Judge will then review the Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636
16 (b)(1)(C). The parties are advised that failure to file objections within the specified time may waive
17 the right to appeal the District Judge’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

19 | IT IS SO ORDERED.

20 | Dated: **January 20, 2009**

/s/ Theresa A. Goldner
UNITED STATES MAGISTRATE JUDGE