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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KEITH ZON DOOLIN,)	Case No. 1:09-CV-01453-AWI-P
)	
Petitioner,)	<u>DEATH PENALTY CASE</u>
)	
vs.)	
)	
VINCENT CULLEN, Acting Warden)	Order Granting in Part Petitioner's
of San Quentin State Prison,)	Motion for Equitable Tolling
)	
Respondent.)	

On August 17, 2010, Petitioner Keith Zon Doolin ("Doolin"), a state prisoner facing capital punishment, filed a motion for equitable tolling of the one-year statute of limitations under the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA"). A case management conference was held September 27, 2010, before the Honorable Anthony W. Ishii, to discuss Doolin's motion and the litigation schedule in this case. The hearing continued after the Warden's counsel was excused to address case budgeting issues in camera. Under 18 U.S.C. § 3599(f), ex parte consideration of funding applications requires a showing of the need for confidentiality. Since budget applications require disclosure of matters protected by the attorney-client and/or work product privileges, the need for confidentiality is inherent in the budgeting process. See

1 Fed.R.Civ.P. 26 (b)(3). Accordingly, budget forms and supporting
2 documentation are filed under seal and court proceedings, though reported,
3 similarly are maintained under seal. A separate order filed under seal
4 documents the results of the ex parte proceedings authorizing a Phase I budget
5 for this case.

6 Doolin first sought federal habeas corpus relief August 17, 2009, and the
7 Federal Defender was appointed to represent him October 14, 2009. The parties
8 agreed the statute of limitations (“SOL”) would expire October 5, 2010, one year
9 after the denial of certiorari on Doolin’s direct appeal. During the investigation
10 of Doolin’s federal habeas petition, the Federal Defender discovered a conflict in
11 their representation which required them to withdraw, and new counsel was
12 appointed under the Criminal Justice Act to represent Doolin on June 15, 2010.

13 Doolin argues his change of counsel justifies tolling the SOL for one year,
14 to October 5, 2011. New counsel assert this amount of time is necessary to review
15 the record and files, familiarize themselves with the work of prior counsel,
16 integrate that into the petition, and conduct further investigation and analysis of
17 the two murders and four attempted murders underlying Doolin’s conviction.
18 New counsel filed a sealed declaration in support stating the tasks projected to be
19 completed prior to filing his federal petition. New counsel also assert the court
20 must consider they are both in private practice with active caseloads. Doolin
21 cites in support of his motion the Ninth Circuit’s approval of seven months of
22 tolling in *Beeler*¹ where lead counsel withdrew and second counsel remained on
23

24 ¹ *Calderon v. United States District Court (Beeler)*, 128 F.3d 1283, 1289 (9th Cir.
25 1997), *overruled on other grounds by Calderon v. United States District Court (Kelly)*, 163
26 F.3d 530, 530 (9th Cir. 1998) (when is a case pending for purposes of applying the
AEDPA), and later affirmed on those grounds by *Woodford v. Garceau*, 538 U.S. 202 (2003)
(abrogating *Kelly*’s ruling regarding application of the AEDPA).

1 the case, arguing that one year of tolling is justified here since no prior counsel
2 remains on his case. Doolin asserts he meets the other requirements for equitable
3 tolling: that he has been diligent and extraordinary circumstances beyond his
4 control require tolling, *see Holland v. Florida*, 560 U.S. ___, 130 S.Ct. 2459, 2560
5 (2010), and that tolling will allow him to receive effective assistance of counsel
6 and will not prejudice the State.

7 Respondent Vincent Cullen (“the Warden”) asserts that new counsel for
8 Doolin can present all the exhausted claims from the state direct appeal and
9 habeas petition by the current deadline. Counsel can then develop any
10 additional claims and seek to amend the federal petition as necessary, risking
11 losing only the “newly developed” claims if equitable tolling is not granted.
12 Alternatively, based on the time that prior and current counsel have been
13 appointed in this case, the Warden requests that should equitable tolling be
14 granted, no more than six months be allowed.

15 Doolin rejects the Warden’s proposal to simply re-title the state filings,
16 then develop any additional claims and seek to amend the federal petition.
17 Doolin asserts new counsel have a duty to ensure all viable claims and the facts
18 supporting them are presented in the petition, which requires review of the
19 record and subsequent investigation, and the Warden’s suggestion to file a
20 petition and seek amendment for additional claims overlooks the limits imposed
21 by *Mayle v. Felix*, 545 U.S. 644 (2005) (amendment only allowed after the one-year
22 statute of limitations if the claims “relate back” to the original petition). Doolin
23 observes the Warden concedes that he risks losing the newly developed claims
24 by seeking amendment, and asserts that when he is not at fault he should not
25 have to “risk” anything, especially where a potential claim might save his life.
26 Doolin further contends the Warden’s argument does not assert any prejudice

1 resulting from the proposed one-year extension, and argues the failure to grant
2 the extra year would seriously prejudice his right to present a comprehensive
3 petition.

4 Under 28 U.S.C. § 2241(d)(1), a state court prisoner has one-year to seek
5 federal habeas corpus relief from a state court judgment. The one-year period
6 runs from the date on which direct review became final, and may be tolled by the
7 filing of a state habeas petition. 28 U.S.C. § 2254(d)(2). The United States
8 Supreme Court recently determined that the one-year statute of limitations of
9 § 2254(d) is subject to equitable tolling, first, since it is not jurisdictional it is
10 subject to a rebuttable presumption in favor of equitable tolling, second, because
11 it differs from statutes where that presumption has been overcome, and third,
12 because the basic purpose of the AEDPA is not undermined by equitable tolling.
13 *Holland v. Florida, supra*, 560 U.S. ___, 130 S.Ct. at 2560-62.

14 In *Holland*, the Supreme Court reiterated that in order to be entitled to
15 equitable tolling, the petitioner must show “that he has been pursuing his rights
16 diligently, and that some extraordinary circumstance stood in his way and
17 prevented timely filing.” *Holland*, ___ U.S. ___. 103 S.Ct. at 2562. The decision on
18 whether a court should grant equitable tolling is “highly fact-dependent” and a
19 petitioner “bears the burden of showing that equitable tolling is appropriate.”
20 *Espinoza-Matthews v. California*, 432 F.3d 1021, 1026 (9th Cir. 2005).

21 The minimum amount of equitable tolling to which Doolin would be
22 entitled is the time he was totally without counsel, or 27 days: 9 days from the
23 denial of certiorari October 5, 2009, until the appointment of the Federal
24 Defender October 14, 2009, plus 18 days from when the Federal Defender’s
25 motion to withdraw was granted May 28, 2010, until the appointment of new
26 counsel June 15, 2010. The maximum amount of equitable tolling, which

1 completely discounts the over seven months of representation by the Federal
2 Defender, would be 253 days (from denial of certiorari to appointment of new
3 counsel).

4 Based on the filings of the parties and their positions as presented at the
5 hearing, the Court determined that equitable tolling is justified in this case due to
6 the change in representation for Doolin. The Court found that seven months
7 (approximately 210 days) of tolling was reasonable in light of the facts of this
8 case. Doolin's federal habeas petition is due on or before April 27, 2011.

9 After filing of the federal petition, the parties shall meet and confer for the
10 purpose of discussing their respective positions about the exhaustion status of
11 the petition, and shall file a Joint Statement on Exhaustion by May 27, 2011.
12 Should the parties be unable to agree about the exhaustion status of any claim(s)
13 in the petition, Doolin shall file, concurrently with the joint statement, a
14 supplemental declaration setting forth where in the state filings he contends the
15 exhaustion requirement was satisfied. A case management conference shall be
16 held June 6, 2011, at 3:00 p.m., to discuss the subsequent litigation schedule. The
17 conference shall be held telephonically, although local counsel may elect to
18 appear in person. Counsel for Doolin shall initiate the conference call, if
19 necessary.

20 IT IS SO ORDERED.

21
22 DATED: October 1, 2010

23 /s/ Anthony W. Ishii

24 Chief United States District Judge
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