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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GARY DELMAR HENDERSON,	}	1:11-cv-00391 LJO MJS HC
Petitioner,	}	
v.	}	FINDINGS AND RECOMMENDATION REGARDING RESPONDENT'S MOTION TO DISMISS
KATHLEEN ALLISON, Warden,	}	[Doc. 13]
Respondent.	}	

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent, Kathleen Allison, as warden of California Substance Abuse Treatment Facility, is hereby substituted as the proper named respondent pursuant to Rule 25(d) of the Federal Rules of Civil Procedure. Respondent is represented in this action by Craig S. Meyers, Esq., of the Office of the Attorney General for the State of California.

I. BACKGROUND

Petitioner is currently in the custody of the California Department of Corrections pursuant to a judgment of the Superior Court of California, County of Tulare, upon being convicted by a jury of first degree burglary, assault with a semiautomatic firearm, forcible rape,

1 penetration by a foreign object, first degree residential robbery, dissuading a witness, and false
2 imprisonment by violence. (See LD No. 1.¹) On March 9, 2007, Petitioner was sentenced to
3 serve an indeterminate term of four-hundred and ninety four (494) years to life. (Id.) On
4 February 19, 2008, the California Court of Appeal, Fifth Appellate District, affirmed the
5 judgment. (LD 2.) Petitioner sought review before the California Supreme Court, which was
6 denied on April 30, 2008. (LDs 3-4.)

7 Starting in October 2008, Petitioner filed ten post-conviction collateral challenges with
8 respect to conviction in the state courts, as follows:

- 9 1. Tulare County Superior Court
10 Filed: October 19, 2008²;
Denied: October 24, 2008;
- 11 2. California Court of Appeal, Fifth Appellate District
12 Filed: December 9, 2008³;
Denied: January 5, 2009;
- 13 3. California Court of Appeal, Fifth Appellate District
14 Filed: February 16, 2009⁴;
Denied: June 12, 2009;
- 15 4. California Supreme Court
16 Filed: March 12, 2009⁵;
Denied: August 12, 2009;
- 17 5. Tulare County Superior Court

20 ¹ "LD" refers to the documents lodged by Respondent in support of his motion to dismiss.

21 ² Under the mailbox rule, the Court deems petitions filed on the date Petitioner handed a petition to prison
22 authorities for mailing. Houston v. Lack, 487 U.S. 266, 276, 108 S.Ct. 2379, 2385, 101 L. Ed. 2d 245 (1988);
23 Campbell v. Henry, 614 F.3d 1056 (9th Cir. 2010); see also Rule 3(d) of the Rules Governing Section 2254 Cases.
Although the petition was filed on October 22, 2008, pursuant to the mailbox rule the Court considers the petition
24 filed on October 19, 2008, the date Petitioner signed the petition.

25 ³ Although the petition was filed on December 10, 2008, under the mailbox rule the Court will consider the
petition filed on December 9, 2008, the date Petitioner signed the petition.

26 ⁴ Although the petition was filed on February 18, 2009, under the mailbox rule the Court will consider the
27 petition filed on February 16, 2009, the date Petitioner signed the petition.

28 ⁵ Although the petition was filed on March 16, 2009, under the mailbox rule the Court will consider the
petition filed on March 12, 2009, the date Petitioner signed the petition.

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Filed: March 18, 2009⁶;
Denied: March 23, 2009;

6. California Court of Appeal, Fifth Appellate District
Filed: August 25, 2009⁷;
Denied: January 7, 2010;

7. Tulare County Superior Court
Filed: September 3, 2009⁸;
Denied: September 15, 2009;

8. California Supreme Court
Filed: September 8, 2009⁹;
Denied: February 24, 2010;

9. California Supreme Court
Filed: December 4, 2009¹⁰;
Denied: June 9, 2010;

10. California Court of Appeal, Fifth Appellate District
Filed: December 4, 2009¹¹;
Denied: January 7, 2010.

(See LDs 5-24.)

On February 12, 2011¹², Petitioner filed the instant federal Petition for Writ of Habeas Corpus in this Court. On November 14, 2011, Respondent filed a Motion to Dismiss the petition as being filed outside the one-year limitations period prescribed by 28 U.S.C. § 2244(d). (Mot. to Dismiss, ECF No. 13.) Petitioner filed a response to the motion on

⁶Although the petition was filed on March 20, 2009, under the mailbox rule the Court will consider the petition filed on March 18, 2009, the date Petitioner signed the petition.

⁷Although the petition was filed on September 4, 2009, under the mailbox rule the Court will consider the petition filed on August 25, 2009, the date Petitioner signed the petition.

⁸Although the petition was filed on September 10, 2009, under the mailbox rule the Court will consider the petition filed on September 3, 2009, the date Petitioner signed the petition.

⁹Although the petition was filed on September 11, 2009, under the mailbox rule the Court will consider the petition filed on September 8, 2009, the date Petitioner signed the petition.

¹⁰Although the petition was filed on December 7, 2009, under the mailbox rule the Court will consider the petition filed on December 4, 2009, the date Petitioner signed the petition.

¹¹Although the petition was filed on December 8, 2009, under the mailbox rule the Court will consider the petition filed on December 4, 2009, the date Petitioner signed the petition.

¹²Petitioner's federal petition was filed on February 17, 2011, under the mailbox rule the Court will consider the petition filed on February 12, 2011, the date Petitioner signed the petition.

1 January 31, 2012. (Response, ECF No. 17.) Respondent filed a reply on April 24, 2012.
2 (Reply, ECF No. 22.) Petitioner requested an opportunity to address the material presented
3 in the reply. The Court granted Petitioner the right to respond to the reply, and Petitioner filed
4 an answer to the reply on August 6, 2012. (Answer, ECF No. 27.)

5 **II. DISCUSSION**

6 **A. Procedural Grounds for Motion to Dismiss**

7 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a
8 petition if it “plainly appears from the petition and any attached exhibits that the petitioner is
9 not entitled to relief in the district court” Rule 4 of the Rules Governing Section 2254
10 Cases.

11 The Ninth Circuit has allowed respondents to file a motion to dismiss in lieu of an
12 answer if the motion attacks the pleadings for failing to exhaust state remedies or being in
13 violation of the state’s procedural rules. See, e.g., O’Bremski v. Maass, 915 F.2d 418, 420 (9th
14 Cir. 1990) (using Rule 4 to evaluate motion to dismiss petition for failure to exhaust state
15 remedies); White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (using Rule 4 as procedural
16 grounds to review motion to dismiss for state procedural default); Hillery v. Pulley, 533 F.Supp.
17 1189, 1194 & n. 12 (E.D. Cal. 1982) (same). Thus, a respondent can file a motion to dismiss
18 after the court orders a response, and the Court should use Rule 4 standards to review the
19 motion. See Hillery, 533 F. Supp. at 1194 & n. 12.

20 In this case, Respondent’s motion to dismiss is based on a violation of the one-year
21 limitations period. 28 U.S.C. § 2244(d)(1). Because Respondent’s motion to dismiss is similar
22 in procedural standing to a motion to dismiss for failure to exhaust state remedies or for state
23 procedural default and Respondent has not yet filed a formal answer, the Court will review
24 Respondent’s motion to dismiss pursuant to its authority under Rule 4.

25 **B. Commencement of Limitations Period Under 28 U.S.C. § 2244(d)(1)(A)**

26 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act
27 of 1996 (hereinafter “AEDPA”). The AEDPA imposes various requirements on all petitions for
28 writ of habeas corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117

1 S.Ct. 2059, 2063 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc),
2 *cert. denied*, 118 S.Ct. 586 (1997).

3 In this case, the petition was filed on February 12, 2011, and is subject to the provisions
4 of the AEDPA. The AEDPA imposes a one-year period of limitation on petitioners seeking to
5 file a federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As amended, § 2244,
6 subdivision (d) reads:

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

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

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

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

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

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

19 28 U.S.C. § 2244(d).

20 Under § 2244(d)(1)(A), the limitations period begins running on the date that the
21 petitioner's direct review became final or the date of the expiration of the time for seeking such
22 review. In this case, the California Supreme Court denied review on April 30, 2008. The state
23 appeal process became final ninety days later, on July 29, 2008, when the time for seeking
24 certiorari with the United States Supreme Court expired. U.S. Supreme Court rule 13; Bowen
25 v. Rowe, 188 F.3d 1157 (9th Cir. 1999). The AEDPA statute of limitations began to run the
26 following day, on July 30, 2008. Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001).

27 Petitioner would have one year from July 30, 2008, absent applicable tolling, in which
28 to file his federal petition for writ of habeas corpus. However, Petitioner delayed in filing the

1 instant petition until February 12, 2011, over a year and a half after the statute of limitations
2 period expired. Absent the later commencement of the statute of limitations or any applicable
3 tolling, the instant petition is barred by the statute of limitations.

4 **C. Tolling of the Statute of Limitations Period During State Court Appeals**

5 28 U.S.C. § 2244(d)(2) states that the “time during which a properly filed application for
6 State post-conviction or other collateral review with respect to the pertinent judgment or claim
7 is pending shall not be counted toward” the one year limitation period. 28 U.S.C. § 2244(d)(2).
8 In Carey v. Saffold, the Supreme Court held the statute of limitations is tolled where a
9 petitioner is properly pursuing post-conviction relief, and the period is tolled during the intervals
10 between one state court's disposition of a habeas petition and the filing of a habeas petition
11 at the next level of the state court system. 536 U.S. 214, 216 (2002); see also Nino v. Galaza,
12 183 F.3d 1003, 1006 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 1846 (2000). Nevertheless, state
13 petitions will only toll the one-year statute of limitations under § 2244(d)(2) if the state court
14 explicitly states that the post-conviction petition was timely or was filed within a reasonable
15 time under state law. Pace v. DiGuglielmo, 544 U.S. 408 (2005); Evans v. Chavis, 546 U.S.
16 189 (2006). Claims denied as untimely or determined by the federal courts to have been
17 untimely in state court will not satisfy the requirements for statutory tolling. Id.

18 Here, the statute of limitations began to run on July 30, 2008. According to the state
19 court records provided by Respondent, Petitioner filed his first petition for collateral relief, in
20 the form of a petition for writ of habeas corpus, on October 19, 2008. (LD 5.) Respondent
21 concedes that Petitioner is entitled to tolling with regard to this petition. However, 81 days of
22 the limitation period passed before the application was filed. Based on such tolling, 284 days
23 of the limitations period remained when the petition was denied on October 24, 2008.

24 Petitioner next filed an appeal with the Fifth District Court of Appeal on December 9,
25 2008, which was denied on January 5, 2009. The court denied the appeal as Petitioner was
26 appealing a non-appealable order, and instead was required to file an original petition of writ
27 of habeas corpus with the court of appeal. (LD 8.) In Artuz v. Bennett, 531 U.S. 4, 121 S. Ct.
28 361, 148 L. Ed. 2d 213 (2000), the Supreme Court noted that a petition is filed "when it is

1 delivered to, and accepted by, the appropriate court officer for placement into the official
2 record." Id. at 8. The court determined that such a petition is "*properly* filed" for § 2244(d)(2)
3 purposes "when its delivery and acceptance are in compliance with the applicable laws and
4 rules governing filings." Id. (emphasis in original). The Supreme Court explained that
5 applicable rules usually include "the form of the document, the time limits upon its delivery, the
6 court and office in which it must be lodged, and the requisite filing fee." Id. (citations omitted).
7 In this case, the state court of appeal rejected Petitioner's attempt to appeal the denial on the
8 ground that the order was not appealable, citing In re Crow, 4 Cal. 3d 613, 621 n.8, 94 Cal.
9 Rptr. 254, 483 P.2d 1206 (1971) ("the prisoner cannot assert any right to appeal the denial of
10 his petition for writ of habeas corpus. . . . Since the petitioner cannot appeal, his remedy lies
11 in the petition for habeas corpus to a higher court"). The court thus refused to accept the
12 notice of appeal because it was not "in compliance" with the procedural rules for seeking
13 review of habeas petitions. Specifically, Petitioner's filing of an appeal rather than a petition
14 for writ of habeas corpus was a failure to comply with applicable laws and rules regarding the
15 form of the document to be filed. Accordingly, the appeal was not a properly filed application
16 for state collateral review and Petitioner is not entitled to tolling. See Parsons v. Carey, 2006
17 U.S. Dist. LEXIS 12322 (E.D. Cal. Mar. 7, 2006).

18 Petitioner next filed a state habeas petition with the Fifth District Court of Appeal on
19 February 16, 2009, which was denied on June 12, 2009. Here, Petitioner delayed 115 days
20 from the denial of his superior court petition to the filing of his habeas petition (rather than
21 notice of appeal) with the court of appeal. Such a delay is unreasonable, thereby making his
22 petition untimely. See Velasquez v. Kirkland, 639 F.3d 964 (9th Cir. 2011) (eighty and ninety-
23 one day delays in filing are unreasonable under California law and prevent tolling of AEDPA's
24 one year statute of limitations.). Petitioner is not entitled to tolling for the period between filing
25 his petitions.

26 115 days passed between the denial of Petitioner's superior court petition and the filing
27 of his court of appeal petition. However, Petitioner is still entitled to tolling during the time in
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1 which the second petition was filed. Accordingly, 169 days of the limitations period remained
2 as of June 12, 2009, the date the second petition was denied.

3 Respondent does not contest that Petitioner is entitled to tolling during the time which
4 petitioner sought habeas review with the court of appeal, and subsequently with the California
5 Supreme Court. Accordingly, Petitioner is entitled to tolling until the denial of his California
6 Supreme Court habeas petition on August 12, 2009. Accordingly, 169 days of the limitations
7 period remained as of August 12, 2009, the date the California Supreme Court petition was
8 denied.¹³

9 Petitioner next filed a state habeas petition with the Fifth District Court of Appeal on
10 August 25, 2009, which was denied on January, 2010. The petition appears to be identical to
11 the California Supreme Court petition denied on August 12, 2009. However, as the claims of
12 the petition were presented to, and denied by, the California Supreme Court, the petition
13 appears successive. In *Banjo v. Ayers*, 614 F.3d 964 (9th Cir. 2010), the Ninth Circuit
14 described when a second petition is considered to be a successive petition, and that the
15 period between such petitions is not entitled to tolling:

16 Only the time period during which a round of habeas review is pending
17 tolls the statute of limitation; periods between different rounds of collateral attack
18 are not tolled. *Biggs v. Duncan*, 339 F.3d 1045, 1048 (9th Cir. 2003). We employ
19 a two-part test to determine whether the period between the denial of one
20 petition and the filing of a second petition should be tolled. *Hemmerle v. Arizona*,
21 495 F.3d 1069, 1075 (9th Cir. 2007); *King v. Roe*, 340 F.3d 821, 823 (9th Cir.
22 2003), abrogated on other grounds by *Chavis*, 546 U.S. 189, 126 S. Ct. 846, 163
23 L. Ed. 2d 684. "First, we ask whether the petitioner's subsequent petitions are
24 limited to an elaboration of the facts relating to the claims in the first petition."
25 *King*, 340 F.3d at 823. If the petitions are not related, then the subsequent
26 petition constitutes a new round of collateral attack, and the time between them
27 is not tolled. *Hemmerle*, 495 F.3d at 1075; *King*, 340 F.3d at 823. If the
28 successive petition was attempting to correct deficiencies of a prior petition,
however, then the prisoner is still making "proper use of state court procedures,"

¹³ During this time period Petitioner filed his fifth action for collateral review, a petition for writ of habeas corpus with the superior court. As Petitioner is already entitled to tolling during that period, the petition is not relevant to the current timeliness inquiry.

1 and habeas review is still pending. King, 340 F.3d at 823 (quoting Nino v.
2 Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999)); Hemmerle, 495 F.3d at 1075.
3 Second, if the successive petition was not timely filed, the period between the
4 petitions is not tolled. Hemmerle, 495 F.3d at 1075; King, 340 F.3d at 823.

5 Banjo, 614 F.3d at 968-969.

6 Petitioner presented the same claims in his sixth petition, but does not appear to be
7 attempting to correct deficiencies of the prior petitions. The sixth petition therefore constitutes
8 a new round of collateral attack, and the time between the filing of the petitions is not tolled.
9 In this case, Petitioner's petition to the California Supreme Court was denied on August 12,
10 2009, and the sixth petition was filed on August 25, 2009. As thirteen (13) days of the statute
11 of limitations expired during this time, 156 days of the period remained as of August 25, 2009.

12 While Petitioner is not entitled to tolling for the period between filing petitions,
13 Respondent concedes that Petitioner is entitled to tolling with regard to the time the sixth and
14 eighth petitions were pending.¹⁴ As 156 days of the statute of limitations period remained
15 before filing the petitions, 156 days of the limitations period still remained when the eighth
16 petition was denied on February 24, 2010.

17 Petitioner next filed his ninth state habeas petition with the California Supreme Court
18 on December 4, 2009, which was denied on June 9, 2010. The California Supreme Court
19 found the petition untimely. The court cited In re Clark, 5 Cal. 4th 750 (1993), and In re
20 Robbins, 18 Cal. 4th 770, 780 (1998), both of which stand for the proposition that untimely
21 petitions will not be permitted. (LD Nos. 21-22.) A habeas petition rejected by the state court
22 as untimely is not "properly filed" for purposes of AEDPA tolling. Pace, 544 U.S. at 414-415;
23 Bonner v. Carey, 425 F.3d 1145, 1149 (9th Cir. 2005). Only "properly filed" state petitions are
24 entitled to AEDPA tolling. 28 U.S.C. § 2244(d)(2). "When a post-conviction petition is untimely

25 ¹⁴ During this time period Petitioner filed his seventh and tenth actions for collateral review, a petition for
26 writ of habeas corpus with the superior court and a petition with the court of appeal. As Petitioner is already entitled
27 to tolling during that period, the petitions are not relevant to the current timeliness inquiry.
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1 under state law, that [is] the end of the matter for purposes of § 2244(d)(2)." Bonner, 425 F.3d
2 at 1148 (quoting Pace, 544 U.S. at 414). Petitioner's ninth state petition does not toll the
3 one-year statute of limitations.

4 Accordingly, 156 days of the limitations period remained as of February 24, 2010, the
5 date the eighth petition was denied. The instant petition was filed on February 12, 2011.
6 However, the statute of limitations expired on July 30, 2010, six months before the instant
7 federal petition was filed. The petition is therefore untimely.

8 **D. Equitable Tolling**

9 The limitations period is subject to equitable tolling if the petitioner demonstrates: "(1)
10 that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance
11 stood in his way." Holland v. Florida, 130 S. Ct. 2549, 2560-62 (2010); quoting Pace v.
12 DiGuglielmo. Petitioner bears the burden of alleging facts that would give rise to tolling. Pace,
13 544 U.S. at 418; Hinton v. Pac. Enters., 5 F.3d 391, 395 (9th Cir.1993). Petitioner presents
14 two grounds for equitable tolling based on: (1) Petitioner's lack of skill in the law, and (2)
15 Petitioner's mental incompetence. The Court shall address Petitioner's claims in turn.

16 1. Ignorance of the Law

17 Petitioner claims he should be entitled to equitable tolling because he is uneducated
18 and does not have knowledge of the law. Petitioner, in his response to the motion to dismiss,
19 describes his diligence in pursuing relief by way of drafting significant correspondence to
20 different organizations in an attempt to advance his collateral challenges. (See Response,
21 ECF No. 17.) Assuming that Petitioner did take the actions stated in his response, and was
22 diligent in his efforts to gain assistance to seek collateral relief, Petitioner still must show that
23 an extraordinary circumstance stood in his way. To the extent that Petitioner contends that the
24 extraordinary circumstance was his lack of understanding of the law, his claim for equitable
25 tolling must fail. Raspberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006) (pro se lack of legal
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1 sophistication is not an extraordinary circumstance warranting equitable tolling); Turner v.
2 Johnson, 177 F.3d 390, 392 (5th Cir. 1999), (inmate's lack of legal training, a poor education,
3 or illiteracy does not give a court reason to toll the limitations period); Shoemate v. Norris, 390
4 F.3d 595, 598 (8th Cir. 2004); Marsh v. Soares, 223 F.3d 1217, 1220 (10th Cir. 2000).

5 Petitioner's circumstances are no different than the majority of incarcerated prisoners
6 attempting to file petitions for writ of habeas corpus. Accordingly, his ignorance of the law is
7 not an extraordinary circumstance entitling Petitioner to equitable tolling.

8 2. Mental Incompetence

9 Under some circumstances, a mental illness can represent an extraordinary
10 circumstance justifying equitable tolling. See Laws v. Lamarque, 351 F.3d 919, 923 (9th Cir.
11 2003) (remanded to determine whether mental illness prevented petitioner from timely filing).
12 In Bills v. Clark, 628 F.3d 1092 (9th Cir. 2010), the Court of Appeals for the Ninth Circuit
13 determined that courts should use a two part test to evaluate the application of equitable tolling
14 in cases where petitioner suffers from a mental impairment. Id.

15 (1) First, a petitioner must show his mental impairment was an "extraordinary
16 circumstance" beyond his control, see Holland, 130 S. Ct. at 2562, by
demonstrating the impairment was so severe that either

17 (a) petitioner was unable rationally or factually to personally
18 understand the need to timely file, or

19 (b) petitioner's mental state rendered him unable personally to
20 prepare a habeas petition and effectuate its filing. [Footnote
omitted]

21 (2) Second, the petitioner must show diligence in pursuing the claims to the
22 extent he could understand them, but that the mental impairment made it
impossible to meet the filing deadline under the totality of the circumstances,
including reasonably available access to assistance. See id.

23 Bills, 628 F.3d at 1100.

24 A petitioner who "makes a good-faith allegation that would, if true, entitle him to
25 equitable tolling" may be entitled to an evidentiary hearing. Roy v. Lampert, 465 F.3d 964, 969
26 (9th Cir. 2006) (quoting Laws, 351 F.3d at 919). However, a district court is not obligated to
27 hold an evidentiary hearing to further develop the factual record, even when a petitioner
28 alleges mental incompetence, when the record is sufficiently developed, and it indicates that

1 the petitioner's mental incompetence was not so severe as to cause the untimely filing of his
2 habeas petition. Roberts v. Marshall, 627 F.3d 768, 773 (9th Cir. 2010).

3 In the instant case, the relevant period is between July 30, 2008, when the one-year
4 limitations period began, and February 12, 2011, the date the instant petition was
5 constructively filed. See Laws, 351 F.3d at 923 ("Laws was adjudicated competent to stand
6 trial in 1993, notwithstanding evidence of serious mental illness. But that determination has
7 little bearing on his competence vel non during the period 1996-2000[,] . . . "the years when
8 his petitions should have been filed.")

9 With his response to the motion to dismiss, Petitioner provided some medical records
10 in support of his claim that he should be entitled to tolling based on mental incompetence.
11 Petitioner claims that prior to 2005, he was under the care of a licensed psychologist and
12 prescribed medications for his paranoia and antisocial conditions. (Response at 7, ECF No.
13 17.) Petitioner also asserts that despite not having a mental health competency hearing before
14 trial, at least one doctor found him not to be sane and that he suffers from post traumatic
15 stress disorder, paranoid personality disorder, and anti-social disorder. (Response at 7-8.)
16 Attached to the response, Petitioner included a copy of a statement of parent or caretaker
17 incapacity from 2005 which states that Petitioner requires childcare assistance due to his
18 mental health issues. (Response at 62.) Petitioner blames his mental health as the reason that
19 he filed his state petitions in an erratic manner. (Response at 7-8.)

20 Respondent then filed a reply and attaching 164 pages of exhibits relating to Petitioner's
21 mental health during the relevant time period. (Reply, ECF No. 22.) Respondent provided
22 medical records from 2007 to 2011. In May 2008, just prior to the relevant period, Petitioner
23 was diagnosed with depression and adjustment disorder, had a history of auditory
24 hallucinations and lack of sleep, and although he previously had been prescribed antipsychotic
25 medications, none were provided during this period.. (Reply, Ex. A at 5-7.) Petitioner's
26 subsequent annual mental health reviews for 2009 and 2010 provide similar information, but
27 note Petitioner's lack of cooperation and belief that mental health services could not provide
28 him assistance.

1 Respondent provided mental health progress notes for Petitioner's treatment from 2008
2 to 2010. (Reply, Ex. A at 33-86.) The notes reflect that Petitioner remained depressed
3 throughout the period and slept only several hours a night. (Id.) However, on several
4 occasions, Petitioner was uncooperative and did not want to receive mental health service
5 assistance. (Id.) The documents assessing Petitioner's cognitive functioning, while
6 recognizing he suffered from depression and paranoid personality disorder, largely indicate
7 that he was alert, oriented, organized, coherent, and cooperative. (Id., Ex. A at pp. 5, 27, 33,
8 34, 37, 40, 52, 59, 70, 80, 86, 87.) Some of the documents reflect that Petitioner had auditory
9 hallucinations primarily before his incarceration, but not during the limitations period. (Id., Ex.
10 A at 4, 8, 11, 16, 18, 19, 20, 22, 23, 24, 25, 28, 30, 66.) Other documents reflect that Petitioner
11 did not want and refused to take medication. (Id., Ex. A at 29, 32, 33, 37, 40, 43, 45, 47, 50,
12 53, 54, 55, 60, 61, 72, 73.)

13 Furthermore, the documents reveal that while Petitioner was included in the mental
14 health treatment program, he participated only as an outpatient in the Correctional Clinical
15 Case Management System (CCCMS) level of care and was usually housed in the general
16 prison population. On April 7, 2011, Petitioner was removed completely from the mental health
17 treatment program. (Id., Ex. A at pp. 61, 79, 85, 86.) While Petitioner was removed from
18 CCCMS, it is unclear if his removal was based on freedom from symptoms or Petitioner's lack
19 of cooperation. For example, on March 15, 2011, less than a month before Petitioner was
20 removed from CCCMS, progress notes indicate that Petitioner "filled out refusal form and left,
21 but returned upon officers request. Reports not liking or needing to talk but wanting to remain
22 in [CCCMS] because 'he knows he needs it.'" (Id. at 59.) On April 7, 2011, treatment notes
23 indicate that Petitioner had no interest in talking, does not want psychiatric medication, and
24 has no interest in getting treatment. (Id. at 61.)

25 Petitioner's GAF¹⁵ scores were fairly stable and ranged from 58 to 65 during the
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27 ¹⁵ "GAF" is an acronym for "Global Assessment of Functioning," a scale used by clinicians to assess an
28 individual's overall level of functioning, including the "psychological, social, and occupational functioning on a
hypothetical continuum of mental health-illness." Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of
Mental Disorders with Text Revisions 32 (4th ed. 2004). A GAF of 61-70 indicates some mild symptoms (e.g.,
depressed mood and mild insomnia) or some difficulty in social, occupational, or school function (e.g. occasional

1 relevant period. (Id., Ex. A at 9, 12, 34, 37, 40, 43, 45, 47, 49-55, 59, 72-3, 78.) While
2 Petitioner's GAF scores indicate moderate symptoms, when he was willing to talk he was often
3 noted to be cooperative and to have goal directed and linear thought processes. (Id.)

4 Thus, review of the medical records confirms that Petitioner was routinely seen on an
5 outpatient basis for his mental health care issues, and that Petitioner was stable without
6 medications. During the majority of the relevant period, petitioner was assigned to the CCCMS
7 level of care, which "suggests that petitioner was able to function despite his mental
8 problems." Washington v. McDonald, 2010 U.S. Dist. LEXIS 17437, 2010 WL 1999469, at *2
9 (C.D. Cal. Feb. 19, 2010).

10 In addition, as noted by Respondent, Petitioner provided no factual allegations to
11 demonstrate his mental illness was so severe that he was unable to understand the need to
12 timely file or that the illness rendered him unable to prepare a habeas petition and file it.
13 During the time the statute of limitations period was running, medical records demonstrate that
14 petitioner was diagnosed with moderate mental illness that required no medication. There is
15 no indication that Petitioner was being treated for incompetence or being specially housed due
16 to his mental health issues. Rather, Petitioner was housed in the general population. The
17 medical records do not demonstrate a medical incapacity so severe that it prevented Petitioner
18 from understanding and acting on his rights. Petitioner was generally oriented, able to
19 communicate, and able to understand communications by others.

20 Thus, while Petitioner suffered from mental illness during the relevant period, Petitioner
21 failed to demonstrate that his mental impairment was so severe that he was unable to either
22 understand the need to file or to personally prepare and file a habeas petition from 2008 to
23

24 truancy, or theft within the household), but generally functioning pretty well, has some meaningful interpersonal
25 relationships. Id. A GAF of 51-60 indicates moderate symptoms (e.g., flat affect and circumstantial speech,
26 occasional panic attacks) or moderate difficulty in social, occupational, or school function (e.g., few friends,
27 conflicts with peers or co-workers.) Id. A 41-50 rating indicates serious symptoms such as suicidal ideation, severe
28 obsessional rituals, or serious impairment in social, work, or school functioning. A GAF of 31-40 indicates: "Some
impairment in reality testing or communication (e.g., speech is at times illogical, obscure, or irrelevant) OR major
impairment in several areas, such as work or school, family relations, judgment, thinking, or mood (e.g.,
depressed man avoids friends, neglects family, and is unable to work; child frequently beats up younger children,
is defiant at home, and is failing at school.)" Id.

1 2010. Accordingly, Petitioner does not meet the first prong of the Bills test.

2 Even if Petitioner's mental illness was so severe as to meet the first prong of Bills,
3 Petitioner failed to address the second prong issue of diligence. Petitioner "must diligently
4 seek assistance and exploit whatever assistance is reasonably available." Bills, 628 F.3d at
5 1100. A Petitioner may satisfy the diligence prong if "the petitioner's mental impairment
6 prevented him from locating assistance or communicating with or sufficiently supervising any
7 assistance actually found." Id. But, as the Supreme Court noted in Holland, the diligence
8 requirement is not maximum diligence but rather reasonable diligence. Id. Thus, the court must
9 examine whether, given Petitioner's impairments, he was sufficiently diligent.

10 Here, Petitioner alleged no facts showing that he attempted to obtain assistance in
11 order to file a timely petition, or that his alleged mental problems prevented him from locating
12 or communicating with others for assistance. Instead records reflect that Petitioner filed ten
13 state habeas petitions, raising substantive legal challenges, albeit in an erratic manner.
14 Petitioner must do more than simply assert his mental impairments to establish that he is
15 entitled to equitable tolling. Review of the medical records demonstrate that Petitioner was
16 able to communicate clearly with medical professionals, but at times chose not to. Records
17 also reflect that Petitioner, either by himself, or with assistance was able to file habeas
18 petitions. Petitioner has alleged no facts demonstrating a causal connection between his
19 alleged mental illness and his inability to file a timely petition. "Without any allegation or
20 evidence of how petitioner's symptoms actually caused him not to be able to file despite his
21 diligence, the court cannot find that he is entitled to equitable tolling." Taylor v. Knowles, 2009
22 U.S. Dist. LEXIS 20110, 2009 WL 688615, at *6 (E.D. Cal. March 13, 2009), *aff'd*, 368 Fed.
23 Appx. 796 (9th Cir. 2010) (no equitable tolling where petitioner failed to show his auditory
24 hallucinations, severe depression, and anxiety "actually caused him not to be able to file
25 despite his diligence"); *see* Howell v. Roe, 2003 U.S. Dist. LEXIS 2458, 2003 WL 403353, *4
26 (N.D. Cal. Feb. 20, 2003) (rejecting equitable tolling where petitioner's suicidal nature and
27 depression did not make him mentally incompetent). Here, Petitioner failed to allege how his
28 condition interfered with his ability to timely file the instant petition.

1 Accordingly, Petitioner has not shown that his mental impairment was an "extraordinary
2 circumstance" beyond his control, to where he was unable rationally or factually to personally
3 understand the need to timely file, or being unable personally to prepare a habeas petition and
4 effectuate its filing. Bills, 628 F.3d at 1100. Petitioner's assertion that he was diligently
5 protecting his rights by sending correspondence and preparing multiple state habeas petitions
6 (See Response, ECF No. 17.) is not relevant in light of his failure to show that his mental
7 impairment was an "extraordinary circumstance" beyond his control. Petitioner is not entitled
8 to equitable tolling, and his claims remain barred by the statute of limitations.

9 **III. CONCLUSION**

10 As explained above, Petitioner failed to file the instant petition for Habeas Corpus within
11 the one year limitation period required by 28 U.S.C. § 2244(d). Petitioner is entitled to the
12 benefit of statutory tolling, however, his federal petition was still untimely filed. Further,
13 Petitioner was not entitled to equitable tolling. Based on the foregoing, this Court recommends
14 that Respondent's motion to dismiss be GRANTED.

15 **IV. RECOMMENDATION**

16 Accordingly, the Court HEREBY RECOMMENDS that the motion to dismiss for
17 Petitioner's failure to comply with 28 U.S.C. § 2244(d)'s one year limitation period be
18 GRANTED.

19 This Findings and Recommendation is submitted to the assigned United States District
20 Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304 of the
21 Local Rules of Practice for the United States District Court, Eastern District of California.
22 Within thirty (30) days after the date of service of this Findings and Recommendation, any
23 party may file written objections with the Court and serve a copy on all parties. Such a
24 document should be captioned "Objections to Magistrate Judge's Findings and
25 Recommendation." Replies to the Objections shall be served and filed within fourteen (14)
26 days after service of the Objections. The Finding and Recommendation will then be submitted
27 to the District Court for review of the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636
28 (b)(1)(c). The parties are advised that failure to file objections within the specified time may

1 waive the right to appeal the Order of the District Court. Martinez v. Ylst, 951 F.2d 1153 (9th
2 Cir. 1991).

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5 IT IS SO ORDERED.

6 Dated: August 10, 2012

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE

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