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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ANTHONY MCCOY,
Petitioner,
v.
JOHN SOTO,
Respondent.

Case No. 1:15-cv-01578-LJO-EPG-HC
FINDINGS AND RECOMMENDATION TO
GRANT RESPONDENT’S MOTION TO
DISMISS AND TO DISMISS PETITION
FOR WRIT OF HABEAS CORPUS
(ECF No. 13)

Petitioner Anthony McCoy is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 2010 convictions in the Fresno County Superior Court for robbery and criminal threats. As the instant petition was filed outside 28 U.S.C. § 2244(d)(1)’s one-year limitation period, the Court recommends granting Respondent’s motion to dismiss.

I.
BACKGROUND

In 2010, Petitioner was convicted in the Fresno County Superior Court of two counts of second-degree robbery (counts 1, 2) and two counts of making criminal threats (counts 3, 4). Petitioner was sentenced to terms of twenty-five years to life on each of the two robbery counts, to be served consecutively. People v. McCoy, No. F061717, 2012 WL 2088660, at *1 (Cal. Ct. App. June 11, 2012). On June 11, 2012, the California Court of Appeal, Fifth Appellate District,

1 vacated Petitioner’s sentence and remanded for resentencing. Id. at *4. On August 13, 2012,
2 Petitioner was resentenced to a term of twenty-five years to life plus fourteen years on count 1
3 and a consecutive term of twenty-five years to life plus eleven years on count 2. People v.
4 McCoy, No. F065829, 2014 WL 2157120, at *1 (Cal. Ct. App. May 23, 2014). On May 23,
5 2014, the California Court of Appeal, Fifth Appellate District, affirmed the judgment. Id. at *2.
6 Petitioner did not seek review in the California Supreme Court. (ECF No. 13 at 2).¹
7 Subsequently, Petitioner filed a state habeas petition in the California Supreme Court, which
8 denied the petition on October 29, 2014. (LDs 5, 6).²

9 On October 16, 2015, the Court received the instant petition for writ of habeas corpus.
10 (ECF No. 1). On January 8, 2016, Respondent filed a motion to dismiss, arguing that the petition
11 was filed outside the one-year limitation period. (ECF No. 13). Petitioner did not file any
12 opposition to the motion to dismiss, and the undersigned issued a findings and recommendation
13 recommending dismissal of the petition. (ECF No. 15). Petitioner filed objections to the findings
14 and recommendation, arguing that he is entitled to equitable tolling. (ECF No. 16). Subsequently,
15 the findings and recommendation was vacated, and the parties filed supplemental briefs on the
16 issue of equitable tolling. (ECF Nos. 17, 18, 25, 27).

17 II.

18 DISCUSSION

19 A. Commencement of the Limitation Period

20 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act
21 of 1996 (“AEDPA”). The AEDPA imposes various requirements on all petitions for writ of
22 habeas corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320 (1997);
23 Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (*en banc*). As the instant petition was filed
24 after April 24, 1996, it is subject to the provisions of the AEDPA. The AEDPA imposes a one-
25 year period of limitation on petitioners seeking to file a federal petition for writ of habeas corpus.
26 28 U.S.C. § 2244(d)(1).

27 _____
28 ¹ Page numbers refer to the ECF page numbers stamped at the top of the page.

² “LD” refers to the documents lodged by Respondent on January 29, 2016. (ECF No. 14).

1 Section 2244(d) provides:

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

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

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

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

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

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

24 28 U.S.C. § 2244(d). In most cases, the limitation period begins running on the date that the
25 petitioner’s direct review became final, but here Petitioner asserts that the limitation period
26 began to run on a later date pursuant to § 2244(d)(1)(B). Petitioner contends that his placement
27 in the Administrative Segregation Unit constituted a state-created impediment that prevented
28 Petitioner from timely filing. (ECF No. 16 at 4–5; ECF No. 25 at 2, 6).

Petitioner alleges that his legal documents, stationery, and personal property were
confiscated upon entering administrative segregation, and that his legal materials were never
returned. Petitioner also alleges that the prison failed to issue Petitioner legal forms, paper,
envelopes, pens, and copies even though he met the standards of an indigent prisoner. Petitioner
further alleges that he was “denied complete access to the law library” from December 29, 2014
to June 26, 2015. (ECF No. 25 at 6). Respondent has submitted evidence demonstrating that
pursuant to Petitioner’s request, Petitioner’s legal materials and personal property were returned
to him on January 18, 2015. (ECF No. 27-1 at 2). Petitioner also requested and received indigent

1 envelopes in January, February, and May of 2015. (ECF No. 27-2 at 2, 3, 5). Petitioner’s inmate
2 segregation record does not demonstrate that Petitioner requested and was denied law library
3 access during his time in administrative segregation. (ECF No. 27-3). Accordingly, the Court
4 finds that there was no state-created impediment in violation of the Constitution or laws of the
5 United States, and therefore, § 2244(d)(1)(B) is inapplicable.

6 As Petitioner did not appeal to the California Supreme Court, his judgment became final
7 when his time for seeking review with the state’s highest court expired. See Gonzalez v. Thaler,
8 132 S. Ct. 641, 653–54 (2012). The time to seek review with the California Supreme Court
9 expired on July 2, 2014, forty days after the Court of Appeal’s decision was filed. See Cal. R. Ct.
10 8.366(b)(1) (“[A] Court of Appeal decision . . . is final in that court 30 days after filing.”); Cal.
11 R. Ct. 8.500(e)(1) (“A petition for review must be . . . filed within 10 days after the Court of
12 Appeal decision is final in that court.”). The one-year limitation period commenced running the
13 following day, July 3, 2014, and absent tolling, was set to expire on July 2, 2015. See Patterson
14 v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001) (citing Fed. R. Civ. P. 6(a)).

15 **B. Statutory Tolling**

16 The “time during which a properly filed application for State post-conviction or other
17 collateral review with respect to the pertinent judgment or claim is pending shall not be counted
18 toward” the one-year limitation period. 28 U.S.C. § 2244(d)(2). On August 25, 2014, the
19 California Supreme Court received Petitioner’s state habeas petition, which was dated July 8,
20 2014. (LD 5). Pursuant to the prison mailbox rule, a *pro se* prisoner’s habeas petition is filed “at
21 the time . . . [it is] delivered . . . to the prison authorities for forwarding to the court clerk.”
22 Hernandez v. Spearman, 764 F.3d 1071, 1074 (9th Cir. 2014) (alteration in original) (internal
23 quotation marks omitted) (quoting Houston v. Lack, 487 U.S. 266, 276 (1988)). According to the
24 prison mail log, Petitioner delivered the state habeas petition to the prison authorities for mailing
25 on August 18, 2014. (ECF No. 13-1 at 2). Thus, Petitioner’s state habeas petition was
26 constructively filed on August 18, 2014, and the California Supreme Court denied the petition on
27 October 29, 2014. (LD 6). There is nothing in the record that suggests Petitioner’s state habeas
28 petition was not properly filed, and Respondent makes no such argument. Thus, Petitioner is

1 entitled to statutory tolling while his state habeas petition was pending in the California Supreme
2 Court.

3 **C. Equitable Tolling**

4 The limitation period also is subject to equitable tolling if the petitioner demonstrates
5 ““(1) that he has been pursuing his rights diligently, and (2) that some extraordinary
6 circumstance stood in his way’ and prevented timely filing.” Holland v. Florida, 560 U.S. 631,
7 649 (2010) (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)). The petitioner bears the
8 “heavy burden” of showing that he is entitled to equitable tolling. Chaffer v. Propser, 592 F.3d
9 1046, 1048 (9th Cir. 2010) (*per curiam*). Petitioner contends he is entitled to equitable tolling
10 due to his limited education and placement in administrative segregation. (ECF No. 25 at 2).

11 1. Diligence

12 In order to be entitled to equitable tolling, a petitioner must have exercised “reasonable
13 diligence, not maximum feasible diligence.” Holland, 560 U.S. at 653 (citations and internal
14 quotation marks omitted). “The standard for reasonable diligence does not require an
15 overzealous or extreme pursuit of any and every avenue of relief. It requires the effort that a
16 reasonable person might be expected to deliver under his or her particular circumstances.” Doe v.
17 Busby, 661 F.3d 1001, 1015 (9th Cir. 2011). “To determine if a petitioner has been diligent in
18 pursuing his petition, courts consider the petitioner’s overall level of care and caution in light of
19 his or her particular circumstances.” Id. at 1013. The Ninth Circuit has held that “diligence
20 *during* the existence of an extraordinary circumstance is the key consideration.” Gibbs v.
21 Legrand, 767 F.3d 879, 892 (9th Cir. 2014). However, Petitioner’s diligence before and after the
22 extraordinary circumstance is “[a]lso relevant” and “may be illuminating.” Id.

23 Here, Petitioner has failed to allege what steps he took to diligently pursue his federal
24 claims at the time the extraordinary circumstance stood in his way and prevented timely filing.
25 For example, in his objections to the vacated findings and recommendation, Petitioner points to
26 the fact that he timely filed a state habeas petition in the California Supreme Court to
27 demonstrate diligence. Although Petitioner’s diligence before the extraordinary circumstance is
28 relevant, this alone is not determinative. See Gibbs, 767 F.3d at 892. In his supplemental brief,

1 Petitioner states he has “established fact to support his claim of extraordinary circumstances and
2 due diligence,” but only provides allegations regarding the extraordinary circumstance and does
3 not provide details of any specific action he took while in administrative segregation. Therefore,
4 the Court finds that Petitioner has not met his burden in establishing that he has been pursuing
5 his rights diligently.

6 2. Extraordinary Circumstance

7 Petitioner contends that he is entitled to equitable tolling due to his limited education and
8 his failure to comprehend the AEDPA. Lack of education and ignorance of the law do not
9 constitute extraordinary circumstances warranting equitable tolling. See, e.g., Raspberry v.
10 Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006) (“[A] pro se petitioner’s lack of legal sophistication
11 is not, by itself, an extraordinary circumstance warranting equitable tolling.”); Baker v. Cal.
12 Dep’t of Corr., 484 F. App’x 130, 131 (9th Cir. 2012) (“Low literacy levels, lack of legal
13 knowledge, and need for some assistance . . . are not extraordinary circumstances to warrant
14 equitable tolling”). The Court notes Petitioner’s submissions in this matter exhibit
15 coherence and organization with citation to cases. Given Ninth Circuit precedent and Petitioner’s
16 demonstrated ability to adequately articulate his arguments, the Court does not find that
17 Petitioner’s limited education and lack of legal sophistication constitute extraordinary
18 circumstances warranting equitable tolling.

19 Petitioner also contends that his placement in administrative segregation constitutes an
20 extraordinary circumstance. Petitioner alleges that his legal documents, stationery, and personal
21 property were confiscated upon entering administrative segregation, and that his legal materials
22 were never returned. Petitioner also alleges that the prison failed to issue Petitioner legal forms,
23 paper, envelopes, pens, and copies even though he met the standards of an indigent petitioner.
24 Respondent has submitted a copy of Petitioner’s Administrative Segregation Personal Property
25 Request form, which shows that pursuant to Petitioner’s request, Petitioner’s legal materials and
26 personal property were returned to him on January 18, 2015. (ECF No. 27-1 at 2). Respondent
27 also submitted a copy of the Indigent Envelope Sign-Up List, which shows that Petitioner
28 requested and received indigent envelopes in January, February, and May of 2015. (ECF No. 27-

1 2 at 2, 3, 5). Although “[d]eprivation of legal materials is the type of external impediment for
2 which [courts] have granted equitable tolling,” Waldron-Ramsey v. Pacholke, 556 F.3d 1008,
3 1013 (9th Cir. 2009), the record before the Court refutes Petitioner’s assertion that his legal
4 materials were confiscated and never returned. Pursuant to the Court’s order, Respondent
5 submitted evidence to contest Petitioner’s allegations. (ECF Nos. 27-1, 27-2, 27-3). Petitioner
6 failed to submit any evidence in support of his allegations.

7 Petitioner further alleges that he was denied complete access to the law library from
8 December 29, 2014 to June 26, 2015. (ECF No. 25 at 6). However, Respondent has submitted a
9 copy of Petitioner’s Inmate Segregation Record (CDC 114-A form), which does not demonstrate
10 that Petitioner requested and was denied law library access during his time in administrative
11 segregation. (ECF No. 27-3). The Ninth Circuit has held that being in administrative segregation
12 with limited access to the law library does not constitute an extraordinary circumstance
13 warranting equitable tolling. Ramirez v. Yates, 571 F.3d 993, 998 (9th Cir. 2009). Accordingly,
14 the Court finds that Petitioner’s placement in administrative segregation does not constitute an
15 extraordinary circumstance that prevented Petitioner from timely filing.

16 **D. Timeliness of the Petition**

17 On October 16, 2015, this Court received the instant federal petition for writ of habeas
18 corpus, which was dated October 6, 2015. (ECF No. 1). Assuming Petitioner delivered the
19 instant petition to prison authorities for mailing on October 6, 2015, the Court finds that the
20 petition was filed outside the one-year limitation period. Forty-six days elapsed between the date
21 Petitioner’s state conviction became final (July 2, 2014) and the date Petitioner filed his state
22 habeas petition in the California Supreme Court (August 18, 2014). The AEDPA’s one-year
23 clock stopped while Petitioner’s state habeas petition was pending. Thereafter, 341 days elapsed
24 between the California Supreme Court’s denial of his state petition (October 29, 2014) and the
25 date Petitioner constructively filed the instant federal petition for writ of habeas corpus (October
26 6, 2015). This adds up to a total of 387 days. Therefore, the Court finds that the petition was filed
27 outside the AEDPA’s one-year limitation and is untimely.

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1 **III.**

2 **RECOMMENDATION**

3 Accordingly, the Court HEREBY RECOMMENDS that:

- 4 1. Respondent’s Motion to Dismiss (ECF No. 13) be GRANTED; and
5 2. The petition for writ of habeas corpus be DISMISSED as untimely.

6 This Findings and Recommendation is submitted to the assigned United States District
7 Court Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local
8 Rules of Practice for the United States District Court, Eastern District of California. Within
9 **THIRTY (30) days** after service of the Findings and Recommendation, any party may file
10 written objections with the court and serve a copy on all parties. Such a document should be
11 captioned “Objections to Magistrate Judge’s Findings and Recommendation.” Replies to the
12 objections shall be served and filed within fourteen (14) days after service of the objections. The
13 assigned United States District Court Judge will then review the Magistrate Judge’s ruling
14 pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within
15 the specified time may waive the right to appeal the District Court’s order. Wilkerson v.
16 Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th
17 Cir. 1991)).

18 IT IS SO ORDERED.
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20 Dated: March 29, 2017

21 /s/ Eric P. Gray
22 UNITED STATES MAGISTRATE JUDGE
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