

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

VENCIL GREEN,

Petitioner,

v.

J. LIZARRAGA,

Respondent.

Case No. 1:17-cv-00545-AWI-EPG-HC

FINDINGS AND RECOMMENDATION TO
GRANT RESPONDENT’S MOTION TO
DISMISS AND DISMISS PETITION FOR
WRIT OF HABEAS CORPUS

(ECF No. 12)

Petitioner 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 2009 convictions in Kings County Superior Court Case No. 09CM7401. As the instant petition was filed outside 28 U.S.C. § 2244(d)(1)’s one-year limitation period, the undersigned recommends granting Respondent’s motion to dismiss.

I.

BACKGROUND

On September 10, 2009, Petitioner pleaded no contest in Kings County Superior Court Case No. 09CM7401 to resisting an officer and exposing himself. Petitioner was sentenced to an imprisonment term of thirty-two months, to be served consecutive to Petitioner’s life term for a prior conviction. (ECF No. 1 at 1¹; ECF No. 23-8). Petitioner did not appeal his sentence.

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

1 On January 14, 2016,² Petitioner filed a state petition for writ of habeas corpus in the
2 Kings County Superior Court, which denied the petition on March 29, 2016. (LDs³ 2, 3). On
3 April 20, 2016, Petitioner filed another state habeas petition in the Kings County Superior Court,
4 which denied the petition as untimely on June 9, 2016. (LDs 4, 5). On January 5, 2017, Petitioner
5 filed a state habeas petition in the California Court of Appeal, Fifth Appellate District, which
6 denied the petition on January 26, 2017. (LDs 6, 7). On February 1, 2017, Petitioner filed a state
7 habeas petition in the California Supreme Court, which denied the petition as untimely on March
8 29, 2017.

9 On April 10, 2017,⁴ Petitioner filed the instant federal petition for writ of habeas corpus.
10 (ECF No. 1). In his sole claim for relief, Petitioner asserts he was not competent to plead no
11 contest. On June 14, 2017, Respondent filed a motion to dismiss. (ECF No. 12). Petitioner has
12 filed an opposition, and Respondent has filed a reply. (ECF Nos. 15, 23).

13 II.

14 DISCUSSION

15 A. Statute of Limitations

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

23 (1) A 1-year period of limitation shall apply to an application for a
24 writ of habeas corpus by a person in custody pursuant to the

25 ² Pursuant to the mailbox rule, a *pro se* prisoner’s habeas petition is filed “at the time . . . [it is] delivered . . . to the
26 prison authorities for forwarding to the court clerk.” Hernandez v. Spearman, 764 F.3d 1071, 1074 (9th Cir. 2014)
(alteration in original) (internal quotation marks omitted) (quoting Houston v. Lack, 487 U.S. 266, 276 (1988)). The
27 mailbox rule applies to both federal and state habeas petitions. Campbell v. Henry, 614 F.3d 1056, 1059 (9th Cir.
2010). The Court notes that Respondent applied the mailbox rule in the motion to dismiss. (ECF No. 12 at 2 n.2).

28 ³ “LD” refers to the documents lodged by Respondent on June 15, 2017. (ECF Nos. 13, 14).

⁴ Petitioner signed the petition on April 10, 2017. (ECF No. 1 at 10). The proof of service states that the petition was
mailed to the Court by Mrs. Virginia S. Green on April 12, 2017. (ECF No. 1 at 22). The Court will deem the
petition filed on April 10, 2017, the date more favorable to Petitioner.

1 judgment of a State court. The limitation period shall run from the
2 latest of –

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

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

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

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

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

21 28 U.S.C. § 2244(d).

22 In most cases, the limitation period begins running on the date that the petitioner’s direct
23 review became final or the expiration of the time for seeking such review. However, in the
24 opposition to the motion to dismiss, Petitioner appears to argue that the limitation period began
25 to run on a later date, January 3, 2016, when “perchance Petitioner discovered new evidence that
26 if a court accepted a plea[] from a defendant that another a court had just previously declared
27 gravely disabled and mentally incompetent, this was ineluctably a fundamental miscarriage of
28 justice.” (ECF No. 15 at 3).

29 Section 2244(d)(1)(D) provides that the one-year limitation period begins to run from
30 “the date on which the factual predicate of the claim or claims presented could have been
31 discovered through the exercise of due diligence.” 28 U.S.C. § 2244(d)(1)(D). “The ‘due
32 diligence’ clock starts ticking when a person knows or through diligence could discover the vital
33 facts, *regardless of when their legal significance is actually discovered.*” Ford v. Gonzalez, 683
34 F.3d 1230, 1235 (9th Cir. 2012) (emphasis added) (citing Hasan v. Galaza, 254 F.3d 1150, 1154
35 n.3 (9th Cir. 2001); Redd v. McGrath, 343 F.3d 1077, 1082 (9th Cir. 2003)). Here, however,

1 Petitioner’s claim is not based on facts of which Petitioner was unaware or facts that could not
2 have been discovered through due diligence until January 3, 2016. Rather, Petitioner discovered
3 the potential *legal significance* of a court accepting a guilty plea from a defendant who had
4 previously been declared gravely disabled and mentally incompetent by another court. Therefore,
5 Petitioner is not entitled to a January 3, 2016 limitation period commencement date pursuant to
6 § 2244(d)(1)(D).

7 Here, Petitioner was sentenced on September 10, 2009, and did not appeal. Therefore, the
8 judgment became final when Petitioner’s time for seeking review expired on November 9, 2009,
9 sixty days after Petitioner was sentenced. See Cal. R. Ct. 8.308. Pursuant to § 2244(d)(1)(A), the
10 one-year limitation period commenced running the following day, November 10, 2009, and
11 absent tolling, was set to expire on November 9, 2010. See Patterson v. Stewart, 251 F.3d 1243,
12 1246 (9th Cir. 2001) (citing Fed. R. Civ. P. 6(a)).

13 **B. Equitable Tolling**

14 The limitation period is subject to equitable tolling if the petitioner demonstrates ““(1)
15 that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance
16 stood in his way’ and prevented timely filing.” Holland v. Florida, 560 U.S. 631, 649 (2010)
17 (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)). The petitioner bears the “heavy
18 burden” of showing that he is entitled to equitable tolling. Chaffer v. Prosper, 592 F.3d 1046,
19 1048 (9th Cir. 2010) (per curiam). Here, Petitioner contends he is entitled to equitable tolling
20 based on mental incompetence. (ECF No. 15 at 4).

21 In Bills v. Clark, 628 F.3d 1092 (9th Cir. 2010), the Ninth Circuit articulated the
22 following standard for equitable tolling based on mental impairment:

23 (1) *First*, a petitioner must show his mental impairment was an
24 “extraordinary circumstance” beyond his control, by demonstrating
the impairment was so severe that either

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

27 (b) petitioner’s mental state rendered him unable personally to
28 prepare a habeas petition and effectuate its filing.

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

6 Bills, 628 F.3d at 1099–1100 (footnote omitted) (citing Holland, 560 U.S. at 649).

7 1. Extraordinary Circumstance

8 In the opposition, Petitioner states that from 2009 to 2016 he was psychotic, hearing
9 voices, and was taking strong psychotropic medication. (ECF No. 15 at 2). Petitioner states that
10 he attempted suicide seven times during that time. (Id. at 3). Petitioner also claims that he was
11 declared gravely disabled and incompetent by an administrative law judge on May 20, 2009. (Id.
12 at 2). Respondent has attached to the reply Petitioner’s mental health records from 2009 to the
13 present, which indicate that he has been diagnosed with bipolar disorder, exhibitionism, and
14 antisocial personality disorder throughout his incarceration. (ECF No. 23 at 8–9 and citations
15 thereto).

16 The Supreme Court has recognized that “[m]ental illness itself is not a unitary concept. It
17 varies in degree. It can vary over time. It interferes with an individual’s functioning at different
18 times in different ways.” Indiana v. Edwards, 554 U.S. 164, 175 (2008). For example, in Yeh v.
19 Martel, 751 F.3d 1075 (9th Cir. 2014), the Ninth Circuit found that equitable tolling was not
20 warranted where the petitioner “repeatedly sought administrative and judicial remedies,”
21 including filing state habeas petitions in three different California venues, which “refute[d] a
22 claim of impairment so debilitating that one could not ‘rationally or factually’ understand the
23 meaning of a deadline.” 751 F.3d at 1078. See also Roberts v. Marshall, 627 F.3d 768, 773 (9th
24 Cir. 2010). Accordingly, the Court will undertake a review of the relevant time period and
25 determine whether at any point Petitioner’s mental impairment was so severe that he “was unable
26 rationally or factually to personally understand the need to timely file” or that his “mental state
27 rendered him unable personally to prepare a habeas petition and effectuate its filing.” Bills, 628
28 F.3d at 1100.

///

///

1 **a. November 10, 2009 to May 17, 2010**

2 In October 2009 Petitioner commenced a § 1983 civil rights action in this Court. Green v.
3 David, No. 1:09-cv-01747-AWI-GBC (E.D. Cal. Oct. 5, 2009).⁵ From November 2009 to May
4 2010, Petitioner filed various administrative appeals. (ECF No. 23-5 at 177, 182, 186–88, 196,
5 203, 207–08, 212, 217, 219, 297). On March 29, 2010, Petitioner filed a motion for a temporary
6 restraining order, and on April 4 and May 17, 2010,⁶ Petitioner filed sworn affidavits in the
7 § 1983 action. Green, No. 1:09-cv-01747-AWI-GBC, ECF Nos. 10–12.

8 On May 20, 2009, prior to the commencement of the limitation period, an administrative
9 law judge found by clear and convincing evidence that as a result of a mental defect or mental
10 disorder, Petitioner was gravely disabled and incompetent to refuse medications and a danger to
11 others. The administrative law judge ordered that Petitioner may be involuntarily administered
12 psychotropic medication for a period of one year, from May 20, 2009 to May 19, 2010. (ECF
13 No. 23-1 at 216). However, in light of Petitioner’s extensive administrative appeals and multiple
14 court filings, the Court finds that Petitioner’s mental condition was not so severe that he “was
15 unable rationally or factually to personally understand the need to timely file” or that his “mental
16 state rendered him unable personally to prepare a habeas petition and effectuate its filing.” Bills,
17 628 F.3d at 1100. Accordingly, Petitioner has not established the existence of an extraordinary
18 circumstance from November 10, 2009, when the limitation period commenced, to May 17,
19 2010—a period of 189 days.

20 **b. May 18, 2010 to September 1, 2010**

21 Based on the records submitted by Respondent, Petitioner was admitted into an inpatient
22 treatment program on June 21, 2010 and discharged on August 5, 2010. (ECF No. 23-1 at 88,
23 93). The Court assumes, without deciding, that Petitioner’s mental condition was severe enough
24 to constitute an extraordinary circumstance during this period. In support of such an assumption
25 is the fact that during this period, Petitioner did not file any administrative appeals and took no

26 ⁵ The Court may take judicial notice of its own records in other cases. United States v. Wilson, 631 F.2d 118, 119
27 (9th Cir. 1980).

28 ⁶ Pursuant to the prison mailbox rule, “a legal document is deemed filed on the date a petitioner delivers it to the
prison authorities for filing by mail.” Lott v. Mueller, 304 F.3d 918, 921 (9th Cir. 2002) (citing Houston v. Lack,
487 U.S. 266, 270–71 (1988)).

1 action in his § 1983 civil rights case. Accordingly, the Court assumes the existence of an
2 extraordinary circumstance from May 18, 2010 to September 1, 2010.⁷

3 **c. September 2, 2010 to February 21, 2011**

4 Petitioner filed objections to findings and recommendation issued in his § 1983 action on
5 September 2, 2010, in addition to two motions later that month. Green, No. 1:09-cv-01747-AWI-
6 GBC, ECF Nos. 15, 20, 21. Petitioner also commenced another § 1983 prisoner civil rights
7 action and filed motions to proceed *in forma pauperis* and for preliminary injunction. Green v.
8 Ferguson, No. 1:10-cv-01768-AWI-JLT (E.D. Cal. Sept. 27, 2010), ECF Nos. 1–3. Petitioner
9 filed administrative appeals on September 25, October 12, and November 21, 2010. (ECF No.
10 23-5 at 155, 162). On January 23 and 27, and February 21, 2011, Petitioner filed motions in his
11 earlier § 1983 proceeding. Green, No. 1:09-cv-01747-AWI-GBC, ECF Nos. 30, 33, 37.

12 In light of Petitioner’s administrative appeals and court filings, the Court finds that
13 Petitioner’s mental condition was not so severe that he “was unable rationally or factually to
14 personally understand the need to timely file” or that his “mental state rendered him unable
15 personally to prepare a habeas petition and effectuate its filing.” Bills, 628 F.3d at 1100.
16 Accordingly, Petitioner has not established the existence of an extraordinary circumstance from
17 September 2, 2010 to February 21, 2011—a period of 173 days.

18 **d. February 23, 2011 to August 9, 2011**

19 On February 23, 2011, an administrative law judge found by clear and convincing
20 evidence that as a result of a mental defect or mental disorder, Petitioner was a danger to himself.
21 The administrative law judge ordered that Petitioner may be involuntarily administered
22 psychotropic medication for a period of 180 days, from February 23, 2011 to August 21, 2011.
23 (ECF No. 23-1 at 196). The Court assumes, without deciding, that Petitioner’s mental condition
24 was severe enough to constitute an extraordinary circumstance from February 22, 2011 to
25 August 9, 2011, a period wherein Petitioner could be involuntarily administered psychotropic

26 _____
27 ⁷ Petitioner did not file any administrative appeals or documents in his § 1983 case from May 18, 2010 to September
28 1, 2010, which encompasses the time Petitioner was admitted into the inpatient treatment program. The Court will
give Petitioner the benefit of the more favorable dates and assume the existence of an extraordinary circumstance
during this period.

1 medication and did not file any administrative appeals or documents in his § 1983 civil rights
2 proceedings.

3 **e. August 10, 2011 to February 13, 2012**

4 On August 10, 2011, Petitioner filed a response to a court order in Case No. 1:10-cv-
5 01768-AWI-JLT. Green, No. 1:10-cv-01768-AWI-JLT, ECF No. 12. On August 17, 2011, an
6 administrative law judge denied a petition to involuntarily medicate Petitioner. (ECF No. 23-1 at
7 185). Petitioner filed documents in his § 1983 cases in October and November 2011 in addition
8 to filing motions for preliminary injunction on February 13, 2012. Green, No. 1:09-cv-01747-
9 AWI-GBC, ECF Nos. 41, 45, 47; Green, No. 1:10-cv-01768-AWI-JLT, ECF No. 26.

10 From August 2011 to February 2012, progress notes indicate that Petitioner is “oriented
11 and alert,” either “stable” or “stabilizing,” and that effective communication was achieved. (ECF
12 No. 23-1 at 141, 145, 147–49, 153, 155–57, 162–66, 168–71, 175, 181, 188; ECF No. 23-2 at
13 163–65, 167, 169–70, 172). Petitioner’s attention and concentration was described as engaged.
14 Petitioner’s speech was described as cohesive, clear, responsive, and spontaneous. Petitioner’s
15 memory was described as intact and consistent. Petitioner’s intellectual functioning was
16 described as intact, average, and high. Petitioner’s thought process was described as linear,
17 logical, and goal-oriented. Petitioner’s thought content was described as within normal limits and
18 reality-based. Petitioner denied hallucinations, suicidal ideation, and homicidal ideation, and
19 there was no discernment of any delusions. (ECF No. 23-2 at 173, 178, 186).

20 Based on the foregoing, the Court finds that Petitioner’s mental condition was not so
21 severe that he “was unable rationally or factually to personally understand the need to timely
22 file” or that his “mental state rendered him unable personally to prepare a habeas petition and
23 effectuate its filing.” Bills, 628 F.3d at 1100. Accordingly, Petitioner has not established the
24 existence of an extraordinary circumstance from August 10, 2011 to February 13, 2012—a
25 period of 188 days.

26 **f. Summary**

27 As set forth above, Petitioner has not established the existence of an extraordinary
28 circumstance for at least the following time periods: November 10, 2009 to May 17, 2010 (189

1 days); September 2, 2010 to February 21, 2011 (173 days); and August 10, 2011 to February 13,
2 2012 (188 days). This adds up to a total of 550 days, which exceeds the one-year limitation
3 period.

4 2. Diligence

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

16 With respect to equitable tolling claims based on a mental impairment, the Ninth Circuit
17 has held that “the petitioner must show diligence in pursuing the claims to the extent he could
18 understand them, but that the mental impairment made it impossible to meet the filing deadline
19 under the totality of the circumstances, including reasonably available access to assistance.”
20 Bills, 628 F.3d at 1100 (citing Holland, 560 U.S. at 649). Here, Petitioner has failed to make any
21 allegations as to what steps he took to diligently pursue his federal claims at the time the
22 extraordinary circumstance stood in his way. Petitioner does not provide details of any specific
23 action he took in pursuing the claims to the extent he could understand them. Therefore, the
24 Court finds that Petitioner has not met his burden in establishing that he has been pursuing his
25 rights diligently.

26 ///

27 ///

28 ///

1 pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within
2 the specified time may waive the right to appeal the District Court's order. Wilkerson v.
3 Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th
4 Cir. 1991)).

5
6 IT IS SO ORDERED.

7 Dated: January 2, 2018

8 /s/ Eric P. Gray
9 UNITED STATES MAGISTRATE JUDGE