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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAVID LEE TERRY,

Petitioner,

No. CIV-S-06-244 GEB KJM P

vs.

JAMES TILTON, et al.,

Respondents.

FINDINGS AND RECOMMENDATIONS

On June 9, 2010, petitioner filed a second motion to vacate the judgment under Rule 60(b) of the Federal Rules of Criminal Procedure. He argues that two cases decided after this case was closed demonstrate he was entitled to equitable tolling, and he was entitled to equitable tolling because of restrictions on access to the law library.

I. Background

Petitioner was convicted on June 4, 1999, and sentenced to state prison. Document No. 1 lodged on September 26, 2006 (Doc. 1). The Court of Appeal affirmed his convictions on April 23, 2003, and the California Supreme Court denied review on July 16, 2003. Docs. 2 & 5.

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1 Petitioner filed a state habeas petition in El Dorado County Superior Court on
2 September 14, 2004.¹ Doc. 6. It was denied on October 14, 2004, as untimely. A motion for
3 reconsideration was denied on November 23, 2004. Docs. 7 & 8.

4 Petitioner filed his next state petition on December 10, 2004, in the Court of
5 Appeal, which denied it on December 22, 2004. Docs. 9 & 10. This was followed by a state
6 habeas petition in the California Supreme Court, filed January 31, 2005, and denied on
7 December 14, 2005. Docs. 11 & 12.

8 The federal petition was dated January 23, 2006, and was filed by this court on
9 February 6, 2006. See Docket No. 1. It raised four issues: the prosecution knowingly used false
10 evidence; the conviction was based on speculative evidence; the evidence on some counts was
11 insufficient; and the prosecution withheld exculpatory information.

12 On September 26, 2006, respondent filed a motion to dismiss on the ground that
13 the petition had been filed outside the statute of limitations. Petitioner opposed the motion,
14 arguing that the Superior Court had improperly rejected his state habeas petition as untimely and
15 that his mental health prevented his filing during the limitations period. Docket Nos. 10 & 18.

16 On August 22, 2007, this court recommended that respondent's motion to dismiss
17 be granted and denied petitioner's request to amend the petition to add additional claims of
18 ineffective assistance of counsel. Docket Nos. 17 & 24.

19 The district court adopted this recommendation on September 28, 2007, and
20 entered judgment. Docket Nos. 26 & 27.

21 Petitioner filed a notice of appeal but the district court and the Court of Appeal
22 each denied his request for the issuance of a certificate of appealability. Docket Nos. 28, 30, 35.

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25 ¹ The court previously identified the filing date of the Superior Court petition as
26 September 17, 2004. However, relying on the prison mailbox rule, the petition was deemed filed
the day it was mailed, which appears to be September 14. Houston v. Lack, 487 U.S. 266, 276
(1988).

1 On December 15, 2008, petitioner filed a motion for relief from judgment,
2 arguing again that the superior court erred in finding his initial state habeas petition to be
3 untimely. Docket No. 37. The court denied this motion because petitioner's arguments had been
4 or could have been made in opposition to the motion to dismiss. Docket No. 38.

5 Petitioner filed a notice of appeal from this order; once again, the District Court
6 and the Court of Appeals each denied his request for a certificate of appealability. Docket Nos.
7 39, 41, 55.

8 Petitioner has now filed a second motion for relief from judgment. The court
9 solicited an opposition from respondent and petitioner has filed a reply.

10 II. Triggering Date For The Statute Of Limitations

11 The Antiterrorism and Effective Death Penalty Act (AEDPA) contains a statute of
12 limitations for filing a federal habeas petition:

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

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

18 (B) the date on which the impediment to filing an application
19 created by 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;

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

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

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

4 28 U.S.C. § 2244. Petitioner suggests he is entitled to a later triggering date for the statute of
5 limitations because institutional overcrowding impeded his access to the law library. Without
6 such access, he avers, he could not conduct research, make copies or even find the addresses of
7 the courts. Mot. To Vacate (Docket No. 51) at 1-3. He alleges he has had difficulty getting to
8 the library even now and has been hampered in his ability to secure the necessary cases to
9 support his motion. Id. at 4.² He has presented declarations from other inmates, all attesting to
10 the impact of the overcrowding on their ability to use the prison law library. See Reply (Docket
11 No. 62).

12 As respondent notes, petitioner was certainly aware of the overcrowding at the
13 time he filed his original opposition to the motion to dismiss. Opp'n (Docket No. 58) at 4. His
14 attempt to pursue something he could have presented earlier is not a proper basis for a Rule
15 60(b) motion. Liberty Mut. Ins. Co. v. E.E.O.C., 691 F.2d 438, 441 (9th Cir.1982).

16 To show a violation of the constitutional right of access to the courts, and thus to
17 show an impediment, the inmate must show that his reduced access to the library hindered his
18 efforts to pursue habeas relief. Finch v. Miller, 491 F.3d 424, 427 (8th Cir. 2007). Even
19 accepting the limitations that overcrowding placed on his access, petitioner has not shown that
20 the conditions constituted an impediment: he has not shown or even suggested what he would
21 have been unable to uncover had he had access to the research facilities at the library.

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25 ² Petitioner requests an evidentiary hearing on the overcrowding he says impedes library
26 access, citing Rules 6 and 8 of the Rules Governing Section 2254 Cases. Petitioner is not
entitled to a hearing; among other reasons, he has not alleged facts that if proven would entitle
him to relief. See, e.g., Earp v. Ornoski, 431 F.3d 1158, 1167 (9th Cir. 2005).

1 III. Equitable Tolling

2 Petitioner suggests he is entitled to equitable tolling because of his problems
3 accessing the law library. Generally, restrictions on library and copier access are not a basis for
4 equitable tolling. Ramirez v. Yates, 571 F.3d 993, 999 (9th Cir. 2009).

5 In Holland v. Florida, ___ U.S. ___, 130 S.Ct. 2549, 2560, 2562, 2564 (2010), the
6 Supreme Court recognized that the AEDPA statute of limitations “may be tolled for equitable
7 reasons” when the petitioner has made a showing of “extraordinary circumstances.” To be
8 entitled to equitable tolling, petitioner must demonstrate "(1) that he has been pursuing his rights
9 diligently, and (2) that some extraordinary circumstance stood in his way." Pace v.
10 DiGuglielmo, 544 U.S. 408, 418 (2005). The Ninth Circuit has explained:

11 To apply the doctrine in “extraordinary circumstances” necessarily
12 suggests the doctrine’s rarity, and the requirement that
13 extraordinary circumstances “stood in his way” suggests that an
14 external force must cause the untimeliness, rather than, as we have
15 said, merely “oversight, miscalculation or negligence on [the
16 petitioner’s] part, all of which would preclude the application of
17 equitable tolling.

18 Waldron-Ramsey v. Pacholke, 556 F.3d 1008, 1011 (9th Cir.) (internal citation omitted), cert.
19 denied, ___ U.S. ___, 130 S.Ct. 244 (2009). It is petitioner’s burden to show he is entitled to
20 equitable tolling. Espinoza-Matthews v. People of the State of California, 432 F.3d 1021, 1026
21 (9th Cir. 2005).

22 In the original findings and recommendations, this court relied on Pace v.
23 DiGuglielmo, which held that an untimely state petition is not properly filed and so does not toll
24 the statute of limitations. Petitioner argues that because Pace changed the law of statutory
25 tolling, he is entitled to equitable tolling. He relies on two Ninth Circuit cases, each of which
26 found equitable tolling appropriate.

27 The first is Harris v. Carter, 515 F.3d 1051 (9th Cir. 2008), cert. denied sub nom.
28 Brunson v. Harris, ___ U.S. ___, 129 S.Ct. 397 (2008). In Harris, the petitioner’s second and
29 third state court “personal restraint petitions” were denied as untimely before he turned to federal

1 court. The Ninth Circuit recognized that at the time petitioner was pursuing state post-
2 conviction relief, circuit law interpreted untimely petitions as “properly filed” so as to toll the
3 running of the statute of limitations.

4 The Ninth Circuit found Harris was entitled to equitable tolling:

5 Harris diligently pursued his rights. He filed successive
6 petitions for post-conviction relief while ensuring that enough time
7 would remain to file a federal habeas petition under the then-
8 existing *Dictado* rule. The Supreme Court’s overruling of the
Dictado rule made it impossible for Harris to file a timely petition.
Harris’ petition became time-barred the moment that *Pace* was
decided.

9 Id. at 1055-56 (internal citations omitted).

10 The second case is Townsend v. Knowles, 562 F.3d 1200 (9th Cir.), cert. denied,
11 ___ U.S. ___, 130 S.Ct. 193 (2009). As in Harris, Townsend’s state habeas petition was denied
12 as untimely in the superior court; because the state court of appeals and supreme court denied the
13 subsequent petitions without comment, the Ninth Circuit looked to the superior court’s order as
14 defining the procedural posture of the case. Id. at 1205. It then considered whether Townsend,
15 like Harris, was entitled to equitable tolling because of the impact of Pace on circuit authority.

16 Id. The court observed:

17 Townsend also diligently pursued his rights in his postconviction
18 habeas petition in the state courts and ensured that he had enough
19 time remaining to file a federal habeas petition under the then-
20 existing *Dictado* rule. . . . Because . . . Townsend’s federal habeas
petition would have been considered timely pre-*Pace* . . . we
conclude that equitable principles dictate that AEDPA’s one-year
statute of limitations be tolled here.

21 Id. at 1206.

22 In this case, the limitations period began to run on October 16, 2003, and would
23 have expired on October 15, 2004, absent any tolling. Under earlier circuit precedent, petitioner
24 was entitled to statutory tolling beginning with the filing of his first state habeas petition on
25 September 14, 2004, which was day 335 of the limitations period, until December 14, 2005.
26 The statute of limitations began running again on December 15, 2005 and expired thirty days

1 later on January 14, 2006. Petitioner is not in the same posture as the petitioners in Harris or
2 Townsend: although there was time remaining to file his federal habeas petition under the earlier
3 rule, petitioner did not take advantage of the time but rather allowed the period defined by circuit
4 precedent at the time to lapse before filing his federal habeas petition on January 23, 2006.

5 Because that petition would not have been timely even if Pace had not been decided, petitioner is
6 not entitled to equitable tolling.

7 IV. The Adequacy Of The Timeliness Bar

8 Petitioner argues that the state court's timeliness ruling does not constitute an
9 adequate procedural bar to his claims, an issue he raised in opposition to the motion to dismiss
10 and which was addressed in the earlier recommendation. This second motion to amend the
11 judgment is not a proper place to reargue an issue raised and rejected before.

12 Accordingly, IT IS HEREBY RECOMMENDED that petitioner's motion for
13 relief from judgment be denied.

14 These findings and recommendations are submitted to the United States District
15 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
16 one days after being served with these findings and recommendations, any party may file written
17 objections with the court and serve a copy on all parties. Such a document should be captioned
18 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
19 shall be served and filed within fourteen days after service of the objections. The parties are
20 advised that failure to file objections within the specified time may waive the right to appeal the
21 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

22 DATED: November 10, 2010.

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25 U.S. MAGISTRATE JUDGE
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