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

QUINTON D. ROBINSON,
Petitioner,

No. CIV S-07-1228-MCE-CMK-P

vs.

FINDINGS AND RECOMMENDATIONS

HEDGPETH,
Respondent.

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Petitioner, a state prisoner proceeding pro se, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pending before the court is respondent’s motion to dismiss (Doc. 22) the petition as untimely.

I. BACKGROUND

Petitioner was convicted of possession of a firearm by a felon and sentenced to a determinate prison term of seven years. Petitioner’s conviction and sentence were affirmed on direct appeal by the California Court of Appeal on December 29, 2004. The California Supreme Court denied direct review on April 13, 2005, and petitioner did not seek further review by the United States Supreme Court. Before filing the instant federal petition, petitioner filed the

1 following:

- 2 1. Petition for Writ of Habeas Corpus – Alameda County Superior Court
3 – Filed June 28, 2005
– Denied June 28, 2005
- 4 2. Petition for Writ of Habeas Corpus – California Court of Appeal
5 – Filed July 20, 2005
– Denied July 27, 2005
- 6 3. Petition for Writ of Habeas Corpus – Alameda County Superior Court
7 – Filed November 7, 2005
– Denied November 7, 2005
- 8 4. Petition for Writ of Habeas Corpus – California Court of Appeal
9 – Filed January 30, 2006
– Denied February 2, 2006
- 10 5. Petition for Writ of Habeas Corpus – California Supreme Court
11 – Filed February 27, 2006
– Denied March 15, 2006
- 12 6. Petition for Writ of Certiorari – U.S. Supreme Court
13 – Filed June 13, 2006
– Denied October 2, 2006

14 15 II. DISCUSSION

16 Federal habeas corpus petitions must be filed within one year from the later of: (1)
17 the date the state court judgment became final; (2) the date on which an impediment to filing
18 created by state action is removed; (3) the date on which a constitutional right is newly-
19 recognized and made retroactive on collateral review; or (4) the date on which the factual
20 predicate of the claim could have been discovered through the exercise of due diligence. See 28
21 U.S.C. § 2244(d). Typically, the statute of limitations will begin to run when the state court
22 judgment becomes final by the conclusion of direct review or expiration of the time to seek direct
23 review. See 28 U.S.C. § 2244(d)(1).

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1 Where a petition for review by the California Supreme Court is filed and no
2 petition for certiorari is filed in the United States Supreme Court, the one-year limitations period
3 begins running the day after expiration of the 90-day time within which to seek review by the
4 U.S. Supreme Court. See Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001). Where no
5 petition for review by the California Supreme Court is filed, the conviction becomes final 40
6 days following the Court of Appeal’s decision, and the limitations period begins running the
7 following day. See Smith v. Duncan, 297 F.3d 809 (9th Cir. 2002). If no appeal is filed in the
8 Court of Appeal, the conviction becomes final 60 days after conclusion of proceedings in the
9 state trial court, and the limitations period begins running the following day. If the conviction
10 became final before April 24, 1996 – the effective date of the statute of limitations – the one-year
11 period begins to run the day after the effective date, or April 25, 1996. See Miles v. Prunty, 187
12 F.3d 1104, 1105 (9th Cir. 1999).

13 The limitations period is tolled, however, for the time a properly filed application
14 for post-conviction relief is pending in the state court. See 28 U.S.C. § 2244(d)(2). To be
15 “properly filed,” the application must be authorized by, and in compliance with, state law. See
16 Artuz v. Bennett, 531 U.S. 4 (2000); see also Allen v. Siebert, 128 S.Ct. 2 (2007); Pace v.
17 DiGuglielmo, 544 U.S. 408 (2005) (holding that, regardless of whether there are exceptions to a
18 state’s timeliness bar, time limits for filing a state post-conviction petition are filing conditions
19 and the failure to comply with those time limits precludes a finding that the state petition is
20 properly filed). A state court application for post-conviction relief is “pending” during all the
21 time the petitioner is attempting, through proper use of state court procedures, to present his
22 claims. See Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). It is not, however, considered
23 “pending” after the state post-conviction process is concluded. See Lawrence v. Florida, 127
24 S.Ct. 1079 (2007) (holding that federal habeas petition not tolled for time during which certiorari
25 petition to the Supreme Court was pending). Where the petitioner unreasonably delays between
26 state court applications, however, there is no tolling for that period of time. See Carey v. Saffold,

1 536 U.S. 214 (2002). If the state court does not explicitly deny a post-conviction application as
2 untimely, the federal court must independently determine whether there was undue delay. See id.
3 at 226-27.

4 There is no tolling for the interval of time between post-conviction applications
5 where the petitioner is not moving to the next higher appellate level of review. See Nino, 183
6 F.3d at 1006-07; see also Dils v. Small, 260 F.3d 984, 986 (9th Cir. 2001). There is also no
7 tolling for the period between different sets of post-conviction applications. See Biggs v.
8 Duncan, 339 F.3d 1045 (9th Cir. 2003). Finally, the period between the conclusion of direct
9 review and the filing of a state post-conviction application does not toll the limitations period.
10 See Nino, 1983 F.3d at 1006-07.

11 In this case, the California Supreme Court denied direct review on April 13, 2005,
12 and petitioner did not seek further review by the United States Supreme Court. Therefore, the
13 limitations period began to run the day after expiration of the 90-day time within which to seek
14 certiorari – July 13, 2005.¹ Because the first post-conviction action was filed and decided before
15 the limitations period commenced, it has no tolling effect. Respondent concedes that petitioner
16 is entitled to statutory tolling for the period the second action was pending in the California Court
17 of Appeal (July 20, 2005, through July 27, 2005) and would give petitioner the benefit of interval
18 tolling between the time the first action was denied and the second action was filed. Thus,
19 respondent states the limitations period was tolled from the date it commenced on July 13, 2005,
20 through July 27, 2005, when the second post-conviction action was denied.

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24 ¹ At page 4 of his motion, respondent incorrectly says the limitations period began
25 to run on June 13, 2005, and that, absent any tolling, the federal petition was due by June 12,
26 2006. On page 8, however, respondent correctly states that the limitations period commenced on
July 13, 2005.

1 Respondent, however, argues that petitioner is not entitled to interval tolling for
2 the time between the denial of the second action by the California Court of Appeal and filing of
3 the third action in the Alameda County Superior Court because petitioner was not moving to the
4 next higher level of state court review. Respondent also argues that petitioner is not entitled to
5 tolling for the time the third action was pending because the Alameda County Superior Court
6 expressly denied it as untimely and, therefore, it was not properly filed. The court agrees with
7 both arguments and finds that petitioner is not entitled to any tolling from the date the second
8 action was denied on July 27, 2005, through the date the third action was denied on November 7,
9 2005.

10 As to the fourth and fifth actions, filed in the California Court of Appeal and in
11 the California Supreme Court, respectively, respondent argues that they were not properly filed
12 because they were also denied as untimely.² Again, the court agrees. Because the court finds
13 that the fourth and fifth actions were not properly filed, petitioner is not entitled to any tolling for
14 the intervals between the third and fourth actions and the fourth and fifth actions, or the time the
15 fourth and fifth actions were pending – November 7, 2005, through March 15, 2006. As to the
16 sixth action – a petition for writ of certiorari filed in the United States Supreme Court – that
17 action has no tolling effect because AEDPA only allows tolling for post-conviction actions filed
18 in the state courts.

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22 ² The California Court of Appeal denied the fourth action without comment or
23 citation. Similarly, the California Supreme Court denied the fifth action without comment or
24 citation. Respondent is correct that, under the “look-through” doctrine, this court looks to the
25 Alameda County Superior Court’s decision to provide the rationale for the subsequent court
26 decision because petitioner was moving to the next higher levels of review with the fourth and
fifth actions. See Ylst v. Nunnemaker, 501 U.S. 797, 803-06 (1991). Because the Alameda
County Superior Court denied the third petition as untimely, it must be presumed that the Court
of Appeal denied the fourth action as untimely, and that the California Supreme Court denied the
fifth action as untimely. Thus, the fourth and fifth actions were not properly filed.

1 As discussed above, the limitations period commenced on July 13, 2005.

2 Accepting that respondent is correct that it was immediately tolled until the second action was
3 denied on July 27, 2005, and in light of the court's discussion concerning the remaining post-
4 conviction actions, the limitations period ran continuously after July 27, 2005. Thus, the last day
5 petitioner could have filed a timely federal petition was July 27, 2006. Because petitioner's
6 federal petition was not filed until March 5, 2007, it is untimely.

7 Petitioner attempts to escape this result by arguing: (1) counsel was ineffective in
8 advising him with respect to various post-conviction actions; (2) the periods of time between
9 various post-convictions actions was not excessive; (3) the timeliness default has not been
10 consistently applied by the state courts; (4) he is entitled to equitable tolling due to period of
11 prison lock-downs and because he is ignorant of the law; and (5) the United States Supreme
12 Court's decisions in Blakely v. Washington, 542 U.S. 296 (2004), and Cunningham v. California,
13 549 U.S. 270 (2007), apply retroactively and, for this reason, he is entitled to a later start of the
14 limitations period. The court agrees with respondent that these arguments are not persuasive.

15 Turning to petitioner's last argument first, Blakely and Cunningham are progeny
16 of Apprendi v. New Jersey, 530 U.S. 466 (2000), which does not apply retroactively. See United
17 States v Sanchez-Cervantes, 282 F.3d 664, 666-67 (9th Cir. 2002); see also See Schardt v.
18 Payne, 414 F.3d 1025, 1027, 1036 (9th Cir. 2005). Therefore, this argument lacks merit and
19 petitioner is not entitled to any later start date for the limitations period due to either Blakely
20 or Cunningham.

21 As to petitioner's first argument that he was denied the effective assistance of
22 counsel, respondent is correct that this argument lacks merit because there is no constitutional
23 right to the effective assistance of counsel during post-conviction proceedings. See Pennsylvania
24 v. Finley, 481 U.S. 551 (1987).

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1 Petitioner’s second argument that he is entitled to interval tolling because the
2 periods of time between his various post-conviction actions was not excessive is also
3 unpersuasive. The question of whether there was unreasonable delay arises in the context of
4 determining if interval tolling applies only where the next state court action was properly filed in
5 the correct court (i.e., the next higher court in the chain of review). As discussed above, the court
6 has determined that petitioner is not entitled to interval tolling either because his subsequent
7 action was not filed in the next higher state court or because it was not properly filed.

8 Next, petitioner argues that his untimely state court actions cannot be considered
9 improperly filed because the timeliness default has not been consistently applied in California.
10 This argument is also unpersuasive. The question of whether a state procedural default is
11 consistently applied arises in the context of determining whether the default results in a
12 procedural bar to federal review. Respondent does not argue that any claims are procedurally
13 barred and the issue of consistent application is not relevant to the question of whether a state
14 court action is properly filed.

15 Finally, petitioner argues that he is entitled to equitable tolling. Because the
16 statute of limitations under AEDPA is not jurisdictional, it is subject to traditional equitable
17 tolling principles. See Calderon v. United States Dist. Ct. (Beeler), 128 F.3d 1283, 1288 (9th
18 Cir. 1997), overruled in part on other grounds by Calderon v. United States Dist. Ct. (Kelly), 163
19 F.3d 530 (9th Cir. 1998) (en banc). To be entitled to equitable tolling, the petitioner must
20 demonstrate that: (1) he has been diligent in pursuing his rights; and (2) extraordinary
21 circumstances prevented him from filing on time. See Pace, 544 U.S. 408.

22 In Pace, the Supreme Court held that equitable tolling was not applicable because
23 “petitioner’s lack of diligence precludes equity’s operation.” 544 U.S. at 419. In Beeler, the
24 district court granted equitable tolling and the respondent sought a writ of mandamus to reverse
25 the district court’s order. See 128 F.3d at 1288. In denying the respondent’s mandamus petition,

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1 the Ninth Circuit addressed the district court’s decision to grant equitable tolling as follows:

2 Having decided that [the statute of limitations] can be tolled, we
3 have no basis for upsetting the district court’s decision to allow Beeler
4 more time to file his petition. The district court found that Beeler’s lead
5 counsel, Scott Braden, had diligently pursued the preparation of Beeler’s
6 petition. Braden, however, withdrew after accepting employment in
7 another state, and much of the work product he left behind was not usable
8 by replacement counsel – a turn of events over which Beeler had no
9 control. There were thus “extraordinary circumstances” which justified
10 tolling [the] statute of limitations.

11 Id. at 1289.

12 In Kelly, the Ninth Circuit again denied mandamus relief and held that equitable tolling was
13 appropriate because:

14 . . . [A]s part of its order that Kelly be mentally evaluated, the
15 district court ordered “that all other aspects of this case be, and hereby are,
16 stayed pending final determination by this Court of the Petitioner’s mental
17 capacity to proceed.” The only reasonable reading of this order was that it
18 prohibited Kelly’s attorney’s from filing a habeas petition, which is how
19 the district court itself construed it. . . . This stay of the proceedings
20 prevented Kelly’s counsel from filing a habeas petition and, in itself,
21 justifies equitable tolling.

22 163 F.3d at 541.

23 In addition, the egregious misconduct of counsel may warrant equitable tolling. See Spitsyn v.
24 Moore, 345 F.3d 796 (9th Cir. 2003). Mental incompetence may also warrant equitable tolling
25 for the period the prisoner was incompetent if he can show that the incompetency in fact caused
26 the delay. See Laws v. Lamarque, 351 F.3d 919 (9th Cir. 2003). The Ninth Circuit has
concluded, however, that equitable tolling is not appropriate based on the ordinary negligence of
counsel. See Frye v. Hickman, 273 F.3d 1144 (9th Cir. 2001).

 In this case, petitioner claims that he is entitled to equitable tolling because his
attorney misadvised him with respect to his post-conviction options. As indicated above, absent
egregious misconduct, attorney negligence is not a basis for equitable tolling. Petitioner also
argues that he is entitled to equitable tolling due to prison lock-downs. Again, this is not an
extraordinary circumstance because, even during a lock-down, petitioner would have had the

1 ability to pursue his state court actions. A lock-down is a routine incident of prison life which
2 petitioner should have taken into account. See Atkins v. Harris, 1999 WL 13719 (N.D. Cal.
3 1999).

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5 **III. CONCLUSION**

6 Based on the foregoing, the undersigned recommends that respondent's motion to
7 dismiss (Doc. 22) be granted.

8 These findings and recommendations are submitted to the United States District
9 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 20 days
10 after being served with these findings and recommendations, any party may file written
11 objections with the court. The document should be captioned "Objections to Magistrate Judge's
12 Findings and Recommendations." Failure to file objections within the specified time may waive
13 the right to appeal. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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15 DATED: January 26, 2009

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17 **CRAIG M. KELLISON**
18 UNITED STATES MAGISTRATE JUDGE
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