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

RANDOLPH M. DIAZ,

Petitioner,

No. CIV S-08-0403 LKK GGH P

vs.

MICHAEL KNOWLES, et al.,

Respondents.

FINDINGS AND RECOMMENDATIONS

Introduction

Petitioner, a state prisoner proceeding pro se, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his amended petition, petitioner focuses on his claim to have pled “nolo contendere” to a charge of assault with a deadly weapon, under Cal. Penal Code § 245(a)(1), arguing that this offense was improperly designated a prior conviction to enhance his current sentence under the “three strikes law.” Amended Petition (AP), p. 2.¹ The record shows that petitioner was convicted by a jury in 2001, in El Dorado County Superior Court, of multiple sexual offenses, including one count of forcible rape (Cal. Pen. Code § 261(a)(2)), one count of sexual battery (Cal. Pen. Code § 243.4(a)), one count of forcible oral copulation (Cal. Pen. Code § 288a(c)(2)), one count of unlawful sexual penetration with a minor

¹ The court references its own electronic pagination.

1 under 18 years old (Cal. Pen. Code § 289(h)), one count of oral copulation with a minor under 18
2 (Cal. Pen. Code § 288a(b)(1)), and unlawful sexual intercourse with a minor more than three
3 years younger than the perpetrator (Cal. Pen. Code § 261.5(c)). Motion to Dismiss (MTD), p. 2;
4 respondent's Lodged Document (Lod. Doc.) 1, p. 1. In addition, petitioner, under the three
5 strikes law (Cal. Pen. Code §§ 667(b) - (I), 1170.12), was found by the trial court to have
6 suffered a prior serious or violent felony conviction. Lod. Doc. 1, pp. 1-2. Petitioner was
7 sentenced, on 5/18/01, to a state prison term of fifty-six years to life. Lod. Doc. 1, pp. 1-2 &
8 Lod. Doc. 2, pp. 2-3.

9 Motion to Dismiss

10 Pending before the court is respondent's motion to dismiss the petition on the
11 ground that petitioner failed to file the petition timely. The statute of limitations for federal
12 habeas corpus petitions is set forth in 28 U.S.C. § 2244(d)(1):

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

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

17 (B) the date on which the impediment to filing an application
18 created by State action in violation of the Constitution or laws of
the United States is removed, if the applicant was prevented from
19 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
recognized by the Supreme Court and made retroactively
applicable to cases on collateral review; or

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

24 Following the imposition of his sentence on 5/18/01, petitioner filed an appeal to
25 the Third District Court of Appeal on 1/16/02, which affirmed the judgment on 10/17/02 (with a
26 modification of the restitution fine). MTD, p. 2; Lod. Docs. 1 & 2. Petitioner then filed a

1 petition for review in the California Supreme Court on 11/21/02 (or 11/22/02), which was denied
2 on 1/15/03. MTD, p. 2; Lod. Docs. 3 & 4. The record demonstrates that petitioner’s conviction
3 became final on 4/15/03, ninety days after the state supreme court denied petitioner’s petition for
4 review on direct appeal. See Cal. Rules of Court, Rule 8.308(a) (former Rule 31); Bowen v.
5 Roe, 188 F.3d 1157, 1158-59 (9th Cir. 1999) (“holding] that the period of ‘direct review’ in 28
6 U.S.C. § 2244(d)(1)(A) includes the [ninety-day] period within which a petitioner can file a
7 petition for a writ of certiorari with the United States Supreme Court, whether or not the
8 petitioner actually files such a petition.”) The statute of limitations began to run the next day, on
9 4/16/03. Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001). Petitioner had one year, that
10 is, until 4/15/04, to file a timely federal petition, absent applicable tolling.

11 28 U.S.C. § 2244(d)(2) provides that the time during which a properly filed
12 application for state post-conviction or other collateral review with respect to the pertinent
13 judgment or claim is pending shall not be counted toward any period of limitation under this
14 section. However, as respondent notes (MTD, p. 4), the filing of a state collateral action
15 following expiration AEDPA limitations period cannot revive the limitations period or toll it
16 under § 2244(d)(2). See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir.2003); Jiminez v.
17 Rice, 276 F.3d 478, 482 (9th Cir.2001).

18 This court applies the mailbox rule² in dating the filing of the two pro se state
19 post-conviction habeas challenges. The first state court petition was filed in El Dorado County
20 Superior Court on 10/20/05, and denied on 1/11/06. Lod. Docs. 5 & 6. Petitioner filed a
21 petition for review of a habeas petition in the California Supreme Court on 8/23/06, which was
22 denied on 2/28/07. AP, p. 17; Lod. Docs. 7 & 8. Plainly, petitioner did not commence his

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24 ² Pursuant to Houston v. Lack, 487 U.S. 266, 275-76, 108 S. Ct. 2379, 2385 (1988), pro se
25 prisoner filing is dated from the date prisoner delivers it to prison authorities. Stillman v. Lamarque,
26 319 F.3d 1199, 1201 (9th Cir. 2003) (mailbox rule applies to pro se prisoner who delivers habeas
petition to prison officials for the court within limitations period). See also, Rule 3(d) of the federal
Rules Governing Section 2254 Cases.

1 habeas filings in state court (on 10/20/05) until long after the AEDPA limitations period had
2 expired (on 4/15/04), thus petitioner is not entitled to any tolling under § 2244(d)(2). Although
3 this matter proceeds upon an amended petition, filed on 3/14/08, the court dates the filing of this
4 matter from the filing date of the original petition, pursuant to the mailbox rule, rendering it filed
5 as of 2/20/08 (notwithstanding the court docket filing date of 2/22/08).

6 Petitioner argues that because the state habeas petitions that he brought were not
7 deemed untimely, respondent should not be permitted to challenge the timeliness of the instant
8 petition. Opposition (Opp.), p. 2. He concedes that he was mistaken in starting over at the state
9 court level by way of habeas applications and not proceeding to federal court after the denial by
10 the state supreme court of his petition for review on his direct appeal. *Id.*, at 1. He argues that he
11 made “an honest effort” to follow court rules but is not an attorney. *Id.* Petitioner also contends
12 that his claims are not subject to AEDPA’s timeliness requirements because a sentencing error
13 can be raised at any time, and without objections having been raised in trial court, because such a
14 question goes to the jurisdiction of the court. *Id.*, citing People v. Serrato, 9 Cal.3d 753, 763, 109
15 Cal. Rptr. 65 (1973) (trial court may not modify verdict and convict defendant on an uncharged
16 crime), disapproved on other grounds in People v. Fosselman, 33 Cal. 3d 572, 581 n. 1; and
17 People v. Neal, 19 Cal.App.4th 1114, 1118, 1120 (1993) (although sentencing judge must state
18 reasons for sentencing choice in imposing consecutive sentences in state court, failure by defense
19 counsel to interpose objections at sentencing for failure to do so precludes issue being raised on
20 appeal). These cases do not appear to be apposite to the instant claim in federal court, that
21 petitioner was unconstitutionally sentenced to an enhanced sentence based on the court’s finding
22 that petitioner’s having previously pled to an assault with a deadly weapon constituted a prior
23 conviction under the three strikes law.

24 Petitioner also seeks to rely on Cunningham v. California, 549 U.S. 270, 127 S.
25 Ct. 856 (2007), contending that his sentencing error claim is new and has arisen since the initial
26 filing of his post-conviction applications. Opp., pp. 3-4. In citing Cunningham, petitioner

1 appears to be arguing for a later trigger date for the running of the statute of limitations, i.e., that
2 it should run from the date Cunningham was decided pursuant to 28 U.S.C. § 2244(d)(1)(C).
3 However, Cunningham addresses and finds unconstitutional California’s Determinate Sentencing
4 Law and is expressly *not* applicable to petitioner’s claim. Citing Apprendi v. New Jersey, 530
5 U.S. 466, 490, 120 S. Ct. 2348 (2000), the Supreme Court states: “*Except for a prior conviction,*
6 ‘any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be
7 submitted to a jury, and proved beyond a reasonable doubt.’” Cunningham, at 288-289, 127 S.
8 Ct. at 868 [emphasis added].³

9 Therefore, the alternative start date of subsection (C) for petitioner’s case is not
10 applicable in this instance. The statute of limitations analysis is governed by the “usual” rule –
11 subsection (A). Petitioner’s attempts to reach the merits of his claim and circumvent the time
12 limitations of 28 U.S.C. § 2244(d) are not availing. Petitioner simply has no cogent argument in
13 opposition to the motion upon which the court could make a finding of timeliness under the
14 applicable statute. The original petition, filed in this court on 2/20/08, was filed nearly four years
15 (three years and ten months) beyond the statute of limitations, which expired on 4/15/04.

16 The court next considers whether petitioner is entitled to equitable tolling. A
17 habeas petitioner bears the burden of proving that equitable tolling should apply to avoid
18 dismissal of an untimely petition. Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002). The
19 one year statute of limitations for filing a habeas petition may be equitably tolled “only if
20 *extraordinary* circumstances beyond a prisoner’s control make it impossible to file a petition on
21 time.” Id., at 1066 (internal quotation omitted [emphasis added in Miranda]). The prisoner must
22 show that the “extraordinary circumstances” were the cause of his untimeliness. Stillman v.
23 LaMarque, 319 F.3d 1199, 1203 (9th Cir. 2003). ““When external forces, rather than a
24 petitioner’s lack of diligence, account for the failure to file a timely claim, equitable tolling may

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26 ³ Moreover, in any event in Butler v. Curry, 528 F.3d 624, 639 (9th Cir. 2008), the Ninth
Circuit concluded that Cunningham did not announce a new rule.

1 be appropriate.” Lott v. Mueller, 304 F.3d 918, 922 (9th Cir. 2002), quoting Miles v. Prunty,
2 187 F.3d 1104, 1107 (9th Cir. 1999).

3 In his opposition, petitioner does not even contend that any external force
4 prevented him from filing his petition timely, particularly since he appears to believe,
5 erroneously, that he may raise a sentencing error claim in this court on federal habeas review at
6 any time. To the extent, as noted, that he argues that his claim is timely because it is new in light
7 of Cunningham, this contention also does not afford him relief. Neither does petitioner’s own
8 admitted error in “start[ing] over” in state court after denial of his state court petition for review
9 rather than proceeding to federal court excuse his untimeliness. Ignorance of the law does not
10 constitute the requisite extraordinary circumstances. Raspberry v. Garcia, 448 F.3d 1150, 1154
11 (9th Cir. 2006) (“We now join our sister circuits and hold that a pro se petitioner’s lack of legal
12 sophistication is not, by itself, an extraordinary circumstance warranting equitable tolling”) citing
13 Allen v. Yukins, 366 F.3d 396, 403 (6th Cir.2004) (“[T]his court has repeatedly held that
14 ignorance of the law alone is not sufficient to warrant equitable tolling” []; United States v. Sosa,
15 364 F.3d 507, 512 (4th Cir.2004) (“[E]ven in the case of an unrepresented prisoner, ignorance of
16 the law is not a basis for equitable tolling”); Marsh v. Soares, 223 F.3d 1217, 1220 (10th
17 Cir.2000) (“[I]t is well established that ignorance of the law, even for an incarcerated pro se
18 petitioner, generally does not excuse prompt filing” []; Felder v. Johnson, 204 F.3d 168, 171-72
19 n. 10 (5th Cir.2000) (“Our conclusion that Felder’s unawareness of AEDPA’s requirements is
20 insufficient to warrant tolling is also consistent with the determinations of other courts that have
21 faced similar claims”).” The court will recommend that respondent’s motion to dismiss the
22 amended petition on grounds of untimeliness be granted.

23 Accordingly, IT IS RECOMMENDED that respondent’s first amended motion to
24 dismiss, filed on 6/12/08 (# 14), be granted and the petition be dismissed as barred by the one-
25 year AEDPA statute of limitations.

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