

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

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

LARRY E. COOK,

Petitioner,

No. CIV S-08-1112 JAM GGH P

vs.

RICH SUBIA, Warden,

Respondent.

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. Petitioner, convicted of second degree murder in 1981, and sentenced to a term of 17 years to life, challenges the Board of Parole Hearings (BPH) decision on November 28, 2005, finding petitioner unsuitable for parole. Petition, p. 1. Petitioner raises the following grounds for his challenge: 1) due process violation where California regulations create a liberty interest in parole and the BPH continues to rely on unchanging factors (the commitment offense and criminal history) in denying petitioner parole; 2) biased BPH members violate petitioner’s due process rights. See Petition.

\\\\\\

\\\\\\

1 Motion to Dismiss

2 Pending before the court is respondent's motion to dismiss the petition as barred  
3 by the one-year AEDPA statute of limitations, filed on July 24, 2008, which petitioner opposed.

4 Discussion

5 On April 24, 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA)  
6 was enacted. AEDPA amended 28 U.S.C. § 2244(d)(1) so that it now provides,

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

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

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

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

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

24 The § 2244(d)(1)(D) limitation period for petitions that challenge administrative  
25 decisions “begins to run on ‘the date on which the factual predicate of the claim or claims  
26 presented could have been discovered through the exercise of due diligence.’” Shelby v. Bartlett,  
391 F.3d 1061, 1066 (9<sup>th</sup> Cir. 2004), citing Redd v. McGrath, 343 F.3d 1077, 1082 (9<sup>th</sup> Cir.  
2003). Under Redd, for habeas petitions challenging parole suitability hearings, the statute of  
limitations runs from the date the BPH denies the administrative appeal. Redd v. McGrath, 343  
F.3d at 1082-1084 (9<sup>th</sup> Cir. 2003), citing 28 U.S.C. § 2244(d)(1)(D). The Shelby Court noted that  
in Redd, a challenge to a parole board's denial of an administrative appeal, it had found that the  
statute of limitations began running the day after petitioner received notice of the Board's

1 decision. However, as respondent contends, since Redd, the administrative appeal/review  
2 process for parole suitability determinations has been eliminated, arguing that therefore the  
3 factual predicate of petitioner's claims became known to him on November 28, 2005, the date  
4 when petitioner appeared before the BPH for his parole consideration hearing. MTD, p. 4, Ex.  
5 G, Transcript of Nov. 28, 2005, Parole Hearing. On that day, petitioner learned of the reasons  
6 for the denial, thus triggering the running of the statute, according to respondent. MTD, pp. 4-5.  
7 Thus, under respondent's argument, 290 days of the statute had run before petitioner filed his  
8 initial state court petition in San Bernardino County Superior Court, on September 18, 2006.  
9 MTD, p. 5, Ex. A. In opposition on this point, however, petitioner argues that the BPH decision  
10 did not become final until March 28, 2006.<sup>1</sup> Opposition (Opp.), p. 2. On the last page of the  
11 transcript of the hearing, dated as 11/28/05, the following is stated:

12                   PAROLE DENIED THREE YEARS  
13                   THIS DECISION WILL BE FINAL ON: MAR 28, 2006  
14                   YOU WILL BE PROMPTLY NOTIFIED, IF PRIOR TO THAT DATE, THE  
15                   DECISION IS MODIFIED.

16                   Petition, p. 118; Respondent's Ex. A, p. 107, Ex. G, p. 60.

17                   In both Redd, 343 F.3d at 1084-1085, and Shelby, 391 F.3d at 1065-1066, the  
18 Ninth Circuit has found that the statute of limitations under 2244(d)(1)(D) only begins to run  
19 once the administrative decision is final. In other words, the Ninth Circuit appears to have found  
20 that the date for discovery with "the exercise of due diligence" of the "factual predicate" of  
21 petitioner's claim does not occur until the decision is deemed final by the relevant administrative  
22 authority. Under Redd, the Ninth Circuit expressly declined to adopt the Fifth Circuit's approach  
23 where it has been determined that the limitations period begins to run "when the initial  
24 administrative decision is made." 343 F.3d at 1084 n. 11, citing Kimbrell v. Cockrell, 311 F.3d

---

25                   <sup>1</sup> Petitioner actually states that the final decision date was March 26, 2006, an apparent  
26 typographical error as the date stamped on the transcript copies submitted is March 28, 2006. Opp.,  
p. 2.

1 361, 363 (5<sup>th</sup> Cir. 2002). Although the court cannot locate a Ninth Circuit decision speaking  
2 precisely to the issue at hand, that is, to the specific question of whether or not, in light of the  
3 elimination of the administrative appeal process for parole decisions, the trigger date for a parole  
4 denial dates from the date of the initial hearing decision or upon finality of the administrative  
5 decision as determined by the administrative entity, the relevant precedent militates for a finding  
6 that the date is triggered when the parole decision is determined to be final administratively.<sup>2</sup> In  
7 addition, the language by the BPH itself on the hearing transcript expressly states that the  
8 decision will not be final until March 28, 2006, and, at least implies, that a modification could  
9 occur. Thus, even assuming petitioner were fully aware that his parole was tentatively denied as  
10 of the Nov. 28, 2005, hearing, and the reasons therefore, the notification at the end of the  
11 transcript of the hearing as to when the decision would become “final,” would suggest that any  
12 state court petition filed earlier as to the decision might be premature.<sup>3</sup> See, e.g., Solorio v.  
13 Hartley, \_\_\_ F. Supp.2d \_\_\_, 2008 WL 5423449 \*2 (C.D. Cal. Dec. 10, 2008) (finding AEDPA  
14 statute of limitations began to run after the parole decision became final). In light of the existing  
15 precedent and the BPH’s express notification of the future date of final decision on the transcript  
16 of the Nov. 28, 2005, panel hearing, this court finds that the trigger date for the running of the  
17 statute is March 28, 2006, and that the statute began to run on the next day, March 29, 2008.  
18 Shelby, 391 F.3d at 1066, citing Redd v. McGrath, 343 F.3d at 1082. Petitioner seeks an even  
19 later trigger date, from late August of 2006, contending that he did not receive the transcripts for  
20 his parole hearing until that time, arguing that immediately thereafter he, along with another

---

21  
22 <sup>2</sup> Although the Ninth Circuit finds that the limitations period for petitions challenging parole  
23 denials runs from when the factual basis of the claims could have been discovered through due  
24 diligence, pursuant to § 2244(d)(1)(D), the reasoning of Redd and Shelby appears to apply §  
25 2244(d)(1)(A) in determining that the statute begins to run from when the decision of the BPH  
26 becomes final.

<sup>3</sup> CAL. CODE REGS. tit.XV, § 2041(h), states, in relevant part, as to “Review of Life Prisoner  
Decisions,” that “[a]ny proposed decision of the panel shall become final within 120 days of the  
hearing.”

1 inmate, began preparing his initial state court petition. Opp., p. 2. See Equitable Tolling  
2 discussion, below. In any event, as noted above, petitioner concedes that the decision became  
3 final in March 2006. See footnote 1.

4 Thus, the court finds that by the time petitioner filed his first state habeas petition,  
5 on September 18, 2006, 174 days of the statutory limitation period had lapsed from the date of  
6 the final administrative decision, on March 28, 2006. Respondent's Ex. A.<sup>4</sup> That petition was  
7 denied on October 4, 2006. Respondent's Ex. B. Thereafter, petitioner filed his petition to the  
8 Fourth Appellate District Court of Appeal on February 9, 2007, which was denied on March 1,  
9 2007. Respondent's Exs. C & D. Petitioner's petition to the state supreme court was filed on  
10 June 6, 2007, and denied on November 14, 2007. Respondent's Exs. E & F. The instant petition  
11 was filed on May 21, 2008.

12 28 U.S.C. § 2254(d)(2) provides that the time during which a properly filed  
13 application for state post-conviction or other collateral review with respect to the pertinent  
14 judgment or claim is pending shall not be counted toward any period of limitation under this  
15 section. In Carey v. Saffold, 536 U.S. 214, 122 S. Ct. 2134 (2002), the United States Supreme  
16 Court found that habeas petitioners are entitled to tolling of the limitations period under 28  
17 U.S.C. § 2244(d)(2) between the period of time after which a habeas petition is denied at a lower  
18 level and then filed at a higher one to the extent that petitioner seeks higher court review of the  
19 lower court's decision. See also, Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999) (the  
20 statute of limitations is tolled under 28 U.S.C. § 2254(d)(2) during the time properly filed state  
21 post-conviction proceedings are pending, and that tolling applies from the time the first state  
22 habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral  
23 challenge). For purposes of § 2244(d)(2), the Supreme Court has more recently held that a  
24 petitioner is entitled to interval tolling only for petitions that were timely filed under state law.

---

25  
26 <sup>4</sup> Petitioner expressly confirms the accuracy of the filing dates ascribed by respondent to  
petitioner's state court petitions and the instant petition. Opp., p. 1.

1 Evans v. Chavis, 546 U.S. 189, 126 S. Ct. 846, 849 (2006). In most states, a statute sets forth a  
2 time period, such as 30 or 60 days, for the filing of a timely appeal. Id., 126 S. Ct. at 849. Under  
3 California law, which does not permit an appeal by a petitioner from an adverse decision, a  
4 petition for writ of habeas corpus filed in the next court is timely if filed within a “reasonable  
5 time.” Id., 126 S. Ct. at 849 (citing In re Harris, 5 Cal. 4th 813, 828 n. 7, 21 Cal. Rptr. 2d 373  
6 (1993)). Respondent argues that the 127- day gap between the denial of the superior state court  
7 petition, on Oct. 4, 2006, and the filing of the Feb. 9, 2007, state appellate court petition was an  
8 unreasonable delay and that petitioner is therefore not entitled to tolling during that interval. In  
9 support of that contention, petitioner cites Culver v. Dir. Corr., 450 F. Supp.2d 1135, 1140-41  
10 (C.D. Cal. 2006), as well as a number of unpublished district court decisions to demonstrate  
11 interval periods that have been determined to have been so unjustified or unreasonable as not to  
12 warrant tolling. Opp., p. 5, Ex. H. In Culver, supra, unexplained intervals of 97 days and 71  
13 days between the denial of one state court habeas petition and the filing of another were found to  
14 be unreasonable and did not act to toll the statute during those intervals. In Lor v. Kramer, 2007  
15 WL 1723300 \*1 (E.D. Cal. 2007), the court granted no tolling for the 140-day gap between the  
16 state appellate court habeas petition denial and the filing of the state supreme court petition  
17 “especially considering the 88 days that passed between” the denial of the state superior court  
18 petition and the filing of the state appellate court petition. In Forrister v. Woodford, 2007 WL  
19 809991, \* 3 (E.D. Cal. 2007), the district court found petitioner not entitled to tolling for a delay  
20 of 88 days between the denial of a state superior court habeas petition and the filing of a habeas  
21 petition in the California Supreme Court because the gap “far exceeded the 30 to 60 day period  
22 the Supreme Court used as a bench mark in Chavis.” In Potts v. Giurbino, 2006 WL 1377105,  
23 \*4 (E.D. Cal. 2006), a delay of 143 days between the denial of the first state court habeas  
24 petition, in superior court, and the filing of the second habeas, in the state appellate court, was  
25 found to be “clearly unreasonable.” In Chavez v. Henry, 2006 WL 1875442, \*4, \*6 (E.D. Cal.  
26 2006) (144-day gap between denial of state appellate court petition and state supreme court filing

1 is a delay more than twice that of the 30 to 60 days most states permit and the California Rules  
2 provide that the People have 60 days to appeal a grant of habeas relief in the superior court),  
3 adopted by Order, in Chavez v. Henry, 2007 WL 120039 (E.D. Cal. 2006).

4 In opposition, petitioner maintains that following the state superior court denial,  
5 he prepared the petition for the California Court of Appeal and sent it to his wife, Jeri Cook, for  
6 copying and filing. Opp., p. 4. He provides no date for when he performed this action.

7 Petitioner goes on to state that his wife then copied and sent the petition to the Court of Appeal  
8 address she had been provided by Inmate Jimmy St. Clair, who had gotten the address for the  
9 court out of the Prisoner's Rights Union Resource Guide, according to petitioner, which provided  
10 an erroneous address, as the petitioner later learned that the court had been moved from an  
11 address in San Bernardino to Riverside, California, when the petition was returned to him at his  
12 prison address. Opp., p. 4. Petitioner states that it took him a while to obtain the correct address,  
13 which was not in the prison law library, but petitioner again provides no dates whatever as to  
14 when the petition was returned or how and when he learned the correct address. Petitioner, again  
15 on an unidentified date, sent the package to his wife to re-mail. Id. Petitioner concedes that it  
16 took him 127 days to get the petition filed and states that he apologizes, stating that "he and  
17 Jimmy St. Clair honestly did not think such a large court would move." Opp., p. 5. Petitioner's  
18 explanations for the delay in filing the state appellate court petition simply do not entitle  
19 petitioner to statutory tolling under the only possible basis under which he might seek it, §  
20 2244(d)(1)(B). Assuming the truth of the allegation that the resource or reference consulted in  
21 the prison may not have had the most current address for the state appellate court, such a  
22 circumstance does not constitute a sufficient basis for this court to find thereby a state-created  
23 impediment to the filing. Therefore, the court finds, under Evans v. Chavis, supra, the 127-day  
24 delay between the denial of the state court habeas petition to be unreasonable and that petitioner  
25 is not entitled to tolling for that period.

26 \\\

1           Petitioner is, nevertheless, entitled to tolling for the time his petition was pending  
2 in the state appellate court. By this court's calculation 301 days of the statute had run by the time  
3 of the filing of the state appellate court petition on Feb. 9, 2007, which as previously noted, was  
4 denied on March 1, 2007. Thereafter, although petitioner offers explanations for his delay in  
5 filing the petition to the state supreme court,<sup>5</sup> which was filed on June 6, 2007, respondent does  
6 not challenge that interval and the court will find the statute tolled until the state supreme court  
7 denial on Nov. 14, 2007, after which the statutory period recommenced until it expired 64 days  
8 later (365 days minus 301), on January 17, 2008. The instant petition was filed on May 21, 2008,  
9 which was 125 days beyond the statute of limitations. The only question that remains is whether  
10 petitioner may be entitled to equitable tolling.

11 Equitable Tolling Standard

12           “Generally, a litigant seeking equitable tolling bears the burden of establishing  
13 two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary  
14 circumstance stood in his way.” Pace v. DiGuglielmo, 544 U.S. 408, 418, 12 S. Ct. 1807, 1814;  
15 Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002) (a habeas petitioner bears the burden of  
16 proving that equitable tolling should apply to avoid dismissal of an untimely petition).

17 “Equitable tolling is unavailable in most cases,” and is only appropriate “if *extraordinary*  
18 circumstances beyond a prisoner's control make it impossible to file a petition on time.”

19 Miranda, supra, at 1066 (internal quotations/citations omitted [emphasis added in Miranda]). A  
20

---

21           <sup>5</sup> Petitioner states that the filing date of the state supreme court petition was May 15, 2007,  
22 apparently erroneously predicating this period on the date that his wife, Jeri Cook, signed a proof of  
23 service for the document. Opp., p. 5. However, petitioner, although proceeding pro se, is not  
24 entitled to the application of the prison mailbox rule. See Houston v. Lack, 487 U.S. 266, 275-76,  
25 108 S. Ct. 2379, 2385 (1988) (pro se prisoner filing is dated from the date prisoner delivers it to  
26 prison authorities); Stillman v. Lamarque, 319 F.3d 1199, 1201 (9<sup>th</sup> Cir. 2003) (mailbox rule applies  
to pro se prisoner who delivers habeas petition to prison officials for the court within limitations  
period). Petitioner sent his filings to his wife to be copied, as well as evidently filed and served  
through the U.S. mail outside of prison. The actual filing dates of the petitions therefore are  
reflected in the court-stamped filing dates on the respective state court petitions. The same applies  
to the petition filed in this court which contains a proof of service attached by Jeri Cook.

1 petitioner must reach a “very high” threshold “to trigger equitable tolling [under AEDPA]...lest  
2 the exceptions swallow the rule.” Id. The Ninth Circuit has held that claims of ignorance of the  
3 law and illiteracy do not constitute such extraordinary circumstances and are insufficient to  
4 justify equitable tolling. See Raspberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006); see also  
5 Hughes v. Idaho State Bd. Of Corrections, supra, 800 F.2d at 909 (9th Cir. 1986) (pro se  
6 prisoner’s illiteracy and lack of knowledge of the law unfortunate but insufficient to establish  
7 cause).

8           Petitioner does not meet the very high requisite threshold to warrant equitable  
9 tolling simply because he did not receive his hearing transcripts until some 30 days prior to the  
10 filing of his initial state habeas petition, on Sept. 18, 2006. Petitioner avers that he includes the  
11 declaration of his inmate assistant, Jimmy St. Clair, attesting if not to the date of petitioner’s  
12 receipt of the transcripts at some time in late August of 2006, at least to petitioner’s recollection  
13 of having immediately thereafter begun to assist petitioner at that point with the initial petition.  
14 Opp., p. 2. However, the court can locate no such declaration. Petitioner’s contention that he  
15 should be able to have his hearing transcript before preparing a habeas petition because  
16 respondent has access to such records in responding to any such petition (Opp., pp. 3-4) is not a  
17 persuasive argument when petitioner was aware of the date of finality of the decision in March of  
18 2006, and when petitioner attended the hearing and was present when the reasons for denying  
19 parole were articulated.

20           As to his circuitous explanation as to how the state appellate court petition went  
21 astray, the court is unable to find that the unfortunate set of circumstances could legitimately  
22 warrant equitable tolling. Not only does petitioner fail to provide anything specific as to when  
23 his petition was returned, when it was mailed back out, etc., it is not clear why petitioner’s wife  
24 could not have ascertained the correct address more quickly, located as she was outside of the  
25 prison, either at the outset before the initial mailing or at least by the time it was first returned to  
26 petitioner. Petitioner never explains how he finally uncovered the correct address or how long it

1 took. Although petitioner, within his opposition, requests an evidentiary hearing, the court finds  
2 that one is not warranted to determine precisely when petitioner received his hearing transcript or  
3 the reasons for any delay in filing subsequent petitions because petitioner has failed to  
4 demonstrate a sufficient potential, factual predicate for either statutory or equitable tolling. Since  
5 the court finds petitioner is not entitled either to statutory or equitable tolling, the court will  
6 recommend that the motion to dismiss on grounds of untimeliness be granted.

7           Accordingly, IT IS HEREBY RECOMMENDED that respondent's motion to  
8 dismiss the petition as barred by the AEDPA one-year statute of limitations, filed on 7/24/08 (#  
9 5), be granted, and this case be dismissed.

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

18 DATED: 01/21/09

/s/ Gregory G. Hollows

UNITED STATES MAGISTRATE JUDGE

21 GGH:009  
22 cook1112.mtd