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

JERRY A. HOFFINE,

Petitioner,

No. CIV S 08-1369 FCD KJM P

vs.

M.C. KRAMER, et al. ,

Respondents.

FINDINGS AND RECOMMENDATIONS

_____ /

Petitioner is a California prisoner proceeding pro se with an application for writ of habeas corpus under 28 U.S.C. § 2254. Petitioner challenges a 2006 denial of parole. Respondent has filed a motion to dismiss petitioner’s habeas application as time-barred.

Title 28 U.S.C. § 2244(d)(1) provides as follows:

A 1-year period of limitation shall apply to an application for a writ 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 –

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

(B) the date on which the impediment to filing an application 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;

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

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

8 28 U.S.C. § 2244(d)(1).

9 With respect to a denial of parole by the California Board of Prison Terms, the
10 section 2244(d)(1) limitations period begins to run under section 2244(d)(1)(D) when the parole
11 process is completed. See Redd v. McGrath, 343 F.3d 1077, 1081-82 (9th Cir. 2003). Petitioner
12 had his parole hearing on January 20, 2006. Mot. To Dismiss at 2. The process was complete on
13 May 20, 2006 when the decision to deny petitioner parole became final. Id., Ex. 1 part B at 113¹;
14 15 C.C.R. § 2041(h) (decision to deny parole to life prisoner is final within 120 days of initial
15 hearing). Thus, for petitioner, the statute of limitations began to run on May 21, 2006, the day
16 after the Board's decision became final, and would have ended on May 20, 2007, without the
17 application of any tolling.

18 Section 2244(d)(2) of AEDPA provides that “the time during which a properly
19 filed application for State post-conviction or other collateral review with respect to the pertinent
20 judgment or claim is pending shall not be counted toward any period of limitation under this
21 subsection.” 28 U.S.C. § 2244(d)(2). In Carey v. Saffold, 536 U.S. 214 (2002), the Supreme
22 Court found that habeas petitioners are generally entitled to tolling of the limitations period under
23 28 U.S.C. § 2244(d)(2) for the period of time after which a habeas petition is denied at a lower
24 court until a subsequent filing at a higher court, to the extent petitioner seeks higher court review
25 of the lower court’s decision. Carey, 536 U.S. at 221-25; see also Evans v. Chavis, 546 U.S.
26 189, 201 (2006) (addressing reasonableness of gap periods of tolling).

¹ Page references are to the number assigned by the court’s electronic docketing system unless otherwise noted.

1 Petitioner filed an application for writ of habeas corpus in Sacramento County
2 Superior Court on April 19, 2007. Mot. To Dismiss, Ex. 1 part A at 48.² The petition was
3 denied on July 26, 2007. Id., Ex. 2 at 2-3. Next, petitioner filed a petition in the California
4 Court of Appeal on September 2, 2007. Id., Ex. 3 part A at 52. The Court of Appeal denied the
5 petition on September 13, 2007. Id., Ex. 4 at 2. Petitioner filed his final state habeas petition in
6 the Supreme Court of California on October 23, 2007. Id., Ex. 5 part A at 49. That petition was
7 denied on April 23, 2008. Pet. at 3. Respondent does not dispute that petitioner is entitled to
8 tolling of the limitations period from the time his initial state habeas petition was filed on April
9 17, 2007, until the date his last petition was denied on April 23, 2008.

10 Considering the above, the court finds that the limitations period ran between May
11 21, 2006, the day after the parole denial became final, and April 18, 2007 for a total of 333 days.
12 The period began to run again on April 24, 2008 and then ran out on May 25, 2008. Because this
13 action was not commenced until June 15, 2008, Pet. at 50, this action is time-barred unless saved
14 by equitable tolling.

15 “Equitable tolling” of the limitations period is appropriate when extraordinary
16 circumstances beyond a habeas petitioner’s control make it impossible for him to file on time.
17 See, e.g., Espinoza-Matthews v. California, 432 F.3d 1021, 1026 (9th Cir. 2005). A petitioner
18 seeking equitable tolling must establish “(1) that he has been pursuing his rights diligently; and
19 (2) that some extraordinary circumstance stood in his way.” Pace v. DiGuglielmo, 544 U.S. 408
20 (2005).

21 Petitioner asserts he delayed in bringing this action because he was waiting for the
22 United States Supreme Court to decide Cunningham v. California, 127 S. Ct. 857 (2007) and the
23 Ninth Circuit to decide Irons v. Carey, 506 F.3d 951 (9th Cir. 2007), two cases petitioner thought

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25 ² For purposes of the statute of limitations and tolling provisions, the court deems
26 actions filed on the date the initiating pleading was submitted to prison officials for mailing. See
Houston v. Lack, 487 U.S. 266, 270 (1988); Lewis v. Mitchell, 173 F. Supp. 2d 1057, 1058 n.1
(C.D. Cal. 2001).

1 might impact his claims. Opp'n at 1. Nothing suggests, however, it was impossible for
2 petitioner to bring his claims while the two cases were pending. For example, it appears
3 petitioner could have filed in the California Superior Court and then requested a stay pending the
4 outcome of Cunningham and Irons.

5 Petitioner also claims he is entitled to equitable tolling of the limitations period
6 between March 4, 2008, when his "jailhouse lawyer" was admitted to the hospital, and June 15,
7 2008 when this action was filed. Opp'n at 8. Petitioner claims that while his jailhouse lawyer
8 was recovering from back surgery for "a number of weeks," he could not assist petitioner and
9 petitioner could not gain access to his legal documents. Id.

10 Courts have held that mistakes by jailhouse lawyers generally do not provide a
11 basis for equitable tolling. In United States v. Cicero, for example, in which the petitioner
12 "unfortunately gave his legal papers to a jailhouse lawyer whose placement in segregation
13 separated petitioner and his papers from some time before the expiration of the one year grace
14 period until after the filing deadline had passed," the court observed that petitioner had not
15 shown he had diligently pursued the filing of his motion. 214 F. 3d 199, 204 (D.C. Cir. 2000).
16 In affirming the denial of equitable tolling, the court noted in particular that petitioner had not
17 made any formal request for return of his papers, or sought an extension of time from the court,
18 steps that would have signaled diligence. See also Paige v. United States, 171 F.3d 559, 561 (8th
19 Cir. 1999) (where petitioner hired brother who was an inmate in another facility to prepare
20 motion, and deadline drew near without his having received the motion, equitable tolling not
21 available because nothing prevented petitioner from preparing document himself or seeking help
22 of another inmate at his institution of residence); Henderson v. Johnson, 1 F. Supp. 2d 650 (N.D.
23 Tex. 1998) (circumstances created by petitioner's hiring of jailhouse lawyer who misrepresented
24 that he had timely filed a document on petitioner's behalf, when he had not, did not satisfy
25 equitable tolling).

26 ////

1 Petitioner fails to specifically identify how long he was without access to his
2 jailhouse lawyer or his legal materials. He also fails to point to anything indicating he could not
3 complete his habeas application without the assistance of his jailhouse lawyer and does not
4 indicate it was impossible to retrieve his legal materials with the assistance of correctional staff
5 while petitioner's jailhouse lawyer was unavailable. Pet. at 8-9. He has not met his burden of
6 establishing a right to equitable tolling.

7 For the foregoing reasons, the court will recommend that respondent's motion to
8 dismiss be granted, and this action be dismissed as time-barred.

9 Accordingly, IT IS HEREBY RECOMMENDED that:

- 10 1. Respondent's March 13, 2009 motion to dismiss (#15) be granted; and
11 2. This action be dismissed.

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

20 DATED: July 2, 2009.

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23 U.S. MAGISTRATE JUDGE

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