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

JASON WILBERT JOHNSON,

Petitioner,

No. CIV S-09-2108 JAM EFB P

vs.

FRANCISCO JACQUEZ, Warden,

Respondent.

FINDINGS AND RECOMMENDATIONS

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Petitioner is a state prisoner without counsel seeking a writ of habeas corpus. *See* 28 U.S.C. § 2254. This action proceeds on his July 30, 2009 petition. Petitioner has filed a motion to stay the case pending his exhaustion of his state remedies. *See* dckt. no. 3. Respondent moves to dismiss this action on the grounds that the petition is time-barred and that petitioner’s claims are unexhausted. *See* Dckt. no. 13. On July 26, 2010, the court found that the petition was mixed, and ordered the parties to file further briefing addressing whether the petition is time-barred and whether there is good cause for petitioner’s failure to exhaust all of his claims.

I. Procedural History

Petitioner was convicted of attempted murder and attempted carjacking. Resp.’s Mot. to Dism., Docs. Lodged in Supp. Thereof (“Lodg. Doc.”) 1. He was sentenced to thirty-two years to life in state prison. *Id.*

1 On October 30, 2007, the California Court of Appeal, Third Appellate District, affirmed
2 the judgment. Lodg. Doc. 2. On February 19, 2008, the California Supreme Court denied
3 review. Lodg. Doc. 4.

4 The instant petition was docketed on July 30, 2009.

5 **II. Statute of Limitations**

6 Respondent argues that this action is time-barred, as it was filed outside of the one-year
7 statute of limitations. A one-year limitations period for seeking federal habeas relief begins to
8 run from the latest of the date the judgment became final on direct review, the date on which a
9 state-created impediment to filing is removed, the date the United States Supreme Court makes a
10 new rule retroactively applicable to cases on collateral review or the date on which the factual
11 predicate of a claim could have been discovered through the exercise of due diligence. 28
12 U.S.C. § 2244(d)(1).

13 The limitations period may also be equitably tolled where a habeas petitioner establishes
14 two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary
15 circumstance stood in his way. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). In light of this
16 pronouncement, the Ninth Circuit has reiterated that the threshold necessary to trigger equitable
17 tolling is very high, and clarified that equitable tolling only applies where a petitioner shows that
18 despite diligently pursuing his rights, some external force *caused* the untimeliness. *Waldron-*
19 *Ramsey v. Pacholke*, 556 F.3d 1008, 1011 (9th Cir. 2009). Petitioner has the burden of showing
20 facts entitling him to equitable tolling. *Smith v. Duncan*, 297 F.3d 809, 814 (9th Cir. 2002);
21 *Miranda v. Castro*, 292 F.3d 1063, 1065 (9th Cir. 2002).

22 In this case, petitioner and respondent agree that his deadline to file his federal habeas
23 petition was May 13, 2009. As explained in the court's August 30, 2010 order, the petition was
24 not filed until July 28, 2009. Thus, unless petitioner is entitled to at least two and a half months
25 of equitable tolling, his petition is time-barred.

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1 Petitioner argues that he is entitled to equitable tolling because: he was placed in
2 administrative segregation from October 30, 2008 until May 5, 2009, and was without his legal
3 materials and library access for much of this time;¹ he injured his right hand; he suffered from
4 depression, stress, bipolar disorder and isolation and was placed in the prison's correctional
5 clinical case management system and given medication and therapy; and he was sent to court in
6 Placer County without his legal materials. He also alleges that his petition was further delayed
7 because his prison requires that all petitions longer than 50 pages be approved by the senior
8 librarian,² and the court returned the first petition that he filed because the prison had provided
9 the wrong form and the court would not accept it.³ Dckt. No. 17.

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11 ¹ Petitioner declares under penalty of perjury that he was denied access to all legal
materials from November 2, 2008 until April 2, 2009. Dckt. No. 3 at 10.

12 ² Petitioner's exhibits show that Pelican Bay State Prison regulations state:

13 Legal documents copied for an inmate shall be limited to 50 pages
14 in total length except when necessary to advance litigation. The
inmate shall provide a written explanation of the need for excess
15 document length. The explanation shall include the relevance of
all attachments and exhibits to the document being filed. In no
16 event shall staff be required to duplicate a legal document
exceeding 100 pages in length in the absence of a court order
17 directing the duplication.

18 Ex. H. It can be inferred that prison officials necessarily take time to review and evaluate
inmates' written explanations before allowing copying of documents. The instant petition is 256
19 pages long.

20 ³ Some evidentiary support for this allegation is found in the response to one of
petitioner's administrative appeals. Ex. A. The Associate Warden wrote on October 1, 2009:

21 [Y]ou stated that while in the stand-alone Administrative
22 Segregation Unit, you had gotten form 6-W, the federal habeas
corpus for the Eastern District, from the Security Housing Unit
23 Law Library, and it had been returned by the court as an outdated
version. You had to fill out and resubmit the version they
24 supplied, thereby doubling the amount of postage you had to pay.
You requested to be reimbursed for that extra postage, since it was
25 the library's fault that you had to pay the postage twice...

26 Regarding your being given an outdated state habeas corpus form,
we are surprised. Ms. McCumsey phoned the Office of the Clerk

1 The court finds that petitioner's placement in administrative segregation and attendant
2 deprivation of law library access and legal materials constitutes extraordinary circumstances
3 warranting equitable tolling. The exhibits attached to petitioner's brief show that petitioner was
4 placed in administrative segregation on October 30, 2008. He filed administrative appeals
5 complaining that he had not received law library access despite repeated requests, which were
6 denied on the grounds that he did not have a pending legal case, as he had not yet filed the
7 instant petition. His administrative appeals complain that he also was denied access to his legal
8 papers while he was in administrative segregation. Exhibit G shows that petitioner finally
9 received his legal papers on April 2, 2009. He was released from administrative segregation on
10 April 30, 2009.⁴ During the period that petitioner was without library access and without his
11 legal materials, it was impossible for him to prepare a habeas petition. Petitioner has
12 demonstrated that he was diligent during this period in pursuing administrative appeals regarding
13 library access and his legal materials and there was nothing more he could have done. Thus, the

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15 of the Eastern District Court on September 24. The clerk checked
16 your record and verified that you have an open case. She stated,
17 however, that normal procedure at the court is to allow inmates
18 considerable leeway on the forms they submit, since the court is
19 away [sic] of the constraints under which inmates are working.
20 She would not have expected a form to be returned to an inmate
21 simply because there is a newer version available. Ms. McCumsey
22 then searched the Internet, hoping to find posted on the Eastern
23 District's website the forms they are currently using, but without
24 success. She has requested more information from you and will
25 continue working on this aspect of your appeal when she receives
26 it.

21 *Id.* Petitioner's claim that he attempted to file the petition twice is also corroborated by Pelican
22 Bay's outgoing mail log, which shows that he mailed three items to "Clerk of the U.S. District"
23 in Sacramento, CA on May 20, 2009, that he received mail from the U.S. District Court on June
24 5 and June 17, 2009, and that he mailed two items to "U.S. Courthouse" and "Clerk, U.S.
25 Courthouse" on July 28, 2009. Lodg. Doc. 5.

24 ⁴ Petitioner claims that he was "out to court in Placer County during this time."
25 Respondent has submitted a log showing that petitioner was released from Pelican Bay State
26 Prison on February 4, 2009, and returned on February 24, 2009. As this falls within the time
period that petitioner was in administrative segregation, it does not warrant further equitable
tolling.

1 court finds that petitioner is entitled to at least five months of equitable tolling (the time that he
2 was without his legal materials) and that his petition is not time-barred.

3 Respondent argues that petitioner should not be granted equitable tolling because his own
4 conduct caused him to be placed in administrative segregation. Respondent states that petitioner
5 was placed in administrative segregation because he assaulted another inmate. Petitioner
6 contends that he was not at fault in the incident. He has filed a civil rights lawsuit stating that
7 correctional officers failed to protect him from violence during a race riot, and that he was forced
8 to defend himself against another inmate. Ex. B. While the court makes no findings regarding
9 the appropriateness of petitioner's conduct or his placement in administrative segregation, it
10 declines to deny equitable tolling on this basis. The approach that respondent urges would
11 require the court to determine the merits of a prisoner's placement in administrative segregation
12 after being found guilty of an offense in an internal prison proceeding without the benefit of
13 ordinary constitutional safeguards, or alternatively, to simply summarily deny equitable tolling
14 in all such cases rendering the administratively segregated inmate ineligible to challenge the
15 constitutionality of his conviction.

16 **III. Exhaustion of State Remedies**

17 The court previously found that the instant petition is mixed, that is, it contains both an
18 exhausted claim and unexhausted claims. As explained in the court's July 26, 2010 order, a
19 mixed petition may be stayed to allow a petitioner to present unexhausted claims to the state
20 courts. *Rhines v. Weber*, 544 U.S. 269, 277 (2005). Stay and abeyance is appropriate when
21 there was good cause for the petitioner's failure to exhaust his claims first in state court, his
22 unexhausted claims are not plainly meritless, and there is no indication that he engaged in
23 intentionally dilatory litigation tactics. *Id.* at 277.

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1 In this case, good cause exists for petitioner's failure to exhaust his claims in state court.
2 By the time that petitioner was released from administrative segregation and given access to his
3 legal materials, he had only about six weeks to research and write his petition.⁵ It appears that
4 by the time that the petition was complete, and the law librarian had approved and copied it,⁶
5 petitioner was out of time to exhaust his claims in the state courts, as the deadline for filing his
6 federal petition had passed.⁷

7 From the court's initial review, it does not appear that petitioner's claims are plainly
8 meritless. Respondent has not argued that they are. Finally, petitioner has sworn that he has not
9 engaged in intentionally dilatory litigation tactics, and there is no evidence to the contrary.
10 Thus, the instant action should be stayed to allow petitioner to exhaust his unexhausted claims in
11 state court.

12 **IV. Conclusion**

13 Accordingly, it is hereby RECOMMENDED that:

14 1. Petitioner's motion to stay the case pending the exhaustion of his unexhausted claims
15 be granted;

16 2. Petitioner be directed to file a state habeas petition containing his unexhausted claims
17 within 30 days and be admonished that he shall inform this court within 30 days after his claims
18 are exhausted in state court; and

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20 ⁵ Respondent argues that petitioner had five and a half months to research and prepare his
21 petition before he was placed in administrative segregation, apparently suggesting that petitioner
22 should have planned for being denied legal materials and library access for nearly all of the
23 second half of the limitations period. The court declines to attribute to the applicable standard a
requirement for such clairvoyance. Under these circumstances, the petitioner cannot be faulted
for not completing his petition during the initial five and a half months.

24 ⁶ Petitioner's inmate account statement shows that he paid \$21.95 for "legal copy" on
May 13, 2009. Ex. E.

25 ⁷ While the AEDPA statute of limitations is statutorily tolled during the time that
26 properly filed habeas petitions are pending in state courts, once the statute has expired it cannot
be revived by the filing of a state habeas petition. *Jiminez v. Rice*, 276 F.3d 476 (9th Cir. 2001).

1 3. Respondent's motion to dismiss be denied.

2 These findings and recommendations are submitted to the United States District Judge
3 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
4 after being served with these findings and recommendations, any party may file written objections
5 with the court and serve a copy on all parties. Such a document should be captioned "Objections
6 to Magistrate Judge's Findings and Recommendations." Failure to file objections within the
7 specified time may waive the right to appeal the District Court's order. *Turner v. Duncan*, 158
8 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

9 Dated: September 13, 2010.

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11 EDMUND F. BRENNAN
12 UNITED STATES MAGISTRATE JUDGE
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