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

CLIFFORD KENNETH MYELLE,

Petitioner,

No. 2:09-cv-2919 JAM KJN P

vs.

G. SWARTHOUT,

Respondent.

FINDINGS AND RECOMMENDATIONS

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Petitioner is a state prisoner proceeding without counsel with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges a decision in 2007 by the California Board of Parole Hearings (the “Board”) to deny him parole. This matter is before the court on respondent’s motion to dismiss. Respondent contends that petitioner’s claims are barred by the statute of limitations and that the petition must be dismissed.

I. Statute of Limitations

Section 2244(d) of Title 28 of the United States Court sets forth a statute of limitations for filing a habeas petition in federal court:

(d)(1) 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—

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

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

8 (C) the date on which the constitutional right asserted was
9 initially recognized by the Supreme Court, if the right has been
10 newly recognized by the Supreme Court and made retroactively
11 applicable to cases on collateral review; or

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

15 (2) The time during which a properly filed application for State
16 post-conviction or other collateral review with respect to the
17 pertinent judgment or claim is pending shall not be counted toward
18 any period of limitation under this subsection.

19 28 U.S.C. § 2244. Where, as here, the petitioner challenges an administrative decision to deny
20 parole, the limitation period is governed by the provisions of 28 U.S.C. § 2244(d)(1)(D). See
21 Redd v. McGrath, 343 F.3d 1077 (9th Cir. 2003).

22 The following facts are relevant to the statute of limitations analysis.

23 1. On January 29, 2007, the Board decided, at the conclusion of its hearing and in
24 petitioner's presence, that petitioner was denied parole. (Pet. at 16-62.) The transcript of this
25 hearing decision provided in pertinent part:

26 PAROLE DENIED FOUR YEARS.
THIS DECISION WILL BE FINAL ON MAY 29, 2007.¹
YOU WILL BE PROMPTLY NOTIFIED, IF PRIOR TO THAT
DATE, THE DECISION IS MODIFIED.

(Id. at 36.)

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¹ See Cal. Penal Code § 3041(b); 15 C.C.R. §§ 2041(h), 2043 (parole board decisions become final 120 days after the date of hearing).

1 2. On May 1, 2008, petitioner signed and dated a petition for writ of habeas
2 corpus directed to the California Superior Court in Solano County. (Mot., Ex. B.) The petition
3 was file stamped in that court on May 7, 2008. (Id.) On July 2, 2008, Solano County transferred
4 the petition to the Yolo County Superior Court because petitioner was sentenced there; it was
5 filed in Yolo County on July 7, 2008. (Mot., Ex. C.) The petition was denied on September 10,
6 2008. (Mot., Ex. D.)

7 3. On November 22, 2008, petitioner signed and dated a petition for writ of
8 habeas corpus in the California Court of Appeal, Third Appellate District. (Mot., Ex. E.) By
9 order filed December 11, 2008, the petition for writ of habeas corpus was denied. (Mot., Ex. G.)

10 4. On February 11, 2009, petitioner filed a habeas corpus petition in the
11 California Supreme Court.² (Pet. at 224.) It was denied without comment by order filed July 22,
12 2009. (Mot., Ex. G.)

13 5. On October 16, 2009, petitioner signed and dated the petition filed in the
14 instant action.

15 II. Application of 28 U.S.C. § 2244(d)(1)(D)

16 Respondent concedes the statute of limitations period began to run on May 30,
17 2007, the day after the Board's decision became final. Thus, the trigger date for the running of
18 the statute was May 29, 2007, with a commencement date of May 30, 2007. See Patterson v.
19 Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001) (citing Fed. R. Civ. P. 6(a)). Absent the statutory
20 tolling noted below, the limitations period would have ended one year later, May 29, 2008.

21 The limitations period began running on May 30, 2007. Petitioner filed his first
22 state court challenge to the Board's decision on May 1, 2008.³ Because petitioner filed his state

24 ² Neither party provided a copy of the entire petition filed in the California Supreme
25 Court.

26 ³ Respondent has not challenged the dates on which petitioner signed and dated each of
the petitions as the date on which the documents were delivered to prison officials for mailing to

1 court petition shortly before the statute of limitations period expired, he had only 28 days of the
2 period left. Respondent agrees that petitioner is entitled to statutory tolling during the pendency
3 of his state court petitions. (Mot. at 2.) Thus, petitioner is entitled to tolling from May 1, 2008,
4 through July 22, 2009, the date the California Supreme Court denied the petition. However, on
5 July 23, 2009, the statute of limitations clock began running again. Twenty-eight days later, on
6 August 19, 2009, the statute of limitations period expired. Petitioner did not file the instant
7 petition until October 16, 2009, almost two months after the deadline expired.

8 Petitioner argues the limitations period should be subject to a ninety-day extension
9 based on the time frame petitioner could have filed a petition for writ of certiorari in the United
10 States Supreme Court. (Opp'n at 1.) However, the United States Supreme Court has rejected
11 petitioner's argument. Lawrence v. Florida, 549 U.S. 327 (2007) (time during which a petition
12 for certiorari to the United States Supreme Court challenging the denial of state habeas relief is
13 pending is not tolled.) Accordingly, respondent's motion to dismiss should be granted.

14 III. Equitable Tolling

15 On June 14, 2010, the United States Supreme Court held that § 2244(d) is subject
16 to equitable tolling in appropriate cases. Holland v. Florida, 130 S.Ct. 2549, 2560 (2010). The
17 limitation period is subject to equitable tolling when "extraordinary circumstances beyond a
18 prisoner's control make it impossible to file the petition on time." Shannon v. Newland, 410 F.3d
19 1083, 1089-90 (9th Cir. 2005) (internal quotation marks and citations omitted). "When external
20 forces, rather than a petitioner's lack of diligence, account for the failure to file a timely claim,
21 equitable tolling of the statute of limitations may be appropriate." Miles v. Prunty, 187 F.3d
22 1104, 1107 (9th Cir. 1999). "Generally, a litigant seeking equitable tolling bears the burden of
23 establishing two elements: "(1) that he has been pursuing his rights diligently, and (2) that some
24 extraordinary circumstance stood in his way." Holland, 130 S.Ct. at 2562; Pace v. DiGuglielmo,

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26 the respective courts. Accordingly, the court treats those dates as the filing dates for each
petition. See Houston v. Lack, 487 U.S. 266 (1988).


1 544 U.S. 408, 418 (2005). “[T]he threshold necessary to trigger equitable tolling under AEDPA
2 is very high, lest the exceptions swallow the rule.” Miranda v. Castro, 292 F.3d 1063, 1066 (9th
3 Cir. 2002) (citation omitted). As a consequence, “equitable tolling is unavailable in most cases.”
4 Miles, 187 F.3d at 1107.

5 In light of Holland, the parties were directed to submit further briefing on the
6 issue of equitable tolling by order filed June 16, 2010. On July 16, 2010, petitioner was granted
7 an additional thirty days in which to file the brief. Thirty days have now passed and petitioner
8 has failed to file a supplemental brief on equitable tolling. Thus, there is no factual basis upon
9 which this court can find equitable tolling applies.

10 In accordance with the above, IT IS HEREBY RECOMMENDED that
11 respondent’s March 18, 2010 motion to dismiss (Docket No. 12) be granted.

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 one 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 response to the
17 objections shall be filed and served within fourteen days after service of the objections. The
18 parties are advised that failure to file objections within the specified time may waive the right to
19 appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

20 DATED: August 24, 2010

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24 KENDALL J. NEWMAN
25 UNITED STATES MAGISTRATE JUDGE
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