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

RICKY D. MATTHEWS,
Petitioner,

No. CIV S-10-1182-LKK-CMK-P

vs.

FINDINGS AND RECOMMENDATIONS

GREG LEWIS,¹
Respondent.

_____ /

Petitioner, a state prisoner proceeding pro se, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pending before the court is Respondent’s motion to dismiss (Doc. 12), petitioner’s request for equitable tolling and stay (Doc. 15), and petitioner’s motion to amend his petition (Doc. 19).

Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition if it “plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court” Rule 4 of the Rules Governing

¹ Respondent informs the court that Greg Lewis is now the Acting Warden at Pelican Bay State Prison and requests the appropriate substitution. The Clerk of the Court is directed to update the docket accordingly. Fed. R. Civ. Proc. 25(d).

1 Section 2254 Cases. The Ninth Circuit has allowed respondents to file a motion to dismiss in
2 lieu of an answer if the motion attacks the pleadings for failing to exhaust state remedies or being
3 in violation of the state's procedural rules. See, e.g., O'Bremski v. Maass, 915 F.2d 418, 420 (9th
4 Cir. 1990) (using Rule 4 to evaluate motion to dismiss petition for failure to exhaust state
5 remedies); White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (using Rule 4 as procedural
6 grounds to review motion to dismiss for state procedural default); Hillery v. Pulley, 533 F. Supp.
7 1189, 1194 & n. 12 (E.D. Cal. 1982) (same). Thus, a respondent can file a motion to dismiss
8 after the court orders a response, and the Court should use Rule 4 standards to review the motion.
9 See Hillery, 533 F. Supp. at 1194 & n.12. The petitioner bears the burden of showing that he has
10 exhausted state remedies. See Cartwright v. Cupp, 650 F.2d 1103, 1104 (9th Cir. 1981).

11 Respondent brings this motion to dismiss Petitioner's mixed federal habeas
12 corpus petition as filed beyond the one-year statute of limitations, pursuant to 28 U.S.C. §
13 2244(d). Petitioner asserts that he is entitled to equitable tolling and a stay in order to complete
14 exhaustion of his claims.

15 I. Statute of Limitations

16 Federal habeas corpus petitions must be filed within one year from the later of:
17 (1) the date the state court judgment became final; (2) the date on which an impediment to filing
18 created by state action is removed; (3) the date on which a constitutional right is newly-
19 recognized and made retroactive on collateral review; or (4) the date on which the factual
20 predicate of the claim could have been discovered through the exercise of due diligence. See 28
21 U.S.C. § 2244(d). Typically, the statute of limitations will begin to run when the state court
22 judgment becomes final by the conclusion of direct review or expiration of the time to seek direct
23 review. See 28 U.S.C. § 2244(d)(1).

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1 Where a petition for review by the California Supreme Court is filed and no
2 petition for certiorari is filed in the United States Supreme Court, the one-year limitations period
3 begins running the day after expiration of the 90-day time within which to seek review by the
4 United States Supreme Court. See Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001).

5 Where a petition for writ of certiorari is filed in the United States Supreme Court, the one-year
6 limitations period begins to run the day after certiorari is denied or the Court issued a merits
7 decision. See Wixom v. Washington, 264 F.3d 894, 897 (9th Cir. 2001). Where no petition for
8 review by the California Supreme Court is filed, the conviction becomes final 40 days following
9 the Court of Appeal’s decision, and the limitations period begins running the following day. See
10 Smith v. Duncan, 297 F.3d 809 (9th Cir. 2002). If no appeal is filed in the Court of Appeal, the
11 conviction becomes final 60 days after conclusion of proceedings in the state trial court, and the
12 limitations period begins running the following day. If the conviction became final before April
13 24, 1996 – the effective date of the statute of limitations – the one-year period begins to run the
14 day after the effective date, or April 25, 1996. See Miles v. Prunty, 187 F.3d 1104, 1105 (9th
15 Cir. 1999).

16 The limitations period is tolled, however, for the time a properly filed application
17 for post-conviction relief is pending in the state court. See 28 U.S.C. § 2244(d)(2). To be
18 “properly filed,” the application must be authorized by, and in compliance with, state law. See
19 Artuz v. Bennett, 531 U.S. 4 (2000); see also Allen v. Siebert, 552 U.S. 3 (2007); Pace v.
20 DiGuglielmo, 544 U.S. 408 (2005) (holding that, regardless of whether there are exceptions to a
21 state’s timeliness bar, time limits for filing a state post-conviction petition are filing conditions
22 and the failure to comply with those time limits precludes a finding that the state petition is
23 properly filed). A state court application for post-conviction relief is “pending” during all the
24 time the petitioner is attempting, through proper use of state court procedures, to present his
25 claims. See Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). It is not, however, considered
26 “pending” after the state post-conviction process is concluded. See Lawrence v. Florida, 549

1 U.S. 327 (2007) (holding that federal habeas petition not tolled for time during which certiorari
2 petition to the Supreme Court was pending). Where the petitioner unreasonably delays between
3 state court applications, however, there is no tolling for that period of time. See Carey v. Saffold,
4 536 U.S. 214 (2002). If the state court does not explicitly deny a post-conviction application as
5 untimely, the federal court must independently determine whether there was undue delay. See id.
6 at 226-27.

7 There is no tolling for the interval of time between post-conviction applications
8 where the petitioner is not moving to the next higher appellate level of review. See Nino, 183
9 F.3d at 1006-07; see also Dils v. Small, 260 F.3d 984, 986 (9th Cir. 2001). There is also no
10 tolling for the period between different sets of post-conviction applications. See Biggs v.
11 Duncan, 339 F.3d 1045 (9th Cir. 2003). Finally, the period between the conclusion of direct
12 review and the filing of a state post-conviction application does not toll the limitations period.
13 See Nino, 1983 F.3d at 1006-07.

14 Here, petitioner is challenging his 2005 conviction. Petitioner admits in his
15 request for equitable tolling, that his statute of limitations time started running on March 12,
16 2008, ninety days after the California Supreme Court denied his request for review. His federal
17 habeas petition was filed in this court on May 14, 2010. Providing petitioner the benefit of the
18 mailbox rule, his petition was signed on April 30, 2010. Thus, without some type of available
19 tolling, his federal habeas petition is clearly untimely having been filed more than two years after
20 the statute of limitations began.

21 Petitioner filed his state habeas petition in the Sacramento County Superior Court
22 on June 26, 2009. That petition was denied on September 23, 2009. He then filed his petition in
23 this court. His petition to the California Supreme Court, filed after his federal petition was filed,
24 was filed on May 10, 2010, and denied on January 26, 2011. Therefore, again without some type
25 of tolling, his state habeas petition was filed outside the statute of limitations. Even if the court
26 were to find petitioner eligible for equitable tolling, as discussed below, he is not entitled to any

1 statutory tolling between state habeas petitions. Petitioner received his denial from the
2 Sacramento County Superior Court on September 23, 2009, and failed to file another state habeas
3 petition without undue delay. Petitioner waited almost nine months after receiving his state
4 habeas denial before filing at the next state appellate level. A delay of eight months is clearly
5 unreasonable. See Carey, 536 U.S. 214; see also Evans v. Chavis, 546 U.S. 189, 201 (2006)
6 (observing that 30 to 60 days would normally be reasonable). Numerous judges who have
7 considered this issue agree that a delay far shorter than the delay involved here is unreasonable.
8 See Contreras v. Curry, 2008 WL 4291473 (N.D. Cal. 2008) (involving 88-day delay);
9 Livermoore v. Watson, 2008 WL 802330 (E.D. Cal. 2008) (involving 78-day delay); Hunt v.
10 Felker, 2008 WL 364995 (E.D. Cal. 2008) (involving 70-day delay); Young v. Hickman, 2008
11 WL 361011 (E.D. Cal. 2008) (involving 95-day delay); Bridge v. Runnels, 2007 WL 2695177
12 (E.D. Cal. 2007) (involving 76-day delay). The delay between state filings therefore, does not
13 entitle petitioner to statutory tolling, which he apparently concedes as he has not argued
14 otherwise. Instead, petitioner relies on his request for equitable tolling to render his federal
15 habeas petition timely.

16 **II. Equitable tolling**

17 Because the statute of limitations under 28 U.S.C. § 2244(d) is not jurisdictional,
18 it is subject to traditional equitable tolling principles. See Calderon v. United States Dist. Ct.
19 (Beeler), 128 F.3d 1283, 1288 (9th Cir. 1997), overruled in part on other grounds by Calderon v.
20 United States Dist. Ct. (Kelly), 163 F.3d 530 (9th Cir. 1998) (en banc). To be entitled to
21 equitable tolling, the petitioner must demonstrate that: (1) he has been diligent in pursuing his
22 rights; and (2) extraordinary circumstances prevented him from filing on time. See Pace v.
23 DiGuglielmo, 544 U.S. 408 (2005).

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1 In Pace, the Supreme Court held that equitable tolling was not applicable because
2 “petitioner’s lack of diligence precludes equity’s operation.” 544 U.S. at 419. In Beeler, the
3 district court granted equitable tolling and the respondent sought a writ of mandamus to reverse
4 the district court’s order. See 128 F.3d at 1288. In denying the respondent’s mandamus petition,
5 the Ninth Circuit addressed the district court’s decision to grant equitable tolling as follows:

6 Having decided that [the statute of limitations] can be tolled, we
7 have no basis for upsetting the district court’s decision to allow Beeler
8 more time to file his petition. The district court found that Beeler’s lead
9 counsel, Scott Braden, had diligently pursued the preparation of Beeler’s
10 petition. Braden, however, withdrew after accepting employment in
11 another state, and much of the work product he left behind was not usable
12 by replacement counsel – a turn of events over which Beeler had no
13 control. There were thus “extraordinary circumstances” which justified
14 tolling [the] statute of limitations.

15 Id. at 1289.

16 In Kelly, the Ninth Circuit again denied mandamus relief and held that equitable
17 tolling was appropriate because:

18 [A]s part of its order that Kelly be mentally evaluated, the district
19 court ordered “that all other aspects of this case be, and hereby are, stayed
20 pending final determination by this Court of the Petitioner’s mental
21 capacity to proceed.” The only reasonable reading of this order was that it
22 prohibited Kelly’s attorney’s from filing a habeas petition, which is how
23 the district court itself construed it. . . . This stay of the proceedings
24 prevented Kelly’s counsel from filing a habeas petition and, in itself,
25 justifies equitable tolling.

26 163 F.3d at 541.

In addition, the egregious misconduct of counsel may warrant equitable tolling.
See Spitsyn v. Moore, 345 F.3d 796 (9th Cir. 2003). The Ninth Circuit has concluded, however,
that equitable tolling is not appropriate based on the ordinary negligence of counsel. See Frye v.
Hickman, 273 F.3d 1144 (9th Cir. 2001). Mental incompetence may also warrant equitable
tolling for the period the prisoner was incompetent if he can show that the incompetency in fact
caused the delay. See Laws v. Lamarque, 351 F.3d 919 (9th Cir. 2003).

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1 The Ninth Circuit has recently addressed a petitioner’s eligibility for equitable
2 tolling due to mental impairment, and set forth a two-part test a petitioner must meet:

- 3 (1) *First*, a petitioner must show his mental impairment was an
4 “extraordinary circumstance” beyond his control by demonstrating
5 the impairment was so severe that either
6 (a) petitioner was unable rationally or factually to
7 personally understand the need to timely file, or
8 (b) petitioner’s mental state rendered him unable personally
9 to prepare a habeas petition and effectuate its filing.

- 10 (2) *Second*, the petitioner must show diligence in pursuing the
11 claims to the extent he could understand them, but that the mental
12 impairment made it impossible to meet the filing deadline under
13 the totality of the circumstances, including reasonably available
14 access to assistance.

15 Bills v. Clark, 628 F.3d 1092, 1099-1100 (9th Cir. 2010) (citing Holland v. Florida, 560 U.S. ___,
16 130 S. Ct. 2549, 2562 (2010)).

17 The Court thus directed the proper inquiry of the districts courts as follows:

- 18 (1) find the petitioner has made a non-frivolous showing that
19 [petitioner] had a severe mental impairment during the filing
20 period that would entitled him to an evidentiary hearing; (2)
21 determine, after considering the record, whether the petitioner
22 satisfied his burden that he was in fact mentally impaired; (3)
23 determine whether the petitioner’s mental impairment made it
24 impossible to timely file on his own; and (4) consider whether the
25 circumstances demonstrate the petitioner was otherwise diligent in
26 attempting to comply with the filing requirements.

Id. at 1100-01.

 Here, petitioner argues he is entitled to equitable tolling for several reasons. He
cites to his multiple and simultaneous prosecutions, along with the related transfers to and from
various prisons during his trials, having been found incompetent in 2007, being quarantined
while incarcerated due to an outbreak of tuberculosis in 2008, and a claim of actual innocence.
In support of his equitable tolling claim, he submits extensive briefs detailing the dates of each
event, as well as his actions during the relevant time frames setting forth his claim of due
diligence.

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1 According to plaintiff, following his Sacramento County conviction and
2 sentencing (the conviction at issue in the underlying habeas petition), he was transferred to North
3 Kern State Prison on September 26, 2005. Throughout 2006 and 2007, he claims he was
4 transferred several times between the Solano County Jail (wherein he was standing trial for a
5 second but separate time), North Kern State Prison, Pelican Bay State Prison, and California
6 State Prison - Solano. His trial in Solano County began September 10, 2008, and concluded
7 September 22, 2008. Thereafter he was again transferred between Pelican Bay, San Quentin and
8 Solano, until January 9, 2009, when he was finally transferred back to Pelican Bay. During this
9 time of transition, he claims he was unable to access his legal material, unable to access a law
10 library, and had to concentrate of his Solano County trial, thus rendering him unable to file his
11 habeas petition regarding his Sacramento County conviction.

12 The undersigned finds it questionable whether during this extended period of time
13 petitioner was unable to find some time to devote to challenging his Sacramento County
14 conviction. He was certainly aware of the running of the limited statute of limitations, as
15 evidenced by the letters he submitted between himself and counsel. In addition, surely Congress
16 was aware of the possibility of a prisoner being forced to stand consecutive trials when it
17 provided for a one-year statute of limitations, without a specific exception for such a situation.
18 However, regardless of how feasible a finding of equitable tolling may be in this situation, such a
19 finding fails to resolve petitioner's statute of limitations problem. Even if the court were to find
20 petitioner entitled to equitable tolling throughout this time frame, from the time of his
21 Sacramento County conviction, until he was finally transferred back to Pelican Bay on January 9,
22 2009, he is still faced with an untimely federal habeas petition.

23 Petitioner was transferred back to Pelican Bay on January 9, 2009. He then filed
24 his first state petition on June 26, 2009. At that point 168 days of the one-year statute of
25 limitations had passed. The Sacramento County Superior Court issued its denial of that petition
26 on September 23, 2009. Petitioner would likely be eligible for statutory tolling during the time

1 his state habeas petition was pending in the Sacramento Superior Court. However, time started
2 running again upon the Court's denial of the petition. As discussed above, the time between the
3 Sacramento Superior Court's denial and the time petitioner filed his state petition in the
4 California Supreme Court on May 10, 2010, was almost nine months. Such an extended delay is
5 unreasonable, and removes the statutory tolling of time. Petitioner filed his federal habeas
6 petition on April 20, 2010. This was 219 days after the Sacramento Superior Court's denial.
7 Added to the 168 days petitioner used before filing his state petition, petitioner used 387 of the
8 365 days allowed by the statute. Therefore, even granting petitioner equitable tolling for the time
9 he was in transition and trial, he was still 22 days late in filing his federal habeas petition.

10 Petitioner also contends that delays in receiving his files from his attorneys
11 contributed to the uncontrollable delays. However, petitioner does not allege any misconduct or
12 negligence of counsel. Rather, he argues that his decision to have his attorneys hold his legal
13 files and transcripts contributed to the delays, beyond his control. The undersigned does not find
14 that argument compelling. The letters petitioner provided clearly indicate he chose to have his
15 attorneys hold his legal documents, and any delay in receiving them was not therefore beyond his
16 control.

17 Petitioner's other grounds for equitable tolling do not help him. First he claims
18 that he was found incompetent to stand trial in 2007. However, that was in relation to his Solano
19 County trial. Again, even if petitioner was granted equitable tolling for that time period, it does
20 not cover the delays in 2009 and 2010. Similarly, petitioner's claim of having to be quarantined
21 in 2008 is not helpful. This also does not address the delays in 2009 and 2010.

22 Petitioner's final grounds for entitlement to equitable tolling is that he is actually
23 innocent of the underlying charge. The Ninth Circuit Court of Appeals has recently found that "a
24 credible claim of actual innocence" may be sufficient to have otherwise time-barred claims heard
25 on the merits. Lee v. Lampert, ___ F.3d ___, 2011 WL 3275947, at *2 (9th Cir. 2011). Petitioner
26 states in a one line statement that he "has and does maintain that he is actually innocent of the

1 crimes by which he was convicted and therefore should be given the opportunity to prove his
2 innocence.” (Petition for Equitable Tolling, Doc. 2, at 29). This claim of actual innocence fails
3 to make any showing entitling him to present his otherwise time-barred claims. Petitioner offers
4 no facts or argument as to how he proposed to show he is factually innocent of the underlying
5 charges. As such, the undersigned finds no basis for allowing his time-barred claims to proceed.

6 **III. Motion to Amend**

7 Finally, petitioner has filed a motion to amend his complaint in order to cure his
8 mixed petition having now exhausted his claims in state court. However, as discussed above,
9 petitioner’s federal petition, exhausted or otherwise, is untimely. Amending the complaint to
10 resolve his unexhausted claim status does not cure the untimeliness. Therefore, petitioner’s
11 motion to amend should be denied.

12 **IV. Conclusion**

13 The undersigned finds the petitioner’s federal habeas petition to be untimely. The
14 statute of limitations expired prior to the filing of petitioner’s first state habeas petition. Even if
15 the court were to grant petitioner equitable tolling until he was permanently housed in at Pelican
16 Bay after his Solano County trial, petitioner’s federal habeas petition was still filed late. In
17 addition, he fails to make any showing in which to base a determination that he can make a
18 credible showing of actual innocence to have his untimely claims heard on the merits.

19 Based on the foregoing, the undersigned recommends that:

- 20 1. Respondent’s motion to dismiss (Doc. 12) be granted;
21 2. Petitioner’s motions for stay and equitable tolling (Docs 2, 15) be denied;

22 and

- 23 3. Petitioner’s motion to amend the petition (Doc. 19) be denied.

24 These findings and recommendations are submitted to the United States District
25 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days
26 after being served with these findings and recommendations, any party may file written

1 objections with the court. Responses to objections shall be filed within 14 days after service of
2 objections. Failure to file objections within the specified time may waive the right to appeal.
3 See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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5 DATED: September 2, 2011

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7 **CRAIG M. KELLISON**
8 UNITED STATES MAGISTRATE JUDGE
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