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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT EDWARD MAURY,
Petitioner,
v.
RONALD DAVIS,
Respondent.

No. 2:12-cv-1043 WBS DB
DEATH PENALTY CASE
FINDINGS AND RECOMMENDATIONS

Petitioner is a condemned state prisoner proceeding through counsel with a petition for writ of habeas corpus under 28 U.S.C. § 2254. Before the court is petitioner’s motion for an extension of the stay of these proceedings and motion for equitable tolling. For the reasons set forth below, this court will recommend both motions be granted.

BACKGROUND

On March 24, 2017, petitioner filed his reply to the answer to petitioner’s October 24, 2012 habeas petition. Two months later, this court granted petitioner’s counsel’s motion to withdraw and appointed the Office of the Federal Defender for the Eastern District of California as counsel for petitioner. (ECF No. 161.) In February 2019, this court granted the motion of the Federal Defender to withdraw. (ECF No. 166.) On May 29, 2019, upon the recommendation of the Selection Board, this court appointed the Office of the Federal Defender for the District of Nevada as counsel for petitioner. (ECF No. 167.)

1 In September 2019, petitioner moved to stay these proceedings to permit his newly-
2 appointed counsel an opportunity to review the record and investigate potential claims. The court
3 granted a stay through May 30, 2020. (ECF Nos. 171, 172.) In June, the court granted
4 petitioner’s unopposed motions for an extension of the stay through August 28, 2020 and for
5 equitable tolling of the statute of limitations for a 90-day period, from March 11 to June 9, based
6 on the restrictions on counsel’s ability to work caused by the COVID-19 pandemic. (ECF Nos.
7 177, 178.)

8 Petitioner now seeks another extension of the stay, which respondent does not oppose, and
9 further equitable tolling, which respondent argues is premature. (ECF Nos. 179, 180, 181.) Both
10 motions are discussed below.

11 MOTION FOR EQUITABLE TOLLING

12 Petitioner argues continued equitable tolling is justified because his attorneys have been
13 diligently investigating his potential claims, but their work has been hampered by the restrictions
14 on travel and the risks of the COVID-19 virus. Respondent argues that recent Ninth Circuit case
15 law prevents the court from granting equitable tolling prospectively.

16 I. Legal Standards

17 A habeas petitioner is entitled to equitable tolling of the one-year statute of limitations
18 only if the petitioner shows: “‘(1) that he has been pursuing his rights diligently, and (2) that
19 some extraordinary circumstance stood in his way’ and prevented timely filing.” Holland v.
20 Florida, 560 U.S. 631, 649 (2010) (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005). ‘For
21 a litigant to demonstrate he has been pursuing his rights diligently, and thus satisfies the first
22 element required for equitable tolling, he must show that he has been reasonably diligent in
23 pursuing his rights not only while an impediment to filing caused by an extraordinary
24 circumstance existed, but before and after as well, up to the time of filing his claim in federal
25 court.’ Smith v. Davis, 953 F.3d 582, 598-99 (9th Cir. 2020) (en banc) (internal quotation marks
26 and citation omitted). In other words, “[w]hen external forces, rather than a petitioner’s lack of
27 diligence, account for the failure to file a timely claim, equitable tolling of the statute of
28 limitations may be appropriate.” Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999) (citations

1 omitted). “The diligence required for equitable tolling purposes is ‘reasonable diligence,’ not
2 ‘maximum feasible diligence.’” Holland, 560 U.S. at 653 (internal citations and some quotation
3 marks omitted).

4 Extraordinary circumstances need not be an “actual impossibility; rather, equitable tolling
5 is appropriate where ‘it would have technically been possible for a prisoner to file a petition, but a
6 prisoner would have likely been unable to do so.’” Grant v. Swarthout, 862 F.3d 914, 918 (9th
7 Cir. 2017) (emphasis in original) (quoting Gibbs, 767 F.3d at 888). That said, equitable tolling
8 should be applied sparingly. See Waldron-Ramsey v. Pacholke, 556 F.3d 1008, 1011 (9th Cir.
9 2009) (“To apply the doctrine in “extraordinary circumstances” necessarily suggests the
10 doctrine’s rarity . . .”).

11 Petitioner bears the burden of alleging facts that would give rise to tolling, Pace, 544 U.S.
12 at 418, and “[a] habeas petitioner ... should receive an evidentiary hearing when he makes ‘a
13 good-faith allegation that would, if true, entitle him to equitable tolling,’” Roy v. Lampert, 465
14 F.3d 964, 969 (9th Cir. 2006) (quoting Laws v. Lamarque, 351 F.3d 919, 921 (9th Cir. 2003)).

15 **II. Discussion**

16 Respondent’s only challenge to petitioner’s motion is based on the recent Ninth Circuit en
17 banc opinion in Smith. Respondent argues that the decision in Smith requires a federal court to
18 consider the issue of equitable tolling only retroactively, not prospectively as petitioner seeks.
19 Therefore, respondent concludes, petitioner’s motion is premature.

20 In Smith, an en banc panel of the Ninth Circuit considered whether a “stop-clock”
21 approach to equitable tolling is appropriate. That “stop-clock” approach would permit a
22 petitioner, who is impeded from filing his petition by extraordinary circumstances while the
23 statute of limitations is running out, to “simply add the time during which he was so impeded to
24 extend the period of the statute of limitations, regardless whether he was reasonably diligent in
25 filing his petition after the impediment was removed.” Smith, 953 F.3d at 586. The court
26 rejected that approach, holding that “whether an impediment caused by extraordinary
27 circumstances prevented timely filing is a ‘causation question’ that requires courts to evaluate a
28 petitioner’s diligence in all time periods - before, during, and after the existence of an

1 ‘extraordinary circumstance’ - to determine whether the extraordinary circumstance actually did
2 prevent timely filing” Id. at 595 (citation omitted). Respondent argues that the approach dictated
3 by Smith can only be conducted retroactively because prospective application would require a
4 court to determine a petitioner’s diligence in the future, something, respondent argues, it cannot
5 do.

6 A district judge of this court very recently considered the question raised by respondent
7 here: What is the effect, if any, of Smith on a prospective determination of equitable tolling in a
8 capital habeas case? In Cowan v. Davis, Judge Drozd held that Ninth Circuit law permitting
9 prospective equitable tolling was not overturned by Smith. Cowan, No. 1:19-CV-00745-DAD,
10 2020 WL 4698968, at *4-6 (E.D. Cal. Aug. 13, 2020). He went on to grant a condemned
11 prisoner’s request for prospective equitable tolling based on the circumstances and limitations of
12 the COVID-19 pandemic.

13 Judge Drozd’s decision in Cowan is thorough and well-reasoned. In sum, Judge Drozd
14 reasoned as follows:

- 15 • “The Supreme Court has not held that equitable tolling of the 28 U.S.C. § 2244 deadline is
16 unavailable prior to filing of an untimely petition.” 2020 WL 4698968, at *3.
- 17 • Starting with its 1997 decision in Beeler,¹ “the Ninth Circuit has long countenanced
18 prospective equitable tolling.” Id.
- 19 • Many district judges in California have relied on Beeler to grant prospective equitable
20 tolling in capital habeas cases. Id. at 3-4.
- 21 • The issue of prospective equitable tolling was not before the court in Smith. Id. at 4.
- 22 • Smith does not expressly overrule Beeler, or even mention it, and is not irreconcilable
23 with it. Id.
- 24 • Disallowing prospective equitable tolling would result in piecemeal litigation and
25 additional burdens on an already-burdened court. Id. at 5.

26
27 ¹ Calderon v. United States Dist. Ct. (Beeler), 128 F.3d 1283, 1288-89 (9th Cir. 1997), partially
28 overruled on other grounds by Calderon v. United States Dist. Ct. (Kelly V), 163 F.3d 530, 540
(9th Cir. 1998), abrogated on other grounds by Woodford v. Garceau, 538 U.S. 202 (2003).

1 This court recognizes that courts have not been consistent in their consideration of the issue of
2 prospective equitable tolling after Smith. At least one judge in this circuit held that Smith
3 prohibits prospective equitable tolling. See Fitzgerald v. Shinn, No. CV-19-5219-PHX-MTL,
4 2020 WL 3414700, at *5 (D. Ariz. June 22, 2020). Another judge held that even though she
5 considers it likely Smith “implicitly eliminated prospective equitable tolling,” the unprecedented
6 and ongoing circumstances of the COVID-19 pandemic, along with the interests of judicial
7 efficiency, compel a conclusion that prospective equitable tolling should be permitted. See Dale
8 v. Williams, No. 3:20-cv-031 MMD CLB, 2020 WL 4904624, at *2 (D. Nev. Aug. 20, 2020);
9 Dunn v. Baca, No. 3:19-cv-0702 MMD WGC, 2020 WL 2525772, at *2 (D. Nev. May 18, 2020).

10 Judge Drozd recognized that there “may arguably be some conceivable tension between the
11 decisions in Beeler and Smith.” However, he determined that this conceivable tension was “an
12 insufficient basis upon which to conclude that the former was implicitly overruled by the latter.”
13 Cowan, 2020 WL 4698968, at *5. This court agrees. The en banc panel in Smith did not
14 consider the issue of prospective equitable tolling and this court will not presume it intended to
15 overrule Ninth Circuit precedent.

16 The next step, then, is to apply the Holland test for equitable tolling by determining: (1)
17 whether petitioner has been and will pursue his rights with reasonable diligence; and (2) whether
18 extraordinary circumstances prevent him from completing an amendment to his petition. There is
19 no dispute that the effects of the COVID-19 pandemic are extraordinary and are ongoing.
20 Further, respondent does not argue that petitioner has not exercised diligence. Nor does
21 respondent specifically challenge: (1) petitioner’s counsel’s assertions that the risks of travel and
22 face-to-face meetings due to COVID-19 prevent petitioner’s counsel from reasonably conducting
23 interviews (Decl. of E. Henderson (ECF No. 179 at 14-15)); (2) such interviews are necessary to
24 support any new claims (id. at 15); and (3) counsel and their staff “will continue diligently working
25 on Mr. Maury’s case to the extent possible, where we can do so from home or, on a limited basis,
26 from the office” (id.).

27 Like the petitioner in Cowan, petitioner here has demonstrated diligence and committed to
28 continuing to exercise all reasonable diligence. Judge Drozd found a 90-day prospective period

1 of equitable tolling was appropriate, extending the period of equitable tolling in that case through
2 November 11, 2020. Cowan, 2020 WL 4698968, at *6. Petitioner’s request in the present case
3 would extend the period of equitable tolling only through September 7, 2020. As of today’s date,
4 the COVID-19 pandemic still presents many risks and many businesses and government agencies,
5 including this court, remain closed. Certainly, petitioner’s ability to conduct reasonable
6 investigations has been, and will continue to be, hindered through September 7.

7 This court finds petitioner has adequately demonstrated that the pandemic is causing, and
8 will cause, limitations on his counsel’s work. Petitioner is not required to exercise all possible
9 diligence. Rather, he must be reasonably diligent. This court will not recommend a result that
10 would force petitioner’s counsel to choose between risking the safety of themselves, their staff,
11 potential witnesses, and all of their families to conduct interviews or risking the loss of the right
12 to assert habeas claims on behalf of their condemned client. The court has ample grounds to
13 grant petitioner’s motion for equitable tolling for an additional 90-day time period.

14 **MOTION FOR STAY**

15 Petitioner seeks a stay of these proceedings until the pandemic is “under control
16 sufficiently for field investigation to safely resume.” (ECF No. 179 at 2.) Respondent does not
17 oppose a stay, stating only that “[t]his Court has already stayed proceedings through August 28,
18 and the COVID-19 restrictions may cause this Court to extend that stay.” (ECF No. 180 at 4.)
19 This court finds good cause for an extension of the stay based on the continued restrictions on
20 travel and health risks caused by the COVID-19 pandemic. The only question is the extent of a
21 stay. This court finds the measure proposed by petitioner lacks clarity. As discussed above,
22 Judge Drozd in Cowan found that the COVID-19 restrictions and risks will not be abated anytime
23 soon. This court will recommend a 90-day extension of the stay, through November 26, 2020.

24 For the foregoing reasons, IT IS HEREBY RECOMMENDED that petitioner’s motion to
25 stay these proceedings and equitably toll the statute of limitations (ECF No. 179) be granted as
26 follows:

- 27 1. These proceedings be stayed through November 26, 2020; and

28 ////

1 2. Petitioner be entitled to equitable tolling of the statute of limitations for an additional
2 90 days, through September 7, 2020.

3 These findings and recommendations will be submitted to the United States District Judge
4 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within thirty days after
5 being served with these findings and recommendations, any party may file written objections with
6 the court and serve a copy on all parties. The document should be captioned “Objections to
7 Magistrate Judge's Findings and Recommendations.” Any response to the objections shall be
8 filed and served within seven days after service of the objections. The parties are advised that
9 failure to file objections within the specified time may result in waiver of the right to appeal the
10 district court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

11 Dated: August 27, 2020

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14 DEBORAH BARNES
15 UNITED STATES MAGISTRATE JUDGE

16 DLB:9
17 DB/orders-capital/maury.eq toll(2)

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