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

DIRK JA'ONG BOUIE,

Petitioner,

No. 2:12-cv-01221 MCE JFM (HC)

vs.

BOARD OF PAROLE HEARINGS,

Respondent.

FINDINGS AND RECOMMENDATIONS

_____/

Petitioner is a state prisoner proceeding pro se with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302. This matter is before the court on respondent's motion to dismiss, filed on November 5, 2012, asserting that petitioner is barred by the applicable one-year statute of limitations set by 28 U.S.C. § 2244(d)(1). ECF 12.

Discussion

On April 24, 1996, Congress enacted AEDPA which amended 28 U.S.C. § 2244 by adding the following provision:

(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 –

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
5 application created by State action in violation of the Constitution
6 or laws of the United States is removed, if the applicant was
7 prevented from 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(d). The one-year AEDPA statute of limitations applies to all federal habeas
20 corpus petitions filed after the statute was enacted and therefore applies to the pending petition.
21 See Lindh v. Murphy, 521 U.S. 320, 322-23 (1997).

22 The one-year statute of limitations period set forth in 28 U.S.C. § 2244 “applies to
23 all habeas petitions filed by persons in ‘custody pursuant to the judgment of a State court,’ even
24 if the petition challenges an administrative decision rather than a state court judgment.” Shelby
25 v. Bartlett, 391 F.3d 1061, 1062 (9th Cir. 2004). See also Redd v. McGrath, 343 F.3d 1077,
26 1080-83 (9th Cir. 2003). When a habeas petitioner challenges an administrative decision,
§ 2244(d)(1)(D) governs the date on which the limitation period begins to run. See Shelby, 391
F.3d at 1066; Redd, 343 F.3d at 1081-83. Under § 2244(d)(1)(D), the limitation period begins to
run once “the factual predicate of the claim or claims presented could have been discovered
through the exercise of due diligence.” 28 U.S.C. § 2244(d)(1)(D).

“The time during which a properly filed application for State post-conviction or
other collateral review with respect to the pertinent judgment or claim is pending shall not be

1 counted” toward the AEDPA statute of limitations. 28 U.S.C. § 2244(d)(2). The statute of
2 limitations is not tolled during the interval between the date on which a judgment becomes final
3 and the date on which the petitioner files his first state collateral challenge because there is no
4 case “pending.” Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). Once a petitioner
5 commences state collateral proceedings, a state habeas petition is “pending” during one full
6 round of review in the state courts, including the time between a lower court decision and the
7 filing of a new petition in a higher court, as long as the intervals between the filing of those
8 petitions are “reasonable.” Carey v. Saffold, 536 U.S. 214, 222-24 (2002).

9 The following facts are relevant to the statute of limitations analysis:

10 1. On July 29, 2008, a jury found petitioner guilty of false imprisonment, first
11 degree burglary with a person other than an accomplice present, home invasion robbery, and
12 false imprisonment. Firearm enhancements were also found in connection with each count,
13 which was later determined by the court to not be applicable to counts 1 and 2.

14 2. Petitioner appealed to the California Court of Appeal, Third Appellate District.
15 On January 8, 2010, the California Court of Appeal affirmed the judgment.

16 3. Petitioner appealed to the California Supreme Court, which denied review on
17 March 18, 2010.

18 4. Petitioner did not petition for a writ of certiorari from the United States
19 Supreme Court during his direct appeal.

20 5. Applying the mailbox rule,¹ on January 28, 2011, petitioner filed a petition for
21 writ of habeas corpus challenging his conviction in the Sacramento County Superior Court. On
22 February 4, 2011, the Sacramento County Superior Court denied that petition for habeas relief.

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26 ¹ See Houston v. Lack, 487 U.S. 266, 276 (1988).

1 6. On February 15, 2011, petitioner filed a petition for writ of habeas corpus in
2 the California Court of Appeal for the Third Appellate District. On February 24, 2011, the
3 California Court of Appeal denied that petition.

4 7. On May 10, 2011, petitioner submitted a petition for writ of habeas corpus to
5 the California Supreme Court. On January 25, 2012, the California Supreme Court denied that
6 petition.

7 8. On May 3, 2012, petitioner commenced this action by filing a federal petition
8 for writ of habeas corpus with this court.

9 Because petitioner did not petition for a writ of certiorari from the United States
10 Supreme Court during his direct appeal, petitioner's conviction became final 90 days after the
11 California Supreme Court's denial of review of petitioner's direct appeal. See Bowen v. Roe,
12 188 F.3d 1157, 1158–59 (9th Cir.1999). Thus, petitioner's conviction became final 90 days from
13 March 18, 2010, or on June 16, 2010. See U.S. Sup.Ct. R. 13.3 (“The time to file a petition for a
14 writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed
15”). Once his conviction became final, petitioner had one year from the following day, June
16 17, 2010, in which to file the instant petition. See 28 U.S.C. § 2244(d)(1)(A); Patterson v.
17 Stewart, 251 F.3d 1243 (9th Cir.2001) (holding that Rule 6(a) of the Federal Rules of Civil
18 Procedure governs the calculation of statutory tolling applicable to the one year limitations
19 period.). Therefore, petitioner had until June 17, 2011, to commence this action. Applying the
20 mailbox rule, petitioner did not file his federal habeas petition in this court until May 3, 2012.
21 Accordingly, the pending petition is untimely by more than one year and ten months unless
22 petitioner is entitled to the benefit of tolling.

23 In this case, petitioner waited two hundred and twenty five days before filing his
24 first habeas petition in state court. The limitation period is not tolled during this time because it
25 was prior to petitioner's first state collateral challenge. See Nino, 183 F.3d at 1006. Petitioner
26 waited another ninety-nine days after the California Supreme Court denied his petition before

1 filing the instant action. This period is also not subject to tolling because it follows his one full
2 round of review in the state courts. See Carey, 536 U.S. at 222-24.

3 Respondent concedes that petitioner is entitled to statutory tolling for the periods
4 during which his petitions were pending before the California Superior Court and the California
5 Court of Appeal, and for the eleven day interval between these petitions. At issue, then, is the
6 seventy-five day delay between the California Court of Appeal’s denial of his petition and filing
7 his petition with the California Supreme Court. Respondent contends that petitioner does not
8 have the benefit of statutory tolling for this period of time because it is unreasonable. Petitioner
9 contends that the seventy-five days is not unreasonable and argues that he was transferred twice
10 during this period of time with no access to records.

11 **Statutory Tolling**

12 California has never definitively stated what is “reasonable” in terms of the
13 intervals between the denial of a petition in one court and the filing of a subsequent petition in a
14 higher court. See Velasquez v. Kirkland, 639 F.3d 964, 967 (9th Cir. 2011). The United States
15 Supreme Court, however, has instructed courts to assume that California law does not differ
16 significantly from other states with determinate timeliness rules. Evans v. Chavis, 546 U.S. 189,
17 198, 126 S.Ct. 846, 163 L.Ed.2d 684 (2006). Therefore, unjustified filing delays longer than
18 thirty to sixty days are unreasonable. Chaffer v. Proper, 592 F.3d 1046, 1048 (9th Cir.2010) (per
19 curiam). Consequently, statutory tolling is inapplicable to such delays. Id.

20 Here, petitioner did not file his habeas petition in the California Supreme Court
21 until seventy-five days after his Court of Appeal petition was denied. Pursuant to Chaffer, this
22 time period was unreasonable. Petitioner is therefore not entitled to statutory tolling for this
23 period of time. Absent equitable tolling, his petition in this court is untimely.

24 **Equitable Tolling**

25 Petitioner suggests that the limitations period should be tolled because he was
26 transferred two times during this interval. In order for a petitioner to be entitled to equitable

1 tolling of AEDPA's one-year limitations period, he must show: "(1) that he has been pursuing
2 his rights diligently, and (2) that some extraordinary circumstance stood in his way and
3 prevented timely filing." Holland v. Florida, ___ U.S. ___, 130 S.Ct. 2549, 2562 (2010)
4 (citation omitted). Equitable tolling is appropriate "if extraordinary circumstances beyond a
5 prisoner's control make it impossible to file a petition on time." Calderon v. United States
6 District Court (Beeler), 128 F.3d 1283, 1288 (9th Cir. 1997), overruled on other grounds, 163
7 F.3d 530 (9th Cir. 1998) (tolling of statute of limitations due to extraordinary circumstances
8 requires that a defendant diligently pursue his claim). A petitioner bears the burden of
9 establishing that he pursued his rights diligently and that some extraordinary circumstances
10 stood in his way. Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005). Grounds for equitable tolling
11 are "highly fact-dependent." Laws v. Lamarque, 351 F.3d 919, 922 (9th Cir. 2003) (citing
12 Whalem/Hunt v. Early, 233 F.3d 1146 (9th Cir. 2000) (en banc)).

13 Pursuant to this court's order, the parties were instructed to provide evidence
14 concerning petitioner's prison transfer(s) between February 24, 2011, and May 10, 2011. ECF
15 18. Respondent provided petitioner's movement history showing petitioner remained at
16 California State Prison, Solano, from April 20, 2010, through February 16, 2012. ECF 20 at 2-3.
17 Petitioner submitted exhibits indicating his trust account was frozen in or around April 2011, and
18 he did not have access to basic hygiene needs. ECF 19 at 5. Petitioner suggests that because he
19 did not have access to his trust account an inference can be made that he did not have access to
20 his legal documents. Petitioner has failed to present clear evidence sufficient to establish that he
21 was in fact transferred during this period of time, or that his transfer(s) deprived him of access to
22 his legal documents, the law library and other means needed to meaningfully litigate his claim.
23 See Waldron-Ramsey v. Pacholke, 556 F.3d 1008, 1013-14 (9th Cir. 2009) (denying equitable
24 tolling based on lack of access to documents because "[the petitioner] d[id] not point to specific
25 instances where he needed a particular document, could not have kept that document within his

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1 permitted three boxes had he been cooperative, and could not have procured that particular
2 document when needed.”).

3 As noted above, two hundred and twenty-five days of the limitation period
4 expired before petitioner filed his first state habeas corpus petition on January 28, 2011. The
5 limitation period was tolled until February 4, 2011, when the Sacramento County Superior Court
6 denied petitioner’s first state habeas petition. The limitation period was tolled for another twenty
7 days, until February 24, 2011, when the California Court of Appeal for the Third Appellate
8 District denied the petitioner’s habeas petition. Another seventy-five days expired before
9 petitioner filed his petition with the California Supreme Court which was denied on January
10 25, 2012. Petitioner did not file the instant action until May 3, 2012, ninety-nine days later.
11 This action is therefore time-barred.

12 **Conclusion**


13 In accordance with the above, IT IS HEREBY RECOMMENDED that:

- 14 1. Respondent’s November 5, 2012, motion to dismiss (ECF 12) be granted;
- 15 2. Petitioner’s first amended petition and motion to appoint counsel (ECF 22) be
16 denied as moot; and
- 17 3. This case be dismissed with prejudice.

18 These findings and recommendations are submitted to the United States District
19 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
20 days after being served with these findings and recommendations, any party may file written
21 objections with the court and serve a copy on all parties. Such a document should be captioned
22 “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections
23 within the specified time may waive the right to appeal the District Court’s order. Turner v.
24 Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991). In
25 his objections petitioner may address whether a certificate of appealability should issue in the
26 event he files an appeal of the judgment in this case. See Rule 11, Federal Rules Governing

1 Section 2254 Cases (the district court must issue or deny a certificate of appealability when it
2 enters a final order adverse to the applicant).

3 DATED: July 10, 2013.

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5 EDMUND F. BRENNAN
6 UNITED STATES MAGISTRATE JUDGE

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