

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

OLATUNDI LEANN GIBBS,
Petitioner,
v.
DEBORAH K. JOHNSON,
Respondent.

No. 2: 16-cv-1753 KJN P

ORDER

I. Introduction

Petitioner is a state prisoner, proceeding without counsel, with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The parties have consented to the jurisdiction of the undersigned. (ECF Nos. 13, 16.) Petitioner challenges her 2014 conviction for second degree robbery, in violation of California Penal Code § 211, and use of a deadly or dangerous weapon in commission of the robbery, in violation of California Penal Code § 12022(b)(1). (Respondent’s Lodged Document 1.)

This action proceeds on the original petition filed June 27, 2016.¹ The petition raises the following claims: 1) after petitioner arrived in prison, her conviction was changed from a

¹ The petition does not contain a proof of service in order for the court to determine when it was filed pursuant to the mailbox rule. Giving petitioner the benefit of the doubt, the undersigned finds that the petition was filed the date it was signed, i.e., June 27, 2016.

1 violation of California Penal Code § 211 to a violation of California Penal Code § 212.5 (claim
2 one); 2) insufficient evidence to support petitioner’s conviction for use of a deadly weapon
3 because the knife was in her co-defendant’s bag (claim two); and 3) trial counsel was ineffective
4 for failing to call the Walmart security guard to the stand (claim 3).

5 Pending before the court is respondent’s motion to dismiss on grounds that this action is
6 barred by the statute of limitations. (ECF No. 14.) For the reasons stated herein, respondent’s
7 motion is granted with respect to claims 2 and 3. For the reasons stated herein, claim 1 is denied
8 because petitioner is not entitled to relief as to this claim.

9 II. Claim 1

10 Petitioner alleges that she was convicted of second degree robbery in violation of
11 California Penal Code § 211. Petitioner alleges that after she arrived in prison, she discovered
12 that her conviction had been changed to a violation of California Penal Code § 212.5.

13 Petitioner’s abstract of judgment states that petitioner was convicted of violating
14 California Penal Code § 211, second degree robbery. (Respondent’s Lodged Document 1.)
15 Attached to the petition is a document titled “Legal Status Summary.” (ECF No. 1 at 8.) This
16 document indicates that it was prepared by the California Department of Corrections and
17 Rehabilitation (“CDCR”). (Id.) The Legal Status Summary states that petitioner was convicted
18 of second degree robbery in violation of California Penal Code § 212.5(c). (Id.)

19 California Penal Code § 212.5 defines the degrees of robbery. Subsection (c) of this
20 section states that “[a]ll kinds of robbery other than those listed in subdivisions (a) and (b) are of
21 the second degree.” Cal. Penal Code § 212.5(c). Therefore, petitioner’s conviction was not
22 changed from a violation of § 211 to a violation of § 212.5(c). Rather, the citation to § 212.5(c)
23 in the Legal Status Summary is another way of stating that petitioner was convicted of second
24 degree robbery. Moreover, there is no evidence that the official records of petitioner’s
25 conviction, such as the abstract of judgment, were changed to reflect a violation of the California
26 Penal Code other than § 211.

27 For the reasons discussed above, petitioner’s claim that her conviction was improperly
28 changed by the CDCR following her incarceration is without merit. Accordingly, this claim is

1 dismissed. See Rule 4 of the Federal Rules Governing Section 2254 Cases (court may dismiss
2 petition if it plainly appears that petitioner is not entitled to relief).

3 III. Statute of Limitations

4 A. Calculation of Limitations Period

5 The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which became
6 law on April 24, 1996, imposed for the first time a statute of limitations on petitions for a writ of
7 habeas corpus filed by state prisoners. This statute of limitations provides that,

8 A 1-year period of limitation shall apply to an application for a writ
9 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 –

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

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

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

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

19 28 U.S.C. § 2244 (d)(1).

20 On October 24, 2014, petitioner was sentenced. (Respondent’s Lodged Document 1.)
21 Petitioner did not appeal the judgment. Accordingly, her conviction became final 60 days later,
22 on December 23, 2014, when the time for filing an appeal expired. See Cal. Rule of Court
23 8.308(a) (notice of appeal must be filed within 60 days of criminal judgment); see also Mendoza
24 v. Carey, 449 F.3d 1065, 1067 (9th Cir. 2006) (California conviction becomes final 60 days after
25 judgment if not appealed). Respondent argues, and the undersigned agrees, that the statute of
26 limitations began running the following day, December 24, 2014. See Patterson v. Stewart, 251
27 F.3d 1243, 1246 (9th Cir. 2001) (the AEDPA limitations period begins to run on the day after the
28 triggering event pursuant to Fed.R.Civ.P. 6(a)).

1 Petitioner had until December 24, 2015, to file a timely federal petition. The instant
2 action, filed June 27, 2016, is not timely unless petitioner is entitled to statutory or equitable
3 tolling.

4 B. Statutory Tolling

5 *Legal Standard*

6 Section 2244(d)(2) suspends the limitations period not only for the time during which a
7 “properly-filed” application for post-conviction relief is “pending” in state court but also, in
8 appropriate circumstances, “during the intervals between the denial of a petition by one court and
9 the filing of a new petition at the next level, if there is not undue delay.” Biggs v. Terhune, 339
10 F.3d 1045, 1046 (9th Cir. 2003); see also Carey v. Saffold, 536 U.S. 214, 219-25 (2002) (in
11 California cases, a post-conviction matter is “pending” between the denial of a petition in a lower
12 court and the filing, “within a reasonable time,” of a “further original state habeas petition in a
13 higher court”). Continuous tolling under Section 2244(d)(2)—commonly referred to as interval
14 or gap tolling—is available only if a prisoner acted promptly in seeking relief at the next state
15 court level. See Evans v. Chavis, 546 U.S. 189, 191-92 (2006); Pace v. DiGuglielmo, 544 U.S.
16 408, 413-14)(2005).

17 The statute of limitations is not tolled between the time the petitioner's conviction
18 becomes final on direct review and the time the first state collateral challenge is filed because
19 there is no case “pending” during that time. Thorson v. Palmer, 479 F.3d 643, 646 (9th Cir.
20 2007).

21 *Background of State Habeas Petitions*

22 Petitioner filed the following four post-conviction collateral challenges to her conviction.

23 On June 16, 2015, petitioner filed a habeas petition in the Sacramento County Superior
24 Court. (Respondent’s Lodged Document 2.) The Superior Court denied this petition on July 31,
25 2015. (Respondent’s Lodged Document 3.)

26 On August 12, 2015, petitioner filed that habeas corpus petition in the California Court of
27 Appeal. (Respondent’s Lodged Document 4.) On August 20, 2015, the California Court of
28 Appeal denied this petition. (Respondent’s Lodged Document 5.)

1 On March 20, 2016, petitioner filed another habeas corpus petition in the California Court
2 of Appeal. (Respondent's Lodged Document 6.) On March 30, 2016, the California Court of
3 Appeal denied this petition. (Respondent's Lodged Document 7.)

4 On April 11, 2016, petitioner filed a habeas corpus in the California Supreme Court.
5 (Respondent's Lodged Document 8.) On June 8, 2016, the California Supreme Court denied this
6 petition. (Respondent's Lodged Document 9.)

7 *Discussion*

8 Respondent concedes that petitioner is entitled to 66 days of statutory tolling from the date
9 she filed her petition in the Superior Court to when the California Court of Appeal denied her first
10 state appellate petition, i.e., from June 16, 2015, to August 20, 2015. Adding 66 days to the
11 limitations period extends it to February 28, 2016.

12 For two reasons, respondent argues that petitioner is not entitled to interval tolling for the
13 212 days between the date the California Court of Appeal denied the first state appellate petition
14 (August 20, 2015) and the date petitioner filed her second petition in the California Court of
15 Appeal (March 20, 2016). Respondent argues that petitioner is not entitled to gap tolling because
16 she delayed in filing the second petition. Respondent also argues that petitioner is not entitled to
17 gap tolling because the state appellate petitions are successive.

18 It appears that the two state appellate petitions raised different claims. The first state
19 petition is difficult to understand. Petitioner appeared to argue that her attorney had a conflict of
20 interest by representing her in her criminal case and also investigating who shot her during an
21 incident that occurred prior to the robbery. (Respondents' Lodged Document 4.) Petitioner also
22 argued that her co-defendant's confession was improperly used against her. (*Id.*) The second
23 state appellate petition raised the claims raised in the instant action. (Respondent's Lodged
24 Document 6.)

25 Although the gaps or intervals between the filing of petitions to higher courts are usually
26 tolled, the Ninth Circuit employs a two-part test to determine whether the period between
27 petitions filed in the same court are tolled:

28 ///

1 First, we ask whether the petitioner’s subsequent petitions are
2 limited to an elaboration of the facts relating to the claims in the
3 first petition. If not, these petitions constitute a “new round” and the
4 gap between the rounds is not tolled. But if the petitioner simply
5 attempted to correct the deficiencies, then the petitioner is still
6 making “proper use of state court procedures,” and his application
7 is still “pending” for tolling purposes. We then ask whether they
8 were ultimately denied on the merits or deemed untimely. In the
9 former event, the time gap between the petitions is tolled; in the
10 latter event it is not.

11 King v. Roe, 340 F.3d 821, 823 (9th Cir. 2003) (citation omitted), overruled on other grounds by
12 Evans v. Chavis, 546 U.S. 189 (2006); accord Banjo v. Ayers, 614 F.3d 964, 968–69 (9th Cir.
13 2010).

14 As noted above, petitioner’s second state appellate petition raised new claims and was not
15 an elaboration of the facts relating to the claims in the first petition. Therefore, petitioner is not
16 entitled to interval tolling between these two petitions.²

17 Respondent also argues that petitioner is not entitled to interval tolling because of the
18 delay in the filing of the second state appellate petition. For the reasons stated herein, the
19 undersigned agrees that petitioner’s delay in filing the second state appellate petition also
20 forecloses interval tolling.

21 Under California law, a habeas petition is timely only if filed within a “reasonable time.”
22 See Chavis, 546 U.S. 189, 192 (2006). Because “California courts had not provided authoritative
23 guidance on this issue,” the Supreme Court in Chavis “made its own conjecture ... ‘that
24 California’s “reasonable time” standard would not lead to filing delays substantially longer than’
25 between 30 and 60 days.” Robinson v. Lewis, 795 F.3d 926, 929 (9th Cir. 2015) (quoting Chavis,
26 546 U.S. at 199). However, if a petitioner demonstrates good cause, California courts allow a
27 longer delay. Robinson, 795 F.3d at 929 (citing In re Robbins, 18 Cal.4th 770, 780 (Cal. 1998)).
28 A petition that has been substantially delayed may nevertheless be considered on the merits if the
petitioner can establish good cause for the delay, such as investigation of a potentially meritorious

² The first state appellate petition may have alleged that trial counsel was ineffective for failing to call the Walmart security guard to the stand. As discussed above, the second state appellate petition raised this claim as well. However, the first state appellate petition clearly did not raise a claim alleging insufficient evidence to support petitioner’s conviction for use of a deadly weapon.

1 claim, or to avoid piecemeal presentation of claims. Robbins, 18 Cal.4th at 780. In order to
2 establish good cause for his failure to file a timely state habeas petition, petitioner must
3 demonstrate that he acted diligently in pursuing his claims. See Robbins, 18 Cal.4th at 808-09
4 (1988).

5 The second state appellate petition is presumptively untimely because it was filed more
6 than 60 days after the California Court of Appeal denied the first state appellate petition. The
7 undersigned next considers whether petitioner has shown good cause for this delay.

8 The second petition filed in the California Court of Appeal raised the claims now
9 presented in claims 2 and 3, i.e., insufficient evidence and ineffective assistance of counsel. The
10 form for the second state appellate petition contained a section asking petitioner to explain “any
11 delay in the discovery of the claimed grounds for relief and in raising the claims in the petition.”
12 (Respondent’s Lodged Document 6, at p. 6.) Petitioner wrote in this section, “Not able to obtain
13 discovery. Judge, courts can obtain discovery.” (Id.)

14 Petitioner’s claim that she delayed in filing the second state appellate petition because she
15 was unable to obtain discovery is vague and conclusory. Petitioner does not describe the
16 discovery she required to raise the two claims alleged in that petition. Petitioner also does not
17 describe any attempts she made to obtain discovery prior to filing the petition. It is unclear why
18 petitioner would require discovery to raise claims 2 and 3. For these reasons, the undersigned
19 does not find that petitioner demonstrated good cause for the delay in the filing of her second
20 state appellate petition. See In re Robbins, 18 Cal.4th at 780 (a petitioner must allege, with
21 specificity, facts supporting claim of good cause for delay). Accordingly, petitioner is not entitled
22 to interval tolling with respect to the gap between the denial of the first state appellate petition
23 and the filing of the second state appellate petition.

24 Because the limitations expired on February 28, 2016, petitioner is not entitled to statutory
25 tolling for the time the second state appellate petition and the petition filed in the California
26 Supreme Court were pending. This conclusion is because these petitions were filed after the
27 statute of limitations expired. A petition filed after the expiration of the statute of limitations
28 cannot extend the limitations period. Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003);

1 Jiminez v. Rice, 276 F.3d 478, 482 (9th Cir. 2001).

2 Petitioner filed the instant action after the statute of limitations ran on February 28, 2016.
3 Accordingly, the instant action is not timely unless petitioner is entitled to equitable tolling.

4 C. Equitable Tolling

5 *Legal Standard*

6 The one year statute of limitations for filing a habeas petition may be equitably tolled if
7 extraordinary circumstances beyond a prisoner's control prevent the prisoner from filing on time.
8 See Holland v. Florida, 560 U.S. 631, 645 (2010). A petitioner seeking equitable tolling must
9 establish two elements: "(1) that he has been pursuing his rights diligently, and (2) that some
10 extraordinary circumstance stood in his way." Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005).

11 *Discussion*

12 On April 14, 2017, the undersigned ordered petitioner to show cause for her failure to file
13 an opposition to the pending motion to dismiss. (ECF No. 18.) In her response to the order to
14 show cause, petitioner raises claims in support of equitable tolling. (ECF No. 20.) The
15 undersigned addresses these claims herein.

16 Petitioner argues that she did not file a timely federal petition because she did not have
17 any help from anyone at the law library. (Id. at 4.) Petitioner also states that she was
18 programming most of the days of the week. (Id.) Petitioner also states that in a 6 to 8 month
19 period, she transferred from prison to prison. (Id.) Petitioner states that "a lot of the times on D
20 Yard at Chowchilla Women's Prison we were [quarantined]." (Id.) It is difficult to read
21 petitioner's handwriting, but she appears to state "more than one person sick so we were on
22 lockdowns." (Id.) Petitioner states that because there were a lot of lockdowns, she could not get
23 to the law library. (Id.)

24 With respect to petitioner's claim that she did not have help from anyone at the law
25 library, lack of education and ignorance of the law do not constitute extraordinary circumstances
26 warranting equitable tolling. See, e.g., Raspberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006)
27 ("[A] pro se petitioner's lack of legal sophistication is not, by itself, an extraordinary circumstance
28 warranting equitable tolling."); Baker v. Cal. Dep't of Corr., 484 Fed.Appx. 130, 131 (9th Cir.

1 2012) (“Low literacy levels, lack of legal knowledge, and need for some assistance...are not
2 extraordinary circumstances to warrant equitable tolling....”).

3 With respect to her claim of frequent transfers, petitioner does not allege how the frequent
4 transfers prevented her from filing a timely federal petition.³ Petitioner also does not allege when
5 these transfers occurred. Because this claim is conclusory, the undersigned finds that petitioner
6 has not met her burden of demonstrating how these transfers prevented her from filing a timely
7 federal petition. See Pace, 544 U.S. at 418 (petitioner bears the burden of establishing equitable
8 tolling).

9 Petitioner alleges that she was frequently denied access to the law library due to
10 lockdowns, some caused by quarantines. Petitioner does not provide any specific information
11 showing the dates and durations of the lockdowns. Accordingly, petitioner has not demonstrated
12 that her lack of law library access prevented her from filing a timely federal petition. See Melgar
13 v. Schwartz, 2012 WL 4512084 at *4 (C.D. Cal. 2012) (citing Williams v. Dexter, 649 F.Supp.2d
14 1055, 1061–62 (C.D.Cal. Aug.19, 2009) (petitioner’s claim for equitable tolling based on
15 “frequent” prison lockdowns was without merit because the claim was “unsupported by
16 competent evidence and [was] grossly conclusory”).

17 For the reasons discussed above, the undersigned finds that petitioner is not entitled to
18 equitable tolling.

19 Accordingly, IT HEREBY ORDERED that:

- 20 1. Petitioner’s claim 1 is dismissed because it is without merit;
- 21 2. Respondent’s motion to dismiss (ECF No. 14), as to claims 2 and 3, is granted;

22 ///

23 ///

24 ///


25 ³ At the time petitioner filed her first state appellate court petition on August 12, 2015, she was
26 housed at a prison in Corona, California. (Respondent’s Lodged Document 4.) At the time
27 petitioner filed her second state appellate petition on March 20, 2016, she was housed at a prison
28 in Chowchilla, California. (Respondent’s Lodged Document 6.) In the second state appellate
petition, petitioner did not allege that her delay in filing the second petition was caused by
transfers or inadequate law library access. (See Respondent’s Lodged Document 6.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

3. The court declines to issue a certificate of appealability.

Dated: July 13, 2017

Gibbs1753.dis
kc


KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE