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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TAMARA NICOLE BASSETT,
Petitioner,
v.
SCOTT M. KERNAN,
Respondent.

No. 2:16-cv-2428 JAM AC P

FINDINGS & RECOMMENDATIONS

Petitioner, a state prisoner proceeding through retained counsel, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Currently before the court is respondent’s fully briefed motion to dismiss (ECF No. 6), which was heard on the court’s regular law and motion calendar on February 15, 2017 (ECF No. 17).

I. Factual and Procedural Background

Petitioner was convicted in Sacramento County of (1) first-degree murder, (2) three counts of attempted murder, and (3) discharging a firearm at an inhabited dwelling. ECF No. 1 at 2. Sentencing enhancement allegations were found to be true, including use of a firearm and commission of a crime for the benefit of a criminal gang. Id. Petitioner was sentenced to life without the possibility of parole for the murder, and a consecutive 121 years to life for the remaining counts and enhancements. Lod. Doc. No. 1.

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1 Petitioner appealed, and the California Court of Appeal affirmed the judgment on March
2 12, 2015. Lod. Doc. No. 2 (reversing parole revocation fine and otherwise affirming the
3 judgment). Petitioner filed a petition for review in the California Supreme Court on April 14,
4 2015. Lod. Doc. No. 3. The petition was denied on July 8, 2015. Lod. Doc. No. 4.

5 On October 11, 2016, petitioner filed the instant petition for writ of habeas corpus. ECF
6 No. 1. Respondent was ordered to respond to the petition (ECF No. 3) and filed a motion to
7 dismiss (ECF No. 6). Petitioner has opposed the motion. ECF No. 12.

8 II. Motion to Dismiss

9 Respondent argues that the petition should be dismissed because it is untimely, as it was
10 filed beyond the one-year statute of limitations. ECF No. 6 at 2-3. Additionally, respondent
11 argues that the petition should be dismissed because Ground 4 is unexhausted and petitioner is not
12 entitled to a Rhines¹ stay because she has failed to demonstrate good cause. Id. at 3-4.

13 III. Opposition

14 Petitioner opposes the motion to dismiss, conceding that the petition is untimely but
15 arguing that equitable tolling is warranted to excuse the untimeliness, which was caused by
16 counsel's miscalculation of the applicable deadline. ECF No. 12 at 2-4. Petitioner also concedes
17 that Ground 4 of the petition is unexhausted, and has filed a request for leave to withdraw the
18 unexhausted claim and file an amended petition reflecting the withdrawal. ECF No. 16.

19 IV. Statute of Limitations

20 Section 2244(d)(1) of Title 28 of the United States Code contains a one-year statute of
21 limitations for filing a habeas petition in federal court. The one-year clock commences from one
22 of several alternative triggering dates. 28 U.S.C. § 2244(d)(1). In this case the applicable date is
23 that "on which the judgment became final by the conclusion of direct review or the expiration of
24 the time for seeking such review." § 2244(d)(1)(A).

25 The California Supreme Court denied review of petitioner's conviction and sentence on
26 July 8, 2015, and the judgment became final when the time to seek certiorari in the United States

27 ¹ Rhines v. Weber, 544 U.S. 269 (2005).
28

1 Supreme Court expired 90 days thereafter. See Velasquez v. Kirkland, 639 F.3d 964, 965 (9th
2 Cir. 2011). Accordingly, the statute of limitations began to run on October 7, 2015, and expired
3 absent tolling on October 6, 2016. The parties do not dispute these calculations. See ECF No. 6
4 at 2; ECF No. 12 at 2.

5 Since petitioner did not file any state collateral actions, she is not entitled to any period of
6 statutory tolling. See 28 U.S.C. § 2244(d)(2) (providing that statute of limitations is tolled during
7 pendency of properly-filed applications for state collateral relief).

8 Because the federal petition was filed on October 11, 2016, five days after expiration of
9 the limitations period, it can only be saved from dismissal for untimeliness if petitioner is entitled
10 to equitable tolling. Equitable tolling requires a showing “(1) that [petitioner] has been pursuing
11 [her] rights diligently, and (2) that some extraordinary circumstances stood in [her] way.” Pace v.
12 DiGuglielmo, 544 U.S. 408, 418 (2005). Equitable tolling is only appropriate if “‘extraordinary
13 circumstances beyond a prisoner’s control make it impossible to file a petition on time.’” Laws v.
14 Lamarque, 351 F.3d 919, 922 (9th Cir. 2003) (quoting Spitsyn v. Moore, 345 F.3d 796, 799 (9th
15 Cir. 2003)). The petitioner bears the burden of demonstrating that equitable tolling is warranted.
16 Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002).

17 As grounds for equitable tolling, petitioner contends that retained habeas counsel
18 misunderstood the finality rules that determine commencement of the statute of limitations, and
19 wrongly believed that the decision of the California Supreme Court, denying review of the
20 intermediate appellate court’s decision, became final upon issuance of the remittitur rather than
21 upon issuance of the decision. ECF No. 12 at 2-3. Counsel was “unaware” of Rule 8.532(b)(A),
22 Cal. Rules of Court, which provides that state Supreme Court decisions are final on filing. Id.²

23
24 ² See 28 U.S.C. § 2244(d)(1)(A) (one-year limitations period runs from “the date on which
25 judgment became final by the conclusion of direct review or the expiration of the time for seeking
26 such review.”) The period of direct review includes the period within which a petitioner can file
27 a petition for a writ of certiorari from the United States Supreme Court, whether or not the
28 petitioner actually files such a petition. Bowen v. Roe, 188 F.3d 1157 (9th Cir. 1999). In this
case, the decision of the California Supreme Court issued on July 8, 2015. The ninety-day period
to seek certiorari ended on October 6, 2015. The limitations period accordingly began to run on
October 7, 2015, see Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001), and the federal
(continued...)

1 Both the United States Supreme Court and the Ninth Circuit have repeatedly held that
2 attorney negligence, including misunderstanding of the AEDPA's requirements or miscalculation
3 of the deadline, does not support equitable tolling. Lawrence v. Florida, 549 U.S. 327, 336-37
4 (2007) (holding that “[a]ttorney miscalculation is simply not sufficient to warrant equitable
5 tolling, particularly in the postconviction context where prisoners have no constitutional right to
6 counsel.”); Frye v. Hickman, 273 F.3d 1144, 1146 (9th Cir. 2001) (attorney negligence in
7 miscalculating limitations period does not warrant equitable tolling); Miranda v. Castro, 292 F.3d
8 1063 (9th Cir. 2002) (attorney provision of misinformation about deadline does not warrant
9 equitable tolling); Porter v. Ollison, 620 F.3d 952, 959 (9th Cir. 2010) (“[a]ttorney negligence,
10 including miscalculation of a filing deadline, is not a sufficient basis for applying equitable
11 tolling”). Such errors constitute “garden variety” excusable neglect, which fails as a matter of
12 law to meet the equitable tolling standard of extraordinary circumstances. Irwin v. Dep’t of
13 Veterans Affairs, 498 U.S. 89, 96 (1990).

14 Facts establishing “extraordinary” or “egregious” attorney misconduct, rather than mere
15 negligence, may nonetheless support equitable tolling. Holland v. Florida, 560 U.S. 631, 652-54
16 (2010); Spitsyn v. Moore, 345 F.3d 796, 800 (9th Cir. 2003). For example, in Spitsyn the court
17 found tolling appropriate because counsel had effectively abandoned his client and completely
18 failed to perform:

19 Though he was hired nearly a full year in advance of the deadline,
20 [counsel] completely failed to prepare and file a petition. Spitsyn
21 and his mother contacted [counsel] numerous times, by telephone
22 and in writing, seeking action, but these efforts proved fruitless.
23 Furthermore, despite a request that he return Spitsyn’s file,
[counsel] retained it for the duration of the limitations period and
more than two months beyond. That conduct was so deficient as to
distinguish it from the merely negligent performance of counsel in
Frye and Miranda.

24 Id. at 801. Holland, which the Supreme Court remanded for consideration of equitable tolling,

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26 petition was due on or before October 6, 2016. Calculating from the date the remittitur issued
27 from the California Supreme Court (July 13, 2015) instead of the date the decision issued, counsel
28 erroneously believed the deadline to be October 11, 2015. ECF No. 12 at 2-3. He filed on the
last possible day of the miscalculated deadline.

1 also involved allegations of dereliction amounting to client abandonment. See Holland, 560 U.S.
2 at 652-53.³

3 The facts here do not come close to those of Spitsyn and Holland. Counsel here did not
4 completely fail to prepare and file a petition. He did not refuse to communicate with his client,
5 fail to provide information about the status of the case, ignore the client's pleas that the petition
6 be prepared by a specific date, or ignore the client's provision of the correct legal rules. Neither
7 did counsel withhold files or otherwise prevent his client from protecting her rights on her own.
8 Although counsel freely admits his failure to perform competently regarding the statute of
9 limitations, a legal error about operation of the limitations rules is the only attorney "misconduct"
10 at issue here. Because this error amounts to negligence, and not abandonment or an equivalent
11 level of egregious misconduct, it is insufficient as a matter of law to support equitable tolling.
12 See Frye, 273 F.3d at 1146; Miranda, 292 F.3d at 1068; Porter, 620 F.3d at 959; see also Taylor
13 v. Hedgpeth, No. CV 08-6483-R (AGR), 2009 WL 82276, at *2, 2008 U.S. Dist. LEXIS 107961,
14 at *5 (C.D. Cal. Jan. 8, 2009) (finding that petitioner was not entitled to equitable tolling when
15 counsel for petitioner miscalculated the AEDPA deadline based on the date of remittitur in state
16 court).

17 Petitioner attempts to bring the facts of this case within the reach of Spitsyn, and
18 distinguish Miranda v. Castro, supra, on grounds that here as in Spitsyn the late filing was directly
19 caused by retained habeas counsel, rather than by the erroneous advice of a lawyer who was not
20 responsible for filing the petition, as in Miranda. ECF No. 12 at 4. That is a distinction without a

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22 ³ "To be sure, [counsel] failed to file Holland's petition on time and appears to have been
23 unaware of the date on which the limitations period expired -- two facts that, alone, might suggest
24 simple negligence. But, in these circumstances, the record facts we have elucidated suggest that
25 the failure amounted to more: Here, [counsel] failed to file Holland's federal petition on time
26 despite Holland's many letters that repeatedly emphasized the importance of his doing so.
27 [Counsel] apparently did not do the research necessary to find out the proper filing date, despite
28 Holland's letters that went so far as to identify the applicable legal rules. [Counsel] failed to
inform Holland in a timely manner about the crucial fact that the Florida Supreme Court had
decided his case, again despite Holland's many pleas for that information. And [counsel] failed
to communicate with his client over a period of years, despite various pleas from Holland that
[counsel] respond to his letters." Id. at 652.

1 difference. The question is whether the late filing was caused by extraordinary circumstances,
2 and the U.S. Supreme Court and the Ninth Circuit have both squarely held that attorney
3 negligence is not an extraordinary circumstance. The Miranda petitioner was denied equitable
4 tolling because his appellate lawyer was merely negligent in giving wrong information about the
5 deadline, not because the lawyer wasn't responsible for the habeas petition. And the Spitsyn
6 petitioner was entitled to equitable tolling because his lawyer committed egregious misconduct
7 above and beyond negligence, not because he was responsible for filing the habeas petition. The
8 distinction that matters is between negligence and egregious misconduct, not between appellate
9 and habeas counsel.

10 Petitioner argues that without equitable tolling, she will be personally prejudiced because
11 of counsel's errors. That is absolutely true. When a petitioner is represented by counsel, she –
12 like any other client in our system of representative litigation – “must bear the risk of attorney
13 error.” Coleman v. Thompson, 501 U.S. 722, 753 (1991).⁴ In fact, “the principal rationale for
14 disallowing equitable tolling based on ordinary attorney miscalculation is that the error of an
15 attorney is constructively attributable to the client and thus is not a circumstance beyond the
16 litigant's control.” Holland, 560 U.S. at 657 (Alito, J., concurring) (citations omitted).
17 Accordingly, petitioner's dependence upon counsel in this case does not support equitable tolling
18 – though it undoubtedly highlights the harsh results created by statutes of limitations and
19 attorneys who negligently fail to understand and follow them.

20 Petitioner's theory for equitable tolling, based exclusively on counsel's erroneous
21 understanding of the limitations period, is contrary to settled authority. As the Supreme Court
22 explained in Lawrence,

23 If credited, this argument would essentially equitably toll
24 limitations periods for every person whose attorney missed a
25 deadline. Attorney miscalculation is simply not sufficient to

26 ⁴ In Coleman, the petitioner was denied review of his federal claims because his lawyer had filed
27 a notice of appeal in state court 3 days late, causing a procedural default. Mr. Coleman was
28 eventually executed without federal court review of his claims, because of attorney error
attributed to him by these general agency principles.

1 warrant equitable tolling, particularly in the postconviction context
2 where prisoners have no constitutional right to counsel.

3 Lawrence, 549 U.S. at 336-37.

4 V. Conclusion

5 If this case involved a deadline that the court had the discretion to extend, it would do so
6 on grounds of excusable neglect. However, that is not the standard which applies here. Petitioner
7 did not miss a court-imposed filing deadline, but a statute of limitations. The court has no
8 authority to excuse such lateness. For the reasons explained above, petitioner has not established
9 that extraordinary circumstances caused the late filing. Because the petition must therefore be
10 dismissed as untimely, the undersigned need not and does not reach the exhaustion issue.

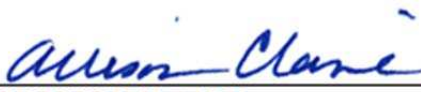
11 Accordingly, IT IS HEREBY RECOMMENDED that:

12 1. Respondent's motion to dismiss (ECF No. 6) be granted and petitioner's application
13 for a writ of habeas corpus be denied as untimely.

14 2. This court decline to issue the certificate of appealability referenced in 28 U.S.C. §
15 2253.

16 These findings and recommendations are submitted to the United States District Judge
17 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
18 after being served with these findings and recommendations, any party may file written
19 objections with the court and serve a copy on all parties. Such a document should be captioned
20 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
21 objections shall be filed and served within fourteen days after service of the objections. The
22 parties are advised that failure to file objections within the specified time may waive the right to
23 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

24 DATED: February 24, 2017

25 
26 ALLISON CLAIRE
27 UNITED STATES MAGISTRATE JUDGE
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