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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JENNIFER DALTON,
Petitioner,
v.
DARRELL ADAMS,
Respondent.

No. 2:16-cv-3042 KJM GGH

FINDINGS AND RECOMMENDATIONS

Introduction

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U. S. C. § 2254. ECF No. 1. Pending before the court is respondent’s motion to dismiss on the ground that petitioner is barred by the one-year statute of limitations pursuant to 28 U.S.C. § 2244(d). ECF No. 10. Petitioner has filed an opposition arguing statutory and equitable tolling, ECF No. 16, which respondent has filed a reply. ECF No. 18. After carefully reviewing filing, the court now issues the following findings and recommendations recommending a granting of the motion to dismiss.

Discussion

I. Statute of limitations

On April 24, 1986, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter “AEDPA”). Pursuant to 28 U.S.C. § 2244(d)(1), AEDPA imposes a one-year

1 statute of limitations for federal habeas corpus petitions. 28 U.S.C. §2244(d)(1) provides, in
2 pertinent part:

3 A 1-year period of limitation shall apply to an application for a
4 writ of habeas corpus by a person in custody pursuant to the
5 judgment of a State court. The limitation period shall run from the
6 latest of—

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

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

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

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

21 28 U.S.C. § 2244(d).

22 On September 15, 2011, petitioner was convicted in Sacramento County Superior Court
23 for second degree murder and it was found true an enhancement for personally and intentionally
24 discharging a firearm, causing death. Resp't's Lodg. Doc. No. 1. She was sentenced to an
25 indeterminate sentence of 40 years to life. Id. On February 27, 2015, the Third District Court of
26 Appeal affirmed the judgment. Resp't's Lodg. Doc. No. 2. A petition for review with the
27 California Supreme Court raising eight claims, was denied on June 17, 2015. Resp't's Lodg.
28 Doc. Nos. 3, 4.

Thereafter, petitioner filed three state habeas petitions. The first petition was filed in
Sacramento Superior Court on September 8, 2016, raising seven issues. Resp't's Lodg. Doc. No.
5. The petition was denied on September 21, 2016 for being untimely. Resp't's Lodg. Doc. No.
6. The second petition filed in the Third District Court of Appeal on October 20, 2016, was
denied on November 10, 2016. Resp't's Lodg. Doc. Nos. 7, 8. The third and final state court
petition filed in California Supreme Court on December 12, 2016, was denied on March 15, 2017.

1 Resp't's Lodg. Doc. Nos. 9, 10. These latter two state petitions were "silent denials," and hence
2 are deemed to have adopted the conclusion of the Superior Court. Ylst v. Nunnemaker, 501 U.S.
3 797 (1991).

4 1. Statutory Tolling

5 a. Finality of Direct Review

6 Without considering the state habeas petitions for the moment, petitioner's conviction
7 became final for purposes of AEDPA on September 18, 2016. Accordingly, this instant action
8 filed December 29, 2016 is barred as untimely unless petitioner is entitled to statutory or
9 equitable tolling.

10 Here, the pertinent commencement period for the statute of limitations begins on "the date
11 on which the judgment became final by the conclusion of direct review or the expiration of the
12 time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). In this case, petitioner sought direct
13 review of her conviction from the California Supreme Court, which was denied on June 17, 2015.
14 Resp't's Lodg. Doc. No. 4. The record shows petitioner did not submit a petition for writ of
15 certiorari to the Supreme Court of the United States. ECF No. 1 at 2. Consequently, petitioner's
16 conviction became final at the expiration of the ninety-day period to seek certiorari immediately
17 following the decision of the state's highest court. Clay v. United States, 537 U.S. 522, 528 n.3
18 (2003); Bowen v. Roe, 188 F.3d 1157, 1159 (9th Cir. 1999). Therefore, petitioner's conviction
19 became final on September 17, 2015, and ADEPA's one-year clock began on September 18,
20 2015. Patterson v. Stewart, 251 F.3d 1243, 1247 (9th Cir. 2001) (citing Fed. R. Civ. P. 6(a)) (the
21 day order or judgment becomes final is excluded and time begins to run the day after the
22 judgment becomes final). Absent tolling, petitioner had until September 18, 2016, to file a
23 federal habeas corpus petition.

24 b. State's Timeliness Decision

25 Petitioner argues, however, the state court's denial of her first state habeas petition due to
26 timeliness "does not conform with an established state legal principle and therefore deserves no
27 deference by this court." ECF No. 16 at 3 ¶7. Petitioner argues that because it was denied on
28 procedural grounds as oppose to being adjudicated on the merits, the deference provision of §

1 2254(d) does not apply here. Id. at ¶9. As observed by respondent, petitioner confuses the law
2 regarding procedural default with the rules applicable to statute of limitations analysis.

3 A state court habeas post-conviction process commenced beyond the expiration of
4 AEDPA's statute of limitations does not toll or revive the limitations period under section
5 2244(d)(1). See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003); Jiminez v. Rice, 276
6 F.3d 478, 482 (9th Cir. 2001). Under AEDPA, the statute of limitations is tolled during the time
7 that a properly filed application for state post-conviction or other collateral review is pending in
8 state court. 28 U.S.C. § 2244(d)(2). "An application is 'properly filed' when its delivery and
9 acceptance are in compliance with the applicable laws and rules governing filings." Artuz v.
10 Bennett, 531 U.S. 4, 8 (2000) (emphasis in original). "An untimely petition, however, is not
11 'properly filed' pursuant to 28 U.S.C. § 2244(d)(2), and so it does not toll the statute of
12 limitation." Banjo v. Ayers, 614 F.3d 964, 968 (9th Cir. 2010) (citing Pace v. DiGuglielmo, 544
13 U.S. 408, 410 (2005); Thorson v. Palmer, 479 F.3d 643, 645 (9th Cir. 2007)). "A California
14 court's determination that a filing was untimely . . . is dispositive." Id. (citing Carey v. Saffold,
15 536 U.S. 214, 225-26 (2002)).

16 In this case, therefore, *none* of the state petitions tolled the AEDPA limitations period as
17 *none* of them were "properly filed." As indicated above, the Superior Court expressly denied the
18 first state habeas petition on untimeliness grounds, and by virtue of the "look through" doctrine,
19 the two latter courts did so as well.¹

20 Accordingly, this petition is untimely unless petitioner can show equitable tolling exists.

21 2. Equitable Tolling

22 A habeas petitioner is entitled to equitable tolling of AEDPA's one-year statute of
23 limitations only if she shows: (1) that she has been pursuing her rights diligently; and (2) that
24 some extraordinary circumstances stood in her way and prevented timely filing. See Holland v.

25 ¹ The parameters of the "look through" doctrine, or even its continued validity, are at issue in a
26 Supreme Court case at issue this term, Wilson v. Sellers, U.S. Supreme Court 16-6855, argued
27 10/30/2017. However, unless and until the Supreme Court rules that the "look through" doctrine
28 no longer applies, the undersigned is bound to apply it. Even if, however, the doctrine were
found not to apply to this case, the California appellate court petition was filed after the
limitations period had expired, albeit, not by much.

1 Florida, 560 U.S. 631, 649, 130 S. Ct. 2549, 2562 (2010); Ramirez v. Yates, 571 F.3d 993, 997
2 (9th Cir. 2009). The diligence required for equitable tolling purposes is “reasonable diligence,”
3 not “maximum feasible diligence.” See Holland v. Florida, 560 U.S. at 653, 130 S. Ct. at 2565.
4 See also Bills v. Clark, 628 F.3d 1092, 1096 (9th Cir. 2010). As to the extraordinary
5 circumstances required, the Ninth Circuit has held that the circumstances alleged must make it
6 impossible to file a petition on time, and that the extraordinary circumstances must be the cause
7 of the petitioner’s untimeliness. See Bills v. Clark, 628 F.3d at 1097, citing Spitsyn v. Moore,
8 345 F.3d 796, 799 (9th Cir. 2003). This is a very high threshold, “lest the exception swallow the
9 rule.” See Miranda v. Castro, 292 F.3d 1063, 1066 (9th Cir. 2002). In addition, “[w]hen external
10 forces, rather than a petitioner’s lack of diligence, account for the failure to file a timely claim,
11 equitable tolling may be appropriate.” Lott v. Mueller, 304 F.3d 918, 922 (9th Cir. 2002),
12 quoting Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999). Determining whether equitable
13 tolling is warranted is a “fact-specific inquiry.” Spitsyn, 345 F.3d at 799 (citing Frye v. Hickman,
14 273 F.3d 1144, 1146 (9th Cir. 2001)).

15 a. “Counsel’s” Oversight

16 In her opposition to the motion to dismiss, petitioner contends equitable tolling is present
17 due to her “ ‘jailhouse lawyer’s’ prior legal obligation of assisting another inmate” with her
18 “submission of her state superior court petition that necessarily took precedence due to an earlier
19 AEDPA statute of limitations.” ECF No. 16 at 2 ¶4-5.

20 Both the United States Supreme Court and the Ninth Circuit have repeatedly held that
21 attorney negligence, including misunderstanding of the AEDPA’s requirements or miscalculation
22 of the deadline, does not support equitable tolling. Lawrence v. Florida, 549 U.S. 327, 336-37
23 (2007) (holding that “[a]ttorney miscalculation is simply not sufficient to warrant equitable
24 tolling, particularly in the postconviction context where prisoners have no constitutional right to
25 counsel.”); Frye v. Hickman, 273 F.3d at 1146 (attorney negligence in miscalculating limitations
26 period does not warrant equitable tolling); Miranda v. Castro, 292 F.3d at 1063 (attorney
27 provision of misinformation about deadline does not warrant equitable tolling); Porter v. Ollison,
28 620 F.3d 952, 959 (9th Cir. 2010) (“[a]ttorney negligence, including miscalculation of a filing

1 deadline, is not a sufficient basis for applying equitable tolling”). Such errors constitute “garden
2 variety” excusable neglect, which fails as a matter of law to meet the equitable tolling standard of
3 extraordinary circumstances. Irwin v. Dep’t of Veterans Affairs, 498 U.S. 89, 96 (1990).

4 Facts establishing “extraordinary” or “egregious” attorney misconduct, rather than mere
5 negligence, may nonetheless support equitable tolling. Holland v. Florida, 560 U.S. at 652-54;
6 Spitsyn v. Moore, 345 F.3d at 800. However, petitioner does not sufficiently present any
7 evidence of “egregious” or “extraordinary” misconduct by her habeas “counsel” warranting
8 equitable tolling.

9 If attorney negligence could not equitably toll the limitations period, certainly non-counsel
10 jailhouse lawyer does not toll it.

11 Accordingly, the undersigned finds that petitioner has not met her burden of
12 demonstrating the existence of grounds for equitable tolling. See Pace v. DiGuglielmo, 544 U.S.
13 at 418 (petitioner bears the burden of demonstrating grounds for equitable tolling).²

14 ***Conclusion***

15 For the reasons stated above, the undersigned recommends granting respondent’s motion
16 to dismiss on the ground that the petition is untimely.

17 Pursuant to Rule 11 of the Federal Rules Governing Section 2254 Cases, this court must
18 issue or deny a certificate of appealability when it enters a final order adverse to the applicant. A
19 certificate of appealability may issue only “if the applicant has made a substantial showing of the
20 denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). For the reasons set forth in these
21 findings and recommendations, a substantial showing of the denial of a constitutional right has
22 not been made in this case

23 Accordingly, IT IS HEREBY RECOMMENDED that:

- 24 1. Respondent’s motion to dismiss (ECF No. 10) be granted;
- 25 2. The petition be dismissed with prejudice;
- 26 3. The District Court decline to issue a certificate of appealability.

27 _____
28 ² The petition does not contain an “actual innocence” claim, so no limitations analysis need be
made if such a claim had been set forth in the petition.

1 These findings and recommendations are submitted to the United States District Judge
2 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty one days
3 after being served with these findings and recommendations, any party may file written
4 objections with the court and serve a copy on all parties. Id.; see also Local Rule 304(b). Such a
5 document should be captioned “Objections to Magistrate Judge’s Findings and
6 Recommendations.” Any response to the objections shall be filed with the court and served on all
7 parties within fourteen days after service of the objections. Local Rule 304(d). Failure to file
8 objections within the specified time may waive the right to appeal the District Court’s order.
9 Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57
10 (9th Cir. 1991).

11 Dated: December 2, 2017

12 /s/ Gregory G. Hollows
13 UNITED STATES MAGISTRATE JUDGE
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