

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

MILORAD OLIC,
Petitioner,
v.
JOE A. LIZARRAGA,
Respondents.

No. 2: 17-cv-0155 JAM KJN P

FINDINGS AND RECOMMENDATIONS

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. This action proceeds on the original petition. Petitioner challenges his 2014 prison disciplinary conviction for refusing assigned housing.

Pending before the court is respondent’s motion to dismiss on grounds that this action is barred by the statute of limitations. (ECF No. 15.) Petitioner has filed an opposition to this motion. (ECF No. 15.) Respondent did not file a reply.

For the reasons stated herein, the undersigned recommends that respondent’s motion to dismiss be denied.

II. Discussion

The undersigned must first determine the date petitioner filed the original petition. The original petition is court stamped as filed on January 23, 2017. (ECF No. 1 at 1.) Under the

1 “mailbox rule,” a pro se prisoner’s habeas petition is deemed constructively filed when he gives it
2 to prison authorities for mailing. Campbell v. Henry, 614 F.3d 1056, 1058-59 (9th Cir. 2010); see
3 also Houston v. Lack, 487 U.S. 266, 276 (1988). Generally, a court deems a habeas petition filed
4 on the day it is signed because it assumes the petitioner turned the petition over to prison
5 authorities for mailing that day. Roberts v. Marshall, 627 F.3d 768, 770 n.1 (9th Cir. 2010)
6 (stating that a court typically deems a habeas petition filed the day it was signed); see Butler v.
7 Long, 752 F.3d 1177, 1178 n.1 (9th Cir. 2014) (per curiam) (stating that a court assumes the
8 petitioner turned the petition over to prison authorities for mailing the day the petition was
9 signed).

10 The petition does not contain a proof of service. The date next to petitioner’s signature
11 indicates that petitioner signed the petition on January 15, 2017, which is consistent with the date
12 the court filed the petition. (ECF No. 1 at 6.) However, there are two other dates near
13 petitioner’s signature, i.e., December 30, 2015 and April 17, 2016. (Id.) Because it is clear that
14 petitioner did not mail the petition to the court on either of those dates, the undersigned finds that
15 petitioner filed the petition on January 15, 2017.

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

19 A 1-year period of limitation shall apply to an application for a writ
20 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 –

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

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

26 (C) the date on which the constitutional right asserted was initially
27 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

28 (D) the date on which the factual predicate of the claim or claims

1 presented could have been discovered through the exercise of due
2 diligence.

3 28 U.S.C. § 2244 (d)(1).

4 The Ninth Circuit has held that “when a habeas petitioner challenges an administrative
5 decision affecting the ‘fact or duration of his confinement,’ AEDPA’s one year statute of
6 limitations runs from when the ‘factual predicate’ of the habeas claims ‘could have been
7 discovered through the exercise of due diligence.’” Mardesich v. Cate, 668 F.3d 1164, 1172 (9th
8 Cir. 2012) (quoting 28 U.S.C. § 2244(d)(1)(D).) “As a general rule, the state agency’s denial of
9 an administrative appeal is the ‘factual predicate’ for such habeas claims.” Id. (citing Shelby v.
10 Bartlett, 391 F.3d 1060, 1066 (9th Cir. 2004); see also Redd v. McGrath, 343 F.3d 1077, 1085
11 (9th Cir. 2003).

12 In this case, petitioner’s third level grievance challenging the at-issue disciplinary
13 conviction was denied on April 28, 2015. (See ECF No. 15 at 14.) The statute of limitations
14 began to run the following day, i.e., April 29, 2015. See Patterson v. Stewart, 251 F.3d 1243,
15 1246 (9th Cir. 2001) (the AEDPA limitations period begins to run on the day after the triggering
16 event pursuant to Fed. R. Civ. P. 6(a)). Petitioner had one year from that date, i.e., until April 29,
17 2016, to file a timely federal petition. The instant action, filed January 15, 2017, is not timely
18 unless petitioner is entitled to statutory or equitable tolling.

19 A. Statutory Tolling

20 Title 28 U.S.C. § 2244(d)(2) provides that the time during which a properly filed
21 application for state post-conviction judgment or other collateral review with respect to the
22 pertinent judgment or claim is pending shall not be counted toward any period of limitation.

23 Pursuant to the mailbox rule, petitioner filed a habeas corpus petition in the California
24 Supreme Court on July 14, 2015. (ECF No. 15 at 13.) The California Supreme Court denied the
25 petition on October 28, 2015. (Id. at 32.) Thus, petitioner is entitled to 106 days of statutory
26 tolling. Adding 106 days of statutory tolling extends the limitations period from April 29, 2016
27 to August 13, 2016. The instant action is still not timely.

28 ///

1 B. Equitable Tolling

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

7 In the opposition, petitioner argues that he is entitled to equitable tolling on two grounds.
8 First, petitioner argues that the Clerk of this court destroyed his petition. Second, petitioner
9 argues that he was denied access to his legal property. The undersigned sets forth the grounds of
10 petitioner's claims for equitable tolling herein:

11 Reason for this long period to submit my petition is Court Clerk of
12 this Court that deliberately with criminal intent destroyed copy of
13 this petition and refused to file it twice. First in February 2016 and
14 then in April 2016. I contacted Court Clerk first and then Chief
15 Judge England of this court and Chief Justice Roberts of the U.S.
16 Supreme Court. You can see that petition is dated and signed 3
17 times, December 30, 2015, April 17, 2016 and January 15th 2017.
18 I also sent my receipts for copies I made in April to Judge Kendall
19 J. Newman as proof that I made copies and sent them by First Class
20 Mail. I enclose copies of 3 habeas petitions and one complaint.
21 Complaint case number is 2: 16-cv-00307 JAM KJN.

22 In May 2016 I was sent to DSH without my property as per CDCR
23 Regulation and was unable to send copy for the third time. I
24 appealed this issue but I was able to obtain my property in January
25 2017. Please see Exhibit A. Deadline may be tolled during period
26 in which petitioner lacked access to his legal files.

27 (ECF No. 16 at 2.)

28 Petitioner offers no evidence supporting his conclusory claim that the Clerk of the Court
destroyed or refused to file a petition. The undersigned is not persuaded by this argument for
equitable tolling.

 The undersigned now turns to petitioner's claim that he was denied access to his legal
property. Attached to petitioner's opposition is a response to petitioner's First Level grievance
addressing the claim that he was denied access to his legal property. (ECF No. 16 at 3.) The
response, dated January 30, 2017, states that petitioner claimed that his legal property remained at
the California Men's Colony ("CMC") when he was transferred from CMC to the California

1 Health Care Facility (“CHCF”) on April 12, 2016. (Id.) On October 18, 2016, petitioner was
2 transferred from CHCF to Salinas Valley State Prison (“SVSP”). (Id.) On November 9, 2016,
3 petitioner was transferred from SVSP to California State Prison-Los Angeles County (“LAC”).
4 (Id.) The response states that petitioner’s legal property was mailed from CMC to LAC via
5 Golden State Overnight on December 7, 2016. (Id.) The property arrived at LAC on December
6 8, 2016. (Id.)

7 The grievance discussed above confirms that petitioner was denied access to his legal
8 property from April 12, 2016, to some date after December 8, 2016. In his opposition, petitioner
9 alleges that he did not receive his legal property until January 2017. Petitioner filed the instant
10 action on January 15, 2017.

11 The deprivation of legal materials by prison officials constitutes an extraordinary
12 circumstance that justifies equitable tolling. Espinoza-Matthews v. California, 432 F.3d 1021,
13 1027 (9th Cir. 2005). In Espinoza-Matthews, Ninth Circuit also granted the petitioner equitable
14 tolling for the reasonable time it took petitioner to prepare and file his petition after the return of
15 his legal materials. (Id. at 1027-28.)

16 In the instant case, petitioner diligently sought the return of his legal property through
17 administrative grievances. Accordingly, petitioner is entitled to equitable tolling for the period of
18 time he was denied access to his legal materials. Petitioner also acted diligently in preparing and
19 filing his federal habeas petition after the return of his legal materials. Accordingly, petitioner is
20 entitled to equitable tolling from the date his legal materials were returned to when he filed the
21 instant action on January 15, 2017. For these reasons, the instant action is timely and
22 respondent’s motion to dismiss should be denied.

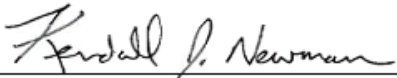
23 Accordingly, IT IS HEREBY RECOMMENDED that respondent’s motion to dismiss
24 (ECF No. 15) be denied; and respondent be ordered to file an answer to the petition within thirty
25 days of the order adopting these findings and recommendations

26 These findings and recommendations are submitted to the United States District Judge
27 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
28 after being served with these findings and recommendations, any party may file written

1 objections with the court and serve a copy on all parties. Such a document should be captioned
2 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the
3 objections shall be served and filed within fourteen days after service of the objections. The
4 parties are advised that failure to file objections within the specified time may waive the right to
5 appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

6 Dated: October 5, 2017

7


KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

8

Olic155.mtd

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28