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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOSE GUZMAN,

No. C 08-2066 SI (pr)

Petitioner,

ORDER OF DISMISSAL

v.

BEN CURRY, warden,

Respondent.

INTRODUCTION

Jose Guzman, a pro se prisoner, has filed a petition for writ of habeas corpus challenging a 2005 parole denial. Now before the court for consideration is respondent's unopposed motion to dismiss the petition as untimely. For the reasons discussed below, the court finds the petition to be barred by the statute of limitations and dismisses it.

BACKGROUND

Guzman was convicted in Los Angeles County Superior Court of second degree murder with use of a firearm and assault with a deadly weapon. In 1990, he was sentenced to 17 years to life in prison. His habeas petition does not challenge his conviction but instead challenges a September 13, 2005 decision of the Board of Parole Hearings ("BPH"), that found him not suitable for parole.

1 1079 (9th Cir. 2003) (limitations period began to run when BPT denied prisoner's administrative
2 appeal challenging the BPT's decision that he was unsuitable for parole). The "factual predicate"
3 of the habeas claims is the date on which the adverse administrative decision becomes final and
4 not and not the denial of the state habeas petition. See id. at 1082.

5 The BPH's September 13, 2005 decision denying parole for Guzman became final on
6 January 12, 2006. See 9/13/05 RT 55. That is the date on which the one-year limitations period
7 started. The presumptive deadline for Guzman to file his federal habeas petition therefore was
8 January 12, 2007.

9 The one-year limitations period will be tolled for the "time during which a properly filed
10 application for State post-conviction or other collateral review with respect to the pertinent
11 judgment or claim is pending." 28 U.S.C. § 2244(d)(2). A prisoner challenging an
12 administrative decision can receive statutory tolling for the period when state habeas petitions
13 are pending. See Redd, 343 F.3d at 1084. Once the limitations period expires it cannot be
14 revived, however. See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (“[S]ection
15 2244(d) does not permit the reinitiation of the limitations period that has ended before the state
16 petition was filed,” even if the state petition was timely filed). The only state habeas petition
17 was filed in October 2007, more than nine months after the expiration of the one-year deadline
18 and therefore could not toll or revive the limitations period under § 2244(d)(2).

19 The limitations period can be equitably tolled because § 2244(d) is a statute of limitations
20 and not a jurisdictional bar. Calderon v. United States District Court (Beeler), 128 F.3d 1283,
21 1288 (9th Cir. 1997), cert. denied, 523 U.S. 1, and cert. denied, 523 U.S. 1061 (1998), overruled
22 in part on other grounds by Calderon v. United States District Court (Kelly), 163 F.3d 530 (9th
23 Cir. 1998) (en banc), cert. denied, 526 U.S. 1060 (1999). Two standards have been articulated
24 for determining whether equitable tolling is appropriate. The standard that has long used in the
25 Ninth Circuit was that equitable tolling would not be available in most cases because extensions
26 of time should be granted only if "extraordinary circumstances beyond a prisoner's control make
27 it impossible to file a petition on time." Beeler, 128 F.3d at 1288 (citation and internal quotation
28 marks omitted). The Supreme Court articulated the standard differently, and stated that "a

1 litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has
2 been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his
3 way.” Pace, 544 U.S. at 418 (petitioner's lack of diligence in filing timely state and federal
4 petitions precluded equitable tolling); Raspberry v. Garcia, 448 F.3d 1150, 1153 (9th Cir. 2006)
5 (quoting Pace); Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999) ("When external forces,
6 rather than a petitioner's lack of diligence, account for the failure to file a timely claim, equitable
7 tolling of the statute of limitations may be appropriate."). The Ninth Circuit has not settled on
8 a single consistent standard. See Harris v. Carter, 515 F.3d 1051, 1055 (9th Cir.), cert. denied,
9 129 S. Ct. 397 (2008) (declining to decide whether Pace standard differs from Beeler standard).
10 Under either articulation of the test, the petitioner bears the burden of showing that equitable
11 tolling is warranted in his case. See Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002);
12 Pace, 544 U.S. at 418.

13 Guzman does not argue that there is any reason for equitable tolling in his case. The court
14 need not decide whether the filing of the earlier federal petition would warrant equitable tolling
15 because the event occurred too late. Guzman’s first federal petition was not filed until June
16 2007, five months after the statute of limitations deadline had passed. Guzman’s current petition
17 was untimely filed and is barred by the habeas statute of limitations.

18 19 CONCLUSION

20 Respondent’s motion to dismiss is GRANTED. (Docket # 6.) The petition for writ of
21 habeas corpus is dismissed because it was not filed before the expiration of the limitations period
22 in 28 U.S.C. § 2244(d)(1). The clerk will close the file.

23 IT IS SO ORDERED.

24 DATED: May 22, 2009

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26 _____
27 SUSAN ILLSTON
28 United States District Judge