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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARCO ANTONIO CORREA,)	No. C 09-3347 MMC (PR)
)	
Petitioner,)	ORDER GRANTING EXTENSION OF
)	TIME TO FILE OPPOSITION;
v.)	GRANTING MOTION TO DISMISS
)	PETITION AS UNTIMELY
KENNETH CLARK, Warden,)	
)	(Docket No. 12 & 13)
Respondent.)	
_____)	

On July 21, 2009, petitioner, a California prisoner proceeding pro se, filed the above-titled petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Now pending before the Court is respondent’s motion to dismiss the petition as untimely. Petitioner has opposed the motion, and respondent has filed a reply.¹

BACKGROUND

On January 23, 2003, in the Superior Court of Santa Clara County (“Superior Court”), petitioner pleaded guilty to two counts of lewd acts on a child with the use of force. He was sentenced to sixteen years in state prison.

On August 24, 2004, the California Court of appeal affirmed the judgment. (People v.

¹Good cause appearing, petitioner’s request for an extension of time to file his opposition will be granted. Accordingly, the opposition is deemed timely.

1 Correa, No. H025733, 2004 WL 1902742 (Cal. Ct. App. Aug. 24, 2004)).² On November 10,
2 2004, the California Supreme Court denied review. (Mot. to Dismiss Ex. 2.)

3 Approximately five years later, on February 26, 2008, petitioner filed a habeas
4 petition in the Superior Court raising, for the first time, the claims he raises in the instant
5 petition, specifically, ineffective assistance of counsel, and violation of petitioner's right to a
6 jury trial as provided by Blakely v. Washington, 542 U.S. 296 (2004), and Cunningham v.
7 California, 549 U.S. 270 (2007). (Mot. to Dismiss Ex. 3.) On March 24, 2008, the Superior
8 Court denied relief. (Mot. to Dismiss Ex. 4.)

9 On April 21, 2008, petitioner filed a habeas petition in the California Court of Appeal.
10 On August 18, 2008, the petition was summarily denied. (Mot. to Dismiss Ex. 5.)

11 On October 6, 2008, petitioner filed a petition for review in the California Supreme
12 Court. On March 25, 2009, review was denied. (Mot. to Dismiss Ex. 6.)

13 As noted, the instant federal habeas petition was filed on July 21, 2009.

14 DISCUSSION

15 A. Standard of Review

16 The Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996 became law
17 on April 24, 1996, and imposed for the first time a statute of limitations on petitions for a
18 writ of habeas corpus filed by state prisoners. Petitions filed by prisoners challenging non-
19 capital state convictions or sentences must be filed within one year of the latest of:

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

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

25 (C) the date on which the constitutional right asserted was initially recognized
26 by the Supreme Court, if the right has been newly recognized by the Supreme

27 ²Petitioner does not provide the date on which the judgment was affirmed.
28 Respondent states the correct date in his moving papers, but cites to an appellate opinion
concerning petitioner's conviction in another case. (See Mot. to Dismiss Ex. 1.) The Court
thus takes judicial notice of the date of the unpublished opinion of the California Court of
Appeal.

1 Court and made retroactively applicable to cases on collateral review; or

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

4 28 U.S.C. § 2244(d)(1).

5 Respondent moves to dismiss the instant petition under 28 U.S.C. § 2244(d)(1)(A), on
6 the ground the petition was filed more than one year after petitioner's conviction became
7 final. In opposition, petitioner argues the petition is timely because he is entitled to delayed
8 commencement of the period of limitations under 28 U.S.C. § 2244(d)(1)(B) and (C).

9 B. Commencement of the Limitations Period

10 As noted, respondent argues the one-year limitations period commenced on the date
11 petitioner's judgment of conviction became final. Petitioner's judgment became final on
12 direct appeal on February 8, 2005, ninety days after the California Supreme Court denied
13 review and the date on which the time for petitioner to file a petition for a writ of certiorari
14 from the United States Supreme Court expired. See Bowen v. Roe, 188 F.3d 1157, 1159 (9th
15 Cir. 1999). Thus, under 28 U.S.C. § 2244(d)(1)(A), petitioner presumptively had until
16 February 9, 2006, to file a timely habeas petition in federal court.³

17 Petitioner maintains, however, that the limitations period did not commence until he
18 was able to bring in the California courts a claim that his sentence violated his right to a jury
19 trial under Cunningham v. California, 549 U.S. 270 (2007), which case held California's
20 determinate sentencing law violated the Sixth Amendment to the extent it authorized a judge,
21 as opposed to the jury, to find the facts permitting an upper term sentence. See 549 U.S. at
22 293. Specifically, petitioner argues the statute of limitations for his sentencing claim did not
23 begin to run until February 2, 2009, the date on which the California Supreme Court held, in

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25 _____
26 ³For purposes of determining whether a petition has been timely filed under AEDPA,
27 the one-year period is calculated in accordance with Rule 6 of the Federal Rules of Civil
28 Procedure, the general rule for computing time in federal courts. See Patterson v. Stewart,
251 F.3d 1243, 1246 (9th Cir. 2001). Under Rule 6, the day of the event triggering the time
period is excluded from the computation, while the last day of the time period is included.
Fed. R. Civ. P. 6(a)(1).

1 In re Gomez, 45 Cal.4th 650 (2009),⁴ that Cunningham applies on collateral review to
2 California cases in which the judgment was not final at the time Blakely v. Washington, 542
3 U.S. 296 (2004), was decided. Petitioner argues that until Gomez was decided, he was
4 “impeded” by the state, under 28 U.S.C. § 2244(d)(1)(B), from challenging his sentence
5 because the California Supreme Court previously had refused to apply Blakely to
6 California’s sentencing procedures. See Cunningham, 549 U.S. at 288-93 (overruling
7 California Supreme Court’s holding in People v. Black, 35 Cal.4th 1238 (2005), that Blakely
8 does not apply to California’s determinate sentencing law).

9 As set forth above, § 2244(d)(1)(B) provides that a petition may be filed within one
10 year of “the date on which the impediment to filing an application created by State action in
11 violation of the Constitution or laws of the United States is removed, if the applicant was
12 prevented from filing by such State action.” The Ninth Circuit has expressly held that a
13 state-created impediment under § 2244(d)(1)(B) exists only when a petitioner, as a result of
14 unconstitutional state action, has been impeded with respect to the filing of a habeas petition.
15 See Shannon v. Newland, 410 F.3d 1083, 1087-88 (9th Cir. 2005). Such impediment may
16 occur, for example, when state prison officials interfere with an inmate’s ability to prepare
17 and file a habeas petition by denying access to legal materials, or when a state court refuses
18 to rule on a constitutional claim that has been properly presented to it. See id. By contrast,
19 no such impediment exists when a petitioner is not precluded from raising a challenge in state
20 court, even if the state has determined its own substantive law in a way that provides no
21 meritorious claim for federal relief. Id. Here, petitioner’s argument that he was impeded
22 from filing a federal habeas petition prior to the Gomez decision is without merit, as
23 petitioner was not precluded from raising a challenge in state court to his sentence based
24 either on Blakely, which was decided while petitioner’s direct appeal was still pending, or
25 Cunningham, which was decided two years before Gomez.

26
27 ⁴Both petitioner and respondent refer to the Gomez case as “In re Sotero.” The
28 caption of the decision, however, is “In re Sotero Gomez on Habeas Corpus.” See 45 Cal.4th
650.

1 Petitioner further argues that he is entitled to delayed commencement of the
2 limitations period under 28 U.S.C. § 2244(d)(1)(C), which, as set forth above, provides that a
3 petition may be filed within one year of “the date on which the constitutional right asserted
4 was initially recognized by the Supreme Court, if the right has been newly recognized by the
5 Supreme Court and made retroactively applicable to cases on collateral review.” The
6 “Supreme Court” referenced in § 2244(d)(1)(C) is the United States Supreme Court; thus, to
7 the extent petitioner maintains that commencement of the limitations period was delayed
8 until the California Supreme Court issued its decision in Gomez, such argument fails.

9 Additionally, to the extent petitioner contends commencement of the limitations
10 period was delayed until the date on which Cunningham was decided, such argument is
11 without merit because the holding in Cunningham does not come within the parameters of
12 § 2244(d)(1)(C). Specifically, Cunningham did not “newly recognize” a constitutional right,
13 but, rather, simply extended to California’s sentencing scheme the right recognized in
14 Blakely. See Butler v. Curry, 528 F.3d 624, 639 (9th Cir. 2008). Further, even if
15 Cunningham’s holding does fall within § 2244(d)(1)(C), petitioner would have been required
16 to file his federal habeas petition no later than January 22, 2008, i.e., one year from
17 January 22, 2007, the date on which the Cunningham opinion was filed. Petitioner, however,
18 did not file his first state habeas petition raising a Cunningham claim until February 26,
19 2008. (See Mot. to Dismiss Ex. 3). By that date, more than one year had passed from the
20 date on which Cunningham was decided, and, consequently, the instant petition would be
21 untimely even if § 2244(d)(1)(C) is applicable. See Ferguson v. Palmateer, 321 F.3d 820,
22 823 (9th Cir. 2003) (“[S]ection 2244(d) does not permit the reinitiation of the limitations
23 period that has ended before the state petition was filed.”).

24 Accordingly, for the reasons stated above, the Court finds persuasive respondent’s
25 argument that the one-year limitations period commenced on the date petitioner’s judgment
26 of conviction became final, specifically, February 8, 2005. As noted, under such
27 circumstances, petitioner presumptively had until February 9, 2006, to file a timely habeas
28 petition in federal court. As the instant petition was not filed until July 21, 2009, however,

1 the petition is untimely unless petitioner is entitled to statutory or equitable tolling.

2 C. Statutory Tolling

3 Pursuant to § 2244(d)(2), the running of the one-year statutory limitations period is
4 tolled for the “time during which a properly filed application for State post-conviction or
5 other collateral review with respect to the pertinent judgment or claim is pending.”
6 28 U.S.C. § 2244(d)(2). The statutory limitations period is not tolled, however, for the time
7 between the date on which the relevant final decision under 28 U.S.C. § 2244(d)(1) is issued
8 and the date on which the first state collateral challenge is filed. Nino v. Galaza, 183 F.3d
9 1003, 1006 (9th Cir. 1999).

10 Here, the limitations period commenced on February 8, 2005, and continued to run for
11 more than five years, specifically, until February 26, 2008, the date on which petitioner filed
12 his first state habeas petition in Superior Court. Consequently, the one-year limitations
13 period already had expired before petitioner ever filed his first state habeas petition in
14 Superior Court. Petitioner’s subsequent filing of that petition did not initiate a new
15 limitations period. See Ferguson, 321 F.3d at 823. Accordingly, petitioner is not entitled to
16 statutory tolling of the limitations period.

17 D. Equitable Tolling

18 AEDPA’s one-year statute of limitations is subject to equitable tolling. Holland v.
19 Florida, 130 S. Ct. 2549, 2560 (2010). “[A] petitioner is entitled to equitable tolling only if
20 he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary
21 circumstance stood in his way and prevented timely filing.” Id. at 2562 (internal quotation
22 and citation omitted). Here, in opposition to the motion to dismiss, petitioner does not argue
23 he is entitled to equitable tolling, and no ground for such tolling is apparent from the record
24 that has been developed in this matter. Accordingly, the Court finds the petition is not
25 rendered timely on the basis of equitable tolling.

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CONCLUSION

For the reasons stated above, the Court orders as follows:

1. Petitioner's request for an extension of time to oppose the motion to dismiss is hereby GRANTED.
2. Respondent's motion to dismiss the petition as untimely is hereby GRANTED.

This order terminates Docket Nos. 12 and 13.

The Clerk shall enter judgment and close the file.

IT IS SO ORDERED.

DATED: December 10, 2010


MAXINE M. CHESNEY
United States District Judge