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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RODNEY BLACH,
Petitioner,

No. C 05-4446 PJH (PR)

vs.

**ORDER GRANTING
RESPONDENT'S MOTION TO
DISMISS**

JOHN DOVEY, Director of Adult
Institutions, CDCR,
Respondent.

_____ /

This is a habeas case brought pro se by a state prisoner under 28 U.S.C. § 2254. Respondent has filed a motion to dismiss on grounds that the petition is barred by the statute of limitations. Petitioner has filed an opposition and respondent a reply. Petitioner has filed several motions, none of which have sufficient merit to require deferring ruling on the motion to dismiss. For the reasons set out below, the motion to dismiss is granted

DISCUSSION

Respondent contends that this petition is barred by the statute of limitations. The statute of limitations is codified at 28 U.S.C. § 2244(d). Petitions filed by prisoners challenging non-capital state convictions or sentences must be filed within one year of the latest of the date on which: (A) the judgment became final after the conclusion of direct review or the time passed for seeking direct review; (B) an impediment to filing an application created by unconstitutional state action was removed, if such action prevented petitioner from filing; (C) the constitutional right asserted was recognized by the Supreme Court, if the right was newly recognized by the Supreme Court and made retroactive to cases on collateral review; or (D) the factual predicate of the claim could have been

United States District Court
For the Northern District of California

1 discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1). Time during
2 which a properly filed application for state post-conviction or other collateral review is
3 pending is excluded from the one-year time limit. *Id.* § 2244(d)(2).

4 The starting date for most state prisoner habeas petitions is the date direct review
5 concluded, and respondent contends that should be the starting date here. On September
6 16, 2003, the California Court of Appeal affirmed the judgment except as to an arson
7 enhancement, and remanded for resentencing. On December 17, 2003, the California
8 Supreme Court denied review. On January 22, 2004, petitioner was resentenced. He did
9 not appeal, so the latest his direct appeal could be deemed to have been completed was
10 upon the expiration of time to appeal from the resentencing, March 22, 2004. If the
11 limitations period began running upon completion of direct review, the deadline for
12 petitioner to file this petition thus was March 22, 2005. *See Patterson v. Stewart*, 251 F.3d
13 1243, 1246 (9th Cir. 2001) (adopting what is referred to as the “anniversary method”
14 because, absent any tolling, the expiration date of the limitation period will be the same
15 date as the triggering event but in the following year). It in fact was not filed until it was
16 placed in the mail on October 27, 2005, 219 days after the deadline. This petition thus is
17 untimely unless tolling applies or a different starting date is used.

18 In his opposition to the motion to dismiss, petitioner complains of difficulty in gaining
19 access to his legal papers. It is not clear whether he means this only as an argument for
20 equitable tolling, or also intends to assert a different starting date for the limitations period,
21 namely that set out in section 2244(d)(1)(B), the date an impediment to filing an application
22 created by unconstitutional state action was removed. Because it is understandable that
23 the distinction might be confusing to a layperson; the court will overlook his failure to clarify
24 the point and will treat his opposition as raising both arguments.

25 The contention that the starting date should be determined under section
26 2244(d)(1)(B) is plainly without merit. In the recent case of *Ramirez v. Yates*, 571 F.3d 993
27 (9th Cir. 2009), the Ninth Circuit held that a section 2244(d)(1)(B) claim must meet “a far
28 higher bar than that for equitable tolling.” *Id.* at 1000-01. When the constitutional right

1 alleged to have been violated is that of access to the courts, as it is here, the delayed start
2 of the limitations period is available only if the impediment prevented the prisoner from filing
3 his claims in “any form in any court.” See *id.* at 1000-01 (emphasis in original) (refusing to
4 allow delayed commencement under 28 U.S.C. § 2244(d)(1)(B) when prisoner filed three
5 state petitions, a state discovery motion, and a federal motion during the relevant time).
6 Here petitioner managed to file with this court a request for an extension of time to file his
7 habeas petition; it was filed on December 14, 2004, after completion of direct review but
8 before expiration of the limitations period, that is, it shows he was not completely prevented
9 from filing by the problems with access to his voluminous legal papers. See *Blach v.*
10 *Campbell*, No. C 04-5284 PJH (PR). Thus it is clear that he was not prevented from filing
11 “in any form in any court,” the prerequisite under *Ramirez* for application of section
12 2244(d)(1)(B).¹ See *Ramirez*, 571 F.3d at 1000-01. Petitioner’s contention that the starting
13 date should be a date other than completion of direct review is rejected.

14 Petitioner also contends he is entitled to equitable tolling. “To receive equitable
15 tolling, “[t]he petitioner must establish two elements: (1) that he has been pursuing his
16 rights diligently, and (2) that some extraordinary circumstances stood in his way.” *Bryant*
17 *v. Arizona Atty. Gen.*, 499 F.3d 1056, 1061 (9th Cir. 2007) (quoting *Rasberry v. Garcia*, 448
18 F.3d 1150, 1153 (9th Cir.2006)). The petitioner must additionally show that “the
19 extraordinary circumstances were the cause of his untimeliness,” *id.* (quoting *Spitsyn v.*

21 ¹The court notes that although the court in *Ramirez* was absolute – only a complete
22 inability to file anything in any court triggers the alternative starting date – in this case petitioner
23 could not meet even a more lenient standard. He has filed no state habeas petitions aside
24 from the lengthy one he filed with his direct appeal and which was decided with it, so he has
25 not exhausted any issues other than those that were raised on direct appeal or in the
26 accompanying habeas petition, and only those issues could properly be included in a federal
27 petition. Although not much clearly emerges from his allegations regarding access to his legal
28 papers at the relevant time, one thing that is clear is that he was not completely prevented from
having any access at all, and that his real complaint is that access was not sufficient to allow
him to make the sort of complex and lengthy arguments he prefers. He also alleges that he
had considerable help from outside the prison. Even with only minimal access to his papers
he could have used his appellate brief and habeas petition to compose the federal petition, or
he could have asked his outside helpers to send him those two items. Thus, even under a less
demanding standard, the facts he alleges would not have prevented him from filing his petition.

1 *Moore*, 345 F.3d 796, 799 (9th Cir.2003)), and that the “extraordinary circumstances
2 ma[de] it impossible to file a petition on time,” *Roy*, 465 F.3d at 969 (quoting *Calderon v.*
3 *United States Dist. Court (Beeler)*, 128 F.3d 1283, 1288 (9th Cir.1997)).” *Ramirez v. Yates*,
4 571 F.3d 993, 997 (9th Cir. 2009).

5 Petitioner fails to say which papers were seized when, and although he says that
6 allegations relevant to his equitable tolling argument are contained in the exhibits attached
7 to the opposition, he does not say where in the voluminous attachments they might be, or
8 what they might say. This is sufficient in itself to reject the equitable tolling argument. See
9 *Keenan v. Allen*, 91 F.3d 1275, 1279 (9th Cir. 1996) (summary judgment case; holding that
10 it is not the task of the district court to scour the record in search of a genuine issue of
11 triable fact when litigant has failed to point out where such evidence might be found).

12 Petitioner’s arguments also have other defects. Petitioner asserts that the loss of his
13 papers requires tolling of “ENTIRE period (23 Mar 05 thru 27 Oct 05) that state retained
14 seized legal papers.” Pet’r P. & A. at 15. Because the limitations period expired on March
15 22, 2005, this allegation provides no basis for equitable tolling. On the other hand,
16 elsewhere in his opposition brief he contends that the “duration of impediment” was
17 “15Jul03 - 26Oct05,” *id.* at 12, which is the relevant period, but provides no clear indication
18 of what papers were stored – it seems from some of his allegations that his point is that not
19 *all* of his papers were permitted to be in his cell at one time – and does not say how long
20 they were stored. He alleges, as part of the same discussion, that he was “cyclically”
21 deprived of papers, and that this had a “chilling” effect. *Id.* Aside from being conclusory
22 and fact-free, even if these allegations were true they would not show that the periodic
23 deprivation of access to his papers, or some of them, made it “impossible” for petitioner to
24 file his petition on time, nor would they show that he was diligent in trying to file it.

25 Petitioner has not carried his burden to show that equitable tolling applies. See
26 *Smith v. Duncan*, 297 F.3d 809, 814 (9th Cir. 2002) (petitioner claiming equitable tolling
27 bears burden of demonstrating limitation period was sufficiently tolled).

28 Because petitioner has failed to establish any basis for avoiding the statute of

1 limitations, the motion to dismiss will be granted.

2 **CONCLUSION**

3 Respondent's motion to dismiss (document number 54 on the docket) is **GRANTED**.
4 The petition is **DISMISSED**. Petitioner's pending motions (documents number 52, 53, 55 &
5 61) are **DENIED** as moot. The clerk shall close the file.

6 **IT IS SO ORDERED.**

7 Dated: September 8, 2009.



PHYLLIS J. HAMILTON
United States District Judge

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