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

JOSE L. MURILLO,

Petitioner,

v.

KELLY HARRINGTON, Warden,

Respondent.

No. C 09-03346 CW (PR)

ORDER GRANTING RESPONDENT'S
MOTION TO DISMISS PETITION AS
UNTIMELY; AND DENYING
CERTIFICATE OF APPEALABILITY

(Docket no. 19)

INTRODUCTION

On July 21, 2009, Petitioner Jose L. Murillo, a state prisoner incarcerated at Kern Valley State Prison, filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Before the Court is Respondent's motion to dismiss the petition as untimely under 28 U.S.C. § 2244(d), the statute of limitations established by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Petitioner filed an opposition, and Respondent filed a reply.

For the reasons set forth below, the Court GRANTS Respondent's motion to dismiss.

BACKGROUND

On March 17, 2006, Petitioner plead guilty to and was convicted of two counts of attempted and three counts of completed second degree robbery as well as one count of reckless driving while fleeing a police officer. He also admitted to personally using a firearm in connection with the robberies and intentionally discharging a firearm in connection with one of the attempted robberies. On December 19, 2006, the state appellate court affirmed Petitioner's conviction.

1 On January 28, 2008, Petitioner filed a habeas petition in the
2 Santa Clara County Superior Court, claiming ineffective assistance
3 of counsel for failing to display surveillance footage at a
4 preliminary hearing. On March 12, 2008, that court denied the
5 petition without prejudice, requiring that Petitioner present more
6 facts to set forth a prima facie case and recommending that he
7 attach to any future petitions the surveillance video that he
8 believed should have been used at the preliminary hearing. To
9 obtain the surveillance video, Petitioner sent a letter to his
10 trial counsel requesting his case file on March 27, 2008. After
11 more than three months, Petitioner's trial counsel mailed the case
12 file on July 8, 2008.

13 On November 10, 2008, Petitioner filed a second habeas
14 petition in the state superior court, claiming ineffective
15 assistance of counsel and attaching the surveillance video. On
16 January 14, 2009, the state superior court denied the second
17 petition.

18 On April 17, 2009, Petitioner filed a habeas corpus petition
19 in the state appellate court. That court denied the petition on
20 April 23, 2009.

21 Petitioner filed the present federal habeas petition on July
22 21, 2009. On the same day, Petitioner filed a motion for stay in
23 order to exhaust state court remedies.

24 In an Order dated October 22, 2009, the Court granted
25 Petitioner's motions, directed him to file quarterly status
26 reports, and instructed the Clerk to administratively close this
27 case until the Court lifted the stay.
28

1 On July 22, 2009, Petitioner filed a habeas corpus petition in
2 the state supreme court. That court denied the petition on
3 December 23, 2009.

4 On January 14, 2010, Petitioner filed a motion to reopen the
5 case and to lift the stay. He also filed a motion to file a
6 supplement to the petition.

7 In an Order dated February 17, 2010, the Court granted
8 Petitioner's motion to reopen the case and lift the stay. He was
9 also granted leave to file a supplement to the petition. The Court
10 ordered Respondent to show cause why the petition should not be
11 granted.

12 On July 27, 2010, Respondent filed the present motion to
13 dismiss. On August 30, 2010, Petitioner filed his opposition. On
14 September 14, 2010, Respondent filed his reply.

15
16 DISCUSSION

17 AEDPA imposes a statute of limitations on petitions for a writ
18 of habeas corpus filed by state prisoners. Petitions filed by
19 prisoners challenging non-capital state convictions or sentences
20 generally must be filed within one year of the date on which the
21 judgment became final after the conclusion of direct review or the
22 time passed for seeking direct review.

23 In the present case, the state appellate court affirmed
24 Petitioner's conviction on December 19, 2006. That decision became
25 final thirty days later, on January 18, 2007. See Cal. Rules of
26 Court 8.366(b)(1). Petitioner did not file a petition for review
27 in the California Supreme Court, and his time to seek further
28 direct review expired ten days after the state appellate court's

1 decision became final. See Cal. Rules of Court 8.500(e)(1).
2 Therefore, AEDPA's one year statute of limitations began running on
3 January 28, 2007. 28 U.S.C. § 2244(d)(1)(A).

4 Accordingly, Petitioner was required to file a federal habeas
5 corpus petition no later than January 28, 2008. 28 U.S.C.
6 § 2244(d). Because he did not file the present petition until July
7 21, 2009 -- more than a year and a half after the limitations
8 period had expired -- the petition is untimely unless Petitioner
9 can show he is entitled to tolling.

10 I. Statutory Tolling

11 Here, the limitations period had run for 364 days before
12 Petitioner began to pursue collateral relief on January 28, 2008.
13 Petitioner is entitled to statutory tolling while his first round
14 of state court petitions remained pending, which ended when the
15 superior court denied his first petition on March 12, 2008.
16 However, Petitioner is not entitled to statutory tolling during the
17 periods the second superior court petition, the appellate court
18 petition, and the supreme court petition were pending, including
19 the gaps between these petitions, as explained below.
20

21 AEDPA's one-year limitations period is tolled for "[t]he time
22 during which a properly filed application for State post-conviction
23 or other collateral review with respect to the pertinent judgment
24 or claim is pending" 28 U.S.C. § 2244(d)(2). The
25 limitations period is also tolled during the time between a lower
26 state court's decision and the filing of a notice of appeal to a
27 higher state court. Carey v. Saffold, 536 U.S. 214, 223 (2002).
28 In California, where prisoners generally use the State's original

1 writ system, this means that the limitations period remains tolled
2 during the intervals between a state court's disposition of an
3 original state habeas petition and the filing of the next original
4 state habeas petition in a higher court, provided the prisoner did
5 not delay unreasonably in seeking review in the higher court. See
6 id. at 220-25.

7 The Ninth Circuit has held that if a California prisoner's
8 petition to the California Supreme Court is denied without
9 prejudice, with citations to cases requiring petitions to allege
10 with particularity the facts warranting habeas relief and allowing
11 amendment to comply, the prisoner may be entitled to tolling until
12 he returns to the lower courts to correct the deficiencies. See
13 King v. Roe, 340 F.3d 821, 823 (9th Cir. 2003). To determine if a
14 prisoner is entitled to tolling between the denial of his first
15 petition and commencement of the second round of petitions, the
16 court should apply a two-part test:

17 First, we ask whether the petitioner's subsequent
18 petitions are limited to an elaboration of the facts
19 relating to the claims in the first petition. If not,
20 these petitions constitute a "new round" and the gap
21 between the rounds is not tolled. But if the petitioner
22 simply attempted to correct the deficiencies, then the
23 petitioner is still making "proper use of state court
24 procedures," and his application is still "pending" for
25 tolling purposes. We thus construe the new petitions as
26 part of the first "full round" of collateral review.

27 Id. (citations omitted).

28 Second, the court must determine whether the subsequent
petitions "were ultimately denied on the merits or deemed
untimely." Id. "In the former event, the time gap between the
petitions is tolled; in the latter event it is not." Id. A court
order "denying a petition 'on the merits' does not automatically

1 indicate that the petition was timely filed." Evans v. Chavis, 546
2 U.S. 189, 197 (2006).

3 In the absence of [a] . . . clear indication that a
4 particular request for appellate review was timely or
5 untimely, the Circuit must itself examine the delay in
6 each case and determine what the state courts would
7 have held in respect to timeliness. That is to say,
8 without using a merits determination as an "absolute
9 bellwether" (as to timeliness), the federal court must
10 decide whether the filing of the request for
11 state-court appellate review (in state collateral
12 review proceedings) was made within what California
13 would consider a "reasonable time."

14 Id.

15 A determination of unreasonable delay is particularly
16 difficult to make in California: "The fact that California's
17 timeliness standard is general rather than precise may make it more
18 difficult for federal courts to determine just when a review
19 application . . . comes too late." Saffold, 536 U.S. at 223.
20 Evans held, however, that California's appellate system could be
21 treated similarly to those in other states, which measure delays
22 "in terms of a determinate time period, such as 30 or 60 days."
23 Evans, 546 U.S. at 192. In other words, "California's 'reasonable
24 time' standard [should] not lead to filing delays substantially
25 longer than those in States with determinate timeliness rules."
26 Id. at 200 (citing Saffold, 536 U.S. at 222-23). Based on the
27 Supreme Court's reference to the usual thirty or sixty day periods
28 provided by states with determinate deadlines, a delay of sixty
days would likely be reasonable. On the other hand, a longer delay
of six months would likely be unreasonable: "Six months is far
longer than the 'short period[s] of time,' 30 to 60 days, that most
States provide for filing an appeal to the state supreme court."
Id. at 201.

1 The language in Evans referred to above -- that most states
2 find thirty to sixty days to be reasonable -- seems to imply that
3 delays are reasonable only if they are of roughly that magnitude,
4 thirty to sixty days. More conclusive is the Supreme Court's
5 statement that in determining whether a delay is reasonable "the
6 [Ninth] Circuit must keep in mind that, in Saffold, we held that
7 timely filings in California fell within the federal tolling
8 provision on the assumption that California law in this respect
9 did not differ significantly from the laws of other states, i.e.,
10 that California's 'reasonable time' standard would not lead to
11 filing delays substantially longer than those in States with
12 determinate timeliness rules." Id. at 199-200 (citing Saffold,
13 536 U.S. at 222-23). "California, of course, remains free to tell
14 us if, in this respect, we were wrong." Id. at 200.

15 In the present case, the state superior court denied
16 Petitioner's January 28, 2008 petition without prejudice.
17 Although King involved the California Supreme Court's denial
18 without prejudice, the same principle applies here and this Court
19 employs King's two-part test. See Banjo v. Ayers, 614 F.3d 964
20 (9th Cir. 2010) (employing the King test in case involving two
21 consecutive superior court petitions).

22 Like in his January 28, 2008 petition, Petitioner alleges
23 ineffective assistance of counsel -- for failing to display
24 surveillance footage at a preliminary hearing -- in his second
25 superior court petition, filed on November 10, 2008. (Mot. to
26 Dismiss, Ex. 2, 4.) The November 10, 2008 petition contains more
27 detail regarding Petitioner's defense counsel and attaches the
28

1 requested surveillance video. Id. It also contains other claims.
2 Even assuming the November 10, 2008 petition is construed as part
3 of the "first 'full round' of collateral review," King, 340 F.3d
4 at 823, the gap between the two superior court petitions is not
5 tolled because the second prong of the King test fails, as
6 discussed below.

7 The state superior court denied the November 10, 2008
8 petition on the merits, but it did not discuss timeliness and thus
9 did not provide a clear indication that the petition was timely or
10 untimely pursuant to Evans. (Mot. to Dismiss, Ex. 5.) However, a
11 California court would not have concluded that the November 10,
12 2008 petition was filed within the "reasonable" delay of thirty to
13 sixty days articulated in Evans.

14 Taking the entire period as a whole, the eight-month gap
15 between the superior court's March 12, 2008 denial and the filing
16 of Petitioner's November 10, 2008 petition is arguably a period of
17 "unreasonable delay." See Evans, 546 U.S. at 201 (finding six
18 months "far longer than the 'short period[s] of time,' 30 to 60
19 days, that most States provide for filing an appeal to the state
20 supreme court" and therefore unreasonable); Chaffer v. Prosper,
21 592 F.3d 1046, 1048 (9th Cir. 2010) (per curiam) (finding
22 unexplained delays of 115 and 101 days between California habeas
23 petitions were not reasonable). However, Petitioner argues that
24 he did not have access to his case file and the surveillance video
25 from March 27, 2008 through July 8, 2008.¹ Even assuming the
26

27 ¹ The Court will further consider below whether Petitioner is
28 entitled to equitable tolling during the period he did not have
access to his case file.

1 three-and-a-half month wait for his case file was reasonable,
2 Petitioner waited from July 8, 2008 until November 10, 2008 --
3 over four months -- to re-file. Because Petitioner offers no
4 justification for the four-month delay after receiving his case
5 file, the Court finds this delay unreasonable. See Banjo, 614
6 F.3d at 970 (finding delay of 146 days between successive
7 petitions not reasonable). Because Petitioner fails the second
8 prong of the King test, he is not entitled to statutory tolling
9 for the gap between his two superior court petitions.

10 As mentioned above, Petitioner waited 364 days before
11 pursuing collateral relief and only one day remained before the
12 statutory limitations period expired.² As explained above,
13 Petitioner is only entitled to statutory tolling of the
14 limitations period during the time his first superior court
15 petition was pending until it was denied on March 12, 2008.
16 Thereafter, Petitioner had only one day, or until March 13, 2008
17 to file his federal habeas petition.³ Because Petitioner filed
18 his federal habeas petition on July 21, 2009 -- more than a year
19 after the statute of limitations had expired -- his petition is
20 untimely unless he is entitled to equitable tolling.

21
22 ² Petitioner has failed to explain his delay in filing his
23 state superior court habeas petition or to claim that he is
24 entitled to equitable tolling at any time during this delay;
therefore, the Court need not address this issue.

25 ³ Petitioner is not entitled to statutory tolling during the
26 pendency of his second superior court petition, his appellate court
27 petition, or his state supreme court petition under Section
28 2244(d)(2) because the limitations period had already run on March
13, 2008. See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir.
2003) (a state habeas petition filed after AEDPA's statute of
limitations ended cannot toll the limitations period).

1 II. Equitable Tolling

2 Petitioner argues that he is entitled to equitable tolling of
3 the eight-month gap between his two superior court petitions
4 because his untimeliness was caused by extraordinary circumstances
5 beyond his control. (Opp'n at 4-6.) Petitioner claims that
6 because his trial counsel was in possession of the case file until
7 July 8, 2008, he could not file a timely second superior court
8 petition. Id. Petitioner also argues his file contained "several
9 cd-roms" which he was "repeatedly denied . . . forcing [him] to
10 resubmit the [superior court] petition without certain knowledge
11 of what is actually in the discs." Id. at 5.

12 The one-year limitations period can be equitably tolled
13 because § 2244(d) is a statute of limitations and not a
14 jurisdictional bar. See Calderon v. United States District Court
15 (Beeler), 128 F.3d 1283, 1288 (9th Cir. 1997), overruled in part
16 on other grounds by Calderon v. United States District Court
17 (Kelly), 163 F.3d 530 (9th Cir. 1998) (en banc). "When external
18 forces, rather than a petitioner's lack of diligence, account for
19 the failure to file a timely claim, equitable tolling of the
20 statute of limitations may be appropriate." Miles v. Prunty, 187
21 F.3d 1104, 1107 (9th Cir. 1999). Equitable tolling will not be
22 available in most cases because extensions of time should be
23 granted only if "'extraordinary circumstances' beyond a prisoner's
24 control make it impossible to file a petition on time." Beeler,
25 128 F.3d at 1288 (citation omitted). The prisoner must show that
26 "the 'extraordinary circumstances' were the cause of his
27 untimeliness." Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir.

1 2003) (citations omitted). Another statement of the standard is
2 that a litigant seeking equitable tolling bears the burden of
3 establishing two elements: "(1) that he has been pursuing his
4 rights diligently, and (2) that some extraordinary circumstance
5 stood in his way," preventing timely filing. Pace v. DiGuglielmo,
6 544 U.S. 408, 418 (2005).

7 The Ninth Circuit has said that the petitioner "bears the
8 burden of showing that this extraordinary exclusion should apply
9 to him." Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002).
10 Indeed, "'the threshold necessary to trigger equitable tolling
11 [under AEDPA] is very high, lest the exceptions swallow the
12 rule.'" Id. at 1066 (quoting United States v. Marcello, 212 F.3d
13 1005, 1010 (7th Cir.), cert. denied, 531 U.S. 878 (2000)).

14 However, "[r]ather than let procedural uncertainties
15 unreasonably snuff out a constitutional claim, the issue of when
16 grave difficulty merges literally into 'impossibility' should be
17 resolved in [a petitioner's] favor." Lott v. Mueller, 304 F.3d
18 918, 920 (9th Cir. 2002). When a prisoner is proceeding pro se,
19 his allegations regarding diligence in filing a federal petition
20 on time must be construed liberally. Roy v. Lampert, 465 F.3d
21 964, 970 (9th Cir. 2006).

22 A habeas petitioner cannot be expected to "'prepare and file
23 a meaningful petition on his own within the limitations period'
24 without access to his legal file." Espinoza-Matthews v.
25 California, 432 F.3d 1021, 1027-28 (9th Cir. 2005) (quoting
26 Spitsyn, 345 F.3d at 801). However, the grounds for granting
27 equitable tolling are "highly fact dependant." Lott, 304 F.3d at
28

1 923. Where a prisoner fails to show "any causal connection"
2 between the grounds upon which he asserts a right to equitable
3 tolling and his inability to file a timely federal habeas
4 application, the equitable tolling claim will be denied. Gaston
5 v. Palmer, 417 F.3d 1030, 1034-35 (9th Cir. 2005), amended, 447
6 F.3d 1165 (9th Cir. 2006).

7 A pro se petitioner's lack of legal sophistication is not, by
8 itself, an extraordinary circumstance warranting equitable
9 tolling. Raspberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006).
10 Nor do "ordinary prison limitations on . . . access to the law
11 library and copier" constitute extraordinary circumstances or make
12 it impossible to file on time. See Ramirez v. Yates, 571 F.3d
13 993, 998 (9th Cir. 2009).

14 Here, as mentioned above, Petitioner received his case file
15 from his trial counsel on July 8, 2008. Arguably, Petitioner
16 could not prepare a "meaningful" superior court petition without
17 the file. See Espinoza-Matthews, 432 F.3d at 1027. Specifically,
18 Petitioner would have not been able to re-file his superior court
19 petition until he had access to the surveillance video from his
20 case file. Therefore, Petitioner is entitled to equitable tolling
21 from March 12, 2008, when the state superior court denied his
22 petition, until July 8, 2008, when his trial counsel mailed his
23 case file. The record shows Petitioner waited another four months
24 before re-filing his superior court petition. Petitioner does not
25 show "any causal connection" between his lack of access to the
26 "cd-roms" from his file and his inability to file a timely
27 petition. Gaston, 417 F.3d at 1034. Petitioner's lack of access
28

1 to "cd-roms" in his file did not delay the filing of his second
2 superior court petition. His primary need for the case file was
3 to gain access to the surveillance video, not to discover more
4 information on these "cd-roms." Therefore, Petitioner is not
5 entitled to further equitable tolling after he received his case
6 file on July 8, 2008. Therefore, since Petitioner had only one
7 day remaining to file a timely petition, the limitations period
8 expired the following day on July 9, 2008.

9 In sum, the one year limitations period ran 364 days from
10 January 28, 2007 until January 28, 2008, when Petitioner filed his
11 habeas petition in the state superior court. Petitioner is
12 entitled to statutory tolling from January 28, 2008 until the
13 state superior court denied his petition on March 12, 2008.
14 Petitioner is not entitled to further statutory tolling after
15 March 12, 2008 because the eight-month gap between the two
16 superior court petitions was not reasonable. Petitioner is
17 entitled to equitable tolling from March 12, 2008 until the date
18 he received his complete case file on July 8, 2008; however he is
19 not entitled to any further equitable tolling for his lack of
20 access to "cd-roms." Thus, the limitations period expired on July
21 9, 2008. Accordingly, the present petition filed on July 22,
22 2009 -- more than a year later -- is untimely.

23 CONCLUSION

24 For the foregoing reasons, the Court GRANTS Respondent's
25 motion to dismiss the petition as untimely; the petition is hereby
26 DISMISSED with prejudice.
27

28 Further, a certificate of appealability is DENIED.

1 Petitioner has not shown "that jurists of reason would find it
2 debatable whether the district court was correct in its procedural
3 ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000). Petitioner
4 may seek a certificate of appealability from the Ninth Circuit
5 Court of Appeals.

6 The Clerk of the Court shall terminate all pending motions
7 and shall enter judgment and close the file.

8 This Order terminates Docket no. 19.

9 IT IS SO ORDERED.

10 DATED: 3/7/2011



CLAUDIA WILKEN

United States District Judge

1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4 JOSE L. MURILLO,

5 Case Number: CV09-03346 CW

6 Plaintiff,

7 **CERTIFICATE OF SERVICE**

8 v.

9 KELLY HARRINGTON et al,

10 Defendant.
11 _____/

12 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District
13 Court, Northern District of California.

14 That on March 7, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said
15 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing
16 said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle
17 located in the Clerk's office.

18
19 Jose Luis Murillo F-22712
20 Salinas Valley State Prison
21 P.O. Box 1050
22 Soledad, CA 93960

23 Dated: March 7, 2011

24 Richard W. Wieking, Clerk
25 By: Nikki Riley, Deputy Clerk
26
27
28