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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

TRUNG QUANG PHAN,

Petitioner,

No. C 11-5286 PJH (PR)

vs.

MATHEW CATE, Warden,

Respondent.

**ORDER GRANTING
RESPONDENT'S MOTION TO
DISMISS AND GRANTING
CERTIFICATE OF
APPEALABILITY**

This is a habeas case brought pro se by a state prisoner under 28 U.S.C. § 2254. Petitioner was originally ordered to show cause why this petition should not be dismissed as untimely as it appeared to have been filed nearly six years after the expiration of the statute of limitations. Petitioner stated that he was unable to file a timely petition because he only speaks Vietnamese and did not have access to any translators or anyone to aid him in preparing a petition until now. The court served the petition on respondent to further develop the record. Respondent has filed a motion to dismiss on the grounds that the petition is barred by the statute of limitations. Petitioner has filed an opposition and respondent has replied. The motion will be granted for the reasons set out below.

DISCUSSION

Statute of Limitations

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

1 time passed for seeking direct review; (B) an impediment to filing an application created by
2 unconstitutional state action was removed, if such action prevented petitioner from filing;
3 (C) the constitutional right asserted was recognized by the Supreme Court, if the right was
4 newly recognized by the Supreme Court and made retroactive to cases on collateral
5 review; or (D) the factual predicate of the claim could have been discovered through the
6 exercise of due diligence. 28 U.S.C. § 2244(d)(1). Time during which a properly filed
7 application for state post-conviction or other collateral review is pending is excluded from
8 the one-year time limit. *Id.* § 2244(d)(2). The one-year period generally will run from "the
9 date on which the judgment became final by the conclusion of direct review or the
10 expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A).

11 The one-year period may start running from "the expiration of the time for seeking
12 [direct] review." 28 U.S.C. § 2244(d)(1)(A). "Direct review" includes the period within which
13 a petitioner can file a petition for a writ of certiorari from the United States Supreme Court,
14 whether or not the petitioner actually files such a petition. *Bowen v. Roe*, 188 F.3d 1157,
15 1159 (9th Cir. 1999). Accordingly, if a petitioner fails to seek a writ of certiorari from the
16 United States Supreme Court, the AEDPA's one-year limitations period begins to run on the
17 date the ninety-day period defined by Supreme Court Rule 13 expires. *See Miranda v.*
18 *Castro*, 292 F.3d 1063, 1065 (9th Cir. 2002) (where petitioner did not file petition for
19 certiorari, his conviction became final 90 days after the California Supreme Court denied
20 review); *Bowen*, 188 F.3d at 1159 (same).

21 Here, Petitioner had ninety days from August 11, 2004, when the state high court
22 denied review (Motion to Dismiss (MTD), Ex. 2), to file a petition for a writ of certiorari with
23 the Supreme Court. *See Bowen*, 188 F.3d at 1159. He did not. Thus, petitioner's one year
24 limitations period began to run on November 9, 2004, and expired on November 9, 2005.
25 See 28 U.S.C. § 2244(d)(1). Petitioner filed no state habeas petitions and this federal
26 petition was not filed until October 21, 2011, and is therefore untimely absent tolling.
27 Petitioner argues that while he was aware of the expiration of the statute of limitations, he is
28 entitled to equitable tolling pursuant to *Mendoza v. Carey*, 449 F.3d 1065 (9th Cir. 2006), in

1 that he is Vietnamese and cannot read or write either English or Vietnamese, and has
2 “poor” spoken English.

3 **Equitable Tolling**

4 AEDPA's one-year statute of limitations is subject to equitable tolling in appropriate
5 circumstances. *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010). “[A] petitioner is entitled
6 to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and
7 (2) that some extraordinary circumstance stood in his way and prevented timely filing.” *Id.*
8 at 2562 (internal quotation and citation omitted); accord *Miles v. Prunty*, 187 F.3d 1104,
9 1107 (9th Cir. 1999) (“When external forces, rather than a petitioner's lack of diligence,
10 account for the failure to file a timely claim, equitable tolling of the statute of limitations may
11 be appropriate.”). The diligence required to establish entitlement to equitable tolling is
12 “reasonable diligence.” *Holland*, 130 S. Ct. at 2565.

13 Petitioner bears the burden of showing “extraordinary circumstances were the cause
14 of his untimeliness.” *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003) (internal quotation
15 and citation omitted). Where a petitioner fails to show “any causal connection” between the
16 grounds upon which he asserts a right to equitable tolling and his inability to timely file a
17 federal habeas application, the equitable tolling claim will be denied. *Gaston v. Palmer*,
18 417 F.3d 1030, 1034–35 (9th Cir. 2005). Further, such Petitioner must show “his
19 untimeliness was caused by an external impediment and not by his own lack of diligence.”
20 *Bryant v. Arizona Attorney General*, 499 F.3d 1056, 1061 (9th Cir. 2007) (citing *Roy v.*
21 *Lampert*, 465 F.3d 964, 973 (9th Cir. 2006)).

22 In *Mendoza v. Carey*, 449 F.3d 1065 (9th Cir. 2006), a magistrate judge issued an
23 order for the petitioner to show cause why his petition should not be dismissed as untimely.
24 See *id.* at 1067. The petitioner there responded that he spoke Spanish, there were no
25 Spanish language law books in the law library, and only English-speaking clerks in the
26 library. *Id.* The magistrate judge recommended that the petition be dismissed as untimely
27 and the district court accepted the recommendation. *Id.* at 1068. The Ninth Circuit held
28 that Mendoza’s allegations that “he lack[ed] English language ability, was denied access to

1 Spanish-language legal materials, and could not procure the assistance of a translator
2 during the running of the AEDPA limitations period” was sufficient to allege “facts that, if
3 true, may entitle him to equitable tolling.” *Id.* at 1071. The court reversed and remanded
4 for “development of the record.” *Id.* Though, the Ninth Circuit was clear in stating “we
5 conclude that a non-English-speaking petitioner seeking equitable tolling must, at a
6 minimum, demonstrate that during the running of the AEDPA time limitation, he was
7 unable, despite diligent efforts, to procure either legal materials in his own language or
8 translation assistance from an inmate, library personnel, or other source.” *Id.* at 1070.

9 Here, petitioner contends that he speaks almost no English and very little Spanish.
10 He states he was born in Vietnam and lived in a Vietnamese community in the Bay Area his
11 entire life, but is not educated or intelligent. Petitioner has also supplied a declaration from
12 another inmate who states that petitioner is minimally competent in English and there are
13 very few other Vietnamese speakers at their facility, and they only speak a little
14 Vietnamese. For purposes of this motion the court will assume petitioner’s statement are
15 accurate and he has very little command of English, and Vietnamese speakers are rare or
16 non-existent at his facility.

17 However, to warrant equitable tolling petitioner must also demonstrate diligence in
18 attempting to file his petition or obtain assistance. *See Mendoza* at 1070. The statute of
19 limitations expired on November 9, 2005. Petitioner includes a letter he wrote to the
20 Northern California Innocence Project in 2005 where he requested and received his state
21 appellate filings. While this could perhaps show diligence in 2005, this federal petition was
22 not filed until 2011. Petitioner describes no other specific actions he took over the next six
23 years, instead stating that he sought help, but provides no details. This is insufficient to
24 warrant equitable tolling for such a long period of time. Moreover, the letter to the
25 California Innocence Project in 2005 demonstrates that petitioner did have at least some
26 ability to seek help but there is no indication of other letters sent to other legal organizations
27 or for translation assistance. Based on the bare record set forth by petitioner and the lack
28 of diligence in seeking assistance, both during or even after the AEDPA statute of

1 limitations, he is not entitled to equitable tolling and this petition is untimely.

2 **CONCLUSION**

3 Respondent's motion to dismiss (Docket No. 14) is **GRANTED** as discussed above.
4 The petition is **DISMISSED**. The clerk shall close the file.

5 **APPEALABILITY**

6 The federal rules governing habeas cases brought by state prisoners require a
7 district court that enters a final order adverse to the petitioner to grant or deny a certificate
8 of appealability in the order. See Rule 11(a), Rules Governing § 2254 Cases, 28 U.S.C.
9 foll. § 2254.

10 A petitioner may not appeal a final order in a federal habeas corpus proceeding
11 without first obtaining a certificate of appealability. See 28 U.S.C. § 2253(c); Fed. R. App.
12 P. 22(b). Section 2253(c)(1) applies to an appeal of a final order entered on a procedural
13 question antecedent to the merits, for instance a dismissal on statute of limitations grounds,
14 as here. See *Slack v. McDaniel*, 529 U.S. 473, 483 (2000).

15 "Determining whether a COA should issue where the petition was dismissed on
16 procedural grounds has two components, one directed at the underlying constitutional
17 claims and one directed at the district court's procedural holding." *Id.* at 484-85. "When the
18 district court denies a habeas petition on procedural grounds without reaching the
19 prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at
20 least, that jurists of reason would find it debatable whether the petition states a valid claim
21 of the denial of a constitutional right and that jurists of reason would find it debatable
22 whether the district court was correct in its procedural ruling." *Id.* at 484. As each of these
23 components is a "threshold inquiry," the federal court "may find that it can dispose of the
24 application in a fair and prompt manner if it proceeds first to resolve the issue whose
25 answer is more apparent from the record and arguments." *Id.* at 485. Supreme Court
26 jurisprudence "allows and encourages" federal courts to first resolve the procedural issue,
27 as was done here. See *id.*

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Here, the court concludes that reasonable jurists could find it debatable whether petitioner could be entitled to equitable tolling. The court therefore GRANTS a COA as to the issue of petitioner's lack of English language ability and inability to procure the assistance of a translator.

Accordingly, the clerk shall forward the file, including a copy of this order, to the Court of Appeals. See Fed. R. App. P. 22(b); *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997).

IT IS SO ORDERED.

Dated: April 22, 2013.



PHYLLIS J. HAMILTON
United States District Judge

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