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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

RAPHAEL JASSO,)	Civil No. 08-0548-JAH(PCL)
)	
Petitioner,)	ORDER:
v.)	
)	GRANTING PETITIONER'S MOTION
ROBERT T. HERNANDEZ, Warden,)	FOR EQUITABLE TOLLING (DOC.
)	#18)
Respondent.)	
)	DENYING AS MOOT PETITIONER'S
)	MOTION TO STAY AND ABEY
)	(DOC. #18)
)	
)	DENYING RESPONDENT'S MOTION TO
)	DISMISS (DOC. #8)

I.

BACKGROUND

On March 16, 2008, Raphael Jasso ("Petitioner"), a state prisoner proceeding pro se, filed a Petition For Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. On June 2, 2008, Petitioner filed a First Amended Petition. On July 16, 2008, Respondent Robert Hernandez ("Respondent") filed a Motion to Dismiss the First Amended Petition. On August 19, 2008, Petitioner filed a Motion for Appointment of Counsel. On

1 August 26, 2008, the Court granted Petitioner's Motion for Appointment
2 of Counsel due to Petitioner's allegations that he was mentally
3 incompetent to proceed *pro se*. On September 16, 2008, the Court held
4 a Status Conference. On November 5, 2008, Respondent filed a Supple-
5 mental Brief to his Motion to Dismiss. On November 26, 2008, Peti-
6 tioner's appointed counsel filed a Petition for Writ of Habeas Corpus
7 in the California Supreme Court for purposes of exhausting Peti-
8 tioner's state court remedies. On January 5, 2009, Petitioner filed a
9 Second Amended Protective Petition for Writ of Habeas Corpus.

10 Respondent seeks dismissal of the First Amended Petition by
11 claiming that it is barred by the statute of limitations and contains
12 unexhausted claims. Petitioner seeks to have the Second Amended
13 Petition stayed and for the Court to determine whether his Petition is
14 entitled to equitable tolling of the statute of limitations.

15 II.

16 PROCEDURAL HISTORY

17 Petitioner was convicted of attempted criminal threats. Peti-
18 tioner had a prior strike conviction, two prior serious felonies and
19 one prison prior. Petitioner was sentenced to 35 years to life
20 imprisonment for each of his convictions. (Respondent's Lodgment No.
21 1)

22 Petitioner appealed his conviction. On July 13, 2005, the Cali-
23 fornia Court of Appeal affirmed Petitioner's conviction. (Respondent's
24 Lodgment No. 1)

25 Petitioner did not file a Petition for Review or Petition for
26 Writ of Habeas Corpus in the California Supreme Court. (Respondent's
27
28

1 Lodgment No. 2) On March 16, 2008, Petitioner constructively¹ filed a
2 Petition for Writ of Habeas Corpus in this Court. On June 2, 2008,
3 Petitioner filed a First Amended Petition for Writ of Habeas Corpus.
4 On July 16, 2008, Respondent filed a Motion to Dismiss the First
5 Amended Petition. Petitioner did not file an Opposition to Respon-
6 dent's Motion to Dismiss. Instead, Petitioner filed Motions to Stay &
7 Abey Federal Proceedings and for Equitable Tolling of the Statute of
8 Limitations

9 **III.**

10 **DISCUSSION**

11 **A. Petitioner's Petition is Barred by the Statute of Limitations**

12 Respondent argues that the Petition is barred by the
13 Antiterrorism and Effective Death Penalty Act's ("the AEDPA") statute
14 of limitations. The provisions of the AEDPA apply to petitions for
15 writs of habeas corpus filed in federal court after the AEDPA's
16 effective date of April 24, 1996. Lindh v. Murphy, 521 U.S. 320, 117
17 S. Ct. 2059, 2068 (1997). Therefore, because the original Petition
18 was filed on March 16, 2008, the AEDPA applies to this case.

19 With enactment of the AEDPA, a state prisoner's time frame for
20 seeking federal habeas relief was dramatically limited. The AEDPA
21 provides for a one-year limitation period for state prisoners to file
22 habeas corpus petitions in federal court. Section 2244(d) states, in
23 pertinent part:

24 (d)(1) A 1-year period of limitation shall apply to an
25 application for a writ of habeas corpus by a person in
26 custody pursuant to the judgment of a State court. The
limitation period shall run from the latest of -

27 ¹The Court gives Petitioner the benefit of the mailbox rule which deems a
28 petition for writ of habeas corpus filed on the date the Petition is given to
prison officials for mailing and filing. Anthony v. Cambra 236 F.3d 568, 575 (9th
Cir. 2000)

1 (A) the date on which the judgment became final
2 by the conclusion of direct review or the expira-
tion of the time for seeking such review;

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

6 (C) the date on which the constitutional right
7 asserted was initially recognized by the Supreme
Court, if the right has been newly recognized by
8 the Supreme Court and made retroactively applica-
ble to cases on collateral review; or

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

11 (2) The time during which a properly filed application for
12 State post-conviction or other collateral review with re-
spect to the pertinent judgment or claim is pending shall
13 not be counted toward any period of limitation under this
subsection.

14 28 U.S.C.A. § 2244(d) (West Supp. 1998).

15 Direct review of Petitioner's judgment concluded on **August 22,**
16 **2005**, forty days after the period in which to file a Petition for
17 Review with the California Supreme Court expired. See 28 U.S.C.
18 §2244(d)(1)(A); Smith v. Duncan 297 F.3d 809, 812 (9th Cir. 2002).

19 Therefore, absent tolling under AEDPA, Petitioner had until
20 **August 22, 2006**, to file his Petition For Writ of Habeas Corpus with
21 this Court. The statute of limitations is not tolled from the time a
22 final decision is issued on direct state appeal and the time the first
23 state collateral challenge is filed because there is no case "pending"
24 during that interval. Nino v. Galaza, 183 F.3d 1003 (9th Cir. 1999).
25 Here, Petitioner did not file any state collateral challenges to his
26 conviction. Therefore, the statute of limitations was not tolled from
27 the date the judgment became final on **August 22, 2005** until he filed
28 his original Petition for Writ of Habeas Corpus in this Court on **March**

1 16, 2008. 937 days (2 years, 6 months, 23 days) elapsed between
2 August 22, 2005 and March 16, 2008. Therefore, Petitioner failed to
3 file his Petition for Writ of Habeas Corpus in this Court before the
4 statute of limitations expired.

5 **B. Petitioner's Motion for Equitable Tolling of the Statute of**
6 **Limitations ("MET")**

7 In Petitioner's MET, Petitioner states that he did not file his
8 Petition within AEDPA's one-year statute of limitations because
9 extraordinary circumstances beyond his control made it impossible for
10 him to file a timely petition. Specifically, Petitioner claims that
11 he suffers from serious mental illnesses, is "incompetent," can barely
12 read or write, and is taking several psychotropic medications. (MET at
13 5)

14 In order for Petitioner to show that he is entitled to equitable
15 tolling of the statute of limitations due to his mental illnesses,
16 Petitioner must present to the Court evidence of his mental illnesses
17 during the time period that the statute of limitations was not tolled
18 (August 22, 2005 to March 16, 2008).

19 1. Petitioner is Entitled to Equitable Tolling of the Statute
20 of Limitations

21 The United States Supreme Court has established a two-part test
22 to determine whether a petitioner is entitled to equitable tolling of
23 the statute of limitations. In Pace v. DiGuglielmo 544 U.S. 408, 418
24 (2005), the Court held that generally, a litigant seeking equitable
25 tolling of the statute of limitations bears the burden of establishing
26 (1) that he has been pursuing his rights diligently and, (2) that some
27 extraordinary circumstance stood in his way.

1 Equitable tolling of the one-year statute of limitations is
2 available only when extraordinary circumstances beyond a prisoner's
3 control make it impossible to file a petition on time and the extraor-
4 dinary circumstances were the cause of the untimeliness. Spitsyn v.
5 Moore 345 F.3d 796, 799 (9th Cir. 2003)

6 Therefore, whether the limitations period for Petitioner's
7 Petition should be tolled depends on whether his mental illnesses
8 between August 22, 2005 and March 16, 2008 constituted the kind of
9 extraordinary circumstances beyond his control that made timely filing
10 impossible.

11 A habeas petitioner's mental incompetency is a condition that is
12 an extraordinary circumstance beyond his control that justifies
13 tolling of the statute of limitations Calderon v. U.S. District Court
14 (Kelly) 163 F.3d 530, 541 (9th Cir. 1988), abrogated on other grounds
15 in Woodford v. Garceau 538 U.S. 202 (2003) Where a habeas peti-
16 tioner's mental incompetence in fact caused him to fail to meet the
17 AEDPA filing deadline, his delay was caused by an "extraordinary
18 circumstance beyond (his) control," and the deadline should be equita-
19 bly tolled. Laws v. LaMarque 351 F.3d 919, 923 (9th Cir. 2003)

20 On June 19 and July 29, 2009, Petitioner submitted his medical
21 and psychiatric records to the Court, dated from August 2005 to March
22 2008. The medical records indicate the following:

23 1. Petitioner suffers from Schizo-Affective Disorder, Depressive
24 Type and possible Bi-Polar Disorder. (Petitioner's Lodgment No. 3, RJ
25 581)

26 2. Since 1992 or 1993, Petitioner has suffered from a seizure
27 disorder, which is believed to have been caused by severe head trauma.
28 (Petitioner's Lodgment No. 3, RJ 388)

1 3. From before August 2005 to March 2008, the seizure disorder
2 caused Petitioner to have been intermittently hospitalized.

3 4. Prior to August 2005, Petitioner attempted suicide. From
4 November 2006 to January 2007, Petitioner was a patient at Vacaville
5 State Hospital, where he was treated for depression, suicidal
6 ideation, self-injurious behavior, and seizures. (Petitioner's Lodg-
7 ment No. 3, RJ 388, 456, 464, 465)

8 5. From March 2007 to December 2007, Petitioner suffered from
9 depression, paranoia and auditory hallucinations. (Petitioner's
10 Lodgment No. 3, RJ 519-569)

11 6. From August 2005 to March 2008, Petitioner was treated with
12 the following medications:

13 a. Prolixin, a medication used for treatment of schizophre-
14 nia, paranoia, hallucinations and bi-polar disorder
15 (www.about.net);

16 b. Buspar, a medication used for the treatment of anxiety
17 disorders (www.medicine.net);

18 c. Paxil, a medication used for the treatment of depressive,
19 anxiety, and panic disorders (www.drugs.com);

20 d. Cogentin, a medication used for the treatment of muscle
21 spasms when they are caused by medications such as Prolixin
22 (www.drugs.com);

23 e. Thorazine, a medication used for the treatment of schizo-
24 phrenia or manic depression (www.drugs.com);

25 f. Zyprexa, a medication used for the treatment of schizo-
26 phrenia and bi-polar disorder (www.drugs.com);

27 g. Geodon, a medication used for the treatment of schizo-
28 phrenia and bi-polar disorder (www.drugs.com);

1 h. Tegretol, a medication used for the treatment of seizures
2 and bi-polar disorder (www.drugs.com);

3 i. Dilantin, a medication used for the treatment of seizures
4 (www.drugs.com);

5 j. Haldol, a medication used for the treatment of schizo-
6 phrenia. Haldol may cause muscle spasms. (www.drugs.com);

7 k. Aripiprazole, a medication used for the treatment of
8 schizophrenia (www.drugs.com);

9 l. Wellbutrin, a medication used for the treatment of major
10 depression. Wellbutrin is associated with an increased risk of
11 seizures. (www.drugs.com).

12 (Petitioner's Lodgment No. 3, RJ 1-607, RJ Supp. 1-230)

13 The Court's review of Petitioner's medical and psychiatric
14 records from August 2005 through March 2008, indicates that Peti-
15 tioner's mental illnesses are extraordinary circumstances beyond his
16 control, that made it impossible for him to file a timely petition.

17 From before August 5, 2005 through March 2008, Petitioner was
18 prescribed and took numerous medications used to treat his schizophre-
19 nia, suicidal ideation, depression and seizure disorder. During that
20 time, Petitioner complained of auditory hallucinations.

21 From November 2006 to January 2007, Petitioner's medical and
22 psychiatric records show a marked deterioration in his mental health.
23 During that time, Petitioner was a patient at Vacaville State Hospital
24 for treatment of his depression, suicidal ideation, self-injurious
25 behavior and seizures.

26 The entirety of Petitioner's medical and psychiatric records
27 raises doubts about Petitioner's capacity to have timely filed a
28 Petition for Writ of Habeas Corpus. The symptoms Petitioner has

1 suffered appear to be serious and debilitating. In all likelihood,
2 they have left him with limited amounts of energy and even more
3 limited ability to think about things clearly and consistently. The
4 Court doubts that Petitioner fully understood the importance of
5 deadlines and the requirements for timely filing a Petition for Writ
6 of Habeas Corpus.

7 Therefore, Petitioner has established that his Petition is
8 entitled to equitable tolling of the statute of limitations. As a
9 result, Petitioner's Motion for Equitable Tolling of the Statute of
10 Limitations is GRANTED.

11 **C. Petitioner's Motion to Stay & Abey Federal Habeas Proceedings**

12 The United States Supreme Court has held that a stay and abeyance
13 is only appropriate when the district court finds that the petitioner
14 has good cause for failure to exhaust his state court remedies, the
15 claims are not plainly meritless and petitioner has not engaged in
16 intentional delay. Rhines v. Weber 544 U.S. 267, 277-278(2008)

17 Petitioner seeks to stay and abey the proceedings in this Court
18 because he has presented good cause for his failure to exhaust his
19 state court remedies, his claims are meritorious and he has not
20 engaged in intentional delay. Respondent opposes Petitioner's Motion
21 to Stay and Abey because Petitioner failed to establish any of the
22 criteria stated in Rhines.

23 On November 26, 2008, Petitioner's appointed counsel filed a
24 Petition for Writ of Habeas Corpus in the California Supreme Court for
25 purposes of exhausting Petitioner's state court remedies. The Peti-
26 tion for Writ of Habeas Corpus filed in the California Supreme Court
27 contained all the claims that were unexhausted in Petitioner's origi-
28 nal Petition. On May 20, 2009, the California Supreme Court denied

1 the Petition. As a result, Petitioner's claims are now exhausted.
2 Therefore, Petitioner's Motion to Stay & Abey Federal Habeas Proceed-
3 ings is DENIED as moot.

4 **D. Respondent's Motion to Dismiss**

5 Respondent asserts that the Court should dismiss the First
6 Petition because it is time-barred, and not entitled to equitable
7 tolling of the statute of limitations. Respondent further asserts
8 that the First Amended Petition should be dismissed because it con-
9 tains unexhausted claims.

10 However, the Court has found that while the Petition is time-
11 barred, it is entitled to equitable tolling of the statute of limita-
12 tions during the entire time interval that the statute of limitations
13 was not tolled. (See Section II.B. of this Order.) Further, the Court
14 has found that Petitioner's claims are now exhausted. (See Section
15 II.C. of this Order.) Therefore, Respondent's Motion to Dismiss is
16 DENIED.

17 **IV.**

18 **CONCLUSION**

19 The Court, having reviewed the Petition for Writ of Habeas Corpus
20 filed in this case, Petitioner's Motion for Equitable Tolling of the
21 Statute of Limitations and Motion to Stay & Abey Federal Habeas
22 Proceedings, Respondent's Opposition to the Motion to Stay & Abey and
23 Respondent's Motion to Dismiss, and GOOD CAUSE APPEARING, HEREBY
24 ORDERS:

- 25 1. Petitioner's Motion for Equitable Tolling of the Statute of
26 Limitations is **GRANTED**;
- 27 2. Petitioner's Motion for Stay & Abey is **DENIED** as moot.
- 28 3. Respondent's Motion to Dismiss is **DENIED**.

1 **IT IS FURTHER ORDERED THAT:**

2 Respondent shall file and serve an Answer to the Petition pursu-
3 ant to Rule 5 of the Rules Governing § 2254 Cases no later than
4 **September 18, 2009**. At the time the Answer is filed, Respondent shall
5 lodge with the Court all records bearing on the merits of Petitioner's
6 claims. The lodgments shall be accompanied by a notice of lodgment
7 which shall be captioned "**Notice of Lodgment in 28 U.S.C. § 2254**
8 **Habeas Corpus Case – To Be Sent to Clerk's Office**." Respondent shall
9 not combine separate pleadings, orders or other items into a combined
10 lodgment entry. Each item shall be numbered separately and sequen-
11 tially.

12 Petitioner may file a Traverse to matters raised in the answer no
13 later than **October 9, 2009**. Any Traverse by Petitioner (a) shall
14 state whether Petitioner admits or denies each allegation of fact
15 contained in the Answer; (b) shall be limited to facts or arguments
16 responsive to matters raised in the Answer; and (c) shall not raise
17 new grounds for relief that were not asserted in the Petition.
18 Grounds for relief withheld until the Traverse will not be considered.
19 No Traverse shall exceed ten (10) pages in length absent advance leave
20 of Court for good cause shown.

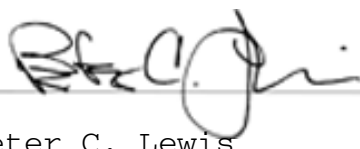
21 A request by a party for an extension of time within which to
22 file any of the pleadings required by this Order should be made in
23 advance of the due date of the pleading, and the Court will grant such
24 a request only upon a showing of good cause. Any such request shall
25 be accompanied by a declaration under penalty of perjury explaining
26 why an extension of time is necessary.

1 Unless otherwise ordered by the Court, this case shall be deemed
2 submitted on the day following the date Petitioner's opposition to a
3 motion to dismiss and/or his traverse is due.

4 Every document delivered to the Court must include a certificate
5 of service attesting that a copy of such document was served on
6 opposing counsel (or on the opposing party, if such party is not
7 represented by counsel). Any document delivered to the Court without
8 a certificate of service will be returned to the submitting party and
9 will be disregarded by the Court.

10 **IT IS SO ORDERED.**

11 DATED: August 20, 2009

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14 Peter C. Lewis
15 U.S. Magistrate Judge
16 United States District Court

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18 cc: The Honorable John A. Houston
19 All Parties and Counsel of Record
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