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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DIALLO E. UHURU,)	Civil No. 08-2424-IEG(LSP)
)	
Petitioner,)	REPORT AND RECOMMENDATION
v.)	GRANTING RESPONDENT'S MOTION
)	TO DISMISS SECOND AMENDED
JOHN MARSHALL, Warden,)	PETITION FOR WRIT OF HABEAS
)	CORPUS (DOC. #11)
Respondent.)	
_____)	

On December 29, 2008, Petitioner Diallo E. Uhuru (hereafter "Petitioner") a state prisoner proceeding pro se, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254.¹ Respondent has filed a Motion to Dismiss the Petition ("Motion"). Petitioner has filed A "Notice of Motion and Objections to Motion to Dismiss Second Amended Petition for Writ of Habeas Corpus, which the Court construes as an Opposition to the Motion. Petitioner has also filed a "Traverse." Respondent asserts that the Petition is untimely, and that neither statutory nor equitable tolling applies to make the Petition timely. Petitioner argues that his Petition is timely filed if he receives the benefit of equitable tolling of the statute of limitations.

The Court, having reviewed Petitioner's Petition for Writ

¹The Petition is styled "Second Amended Petition."

1 of Habeas Corpus, the exhibits attached thereto, the Motion to
2 Dismiss, the lodgments submitted by Respondent, Petitioner's
3 Opposition and Traverse, finds that the Petition is barred by the
4 statute of limitations. Therefore, the Court RECOMMENDS that
5 Respondent's Motion to Dismiss be GRANTED.

6 I

7 PROCEDURAL HISTORY

8 On February 22, 2000, Petitioner pled guilty to second
9 degree murder while using a gun. (Respondent's Lodgment No. 1 at
10 20, 23, 26-29, Lodgment No. 2 at 1-3) On March 21, 2000, the Court
11 sentenced Petitioner to 25 years to life imprisonment. (Respon-
12 dent's Lodgment No. 1 at 27-29, Lodgment No. 2 at 1) Petitioner
13 did not appeal his conviction or sentence.

14 On November 22, 2004, Petitioner filed² a Petition for Writ
15 of Habeas Corpus in the San Diego Superior Court. The Petition
16 challenged the conditions of Petitioner's confinement. It did not
17 challenge the constitutionality of his conviction or sentence.
18 (Respondent's Lodgment No. 6) On January 7, 2005, the Superior
19 Court denied the Petition because it was not signed and it sought
20 relief already being pursued in a Petition for Writ of Habeas
21 Corpus filed in the Los Angeles Superior Court. (Respondent's
22 Lodgment No. 7)

23 On August 9, 2006, Petitioner attempted to file a Notice of
24 Appeal in the San Diego Superior Court. The Notice of Appeal was
25 stamped "Received But Not Filed." (Respondent's Lodgment No. 8) On
26 August 10, 2006, the Court sent a letter to Petitioner informing
27

28 ²The Court gives Petitioner the benefit of the "mailbox rule" which deems
that a petition is constructively filed when it is delivered to prison officials
for filing. Houston v. Lack 487 U.S. 266 (1988)

1 him that his appellate rights had expired. (Respondent's Lodgment
2 No. 9)

3 On April 3, 2007, Petitioner filed another Petition for
4 Writ of Habeas Corpus in the San Diego Superior Court. (Respon-
5 dent's Lodgment No. 10) On June 1, 2007, the Petition was denied
6 as successive, untimely and without merit. (Respondent's Lodgment
7 No. 11)

8 On June 28, 2007, Petitioner filed a Petition for Writ of
9 Habeas Corpus in the California Court of Appeal. (Respondent's
10 Lodgment No. 12) On October 5, 2007, the Petition was denied.
11 (Respondent's Lodgment No. 13)

12 On October 22, 2007, Petitioner filed a Petition for Writ
13 of Habeas Corpus in the California Supreme Court. (Respondent's
14 Lodgment No. 14) On April 16, 2008, the Petition was denied as
15 untimely, citing In re Robbins 18 Cal. 4th 770 (1998)

16 On December 29, 2008, Petitioner filed the Petition for
17 Writ of Habeas Corpus that is now before this Court.

18 II

19 PETITIONER'S PETITION IS BARRED

20 BY THE STATUTE OF LIMITATIONS

21 **A. The AEDPA's One-Year Statute of Limitations.**

22 Respondent argues that the Petition is barred by the Ant-
23 iterrorism and Effective Death Penalty Act's ("the AEDPA") statute
24 of limitations. The provisions of the AEDPA apply to petitions
25 for writs of habeas corpus filed in federal court after the
26 AEDPA's effective date of April 24, 1996. Lindh v. Murphy, 521
27 U.S. 320, 117 S. Ct. 2059, 2068 (1997). Because the Petition was
28 filed on December 29, 2008, the AEDPA applies to this case.

1 Prior to the enactment of the AEDPA on April 24, 1996,
2 "state prisoners had almost unfettered discretion in deciding when
3 to file a federal habeas petition." Calderon v. United States
4 Dist. Court (Beeler), 128 F.3d 1283, 1286 (9th Cir. 1997), cert.
5 denied, 118 U.S. 897 (1998), overruled on other grounds by
6 Calderon v. United States Dist. Court (Kelly), 163 F.3d 530, 540
7 (9th Cir. 1998). "[D]elays of more than a decade did not neces-
8 sarily bar a prisoner from seeking relief." Id.

9 With enactment of the AEDPA, a state prisoner's time frame
10 for seeking federal habeas relief was dramatically limited. The
11 AEDPA amended 28 U.S.C. § 2244 by, in part, adding subdivision
12 (d), which provides for a one-year limitation period for state
13 prisoners to file habeas corpus petitions in federal court.

14 Section 2244(d) states, in pertinent part:

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

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

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

24 (C) the date on which the constitutional
25 right asserted was initially recognized
26 by the Supreme Court, if the right has
27 been newly recognized by the Supreme
28 Court and made retroactively applicable
to cases on collateral review; or

(D) the date on which the factual predi-
cate of the claim or claims presented
could have been discovered through the

1 exercise of due diligence.

2 (2) The time during which a properly filed appli-
3 cation for State post-conviction or other collat-
4 eral review with respect to the pertinent judgment
or claim is pending shall not be counted toward any
period of limitation under this subsection.

5 28 U.S.C.A. § 2244(d)

6 The Ninth Circuit has noted that under 28 U.S.C.A.
7 §2244(d)(1)(A), a conviction becomes final by the expiration of
8 the time to seek review from the highest court, whether or not
9 such a petition is actually filed. Wixom v. Washington, 264 F.3d
10 894, 897(9th Cir.2001); Bowen v. Roe, 188 F.3d 1157, 1158-59 (9th
11 Cir. 1999). Direct review of Petitioner's conviction was com-
12 pleted on March 21, 2000. Petitioner had until sixty days from
13 the date of his conviction to appeal his conviction and sentence.
14 Smith v. Duncan 297 F.3d 809, 812-13 (9th Cir. 2002), Cal. R. Ct.
15 30.1(a)[now Cal. R. Ct. 8.308(a)] Therefore, on May 22, 2000,
16 Petitioner's conviction became final and the statute of limita-
17 tions began to run.

18 Absent any statutory or equitable tolling, the statute of
19 limitations for Petitioner expired on May 22, 2001.

20 **1. Petitioner Is Not Entitled to Statutory Tolling**

21 The statute of limitations is tolled while a "properly
22 filed" state habeas corpus petition is "pending" in the state
23 court. Under the holding of Nino v. Galaza 183 F.3d 1003, 1006
24 (9th Cir. 1999), the "statute of limitations is tolled from the
25 time the first state habeas petition is filed until the California
26 Supreme Court rejects petitioner's final collateral challenge,"
27 provided the petitions were properly filed and pending during that
28 entire time.

1 The statute of limitations is not tolled from the time a
2 final decision is issued on direct state appeal and the time the
3 first state collateral challenge is filed because there is no case
4 "pending" during that interval. Nino 183 F.3d at 1006

5 The meaning of the terms "properly filed" and "pending" in
6 Nino have been clarified by the United States Supreme Court. In
7 Carey v. Saffold 536 U.S. 214 (2002), the Court held that the time
8 between the denial of a petition in a lower California court and
9 the filing of a subsequent petition in the next higher court does
10 not toll the statute of limitations, if the petition is ultimately
11 found to be untimely. Id. at 223-26. In Pace v. DiGuiglielmo 544
12 U.S. 408 (2005), the Court held that statutory tolling is not
13 available for the period a petition is under consideration, if it
14 is dismissed by the state court as untimely. Id. at 413. In
15 Evans v. Chavis 546 U.S. 189 (2006), the Court held that in the
16 absence of a clear indication by the California Supreme Court that
17 a petition is untimely, "the federal court must itself examine the
18 delay in each case and determine what the state courts would have
19 held in respect to timeliness." Id. at 197

20 The Evans Court gave some guidance in making that determi-
21 nation: federal courts must assume (until the California courts
22 state otherwise) that California law regarding timeliness does not
23 differ significantly from other states which use thirty or sixty
24 day rules for untimeliness and, a six month unexplained delay is
25 presumptively unreasonable.

26 In this case, Petitioner's first petition for post convic-
27 tion relief was filed in the San Diego Superior Court on November
28

1 22, 2004³. (Respondent's Lodgment No. 6). From May 21, 2000 (the
2 date Petitioner's conviction became final) to November 22, 2004,
3 2004, **four years, six months and one day elapsed**. Therefore,
4 Petitioner filed his first petition for post-conviction relief
5 well over four years after the statute of limitations expired.⁴

6 Thus, Petitioner is not entitled to statutory tolling.

7 **2. Petitioner Is Entitled to Some Equitable Tolling**
8 **of the Statute of Limitations**

9 The one-year statute of limitations is subject to equitable
10 tolling. Calderon 128 F.3d at 1288. Equitable tolling of the
11 statute of limitations is appropriate where a habeas petitioner
12 shows: (1) that he has been pursuing his rights diligently, and
13 (2) that some extraordinary circumstance stood in his way. Pace v.
14 DiGuiglielmo 544 U.S. 408, 418 (2005). When courts assess a habeas
15 petitioner's argument in favor of equitable tolling, they must
16 conduct a "highly fact-dependent" inquiry. Whalem/Hunt v. Early
17 233 F.3d 1146, 1148 (9th Cir. 2000), Lott v. Mueller 304 F.3d 918,
18 923 (9th Cir. 2002) The extraordinary circumstances must be the
19 "but-for and proximate cause" of the untimely filing. Allen v.
20 Lewis 255 F.3d 798, 800 (9th Cir. 2001).

21 Respondent argues that Petitioner is not entitled to
22 equitable tolling because equitable tolling is only available to
23 petitioners who pursue their rights diligently and that Petitioner
24 did not pursue his rights diligently in this case. Moreover,

25
26 ³The Court notes that the November 22, 2004 Petition filed in the San Diego
27 Superior Court did not challenge the constitutionality of Petitioner's conviction
or sentence. Nevertheless, the Court gives Petitioner the benefit of the doubt
by using the November 22, 2004 Petition as Petitioner's first petition for post-
conviction relief.

28 ⁴From August 9, 2006 to October 22, 2007, Petitioner filed numerous
pleadings in the San Diego Superior Court, Los Angeles Superior Court, California
Court of Appeal and California Supreme Court.

1 Respondent argues that the evidence presented to the Court shows
2 that Petitioner had ample time to timely file a Petition in this
3 Court and did not do so.

4 Petitioner asserts that his mental illness was an extraor-
5 dinary circumstance beyond his control that prevented his timely
6 filing. Specifically, Petitioner argues that he suffers from
7 paranoid schizophrenia.

8 Respondent was ordered to lodge with the Court, *inter alia*,
9 Petitioner's psychiatric records dated from May 22, 2000 to
10 November 22, 2004. On May 27, 2009, Respondent lodged Petitioner's
11 psychiatric records, as ordered. Petitioner's claim may qualify
12 as the "but-for and proximate cause" of his untimely filing.

13 In light of Petitioner's contentions of entitlement to
14 equitable tolling and Respondent's refutation of those conten-
15 tions, this Court will conduct the required fact-dependent inquiry
16 of the relevant time period⁵ to determine if Petitioner is enti-
17 tled to equitable tolling. Whalem/Hunt 233 F.3d at 1148

18 **a. Petitioner's Mental Capacity**

19 Where a habeas petitioner's mental incompetence in fact
20 caused him to fail to meet the AEDPA filing deadline, his delay
21 was caused by an "extraordinary circumstance beyond (his) con-
22 trol," and the deadline should be equitably tolled. Laws v.
23 LaMarque 351 F.3d 919, 923 (9th Cir. 2003).

24 Therefore, whether the limitations period should be tolled
25 depends on whether his mental illness between **May 22, 2000 and**
26 **November 22, 2004** constituted the kind of extraordinary circum-
27 stance beyond his control that made timely filing impossible. No

28 ⁵May 21, 2000 to November 22, 2004 (the date Petitioner's conviction became final through Petitioner's first post-conviction petition for relief).

1 other time period is relevant to the analysis.

2
3 **b. Petitioner's Psychiatric Records**

4 (Respondent's Lodgment No. 17)

5 2000 - 2001

6 Petitioner's psychiatric records indicate that from 2000 to
7 2001, Petitioner was prescribed the medications Prozac⁶, Zyprexa⁷
8 and Vistaril⁸. During his period, at times, Petitioner reported
9 that he was depressed and appeared anxious and agitated. Prison
10 psychiatrists diagnosed Petitioner as possibly suffering from
11 paranoid schizophrenia. However, prison psychiatrists assessed
12 Petitioner's fund of information, intellectual functioning,
13 organization of thought, reality contact and thought quality to be
14 within normal limits. Further, they found Petitioner's orienta-
15 tion, memory, attention and concentration to be within normal
16 limits.

17 2002

18 In 2002, Petitioner's mental condition appeared to be the
19 same or better than from 2000 to 2001. Petitioner continued on
20 the same prescribed medications and reported to prison psychia-
21 trists, "I'm Okay," and that he was "doing okay on his medica-
22 tions."

23 2003

24 On August 22, 2003, Petitioner was prescribed the medica-
25

26 ⁶Prozac is a drug that is used for treating depression. www.medicinenet.com

27 ⁷Zyprexa is a drug that is used to treat schizophrenia. It is also used in
28 combination with Prozac for treatment of resistant depression.
www.medicinenet.com

⁸Vistaril is an antihistamine with drying and sedative properties that is
used to treat allergic reactions. www.medicinenet.com

1 tion Risperdal and Geodon⁹ to be added to the medications that had
2 already been prescribed. On September 21, 2003, Petitioner re-
3 ported hearing voices. However, on October 23, 2003, prison
4 psychiatrists assessed Petitioner's intellectual functioning,
5 organization and association of thought, reality contact and
6 thought quality to be within normal limits.

7 2004

8 Petitioner appeared to be doing well until mid-2004. On
9 May 28, 2004, correctional officers reported that Petitioner was
10 smearing feces in his cell and urinating on himself. Shortly
11 thereafter, Petitioner was seen on an emergency visit to a psychi-
12 atrist. Petitioner reported to the psychiatrist that he smeared
13 feces and urinated on himself so that he could be housed alone
14 without a cell mate.

15 On July 14, 2004, Petitioner reported to prison psychia-
16 trists episodes of "blacking out." The psychiatrists described
17 Petitioner as being disoriented, hostile, depressed, paranoid and
18 with a tangential thought process.

19 In September 2004, prison psychiatrists prescribed Buspar¹⁰
20 for Petitioner. From September 2004 to late October 2004, Peti-
21 tioner reported he was "doing well, no complaints." However in
22 late October 2004, prison psychiatrists reported Petitioner to be
23 irritable and menacing.

24 On December 27, 2004, Petitioner reported that he was
25 hearing voices.

26 The Court's review of Petitioner's psychiatric records from
27

28 ⁹Risperdal and Geodon are drugs that are used to treat schizophrenia.
www.medicinenet.com

¹⁰Buspar is a drug that is used to treat anxiety. www.medicinenet.com

1 July 14, 2004 to September 1, 2004, indicates that Petitioner *may*
2 have suffered mental illness that caused him to fail to meet the
3 AEDPA filing deadline. As noted above, on July 14, 2004, Peti-
4 tioner reported to prison psychiatrists that he had episodes of
5 "blacking out." Prison psychiatrists described Petitioner as
6 being disoriented, hostile, depressed, and paranoid with a tangen-
7 tial thought process. Giving Petitioner the benefit of the doubt,
8 the Court construes Petitioner's mental illness during that
9 interval to be an extraordinary circumstance beyond his control
10 that made him unable to file a timely Petition for Writ of Habeas
11 Corpus in this Court. From July 14, 2004 to September 1, 2004, **49**
12 **days** elapsed.

13 However, from May 22, 2000 to November 22, 2004 (other than
14 noted above), Petitioner's psychiatric records do not indicate
15 that Petitioner was mentally incompetent such that any mental
16 condition in fact caused him to fail to meet the AEDPA filing
17 deadline. In fact, the contrary appears to be true. During the
18 entire interval when the statute of limitations was not tolled,
19 except for the short interval noted above, Petitioner appears to
20 have had some psychiatric problems, but his intellectual function-
21 ing, organization and association of thought and thought quality
22 was always within normal limits. Moreover, several times during
23 the period when the statute of limitations was not tolled, Peti-
24 tioner reported that he was doing "Okay," and "Okay on his medica-
25 tions."

26 The Court is cognizant of Petitioner's May 28, 2004 inci-
27 dent in which Petitioner was seen smearing feces in his cell and
28 urinating on himself. This type of behavior may show mental
illness or incompetence. However, here, that is not the case.

1 Petitioner reported to prison psychiatrists that he behaved the
2 way he did to secure a cell in which he did not have a cell mate.
3 Therefore, it appears that Petitioner knew what he was doing at
4 the time, and thought his behavior might secure himself a single-
5 bedded cell. Petitioner's psychiatric records do not indicate that
6 Petitioner's behavior was the result of a mental illness.

7 As a result, Petitioner is entitled to 49 days of equitable
8 tolling. Therefore, if the Court subtracts **49** days (from July 14,
9 2004 to September 1, 2004) from the **four years, six months and one**
10 **day** that the statute of limitations was not tolled, Petitioner's
11 Petition for Writ of Habeas Corpus was still filed over four years
12 after the statute of limitations expired.

13 The Court finds that Petitioner has failed to establish
14 that he is entitled to sufficient tolling of the statute of
15 limitations pursuant to the doctrine of equitable tolling. Thus,
16 Petitioner failed to file his Petition For Writ of Habeas Corpus
17 with this court within the one-year statute of limitations man-
18 dated in 28 U.S.C. §2244(d)(1)(A).

19 IV

20 CONCLUSION

21 After a thorough review of the record in this matter, the
22 Court has determined that Petitioner has failed to comply with the
23 AEDPA's statute of limitations and that he is not entitled to
24 equitable tolling of the statute of limitations. 28 U.S.C.A. §
25 2244(d).

26 Accordingly, the Court RECOMMENDS that Respondent's Motion
27 to Dismiss be GRANTED.

28 This report and recommendation of the undersigned Magis-
trate Judge is submitted to the United States District Judge

1 assigned to this case, pursuant to the provision of 28 U.S.C. §
2 636(b)(1).

3 **IT IS ORDERED** that no later than June 29, 2009, any party
4 to this action may file written objections with the Court and
5 serve a copy on all parties. The document should be captioned
6 "Objections to Report and Recommendation."

7 **IT IS FURTHER ORDERED** that any reply to the objections
8 shall be filed with the Court and served on all parties no later
9 than July 13, 2009. The parties are advised that failure to file
10 objections within the specified time may waive the right to raise
11 those objections on appeal of the Court's order. Martinez v.
12 Ylst, 951 F.2d 1153 (9th Cir. 1991).

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17 DATED: May 29, 2009

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Hon. Leo S. Papas
U.S. Magistrate Judge

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