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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10
11 ANTHONY T. GUILLEN,

Petitioner,

v.

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13 MATTHEW CATE, Secretary, California
14 Department of Corrections and Rehabilitation,

Respondent.

Civil No. 09cv0608-JM (CAB)

**REPORT AND RECOMMENDATION TO
GRANT RESPONDENT'S MOTION TO
DISMISS**

[Doc. No. 7]

15
16 Petitioner Anthony T. Guillien, a state prisoner proceeding *pro se*, has filed a Petition for Writ of
17 Habeas Corpus pursuant to 28 U.S.C. § 2254. This matter comes before the Court on consideration of
18 Respondent Matthew Cate's motion to dismiss the petition. Having considered the motion, the
19 opposition thereto, and relevant legal authority, this Court **RECOMMENDS** that the motion to dismiss
20 be **GRANTED** and the Petition be **DISMISSED** with prejudice.

21 **I. PROCEDURAL BACKGROUND**

22 According to the Petition, on April 22, 2004, a jury convicted Petitioner of assault with a deadly
23 weapon and by means likely to produce great bodily injury. (Pet. 2; Lodgment 2, Clerk's Transcript, vol.
24 1, at 115.) On May 26, 2004, Petitioner was sentenced to a prison term of 35 years to life. (Pet. 1;
25 Lodgment 2, vol. 1, at 135.) Petitioner appealed his conviction to the California Court of Appeal on
26 June 20, 2005. (Lodgment 3.) The state appellate court affirmed the judgment on February 6, 2006.
27 (Lodgment 6.) On March 20, 2006, Petitioner filed a petition for review in the California Supreme
28 Court. (Lodgment 7.) On April 26, 2006, the state supreme court denied the petition for review, without

1 prejudice to any relief to which Petitioner might be entitled after the court decided *People v. Cage*.
2 (Lodgment 8.) Over two years later, on July 7, 2008, Petitioner filed a petition for writ of habeas corpus
3 in the state supreme court. (Lodgment 9.) The state supreme court denied the petition on December 10,
4 2008. (Lodgment 10.)

5 Petitioner filed his federal habeas petition on March 23, 2009. [Doc. No. 1.] In his Petition,
6 Petitioner asserts several grounds for relief based on alleged errors by the trial court in admitting
7 evidence, giving jury instructions and sentencing. (Pet. 6-8.) On May 11, 2009, Respondent filed a
8 motion to dismiss the petition (“Resp’t Mem.”), arguing Petitioner’s claims are barred by the applicable
9 one-year statute of limitations. [Doc. No. 7.] Petitioner has filed an opposition to the motion to dismiss
10 (“Pet’r Opp’n”), arguing that his Petition was timely filed. [Doc. No. 8.]

11 II. DISCUSSION

12 Respondent argues that the Petition should be dismissed, because it is barred by the applicable
13 statute of limitations. Because this case was filed after April 24, 1996, it is governed by the
14 Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 (“AEDPA”). *Lindh v.*
15 *Murphy*, 521 U.S. 320, 336 (1997). Pursuant to 28 U.S.C. § 2244(d)(1), a one-year period of limitation
16 applies to an application for a writ of habeas corpus filed “by a person in custody pursuant to the
17 judgment of a State court.” The limitation period runs from the latest of:

- 18 (A) the date on which the judgment became final by the conclusion of
19 direct review or the expiration of the time for seeking such review;
20 (B) the date on which the impediment to filing an application created by
21 State action in violation of the Constitution or laws of the United States is
22 removed, if the applicant was prevented from filing by such State action;
23 (C) the date on which the constitutional right asserted was initially
24 recognized by the Supreme Court, if the right has been newly recognized
25 by the Supreme Court and made retroactively applicable to cases on
26 collateral review; or
27 (D) the date on which the factual predicate of the claim or claims
28 presented could have been discovered through the exercise of due
diligence.

28 U.S.C. § 2244(d)(1).

The “conclusion of direct review” is not the denial of review by the California Supreme Court,
but 90 days thereafter, upon the expiration of the time in which to file a petition for a writ of certiorari in
the United States Supreme Court. *Tillema v. Long*, 253 F.3d 494, 498 (9th Cir. 2001); *Bowen v. Roe*,

1 188 F.3d 1157, 1159 (9th Cir. 1999). In this case, the California Supreme Court denied Petitioner’s
2 petition for review on April 26, 2006. (Lodgment 8.) Petitioner never filed a petition for writ of
3 certiorari with the U.S. Supreme Court, so the judgment became final 90 days thereafter, on July 26,
4 2006. The statute of limitations began running on July 27, 2006 and expired on July 27, 2007. Fed. R.
5 Civ. P. 6(a) (excluding the day from which the period begins to run from the calculation of the time).
6 Petitioner filed his federal Petition on March 23, 2009, well past the one-year limitations period. Absent
7 statutory or equitable tolling, the Petition is time-barred.

8 **A. Statutory tolling**

9 The statute of limitations is tolled during the pendency of any “properly filed” collateral attack in
10 the state courts. 28 U.S.C. § 2244(d)(2); *Artuz v. Bennet*, 531 U.S. 4, 7-8 (2000). The Ninth Circuit has
11 held that “the statute of limitations is tolled from the time the first state habeas petition is filed until the
12 California Supreme Court rejects the petitioner’s final collateral challenge.” *Nino v. Galaza*, 183 F.3d
13 1003, 1006 (9th Cir. 1999). On July 7, 2008, Petitioner sought state collateral review by filing a petition
14 for writ of habeas corpus in the state supreme court. (Lodgment 9.) At this point, however, the statute
15 of limitations had already expired. It is well established that the filing of a state post-conviction petition
16 cannot restart the limitation clock under § 2244(d)(2) once it has expired. *Ferguson v. Palmateer*, 321
17 F.3d 820, 823 (9th Cir. 2003); *Green v. White*, 223 F.3d 1001, 1003 (9th Cir. 2000).

18 In his opposition, Petitioner argues, “toll time does not start until 90 days after the California
19 Supreme Court decided (*People v. Cage* S127344) which was decided in May, 2007.” (Pet’r Opp’n 1-
20 2.) Petitioner’s argument appears to be that the statute of limitations was tolled until the state supreme
21 court made a decision on *People v. Cage*. Under AEDPA, however, the statute of limitations begins to
22 run upon the “conclusion of direct review” of Petitioner’s case, not some other case. The limitations
23 period in Petitioner’s case expired on July 27, 2007, and statutory tolling is not available, because
24 Petitioner’s collateral attack in the state court was filed after that date. Absent equitable tolling, the
25 instant Petition is time-barred.

26 **B. Equitable tolling**

27 AEDPA’s limitations provision is subject to equitable tolling when “extraordinary
28 circumstances” beyond a prisoner’s control prevented him from filing a petition on time. *Harris v.*

1 *Carter*, 515 F.3d 1051, 1055-56 (9th Cir. 2008); *Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir.
2 2006); *Espinoza-Matthews v. California*, 432 F.3d 1021, 1026 (9th Cir. 2005); *see also* *Lott v. Mueller*,
3 304 F.3d 918, 922 (9th Cir. 2002); *Miranda v. Castro*, 292 F.3d 1063, 1066-67 (9th Cir. 2002); *Miles v.*
4 *Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999). “When external forces, rather than a petitioner’s lack of
5 diligence, account for the failure to file a timely claim, equitable tolling of the statute of limitations may
6 be appropriate.” *Miles*, 187 F.3d at 1107. Equitable tolling will not be available in most cases because
7 extensions of time should be granted only if “extraordinary circumstances beyond [a] prisoner’s control
8 make it impossible to file a petition on time.” *Calderon v. U.S. Dist. Court for the Cent. Dist. of Cal.*
9 (*“Beeler”*), 128 F.3d 1283, 1288 (9th Cir. 1997) (citation and internal quotation marks omitted). This
10 high bar is necessary to effectuate AEPDA’s statutory purpose of encouraging prompt filings in federal
11 court. *See Carey v. Saffold*, 536 U.S. 214, 226 (2002). The Ninth Circuit has said that the petitioner
12 “bears the burden of showing that this extraordinary exclusion should apply to him.” *Miranda*, 292 F.3d
13 at 1065. Whether equitable tolling is in order turns on an examination of detailed facts. *Lott*, 304 F.3d
14 at 923.

15 Here, Petitioner fails to demonstrate extraordinary circumstances to warrant equitable tolling. It
16 appears Petitioner mistakenly believed that he could wait until *People v. Cage* was decided to file his
17 collateral attack in state court.¹ Petitioner’s lack of understanding of AEDPA’s statute of limitations,
18 however, does not constitute extraordinary circumstances. Any claim of ignorance of the exhaustion
19 requirement, statute of limitations, or statutory tolling rules does not constitute an extraordinary
20 circumstance warranting equitable tolling. *See Rasberry*, 448 F.3d at 1154 (holding that a *pro se*
21 petitioner’s lack of legal sophistication is not, by itself, an extraordinary circumstance warranting
22 equitable tolling). Petitioner has not met the burden of showing that equitable tolling should be applied

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24 ¹ The state courts cited this case in reference to Petitioner’s claim that the trial court erred by
25 admitting a tape and transcript of a 911 call from the victim, because it violated his Sixth Amendment
26 right to confrontation. (Lodgment 6, at 5.) The state appellate court rejected this claim and found that
27 the trial court had not erred in admitting the evidence. In a footnote, however, that court noted that
28 *People v. Cage* was pending. (*Id.* at 11 n.3.) The issue in that case was whether statements obtained
through police officer questioning in the field are testimonial. The California Supreme Court decided
People v. Cage in April 2007 and found that the victim’s statements to the police officer in the hospital
waiting room was testimonial and its admission at trial was a violation of the confrontation clause.
People v. Cage, 40 Cal. 4th 965, 986 (Cal. 2007). After the decision in *People v. Cage*, Petitioner did
not file a renewed petition for review in the state supreme court. Nor does he argue now that *People v.*
Cage entitled him to any sort of relief.

1 in his case. As such, the instant Petition was untimely filed.²

2 **III. CONCLUSION**

3 Based upon the foregoing discussion, the Court **RECOMMENDS** that the motion to dismiss the
4 habeas corpus petition be **GRANTED** and the Petition be **DISMISSED** with prejudice. This report and
5 recommendation of the undersigned Magistrate Judge is submitted to the United States District Judge
6 assigned to this case pursuant to 28 U.S.C. § 636(b)(1).

7 **IT IS ORDERED** that no later than July 29, 2009, any party to this action may file written
8 objections with the Court and serve a copy on all parties. The document should be captioned
9 “Objections to Report and Recommendation.”

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

14 DATED: June 29, 2009

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17 **CATHY ANN BENCIVENGO**
18 United States Magistrate Judge

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28 ² Even if the limitations period should somehow be tolled during the time that *People v. Cage*
was pending and began to run again when it was decided on April 9, 2007, the one-year period would
have run out by April 10, 2008. Petitioner did not file his state habeas petition until July 7, 2008, after
that one-year period had expired. As discussed above, the limitations clock can be tolled for a properly
filed collateral attack in state court, but not after the limitations period has already run.