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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HARON ONTIVEROS,
Petitioner,
v.
MATTHEW CATE, Secretary,
Respondent.

Civil No. 09CV1503 JAH (CAB)
**ORDER OVERRULING
PETITIONER’S OBJECTIONS;
ADOPTING THE MAGISTRATE
JUDGE’S REPORT AND
RECOMMENDATION;
GRANTING RESPONDENT’S
MOTION TO DISMISS; AND
DISMISSING THE PETITION FOR
WRIT OF HABEAS CORPUS AS
UNTIMELY**

INTRODUCTION

Petitioner, a state prisoner appearing *pro se*, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his conviction and sentence before the state court. Respondent, in lieu of an answer, filed a motion to dismiss the petition as untimely. The Honorable Cathy Ann Bencivengo, United States Magistrate Judge, issued a report and recommendation, recommending that respondent’s motion to dismiss be granted and the petition be dismissed with prejudice. Petitioner filed objections to the magistrate judge’s report and recommendation. After a careful consideration of the pleadings and relevant exhibits submitted by the parties along with the magistrate judge’s report, and for the reasons set forth below, this Court OVERRULES petitioner’s objections, ADOPTS the magistrate judge’s report, GRANTS respondent’s motion to

1 dismiss and DISMISSES the instant petition with prejudice as untimely.

2 **BACKGROUND**¹

3 On October 23, 2003, a jury found petitioner guilty of first degree murder and
4 conspiracy to commit murder. The jury also found true special circumstance allegations
5 that the murder was committed for financial gain and while lying in wait. Petitioner was
6 sentenced, on April 2, 2004, to life in prison without the possibility of parole for the
7 murder conviction and a concurrent term of twenty-five years to life for the conspiracy
8 conviction. Petitioner appealed his conviction to the California Court of Appeal and, on
9 June 23, 2006, the California Court of Appeal affirmed the conviction. Petitioner
10 subsequently filed a petition for review before the California Supreme Court, which was
11 denied on September 13, 2006.

12 Petitioner filed a petition for writ of habeas corpus before the California Superior
13 Court on August 14, 2008, which was denied on its merits on September 11, 2008. On
14 November 3, 2008, petitioner filed a habeas corpus petition before the California Court
15 of Appeal, which was denied on November 25, 2008. Petitioner also filed, on October 16,
16 2009, a petition for writ of habeas corpus before the California Supreme Court, which was
17 denied on June 10, 2009. Petitioner did not seek a writ of certiorari before the United
18 States Supreme Court.

19 The instant petition was filed on July 2, 2009. Respondent filed a motion to
20 dismiss the petition on October 28, 2009. Petitioner filed a response to the motion on
21 November 25, 2009. The magistrate judge issued a report and recommendation on
22 April 2, 2010. Petitioner filed his objections to the magistrate judge's report on June 1,
23 2010. Petitioner also filed supplemental lodgments in support of his objections on June 7,
24 2010.

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26 ¹ Petitioner does not object to the factual findings presented by the magistrate judge. *See* Doc. # 25
27 at 2-4. However, petitioner does present additional facts not included in the magistrate judge's factual
28 background and submits evidentiary support for those facts. *See id.* This Court incorporates those facts, as
well as those presented by the magistrate, that are deemed relevant to the issues presented in the instant
motion.

1 DISCUSSION

2 1. **Legal Standard**

3 a. **Scope of Review**

4 The district court’s role in reviewing a magistrate judge’s report and
5 recommendation is set forth in Title 28, United States Code, Section 636(b)(1). Under
6 this statute, the district court “shall make a *de novo* determination of those portions of the
7 report . . . to which objection is made,” and “may accept, reject, modify, in whole or in
8 part, the findings or recommendations made by the magistrate [judge].” *Id.* It is
9 well-settled, under Rule 72(b) of the Federal Rules of Civil Procedure, that a district court
10 may adopt those parts of a magistrate judge’s report to which no specific objection is
11 made, provided they are not clearly erroneous. Thomas v. Arn, 474 U.S. 140, 153 (1985).

12 b. **Statute of Limitations**

13 Under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), a
14 one-year period of limitation applies to the filing of a petition for a writ of habeas corpus
15 by a person in custody pursuant to the judgment of a state court. The limitation period
16 begins on the date on which the judgment became final by the conclusion of direct review
17 or the expiration of the time for seeking such review.² 28 U.S.C. § 2244(d)(1)(A).

18 AEDPA’s statute of limitation is subject to statutory tolling which tolls the statute
19 during the time a properly filed state habeas corpus petition is pending in the state court.
20 28 U.S.C. § 2244(d)(2). Provided the petitions were properly filed and pending, the
21 “statute of limitations is tolled from the time the first state habeas petition is filed until
22 the California Supreme Court rejects the petitioner’s final collateral challenge.” Nino v.
23 Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). A state habeas petition determined to be
24 untimely is not considered pending or properly filed for statutory tolling purposes. Carey
25 v. Saffold, 536 U.S. 214, 223-26 (2002); Pace v. DiGuglielmo, 544 U.S. 408, 413-14
26 (2005).

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28 ² In the Ninth Circuit, the period of “direct review” includes the ninety-day period within which a
petitioner can file a petition for a writ of certiorari regardless of whether the petitioner seeks such review.
Bowen v. Roe, 188 F.3d 1157, 1158-59 (9th Cir. 1999).

1 AEDPA's statute of limitations is also subject to equitable tolling. See Roy v.
2 Lampert, 465 F.3d 964, 970 (9th Cir. 2006); Calderon v. United States Dist. Court
3 (Beeler), 128 F.3d 1283, 1288 (9th Cir. 1997), *overruled on other grounds by* Calderon v.
4 United States Dist. Court (Kelly), 163 F.3d 530, 540 (9th Cir. 1998). Equitable tolling
5 is generally appropriate where a petitioner demonstrates two elements: "(1) that he has
6 been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in
7 his way." Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005). "Indeed, the threshold
8 necessary to trigger equitable tolling [under AEDPA] is very high, lest the exceptions
9 swallow the rule." Miranda v. Castro, 292 F.3d 1063, 1066 (9th Cir. 2002) (citing United
10 States v. Marcello, 212 F.3d 1005, 1010 (7th Cir.), *cert. denied*, 531 U.S. 878, 121 S.Ct.
11 188, 148 L.Ed.2d 130 (2000)). The Ninth Circuit in Beeler noted that "equitable tolling
12 will not be available in most cases, as extensions of time will only be granted if
13 'extraordinary circumstances' beyond a prisoner's control make it impossible to file a
14 petition on time." Beeler, 128 F.3d at 1288 (quoting Alvarez-Machain v. United States,
15 107 F.3d 696, 701 (9th Cir. 1996)). The burden is on the petitioner to show that the
16 "extraordinary circumstances" he has identified were the proximate cause of his
17 untimeliness, rather than merely a lack of diligence on his part. Spitsyn v. Moore, 345
18 F.3d 796, 799 (9th Cir. 2003); Stillman v. LaMarque, 319 F.3d 1199, 1203 (9th Cir.
19 2003).

20 2. Analysis

21 In the report, the magistrate judge determined that petitioner's conviction became
22 final on December 13, 2006, ninety days after the entry of the order denying petitioner's
23 direct review before the California Supreme Court, thereby commencing the statute of
24 limitations to begin to run on that day. Doc. # 19 at 3. The magistrate judge then found
25 that the instant petition, filed thirty months after the statute of limitations began to run
26 was untimely absent tolling and determined petitioner was not entitled to either statutory
27 or equitable tolling. Id. at 4-5. In addition, the magistrate judge noted petitioner
28 presented no arguments regarding state impediments to filing his federal petition nor

1 arguments concerning lack of knowledge of the factual predicate to his claims prior to the
2 expiration of the statute of limitations. Id. at 4.

3 Petitioner presents three specific objections to the magistrate judge’s findings and
4 conclusions: (a) the magistrate judge erred in concluding that petitioner failed to raise an
5 argument concerning a state impediment to filing his federal petition; (b) the magistrate
6 judge erred in concluding petitioner is not entitled to equitable tolling because he was
7 diligent and extraordinary circumstances exist; and (c) the magistrate judge erred in failing
8 to grant an evidentiary hearing in regards to the claims presented in the instant petition.³

9 **a. State Impediment**

10 Petitioner contends, in his objections, that the fact he did not receive “actual
11 notification” of the denial of his petition for review before the California Supreme Court
12 created a state impediment to his filing his federal petition and thus, claims the magistrate
13 judge erred in this regard. *See* Doc. # 25 at 3, 12, 15, 17. However, the argument
14 concerning actual notification of the California Supreme Court’s denial was presented to
15 the magistrate judge in support of petitioner’s claim for the application of equitable
16 tolling,⁴ not as creating a state impediment to filing. *See* Doc. # 14 at 15-16. Thus, the
17 magistrate judge correctly found petitioner presented no argument regarding a state
18 impediment to filing. Accordingly, petitioner’s objection to the magistrate judge’s
19 conclusion on this issue is OVERRULED.

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25 ³ Because this Court ultimately finds petitioner has failed to demonstrate the requisite diligence in
26 pursuing his state collateral remedies prior to the expiration of the statute of limitations, this Court need not
27 address whether extraordinary circumstances were present. *See Pace*, 544 U.S. at 418. In addition, this
28 Court need not address petitioner’s objections regarding the magistrate judge’s failure to hold an evidentiary
hearing on the merits of petitioner’s claims since this Court finds the petition untimely filed.

⁴ Insofar as the arguments presented by petitioner relate to the magistrate judge’s determination
regarding equitable tolling, the arguments will be addressed therein.

1 **b. Equitable Tolling**

2 The magistrate determined that petitioner is not entitled to equitable tolling of the
3 statute of limitations because he did not sufficiently establish he was diligent in pursuing
4 his state collateral attack nor that extraordinary circumstances stood in his way to filing
5 his federal habeas petition. Doc. # 19 at 5-8 (citing Pace, 544 U.S. at 418).

6 In regards to diligence, the magistrate judge noted the following facts: petitioner
7 first wrote to his appellate attorney on November 4, 2007, seeking a status of his case but
8 this letter was sent more than a year after his petition for review had been filed. Id. at 5
9 (citing Pet., Exh. 2 at 61). Petitioner’s next letter to his appellate attorney, dated
10 January 8, 2008, did not seek information regarding his case but, instead, requested his
11 legal materials be sent to Ms. Martha De La Torres. Id. (citing Pet., Exh. 2 at 62). Then,
12 on June 16, 2008, petitioner sent another letter seeking status of his appeal to his
13 appellate attorney. Id. (citing Pet., Exh. 2 at 63). Finally, petitioner wrote a letter to the
14 California Supreme Court on July 29, 2008, well after AEDPA’s statute of limitations had
15 expired, seeking a status of his petition for review. Id. (citing Pet., Exh. 4 at 72). The
16 California Supreme Court responded to this inquiry, thereby informing petitioner that his
17 petition had been denied on September 13, 2006. Id. (citing Pet., Exh. 4 at 73).

18 The magistrate judge further noted that petitioner’s claims concerning telephonic
19 contact by himself and his family members with his appellate attorney to ascertain the
20 status of his petition for review is not reflected in the record. Id. at 5-6. The magistrate
21 judge explained that petitioner failed to identify the dates such attempts were made or
22 specify how many times he and his family members made attempts to contact his attorney.
23 Id. at 5. The magistrate judge thus found this lack of specificity unpersuasive in regards
24 to petitioner’s claim that he exercised reasonable diligence. Id. at 6. The magistrate judge
25 pointed out that petitioner made no attempt to contact his attorney for more than a year
26 after his petition for review was filed and indicates only that petitioner was being “patient”
27 with his attorney. Id. The magistrate judge further pointed out that petitioner did not
28 offer any explanation as to why he did not write to “the California Supreme Court before

1 July 29, 2008; especially since he had not heard from his attorney since she filed his
2 petition for review in July of 2006.” Id.

3 Although petitioner objects to the magistrate judge’s findings and conclusions
4 regarding diligence, he does not address the magistrate judge’s findings regarding his lack
5 of diligence prior to receiving notice that his petition for review before the California
6 Supreme Court was denied. *See* Doc. # 25 at 9, 12. Based on this Court’s review of the
7 record, and considering petitioner’s lack of objections to the magistrate judge’s findings
8 and conclusions concerning diligence in pursuing petitioner’s collateral attack before the
9 state courts prior to July 2008, this Court agrees with the magistrate judge’s determination
10 that petitioner has not demonstrate sufficient diligence to warrant equitable tolling of the
11 statute of limitations prior to July 2008. Therefore, petitioner’s objections to the
12 magistrate judge’s findings and conclusions in this regard are OVERRULED.

13 After a careful *de novo* review of the entire record in this matter, this Court finds the
14 magistrate judge’s findings and conclusions presented in the report are not clearly
15 erroneous. Accordingly, this Court adopts the magistrate judge’s findings and conclusions
16 presented in the report in full.

17 **3. Certificate of Appealability**

18 Pursuant to Rule 11 of the Rules following 28 U.S.C. section 2254, which was
19 amended effective December 1, 2009, a district court now “must issue or deny a certificate
20 of appealability when it enters a final order adverse to the applicant.” A state prisoner
21 may not appeal the denial of a section 2254 habeas petition unless he obtains a certificate
22 of appealability from a district or circuit judge. 28 U.S.C. § 2253(c)(1)(A); *see also* United
23 States v. Asrar, 116 F.3d 1268, 1269-70 (9th Cir. 1997) (holding that district courts
24 retain authority to issue certificates of appealability under AEDPA). A certificate of
25 appealability is authorized “if the applicant has made a substantial showing of the denial
26 of a constitutional right.” 28 U.S.C. § 2253(c)(2). To meet this threshold showing,
27 petitioner must show that: (1) the issues are debatable among jurists of reason, (2) that
28 a court could resolve the issues in a different manner, or (3) that the questions are

1 adequate to deserve encouragement to proceed further. Lambright v. Stewart, 220 F.3d
2 1022, 1024-25 (9th Cir. 2000) (citing Slack v. McDaniel, 529 U.S. 473 (2000); Barefoot
3 v. Estelle, 463 U.S. 880 (1983)).

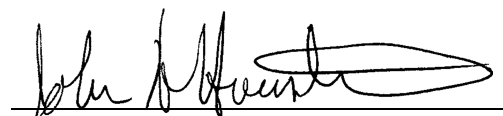
4 This Court must decide whether to grant petitioner a certificate of appealability
5 because dismissal of the petition constitutes a “final order adverse to the applicant.” Based
6 on this Court’s review of the magistrate judge’s report, petitioner’s objections thereto, and
7 the entire record in this matter, this Court finds that no issues presented herein are
8 debatable among jurists of reason nor could they be resolved in a different manner. This
9 Court further finds that there are no questions raised that deserve encouragement to
10 proceed further. Accordingly, this Court DENIES petitioner a certificate of appealability.

11 **CONCLUSION AND ORDER**

12 Based on the foregoing, IT IS HEREBY ORDERED that:

- 13 1. Petitioner’s objections to the magistrate judge’s report and recommendation
14 [doc. # 25] are **OVERRULED**;
- 15 2. The findings and conclusions of the magistrate judge presented in the report
16 and recommendation [doc. # 19] are **ADOPTED** in their entirety;
- 17 3. Respondent’s motion to dismiss the instant petition [doc. # 10] is
18 **GRANTED**;
- 19 4. The instant petition is **DISMISSED** with prejudice as untimely; and
20 5. Petitioner is **DENIED** a certificate of appealability.

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22 DATED: September 1, 2010



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24 JOHN A. HOUSTON
United States District Judge