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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BRENT CLARK,
Petitioner,
v.
J. GASTELO, WARDEN,
Respondent.

Case No.: 16CV1803-AJB(JMA)

**ORDER FOR FURTHER
BRIEFING AND
SUPPLEMENTATION OF THE
COURT’S RECORD**

Petitioner Brent Clark is a state prisoner, proceeding without counsel, with a petition for a writ of habeas corpus (“Petition”) pursuant to 28 U.S.C. § 2254. [Doc. No. 1.] Petitioner challenges his 2004 conviction for kidnapping for robbery, Cal. Pen. Code § 209(b)(1); forcible copulation, Cal. Pen. Code § 288a(c)(2); robbery, Cal. Penal Code § 211; and burglary, Cal. Penal Code § 459. [*Id.*] Respondent has filed a motion to dismiss, arguing the Petition must be dismissed because Petitioner’s claims are barred by the one-year statute of limitations. [Doc. No. 10.] On January 17, 2017, Petitioner filed a brief in opposition to the motion to dismiss, contending that his Petition should be considered timely because he is entitled to equitable tolling, and on March 20, 2017, he filed supplemental exhibits in support of his opposition. [Doc. Nos. 15 & 16.] After careful consideration, the undersigned finds Petitioner should be granted the

1 opportunity to further develop the record before the Court rules on the motion to
2 dismiss.

3 **I. Introduction and Procedural Background**

4 Petitioner's efforts to challenge his conviction commenced with an appeal
5 to the California Court of Appeal, in which he argued the trial court erred by: (1)
6 failing to conduct a fifth hearing on his competency to stand trial; and (2) granting
7 his request for self-representation despite his incompetence. [Lod. No. 1, App. at
8 2.] The Court of Appeal rejected these claims on the merits and affirmed the
9 judgment on January 25, 2008. [Lod. No. 1, App.] Thereafter, Petitioner
10 petitioned the California Court of Appeal for review of both claims. [Lod. No. 1.]
11 The California Supreme Court denied review on May, 14, 2008. [Lod. No. 2.]

12 The record indicates Petitioner did not take any further action to challenge
13 his conviction for more than six years, until June 16, 2015, when he filed a
14 motion in the San Diego Superior Court to modify his sentence by striking his
15 restitution fine and reducing it to \$200. [Lod. No. 3.] The motion was denied on
16 July 20, 2015. [*Id.*] Petitioner then filed a notice of appeal on August 4, 2015.
17 [Lod. No. 4.] The California Court of Appeal dismissed the appeal on September
18 3, 2015, finding the Superior Court's order was not appealable because it did not
19 affect Petitioner's substantial rights, and noting the Superior Court lost jurisdiction
20 to resentence Petitioner once the execution of his sentence commenced. [Lod.
21 No. 5.]

22 On January 21, 2016, Petitioner filed a habeas petition in the Superior
23 Court, claiming (1) his trial and appellate counsel were ineffective in failing to
24 raise and investigate issues relating to sentencing; (2) the trial court abused its
25 discretion in failing to dismiss one or more strike allegations; (3) the trial court
26 should not have permitted him to waive counsel because he was mentally
27 incompetent; and (4) the trial court should not have permitted him to represent
28 himself because of his mental incompetence. [Lod. No. 6.] On March 3, 2016, the

1 Superior Court found the habeas petition was “procedurally barred for being
2 untimely.” [Lod. No. 7, at 3-4.] The court also rejected Petitioner’s ineffective
3 assistance of counsel claims as conclusory and ruled Petitioner’s sentencing
4 error claim was “fatally flawed” because Petitioner was sentenced as a violent
5 sex offender under California’s One Strike law, Cal Pen. Code § 667.61, not as a
6 recidivist under California’s Three Strikes law, Cal. Pen. Code § 667(b)-(i). [*Id.* at
7 3-5.] Finally, the court found Petitioner’s competency-related claims were not
8 cognizable on habeas corpus because those claims were raised and rejected on
9 direct appeal. [*Id.* at 5.] The next day, March 4, 2016, the Superior Court denied
10 Petitioner’s second motion to modify his sentence by reducing the restitution fine,
11 ruling it did not have jurisdiction to modify the sentence because more than 120
12 days had passed since sentencing, and that Petitioner waived his right to
13 challenge the restitution fine by failing to object at sentencing. [Lod. No. 8.]

14 On March 28, 2016, Petitioner filed a notice of appeal in the California
15 Court of Appeal, challenging the Superior Court’s denial of his motion to modify
16 his sentence. [Lod. No. 9 at 2.] Two days later, on March 30, 2016, he also filed a
17 notice of appeal of the Superior Court’s denial of his habeas petition. [Lod. No.
18 10.] On April 7, 2016, the Court of Appeal addressed Petitioner’s notice of
19 Appeal relating to the habeas petition, construing the filing as a petition for writ of
20 habeas corpus and denying habeas relief. [Lod. No. 11.] The following day, April
21 8, 2016, the Court of Appeal addressed Petitioner’s attempt to appeal the
22 Superior Court’s denial of his second motion to modify his sentence, finding the
23 order was not appealable and dismissing the appeal. [Lod. No. 15.]

24 On April 25, 2016, Petitioner filed a habeas petition in the California
25 Supreme Court, raising the same claims that he raised in the habeas petitions
26 filed in the lower state courts. [Lod. No. 13.] Thereafter, on May 10, 2016,
27 Petitioner also filed a petition for review with the California Supreme Court,
28 raising identical claims. [Lod. No. 14.] The California Supreme Court denied the

1 petition for review on June 15, 2016, and on June 22, 2016, it denied the habeas
2 petition, without comment or citation to authority. [Lod. Nos. 15 & 16.]

3 On July 6, 2016, Petitioner constructively filed the present Petition, raising
4 the same claims that he raised in his state habeas petitions.¹

5 **II. Discussion**

6 The AEDPA's one-year statute of limitations applies to Petitioner's federal
7 habeas corpus claims. *Calderon v. U.S. District Court (Beeler)*, 128 F.3d 1283,
8 1286-87 (9th Cir. 1997), as amended on denial of reh. and reh. en banc, cert.
9 denied, 522 U.S. 1099 (1998), overruled on other grounds in *Calderon v. U.S.*
10 *District Court*, 163 F.3d 530 (9th Cir. 1998), cert. denied, 523 U.S. 1063 (1999).

11 Pursuant to 28 U.S.C. § 2244(d)(1):

12 A 1-year period of limitation shall apply to an application for a
13 writ of habeas corpus by a person in custody pursuant to the
14 judgment of a State court. The limitation period shall run from the
latest of --

15 (A) the date on which the judgment became final by the
16 conclusion of direct review or the expiration of the time for seeking
17 such review;

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

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

25 (D) the date on which the factual predicate of the claim or

26
27 ¹ See *Anthony v. Cambra*, 236 F.3d 568, 574-75 (9th Cir. 2000) (applying "mailbox rule" which
28 provides for the constructive filing of court documents as of the date they are submitted to
prison authorities for mailing to the court).

1 claims presented could have been discovered through the exercise of
2 due diligence.

3 28 U.S.C. § 2244(d)(1)(A)-(D). Here, pursuant to 28 U.S.C. § 2244(d)(1)(A), the
4 conclusion of direct review of Petitioner's conviction occurred on August 12,
5 2008, ninety (90) days after the California Supreme Court denied Petitioner's
6 petition for review on May 14, 2008. See Rule 13(1), U.S. Sup. Ct. Rules; *Bowen*
7 *v. Roe*, 188 F.3d 1157, 1159-60 (9th Cir. 1999). Accordingly, absent any
8 applicable tolling, Petitioner had until August 13, 2009 to file his federal habeas
9 petition. *Id.*; *Patterson v. Stewart*, 251 F.3d 1243, 1246 (9th Cir. 2001). Because
10 Petitioner did not constructively file his federal habeas petition until July 6, 2016,
11 it is untimely unless Petitioner is entitled to statutory or equitable tolling. He
12 contends equitable tolling is warranted based on his mental health status and
13 requests an evidentiary hearing. [Doc. No. 15, p. 5.]

14 *Equitable Tolling*

15 The one year statute of limitations for filing a federal habeas petition may
16 be equitably tolled if extraordinary circumstances beyond a prisoner's control
17 prevent the prisoner from filing on time. See *Holland v. Florida*, 560 U.S. 631,
18 645 (2010). A petitioner seeking equitable tolling must establish two elements:
19 "(1) that he has been pursuing his rights diligently, and (2) that some
20 extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S.
21 408, 418 (2005). The diligence required is "reasonable diligence," not "maximum
22 feasible diligence." See *Holland*, 560 U.S. at 653; see also *Bills v. Clark*, 628
23 F.3d 1092, 1096 (9th Cir. 2010).

24 The Ninth Circuit has articulated a specific, two-part test for an equitable
25 tolling claim based on a petitioner's mental impairment:

- 26 (1) First, a petitioner must show his mental impairment was an
27 "extraordinary circumstance" beyond his control by demonstrating
28 the impairment was so severe that either

1 (a) petitioner was unable to rationally or factually to personally
2 understand the need to timely file, or

3 (b) petitioner's mental state rendered him unable personally to
4 prepare a habeas petition and effectuate its filing.

5 (2) Second, the petitioner must show diligence in pursuing the claims
6 to the extent he could understand them, but that the mental
7 impairment made it impossible to meet the filing deadline under
8 the totality of the circumstances, including reasonably available
access to assistance.

9 *Bills*, 628 F.3d at 1099-1100; see also *Orthel v. Yates*, 795 F.3d 935, 938 (9th
10 Cir. 2015) (“A petitioner seeking equitable tolling on the grounds of mental
11 incompetence must show extraordinary circumstances, such as an inability to
12 rationally or factually personally understand the need to timely file, or a mental
13 state rendering an inability personally to prepare a habeas petition and effectuate
14 its filing.”).

15 A petitioner alleging a severe mental impairment during the filing period is
16 not entitled to an evidentiary hearing unless he or she makes “a good faith
17 allegation that would, if true, entitle him to equitable tolling.” *Laws v. Lamarque*,
18 351 F.3d 919, 921 (9th Cir. 2003) (remanding for consideration of whether the
19 petitioner's delayed filing was “attributable to psychiatric medication which
20 deprived Petitioner of any kind of consciousness” where the petitioner had
21 demonstrated “evidence of serious mental illness” by attaching prison psychiatric
22 and medical records); *Bills*, 628 F.3d at 1099-100 (remanding where the
23 petitioner was in the lowest percentile for verbal IQ, verbal comprehension and
24 working memory, and, according to clinical psychologists, was incapable of
25 inferential thinking necessary to complete a federal habeas form); see also
26 *Orthel*, 795 F.3d at 939-40 (“Where the record is amply developed, and where it
27 indicates that the petitioner's mental incompetence was not so severe as to
28 cause the untimely filing of his habeas petition, a district court is not obligated to

1 hold evidentiary hearings to further develop the factual record, notwithstanding a
2 petitioner's allegations of mental incompetence.”) (*quoting Roberts v. Marshall*,
3 627 F.3d 768, 773 (9th Cir. 2010).)

4 Here, Petitioner alleges he has been under the care of the prison mental
5 health system for a “major mental illness” since November 2004. [Doc. No. 15,
6 pp. 1-2. He reports his diagnosis is Bipolar/Mood Disorder and Major Depression
7 and during this time he has taken Zyprexa 15 mg, Depakote 1500 mg, Buspar 30
8 mg, Cogentin 2 mg, Lamictal 50 mg, Vistaril 100 mg, and Propranolol 10 mg. [*Id.*
9 at 2.] He states his “mental illness coupled with the medications and there
10 affects” created an “extraordinary circumstance” that made it “physically
11 impossible” for Petitioner to pursue his claims in the judicial system. [*Id.*] He
12 further represents his medications “have changed throughout the years causing
13 at times “additional obstructions” due to side effects that “at times” have been
14 suicidal thoughts and a deeper depression causing crisis bed observations and
15 mental health transfers.” [*Id.*] Petitioner’s claims are supported by the declaration
16 of Christopher Griffith, a self-described “jailhouse lawyer,” who states he believes
17 Petitioner’s mental health circumstances prevented him from filing a federal
18 habeas petition. [*Id.* at 6-7.] Petitioner has also provided what appears to be a
19 portion of his declaration, in which he represents his medications have played a
20 “major part” in preventing him from pursuing federal habeas relief.² [*Id.* at 8.]
21 Petitioner has provided some medical records to support his assertion. [Doc. No.
22 15, Exs. A-E and Doc. No. 16, Ex. F.]

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26 ² The Court’s record contains what appears to be only the final page Petitioner’s declaration,
27 dated January 11, 2017. Petitioner’s declaration, as it appears in the Court’s record is one
28 page in length, beginning with paragraph 9, creating the impression that Petitioner may have
intended for another page or pages to have preceded it. If Petitioner’s declaration, as it
currently appears in the record, is incomplete, Petitioner may refile a full and complete version
of his declaration, along with the supplemental briefing the Court requests herein.

1 Although these records indicate Petitioner has a long history of mental
2 illness, the record is sparse with respect to his mental state during the AEDPA
3 limitations period. He indicates his medications have changed over time and his
4 mental condition has fluctuated “at times” as a result, but does not provide any
5 detail as to which specific medication(s) impaired his ability to file his federal
6 habeas petition, how the medication(s) impaired him, or when he took the
7 medication(s).

8 Nearly all of the records Petitioner has provided relate to his mental health
9 condition before the California Supreme Court denied his first petition for review
10 on May 14, 2008 [See e.g. Doc. No. 15, Exs. A-B and Doc. No. 16, Ex. F] or after
11 he filed his federal habeas petition on July 6, 2016 [See e.g. Doc. No. 15, Ex. E]
12 and, thus, do not provide information regarding the nature and severity of
13 Petitioner’s alleged mental impairments during the time period for which
14 Petitioner must establish he is entitled to equitable tolling (May 15, 2008 to July
15 6, 2016). The only records that shed any light on Petitioner’s mental health
16 condition during this relevant time period relate to treatment he received at John
17 D. Klarich Memorial Hospital from August 7 to October 6, 2010 [*Id.*, Ex. C], and
18 from the Vacaville Psychiatric Program from October 7 – December 2, 2010 [*Id.*,
19 Ex. D]. It appears, however, additional mental health records may exist for the
20 relevant time period, as Petitioner represents the exhibits are “only a portion of
21 the record.” [*Id.* p. 2.]

22 Although Petitioner has not met his burden under *Bills*, given the state of
23 the record, further development of the record is needed. See e.g., *Chick v.*
24 *Chevaz*, 518 Fed. Appx. 567, 569 (9th Cir. 2013) (remanding for further
25 development of the record where the existing record indicated the petitioner had
26 some degree of mental impairment, but did not conclusively indicate the severity
27 during the time period for which equitable tolling was sought.) Petitioner, thus, is

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1 granted the opportunity to provide additional briefing and evidence in support of
2 his equitable tolling claim.

3 **III. Conclusion**

4 Based on the foregoing, Petitioner is directed to file a supplemental brief,
5 signed under penalty of perjury, addressing his allegations that his mental health
6 and medications interfered with his ability to pursue federal habeas relief.

7 Petitioner should explain when (start and end dates) he took each medication he
8 contends impaired his ability to file his federal habeas petition, explain what side
9 effect(s) of the medication(s) interfered with his ability to file a federal habeas
10 brief, and identify what period(s) of time he was unable to file his federal habeas
11 petition as a result of these side effects. Petitioner is encouraged to attach any
12 additional medical records he may have in support of his claims, including copies
13 of his prescriptions or progress notes prepared by medical staff. Specifically,
14 Petitioner should submit any documents that would support his claim that (1) he
15 suffered from the effects of a serious mental illness during the AEDPA limitations
16 period; (2) he took medications during this time period, and (3) the medications
17 and related side effects interfered with his thought process so severely that it
18 caused the untimely filing of his federal habeas petition.

19 Petitioner's supplemental brief and any supporting documentation shall be
20 filed no later than **June 13, 2017**. Respondent shall file a brief in reply to
21 Petitioner's supplemental brief no later than **June 23, 2017**.

22 Dated: May 23, 2017

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25 Honorable Jan M. Adler
26 United States Magistrate Judge
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