

APRIL 2008

A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

APR 2 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MICHAEL WILSON,

Petitioner-Appellant,

v.

SHAWN HATTON, Warden,

Respondent-Appellee.

No. 18-56313

D.C. No. 2:18-cv-06189-MWF-GJS
Central District of California,
Los Angeles

ORDER

Before: SILVERMAN and CALLAHAN, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not shown that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.”

Slack v. McDaniel, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2);

Gonzalez v. Thaler, 565 U.S. 134, 140-41 (2012).

Any pending motions are denied as moot.

DENIED.

John Wiley
and Sons

B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL WILSON,
Petitioner

V.

HATTON, WARDEN,
Respondent.

Case No. CV 18-6189-MWF (GJS)

**ORDER: DISMISSING PETITION
WITH PREJUDICE FOR
UNTIMELINESS; AND DENYING
A CERTIFICATE OF
APPEALABILITY**

On July 17, 2018, Petitioner filed a 28 U.S.C. § 2254 habeas petition in this District (Dkt. 1, “Petition”). The Petition stems from, and seeks to challenge, Petitioner’s November 2001 conviction in Los Angeles County Superior Court Case No. BA212549 (the “State Conviction”). (Petition at 2.)¹

After he was sentenced pursuant to the State Conviction, Petitioner appealed to the California Court of Appeal (Case No. B156274). He was represented by appointed appellate counsel (Jeffrey S. Kross), who raised a number of claims challenging jury instructions, the admission of evidence, the prosecutor's use of peremptory challenges, and the sufficiency of the evidence. *See People v. Wilson*, 2003 WL 1091052 (Cal. Ct. 2003). On March 13, 2003, the California Court of

¹ Pursuant to Rule 201 of the Federal Rules of Evidence, the Court has reviewed the dockets available electronically for the Los Angeles County Superior Court, the California Court of Appeal, and the California Supreme Court.

1 Appeal affirmed the judgment. *Id.* Attorney Kross filed a petition for review with
2 the California Supreme Court on behalf of Petitioner, which was denied on May 21,
3 2003 (Case No. S 115096).

4 On April 17, 2004, Petitioner filed a pro se habeas petition in the California
5 Court of Appeal (Case No. B174794), which raised an ineffective assistance of
6 counsel claim. (Petition at 2-3.)² That petition was denied on May 7, 2004.
7 (Petition Ex., ECF #44.) Petitioner alleges that he did not file any other state court
8 proceedings (Petition at 2-5), but this allegation is not correct.

9 The Petition appends a copy of a June 24, 2014 letter from the California
10 Supreme Court to Petitioner, which references Case No. S219008. (Petition Ex.,
11 ECF #46.) The docket for that case shows that: on June 4, 2014, Petitioner filed a
12 pro se habeas petition in the state high court; and on August 13, 2014, the California
13 Supreme Court denied the petition citing a host of procedural bars, including
14 untimeliness. In addition, a review of the California courts' dockets show that: on
15 July 28, 2016, Petitioner filed a habeas petition in the trial court, which apparently
16 was denied on July 17, 2017; on or about August 1, 2017, Petitioner submitted a
17 notice of appeal to the California Court of Appeal, which was filed on September
18 15, 2017 (Case No. B285080); on October 2, 2017, the appeal was dismissed; and
19 there is no indication – in the Petition or in the California court dockets – that
20 Petitioner sought review in the California Supreme Court.

21 The Petition bears a signature date of July 8, 2018, and the envelope in which it
22 was mailed to the Court shows a postmark date of July 9, 2018. Pursuant to the
23 "mailbox rule," the Court will deem the Petition to have been "filed" on July 8,
24 2018. *See Campbell v. Henry*, 614 F.3d 1056, 1058-59 (9th Cir. 2010); Rule 3(d) of
25 the Rules Governing Section 2254 Cases in the United States District Courts.

27 ² Petitioner alleges that this proceeding was an appeal from the judgment of
28 conviction, but the California Court of Appeal's docket shows that it was a habeas
proceeding.

1 The one-year limitations period that governs the Petition is set forth in 28 U.S.C.
2 § 2244(d)(1), and Petitioner does not dispute that the applicable limitations period is
3 that set forth in subpart (d)(1)(A). Therefore, Petitioner's judgment became "final"
4 on the date on which its state direct appeal became final. The California Supreme
5 Court denied review on May 21, 2003, and there is no evidence that Petitioner
6 sought a writ of certiorari in the United States Supreme Court. Accordingly,
7 Petitioner's state conviction became "final" 90 days later, *i.e.*, on August 19, 2003,
8 and his limitations period commenced running the next day. *See* 28 U.S.C. §
9 2244(d)(1)(A); *Zepeda v. Walker*, 581 F.3d 1013, 1016 (9th Cir. 2009). As a result,
10 Petitioner had until August 19, 2004, in which to file a timely federal habeas
11 petition, absent statutory or equitable tolling.

12 28 U.S.C. § 2244(d)(2) suspends the limitations period for the time during which
13 a "properly-filed" application for post-conviction relief is "pending" in state court.
14 Petitioner filed a habeas petition in the California Court of Appeal on April 27,
15 2004, which appears to have been denied on its merits, and thus, he may receive
16 Section 2244(d)(2) tolling for the time in which it was pending. As of April 26,
17 2004, 250 days of Petitioner's limitations period had run. Once the California Court
18 of Appeal denied habeas relief on May 7, 2014, Petitioner's limitations period
19 recommenced running the next day and expired 115 days later on August 31, 2004.

20 Petitioner filed state proceedings after 2004, including in 2014 and in 2017. But
21 by then, his limitations period had expired many years earlier and there was no
22 limitations period in existence to be tolled. As a result, neither the 2014 state high
23 court habeas petition nor the 2017 appeal – nor any other state proceedings filed
24
25

26 appointed to represent Petitioner on March 11, 2002; Attorney Kross filed a
27 "timely" opening brief on September 18, 2002; and Attorney Kross filed a timely
28 petition for review in the California Supreme Court.

1 after August 31, 2004 – can serve as a basis for Section 2244(d)(2) statutory tolling.⁴
2 *See, e.g., Laws v. Lamarque*, 351 F.3d 919, 922 (9th Cir. 2003) (“because
3 [petitioner] did not file his first state petition until after his eligibility for federal
4 habeas had already elapsed, statutory tolling cannot save his claim in the first
5 instance”); *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003) (“section
6 2244(d) does not permit the reinitiation of the limitations period that has ended
7 before the state petition was filed”). Accordingly, Petitioner’s limitations period
8 expired on August 31, 2004, almost 14 years *before* the instant Petition has been
9 deemed filed. The Petition remains substantially untimely absent equitable tolling.

10 The limitations period for Section 2254 petitions is subject to equitable tolling in
11 appropriate circumstances. *Holland v. Florida*, 560 U.S. 631, 645-49 (2010).
12 However, application of the equitable tolling doctrine is the exception rather than
13 the norm. *See, e.g., Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1011 (9th Cir.
14 2009) (characterizing the Ninth Circuit’s “application of the doctrine” as “sparing”
15 and a “rarity”); *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999) (“equitable
16 tolling is unavailable in most cases”). A habeas petitioner may receive equitable
17 tolling only if he “shows ‘(1) that he has been pursuing his rights diligently, and (2)
18 that some extraordinary circumstance stood in his way’ and prevented timely filing.”
19 *Holland*, 560 U.S. at 649 (citation omitted); *see also Pace v. DiGuglielmo*, 544 U.S.
20 408, 418 & n.8 (2005). Both elements must be met. *Id.* at 418 (finding that the
21 petitioner was not entitled to equitable tolling, because he had not established the
22 requisite diligence). A petitioner seeking application of the doctrine bears the
23

24

25 ⁴ In addition, the fact that the 2014 state high court petition was denied on
26 procedural grounds that included untimeliness rendered it not properly filed for
27 Section 2244(d)(2) purposes and, thus, not a candidate for statutory tolling. *Walker*
28 *v. Martin*, 562 U.S. 307, 313 (2011) (as here, a summary denial citation to *In re*
Robbins, 18 Cal. 4th 770, 780 (1998), means that the state court denied the petition
as untimely); *Allen v. Seibert*, 552 U.S. 3, 5 (2007) (*per curiam*) (“a state
postconviction petition is . . . not ‘properly filed’ if it was rejected by the state court
as untimely”).

1 burden of showing that it should apply to him. *Id.*; *see also Lawrence v. Florida*,
2 549 U.S. 327, 336 (2007) (observing that, to receive equitable tolling, the petitioner
3 must prove the above two requirements).

4 In his Response to the OSC, Petitioner asserts vaguely, without any supporting
5 facts and not under penalty of perjury, three reasons why the Petition should be
6 considered timely under the equitable tolling doctrine. First, he states that he was
7 unable to “prepare or present his legal grievances in a coherent format” and, thus,
8 sought the assistance of other inmates. Second, Petitioner asserts, without
9 elaboration or reference to any particular time frame, that “the institutional law
10 library imposes a strict access to inmates from 3 to 4 months for a 2 hours visit.”
11 Third, Petitioner asserts that, following various acts of misconduct on his part
12 (participating in a riot, battery on another inmate, and possessing an inmate-
13 manufactured weapon), he was placed in administrative segregation from May
14 through November 2010, July through October 2012, and September 2013 through
15 March 2014. None of these assertions, whether viewed individually or
16 cumulatively, support application of the equitable tolling doctrine in this case.

17 With respect to Petitioner’s first reason, his reliance on the assistance of other
18 inmates is not an extraordinary circumstance. *See Chaffer v. Prosper*, 592 F.3d.
19 1046, 1049 (9th Cir. 2010) (*per curiam*); *see also Baker v. California Dept. of Corr.*,
20 484 Fed. Appx. 130, 131 (9th Cir. June 7, 2012) (No. 09-17371) (under Ninth
21 Circuit precedent, “[l]ow literacy levels, lack of legal knowledge, and need for some
22 assistance to prepare a habeas petition are not extraordinary circumstances to
23 warrant equitable tolling of an untimely habeas petition”). Reliance on the
24 assistance of other inmates cannot meet the extraordinary circumstance requirement,
25 because this is a common incident of prison life. *See Chaffer*, 592 F.3d at 1049;
26 *Wilson v. Bennett*, 188 F. Supp. 2d 347, 353-54 (S.D.N.Y. 2002) (allegations that
27 the petitioner lacked legal knowledge and had to rely on other prisoners for legal
28 advice and in preparing his papers “cannot justify equitable tolling,” as such

1 limited law library access unsupported by competent evidence held to be inadequate
2 to state a basis for equitable tolling). “Ordinary prison limitations on [a petitioner’s]
3 access to the law library . . . were neither ‘extraordinary’ nor made it ‘impossible’
4 for him to file his petition in a timely manner. Given even the most common day-
5 to-day security restrictions in prison, concluding otherwise would permit the
6 exception to swallow the rule.” *Ramirez v. Yates*, 571 F.3d 993, 998 (9th Cir. 2009).
7 As in *Ramirez*, Petitioner fails to explain how any restrictions on his law library
8 access, and/or any deficiencies in the library, made it impossible for him to seek
9 federal habeas relief on a timely basis.

10 Petitioner’s third contention – that at various times between 2010 and 2014, he
11 was placed in administrative segregation due to his own misconduct – plainly fails
12 to establish a basis for equitable tolling. As set forth above, Petitioner’s limitations
13 period expired on August 31, 2004, many years *before* these stints in administrative
14 segregation. Events that occur after a limitations period already has expired cannot
15 constitute circumstances (extraordinary or not) that caused a petitioner to be unable
16 to seek timely relief while his limitations period actually was pending.

17 There is nothing in the record that could establish the requisite extraordinary
18 circumstance that prevented Petitioner from seeking federal habeas relief for close
19 to 14 years. There also is nothing in the record that explains, much less justifies,
20 Petitioner’s egregious delay. Significantly, Petitioner alleges (Petition at 2-3) that
21 he raised his present ineffective assistance claim as far back as 2004, through his
22 California Court of Appeal habeas petition in Case No. B174794. Thus, he knew of,
23 and had formulated, his federal habeas claim over 14 years before coming to federal
24 court. Petitioner failed to exhaust the claim at that point in time, *i.e.*, after the
25 California Court of Appeal denied it on May 7, 2004. Assuming he finally did so
26 through his 2014 habeas petition filed in the state high court in Case No. S219008,
27 or only raised the claim in the state courts for the first time through that petition,
28 waiting over ten years to take this step was dilatory. Moreover, after the California

McDaniel, 529 U.S. 473, 484-85 (2000). The Court concludes that a certificate of appealability is unwarranted, and thus, a certificate of appealability is DENIED.

IT IS SO ORDERED.

DATED: August 20, 2018

Michael W. Fitzgerald
MICHAEL W. FITZGERALD
UNITED STATES DISTRICT JUDGE

Presented by:

**GAIL J. STANDISH
UNITED STATES MAGISTRATE JUDGE**

**Additional material
from this filing is
available in the
Clerk's Office.**