APPENDIX A

Rec'd 4 Dec. 24

FILED

NOV 22 2024

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ADAM JAY STONE,

Petitioner - Appellant,

v.

C. PFEIFFER, Warden of CDCR KVSP,

Respondent - Appellee.

No. 24-394

D.C. No. 8:22-cv-01703-CJC-BFM
Central District of California,
Santa Ana

ORDER

Before: BRESS and SUNG, Circuit Judges.

The request for a certificate of appealability is denied because the underlying 28 U.S.C. § 2254 petition fails to state any federal constitutional claims debatable among jurists of reason. *See* 28 U.S.C. § 2253(c)(2)-(3); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) ("When ... the district court denies relief on procedural grounds, the petitioner seeking a COA must show both '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.'") (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Any pending motions are denied as moot.

DENIED.

A

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ADAM JAY STONE,

Petitioner - Appellant,

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C. PFEIFFER, Warden of CDCR KVSP,

Respondent - Appellee.

No. 24-394

D.C. No. 8:22-cv-01703-CJC-BFM
Central District of California,
Santa Ana

ORDER

Before: SILVERMAN and SUNG, Circuit Judges.

Appellant has filed a combined motion for reconsideration and motion for reconsideration en banc (Docket Entry No. 4).

The motion for reconsideration is denied and the motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

A

APPENDIX B

Rec'd
13 Nov. 2023

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

ADAM JAY STONE,

Petitioner,

v.

C. PFEIFFER,

Respondent.

No. 8:22-cv-1703-CJC-BFM

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Cormac J. Carney, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

SUMMARY OF RECOMMENDATION

This case involves a habeas petition challenging a state murder conviction. Respondent moved to dismiss the Petition, arguing that it was not timely filed. Petitioner does not dispute that his Petition was not filed within the one-year statute of limitations, but he argues that he should receive equitable tolling because he was delayed in learning that the California

Supreme Court had dismissed his petition for review. The Court recommends that the Motion be granted. Petitioner makes a strong claim that his appellate counsel did not immediately notify him of the California Supreme Court's decision. But Petitioner did receive a trial court decision in an unrelated proceeding that described the California Supreme Court's decision denying his petition. That trial court decision put him on notice that his state direct appellate proceedings were complete. Petitioner did not exercise diligence from the time he received that other decision; instead, it appears that he waited several months after receiving that other decision to begin collecting records in earnest. And because equitable tolling requires a petitioner to show that he was diligent from the time that the impediment to filing was lifted until the time the petition was filed, his lack of diligence after receiving the trial court decision means Petitioner cannot show that he is entitled to equitable tolling. The Court therefore recommends that the Motion be granted and that the Petition be dismissed.

FACTUAL BACKGROUND

In 2018, an Orange County jury found Petitioner guilty of first-degree murder. *People v. Stone*, Case No. G056524, 2020 WL 426524, at *1 (Cal. Ct. App. Jan. 28, 2020). He was sentenced to fifty years to life. *Id.* The California Court of Appeal affirmed the judgment. *Id.*

Petitioner filed a petition for review in the California Supreme Court. (Lodged Document ("LD") 5.) On April 29, 2020, the California Supreme Court granted reviewed and deferred further action on Petitioner's case pending consideration of a related issue in a separate case, *People v. Frahs*. (LD 6.) On August 26, 2020, after *Frahs* was decided, the California Supreme Court dismissed Petitioner's petition for review without comment. (LD 7.) It does not appear that Petitioner filed a petition for a writ of certiorari in the United States

Supreme Court. His case thus became final 150 days later, on January 23, 2021. *See* U.S. Supreme Court Misc. Order (Mar. 19, 2020) (extending the deadline for filing petitions for a writ of certiorari to 150 days due to COVID-19); *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999) (a state conviction does not become final until the period for filing a petition for a writ of certiorari runs, whether the individual files a petition or not).

Petitioner filed a Petition in this Court on September 8, 2022. (ECF 1.) Respondent moved to dismiss the Petition as untimely. (ECF 28.) That Motion is fully briefed and ready for decision.

ANALYSIS

The time for filing a habeas petition in federal court is governed by statute. Section 2244(d) of Title 28 states:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court

and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d). Petitioner does not claim that the one-year clock was triggered by any event *after* his conviction became final. As such, the limitation period began to run on January 24, 2021, the first day after his conviction became final. Petitioner did not file within a year of that date; he filed about eight months after that mark.

A petition for writ of habeas corpus "can . . . be timely, even if filed after the one-year time period has expired, when statutory or equitable tolling applies." *Jorss v. Gomez*, 311 F.3d 1189, 1192 (9th Cir. 2002). Statutory tolling is premised on § 2244(d)(2), which states that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." But Petitioner did not present any state post-conviction filing between the date that his conviction became final (January 24, 2021) and the date the one-year period of limitation expired (January 23, 2022). He filed his first state post-conviction petition on September 9, 2022. (*See* LD 8.) Because he did not file his state petition until after the statute of limitations for federal habeas had run, statutory tolling does not apply. *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003). Petitioner does not claim otherwise. (ECF 30 at 12 (Petitioner disclaiming any entitlement to statutory tolling).)

Petitioner does claim, however, that he is entitled to equitable tolling. A petitioner must show two things to be entitled to equitable tolling: (1) that he has been pursuing his rights diligently; and (2) that some extraordinary

circumstance stood in his way and prevented timely filing. *Holland v. Florida*, 560 U.S. 631, 645 (2010).

In this case, Petitioner claims that he is entitled to equitable tolling because he did not learn that the California Supreme Court had denied his petition for review until June 6, 2022, nearly two years after the court issued its order. As Respondent concedes, under some circumstances, an attorney's failure to notify his client of a state supreme court's decision can serve as a basis for equitable tolling. *Ramirez v. Yates*, 571 F.3d 993, 998 (9th Cir. 2009). (*See* ECF 28-1 at 20-21.) Respondent argues, however, that the facts undermine Petitioner's claim that he did not learn about the California Supreme Court's decision until June 2022, and do not support a finding of equitable tolling.

The record reflects the following facts: On May 4, 2020, Petitioner's appellate counsel, Brett Duxbury, wrote Petitioner to advise him that his petition for review in the California Supreme Court was stayed pending *People v. Frahs*, S252220. Duxbury wrote, "This may take a while." (ECF 1 at 98.)

The California Supreme Court decided *People v. Frahs* on June 18, 2020. 466 P.3d 844 (Cal. 2020). The California Supreme Court dismissed Petitioner's case on August 27, 2020. (LD 7.) Petitioner claims that his appellate counsel did not send him a letter advising him of the California Supreme Court's decision. Petitioner presents a log from his facility showing incoming and outgoing legal mail, and indeed, it reflects no letter from Duxbury to Petitioner in September 2020 or October 2020. (ECF 1 at 102.)

Petitioner claims he was diligently following *Frahs* and noted the California Court of Appeal decision issued in that case on remand. (ECF 1 at 31, 104.) That decision was issued on May 26, 2022.

Petitioner claims he reached out to Duxbury, and Duxbury sent him a letter telling him that his case was final. (ECF 1 at 99.) Duxbury said that he had sent a letter in September 2020 advising him of the court's decision, and

that he had sent Petitioner all the records in the case at that time. As discussed below, there is a dispute as to when that letter was sent. The letter has a typewritten date of December 17, 2021. The typewritten date is crossed off and handwritten next to it is the notation "27 May 2022." On the other side of the page, in different handwriting, there is a notation: "Rec'd 6 June 2022." (ECF 1 at 99.) In his Petition, Petitioner claims that June 6, 2022, is the date he learned of the unfavorable California Supreme Court decision in his case—apparently relying on this letter.

Duxbury wrote a subsequent letter dated June 9, 2022. Duxbury said that he learned from Petitioner's mother that Petitioner did not receive the package sent in September 2020, which contained the complete record on appeal. (ECF 1 at 100.) Duxbury claimed that he did not retain a copy of the record, and he suggested that Petitioner could hire a document retrieval service if he is unable to locate it. "As for any deadlines that may have passed, this letter along with your statement of not getting the record or notice of remittitur may suffice for relief from default." (ECF 1 at 100.)

Petitioner claims that his family paid for the transcripts in the case in June 2022. Petitioner claims that he reached out to his trial counsel by letter on June 12, 2022. He received a letter in return, dated June 16, 2022, in which trial counsel told him it would take a while for him to pull his file and send him a copy of it. (ECF 1 at 101.) On June 28, 2022, Petitioner claims he received a copy of the California Supreme Court docket. (ECF 1 at 105.)

From these facts, Petitioner constructs this argument for equitable tolling: His counsel did not notify him that the California Supreme Court had decided his case. Nor did he receive his file from counsel, which counsel told him he would receive once his case was over. He was diligently following *Frahs*, and only became aware it was decided when he saw the California Court of Appeal decision on remand. He reached out to his appellate counsel, who confirmed in

early June 2022 that indeed his petition had been denied and his case was final. He had his family order transcripts, tried to collect his trial file, and then filed his Petition in this Court and in the Superior Court, both on September 8, 2022.

Respondent concedes that the legal-mail log reflects no letter from Duxbury in September or October 2020 that would have plausibly been the letter Duxbury claims he sent shortly after the California Supreme Court dismissal. (ECF 28-1 at 17.) But, Respondent claims, there were three other ways Petitioner was notified that his case had been denied—two of which happened before the statute of limitations ran out on January 23, 2022, and one more that happened before June 2, 2022, the date on which Petitioner claims he first learned that the California Supreme Court took in his case.

The first relates to an order in an unrelated filing. In January 2021, Petitioner filed a petition for writ of habeas corpus related to prison conditions; it did not relate to his claims here. In response to that petition, the Kern County Superior Court issued an order. And in reciting the procedural history of the case, the court stated that the California Supreme Court had denied Petitioner's petition for review on April 29, 2020. (LD 16 at 1.) There is no doubt that Petitioner received this order; it is reflected in the incoming legal mail logs and Petitioner attached a copy of it to a different pleading. (ECF 28-3 at 7; LD 17 at 20-22.) The Superior Court order had the wrong date; April 29, 2020, was the date that the California Supreme Court *granted* the petition and stayed Petitioner's case. Still, Respondent claims, the language of the order should have caused Petitioner to inquire of his counsel whether the California Supreme Court had acted in his case. (ECF 28-1 at 19.)

The Court finds this fact more ambiguous than Respondent does. The date in the order did match an order issued by the California Supreme Court, one that Petitioner was aware of and one that *granted* review. Petitioner claims that he believed the Superior Court got the date right and the content of the order

wrong, not the other way around. (ECF 30 at 21.) That appears to be a reasonable possibility. At least, the Court could not dismiss that possibility without holding an evidentiary hearing. *See Roy v. Lampert*, 465 F.3d 964, 969 (9th Cir. 2006) (habeas petitioner is entitled to an evidentiary hearing where he makes "a good-faith allegation that would, if true, entitle him to equitable tolling") (internal quotation marks and citations omitted).

The second thing Respondent points to is the letter from Duxbury—the one that contained the typewritten date of December 17, 2021, crossed out to say "27 May 2022." The contents of that letter reflect that Duxbury told him his case was final. (ECF 1 at 99.) The mail log from Kern Valley State Prison shows that Petitioner did indeed receive mail from Duxbury on December 24, 2021. (ECF 28-3 at 8.) Based on that fact, Respondent claims that Petitioner himself crossed off the date of the letter to make it appear as though he received this letter in June 2022 instead of December 2021.

Petitioner claims that Duxbury crossed off the date and sent it on June 3, 2022. As support for this claim, Petitioner attaches a different letter from Duxbury dated December 17, 2021. (ECF 30 at 37.) That letter, quite plausibly, is the letter Petitioner received on December 24, 2021. It does not appear that this letter is the same as the letter with the crossed off dates; the signatures appear to be slightly different. (*Compare* ECF 30 at 37 with ECF 29-8 at 102.)

Petitioner also provides a different letter on which someone has crossed out the date December 17, 2021, and written April 27, 2022. (ECF 30 at 36.) Putting all of these together, Petitioner makes a good faith claim that it was Duxbury, and not him, who crossed off the dates on the letters—which could be the case if Duxbury uses the "save as" function with client letters without paying sufficient attention to the date until it is already printed out. Once again, the Court could not dismiss that possibility without holding an evidentiary hearing.

Roy, 465 F.3d at 969.

The third item, however, is the problem for Petitioner. On January 18, 2022, the Kern County Superior Court issued a second order in his prison conditions case. (LD 21.) On page 1 of that order, the court wrote that the California Supreme Court granted review and held Petitioner's case pending *People v. Frahs*, and then dismissed review on August 26, 2020. (LD 21 at 5.) Unlike the first order from the Kern County Superior Court, this order had the correct date and the correct description of the California Supreme Court's actions. Mail logs from the prison facility reflect that Petitioner received mail from the Kern County Superior Court on January 24, 2022, and January 25, 2022. (ECF 28-3 at 8.) And Petitioner himself later prepared a filing in which he confirmed that he received that order on January 25, 2022. (LD 22 at 1.)

Petitioner does not contest that he received the January 25, 2022, order, but he claims that that order did not provide him actual notice of the California Supreme Court's decision. He says that he "either thought this was another mistake or just did not notice it." (ECF 30 at 19.) That claim, if credited as true, would not justify equitable tolling. In cases where a petitioner claims equitable tolling based on lack of notice of a court decision, the court must consider when the petitioner received actual notice and whether the petitioner acted diligently to get notice. *Ramirez v. Yates*, 571 F.3d 993, 998 (9th Cir. 2009). The diligence required for equitable tolling purposes is "'reasonable diligence,' not 'maximum feasible diligence.'" *Holland*, 560 U.S. at 653 (citations omitted). Reasonable diligence requires only "the effort that a reasonable person might be expected to deliver under his or her particular circumstances." *Doe v. Busby*, 661 F.3d 1001, 1015 (9th Cir. 2011).

Here, if Petitioner read the Kern County decision, saw the part saying that the California Supreme Court had decided his case, and wrote it off as a mistake, he did not exercise reasonable diligence under *Ramirez*. The Kern

County decision is clear. It reads: "Petitioner's request for review by the California Supreme Court was granted and held pending the resolution of the case *People v. Frahs* and was then dismissed on August 26, 2020." (LD 21 at 5.) At the very least, the exercise of diligence would require Petitioner to reach out to his counsel or to the court, or have a friend search the online docket and check whether the case was final. Simply assuming that the court's order was mistaken was not a reasonably diligent choice. Petitioner's alternative claim that he read the order but did not "notice" the sentence—an unmistakeable sentence on page one of a brief five-page order—does not reflect the exercise of diligence either.

Important in the Court's view, this was a case where Petitioner was represented with respect to the petition in question and had access to his counsel throughout the relevant period. Petitioner sent six letters to Duxbury between the date the California Supreme Court decided his case and the date Petitioner claims he first learned about the California Supreme Court's decision (6/8/21; 7/15/21; 10/8/21; 12/10/21; 4/11/22; 5/6/22); he received letters back from Duxbury on five occasions during that interval (8/6/21; 10/25/21; 12/24/21; 5/5/22; 6/3/22). (ECF 28-3 at 4-9.) Not using his access to counsel to inquire about the status of his case or to ask whether the Kern County order was correct does not reflect reasonable diligence.

Those facts set this case apart from *Fue v. Biter*, 842 F.3d 650 (9th Cir. 2016) (en banc). There the Ninth Circuit found equitable tolling for a pro se petitioner who waited 14 months to follow up with the court after filing his habeas petition with the California Supreme Court. The Court found that that was not an unreasonable choice. The California Supreme Court has no time limit for deciding cases and invited a "don't call us, we'll call you" attitude to filings. *Id.* at 654-66. But *Fue* reiterated that each case must be taken on its own facts. Here, Petitioner was waiting on a decision in a counseled petition for

review and had steady access to his counsel throughout the relevant period—not merely theoretical access but an actual back-and-forth stream of communication. He was informed by another court that the California Supreme Court had acted in his case. Under those facts, it was not reasonable for him to go years without checking in one whether his petition had been denied, particularly after he read in a Superior Court decision that it had been.

Petitioner makes an alternative argument. He claims that "if [he] did find out that his case was final" on January 25, 2022, then his petition was timely because he filed it on September 8, 2022—i.e., within one year of the date on which the impediment was lifted. (ECF 30 at 21.) But that is not the law in the Ninth Circuit. The Ninth Circuit has said that equitable tolling is not like a "stopped clock"; if a petitioner shows the existence of an impediment to filing during some part of the one-year statute of limitation, he does not get to tack the period during which he was under the impediment onto the end of the limitations period. Instead, he must show diligence from the moment the impediment was lifted until the time of filing. *Smith v. Davis*, 953 F.3d 582 (9th Cir. 2020) (en banc).

The facts of *Smith* illustrate the rule. In *Smith*, the California Supreme Court denied his petition for review in March 2014. His case became final in June 2014, when the time expired for him to file a petition for a writ of certiorari in the United States Supreme Court. But as with Petitioner here, the petitioner in *Smith* did not immediately learn that the state appellate court had decided his case. He first learned of the California Supreme Court's decision in March 2014, and he did not receive his file from appellate counsel until August 2014. The petitioner filed his petition in August 2015, 364 days after appellate counsel sent him his file. He claimed he was entitled to equitable tolling through August 2014, when counsel provided him with his file, and that his one-year statute of

limitations should be calculated as running at that date. *Id.* at 586-87.

The en banc court disagreed. Because the petitioner's case was final in June 2014, the statute of limitations ran in June 2015. To justify any filing after June 2015, the petitioner would have to show that he exercised diligence from the time that the impediment to filing was lifted until the time of his federal filing. In petitioner's case, the impediments had been lifted in August 2014, at the point he had both notice of the California Supreme Court's denial and had his file in his possession. Because petitioner could not show diligence between August 2014 and the time of his filing, he could not receive equitable tolling.

Petitioner here has the same problem as the petitioner in *Smith*. Using January 25, 2022, as the latest date Petitioner reasonably should have learned the Supreme Court had dismissed his petition, Petitioner would have to show diligence between that date and the date he filed in federal court. He cannot do so. Indeed, the facts reflect that he was diligent only from June 2022 on. In June 2022: (a) Petitioner's family ordered a copy of his transcript; (b) his mother contacted Duxbury about a copy of the file; (c) Petitioner got a copy of the California Supreme Court docket; and (d) he contacted his trial counsel and asked for his file. But in neither his Petition nor his Opposition does Petitioner allege any step he took toward preparing his federal filing between January 2022 and June 2022.

"[R]easonable diligence seemingly requires the petitioner to work on his petition with some regularity—as permitted by his circumstances." *Smith*, 953 F.3d at 601. Petitioner's allegations, if true, might support a finding that a reasonably diligent person would not have known about the California Supreme Court's action until January 2022, but not later than that date. Likewise, his allegations suggest that he was diligent from June 2022, the date he claims he received actual notice, until the date of his filing. But Petitioner has not alleged any step he took between January 2022 and June 2022. He was not reasonably

diligent during that period.

For these reasons, the Court concludes that Petitioner is not entitled to equitable tolling. The Court further finds that no evidentiary hearing is required. A hearing is required where a habeas petitioner makes a good faith allegation of facts that, if proved, would entitle him to tolling. The above analysis concludes that even if the Court takes as true all the facts Petitioner alleges, he would not be entitled to equitable tolling. The Court thus declines to hold an evidentiary hearing and recommends that the Petition be dismissed with prejudice.

RECOMMENDATION

For the foregoing reasons, it is recommended that the District Judge issue an Order: (1) accepting and adopting this Report and Recommendation; (2) granting Defendant's Motion to Dismiss (ECF 28); and (3) directing that Judgment be entered dismissing this action with prejudice.

DATED: November 6, 2023

BRIANNA FULLER MIRCHEFF
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the United States Court of Appeals for the Ninth Circuit, but may be subject to the right of any party to file objections as provided in the Local Civil Rules for the United States District Court for the Central District of California and review by the United States District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until the District Court enters judgment.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

ADAM JAY STONE,
Petitioner,
v.
C. PFEIFFER,
Respondent.

No. 8:22-cv-01703-CJC-BFM

ORDER ACCEPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the records and files herein, the Magistrate Judge's Report and Recommendation, Petitioner's Objections to the Report and Recommendation, and Respondent's Reply to Petitioner's Objections. The Court accepts the recommendations of the Magistrate Judge.

ACCORDINGLY, IT IS ORDERED:

1. The Report and Recommendation is accepted.

2. Judgment shall be entered consistent with this Order.

B

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