NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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

CEVIN ALEXANDER, aka Kevin James Clark, Petitioner - Appellant, v. DORA B. SCHRIRO; et al., Respondents - Appellees.	No. 05-17389 D.C. No. CV-05-00181-SMM MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Stephen M. McNamee, District Judge, Presiding

Argued and Submitted December 9, 2008
San Francisco, California

Before: B. FLETCHER, McKEOWN and N.R. SMITH, Circuit Judges.

Petitioner Cevin Alexander appeals the district court's dismissal of his petition for habeas corpus, filed under 28 U.S.C. § 2254. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253. We affirm.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Alexander filed his petition after the time period of the one-year statute of limitations had passed. *See* 28 U.S.C. § 2244(d). Adopting the recommendations of the magistrate, the district court dismissed the petition as untimely. On appeal, Alexander argues that (1) the district erred in calculating the time period for the statute of limitations and (2) in any event, he is entitled to equitable tolling.

The limitations period begins to run from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *See* 28 U.S.C. § 2244(d)(1)(A). It is tolled while "a properly filed application for State post-conviction or other collateral review . . . is pending." *Id.* § 2244(d)(2). Where a defendant directly appeals his conviction all the way to the state supreme court, the § 2244(d) limitations period begins to run once the defendant's time to appeal to the United States Supreme Court expires. *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 2001). We are bound by *Hemmerle v. Schriro*, 495 F.3d 1069 (9th Cir. 2007), despite misgivings about its statement of Arizona law. *Hemmerle* confirms that the date on which the state court mandate issues is irrelevant. *See id.* at 1073-74.[1] Therefore, although we conclude that the

[1] Alexander also concedes that the Arizona Court of Appeals would not issue a mandate upon denying review of Alexander's petition for post-conviction relief, so that tolling of the limitations period ended once Alexander's time for seeking review in the Arizona Supreme Court expired.

district court's calculations are not entirely accurate,[2] Alexander's petition is nonetheless untimely.

Alexander is not entitled to equitable tolling, because tolling is appropriate "only if extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999) (citing *Calderon v. U.S. Dist. Court for Cent. Dist. of Cal.*, 163 F.3d 530, 541 (1998), *abrogated on other grounds by Woodford v. Garceau*, 538 U.S. 202, 206 (2003)); *see also Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Because the allegations made by Alexander would not, if true, justify equitable tolling, he is also not entitled to an evidentiary hearing. *See Roy v. Lampert*, 465 F.3d 964, 969 (9th Cir. 2006).

We have held that a total lack of access to any legal materials regarding the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which imposes the § 2244 limitations period, can justify equitable tolling. *See Whalem/Hunt v. Early*, 233 F.3d 1146, 1148 (9th Cir. 2000) (en banc) (remanding for an evidentiary hearing where the petitioner alleged that the prison law library had no materials

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[2] The district court neglected the fact that, because Alexander's last day to seek certiorari in his direct appeal fell on a Sunday, he had until the following Monday to file with the Supreme Court. The statute of limitations began to run the next day, on March 13, 2001. *See* Sup. Ct. R. 13.1, 30.1. The district court also seems to have counted the day Alexander filed his state petition for post-conviction relief as an untolled day when, in fact, Alexander's petition should be considered pending for that day. *See* 28 U.S.C. § 2244(d)(2).

describing AEDPA); *Roy*, 465 F.3d at 969 (remanding for an evidentiary hearing where prisoners alleged that Arizona prison law library did not have any AEDPA materials). However, Alexander does not claim that he did not have access to AEDPA or *any* materials interpreting AEDPA.[3] Rather, Alexander was aware of the limitation period, but he claims that he was unable to correctly calculate when the period began, because he had no access to case law or other materials defining the term "final judgment" under AEDPA. This allegation falls short of extraordinary circumstances that would justify equitable tolling.

Alexander next contends that he was prevented from timely filing his petition, because he was delayed in making copies of his petition while the prison resource center temporarily closed for the holidays and his prison counselor went on vacation for a week. Alexander had a year to prepare and file his petition, and a short delay in access to a copy machine does not warrant equitable tolling. *Cf. Allen v. Lewis*, 255 F.3d 798, 801 (9th Cir. 2001) (per curiam), *rev'd on other grounds*, 295 F.3d 1046 (9th Cir. 2002) (en banc) (prisoner's 27-day lack of access

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[3] The dissent states that we cannot assume that the prison law library had any of the legal materials required by the Arizona Department of Corrections, and therefore an evidentiary hearing is necessary to determine what materials were actually available to Alexander. However, Alexander does not allege that he was denied any of the legal materials required to be in the library, which included materials covering the AEDPA. *See* Arizona Department of Corrections, Department Order 902 att. A. He also does not allege that he ever sought materials clarifying the term "final judgment," let alone that he was denied such materials after requesting them.

to case materials during a prison transfer and early in the limitation period did not warrant equitable tolling).

Lastly Alexander alleges that a prison paralegal gave him incorrect legal advice in calculating the limitations period. That allegation also does not rise to the level of extraordinary circumstances. *See, e.g.*, *Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir. 2001) (miscalculation of the limitations period by attorney not extraordinary circumstances); *Miranda v. Castro*, 292 F.3d 1063, 1068 (9th Cir. 2002) (same). We have found extraordinary circumstances where a prison official's "wrongful conduct prevents a prisoner from filing." *See, e.g.*, *Stillman v. LaMarque*, 319 F.3d 1199, 1202 (9th Cir. 2003) (finding extraordinary circumstances where prison litigation coordinator broke his promise to prisoner's attorney to obtain the prisoner's signature in time for filing); *Miles*, 187 F.3d at 1107 (holding that extraordinary circumstances existed when prison officials ignored prisoner's request to pay habeas petition filing fee from his trust account and mail it directly to the court with the petition). However, in this case, the paralegal did not do or fail to do anything that actually made it impossible for Alexander to file on time. Further, Alexander was not entitled to and should not have relied on any advice from the paralegal. The paralegal was not authorized to practice law, *see* Ariz. R. Sup. Ct. R. 31, and the rules of the Arizona Department of Corrections, which were available to Alexander, make it clear that the paralegal

was not available to give legal advice, *see* Arizona Department of Corrections, Department Order 902.

Ultimately, Alexander made an incorrect interpretation of the statute and miscalculated the limitations period. This does not amount to an "extraordinary circumstance" warranting equitable tolling. *See Raspberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006) ("[A petitioner's] inability correctly to calculate the limitations period is not an extraordinary circumstance warranting equitable tolling.").

AFFIRMED.