

MAR 05 2009

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL GORDON BEAUCHMAN,

Petitioner - Appellant,

v.

MIKE MAHONEY,

Respondent - Appellee.

No. 07-35651

D.C. No. CV-05-00046-KS

MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Keith Strong, Magistrate Judge, Presiding

Submitted February 18, 2009**

Before: BEEZER, FERNDANDEZ, and W. FLETCHER, Circuit Judges.

Michael Gordon Beauchman appeals from the district court's judgment dismissing his 28 U.S.C. § 2254 habeas petition. We have jurisdiction pursuant to

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

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

28 U.S.C. § 2253, and we affirm.

Beauchman contends that he is entitled to equitable tolling of the one-year limitations period under 28 U.S.C. § 2244(d)(1), because mental incapacity resulting from a brain injury prevented him from timely filing his petition. The record discloses, however, that Beauchman did not file a state habeas petition raising his federal claims until more than six years after his conviction became final, and that he sought other state and federal relief during this time. Under these circumstances, Beauchman has not shown “that he has been pursuing his rights diligently.” *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Beauchman also has failed to establish that mental incapacity resulting from a brain injury was the cause of his untimeliness. *See Bryant v. Schriro*, 499 F.3d 1056, 1061 (9th Cir. 2007). We conclude that Beauchman has not carried his burden of showing that he is entitled to equitable tolling. *See Pace*, 544 U.S. at 418-19. Because the petition is untimely, we do not consider whether Beauchman’s claims are procedurally defaulted.

AFFIRMED.