

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

RONALD BRAND,	)	No. CV 12-09178-VBK
	)	
	)	MEMORANDUM AND ORDER
Petitioner,	)	
	)	
v.	)	
	)	
JEFFREY BEARD, <sup>1</sup>	)	
	)	
Respondent.	)	
_____	)	

Ronald Brand (hereinafter referred to as "Petitioner"), a California state prisoner proceeding pro se, filed a "Petition for Writ of Habeas Corpus by a Person in State Custody" ("Petition"), pursuant to 28 U.S.C. § 2254 on October 25, 2012, in the United States District Court for the Central District of California.<sup>2</sup> Petitioner also executed

<sup>1</sup> The Court grants Respondent's request to substitute Jeffrey Beard, Secretary of the California Department of Corrections and Rehabilitation, as the proper Respondent pursuant to Fed. R. Civ. P. 25(d). See Rule 2, Rules Governing Section 2254 Cases.

<sup>2</sup> The Court takes notice that Petitioner signed his Federal Petition on October 10, 2012, which is the earliest he could have turned it over to prison authorities for mailing. See Houston v. Lack, 487 U.S. 266, 276, 108 S. Ct. 2379 (1988) (pro se prisoners constructively file pleading when they deliver it to prison authorities for mailing); Roberts v. Marshall, 627 F.3d 768, 770 n.1 (9th Cir. 2010) ("When a prisoner gives prison authorities a habeas petition or other pleading to mail to court, the court deems the petition constructively 'filed' on the date it is signed."), cert. denied, 132

1 a "Consent to Proceed Before a United States Magistrate Judge." In  
2 accordance with the Court's Order requiring Respondent to file a  
3 response, on February 28, 2013, Respondent filed a "Motion to Dismiss  
4 Petition for Writ of Habeas; Memorandum of Points and Authorities"  
5 ("MTD") and a "Notice of Lodging" contending that the Petition is barred  
6 by the one-year statute of limitations set forth in 28 U.S.C.  
7 § 2244(d)(1) as amended by the Anti-Terrorism and Effective Death  
8 Penalty Act of 1996 ("AEDPA"), and alternatively that ground one of the  
9 Petition is unexhausted and conclusory. Respondent also executed a  
10 "Consent to Proceed Before a United States Magistrate Judge." On March  
11 27, 2013, Petitioner filed an "Objection to the Motion to Dismiss"  
12 ("Obj.") and a "Supplemental [sic] to the Objection to the Motion to  
13 Dismiss."

14 Having reviewed the allegations in the Petition and the matters set  
15 forth in the record, the Motion to Dismiss, and Petitioner's Opposition,  
16 it is **ORDERED** that the Motion to Dismiss be granted and the Petition be  
17 dismissed.

18  
19 **PRIOR PROCEEDINGS**

20 On October 21, 2008, Petitioner pleaded no contest in the Los  
21 Angeles County Superior Court to twelve counts of identity theft in  
22 violation of California Penal Code ("PC") § 530.5(a) and one count of  
23 forgery of an official seal in violation of PC § 472. (Lodged Document  
24 No. 1 at 4-5; Lodged Document No. 3 at 1.) Petitioner also admitted he  
25 served a prior prison term within the meaning of PC § 667.5(b) for a

26 \_\_\_\_\_  
27 S. Ct. 286 (2011). Where applicable, the Court has afforded Petitioner  
28 the constructive filing dates. Although, as Respondent notes (MTD at 1  
n.3), ultimately it does not make a difference because the Petition is  
untimely even taking into account the earlier signature dates.

1 prior grand theft conviction. (Lodged Document No. 1 at 5.) On that  
2 same day, Petitioner was sentenced to a 12-year prison term, the  
3 sentence was suspended, and Petitioner was placed on formal probation  
4 for five years. (Lodged Document No. 1 at 6-10; Lodged Document No. 3  
5 at 1.) Petitioner did not appeal the judgment.

6 On November 17, 2010, Petitioner's probation was revoked and he was  
7 remanded to custody. (Lodged Document No. 1 at 10-11.)

8 On June 29, 2011, counsel for Petitioner filed a petition for writ  
9 of habeas corpus in the Los Angeles County Superior Court.<sup>3</sup> (Lodged  
10 Document No. 2.) On August 8, 2011, the court denied the petition  
11 because it was untimely and Petitioner had offered no justification for  
12 the nearly three-year delay, citing In re Clark, 5 Cal. 4th 750, 783  
13 (1993) and In re Seaton, 34 Cal. 4th 193, 199-200 (2004). The court  
14 alternatively denied the petition on the merits. (Lodged Document No.  
15 3; Lodged Document No. 1 at 14-16.)

16 On October 5, 2011, Petitioner filed a pro se habeas petition in  
17 the California Court of Appeal.<sup>4</sup> (Lodged Document No. 4.) On October  
18 27, 2011, the court denied the petition as "untimely and, on the merits,  
19 [P]etitioner has not presented facts or evidence to demonstrate  
20 entitlement to relief." (Lodged Document No. 5.)

21 On November 10, 2011, a Los Angeles County Superior Court judge  
22 found Petitioner to be in violation of probation. (Lodged Document No.  
23 1 at 17-18.) He was ordered to serve his 12-year state prison sentence  
24

---

25 <sup>3</sup> Petitioner is not entitled to an earlier constructive filing  
26 date under the prison mailbox rule for this petition because it was  
27 filed by counsel. See Stillman v. LaMarque, 319 F.3d 1199, 1201  
(2003).

28 <sup>4</sup> Petitioner signed but did not date this petition. The Court  
therefore utilizes the filing date on the petition.

1 in county jail under California's Criminal Justice Realignment Act (see  
2 PC § 1170(h)). (Lodged Document No. 1 at 18-21.)

3 On December 19, 2011, Petitioner constructively filed a habeas  
4 petition in the California Supreme Court. (Lodged Document No. 7.) On  
5 May 9, 2012, the court denied the petition with citations to People v.  
6 Duvall, 9 Cal. 4th 464, 474 (1995) and In re Swain, 34 Cal. 2d 300, 304  
7 (1949). (Lodged Document No. 8 at 2.)

8 Meanwhile, on December 21, 2011, Petitioner filed a notice of  
9 appeal in the California Court of Appeal challenging the November 10,  
10 2011 finding that Petitioner was in violation of probation. (Lodged  
11 Document No. 6.) On May 16, 2012, Petitioner filed a notice of  
12 abandonment of his appeal, and on May 18, 2012, the Court of Appeal  
13 dismissed his appeal. (Lodged Document No. 6.)

14 On June 15, 2012, Petitioner constructively filed a second habeas  
15 petition in the California Supreme Court. (Lodged Document No. 9.) On  
16 September 26, 2012, the court denied the petition "on the merits" with  
17 citations to Harrington v. Richter, 526 U.S. -, 131 S. Ct. 770, 785  
18 (2011), and Ylst v. Nunnemaker, 501 U.S. 797, 803, 111 S. Ct. 2590  
19 (1991). (Lodged Document No. 10 at 2.)

20 The within Petition was constructively filed on October 10, 2012.  
21

22 **PETITIONER'S CONTENTIONS**

23 Petitioner contends the following, inter alia:

- 24 1. "California State Supreme Court in Petitioner['s] view,  
25 has violated his [S]ixth and [F]ourteenth Amendment  
26 rights";  
27 2. The trial court improperly denied Petitioner's request  
28

1 to represent himself under Faretta,<sup>5</sup> and trial counsel  
2 was ineffective by failing to inform Petitioner of his  
3 right to appeal or otherwise perfect an appeal so  
4 Petitioner could challenge the trial court's Faretta  
5 ruling.

6 (See Petition at 5-6; Petition Memoranda at 1-4, 6-11.)<sup>6</sup>

7  
8 **DISCUSSION**

9 In the Motion to Dismiss, Respondent contends that the Petition  
10 should be dismissed on the grounds it is untimely, and because ground  
11 one is unexhausted and conclusory.

12  
13 **A. The Petition Is Facially Untimely.**

14 Since the Petition was filed after the President signed into law  
15 the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA")  
16 on April 24, 1996, the Court's consideration of the Petition's  
17 timeliness is governed by 28 U.S.C. § 2244(d), as amended by the AEDPA.  
18 See Calderon v. United States District Court for the Central District  
19 of California (Beeler), 128 F.3d 1283, 1287 n.3 (9th Cir. 1997), cert.  
20 denied, 522 U.S. 1099 & 523 U.S. 1061 (1998).<sup>7</sup> That section provides:

21 "(1) A 1-year period of limitation shall apply to an  
22 application for a writ of habeas corpus by a person in custody

23  
24 <sup>5</sup> Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525 (1975)

25 <sup>6</sup> Petitioner attaches two memoranda with overlapping page  
26 numbers. For ease of reference, the Court refers to the memoranda by  
citing the pages consecutively as they are attached to the Petition.

27 <sup>7</sup> Beeler was overruled on other grounds in Calderon v. United  
28 States District Court (Kelly), 163 F.3d 530, 540 (9th Cir. 1998) (en  
banc), cert. denied, 526 U.S. 1060 (1999).

1 pursuant to the judgment of a State court. The limitation  
2 period shall run from the latest of-

3 (A) the date on which the judgment became final by  
4 the conclusion of direct review or the expiration of the  
5 time for seeking such review;

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

11 (C) the date on which the constitutional right  
12 asserted was initially recognized by the Supreme Court,  
13 if the right has been newly recognized by the Supreme  
14 Court and made retroactively applicable to cases on  
15 collateral review; or

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

19 (2) The time during which a properly filed application  
20 for State post-conviction or other collateral review with  
21 respect to the pertinent judgment or claim is pending shall  
22 not be counted toward any period of limitation under this  
23 subsection."

24  
25 In most instances, a state prisoner's AEDPA limitations period will  
26 be governed by § 2244(d)(1)(A). It is only in "rare instances" that,  
27 pursuant to § 2244(d)(1)(B)-(D), "the limitation period may run from a  
28 date later than the date on which judgment becomes final." Baker v.

1 State of California, No. C 99-2088 CRB (PR), 2000 WL 74071 at \*1 n.1  
2 (N.D. Cal. Jan. 25, 2000). In the Motion to Dismiss, Respondent  
3 contends that the running of the limitations period in this case is  
4 governed by § 2244(d)(1)(A). (MTD at 4 & n.6.)

5  
6 **1. Application of § 2244(d)(1)(A) Renders the Petition**  
7 **Facially Untimely.**

8 Under § 2244(d)(1)(A), the statute began to run at the completion  
9 of direct review in the state courts. Consequently, the judgment became  
10 final when the time to file an appeal expired. Gonzalez v. Thaler, 565  
11 U.S. -, 132 S. Ct. 641, 646, 653-54 (2012); Mendoza v. Carey, 449 F.3d  
12 1065, 1067 (9th Cir. 2006). Under California law, Petitioner had 60  
13 days in which to file and perfect his appeal. See Cal. R. Ct. 8.308(a).  
14 As Petitioner was sentenced on October 21, 2008, his time to appeal  
15 expired on December 22, 2008.<sup>8</sup> Id.; see also PC § 1237(a) (a "sentence"  
16 and "an order granting probation" constitute a "final judgment" for  
17 purposes of a defendant's right to appeal).<sup>9</sup> Therefore, Petitioner's  
18 conviction was "final" on December 22, 2008, and he had until December  
19 22, 2009, in which to file a timely federal habeas petition. 28 U.S.C.

20  
21 <sup>8</sup> The 60th day fell on December 20, 2008, which was a Saturday.  
22 Accordingly, the notice of appeal was due the following Monday,  
23 December 22, 2008. See Lopez v. Felker, 536 F. Supp. 2d 1154, 1157 &  
n.3 (C.D. Cal. 2008) (explaining computation of time to file appeal  
under California Rules of Court).

24 <sup>9</sup> The fact that the trial court suspended the sentence has no  
25 bearing on the finality of the conviction. Under California law, when  
26 the order granting probation is issued, the clock starts running on any  
27 appeal. See People v. Amons, 125 Cal. App. 4th 855, 868-69 (2005);  
28 Tresvan v. Martell, No. CV 08-5077-PSG (PLA), 2009 WL 3245702 at \*2 n.5  
(C.D. Cal. Oct. 6, 2009). Further, Petitioner makes no challenge in  
the Petition to his subsequent probation violation or otherwise contend  
that he is entitled to a later finality date based on the probation  
violation.

1 § 2244(d)(1)(A); see Patterson v. Stewart, 251 F.3d 1243, 1246 (9<sup>th</sup>  
2 Cir.), cert. denied, 534 U.S. 978 (2001). Here, Petitioner did not  
3 constructively file the within Petition until October 10, 2012, almost  
4 three years after the statute of limitations had already expired.  
5 Absent statutory or equitable tolling, the within Petition is untimely.

6  
7 **2. Petitioner Is Not Entitled to an Alternate Start Date of**  
8 **the Statute of Limitations Period.**

9  
10 **a. State-Created Impediment.**

11 In rare instances, AEDPA provides that its one-year limitations  
12 period shall run from "the date on which the impediment of filing an  
13 application created by state action in violation of the Constitution or  
14 laws of the United States is removed, if the applicant was prevented  
15 from filing by such state action." 28 U.S.C. § 2244(d)(1)(B).  
16 Petitioner has failed to set forth any facts showing that Petitioner is  
17 entitled to relief under this provision.

18  
19 **b. Newly Recognized Constitutional Right.**

20 AEDPA provides that, if a claim is based upon a constitutional  
21 right that is newly recognized and applied retroactively to habeas cases  
22 by the United States Supreme Court, the one-year limitations period  
23 begins to run on the date which the new right was initially recognized  
24 by the United States Supreme Court. 28 U.S.C. § 2244(d)(1)(C).  
25 Petitioner has not alleged or forth facts showing that he is entitled  
26 to relief under this provision.

27 //

28 //



1                   c.       Discovery of Factual Predicate.

2           Under 28 U.S.C. § 2244(d)(1)(D), the statute of limitations begins  
3 to run when the "factual predicate" of Petitioner's claims "could have  
4 been discovered through the exercise of due diligence." Id. The term  
5 'factual predicate' refers to the facts underlying the claim, not the  
6 legal significance of those facts. Hasan v. Galaza, 254 F.3d 1150, 1154  
7 n.3 (9<sup>th</sup> Cir. 2001) ("This is not to say that [petitioner] needed to  
8 understand the legal significance of those facts-rather than simply the  
9 facts themselves-before the due diligence (and hence the limitations)  
10 clock started ticking."). Due diligence does not require "the maximum  
11 feasible diligence," but it does require reasonable diligence in the  
12 circumstances. Schlueter v. Varner, 384 F.3d 69, 74 (3<sup>rd</sup> Cir. 2004)  
13 (quoting Moore v. Knight, 368 F.3d 936, 940 (7<sup>th</sup> Cir. 2004)), cert.  
14 denied, 544 U.S. 1037 (2005).

15           Petitioner contends that he was unaware of his Faretta claim until  
16 he spoke with an alternate public defender between January and April of  
17 2011. (Obj. at 3.) However, Petitioner was well aware of the factual  
18 predicate underlying the claim when the trial court denied his request  
19 to represent himself in 2008. (Pet. Ex. A, 10/9/08 RT at 3-4.)  
20 Petitioner made the request and was present at the hearing, and  
21 therefore knew of the factual predicate over six years before the  
22 Petition was filed. See, e.g., Kartiganer v. Henderson, No. CV 07-7575  
23 JVS (FFM), 2011 WL 3293389, at \*3 n.3 (C.D. Cal. June 27, 2011) (because  
24 petitioner was present at hearings, "he was aware of whatever  
25 impropriety may have occurred during either of those hearings at the  
26 time of the hearing"), adopted by, 2011 WL 3290361 (C.D. Cal. July 29,  
27 2011). Petitioner has therefore failed to set forth sufficient facts  
28 showing that he is entitled to relief under this provision.

1           **B. Petitioner Is Not Entitled To Statutory Tolling.**

2           The running of the AEDPA's one-year time limitation is tolled for  
3 the time period during which a properly filed application for post-  
4 conviction or other state collateral review is pending in state court.  
5 See 28 U.S.C. § 2244(d)(2); Duncan v. Walker, 533 U.S. 167, 173-74, 121  
6 S. Ct. 2120 (2001) (the statutory term "other collateral review" refers  
7 to other state collateral review). The statute is tolled during the  
8 time period a state post-conviction petition is considered pending  
9 between a lower court's decision on the petition and the filing of a new  
10 petition in a higher court. Carey v. Saffold, 536 U.S. 214, 223-25, 122  
11 S. Ct. 2134 (2002). However, state petitions will only toll the one-  
12 year statute of limitations under § 2244(d)(2) if the state court  
13 explicitly states that the post-conviction petition was timely or was  
14 filed within a reasonable time under state law. Pace v. DiGuglielmo,  
15 544 U.S. 408, 410, 419, 125 S. Ct. 1807 (2005). Claims denied as  
16 untimely or determined by federal courts to have been untimely in state  
17 court will not satisfy the requirements for statutory tolling. Id.

18           Here, Petitioner is not entitled to statutory tolling under 28  
19 U.S.C. § 2244(d)(2). Petitioner's state habeas petitions, filed in 2011  
20 and 2012 (Lodged Document Nos. 2, 4, 7, 9), have no tolling effect  
21 because they were filed well after the period of limitations had already  
22 expired. See Ferguson v. Palmateer, 321 F.3d 820, 823 (9<sup>th</sup> Cir.)  
23 ("section 2244(d) does not permit the reinitiation of a limitations  
24 period that has ended before the state petition was filed"), cert.  
25 denied, 540 U.S. 924 (2003); Laws v. Lamarque, 351 F.3d 919, 922 (9<sup>th</sup>  
26 Cir. 2003) (if the first petition is filed after expiration of the  
27 limitations period "statutory tolling cannot save his claim"); Green v.  
28 White, 223 F.3d 1001, 1003 (9<sup>th</sup> Cir. 2000) (petitioner is not entitled

1 to tolling where the limitations period has already run). Thus,  
2 Petitioner is not entitled to any statutory tolling and the Petition is  
3 untimely unless he is entitled to equitable tolling.

4  
5 **C. Petitioner Is Not Entitled to Relief Based on Equitable**  
6 **Tolling.**

7 **1. Applicable Law.**

8 The AEDPA's one-year statute of limitations is subject to equitable  
9 tolling but only if a petitioner can show "(1) that he has been  
10 pursuing his rights diligently, and (2) that some extraordinary  
11 circumstance stood in his way' and prevented timely filing." Holland  
12 v. Florida, - U.S. -, 130 S. Ct. 2549, 2562-63 (2010) (quoting Pace, 544  
13 U.S. at 418); see also Lawrence v. Florida, 549 U.S. 327, 336, 127 S.  
14 Ct. 1079 (2007). Petitioner bears the burden of alleging facts that  
15 would give rise to tolling. Pace, 544 U.S. at 418; Hinton v. Pacific  
16 Enterprises, 5 F.3d 391, 395 (9<sup>th</sup> Cir. 1993); Randle v. Crawford, 604  
17 F.3d 1047, 1057 (9<sup>th</sup> Cir.) ("Equitable tolling is only appropriate if  
18 extraordinary circumstances beyond a prisoner's control make it  
19 impossible to file a petition on time.") (quotation marks and citation  
20 omitted) (emphasis in original), cert. denied, 131 S. Ct. 474 (2010).

21 Equitable tolling is "unavailable in most cases," Miles v. Prunty,  
22 187 F.3d 1104, 1107 (9<sup>th</sup> Cir. 1999), and the "threshold necessary to  
23 trigger equitable tolling [under AEDPA] is very high, lest the  
24 exceptions swallow the rule." Miranda v. Castro, 292 F.3d 1063, 1066  
25 (9<sup>th</sup> Cir.) (quoting United States v. Marcello, 212 F.3d 1005, 1010 (7<sup>th</sup>  
26 Cir. 2000)), cert. denied, 537 U.S. 1003 (2002); Spitsyn v. Moore, 345  
27 F.3d 796, 799 (9<sup>th</sup> Cir. 2003); see Beeler, 128 F.3d at 1288 (noting that  
28 "[e]quitable tolling will not be available in most cases, as extensions

1 of time will only be granted if 'extraordinary circumstances' beyond a  
2 prisoner's control make it impossible to file a petition on time.")  
3 "[W]hen external forces, rather than a petitioner's lack of diligence,  
4 account for the failure to file a timely claim, equitable tolling may  
5 be appropriate." Lott v. Mueller, 304 F.3d 918, 922 (9<sup>th</sup> Cir. 2002)  
6 (quoting Miles, 187 F.3d at 1107).

7  
8 **2. Petitioner Has Not Met His Burden Entitling Him to**  
9 **Equitable Tolling.**

10 Petitioner alleges that he is entitled to equitable tolling of the  
11 statute of limitations because he did not have access to the transcript  
12 of the Marsden hearing<sup>10</sup> in his case until June 2011. (Obj. at 3.)  
13 However, he does not explain how the Marsden hearing transcript was  
14 necessary to raise his Faretta claim, as Marsden and Faretta are based  
15 on different constitutional and procedural principles. See Robinson v.  
16 Kramer, 588 F.3d 1212, 1216 (9th Cir. 2009) ("At the trial level,  
17 Faretta and Marsden requests are as distinct as would be a request to  
18 be allowed to drive a car from a request for a driver to drive it."),  
19 cert. denied, 131 S. Ct. 83 & 131 S. Ct. 108 (2010). As mentioned,  
20 although Petitioner initially asked the court about representing himself  
21 during the September 19, 2008 Marsden hearing, he withdrew that request.  
22 (Pet. Ex. A, 9/19/08 RT at 5-6.) His actual request to represent  
23 himself was raised and denied on October 9, 2008. (Pet. Ex. A, 10/9/08  
24 RT at 3-4.) Under these circumstances, Petitioner has not shown how the  
25 Marsden hearing transcript would have been necessary to file a federal

---

26  
27 <sup>10</sup> A Marsden hearing is a California state court procedure to  
28 replace existing appointed counsel, heard outside the presence of the  
prosecutor and the jury, based on allegations of ineffective  
assistance. People v. Marsden, 2 Cal. 3d 118 (1970).

1 petition based on Faretta, or that the relevant documents could not have  
2 been procured later if needed. Chaffer v. Prosper, 592 F.3d 1046, 1049  
3 (9th Cir. 2010) (per curiam) (allegations of lack of access to legal  
4 file insufficient to warrant equitable tolling because inmate failed to  
5 point to specific instances where he needed a particular document);  
6 Waldron-Ramsey v. Pacholke, 556 F.3d 1008, 1014 (9th Cir.) (suggesting  
7 a diligent inmate wishing to raise a Faretta claim who did not have  
8 possession of his legal materials "could have prepared a basic form  
9 habeas petition and filed it to satisfy the AEDPA deadline"), cert.  
10 denied, 558 U.S. 897 (2009); Kartiganer, 2011 WL 3293389, at \*3 n.3, \*5  
11 (alleged failure to receive Marsden hearing transcript at an earlier  
12 date did not justify equitable tolling because petitioner was at the  
13 hearing and he failed to explain why the transcript was required to file  
14 a federal habeas petition on time). Finally, even if the Court were to  
15 allow tolling for the time up until Petitioner allegedly acquired access  
16 to the transcript in June 2011, he does not explain the one year, four  
17 month delay that followed until he filed the Petition.

18 Petitioner further contends his attorney failed to advise him of  
19 his appellate rights and seek a certificate of probable cause ("CPC").<sup>11</sup>  
20 (Obj. at 4.) Relatedly, petitioner also appears to contend that because  
21 he was "not allowed to go pro-per while in custody," he had to rely on  
22 appointed counsel who in turn caused the untimeliness. (Obj. at 4-5.)  
23 Neither of these circumstances constitute an "extraordinary  
24 circumstance" justifying equitable tolling. See Randle, 604 F.3d at  
25 1056-58 (rejecting claim for equitable tolling based on counsel's  
26 alleged failure to perfect appeal and incorrect advice with respect to

---

27  
28 <sup>11</sup> A CPC is a necessary predicate under state law to filing an  
appeal after entering a plea. See Cal. Rules of Court 8.304(b).

1 the time frame in which to file a state habeas petition); Perez v.  
2 Hedgpeth, No. CV F 06-00846 AWI DLB HC, 2009 WL 174145, at \*5 (E.D. Cal.  
3 Jan. 23, 2009) (trial counsel's failure to advise habeas petitioner, who  
4 pleaded guilty, of right to appeal and/or ability to seek collateral  
5 review does not present extraordinary circumstance justifying equitable  
6 tolling). Further, even if petitioner's attorney was negligent,  
7 negligence generally does not constitute an extraordinary circumstance  
8 sufficient to warrant equitable tolling. See, e.g., Lawrence, 549 U.S.  
9 at 336 (attorney miscalculation of limitations period insufficient to  
10 warrant equitable tolling); Miranda, 292 F.3d at 1068 (appellate  
11 attorney's provision of erroneous information regarding deadline to file  
12 habeas petition did not constitute extraordinary circumstance); Frye v.  
13 Hickman, 273 F.3d 1144, 1146 (9th Cir. 2001) (miscalculation of  
14 limitations period by counsel and counsel's negligence in general do not  
15 constitute extraordinary circumstances sufficient to warrant equitable  
16 tolling), cert. denied, 535 U.S. 1055 (2002). Rather, attorney  
17 misconduct may constitute an extraordinary circumstance warranting  
18 equitable tolling only where the conduct is "sufficiently egregious."  
19 Spitsyn, 345 F.3d at 800, 801 (equitable tolling warranted where  
20 attorney was hired nearly a full year in advance of the deadline but  
21 completely failed to prepare and file a petition, was contacted by  
22 petitioner and his mother numerous times by telephone and in writing,  
23 and retained the file beyond the expiration of the statute of  
24 limitations). Petitioner has not shown that his attorney's conduct was  
25 sufficiently egregious, or that it was the cause of the delayed filing  
26 of the instant Petition. Randle, 604 F.3d at 1058.

27 Finally, Petitioner contends he was ignorant of the applicable time  
28 limitations. (Obj. at 4-5.) A petitioner's lack of legal knowledge, no

1 matter what its origin, has not been held to provide an excuse for  
2 failing to timely file a habeas petition. Ford v. Pliler, 590 F.3d 782,  
3 789 (9<sup>th</sup> Cir. 2009), cert. denied, 131 S. Ct. 77 (2010); Raspberry v.  
4 Garcia, 448 F.3d 1150, 1154 (9<sup>th</sup> Cir. 2006). "It is clear that pro se  
5 status, on its own, is not enough to warrant equitable tolling." Roy  
6 v. Lampert, 465 F.3d 964, 970 (9<sup>th</sup> Cir. 2006) (citing Johnson v. United  
7 States, 544 U.S. 295, 311 (2005)), cert. denied, 549 U.S. 1317 (2007).

8 Petitioner has not shown that extraordinary circumstances exist  
9 warranting equitable tolling. Accordingly, the within Petition is  
10 untimely.<sup>12</sup>

11 **ACCORDINGLY, IT IS ORDERED** that the Petition be dismissed.

12  
13 DATED: 5/30/2013

13 /s/  
14 VICTOR B. KENTON  
15 UNITED STATES MAGISTRATE JUDGE

16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26 <sup>12</sup> Because the Court concludes that the Petition is clearly  
27 untimely, it need not address Respondent's alternative basis for  
28 dismissal, that ground one is unexhausted and conclusory. See Reed v.  
Gonzalez, No. EDCV 12-650 JST (FFM), 2012 WL 6967251, at \*2 n.3 (C.D.  
Cal. Nov. 15, 2012), adopted by, 2013 WL 395042 (C.D. Cal. Jan. 27,  
2013).