

1 by the prosecution before trial. (Petition at 5, Attachment at 20-63).

2 Respondent filed an Initial Answer to the Petition on May 28, 2013. Respondent
3 filed a Return to the Petition (“Return”) on June 27, 2013. In the Return, respondent
4 contended that the Petition should be dismissed on the grounds that it is barred by the
5 one-year statute of limitations. (See Return at 3-5). Respondent alternatively contended
6 that the sole claim alleged in the Petition was procedurally defaulted. (See Return at 4-
7 5).¹

8 After receiving an extension of time, petitioner filed a Reply to the Return on May
9 20, 2013.

10 Thus, this matter now is ready for decision.

11 **II. PROCEDURAL HISTORY**

12 On April 8, 1993, a Ventura County Superior Court jury found petitioner guilty of
13 two counts of forcible rape, one count of sodomy by use of force, four counts of forcible
14 oral copulation, and three counts of rape by a foreign object, and one count of false
15 imprisonment by violence. In addition the jury found true the special allegations that in
16 the commission of the offenses petitioner used a firearm and deadly weapon. (See
17 Clerk’s Transcript [“CT”] 122-35; 5 Reporter’s Transcript [“RT”] 1161-66). On May 6,
18 1993, the trial court sentenced petitioner to state prison for a total of seventy years. (See
19 CT 136-395 RT 1200-08).

20 Petitioner appealed his convictions and sentence to the California Court of Appeal.
21 (See respondent’s Notice of Lodging of Documents [“Lodgment”] Nos. 3 and 5).
22 Petitioner also filed a petition for writ of habeas corpus with the California Court of
23 Appeal. (See Lodgment No. 6). In an unpublished Opinion issued on December 22,
24 1994, the California Court of Appeal affirmed the Judgment. (See Lodgment No. 7). On
25 the same date, the California Court of Appeal summarily denied the habeas petition
26

27
28 ¹ The Court’s determination that the Petition is time barred renders it unnecessary for the Court to address respondent’s procedural default contention.

1 without citation of authority. (See Lodgment No. 8).

2 Petitioner filed a Petition for Review with the California Supreme Court. (See
3 Lodgment No. 9). On March 22, 1995, the California Supreme Court summarily denied
4 the Petition for Review without citation of authority. (See Lodgment Nos. 10 and 11).

5 Petitioner subsequently filed a petition for writ of habeas corpus herein (Case No.
6 CV 95-04234-JSL (SH)). On January 31, 1996, that habeas petition was dismissed
7 without prejudice.

8 Petitioner then filed habeas petitions with the Ventura County Superior Court (see
9 Petition, Exhibit AC1 [noting a second Superior Court habeas petition filed on August
10 16, 2007), the California Court of Appeal (see Lodgment No. 12 [filed February 29,
11 2008]), and the California Supreme Court (see Lodgment No. 14 [filed April 23, 2008]),
12 which were respectively denied on October 10, 2007, March 12, 2008 and October 1,
13 2008. (See Petition, Exhibit AC1; Lodgment Nos. 13 and 15).

14 On September 25, 2012, petitioner filed a habeas petition with the Ventura County
15 Superior Court, solely alleging the same claim as the claim alleged in the Petition herein.
16 (See Lodgment No. 16).² On October 17, 2012, the Ventura County Superior Court
17 denied that habeas petition. The Court stated, in pertinent part, that: “The Petitioner has
18 failed to justify the significant delay in seeking habeas relief on this issue. See In re
19 Clark (1993) 5 Cal. 4th 750, 756. The court finds that these new and additional grounds
20 having been known (factually) to the Petitioner since the Spring of 1993 despite his
21 claiming not to have known any potential legal significance to those facts could have

22
23 ² For purposes of the statute of limitations, pursuant to the “mailbox” rule, this
24 Court utilizes the date on which petitioner, appearing in pro per, provided prison
25 authorities with the document as the filing date. See Houston v. Lack, 487 U.S. 266, 108
26 S.Ct. 2379, 101 L.Ed.2d 245 (1988); Patterson v. Stewart, 251 F.3d 1243, 1245 n.2 (9th
27 Cir. 2001); Saffold v. Newland, 250 F.3d 1262, 1268 (9th Cir. 2001).

28 For purposes of its analysis, the Court will utilize as the filing date the date
on the proof of service attached to that habeas petition. The Court’s utilization of the
date on which petitioner originally turned over that habeas petition to prison authorities
for mailing -- September 12, 2012 (see Petition at 28-29, Exhibits T, X1 [September 17,
2012 letter from the Superior Court stating that petitioner’s habeas petition was returned
for failure to serve the proper party], and X2) -- would have no effect on its analysis.

1 raised on appeal.” (See Petition, Exhibit AC1-3).

2 On November 14, 2012, petitioner filed a habeas petition with the California Court
3 of Appeal, wherein he solely alleged the same claim as the claim alleged in the Petition
4 herein. (See Lodgment No. 17).³ On December 5, 2012, the California Court of Appeal
5 summarily denied that habeas petition without citation of authority. (See Lodgment No.
6 18).

7 On December 12, 2012, petitioner filed a habeas petition with the California
8 Supreme Court, solely alleging the same claims as the claims alleged in the Petition
9 herein. (See Lodgment No. 19).⁴ On April 17, 2013, the California Supreme Court
10 summarily denied that habeas petition without citation of authority. (See Lodgment No.
11 20).

12 The instant Petition was signed on April 25, 2013, lodged in this Court on April
13 29, 2013, and filed in this Court on May 2, 2013.⁵

14
15 **A. ABSENT GROUNDS TO EITHER DELAY THE RUNNING OF OR**
16 **EQUITABLY TOLL THE STATUTE OF LIMITATIONS, THE**
17 **PETITION IS UNTIMELY.**

18 Federal habeas corpus relief is governed by statute and codified in Title 28, United
19 States Code at Sections 2241-2255. In an attempt to “curb delays, to prevent ‘retrials’ on
20 federal habeas, and to give effect to state convictions to the extent possible under law,”

21 _____
22 ³ There is no proof of service attached to that habeas petition. For purposes of
23 its analysis, the Court will utilize as the filing date the date on which petitioner signed
24 that habeas petition.

24 ⁴ For purposes of its analysis, tthe Court will utilize as the filing date the date
25 on the proof of service attached to that habeas petition.

25 ⁵ “Under the ‘prison mailbox rule’ of Houston v. Lack, 487 U.S. 266, 108
26 S.Ct. 2379, 101 L.Ed.2d 245 (1988), a prisoner’s federal habeas petition is deemed filed
27 when he hands it over to prison authorities for mailing to the district court.” Huizar v.
28 Carey, 273 F.3d 1220, 1222 (9th Cir. 2001).

28 Since the proof of service is dated April 25, 2013, the Court will utilize as
the filing date April 25, 2013.

1 Congress, as part of the Anti-terrorism and Effective Death Penalty Act of 1996, revised
2 several of the statutes governing federal habeas relief. Williams v. Taylor, 529 U.S. 362,
3 404, 120 S.Ct. 1495, 146 L.Ed.2d389 (2000). One such revision amended 28 U.S.C. §
4 2244 to include a one-year statute of limitations for state prisoners seeking federal habeas
5 relief.⁶

6 A state prisoner with a conviction finalized before April 24, 1996, such as
7 petitioner, must have sought federal habeas relief by April 24, 1997. Calderon v. United
8 States District Court (Beeler), 128 F.3d 1283, 1286 (9th Cir. 1997), overruled in part on
9 other grounds by Calderon v. United States District Court (Kelly), 163 F.3d 530 (9th Cir.
10 1998)(en banc). Absent statutory or equitable tolling, petitioner had until April 24, 1997
11 to timely seek federal habeas relief.

12 Petitioner is not entitled to any statutory tolling during the pendency of his first
13 federal habeas petition (from June 26, 1995 to January 31, 1996). See Duncan v Walker,
14 533 U.S. 167, 181-82, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001)(“We hold that an
15 application for federal habeas corpus review is not an ‘application for State
16 post-conviction or other collateral review’ within the meaning of 28 U.S.C. § 2244(d)(2).
17 Section 2244(d)(2) therefore did not toll the limitation period during the pendency of
18 respondent’s first federal habeas petition.”).

19
20 ⁶ 28 U.S.C. § 2244(d)(1)-(2) provides as follows:
21 “(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus
22 by a person in custody pursuant to the judgment of a State court. The limitation period
23 shall run from the latest of--
24 (A) the date on which the judgment became final by the conclusion of direct
25 review or the expiration of the time for seeking such review;
26 (B) the date on which the impediment to filing an application created by
27 State action in violation of the Constitution or laws of the United States is
28 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.
(2) The 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.”

1 Petitioner filed his post-Petition for Review habeas petitions with the Ventura
2 County Superior Court, the California Court of Appeal and the California Supreme Court
3 after the one-year statute of limitations expired. (See Petition, Exhibit AC1; Lodgment
4 Nos. 12, 14, 16, 17 and 19). Thus, those habeas petitions did not statutorily toll the
5 limitations period. See 28 U.S.C. § 2244(d)(2); Ferguson v. Palmateer, 321 F.3d 820,
6 823 (9th Cir.) (28 U.S.C. § 2244(d) “does not permit the reinitiation of the limitations
7 period that has ended before the state petition as filed.”), cert. denied, 540 U.S. 924
8 (2003).

9 Petitioner did not file the instant Petition until April 25, 2013, more than sixteen
10 years after the statute of limitations expired. Therefore, the Petition is untimely absent
11 grounds for statutory and/or equitable tolling.

12
13 **B. PETITIONER HAS NOT ALLEGED GROUNDS FOR EITHER**
14 **DELAYING OR EQUITABLY TOLLING THE STATUTE OF**
15 **LIMITATIONS.**

16 Under 28 U.S.C. § 2244(d), the statute of limitations begins to run the later of four
17 possible dates. 28 U.S.C. § 2244(d)(1)(A)-(D).

18 Petitioner contends that he did not know that his constitutional rights had been
19 denied until January 16, 2012, the date he “opened up Mr. Brinkley’s copy of THE
20 PRISONER’S GUIDE TO SURVIVAL and saw ‘failure to disclose a plea offer to the
21 defendant’ listed under ‘Ineffective Assistance of Counsel.’” According to petitioner,
22 until that date, he had believed that “there was no claim to be raised in that regard based
23 on his appellate counsel’s unqualified statement that [trial counsel’s] failure to
24 communicate the prosecution’s plea bargain offer to him was an unappealable issue.”
25 Petitioner is claiming that the statute of limitations did not begin to run until January 16,
26 2012, “the date on which the factual predicate of the claim or claims presented could
27 have been discovered through the exercise of due diligence” within the meaning of 28
28 U.S.C. § 2244(d)(1)(D). (See Petition at 41-43, 60-63; Reply at 2-5).

1 However, as found by the Ventura County Supreme Court (see Petition, Exhibit
2 AC2-3), and as admitted by petitioner (see Petition at 21), the factual predicate of the sole
3 claim alleged in the Petition was known to petitioner in 1993. Hasan v. Galaza, 254 F.3d
4 1150, 1154 n.3 (9th Cir. 2001)(stating that the statute of limitations begins to run when
5 the prisoner knows, or through diligence could discover, the important facts, not when the
6 prisoner recognizes their legal significance). Consequently, contrary to petitioner’s
7 assertion, the statute of limitations began to run on April 24, 1996.

8 The Ninth Circuit has recognized the availability of equitable tolling to the one-
9 year statute of limitations in situations where “extraordinary circumstances beyond a
10 prisoner’s control make it impossible to file a petition on time.” Beeler, supra, 128 F.3d at
11 1289 (9th Cir. 1997) (emphasis added)(citations omitted). The words “extraordinary”
12 and “impossible” suggest the limited availability of this doctrine. To date, the Ninth
13 Circuit has found very few circumstances which warrant equitable tolling.⁷ The lack of
14

15 ⁷ See e.g., Bills v. Clark, 628 F.3d 1092, 1099-1101 (9th Cir. 2010)(equitable
16 tolling may be warranted where “mental impairment so severe that the petitioner was
17 unable personally either to understand the need to timely file or prepare a habeas petition,
18 and that impairment made it impossible under the totality of the circumstances to meet
19 the filing deadline despite petitioner’s diligence”); Harris v. Carter, 515 F.3d 1051, 1054-
20 57 (9th Cir. 2008)(petitioner entitled to equitable tolling because he relied on the Ninth
21 Circuit’s legally erroneous holding in determining when to file a federal habeas petition);
22 Jefferson v. Budge, 419 F.3d 1013, 1014, 1017 (9th Cir. 2005)(petitioner entitled to
23 equitable tolling because district court dismissed mixed petition without first giving
24 petitioner choice of returning to state court to exhaust his claims or of amending or
25 resubmitting the habeas petition to present only exhausted claims, but assumes “ordinary
26 diligence” on the petitioner’s part); Spitsyn v. Moore, 345 F.3d 796, 800-02, (9th Cir.
27 2003)(although in a non-capital case an attorney’s negligence usually will not justify
28 equitable tolling, equitable tolling available where the attorney does nothing, is
completely unresponsive, and fails to return the petitioner’s file until after the statute of
limitations had run); Smith v. Ratelle, 323 F.3d 813, 819 (9th Cir. 2003)(petitioner
entitled to equitable tolling because district court erroneously dismissed his earlier,
timely petition without first giving him an opportunity to file an amended petition as an
alternative to dismissal for failure to exhaust state remedies as to all claims); Corjasso v.
Ayers, 278 F.3d 874, 877-79 (9th Cir. 2002)(equitable tolling warranted where district
court mishandles a petition [dismissal on a technicality and losing the body of the
petition] causing it to be untimely); Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir.
1999)(equitable tolling available where petitioner turned petition over to prison officials
before the statutory deadline but a delay in mailing caused petition to be untimely);
Beeler, supra, 128 F.3d at 1289 (equitable tolling available in situation where petitioner’s
lead counsel withdraws, and replacement counsel needs time to become familiar with

(continued...)


1 precedent finding circumstances worthy of equitable tolling suggests not only the scarce
2 applicability of the doctrine, but also that the circumstances must truly rise to the
3 occasion of being “extraordinary” and petitioner must be able to demonstrate that filing a
4 timely petition was not possible.

5 Because petitioner has not shown he is entitled to statutory or equitable tolling, the
6 Court finds that the Petition is untimely and therefore should be dismissed.

7 **ORDER**

8 For the foregoing reasons, Judgment shall be entered dismissing the action with
9 prejudice.

10 DATED: July 30, 2013

11
12 
13 _____
14 STEPHEN J. HILLMAN
15 UNITED STATES MAGISTRATE JUDGE
16
17
18
19
20
21
22
23
24
25

26 _____
27 ⁷ (...continued)
28 case); Calderon v. United States Dist. Court (Kelly), 163 F.3d 530, 541 (9th Cir. 1998)
(equitable tolling available in light of petitioner’s possible mental incompetence), cert. denied, 526 U.S. 1060 (1999).

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

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