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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LARRY DIXON,

Petitioner,

v.

DAVE DAVEY, Warden,

Respondent.

Case No. 1:15-cv-01190 LJO MJS (HC)

**FINDINGS AND RECOMMENDATION
REGARDING RESPONDENT'S MOTION
TO DISMISS**

[Doc. 17]

Petitioner is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent is represented in this action by William K. Kim, of the Office of the Attorney General for the State of California.

I. BACKGROUND

Petitioner is currently in the custody of the California Department of Corrections pursuant to a judgment of the Superior Court of California, County of Fresno, upon being convicted of four counts of second degree robbery with personal use of a deadly or dangerous weapon in the commission of the offenses and various sentencing enhancements. (See Pet. at 1.) On March 2, 2006, Petitioner was sentenced to an indeterminate state prison term of 121 years to life under California's Three Strikes Law.

1 (Id.)

2 On July 27, 2007, the California Court of Appeal, Fifth Appellate District, affirmed
3 the judgment. (Mot. to Dismiss, ECF No. 17, Ex. A.) Review was denied by the California
4 Supreme Court on October 24, 2007. (Lodged Docs. 1-2.)

5 Petitioner appears to have filed at least four state post-conviction challenges to
6 his conviction. Respondent provides state court records indicating that Petitioner filed
7 three petitions for writ of habeas corpus in 2015. (See Lodged Docs. 3-8.) However,
8 there is evidence in the documents presented that at least one additional habeas petition
9 was filed by Petitioner in the Fresno County Superior Court in 2008. (See Lodged Doc. 6
10 at 2; Opp'n, ECF No. 21, Ex. A.) The Fresno County Superior Court denied his 2015
11 petition based on the earlier filed petition. (Lodged Doc. 6 at 2.) In addition, Petitioner
12 lists as records provided to his counsel a 2008 state court petition along with an order
13 denying the petition. (Opp'n, ECF No. 21, Ex. A.) Interpreting the evidence in the light
14 most favorable to the non-moving party, the Court will assume that the 2008 petition was
15 filed, and that Petitioner should be entitled to statutory tolling for the petition, if eligible.
16 Accordingly, the Court finds that Petitioner filed the following four petitions in state court:

- 17 1. Fresno County Superior Court
18 Filed: July 2, 2008¹;
19 Denied: September 26, 2008;
- 20 2. California Court of Appeal, Fifth Appellate District
21 Filed: January 13, 2015²;

22 ¹ Under the mailbox rule, the Court deems petitions filed on the date Petitioner handed a petition
23 to prison authorities for mailing. Houston v. Lack, 487 U.S. 266, 276, 108 S.Ct. 2379, 2385, 101 L. Ed. 2d
24 245 (1988); Campbell v. Henry, 614 F.3d 1056 (9th Cir. 2010); see also Rule 3(d) of the Rules Governing
25 Section 2254 Cases. Here, the Court is not in possession of the state court records. The dates used are
26 those stated on the list of records described by Petitioner's counsel on November 21, 2008. (Opp'n, ECF
27 No. 21, Ex. A.) The Court is not able to determine whether Petitioner is eligible for earlier filing. However,
28 as described in the analysis, several extra days or weeks of tolling would not affect the outcome of the
motion.

² Under the mailbox rule, the Court deems petitions filed on the date Petitioner handed a petition
to prison authorities for mailing. Houston v. Lack, 487 U.S. 266, 276, 108 S.Ct. 2379, 2385, 101 L. Ed. 2d
245 (1988); Campbell v. Henry, 614 F.3d 1056 (9th Cir. 2010); see also Rule 3(d) of the Rules Governing
Section 2254 Cases. Although the petition was filed on January 16, 2015, the petition shall be considered
filed on January 13, 2015, the date Petitioner signed the petition.

1 Denied: February 19, 2015;

2 3. Fresno County Superior Court
3 Filed: February 5, 2015³;
4 Denied: March 13, 2015;

5 4. California Supreme Court
6 Filed: April 10, 2015⁴;
7 Denied: July 8, 2015;

8 (See Lodged Docs. 3-8.)

9 On July 27, 2015, Petitioner filed the instant federal Petition for Writ of Habeas
10 Corpus in this Court.⁵ On October 21, 2015, Respondent filed a Motion to Dismiss the
11 petition as being filed outside the one-year limitations period prescribed by 28 U.S.C. §
12 2244(d). (Mot. to Dismiss, ECF No. 17.) Petitioner filed objections on January 8, 2016.
13 (Opp'n, ECF No. 21.) The matter stands ready for adjudication.

14 **II. DISCUSSION**

15 **A. Procedural Grounds for Motion to Dismiss**

16 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to
17 dismiss a petition if it “plainly appears from the petition and any attached exhibits that the
18 petitioner is not entitled to relief in the district court” Rule 4 of the Rules Governing
19 Section 2254 Cases.

20 The Ninth Circuit has allowed respondents to file a motion to dismiss in lieu of an
21 answer if the motion attacks the pleadings for failing to exhaust state remedies or being
22 in violation of the state’s procedural rules. See, e.g., O’Bremski v. Maass, 915 F.2d 418,
23 420 (9th Cir. 1990) (using Rule 4 to evaluate motion to dismiss petition for failure to
24 exhaust state remedies); White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (using
25 Rule 4 as procedural grounds to review motion to dismiss for state procedural default);

26 ³ Although the petition was filed on February 9, 2015, the petition shall be considered filed on
27 February 5, 2014, the date Petitioner signed the petition.

28 ⁴ Although the petition was filed on April 17, 2015, the petition shall be considered filed on April 10,
2015, the date Petitioner signed the petition.

⁵ Although the petition was filed on July 31, 2015, the petition shall be considered filed on July 27,
2015, the date Petitioner signed the petition.

1 Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n. 12 (E.D. Cal. 1982) (same). Thus, a
2 respondent can file a motion to dismiss after the court orders a response, and the Court
3 should use Rule 4 standards to review the motion. See Hillery, 533 F. Supp. at 1194 &
4 n. 12.

5 In this case, Respondent's motion to dismiss is based on a violation of the one-
6 year limitations period. 28 U.S.C. § 2244(d)(1). Because Respondent's motion to dismiss
7 is similar in procedural standing to a motion to dismiss for failure to exhaust state
8 remedies or for state procedural default and Respondent has not yet filed a formal
9 answer, the Court will review Respondent's motion to dismiss pursuant to its authority
10 under Rule 4.

11 **B. Commencement of Limitations Period Under 28 U.S.C. § 2244(d)(1)(A)**

12 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death
13 Penalty Act of 1996 (hereinafter "AEDPA"). AEDPA imposes various requirements on all
14 petitions for writ of habeas corpus filed after the date of its enactment. Lindh v. Murphy,
15 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th
16 Cir. 1997).

17 In this case, the petition was filed on July 27, 2015 and is subject to the provisions
18 of AEDPA. AEDPA imposes a one-year period of limitation on petitioners seeking to file
19 a federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As amended, §
20 2244, subdivision (d) reads:

21 (1) A 1-year period of limitation shall apply to an application for a writ of
22 habeas corpus by a person in custody pursuant to the judgment of a State
court. The limitation period shall run from the latest of –

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

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

28 (C) the date on which the constitutional right asserted was initially
recognized by the Supreme Court, if the right has been newly

1 recognized by the Supreme Court and made retroactively
applicable to cases on collateral review; or

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

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

7 28 U.S.C. § 2244(d).

8 Under § 2244(d)(1)(A), the limitations period begins running on the date that the
9 petitioner's direct review became final or the date of the expiration of the time for seeking
10 such review. In this case, the California Supreme Court denied review on October 24,
11 2007. The state appeal process became final ninety days later, on January 22, 2008,
12 when the time for seeking certiorari with the United States Supreme Court expired. U.S.
13 Supreme Court rule 13; Bowen v. Rowe, 188 F.3d 1157 (9th Cir. 1999). The AEDPA
14 statute of limitations began to run the following day, on January 23, 2008. Patterson v.
Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001).

15 Petitioner had one year from January 23, 2008, absent applicable tolling, in which
16 to file his federal petition for writ of habeas corpus. However, Petitioner delayed in filing
17 the instant petition until July 27, 2015, over six years after the statute of limitations period
18 expired. Absent the later commencement of the statute of limitations or any applicable
19 tolling, the instant petition is barred by the statute of limitations.

20 **C. Tolling of the Limitation Period Pursuant to 28 U.S.C. § 2244(d)(2)**

21 28 U.S.C. § 2244(d)(2) states that the "time during which a properly filed
22 application for State post-conviction or other collateral review with respect to the
23 pertinent judgment or claim is pending shall not be counted toward" the one year
24 limitation period. 28 U.S.C. § 2244(d)(2). In Carey v. Saffold, the Supreme Court held
25 the statute of limitations is tolled where a petitioner is properly pursuing post-conviction
26 relief, and the period is tolled during the intervals between one state court's disposition of
27 a habeas petition and the filing of a habeas petition at the next level of the state court
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1 system. 536 U.S. 214, 216 (2002); see also Nino v. Galaza, 183 F.3d 1003, 1006 (9th
2 Cir. 1999). Nevertheless, state petitions will only toll the one-year statute of limitations
3 under § 2244(d)(2) if the state court explicitly states that the post-conviction petition was
4 timely or was filed within a reasonable time under state law. Pace v. DiGuglielmo, 544
5 U.S. 408 (2005); Evans v. Chavis, 546 U.S. 189 (2006). Claims denied as untimely or
6 determined by the federal courts to have been untimely in state court will not satisfy the
7 requirements for statutory tolling. Id.

8 Petitioner filed his first state habeas petition on July 2, 2008, and the petition was
9 denied on September 26, 2008. Accordingly, Petitioner is entitled to an additional 86
10 days for the period that the state petition was tolling. Rather than the limitations period
11 expiring a year from its commencement on January 22, 2009, Petitioner was entitled an
12 additional 86 days, until April 18, 2009, to file the petition.

13 Accordingly, the limitations period commenced on January 22, 2008 and expired
14 on April 18, 2009. The statute of limitations therefore expired over six years before the
15 instant federal petition was filed on July 27, 2015. While Petitioner filed three additional
16 petitions for writ of habeas corpus in state court in 2015, petitions filed after the
17 expiration of the statute of limitations period have no tolling effect. Ferguson v.
18 Palmateer, 321 F.3d 820 (9th Cir. 2003) ("section 2244(d) does not permit the reinitiation
19 of the limitations period that has ended before the state petition was filed.").

20 The Court is not in possession of Petitioner's July, 2008 state petition. It is
21 possible that Petitioner is entitled to several extra days or even weeks of tolling for the
22 time between when the state petition was handed to prison officials for mailing, and
23 when the petition was received by the Court. However, based on the additional six years
24 of delay in filing the instant federal petition, it is clear any additional time provided by
25 statutory tolling would have no effect on the untimeliness of the federal petition.

26 The present petition was filed on July 27, 2015, over six years after the expiration
27 of the year statute of limitations period. The instant federal petition is untimely.
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1 **D. Equitable Tolling**

2 The limitations period is subject to equitable tolling if the petitioner demonstrates:
3 “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary
4 circumstance stood in his way.” Holland v. Florida, 130 S. Ct. 2549, 2560-62 (2010);
5 quoting Pace v. DiGuglielmo. Petitioner bears the burden of alleging facts that would
6 give rise to tolling. Pace, 544 U.S. at 418; Hinton v. Pac. Enters., 5 F.3d 391, 395 (9th
7 Cir. 1993). In his opposition, Petitioner claims he is entitled to equitable tolling of the
8 limitations period based on abandonment of counsel, lack of legal files, and his actual
9 innocence.

10 1. Abandonment of Counsel

11 In his opposition, Petitioner asserts that he should be granted equitable tolling
12 because his appellate counsel was in possession of his legal files and did not file a
13 petition on his behalf. (ECF No. 17.) Specifically, he asserts that his post-conviction
14 attorney was in possession of his legal files for over five years and only returned his files
15 after he contacted the California State Bar. (Id.)

16 Sufficiently egregious attorney misconduct may provide grounds for equitable
17 tolling. See Doe v. Busby, 661 F.3d 1001, 1012 (9th Cir. 2011); Maples v. Thomas, 132
18 S. Ct. 912, 924, 181 L. Ed. 2d 807 (2012) (“We agree that, under agency principles, a
19 client cannot be charged with the acts or omissions of an attorney who has abandoned
20 him.”); Holland v. Florida, 560 U.S. 631, 130 S. Ct. 2549, 2564, 177 L. Ed. 2d 130
21 (2010); Mackey v. Hoffman, 682 F.3d 1247, 2012 U.S. App. LEXIS 12925 (9th Cir., June
22 25, 2012) (holding abandonment of counsel as equitable grounds to allow petitioner to
23 file an untimely appeal from the district court’s denial of his habeas petition.).

24 Based on the evidence presented to the Court, Petitioner has not shown
25 egregious misconduct on the part of counsel. Petitioner has only presented evidence
26 that counsel did not prepare or file a federal petition with the claims previously
27 exhausted in state court. However, Petitioner has not shown that counsel intended to file
28 such a petition. Reviewing the records presented by Petitioner, it appears that

1 Petitioner's counsel accepted representation to investigate and present claims of actual
2 innocence, if they could be established. Specifically, counsel terminated the relationship
3 with Petitioner after determining that no further testing could be performed to establish
4 Petitioner's innocence. Based on the evidence presented, it appears that counsel did not
5 intend to file a petition on Petitioner's behalf consisting of his previously exhausted
6 claims. Counsel's intentional actions do not serve as a basis for equitable tolling. See,
7 e.g., Lawrence v. Florida, 549 U.S. 327, 127 S.Ct. 1079, 1085, 166 L. Ed. 2d 924 (2007)
8 ("[a]ttorney miscalculation simply not sufficient to warrant equitable tolling, particularly in
9 the postconviction context where prisoners have no constitutional right to counsel");
10 Miranda v. Castro, 292 F.3d 1063, 1067 (9th Cir. 2002) (attorney's miscalculation of
11 limitations period did not constitute extraordinary circumstances); Frye v. Hickman, 273
12 F.3d 1144, 1146 (9th Cir. 2001) (holding that an attorney's general negligence and
13 miscalculation of limitations deadline did not constitute extraordinary circumstances that
14 warranted equitable tolling in a non-capital habeas case).

15 Petitioner has not shown that that he was abandoned by counsel or that counsel's
16 conduct was sufficiently egregious to support a finding of equitable tolling.

17 2. Lack of Legal Files

18 Petitioner alleges that he sent his legal files to his attorneys in 2008 and they not
19 return them to him until 2014. Denial of access to legal documents may, in some cases,
20 constitute an "extraordinary circumstance" beyond a petitioner's control for purposes of
21 justifying the application of equitable tolling to the AEDPA statute of limitations. See
22 Chaffer v. Prosper, 592 F.3d 1046, 1049 (9th Cir. 2010); see also Espinoza-Matthews v.
23 California, 432 F.3d 1021, 1027-28 (9th Cir. 2005); Lott v. Mueller, 304 F.3d 918, 924-25
24 (9th Cir. 2002). However, in order to demonstrate that the denial of his legal files
25 constituted an extraordinary circumstance justifying equitable tolling, Petitioner must
26 demonstrate a causal link between the delay in filing and the extraordinary circumstance.
27 See Bryant v. Arizona Atty. Gen., 499 F.3d 1056, 1061 (9th Cir. 2007) ("The prisoner
28 must show that the extraordinary circumstances were the cause of his untimeliness.").

1 Courts have routinely recognized that restricted access to legal property does not
2 generally constitute extraordinary circumstances warranting the grant of equitable tolling.
3 "In general, the difficulties attendant on prison life, such as transfers between facilities,
4 solitary confinement, lockdowns, restricted access to the law library and an inability to
5 secure court documents, do not by themselves qualify as extraordinary circumstances."
6 Corrigan v. Barbery, 371 F.Supp.2d 325, 330 (W.D.N.Y. 2005); see also Ford v. Pliier,
7 590 F.3d 782, 790 (9th Cir. 2009) ("[Petitioner's] alleged inability to access [his legal
8 files] cannot be the 'cause of his untimeliness' since he did not need the legal materials
9 they contained to file a timely habeas petition.") (internal quotation marks omitted.);
10 Waldron-Ramsey v. Pacholke, 556 F.3d 1008, 1014 (9th Cir. 2009) (finding that even if
11 petitioner had difficulty developing habeas claims without records, he could have filed a
12 "basic form habeas petition" to satisfy AEDPA deadlines and sought to amend when he
13 received records); Gassler v. Bruton, 255 F.3d 492, 495 (8th Cir. 2001) (rejecting
14 equitable tolling based on delay in receiving trial transcripts, because possession of trial
15 transcripts is not a condition precedent to filing for post-conviction relief; a petition
16 seeking collateral relief could have been filed, following which, if necessary for decision
17 of the issues raised, the Court could have ordered production of the transcript).

18 Petitioner has not demonstrated that the delay in receiving his files from his post-
19 conviction attorney was an actual cause of his delayed filing. Petitioner does not explain
20 why he was unable to file his habeas petition without these documents. Petitioner had
21 previously filed a habeas petition in Fresno County Superior Court, and has not
22 explained why he was unable to use that petition to file further petitions alleging his
23 claims in the state appellate and Supreme Court and eventually with this Court.

24 Thus, Petitioner has failed to establish that the alleged lack of access to his legal
25 files was an extraordinary circumstance that made it impossible for him to file a federal
26 petition on time.

27 3. Actual Innocence

28 In his objections to the motion to dismiss, Petitioner makes a passing reference

1 that he is entitled to the equitable exception to the limitations period based on his actual
2 innocence.

3 On May 28, 2013, the Supreme Court held that a federal court may entertain an
4 untimely claim if a petitioner makes a showing of actual innocence. McQuiggin v.
5 Perkins, 133 S. Ct. 1924, 185 L. Ed. 2d 1019, 2013 WL 2300806 (2013). To qualify for
6 the equitable exception to the timeliness bar based on actual innocence, a petitioner
7 "must show that it is more likely than not that no reasonable juror would have convicted
8 him in the light of the new evidence." 133 S. Ct. at 1935 (quoting Schlup v. Delo, 513
9 U.S. 298, 327 (1995)). "[T]he emphasis on 'actual innocence' allows the reviewing
10 tribunal also to consider the probative force of relevant evidence that was either
11 excluded or unavailable at trial." Schlup, 513 U.S. at 327. "The gateway should open
12 only when a petition presents 'evidence of innocence so strong that a court cannot have
13 confidence in the outcome of the trial unless the court is also satisfied that the trial was
14 free of nonharmless constitutional error.'" McQuiggin, 133 S. Ct. 1924, 1936 (quoting
15 Schlup, 513 U.S. at 316.) "Unexplained delay in presenting new evidence bears on the
16 determination whether the petitioner has made the requisite showing." 133 S. Ct. 1924,
17 1935.

18 Petitioner asserts that he meets the actual innocence standard as set forth in
19 Schlup. (Opp'n at 6.) Petitioner's claims, without further explanation, do not undermine
20 his guilt. Most importantly, Petitioner has not presented any new evidence that he is
21 factually innocent of the crime. Even more damaging to the claim is the letter Petitioner
22 attached to his opposition from counsel in which counsel explains that despite testing,
23 they were not able to obtain any new evidence of his innocence. Accordingly, the
24 evidence presented in the opposition is not sufficient to support a finding of actual
25 innocence. Petitioner's new evidence, if presented to a reasonable juror, would not
26 convince the juror of his innocence. Petitioner's actual innocence claim is without merit
27 and the petition for writ of habeas corpus must be dismissed as untimely.

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III. CONCLUSION

As explained above, Petitioner failed to file the instant petition for habeas corpus within the one year limitation period required by 28 U.S.C. § 2244(d). Petitioner is not entitled to the benefit of statutory or equitable tolling. Based on the foregoing, this Court recommends that Respondent’s motion to dismiss be GRANTED.

IV. RECOMMENDATION

Accordingly, the Court HEREBY RECOMMENDS that the motion to dismiss for Petitioner’s failure to comply with 28 U.S.C. § 2244(d)’s one year limitation period be GRANTED.

This Findings and Recommendation is submitted to the assigned United States District Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within thirty (30) days after the date of service of this Findings and Recommendation, any party may file written objections with the Court and serve a copy on all parties. Such a document should be captioned “Objections to Magistrate Judge’s Findings and Recommendation.” Replies to the Objections shall be served and filed within fourteen (14) days after service of the Objections. The Finding and Recommendation will then be submitted to the District Court for review of the Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(c). The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014).

IT IS SO ORDERED.

Dated: January 23, 2016

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE