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

DONALD WASHINGTON, JR.,

Petitioner,

No. CIV S-10-1843 JAM EFB P

vs.

TIM VIRGA,¹

Respondent.

FINDINGS AND RECOMMENDATIONS

_____/

Petitioner is a state prisoner without counsel on a petition for a writ of habeas corpus. See 28 U.S.C. § 2254. Respondent moves to dismiss the petition on the ground that it was filed beyond the applicable one-year statute of limitations. In response to the motion, petitioner has filed seven handwritten documents. Respondent filed a reply brief, to which petitioner then filed a surreply.² As discussed below, the court finds that petitioner’s application for a writ of habeas

¹ Pursuant to Fed. R. Civ. P. 25(d) and Rule 2(a), Rules Governing § 2254 Proceedings, Tim Virga, the Warden of the facility where petitioner currently is located, is substituted as the respondent.

² Petitioner’s numerous filings are not authorized by the Federal Rules of Civil Procedure or the Local Rules. See E.D. Cal. L.R. 230(1) (providing for a motion, an opposition and a reply). However, in the interests of efficiency, rather than directing petitioner to rewrite and refile a single opposition brief, and to the extent multiple documents are legible, the court has taken into consideration all eight of petitioner’s filings.

1 corpus is untimely, and therefore recommends that respondent’s motion to dismiss be granted.

2 In June 1986, petitioner was sentenced to a determinate state prison term of two years,
3 following his conviction of battery by a prisoner on a non-prisoner.³ Dckt. No. 1 at 1⁴; Resp.’s
4 Mot. to Dism., Docs. Lodged in Supp. Thereof (“Lodg. Doc.”) 1. On July 9, 1987, the California
5 Court of Appeal, Third Appellate District, affirmed the judgment. Lodg. Doc. 1. Petitioner did
6 not seek review in the California Supreme Court. Resp.’s Mot. to Dism., Mem. of P. & A. in
7 Supp. Thereof (“Mot.”) at 2.

8 The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) applies to all
9 petitions for writ of habeas corpus filed after its enactment. *See Lindh v. Murphy*, 521 U.S. 320,
10 336 (1997); *Clark v. Murphy*, 331 F.3d 1062, 1067 (9th Cir. 2003). It imposes a one-year
11 limitations period for seeking federal habeas relief, beginning from the latest of (1) the date the
12 judgment became final on direct review, (2) the date on which a state-created impediment to
13 filing is removed, (3) the date the United States Supreme Court makes a new rule retroactively
14 applicable to cases on collateral review, or (4) the date on which the factual predicate of a claim
15 could have been discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1). In
16 certain circumstances, the limitations period may be tolled. Petitioner bears the burden of
17 showing he is entitled to tolling. *Smith v. Duncan*, 297 F.3d 809, 814 (9th Cir. 2002) (statutory
18 tolling); *Miranda v. Castro*, 292 F.3d 1063, 1065 (9th Cir. 2002) (equitable tolling).

19 In this case, the applicable date for commencing the limitations period is the date that
20 petitioner’s conviction became final on direct review. *See* 28 U.S.C. § 2244(d)(1)(A). On July
21 9, 1987, the state appellate court affirmed the 1986 judgment of conviction, Lodg. Doc. 1, and

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23 ³ Petitioner challenges the custody imposed as a result of the 1986 judgment. Respondent
24 does not dispute that petitioner is “in custody” within the meaning of 28 U.S.C. § 2254(a). *See*
25 Resp.’s Reply (“Reply”) at 1, n1 (reasoning that the custody requirement is satisfied because
26 petitioner’s two year sentence was ordered to be served consecutive to a life term petitioner is
currently serving) (citing *Garlott v. Fordice*, 515 U.S. 39, 46 (1995)).

⁴ The page numbers cited herein are those assigned by the court’s electronic docketing
system and not those assigned by petitioner.

1 petitioner did not seek review in the California Supreme Court. The judgment therefore became
2 final well before April 24, 1996, the effective date of AEDPA. *See* Mot. at 4. In these
3 circumstances, inmates had a one-year grace period to file their petitions. *Patterson v. Stewart*,
4 251 F.3d 1243, 1245 (9th Cir. 2001). The grace period expired on April 24, 1997. *See id.* at
5 1247. Absent tolling, petitioner's July 1, 2010 application for a writ of habeas corpus was filed
6 over thirteen years late.⁵ *See* Dckt. No. 1.

7 Respondent contends that petitioner is not entitled to tolling under § 2244(d)(2) because
8 petitioner did not file any state post-conviction collateral actions with respect to the 1986
9 judgment during the one-year limitations period. Mot. at 5. The proper filing of a state post-
10 conviction collateral attack on the pertinent judgment tolls the one-year limitation period. 28
11 U.S.C. § 2244(d)(2); *see Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999). If the limitations
12 period has run, however, it cannot be revived by a collateral action. *Jiminez v. Rice*, 276 F.3d
13 478, 482 (9th Cir. 2001).

14 Petitioner filed eight petitions for post-conviction relief in the state courts. Lodg. Docs. 2
15 (filed in Sacramento County Superior Court, dated June 2, 2008), 4 (filed in California Court of
16 Appeal, Third Appellate District, dated September 8, 2008), 6 (filed in California Supreme
17 Court, dated March 8, 2009), 9 (filed in Sacramento County Superior Court, dated March 8,
18 2009), 11 (filed in California Court of Appeal, Third Appellate District, dated May 26, 2009), 13
19 (filed in California Supreme Court, dated June 11, 2009), 16 (filed in California Supreme Court,
20 dated August 5, 2009), 18 (filed in California Supreme Court, dated October 15, 2009). The
21 earliest of these petitions was filed on June 2, 2008. Lodg Doc. 2. Because petitioner waited
22 over ten years after the federal statute of limitations period expired before filing his first state
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24 ⁵ The court deems the filing date for each of petitioner's habeas petitions to be the date
25 reflected on the certificate of service for the respective petitions. *See Houston v. Lack*, 487 U.S.
26 266, 276 (1988) (prisoner's notice of appeal deemed timely filed on the date it was delivered to
prison staff for delivery to the court); *Smith v. Duncan*, 297 F.3d 809, 814 (9th Cir. 2002)
(applying mailbox rule to petitions filed in state court).

1 habeas petition, he is not entitled to statutory tolling. *See Jiminez*, 276 F.3d at 482.

2 Petitioner filed seven handwritten documents in response to respondent's motion to
3 dismiss. *See* Dckt. Nos. 17, 18, 19, 20, 21, 24, 25. Respondent addressed each of those
4 responses in his reply brief, arguing that petitioner has not squarely addressed the issues raised
5 by respondent in the motion to dismiss. Reply at 2-5. The court agrees. Petitioner's filings,
6 while lengthy and brimming with legal citations, have little to no relevance to the issue of
7 timeliness under AEDPA.

8 In several of the filings, however, petitioner references equitable tolling in the context of
9 his alleged mental illness and incompetence. *See* Dckt. No. 17 at 1-2 (mentioning "tolling for
10 mental illness"); Dckt. No. 18 at 10-11 ("due to my mental illness the petitioner sought legal
11 assistance from his fellow prisoners, who helped and assisted [me] in preparation of these legal
12 documents to the court"); Dckt. No. 20 at 5-33 (including documentation showing petitioner
13 suffered from "Schizoaffective disorder, bipolar type," rendering him a danger to others, and was
14 involuntarily administered psychotropic medication from December 15, 2005 though April 23,
15 2009); Dckt. No. 21 at 8-25 (same), 26-42 (documentation showing court authorized further
16 administration of involuntary medication to petitioner from March 24, 2010 through September
17 20, 2010, and that petitioner had been subject to similar court orders as early as March 6, 1995,
18 and from January 12, 1996 though 2000, and again in 2004), 34 (declaration of psychiatrist
19 stating that "by the mid-1990s [petitioner] was seen as being severely mentally ill"), 69
20 (discussing equitable tolling). The court liberally construes these references and exhibits as an
21 argument that the limitations period should be equitably tolled due to petitioner's mental
22 impairment.

23 A petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing
24 his rights diligently, and (2) that some extraordinary circumstance stood in his way and
25 prevented timely filing. *Holland v. Florida*, 130 S. Ct. 2549, 2562 (2010). Mental impairment
26 can constitute an extraordinary circumstance. *Bills v. Clark*, 628 F.3d 1092, 1097 (9th Cir.

1 2010). To demonstrate mental impairment was an extraordinary circumstance, the petitioner
2 must show that he “was unable rationally or factually to personally understand the need to timely
3 file,” or his “mental state rendered him unable personally to prepare a habeas petition and
4 effectuate its filing.” *Id.* at 1099-1100. To demonstrate diligence, the petitioner must show that
5 the mental impairment made it impossible to meet the filing deadline under the totality of the
6 circumstances, including reasonably available access to assistance. *Id.* (explaining that tolling
7 may be justified where mental impairment “interferes with the ability to understand the need for
8 assistance, the ability to secure it, or the ability to cooperate with or monitor assistance the
9 petitioner does secure.”).

10 Respondent argues that even given a liberal construction of petitioner’s filings, petitioner
11 fails to demonstrate he suffered from an extraordinary mental impairment during all the years he
12 did nothing to challenge his 1986 conviction. Reply at 4. Respondent contends further that
13 petitioner has not established that a mental impairment made it “impossible” for him to meet his
14 filing deadline for all the years his case languished. *Id.* (citing *Bills*, 628 F.3d 1092).

15 The relevant time frame for the purpose of equitable tolling is from April 24, 1996 to July
16 1, 2010. Petitioner has submitted evidence he suffered from a mental impairment during most of
17 this time. But petitioner does not argue that he was unable to understand the need to timely file
18 or that he was unable to prepare a petition and effectuate its filing. Moreover, petitioner’s
19 litigation history would refute any such contention. Between April 24, 1996 and June 20, 1997
20 alone, petitioner initiated no fewer than six actions in the United States District Court for the
21 Northern District of California.⁶ See *Washington v. Gomez*, Case No. 3:96-cv-2233-CAL (civil
22 rights complaint filed June 19, 1996); *Washington v. Gomez*, Case No. 3:96-cv-2629-CAL (civil
23 rights complaint filed July 24, 1996); *Washington v. Lungren*, Case No. 3:96-cv-2959-CAL
24 (civil rights complaint filed August 19, 1996); *Washington v. Lungren*, Case No. 3:96-cv-4355-

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26 ⁶ A court may take judicial notice of court records. See *MGIC Indem. Co. v. Weisman*,
803 F.2d 500, 505 (9th Cir. 1986); *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980).

1 CAL (civil rights complaint filed December 3, 1996); *Washington v. Cambra*, Case No. 3:96-cv-
2 4597-CAL (habeas petition filed December 23, 1996); *Washington v. Cambra*, Case No. 3:97-
3 cv-2316-VRB (habeas petition filed June 20, 1997, denied on its merits on April 17, 2001). Of
4 particular relevance is *Washington v. Cambra*, Case No. 3:97-cv-2316-VRB (“*Cambra*”), in
5 which petitioner challenged a 1994 conviction of battery on a correctional officer, resisting
6 arrest, and assault by force likely to produce great bodily injury. *See Washington v. Cambra*,
7 208 F.3d. 832, 833 (9th Cir. 2000). The district court initially dismissed the petition on
8 procedural grounds, but following petitioner’s timely filed notice of appeal and order of remand
9 from the Ninth Circuit Court of Appeals, the district court denied the petition on its merits.
10 *Cambra*, Dckt. No. 8 (petitioner’s March 23, 1998 timely filed notice of appeal), Dckt. No. 23
11 (petitioner’s January 5, 2001 timely filed traverse following remand from the Ninth Circuit Court
12 of Appeals); Dckt. No. 24 (April 17, 2001 order denying petition on the merits). The record in
13 *Cambra* manifests that petitioner both understood the need to timely file a habeas petition and
14 was able to effectuate its filing.

15 Petitioner previously sought equitable tolling to render timely an earlier filed petition
16 that, like the petition here, was due on April 24, 1997. *See Washington v. Virga*, 2011 U.S. Dist.
17 LEXIS 11620, at *10, 11-17 (C.D. Cal. Jan. 3, 2011), *adopted in full by* 2011 U.S. Dist. LEXIS
18 11623 (C.D. Cal. Jan. 30, 2011). In that action, the United States District Court for the Central
19 District of California found that petitioner’s mental condition did not justify equitable tolling.
20 *Id.* The court concluded there was “no evidence that petitioner suffered from a mental
21 impairment while the statute of limitations was running or that if he did, such mental impairment
22 was so severe that petitioner was either unable rationally or factually to personally understand
23 the need to timely file a federal petition, or that such mental state rendered him unable personally
24 to prepare a habeas petition and effectuate its filing, i.e., that it caused his untimeliness.” *Id.*

25 In this case, petitioner submits evidence that he suffered from a mental impairment while
26 the statute of limitations was running, but he neither argues nor submits evidence that the mental

1 impairment was so severe that he could not understand the need to timely file a habeas petition
2 or effectuate its filing. Moreover, the record in this action and from other courts undercuts any
3 claim that petitioner's mental state was so impaired that he could not timely pursue his legal
4 remedies, or secure access to such assistance. Petitioner's mental impairment, alone, is not itself
5 an extraordinary circumstance and does not automatically excuse petitioner from pursuing his
6 rights diligently. *See Bills*, 628 F.3d at 1100 (petitioner "always remains accountable for
7 diligence in pursuing his or her rights"). Thus, the court finds petitioner is not entitled to
8 equitable tolling and no further development of the record is necessary. *See Roberts v. Marshall*,
9 627 F.3d 768, 773 (9th Cir. 2010) ("Where the record is amply developed, and where it indicates
10 that the petitioner's mental incompetence was not so severe as to cause the untimely filing of his
11 habeas petition, a district court is not obligated to hold evidentiary hearings to further develop
12 the factual record, notwithstanding a petitioner's allegations of mental incompetence.").

13 Accordingly, it is hereby RECOMMENDED that

- 14 1. Respondent's October 12, 2010 motion to dismiss this action be granted; and
- 15 2. The Clerk be directed to close this case.


16 These findings and recommendations are submitted to the United States District Judge
17 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
18 after being served with these findings and recommendations, any party may file written
19 objections with the court and serve a copy on all parties. Such a document should be captioned
20 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections
21 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
22 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991). In
23 his objections petitioner may address whether a certificate of appealability should issue in the
24 event he files an appeal of the judgment in this case. *See* Rule 11, Federal Rules Governing

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1 Section 2254 Cases (the district court must issue or deny a certificate of appealability when it
2 enters a final order adverse to the applicant).

3 Dated: August 30, 2011.

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5 EDMUND F. BRENNAN
6 UNITED STATES MAGISTRATE JUDGE
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