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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

BRIAN KEITH BRIM, <sup>1</sup>	)	Case No. CV 16-5488-JPR
	)	
Petitioner,	)	
	)	MEMORANDUM OPINION AND ORDER
v.	)	GRANTING RESPONDENT'S MOTION TO
	)	DISMISS AND DISMISSING ACTION
PEOPLE OF STATE OF	)	WITH PREJUDICE
CALIFORNIA,	)	
	)	
Respondent.	)	

On July 13, 2016, Petitioner constructively filed a Petition for Writ of Habeas Corpus by a Person in State Custody and accompanying memorandum of points and authorities.<sup>2</sup> Petitioner

<sup>1</sup> Many of Petitioner's pleadings in state court refer to him as "Bryant" Brim, not "Brian." (See, e.g., Lodged Docs. 1, 3, 4, 7.) His pleadings in this case distinctly read Brian, however, so the Court has used that name.

<sup>2</sup> The Court adopts the signature date of the Petition as the constructive filing date. See Houston v. Lack, 487 U.S. 266, 276 (1988) (pro se prisoner constructively files pleading when he delivers 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.").

1 is actually in federal custody (see Pet. at 1),<sup>3</sup> but his Petition  
2 challenges his 1988 conviction in Los Angeles County Superior  
3 Court by guilty plea for possessing a controlled substance for  
4 sale (id.). Petitioner subsequently filed an "Election Regarding  
5 Consent to Proceed Before a United States Magistrate Judge,"  
6 indicating that he voluntarily consented to "have a United States  
7 Magistrate Judge conduct all further proceedings in this case,  
8 decide all dispositive and non-dispositive matters, and order the  
9 entry of final judgment." On November 30, 2016, Respondent also  
10 consented to proceed before the undersigned.

11 On November 29, 2016, Respondent filed a motion to dismiss  
12 the Petition on numerous grounds, including that it was untimely  
13 by nearly two decades. On December 15, 2016, Petitioner filed  
14 opposition to the motion. Respondent did not file a reply.

15 For the reasons set forth below, the Court grants  
16 Respondent's motion to dismiss the Petition as untimely. It  
17 therefore does not address Respondent's other arguments.<sup>4</sup>

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19 <sup>3</sup> Throughout, the Court uses the pagination provided by its  
20 Case Management/Electronic Case Filing system.

21 <sup>4</sup> One of those arguments is that Petitioner is no longer in  
22 custody on the challenged conviction and thus that this Court lacks  
23 jurisdiction. (Mot. Dismiss at 10-11.) Although that is likely  
24 true (see Lodged Doc. 2 (state supreme court denying 2005 habeas  
25 petition with case citation signaling that it found petitioner no  
26 longer in custody on challenged conviction)), the record contains  
27 some ambiguity concerning whether Petitioner was subject to a  
28 parole term on the 1988 conviction and whether he has finished  
serving it (see Pet., Mem. P. & A. at 20 (trial court telling  
Petitioner that if he "should end up in state prison on this case  
. . . you will be on parole"), Lodged Doc. 1, Ex. 1 (sentencing  
Petitioner to state prison)). If Petitioner remains subject to a  
parole term, he is "in custody." See Murquia v. Martel, No. CV 09-

(continued...)

1 **BACKGROUND**

2 On June 30, 1988, Petitioner pleaded guilty to possessing  
3 for sale a controlled substance. (See Pet'r's Mem. P. & A., Ex.  
4 B (guilty-plea transcript)); see also Cal. Health & Safety Code  
5 § 11351. He was sentenced to two years' imprisonment. (See  
6 Lodged Doc. 1, Ex. 1 (abstract of judgment and sentencing  
7 transcript).) He did not appeal (Pet. at 1),<sup>5</sup> and on March 28,  
8 1990, he completed serving his sentence and began a 14-month  
9 federal sentence (Lodged Doc. 4 at 7; Lodged Doc. 1, Ex. 1). On  
10 April 26, 1996, he was convicted in federal court of various drug  
11 offenses and was later sentenced to life in prison. United  
12 States v. Brim, No. SACV 93-cr-0098-LHM (C.D. Cal. filed July 26,  
13 1993). His federal life sentence was apparently enhanced because  
14 of his drug convictions in this case. (See Lodged Doc. 1, Ex. 4  
15 (portion of federal presentence report showing criminal-history-  
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17 \_\_\_\_\_  
18 <sup>4</sup>(...continued)  
19 3054-ODW(E), 2009 WL 4980282, at \*2-3 (C.D. Cal. Dec. 16, 2009)  
20 (finding petitioner "in custody" on challenged conviction when he  
21 had served prison sentence on that conviction but had not yet  
22 served mandatory parole term and remained incarcerated on  
23 different conviction); cf. United States v. Monreal, 301 F.3d 1127,  
24 1130, 1132 (9th Cir. 2002) (finding defendant in custody with  
25 respect to challenged federal conviction when he had served prison  
26 term on that conviction but had not yet served period of supervised  
27 release and was incarcerated for different conviction). Moreover,  
28 contrary to Respondent's assertion (Mot. Dismiss at 11), Petitioner  
does allude to being in custody based on an unexpired parole term  
(see Opp'n at 5 ("Custody does not require incarceration; it  
includes probation[,] parole and other significant restraints on  
liberty.")). Because the Petition is clearly untimely, the Court  
need not decide the custody issue.

<sup>5</sup> The Court's review of the California Appellate Courts  
Case Information website confirms that Petitioner did not appeal  
the judgment.

1 points calculation based on prior convictions); Lodged Doc. 7 at  
2 8 (transcript of hearing on motion to vacate 1988 plea, noting  
3 that "two state convictions" were used to enhance federal  
4 sentence).)

5 Beginning in 2001, Petitioner filed a series of habeas  
6 petitions and other pleadings in state court challenging his 1988  
7 convictions and sentence. (See Lodged Docs. 3, 6, 7 at 5  
8 (superior court noting that Petitioner had challenged his 1988  
9 guilty plea five times since 2001), 9; see also Mot. Dismiss at  
10 8-9 (laying out history of such pleadings).)<sup>6</sup> His most recent  
11 round of such petitions alleged that he deserved to be  
12 resentenced under California's Proposition 47, codified at Penal  
13 Code section 1170.18, which gives state-court judges discretion  
14 to reduce certain felony convictions to misdemeanors. (See  
15 Lodged Docs. 9, 10, 11.) The state superior court ruled that  
16 Petitioner was ineligible for resentencing under section 1170.18  
17 because possession-with-intent-to-sell convictions are  
18 statutorily barred from being reduced to misdemeanors. (See  
19 Lodged Doc. 9.) The court of appeal found that the superior  
20 court "properly denied" Petitioner's petition for resentencing  
21 (Lodged Doc. 10 at 2 (citing § 1170.18(b))), and the state  
22 supreme court summarily denied review (Lodged Doc. 12).

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27 <sup>6</sup> The Court's review of the California Appellate Courts  
28 Case Information website confirms that the earliest such petition  
Petitioner filed in the state court of appeal or supreme court was  
in 2002.

1 **PETITIONER'S CLAIMS**

2 I. The trial court failed to inform Petitioner of the  
3 nature of the crime to which he pleaded guilty. (Pet. at 4.)

4 II. The court's participation in the "plea hearing"  
5 violated Federal Rule of Criminal Procedure 11. (Id.)

6 III. No factual basis for the guilty plea existed. (Id. at  
7 5.)

8 IV. Petitioner's guilty plea was "ambiguous." (Id.)<sup>7</sup>

9 **DISCUSSION**

10 **I. The Petition Is Untimely and Must Be Dismissed on that Basis**

11 A. Applicable Law

12 The Antiterrorism and Effective Death Penalty Act sets forth  
13 a one-year limitation period for filing a federal habeas petition  
14 and specifies that the period runs from the latest of the  
15 following dates:

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

19 (B) the date on which the impediment to filing an  
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21 <sup>7</sup> As noted, Petitioner's most recent state-court filings  
22 focused on his request to be resentenced under Proposition 47,  
23 section 1170.18. The claims in the Petition, on the other hand,  
24 address the factual basis for why he contended in state court that  
25 he deserved to be resentenced and do not directly concern section  
26 1170.18. To the extent the Petition could be interpreted as  
27 raising the same claims as in his recent round of state-court  
28 petitions, it might not be untimely, but the claims would not be  
cognizable on federal habeas review. See, e.g., Givens v. Muniz,  
No. 2:16-cv-00249 TLN AC P, 2017 WL 387258, at \*3 (E.D. Cal. Jan.  
26, 2017) (citing cases holding that claims challenging denial of  
resentencing under section 1170.18 are not cognizable on federal  
habeas review and so holding).

1 application created by State action in violation of the  
2 Constitution or laws of the United States is removed, if  
3 the applicant was prevented from filing by such State  
4 action;

5 (C) the date on which the constitutional right  
6 asserted was initially recognized by the Supreme Court,  
7 if the right has been newly recognized by the Supreme  
8 Court and made retroactively applicable to cases on  
9 collateral review; or

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

13 28 U.S.C. § 2244(d)(1). AEDPA extended the limitation period for  
14 those whose convictions became final before its enactment in 1996  
15 to one year after its effective date - or until April 24, 1997.  
16 See United States v. Gamboa, 608 F.3d 492, 493 n.1 (9th Cir.  
17 2010).

18 AEDPA includes a statutory tolling provision that suspends  
19 the limitation period for the time during which a properly filed  
20 application for postconviction or other collateral review is  
21 pending in state court. § 2244(d)(2); see Waldrip v. Hall, 548  
22 F.3d 729, 734 (9th Cir. 2008). In addition to statutory tolling,  
23 federal habeas petitions are subject to equitable tolling of the  
24 one-year limitation period in appropriate cases. Holland v.  
25 Florida, 560 U.S. 631, 645 (2010). Determining whether equitable  
26 tolling is warranted is a fact-specific inquiry. Frye v.  
27 Hickman, 273 F.3d 1144, 1146 (9th Cir. 2001) (as amended). The  
28 petitioner must show that (1) he has been pursuing his rights

1 diligently and (2) some extraordinary circumstance stood in his  
2 way and prevented timely filing. Holland, 560 U.S. at 649.

3 As to both statutory and equitable tolling, a petitioner  
4 bears the burden of demonstrating that AEDPA's limitation period  
5 was sufficiently tolled. Pace v. DiGuglielmo, 544 U.S. 408, 418  
6 (2005) (equitable tolling); Smith v. Duncan, 297 F.3d 809, 814  
7 (9th Cir. 2002) (as amended) (statutory tolling), abrogation on  
8 other grounds recognized by Moreno v. Harrison, 245 F. App'x 606,  
9 608 (9th Cir. 2007).

10 B. Limitation Period

11 Under California law in effect at the time of Petitioner's  
12 conviction, an appeal – for which Petitioner would likely have  
13 needed a certificate of probable cause – had to be filed within  
14 60 days of judgment. See Cal. R. Ct. 31 (repealed). Petitioner  
15 did not appeal his convictions. (See Pet. at 1.) Consequently,  
16 “the date on which the judgment became final by conclusion of  
17 direct review or the expiration of the time for seeking such  
18 review” was sometime in early 1989, 60 days after he was  
19 sentenced, in February 1989. § 2244(d)(1)(A); (see Lodged Doc.  
20 1, Ex. 1). Although Petitioner's one-year limitation period  
21 would normally have begun to run then, AEDPA extended the end of  
22 the limitation period to April 24, 1997, for those convicted  
23 before its enactment. Gamboa, 608 F.3d at 493 n.1. Petitioner  
24 did not file his federal Petition until nearly two decades later.

25 Unless Petitioner can show a later accrual date under  
26 § 2244(d)(1)(B), (C), or (D) or statutory or equitable tolling of  
27 the limitation period, his Petition must be dismissed as  
28 untimely.

1 C. Later Accrual Date

2 Petitioner does not point to any State-created impediment  
3 that prevented him from earlier raising his claims, nor does he  
4 rely on a newly recognized constitutional right. Thus, he is not  
5 entitled to a later trigger date under § 2244(d)(1)(B) or (C).

6 As for § 2244(d)(1)(D), Petitioner's claims all center on  
7 his contention that he never pleaded guilty to possession for  
8 sale of a controlled substance but rather only to straight  
9 possession. He rests his argument on the allegedly ambiguous  
10 nature of a portion of the plea colloquy:

11 THE COURT: Are you pleading guilty because you possessed  
12 cocaine for sale on February 22nd, 1987? Did you? Did  
13 you possess the cocaine with the intent to sell it?

14 THE DEFENDANT: I possessed it.

15 THE COURT: Pardon?

16 THE DEFENDANT: Huh-uh, (Negative).

17 (Pet., Mem. P. & A. at 3, 21; see also id. at 3-10 (memorandum's  
18 argument section, resting on quoted portion of plea colloquy).)  
19 The trial court did not follow up on this point with Petitioner.

20 But these facts were necessarily known to Petitioner as soon  
21 as he pleaded guilty. Accordingly, he is not entitled to a later  
22 trigger date under § 2244(d)(1)(D), either. See Hasan v. Galaza,  
23 254 F.3d 1150, 1154 n.3 (9th Cir. 2001) (holding that limitation  
24 period begins running when petitioner knows or through diligence  
25 could have discovered important facts, not when he recognizes  
26 their legal significance).

27 For all these reasons, Petitioner is not entitled to a later  
28 trigger date of the limitation period.



1           D.    Statutory Tolling

2           Petitioner is not entitled to any statutory tolling because  
3 he did not file his first state-court habeas petition until  
4 December 2001 (see Lodged Doc. 3 at 2), more than four years  
5 after the limitation period had expired. See Ferguson v.  
6 Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (holding that  
7 § 2244(d) "does not permit the reinitiation of the limitations  
8 period that has ended before the state petition was filed" even  
9 if state petition was timely filed).

10           Accordingly, statutory tolling does not render the Petition  
11 timely.

12           E.    Equitable Tolling

13           Petitioner has not offered any basis for equitable tolling,  
14 as was his burden, and the record reveals none. In 2009, in  
15 ruling on one of Petitioner's challenges to his sentence, the  
16 state court of appeal noted that he had offered no explanation  
17 for his years of delay in bringing his claim. (Lodged Doc. 3 at  
18 4.) And in his opposition to the motion to dismiss, Petitioner  
19 does not even address the timeliness of the Petition.  
20 Accordingly, equitable tolling cannot save the Petition.

21 **II. Conclusion**

22           The Petition is untimely by nearly 20 years and must be  
23 denied on that basis. The Court therefore does not address  
24 Respondent's other arguments for why it should be dismissed.<sup>8</sup>

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26           <sup>8</sup> To the extent the Petition can be interpreted to claim  
27 that Petitioner is "actually innocent" of his crimes of conviction,  
28 he still cannot escape the timeliness bar. A petitioner seeking to  
proceed under the actual-innocence exception must present new  
evidence demonstrating his innocence. See Schlup v. Delo, 513 U.S.

ORDER

IT IS ORDERED that Respondent's motion to dismiss the  
Petition is granted and Judgment be entered denying the Petition  
and dismissing this action with prejudice.

DATED: February 10, 2017

  
\_\_\_\_\_  
JEAN ROSENBLUTH  
U.S. MAGISTRATE JUDGE

298, 324 (1995). Petitioner has presented no evidence of any kind  
demonstrating that he is actually innocent; he claims merely a  
defect in his plea proceeding.