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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 MOISES BAUTISTA, ) No. CV 17-6004 RGK (FFM)  
12 Petitioner, )  
13 v. ) ORDER TO SHOW CAUSE WHY THE  
14 WARDEN RAYMOND ) PETITION SHOULD NOT BE  
15 MADDEN, ) DISMISSED AS UNTIMELY  
16 Respondent. )  
\_\_\_\_\_ )

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18 On August 8, 2017, petitioner Moises Bautista (“petitioner”), a California  
19 prisoner, constructively<sup>1</sup> filed a Petition for Writ of Habeas Corpus by a Person  
20 in State Custody (the “petition”) pursuant to 28 U.S.C. § 2254. (Dkt. 1.) The  
21 petition challenges petitioner’s 2014 conviction in the Superior Court of Los  
22 Angeles County for various crimes.

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27 <sup>1</sup> A pro se petitioner’s relevant filings may be construed as filed on the date  
28 they were submitted to prison authorities for mailing, under the prison “mailbox  
rule” of *Houston v. Lack*, 487 U.S. 266 (1988). While no proof of service is  
attached to the petition, the outside of the envelope in which the petition was  
filed bears a notation seemingly indicating that the petition was received by  
prison authorities on August 8, 2017.



1 Supreme Court affirmed his conviction. Accordingly, the one-year limitations  
2 period was set to expire on September 14, 2016. *See Patterson*, 251 F.3d at  
3 1245-47. Because petitioner did not initiate the current proceedings until August  
4 8, 2017, the present action is untimely, absent statutory or equitable tolling. *See*  
5 28 U.S.C. § 2244(d)(1).  
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## 7 **2. STATUTORY TOLLING**

8 Title 28 U.S.C. § 2244(d)(2) provides that “[t]he time during which a  
9 properly filed application for state post-conviction or other collateral review with  
10 respect to the pertinent judgment or claim is pending shall not be counted toward  
11 any period of limitation under this subsection.” Here, petitioner admits he has  
12 never filed a state habeas petition. Accordingly, he is not entitled to any  
13 statutory tolling and the petition is untimely unless he is entitled to almost one  
14 year of equitable tolling.  
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## 16 **3. EQUITABLE TOLLING**

17 The AEDPA limitations period also may be subject to equitable tolling, if  
18 the petitioner shows that extraordinary circumstances beyond the petitioner’s  
19 control made timely filing of a federal habeas petition impossible and the  
20 petitioner has acted diligently in pursuing his rights. *Holland v. Florida*, 560  
21 U.S. 631, 649 (2010). The petitioner bears the burden of showing that equitable  
22 tolling is appropriate. *Miranda v. Castro*, 292 F.3d 1063, 1065 (9th Cir. 2002).  
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24 Petitioner argues<sup>3</sup> that he is entitled to equitable tolling because: (1) his  
25 counsel failed to timely send petitioner his “papers” and (2) when counsel did  
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27 <sup>3</sup> Petitioner’s contentions regarding equitable tolling are set forth in a  
28 document, filed concurrently with the petition, entitled “Motion to Show Cause As  
to Time Filed Writ of Habeas Corpus.” (Dkt. 2.)

1 send him the papers, he sent them as standard prison mail rather than prison legal  
2 mail.

3 A lawyer's failure to send a petitioner their legal materials can constitute  
4 extraordinary circumstances that warrant equitable tolling. *See Espinoza-*  
5 *Matthews v. California*, 432 F.3d 1021, 1027-28 (9th Cir. 2005). However, even  
6 if a petitioner's counsel did not timely send the petitioner any materials, the  
7 petitioner is not relieved of his obligation to show a causal relationship between  
8 counsel's failure and the untimely filing of the petition. *See Spitsyn v. Moore*,  
9 345 F.3d 796, 799 (9th Cir. 2003).

10 At this point, petitioner has not demonstrated that his attorney's failure to  
11 timely mail petitioner's "papers" prevented him from filing a timely petition.  
12 First, and perhaps most critically, petitioner has not explained why he needed the  
13 materials in his attorney's possession in order to file the petition. Indeed,  
14 petitioner does not define the term "papers" (i.e. whether they are trial  
15 transcripts, prior filings, etc.), leaving the Court to guess about the materials'  
16 usefulness or necessity. Additionally, petitioner admits that his lawyer did mail  
17 him his documents, but that the mailing was untimely. However, petitioner does  
18 not state when received the materials from his attorney. Moreover, although  
19 petitioner purports to have attached a copy of the envelope in which his attorney  
20 sent the "papers," no such copy is attached to the petition. Without knowing  
21 when petitioner received the materials from his attorney, the Court cannot  
22 evaluate petitioner's claim that he received his "papers" too late to effectively  
23 file a timely petition. For these reasons, the Court finds that petitioner has not  
24 shown that he is entitled to equitable tolling at this time.

#### 25 26 **4. ORDER TO SHOW CAUSE**

27 Under the allegations and facts of the petition, petitioner has not  
28 demonstrated that he is entitled to a later start date of the limitations period.

1 Therefore, and because the petition does not demonstrate any basis for tolling the  
2 statute, or for setting aside the one-year limitation, the Court orders petitioner to  
3 show cause in writing within thirty (30) days of the date of this order why the  
4 petition should not be dismissed as time-barred. If petitioner fails to provide a  
5 timely response to this order, the Court will recommend that the petition be  
6 dismissed, with prejudice, as time-barred.

7 IT IS SO ORDERED.

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9 DATE: October 4, 2017

10 /S/ FREDERICK F. MUMM  
11 FREDERICK F. MUMM  
12 United States Magistrate Judge  
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