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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 RAYFORD TYLER, JR.,) Case No. CV 20-0679-JPR
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13) Petitioner,) MEMORANDUM DECISION AND ORDER
14) DENYING PETITION AND DISMISSING
15) v.) ACTION WITH PREJUDICE
16)
17) JOSIE GASTELO, Warden,)
18) Respondent.)
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PROCEEDINGS

On January 16, 2020, Petitioner, proceeding pro se, constructively filed a Petition for Writ of Habeas Corpus by a Person in State Custody, raising two claims: he is entitled to resentencing under a change in state law, and California's robbery statutes under which he was convicted are void for vagueness.¹ (Pet. at 5, 25-35.) Respondent moved to dismiss the

¹ Under the mailbox rule of Houston v. Lack, 487 U.S. 266, 275-76 (1988), a prisoner constructively files something on the day he gives it to prison authorities for forwarding to the relevant court. See Roberts v. Marshall, 627 F.3d 768, 770 n.1 (9th Cir. 2010). The Court presumes that is the day he signed the document unless there is evidence to the contrary. See Butler v. Long, 752 F.3d 1177, 1178 n.1 (9th Cir. 2014) (per

1 Petition on April 14, 2020, arguing in part that Petitioner's
2 void-for-vagueness claim was untimely, and Petitioner opposed on
3 June 15. Respondent replied on June 23, 2020, asserting for the
4 first time that the resentencing claim was untimely as well. The
5 Court allowed supplemental briefing, and Petitioner filed
6 supplemental opposition on July 13, 2020. Respondent did not
7 file a supplemental reply. The parties consented to the
8 jurisdiction of the undersigned under 28 U.S.C. § 636(c)(1). For
9 the reasons discussed below, the Petition is untimely and this
10 action is dismissed with prejudice.

11 BACKGROUND

12 On May 10, 2017, Petitioner pleaded no contest in Los
13 Angeles County Superior Court to three counts of second-degree
14 robbery, admitted a prior serious-felony conviction under
15 California's Three Strikes Law, and received a negotiated
16 sentence of 13 years in state prison. (Lodged Doc. 1 at 11-14.)
17 He did not appeal. See Cal. App. Cts. Case Info., [http://](http://appellatecases.courtinfo.ca.gov/)
18 appellatecases.courtinfo.ca.gov/ (search for "Tyler" with
19 "Rayford" in Second App. Dist. revealing no appeal filed) (last

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21 curiam) (as amended). Here, although Petitioner signed his
22 Petition on January 14, 2020, it appears he gave it to prison
23 authorities on January 16 because that is when he signed and
24 initialed the back of the envelope in which it was mailed. (See
25 Pet. at 7, 40 (for nonconsecutively paginated documents, the
26 Court uses the pagination provided by its Case Management/
27 Electronic Case Filing system).) The Court therefore deems that
28 to be its constructive filing date. See Kane v. Foulk, No. CV
13-3521-JVS (DTB)., 2014 WL 1370368, at *3 (C.D. Cal. Apr. 4,
2014) (noting that handwritten date next to signature on envelope
containing petition was "likely the date that the [p]etition was
turned over to prison authorities"). The mailbox rule applies to
state habeas petitions as well. Stillman v. LaMarque, 319 F.3d
1199, 1201 (9th Cir. 2003).

1 visited Oct. 7, 2020).

2 On May 19, 2019, Petitioner constructively filed a habeas
3 petition in the superior court (Lodged Doc. 2 at 1, 18), which it
4 denied in a reasoned order on July 10 (Lodged Doc. 3).

5 Petitioner filed a signed but undated petition in the court of
6 appeal (Lodged Doc. 4 at 1, 6, 18), which filed it on July 29,
7 2019, and summarily denied it on August 6 (Lodged Doc. 5). He
8 filed the May 19, 2019 petition a second time in the superior
9 court on August 15 (Lodged Doc. 6 at 6, 18); it denied the
10 petition as successive on August 20 (Lodged Doc. 7). On
11 September 26, 2019, the California Supreme Court filed
12 Petitioner's signed but undated petition (Lodged Doc. 8 at 1, 6,
13 12, 18), and it summarily denied it on December 11 (Lodged Doc.
14 9).

15 PETITIONER'S CLAIMS

16 1. He should be resentenced under California Senate Bill
17 1393, which in 2019 gave judges discretion to strike or dismiss
18 prior-serious-felony enhancements. (Pet. at 5, 25-30.)

19 2. California's robbery statutes are void for vagueness.
20 (Id. at 5, 31-40.)

21 DISCUSSION

22 I. The Statute-of-Limitation Defense Was Not Forfeited

23 Despite asserting in her motion to dismiss that Petitioner's
24 second claim was untimely, Respondent argued for the first time
25 in her reply that his first claim was also time barred.

26 (See Mot. to Dismiss at 2-3; Reply at 3-4.) Petitioner contends
27 that by not contesting the first claim's timeliness until her
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1 reply, she "waived" the defense.² (Suppl. Opp'n at 2.)

2 "Ordinarily in civil litigation, a statutory time limitation
3 is forfeited if not raised in a defendant's answer or in an
4 amendment thereto." Day v. McDonough, 547 U.S. 198, 202 (2006)
5 (citing Fed. Rs. Civ. P. 8(c), 12(b), & 15(a)); see also R. 5(b),
6 Rules Governing § 2254 Cases in U.S. Dist. Cts. (requiring
7 respondent to plead statute-of-limitation defense in answer).
8 But bars to considering habeas corpus defenses aren't absolute,
9 and exceptions based on important interests such as exhaustion
10 and timeliness have been recognized. Cf. Wood v. Milyard, 566
11 U.S. 463, 470-73 (2012) (acknowledging exceptions to general rule
12 on forfeiture of affirmative defenses and declining to adopt
13 absolute rule barring court of appeal from sua sponte raising
14 forfeited timeliness defense). Accordingly, a party is
15 prohibited from relying on a statute-of-limitation defense only
16 if it intentionally waives it. Day, 547 U.S. at 202 (holding
17 that when respondent made "no intelligent waiver" of limitation
18 defense, federal court had discretion to "dismiss the petition as
19 untimely under AEDPA's one-year limitation").

20 When, as here, a respondent's failure to raise timeliness in
21 a motion to dismiss was apparently inadvertent, she is not barred
22 from asserting it in her reply. Id.; see also Harmon v. Adams,
23 No. 2:08-1218-GEB-KJN-P., 2013 WL 5954896, at *11 (E.D. Cal. Nov.
24 7, 2013) (holding that respondent didn't forfeit statute-of-

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26 ² "A waived claim or defense is one that a party has
27 knowingly and intelligently relinquished; a forfeited plea is one
28 that a party has merely failed to preserve." Wood v. Milyard,
566 U.S. 463, 470 n.4 (2012). Thus, the issue here is whether
Respondent has forfeited her timeliness argument.

1 limitation defense by omitting it from answer because it didn't
2 expressly waive it and asserted it in response to further-
3 briefing order), accepted by 2014 WL 127962 (E.D. Cal. Jan. 14,
4 2014); Whitehead v. Hedgpeth, No. C-12-3487 EMC, 2013 WL 3967341,
5 at *7 (N.D. Cal. July 31, 2013) (holding that respondent wasn't
6 barred from asserting timeliness defense by not moving to dismiss
7 on that ground and instead raising it in opposition to motion for
8 stay and abeyance). And Petitioner was not deprived of an
9 opportunity to challenge the newly raised argument, as the Court
10 allowed supplemental briefing. See Day, 547 U.S. at 210.
11 Moreover, strong interests are served by applying AEDPA's one-
12 year limitation period. See id. at 205-06 (citing with approval
13 Acosta v. Artuz, 221 F.3d 117, 123 (2d Cir. 2000) ("The AEDPA
14 statute of limitation promotes judicial efficiency and
15 conservation of judicial resources, safeguards the accuracy of
16 state court judgments by requiring resolution of constitutional
17 questions while the record is fresh, and lends finality to state
18 court judgments within a reasonable time.")). Thus, the statute-
19 of-limitation defense was not forfeited.

20 **II. The Petition Is Untimely**

21 Petitioner filed the Petition a year and a half after the
22 limitation period had expired, and he is not entitled to a later
23 trigger date or tolling of any kind. Thus, he is too late.

24 **A. Applicable Law**

25 The Antiterrorism and Effective Death Penalty Act sets forth
26 a one-year limitation period for filing a federal habeas petition
27 and specifies that the period runs from the latest of the
28 following dates:

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

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

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

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

17 § 2244(d)(1). The timeliness of each claim in a habeas petition
18 must be assessed "on an individual basis." Mardesich v. Cate,
19 668 F.3d 1164, 1171 (9th Cir. 2012).

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

1 Hickman, 273 F.3d 1144, 1146 (9th Cir. 2001) (as amended). The
2 petitioner must show that he has been pursuing his rights
3 diligently and that some extraordinary circumstance stood in his
4 way and prevented timely filing. Holland, 560 U.S. at 649.

5 As to both statutory and equitable tolling, a petitioner
6 bears the burden of demonstrating that AEDPA's limitation period
7 was sufficiently tolled. Pace v. DiGuglielmo, 544 U.S. 408, 418
8 (2005) (equitable tolling); Smith v. Duncan, 297 F.3d 809, 814
9 (9th Cir. 2002) (as amended) (statutory tolling), abrogation on
10 other grounds recognized by United States v. Davis, 508 F. App'x
11 606, 609 (9th Cir. 2013).

12 B. Analysis

13 Petitioner pleaded no contest and was convicted on May 10,
14 2017. (Lodged Doc. 1 at 11-14.) He did not appeal. See Cal.
15 App. Cts. Case Info., <http://appellatecases.courtinfo.ca.gov/>
16 (search for "Tyler" with "Rayford" in Second App. Dist. revealing
17 no appeal filed) (last visited Oct. 7, 2020). Thus, his
18 convictions became final on July 9, 2017, 60 days later. See
19 Cal. R. Ct. 8.308(a); cf. Caspari v. Bohlen, 510 U.S. 383, 390
20 (1994) (state conviction and sentence become final when
21 availability of direct appeal has been exhausted and time for
22 filing petition for writ of certiorari has elapsed or timely
23 filed petition has been denied).³ Ostensibly, then, AEDPA's one-
24 year statute of limitation began to run on July 10, 2017, and
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26 ³ Petitioner could not have filed a petition for writ of
27 certiorari in the U.S. Supreme Court because he did not appeal to
28 the highest state court. See 28 U.S.C. § 1257(a); Sup. Ct. R.
13(1).

1 expired on July 9, 2018. See Patterson v. Stewart, 251 F.3d
2 1243, 1246 (9th Cir. 2001) (holding that AEDPA limitation period
3 begins running day after triggering event). Petitioner did not
4 constructively file his Petition until January 16, 2020, more
5 than a year and a half late.

6 To the extent Petitioner contends he is entitled to a later
7 trigger date under § 2244(d)(1)(C) (see Pet. at 25-35; Opp'n at
8 2), his contention is unfounded.⁴ As to his second claim, he
9 argues that the Supreme Court's ruling in Sessions v. Dimaya, 138
10 S. Ct. 1204 (2018), created "an issue surrounding the 'nature' of
11 the California robbery being '[s]erious' as opposed to
12 '[v]iolent.'" (Pet. at 31-32); see Dimaya, 138 S. Ct. at 1216
13 (holding that 18 U.S.C. § 16(b) was vague in violation of due
14 process). In United States v. Dixon, 805 F.3d 1193 (9th Cir.
15 2015), and United States v. Garcia-Lopez, 903 F.3d 887 (9th Cir.
16 2018), also cited by Petitioner (see Pet. at 32), the Ninth
17 Circuit held that the defendants' California robbery convictions
18 did not qualify as violent felonies under the Armed Career
19 Criminal Act, Dixon, 805 F.3d at 1198-99, or crimes of violence
20 under § 16(a), Garcia-Lopez, 903 F.3d at 893. Dixon and Garcia-
21 Lopez are not U.S. Supreme Court cases and are in any event, like
22 Dimaya, not relevant clearly established federal law here because
23 Petitioner's sentence was enhanced under state statutes.

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25 ⁴ Petitioner does not argue that he's entitled to a later
26 trigger date under § 2244(d)(1)(B) or (D). Any such claim would
27 fail. See Shannon v. Newland, 410 F.3d 1083, 1087-89 (9th Cir.
28 2005) (holding that change in state law does not qualify as
removal of "impediment" under subsection (B) or "factual
predicate" under subsection (D)).

1 Therefore, he is not entitled to a later start of the statute of
2 limitation under § 2244(d)(1)(C). See Gray v. Sherman, No. CV
3 18-07721-JVS (AS), 2019 WL 469137, at *4 (C.D. Cal. Jan. 9, 2019)
4 (rejecting claim identical to that raised here), accepted by 2019
5 WL 468802 (C.D. Cal. Feb. 5, 2019), certificate of appealability
6 denied, No. 19-55214, 2019 WL 8059542 (9th Cir. Nov. 8, 2019).
7 And Petitioner does not identify any new U.S. Supreme Court
8 authority giving rise to his first claim. It rests entirely on
9 new state law. Thus, no later trigger date applies for it
10 either.

11 Petitioner is not entitled to statutory tolling because he
12 constructively filed his first state habeas petition on May 19,
13 2019, well after the AEDPA limitation period ended, on July 9,
14 2018. (See Lodged Doc. 1 at 16-18); Ferguson v. Palmateer, 321
15 F.3d 820, 823 (9th Cir. 2003) ("[S]ection 2244(d) does not permit
16 the reinitiation of the limitations period that has ended before
17 the state petition was filed."); Green v. White, 223 F.3d 1001,
18 1003 (9th Cir. 2000) (holding that habeas petition filed after
19 limitation period had already run resulted in no tolling).
20 Because he is not entitled to any statutory tolling, he must show
21 equitable tolling sufficient to account for the delay in filing
22 the Petition. In neither his opposition nor his supplemental
23 opposition does he argue for equitable tolling, and no basis for
24 it is apparent to the Court. See Gaston v. Palmer, 417 F.3d
25 1030, 1034 (9th Cir. 2005) (noting that "equitable tolling will
26 not be available in most cases," and petitioner has burden of
27 showing that extraordinary circumstances justify tolling).


28 Accordingly, Petitioner is not entitled to a later trigger

1 date or tolling of any kind for either of his claims, and the
2 Petition is untimely by more than a year and a half.⁵

3 **ORDER**

4 IT THEREFORE IS ORDERED that judgment be entered denying the
5 Petition and dismissing this action with prejudice.

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7 DATED: 10/8/2020



8 JEAN ROSENBLUTH
9 U.S. MAGISTRATE JUDGE
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27 ⁵ Because the Petition is clearly untimely, the Court does
28 not reach the issue of the cognizability of Petitioner's first
claim. (See Mot. to Dismiss at 2-3.)