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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LOUIE GRIJALVA JR.,

1:07-CV-01665 AWI DLB HC

Petitioner,

ORDER ADOPTING FINDINGS AND
RECOMMENDATION, GRANTING
RESPONDENT’S MOTION TO DISMISS,
DISMISSING PETITION FOR WRIT OF
HABEAS CORPUS AS UNTIMELY, AND
DECLINING TO ISSUE CERTIFICATE OF
APPEALABILITY

v.

JOHN C. MARSHALL,

Respondent.

/ [Doc. 20]

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

On November 6, 2008, the Magistrate Judge issued a [Findings and Recommendation](#) that the Motion to Dismiss be GRANTED. This Findings and Recommendation was served on all parties and contained notice that any objections were to be filed within thirty (30) days of the date of service of the order.

On January 13, 2009, Petitioner filed timely [objections](#) to the Findings and Recommendation. Petitioner continues to argue that counsel’s failure to return the state court transcripts until August 2005 entitles him to a later start of the limitations period and/or equitable tolling. Although the Ninth Circuit has observed that an inability to obtain transcripts and/or access to legal files may warrant equitable tolling, this is only if the record shows that such inability actually prevented Petitioner from filing a collateral petition. See e.g. United States v. Battles, 362 F.3d 1195, 1198 (9th Cir. I2004); Lott v. Mueller, 304 F.3d 918, 924-925 (9th Cir. 2002). As stated in the Findings and Recommendation, Petitioner has simply failed to demonstrate that the lack of access to his transcripts proximately caused him to file a late

1 collateral petition. Nor has Petitioner demonstrated the requisite due diligence.

2 In accordance with the provisions of 28 U.S.C. § 636 (b)(1)(C), this Court has conducted
3 a *de novo* review of the case. Having carefully reviewed the entire file, including Petitioner's
4 objections, the Court concludes that the Magistrate Judge's Findings and Recommendation is
5 supported by the record and proper analysis. Petitioner's objections present no grounds for
6 questioning the Magistrate Judge's analysis.

7 Accordingly, IT IS HEREBY ORDERED that:

- 8 1. The Findings and Recommendation issued November 6, 2008, is ADOPTED IN
9 FULL;
- 10 2. Respondent's Motion to Dismiss is GRANTED;
- 11 3. The Petition for Writ of Habeas Corpus is DISMISSED, with prejudice;
- 12 4. The Clerk of the Court is DIRECTED to close this action; and
- 13 5. The court declines to issue a Certificate of Appealability. 28 U.S.C. § 2253(c);
14 Slack v. McDaniel, 529 U.S. 473, 484 (2000) (in order to obtain a COA,
15 petitioner must show: (1) that jurists of reason would find it debatable whether the
16 petition stated a valid claim of a denial of a constitutional right; and (2) that jurists
17 of reason would find it debatable whether the district court was correct in its
18 procedural ruling. Slack v. McDaniel, 529 U.S. 473, 484 (2000). In the present
19 case, the Court does not find that jurists of reason would not find it debatable
20 whether the petition was properly dismissed, with prejudice, as time-barred under
21 28 U.S.C. § 2244(d)(1). Petitioner has not made the required substantial showing
22 of the denial of a constitutional right.

23
24 IT IS SO ORDERED.

25 **Dated: February 14, 2009**

26 **/s/ Anthony W. Ishii**
27 **CHIEF UNITED STATES DISTRICT JUDGE**
28