

5 **UNITED STATES DISTRICT COURT**

## 6 EASTERN DISTRICT OF CALIFORNIA

7 LOUIE GRIJALVA JR.,

1:07-CV-01665 AWI DLB HC

8 Petitioner,

9 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

10 v.

11 JOHN C. MARSHALL,

12 Respondent.

13 / [Doc. 20]

14 Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus  
15 pursuant to 28 U.S.C. § 2254.16 On November 6, 2008, the Magistrate Judge issued a [Findings and Recommendation](#) that  
17 the Motion to Dismiss be GRANTED. This Findings and Recommendation was served on all  
18 parties and contained notice that any objections were to be filed within thirty (30) days of the  
19 date of service of the order.20 On January 13, 2009, Petitioner filed timely [objections](#) to the Findings and  
21 Recommendation. Petitioner continues to argue that counsel's failure to return the state court  
22 transcripts until August 2005 entitles him to a later start of the limitations period and/or equitable  
23 tolling. Although the Ninth Circuit has observed that an inability to obtain transcripts and/or  
24 access to legal files may warrant equitable tolling, this is only if the record shows that such  
25 inability actually prevented Petitioner from filing a collateral petition. [See e.g. United States v.](#)  
26 [Battles](#), 362 F.3d 1195, 1198 (9<sup>th</sup> Cir. 2004); [Lott v. Mueller](#), 304 F.3d 918, 924-925 (9<sup>th</sup> Cir.  
27 2002). As stated in the Findings and Recommendation, Petitioner has simply failed to  
28 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