



1 under the age of 14 in violation of California Penal Code section 288.5 and various  
2 enhancements. (See Pet. at 1, ECF No. 1.) Based on the offense and prior convictions,  
3 Petitioner was sentenced to serve a determinate term of 12 years. (Id.) On April 4, 2007, the  
4 California Court of Appeal, Fifth Appellate District, affirmed the judgment. (See LD<sup>2</sup> No. 2.)  
5 Petitioner's request for California Supreme Court review was denied on June 13, 2007. (See  
6 LD No. 4.) Petitioner did not file any state post-conviction collateral challenges.

7 On June 12, 2008<sup>3</sup>; Petitioner filed the instant federal petition for writ of habeas corpus  
8 in this Court. Petitioner then filed an amended petition with this Court on July 16, 2010<sup>4</sup>. A  
9 second amended petition was filed on October 26, 2009; it appears to be identical to the first  
10 amended petition. On October 18, 2010, Respondent filed a motion to dismiss the petition as  
11 being filed outside the one-year limitations period prescribed by 28 U.S.C. § 2244(d).  
12 Petitioner filed opposition to Respondent's motion to dismiss on February 25, 2011. On March  
13 8, 2011, Respondent filed a reply to Petitioner's opposition.

## 14 **II. DISCUSSION**

### 15 **A. Procedural Grounds for Motion to Dismiss**

16 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a  
17 petition if it "plainly appears from the petition and any attached exhibits that the petitioner is  
18 not entitled to relief in the district court . . . ." Rule 4 of the Rules Governing Section 2254  
19 Cases.

20 The Ninth Circuit has allowed respondents to file a motion to dismiss in lieu of an  
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22 <sup>2</sup>"LD" refers to documents lodged with Respondent's motion to dismiss.

23 <sup>3</sup> In Houston v. Lack, the Court held that a pro se habeas petitioner's notice of appeal is deemed filed on  
24 the date of its submission to prison authorities for mailing, as opposed to the date of its receipt by the court clerk.  
25 487 U.S. 266, 276, 108 S.Ct. 2379, 2385 (1988). The Ninth Circuit has applied the rule to assess the timeliness  
26 of federal habeas filings under the AEDPA limitations period. Huizar v. Carey, 273 F.3d 1220, 1222, (9th Cir.  
27 2001), *citing* Houston, 487 U.S. 266, 276, 108 S.Ct. at 2385. Under the mailbox rule, the Court deems petitions  
28 filed on the date Petitioner presumably handed his petition to prison authorities for mailing. See also Rule 3(d)  
of the Rules Governing Section 2254 Cases. Although the petition was filed on June 16, 2008, pursuant to the  
mailbox rule the Court considers the petition filed on June 12, 2008, the date Petitioner signed the petition.

<sup>4</sup>While the petition was filed on July 22, 2009, the petition shall be deemed filed on July 16, 2010, the date  
Petitioner signed the petition.

1 answer if the motion attacks the pleadings for failing to exhaust state remedies or being in  
2 violation of the state's procedural rules. See, e.g., O'Bremski v. Maass, 915 F.2d 418, 420 (9th  
3 Cir. 1990) (using Rule 4 to evaluate motion to dismiss petition for failure to exhaust state  
4 remedies); White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (using Rule 4 as procedural  
5 grounds to review motion to dismiss for state procedural default); Hillery v. Pulley, 533 F.Supp.  
6 1189, 1194 & n. 12 (E.D. Cal. 1982) (same). Thus, a respondent can file a motion to dismiss  
7 after the Court orders a response, and the Court should use Rule 4 standards to review the  
8 motion. See Hillery, 533 F. Supp. at 1194 & n. 12.

9 In this case, Respondent's motion to dismiss is based on a violation of the one-year  
10 limitations period. 28 U.S.C. § 2244(d)(1). Because Respondent's motion to dismiss is similar  
11 in procedural standing to a motion to dismiss for failure to exhaust state remedies or for state  
12 procedural default and Respondent has not yet filed a formal answer, the Court will review  
13 Respondent's motion to dismiss pursuant to its authority under Rule 4.

14 **B. Commencement of Limitations Period Under 28 U.S.C. § 2244(d)(1)(A)**

15 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act  
16 of 1996 (hereinafter "AEDPA"). The AEDPA imposes various requirements on all petitions for  
17 writ of habeas corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117  
18 S.Ct. 2059, 2063 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997).

19 In this case, the petition was filed on June 16, 2008, and therefore, it is subject to the  
20 provisions of the AEDPA. The AEDPA imposes a one-year period of limitation on petitioners  
21 seeking to file a federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As  
22 amended, § 2244, subdivision (d) reads:

23 (1) A 1-year period of limitation shall apply to an application for a writ of  
24 habeas corpus by a person in custody pursuant to the judgment of a State court.  
The limitation period shall run from the latest of –

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

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

1 (C) the date on which the constitutional right asserted was initially  
2 recognized by the Supreme Court, if the right has been newly recognized by the  
3 Supreme Court and made retroactively applicable to cases on collateral review;  
4 or

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

(2) The time during which a properly filed application for State post-conviction  
or other collateral review with respect to the pertinent judgment or claim is  
pending shall not be counted toward any period of limitation under this  
subsection.

8 28 U.S.C. § 2244(d).

9 Under § 2244(d)(1)(A), the limitations period begins running on the date that the  
10 Petitioner's direct review became final or the date of the expiration of the time for seeking such  
11 review. In this case, the California Supreme Court denied review on June 13, 2007. The state  
12 appeal process became final ninety days later, on September 11, 2007, when the time for  
13 seeking certiorari with the United States Supreme Court expired. U.S. Supreme Court rule 13;  
14 Bowen v. Rowe, 188 F.3d 1157 (9th Cir. 1999). The AEDPA statute of limitations began to run  
15 the following day, on September 12, 2007. Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir.  
16 2001).

17 Petitioner had one year from September 12, 2007, absent applicable tolling, in which  
18 to file his federal petition for writ of habeas corpus. Petitioner filed the instant petition on June  
19 12, 2008, within the statute of limitations period. However, Respondent asserts that the claims  
20 at issue were first filed in the amended petition on July 16, 2010 and do not relate back to the  
21 original petition. Absent relation back, the later commencement of the statute of limitations,  
22 or any applicable tolling, the claims in the amended petition are barred by the statute of  
23 limitations. Petitioner has made no showing that the statute of limitations should commence  
24 at a later date under § 2244(d)(1)(B)-(D). Accordingly, Petitioner may only rely on relation back  
25 and equitable tolling to attempt to show that this petition is not barred by the statute of  
26 limitations.

27 **C. Relation Back Under Federal Rule of Civil Procedure 15(c)**

28 "Congress enacted AEDPA to advance the finality of criminal convictions by imposing

1 'a tight time line' in the form of a one-year time limit on state prisoners seeking to challenge  
2 their convictions in federal court." Hebner v. McGrath, 543 F.3d 1133, 1137 (9th Cir. 2008)  
3 (citing Mayle v. Felix, 545 U.S. 644 at 662 (2005)). Habeas petitions may be amended "as  
4 provided in the rules of procedure applicable to civil actions." 28 U.S.C. § 2242. The Federal  
5 Rules of Civil Procedure allow for amendments made after the statute of limitations has run  
6 to "relate back" to the date of the original pleading when the amended pleading arises "out  
7 of the conduct, transaction, or occurrence set out--or attempted to be set out--in the original  
8 pleading." Fed. R. Civ. P. 15(c)(1).

9 In Mayle, the United States Supreme Court narrowly interpreted the meaning of  
10 "conduct, transaction, or occurrence" that allows for an amended claim to relate back. Hebner,  
11 543 F.3d at 1138 ("[The Ninth Circuit] previously interpreted broadly 'conduct, transaction, or  
12 occurrence' to allow the relation back of an amended claim as long as it stems from the same  
13 trial, conviction, or sentence as the original. In Mayle, the Supreme Court rejected our  
14 construction as 'boundless,' because '[u]nder that comprehensive definition, virtually any new  
15 claim introduced in an amended petition will relate back, for federal habeas claims, by their  
16 very nature, challenge the constitutionality of a conviction or sentence.'" Mayle, 545 U.S. at  
17 656-57, 661.) Ultimately, an amended habeas petition "does not relate back (and thereby  
18 escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by  
19 facts that differ in both time and type from those the original pleading set forth." Mayle, 545  
20 U.S. at 650; see also United States v. Ciampi, 419 F.3d 20, 24 (1st Cir. 2005) (restating the  
21 Mayle standard despite the fact that pro se habeas petitions are normally liberally construed.).

22 In the amended petition, Petitioner asserts that California Criminal Jury Instruction 226  
23 impermissibly shifted the burden of proof in violation of the Fourteenth Amendment and that  
24 the erroneous instruction was prejudicial. (Am. Pet. at 2, ECF No. 23.) In Petitioner's original  
25 petition, he raised five claims, including, (1) the sentence was in violation of the Constitution  
26 and laws of the United States, (2) ineffective assistance of counsel, (3) prosecutorial  
27 misconduct, (4) insufficient evidence, and (5) the grand jury procedures were in violation of  
28 the Fifth Amendment. (Pet. at 7.) In Petitioner's third claim of his original petition, he states

1 that the failure to provide a jury instruction is a ground for reversal of a conviction. (Pet. at 43.)  
2 However, in the amended petition, Petitioner raises the claim that an improper jury instruction  
3 was given. (Id.) Specifically, he asserts that an improper jury instruction was given regarding  
4 his credibility and whether his testimony should be believed. (Id.)

5 Based on the narrowly prescribed definition of "conduct, transaction, or occurrence"  
6 under Mayle, Petitioner's claim does not relate back. The claim is supported by facts that differ  
7 in both time and type from those of the original pleading. Mayle, 545 U.S. at 650. The claim  
8 is different in type than the claims raised in his original petition. The original petition does not  
9 state any claims regarding jury instructions, except in passing reference to his prosecutorial  
10 misconduct claim. That claim discussed the failure to provide a jury instruction rather than  
11 providing an improper jury instruction. Additionally, the claim in the amended petition relates  
12 to a different time of the proceeding than the claims raised in the original petition. Petitioner  
13 did not assert any other claims regarding instructional error relating to jury deliberation in the  
14 original petition. Petitioner's multiple claims in the original petition regarding other aspects of  
15 the trial are not sufficient to allow for relation back where the amended petition focuses on  
16 factual underpinnings that were not specifically described in the original petition.

17 Petitioner, in his traverse, asserts that Respondent has waived the statute of limitations  
18 defense, as it was not raised in the first motion to dismiss.<sup>5</sup> Petitioner's claim lacks merit.  
19 Respondent did raise the defense at the first opportunity. The defense was raised after  
20 Petitioner filed his first amended petition, which created the factual scenario in which a statute  
21 of limitations defense became relevant. "Ordinarily in civil litigation, a statutory time limitation  
22 is forfeited if not raised in a defendant's answer or in an amendment thereto." Day v.  
23 McDonough, 547 U.S. 198, 202 (2006) (citing Fed. R. Civ. Proc. 8(c), 12(b), and 15(a)).  
24 However, the Supreme Court has cautioned against a strict application of potential waiver of  
25 affirmative defenses in habeas cases. Day, 547 U.S. at 208 (agreeing with the State's  
26 argument that "[t]he considerations of comity, finality, and the expeditious handling of habeas

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28 <sup>5</sup> Respondent filed a motion to dismiss in response to the original petition. (Mot. to Dismiss, ECF No. 18.)  
That motion to dismiss was filed before Petitioner amended the petition.

1 proceedings that motivated AEDPA... counsel against an excessively rigid or formal approach  
2 to the affirmative defenses now listed in Habeas Rule 5."). Further, "a court must accord the  
3 parties fair notice and an opportunity to present their positions." Id. at 210; see also Robinson  
4 v. Johnson, 313 F.3d 128, 135-136 (3rd Cir. 2002) ("Consistent with the purpose of Rule 8(c),  
5 courts require that defendants assert a limitations defense as early as reasonably possible.")

6 Respondent, in his motion to dismiss, asserts that Petitioner's claims are barred by the  
7 statute of limitations as they do not relate back to the claims presented in the original petition.  
8 The defense did not arise until Petitioner filed the amended petition. The present motion to  
9 dismiss was the first opportunity to present defense. Petitioner's claim that the statute of  
10 limitations defense is waived is without merit.

11 Petitioner asserts in his traverse that the claims should relate back based on his actual  
12 innocence. Actual innocence is not relevant to the relation back doctrine under Federal Rule  
13 of Civil Procedure 15(c). Petitioner's actual innocence claims are addressed separately below.  
14 Accordingly, Petitioner's amended petition does not relate back to the same transaction or  
15 occurrence as set forth in the original petition. Petitioner's claims are barred by the statute of  
16 limitations unless otherwise tolled.

17 **D. Tolling of the Limitation Period Pursuant to 28 U.S.C. § 2244(d)(2)**

18 28 U.S.C. § 2244(d)(2) states that the "time during which a properly filed application for  
19 State post-conviction or other collateral review with respect to the pertinent judgment or claim  
20 is pending shall not be counted toward" the one year limitation period. 28 U.S.C. § 2244(d)(2).  
21 Petitioner did not file any post-conviction collateral relief and is therefore not entitled to  
22 statutory tolling.

23 **E. Equitable Tolling**

24 The limitations period is subject to equitable tolling if the petitioner demonstrates: "(1)  
25 that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance  
26 stood in his way." Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005); see also Irwin v.  
27 Department of Veteran Affairs, 498 U.S. 89, 96 (1990); Calderon v. U.S. Dist. Ct. (Kelly), 163  
28 F.3d 530, 541 (9th Cir. 1998), citing Alvarez-Machain v. United States, 107 F.3d 696, 701 (9th

1 Cir. 1996). Petitioner bears the burden of alleging facts that would give rise to tolling. Pace,  
2 544 U.S. at 418; Hinton v. Pac. Enters., 5 F.3d 391, 395 (9th Cir.1993). Petitioner presents  
3 several reasons why the Court should be lenient and disregard Respondent's motion to  
4 dismiss including ignorance of the law and difficulty in finding assistance from other inmates  
5 to prepare his petition.

6 The federal courts have duty to construe pro se pleadings liberally. Hamilton v. United  
7 States, 67 F.3d 761, 764 (9th Cir.1995) (citing Hughes v. Rowe, 449 U.S. 5, 9 (1980)  
8 (quotation omitted)). Consistent with such duty, the Court shall consider Petitioner's grounds  
9 for lenience as potential grounds for equitable tolling, and review them in turn.

10 1. Ignorance of the Law

11 Petitioner claims he should be entitled to equitable tolling because he is uneducated  
12 and does not have knowledge of the law. This claim for equitable tolling must fail. Raspberry  
13 v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006) (pro se lack of legal sophistication is not an  
14 extraordinary circumstance warranting equitable tolling); Turner v. Johnson, 177 F.3d 390, 392  
15 (5th Cir. 1999), (inmate's lack of legal training, a poor education, or illiteracy does not give a  
16 court reason to toll the limitations period); Shoemate v. Norris, 390 F.3d 595, 598 (8th Cir.  
17 2004); Marsh v. Soares, 223 F.3d 1217, 1220 (10th Cir. 2000). Petitioner's circumstances are  
18 no different than the majority of incarcerated prisoners attempting to file petitions for writ of  
19 habeas corpus. Accordingly, his ignorance of the law is not an extraordinary circumstance  
20 entitling Petitioner to equitable tolling.

21 2. Assistance from Other Inmates

22 Additionally, Petitioner's claim of equitable tolling based on difficulty in finding  
23 assistance from other inmates must fail. The actions of fellow inmate assistants which result  
24 in an untimely petition do not constitute extraordinary circumstances sufficient to justify  
25 equitable tolling. See Tacho v. Martinez, 862 F.2d 1376, 1381 (9th Cir. 1988); Hughes v. Idaho  
26 Board of Corrections, 800 F.2d 905, 909 (9th Cir. 1986).

27 **F. Actual Innocence**

28 Petitioner's traverse discussed the applicability of the actual innocence exception to the



1 statue of limitations. (Traverse, ECF No. 38.) "Under Schlup v. Delo, 513 U.S. 298 (1995), a  
2 petitioner's otherwise-barred claims [may be] considered on the merits... if his claim of actual  
3 innocence is sufficient to bring him within the narrow class of cases... implicating a  
4 fundamental miscarriage of justice." Majoy v. Roe, 296 F.3d 770, 775 (9th Cir. 2002) (quoting  
5 Carriger v. Stewart, 132 F.3d 463, 477 (9th Cir. 1997) (en banc) (quoting Schlup, 513 U.S.  
6 298) (quotations omitted). In order to pass through Schlup's gateway, and have an otherwise  
7 barred constitutional claim heard on the merits, a petitioner must show that, in light of all the  
8 evidence, including evidence not introduced at trial, "it is more likely than not that no  
9 reasonable juror would have found petitioner guilty beyond a reasonable doubt." Majoy, 296  
10 F.3d 775-776 (quoting Schlup, 513 U.S. at 327).

11         Neither the United States Supreme Court nor the Ninth Circuit has addressed whether  
12 a habeas petitioner's demonstration of probable innocence may excuse his noncompliance  
13 with the AEDPA statute of limitations.<sup>6</sup> See Majoy, 296 F.3d at 776 (declining to answer  
14 whether "surviving the rigors of this gateway [under Schlup] has the consequence of overriding  
15 AEDPA's one-year statute of limitation.").

16         Regardless, under the Schlup standard referenced in Majoy v. Roe, to show actual  
17 innocence sufficient to overcome a procedural default, a petitioner must furnish "'new reliable  
18 evidence . . . that was not presented at trial.'" See House v. Bell, 547 U.S. 518, 537 (2006)  
19 (quoting Schlup, 513 U.S. at 324; ellipses added); Griffin v. Johnson, 350 F.3d 956, 963 (9th  
20 Cir. 2003). Even assuming arguendo that Schlup's "actual innocence" exception extends to  
21 Petitioner's claims of improper jury instruction, see Dretke v. Haley, 541 U.S. 386, 393-94  
22 (2004) (declining to address the issue whether "actual innocence" exception extends to  
23 challenges to noncapital sentences), Petitioner has failed to present any "new, reliable  
24 evidence" not presented at trial which shows Petitioner's alleged actual innocence of his crime  
25 or his sentence. See House v. Bell, 547 U.S. at 537; Schlup, 513 U.S. at 324. As such,

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27         <sup>6</sup>On February 8, 2011, the Ninth Circuit granted rehearing en banc in Lee v. Lampert, 610 F.3d 1125, 1133  
28 (9th Cir. 2010), rehearing granted, 633 F.3d 1176 (9th Cir. 2011), to review a panel decision holding that the  
"actual innocence" exception to the statute of limitations does not exist. As per the order of the Ninth Circuit, the  
panel decision shall not be cited as precedent, and relief via the actual innocence gateway is not foreclosed.

1 Petitioner's actual innocence claim lacks merit.

2 **III. CONCLUSION**

3 As explained above, Petitioner failed to file the instant petition for habeas corpus within  
4 the one year limitation period required by 28 U.S.C. § 2244(d). Petitioner does not benefit  
5 from relation back, statutory tolling, equitable tolling, or alleged actual innocence.

6 Accordingly, the petition was not timely filed. Based on the foregoing, Respondent's  
7 motion to dismiss shall be granted.

8 **IV. RECOMMENDATION**

9 The Court HEREBY RECOMMENDS that the motion to dismiss be GRANTED and the  
10 habeas corpus petition be DISMISSED with prejudice for Petitioner's failure to comply with 28  
11 U.S.C. § 2244(d)'s one year limitation period.

12 This Findings and Recommendation is submitted to the assigned United States District  
13 Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304 of the  
14 Local Rules of Practice for the United States District Court, Eastern District of California.  
15 Within thirty (30) days after the date of service of this Findings and Recommendation, any  
16 party may file written objections with the Court and serve a copy on all parties. Such a  
17 document should be captioned "Objections to Magistrate Judge's Findings and  
18 Recommendation." Replies to the Objections shall be served and filed within fourteen (14)  
19 days after service of the Objections. The Finding and Recommendation will then be submitted  
20 to the District Court for review of the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636  
21 (b)(1)(c). The parties are advised that failure to file objections within the specified time may  
22 waive the right to appeal the Order of the District Court. Martinez v. Ylst, 951 F.2d 1153 (9th  
23 Cir. 1991).

24  
25 IT IS SO ORDERED.

26 Dated: May 8, 2011

*1st Michael J. Seng*  
UNITED STATES MAGISTRATE JUDGE