

1 decision finding him unsuitable for parole. (Id. at 5.)

2 Starting in April 2007, Petitioner filed three collateral challenges with respect to the
3 decision of the Board finding him unsuitable for parole in the state courts, all petitions for writ
4 of habeas corpus, as follows:

- 5 1. San Diego County Superior Court
6 Filed: April 27, 2007¹;
7 Denied: June 20, 2007;
- 8 2. California Court of Appeals, Fourth Appellate District
9 Filed: August 3, 2007²;
10 Denied: November 8, 2007;
- 11 3. California Supreme Court
12 Filed: January 18, 2008³;
13 Denied: June 25, 2008;

14 See Mot., Exs. A-C.

15 On April 19, 2009⁴, Petitioner filed the instant federal petition for writ of habeas corpus
16 in this Court. On August 12, 2010, Respondent filed a motion to dismiss the petition as being
17 filed outside the one-year limitations period prescribed by 28 U.S.C. § 2244(d). Petitioner filed
18 an opposition to Respondent's motion to dismiss on September 8, 2010. On September 16,
19 2010, Respondent filed a reply to Petitioner's opposition. On November 1, 2010 the Court
20 ordered Respondent to produce medical records relating to Petitioner's equitable tolling
21 claims. Respondent lodged the documents with the Court on November 18, 2010.

22 ¹ In Houston v. Lack, the Court held that a pro se habeas petitioner's notice of appeal is deemed filed on
23 the date of its submission to prison authorities for mailing, as opposed to the date of its receipt by the court clerk.
24 487 U.S. 266, 276, 108 S.Ct. 2379, 2385 (1988). The Ninth Circuit has applied the rule to assess the timeliness
25 of federal habeas filings under the AEDPA limitations period. Huizar v. Carey, 273 F.3d 1220, 1222, (9th Cir.
26 2001), *citing* Houston, 487 U.S. 266, 276, 108 S.Ct. at 2385. Under the mailbox rule, the Court deems petitions
27 filed on the date Petitioner presumably handed her petition to prison authorities for mailing. See also Rule 3(d)
28 of the Rules Governing Section 2254 Cases. As Petitioner's state petitions have not been provided to the Court,
Petitioner may benefit from the mailbox rule with regard to this filing.

² As Petitioner's state petitions have not been provided to the Court, Petitioner may benefit from the
mailbox rule with regard to this filing.

³ As Petitioner's state petitions have not been provided to the Court, Petitioner may benefit from the
mailbox rule with regard to this filing.

⁴ While the petition was filed with the Court on April 27, 2009, Petitioner signed and dated the petition on
April 19, 2009. Accordingly, the petition shall be considered filed on April 19, 2009.

1 **II. DISCUSSION**

2 **A. Procedural Grounds for Motion to Dismiss**

3 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a
4 petition if it “plainly appears from the petition and any attached exhibits that the petitioner is
5 not entitled to relief in the district court” Rule 4 of the Rules Governing Section 2254
6 Cases.

7 The Ninth Circuit has allowed respondents to file a motion to dismiss in lieu of an
8 answer if the motion attacks the pleadings for failing to exhaust state remedies or being in
9 violation of the state’s procedural rules. See, e.g., O’Bremski v. Maass, 915 F.2d 418, 420 (9th
10 Cir. 1990) (using Rule 4 to evaluate motion to dismiss petition for failure to exhaust state
11 remedies); White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (using Rule 4 as procedural
12 grounds to review motion to dismiss for state procedural default); Hillery v. Pulley, 533 F.Supp.
13 1189, 1194 & n. 12 (E.D. Cal. 1982) (same). Thus, a respondent can file a motion to dismiss
14 after the court orders a response, and the Court should use Rule 4 standards to review the
15 motion. See Hillery, 533 F. Supp. at 1194 & n. 12.

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

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

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

26 In this case, the petition was filed on April 19, 2009, and therefore, it is subject to the
27 provisions of the AEDPA. The AEDPA imposes a one-year period of limitation on petitioners
28 seeking to file a federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As

1 amended, § 2244, subdivision (d) reads:

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

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

6 (B) the date on which the impediment to filing an application created by
7 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;

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

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

12 (2) The time during which a properly filed application for State post-conviction
13 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.

14 28 U.S.C. § 2244(d).

15 In most cases, the limitations period begins running on the date that the Petitioner's
16 direct review became final. In a situation such as this where the Petitioner is challenging a
17 parole board decision, the Ninth Circuit has held that direct review is concluded and the statute
18 of limitations commences when the final administrative appeal is denied. See Redd v.
19 McGrath, 343 F.3d 1077, 1079 (9th Cir. 2003) (holding that § 2244(d)(1)(D) applies in the
20 context of parole decisions and that the Board's denial of an inmate's administrative appeal
21 is the "factual predicate" of the inmate's claim that triggers the commencement of the
22 limitations period).

23 With respect to the discovery of the factual predicate of a claim alleging an
24 unconstitutional denial of parole, the Ninth Circuit Court of Appeals has not decided whether
25 the triggering event is the initial decision denying parole or the point at which the decision
26 becomes final. In Redd, the Ninth Circuit held that the factual predicate occurred on the date
27 the administrative decision to deny parole became final. 343 F.3d at 1083-1084. This occurred
28 after an administrative appeal taken by the petitioner was denied. Id.

1 At the time the Redd decision was rendered, September 11, 2003, California prisoners
2 could contest the Board's adverse parole decision by filing an administrative appeal from the
3 final decision of the Board. See Cal. Code Regs. tit. 15, § 2050 et seq. (2003). However, on
4 May 1, 2004, the administrative appeal process was repealed and abolished. See Cal. Code
5 Regs. tit. 15, § 2050 et seq. (2004).

6 Now, a parole consideration hearing decision, such as the May 2, 2006 decision in this
7 instance, is considered a proposed decision until it passes through a decision review process.
8 Cal. Pen. Code § 3041(a), (b); Cal. Code Regs., tit. 15, § 2041(h). All proposed decisions
9 become final within 120 days unless the Board finds an error of law, the decision was based
10 on an error of fact, or if new information when corrected or considered by the Board has a
11 substantial likelihood of resulting in a substantially different decision on rehearing. Id.; Cal.
12 Penal Code § 3041(b) ("any decision of the parole panel finding an inmate suitable for parole
13 shall become final within 120 days of the date of the hearing. During that period, the board
14 may review the panel's decision.")

15 Generally, it is not knowledge of some facts pertinent to a claim that constitutes
16 discovery of a factual predicate within the meaning of § 2244(d)(1)(D); rather, it is knowledge
17 of facts constituting reasonable grounds for asserting all elements of a claim in good faith.
18 Hasan v. Galaza, 254 F.3d 1150, 1154-55 (9th Cir. 2001). The time begins to run when the
19 petitioner knows, or through diligence could discover, the important facts, and not when the
20 petitioner recognizes their legal significance; it is not necessary for a petitioner to understand
21 the legal significance of the facts themselves before the obligation to exercise due diligence
22 commences and the statutory period starts running. Id. at 1154 n. 3.

23 Here, the parole decision itself stated that it would not be final for 120 days. At all
24 pertinent times, the state statute that provides for the parole suitability hearing and decision
25 has also expressly provided for review of the decision before finality. Cal. Pen. Code §
26 3041(a), (b). The state statute has also stated that any decision granting parole becomes final
27 within 120 days of the date of the hearing. Cal. Pen. Code § 3041(b). The pertinent regulations
28 have provided that parole decisions of the board after a hearing "are proposed decisions and

1 shall be reviewed prior to their effective date in accordance with" specified procedures. Cal.
2 Code Regs. tit. 15, § 2041(a) (2010). It is expressly provided that "[a]ny proposed decision
3 granting, modifying, or denying a parole date for a life prisoner... shall become final no later
4 than 120 days after the hearing at which the proposed decision was made." Cal. Code Regs.
5 tit. 15, § 2043 (2010); see, Cal. Code Regs. tit. 15, § 2041(h). Under these circumstances, the
6 initial, proposed decision cannot logically constitute all the facts constituting reasonable
7 grounds for asserting a claim challenging a parole decision because the parole decision has
8 yet to be made.

9 This Court then concludes that the date on which the factual predicate of a decision on
10 Petitioner's parole could have been discovered through the exercise of reasonable diligence
11 was upon the decision's finality one hundred twenty (120) days after the decision was
12 rendered on May 2, 2006. Here, the Board's adverse decision rendered on May 2, 2006, was
13 merely a proposed decision and it did not become final until 120 days thereafter, on August
14 30, 2006. (See Pet. at 111.) The statute of limitations began to run the next day, August 31,
15 2006, and Petitioner had one-year thereafter to file a timely petition. 28 U.S.C. §
16 2244(d)(1)(D); Shelby v. Bartlett, 391 F.3d 1061, 1066 (9th Cir. 2004).

17 Petitioner would have one year from August 31, 2006, absent applicable tolling, in
18 which to file his federal petition for writ of habeas corpus. However, Petitioner delayed in filing
19 the instant petition until April 19, 2009, over a year and a half after the statute of limitations
20 period expired. Absent the later commencement of the statute of limitations or any applicable
21 tolling, the instant petition is barred by the statute of limitations. Petitioner has made no
22 showing that the statute of limitations should commence at a later date under § 2244(d)(1)(B)-
23 (D). Accordingly, Petitioner may only rely on tolling to attempt to show that his petition is not
24 barred by the statute of limitations.

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

26 28 U.S.C. § 2244(d)(2) states that the "time during which a properly filed application for
27 State post-conviction or other collateral review with respect to the pertinent judgment or claim
28 is pending shall not be counted toward" the one year limitation period. 28 U.S.C. § 2244(d)(2).

1 In Carey v. Saffold, the Supreme Court held the statute of limitations is tolled where a
2 petitioner is properly pursuing post-conviction relief, and the period is tolled during the intervals
3 between one state court's disposition of a habeas petition and the filing of a habeas petition
4 at the next level of the state court system. 536 U.S. 214, 216 (2002); see also Nino v. Galaza,
5 183 F.3d 1003, 1006 (9th Cir. 1999). Nevertheless, state petitions will only toll the one-year
6 statute of limitations under § 2244(d)(2) if the state court explicitly states that the post-
7 conviction petition was timely or was filed within a reasonable time under state law. Pace v.
8 DiGuglielmo, 544 U.S. 408 (2005); Evans v. Chavis, 546 U.S. 189 (2006). Claims denied as
9 untimely or determined by the federal courts to have been untimely in state court will not
10 satisfy the requirements for statutory tolling. Id.

11 As stated above, the statute of limitations period began on August 31, 2006. Petitioner
12 filed his first state habeas petition on April 27, 2007, in the San Diego County Superior Court.
13 At that point, 239 days of the limitations period had elapsed. (Respondent has not provided
14 copies of Petitioner's state court petitions. While April 27, 2007 is the date the petition was
15 filed with the state court, Petitioner may benefit from the mail-box rule if he submitted the
16 petition to prison authorities on an earlier date for mailing.) Assuming that all of Petitioner's
17 state habeas petitions were properly filed, the statute of limitations period is tolled from April
18 27, 2007, the date the first petition was filed (or earlier, depending on the application of the
19 mail box rule), until June 25, 2008, the date the California Supreme Court denied Petitioner's
20 final petition.

21 As 239 days had expired prior to Petitioner filing his first round of state habeas
22 petitions, 117 days of the limitations period remained as of June 25, 2008. Accordingly, the
23 limitations period expired 117 days later on October 20, 2008. The present petition was filed
24 on April 19, 2009, over five months after the expiration of the year statute of limitations period
25 including applicable tolling. As noted, this calculation does not take into account any benefit
26 for earlier filing Petitioner may receive by way of the mail-box rule. Houston, 487 U.S. at 276.
27 However, it is unlikely the mail-box rule, even if it applied here, would benefit Petitioner more
28 than by giving him a week, or perhaps two, of additional time. Accordingly, the instant federal

1 petition likely remains untimely.

2 **D. Equitable Tolling**

3 The limitations period is subject to equitable tolling if the petitioner demonstrates: “(1)
4 that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance
5 stood in his way.” Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005); see also Irwin v.
6 Department of Veteran Affairs, 498 U.S. 89, 96 (1990); Calderon v. U.S. Dist. Ct. (Kelly), 163
7 F.3d 530, 541 (9th Cir. 1998), citing Alvarez-Machain v. United States, 107 F.3d 696, 701 (9th
8 Cir. 1996). Petitioner bears the burden of alleging facts that would give rise to tolling. Pace,
9 544 U.S. at 418; Hinton v. Pac. Enters., 5 F.3d 391, 395 (9th Cir.1993).

10 1. Petitioner's Assertions Regarding Equitable Tolling

11 Petitioner, in his opposition to the motion to dismiss, asserts that his medical condition
12 should serve as a basis for equitable tolling. (Opp'n, ECF No. 21.) Petitioner asserts that he
13 is an epileptic and suffers from both grand mal and petite mal seizures. (Id. at 2.) Petitioner
14 attached documents to his opposition which corroborate that: (1) Petitioner has been medically
15 assigned to a lower bunk and cannot operate machinery, (2) Petitioner suffered a grand mal
16 seizure that required medical attention on July 22, 2008, (3) Petitioner suffered a seizure while
17 being interviewed for a psychological assessment in 2003, (4) and Petitioner is on medication
18 to help control the seizures.

19 Petitioner further asserts that while treatment has largely controlled his grand mal
20 seizures, he may still experience up to five or six partial seizures a day. The daily seizures
21 make it difficult for Petitioner to read, write, and speak properly and leave him with momentary
22 memory loss, focus, and concentration difficulties. (Id. at 3.)

23 Because of Petitioner's claims in this regard, the Court requested Respondent to
24 produce Petitioner's relevant medical records during the period Petitioner asserts equitable
25 tolling. (Order for Production of Medical Records, ECF No. 23.) Respondent lodged the
26 medical records under seal on November 18, 2010.⁵ The medical records produced

27 _____
28 ⁵The Court has ordered the medical records be sealed by way of a separate order to protect Petitioner's
privacy interests in his medical records. (See Order Sealing Records.) Respondent produced the medical records
without identifying pagination. However, the Court is not relying on the documents to determine the merits of the

1 corroborate that Petitioner does suffer from a epileptic condition for which he receives
2 medication and that Petitioner reports daily seizures and slurred speech after seizures. In
3 addition, Petitioner was undergoing evaluation by specialists in neuroscience and neurological
4 impairment in 2007 and 2008. The latter period is one in which the statute of limitations period
5 for filing the present petition for writ of habeas corpus is at issue.

6 The existing evidence is such as to confirm that Petitioner suffers from an epileptic
7 condition which could have adversely affected his cognitive ability on a daily basis during the
8 period of time in which he asserts he should benefit from equitable tolling.

9 2. Analysis of Equitable Tolling Determination

10 The Ninth Circuit has determined that mental incompetence can represent an
11 extraordinary circumstance and serve as a basis for equitable tolling under the Antiterrorism
12 and Effective Death Penalty Act of 1996 ("AEDPA"). See Bills v. Clark, No. 08-17571 (9th Cir.
13 Dec. 8, 2010); Laws v. Lamarque, 351 F.3d 919, 923 (9th Cir. 2003). If the petition or the
14 record contains some evidence of a period of mental incompetency, courts have generally
15 required further factual development of the record. See id. at 923-24 (describing extended
16 incompetency evaluations at petitioner's trial); Rohan ex rel. Gates v. Woodford, 334 F.3d 803,
17 814 (9th Cir. 2003) (describing a record documenting "serious mental problems for many
18 years"); Nara v. Frank, 264 F.3d 310, 319-20 (3d Cir. 2001), overruled in part on other grounds
19 by Carey, 536 U.S. 214, 122 (evidentiary hearing warranted where evidence showed "ongoing,
20 if not consecutive, periods of mental incompetency"). On the other hand, where a prisoner fails
21 to show "any causal connection" between the grounds upon which he asserts a right to
22 equitable tolling and his inability to timely file a federal habeas application, the equitable tolling
23 claim will be denied. Gaston v. Palmer, 417 F.3d 1030, 1034 (9th Cir. 2005) (Not clear error
24 to find equitable tolling inapplicable where prisoner fails to show causal connection between
25 physical and mental disabilities and inability to timely file petition.).

26 The Court previously found sufficient evidence of alleged mental incompetency to
27

28 _____
matter, and so will simply summarize essential facts therein to show that a genuine issue of fact and law exists
with regard to Petition's equitable tolling claims.

1 require an expansion of the record. The records provided, though helpful, do serve to reinforce
2 the Court's concern that substantial factual and legal findings are necessary to determine if
3 Petitioner's medical condition may serve to equitably toll the statute of limitations period.
4 Specifically, and consistently with Ninth Circuit authority, this Court holds that further factual
5 development is required before the court can determine Petitioner's mental capacity. (See e.g.,
6 Laws v. Lamarque, 351 F.3d at 924 (Noting the inadequate record before the court, when
7 petitioner's previous competence inquiry required the assistance of three psychiatrists and two
8 psychologists.)

9 The continuing potential for equitable tolling notwithstanding, Respondent in his reply
10 asks the Court to grant the motion to dismiss based on the one year statute of limitations.
11 (Reply, ECF No. 22.) Respondent acknowledges that Petitioner produced documents
12 evidencing that he has a medical condition and that he suffered a grand mal seizure on July
13 22, 2008. (Id. at 2.) Respondent further admits that Petitioner may be entitled to equitable
14 tolling due to the July 22, 2008 seizure. (Id. at 3. "At best, Ruiz could arguably be entitled to
15 equitable toiling for a period of days, not months.") The Court agrees that a single seizure,
16 while certainly a potential ground for equitable tolling, is not likely to explain the nearly six
17 month delay in filing the petition. However, Respondent fails to address Petitioner's assertions
18 that he suffers from several small daily seizures which leave him confused and disoriented.
19 The medical records produced by Respondent are not sufficient to enable the Court to
20 determine the merits of Petitioner's equitable tolling claims at this time.

21 The Court can dismiss a petition only if it "plainly appears from the petition and any
22 attached exhibits that the petitioner is not entitled to relief in the district court" Rule 4 of
23 the Rules Governing Section 2254 Cases. Petitioner has alleged potential grounds for
24 equitable tolling. It is possible that when given the benefit of equitable tolling, Petitioner could
25 be found to have timely filed the instant petition. As issues of fact and law exist with regard to
26 whether Petitioner timely filed the petition, it does not "plainly appear" that Petitioner is barred
27 from relief based on the statute of limitations. Respondent has not met the pleading burden,
28 and the motion to dismiss must be denied at this time.

1 The Court has not made a determination as to whether Petitioner is entitled to equitable
2 tolling. Should Respondent choose, he may file a renewed motion to dismiss addressing
3 equitable tolling issues upon expanding the record by way of discovery or even an evidentiary
4 hearing. See Rules 6-8 of the Rules Governing Section 2254 Cases. However, it may be that
5 significant evidence, possibly including expert witness evidence, will be required to determine
6 such issues. Alternatively, Respondent may address Petitioner's claims on the merits.

7 **III. CONCLUSION**

8 As explained above, Petitioner failed to file the instant petition for habeas corpus within
9 the one year limitation period required by 28 U.S.C. § 2244(d). Even after giving Petitioner
10 the benefit of statutory tolling, the Petition was still filed nearly six months after the statute of
11 limitations period elapsed. However, Petitioner may be excused from timely filing due to
12 equitable tolling based on his medical condition. Accordingly, it does not plainly appear that
13 Petitioner is barred from relief based on the expiration of the statute of limitations. Accordingly,
14 this Court recommends that Respondent's motion to dismiss be denied with leave to file a
15 renewed motion to dismiss based on the statute of limitations after the record has been
16 expanded. Alternatively, Respondent may address Petitioner's claims on the merits.

17 **IV. RECOMMENDATION**

18 Accordingly, the Court HEREBY RECOMMENDS that the motion to dismiss be
19 DENIED.

20 This Findings and Recommendation is submitted to the Honorable Lawrence J. O'Neill,
21 United States District Court Judge, pursuant to the provisions of 28 U.S.C. section 636
22 (b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court,
23 Eastern District of California. Within thirty (30) days after the date of service of this Findings
24 and Recommendation, any party may file written objections with the Court and serve a copy
25 on all parties. Such a document should be captioned "Objections to Magistrate Judge's
26 Findings and Recommendation." Replies to the Objections shall be served and filed within
27 fourteen (14) days after service of the Objections. The Finding and Recommendation will then
28 be submitted to the District Court for review of the Magistrate Judge's ruling pursuant to 28

1 U.S.C. § 636 (b)(1)(c). The parties are advised that failure to file objections within the
2 specified time may waive the right to appeal the Order of the District Court. Martinez v. Ylst,
3 951 F.2d 1153 (9th Cir. 1991).

4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IT IS SO ORDERED.

Dated: December 8, 2010

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE