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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

GERALD RIGHETTI,

1:09-cv-01626-DLB (HC)

Petitioner,

ORDER GRANTING RESPONDENT’S  
MOTION TO DISMISS THE PETITION,  
DIRECTING CLERK OF COURT TO DISMISS  
ACTION WITH PREJUDICE, DIRECTING  
CLERK OF COURT TO ENTER JUDGMENT,  
AND DECLINING TO ISSUE A  
CERTIFICATE OF APPEALABILITY

v.

A. HEDGPETH,

Respondent.

/ [Doc. 12]

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pursuant to 28 U.S.C. § 636(c)(1), the parties have consented to the jurisdiction of the United States Magistrate Judge.

BACKGROUND

Petitioner pled no contest to attempted murder and admitted premeditation and firearm use enhancements. (Lodged Doc. No. 1.) On November 13, 1996, Petitioner was sentenced to an indeterminate state prison term of life with the possibility of parole for the attempted murder and a determinate term of ten years for the firearm enhancement. (Lodged Doc. No. 2.)

Petitioner filed a notice of appeal. On January 15, 1998, the California Court of Appeal, Fifth Appellate District, affirmed the judgment. (Lodged Doc. No. 1.) Petitioner did not seek review by the California Supreme Court.

Petitioner did file four pro se post-conviction collateral petitions. The first petition was filed on March 15, 2007, in the Kings County Superior Court. It was denied with citation to In re

1 Clark, 5 Cal.4th 750 (1993) on May 1, 2007. (Lodged Doc. No. 3.)

2 The second petition was filed on May 29, 2007, in the Kings County Superior Court.  
3 (Lodged Doc. No. 5.) The petition was denied on June 12, 2007. (Lodged Doc. No. 6.)

4 The third petition was filed in the California Court of Appeal, Fifth Appellate District on  
5 July 3, 2007. (Lodged Doc. No. 7.) On February 1, 2008, the petition was denied with citations  
6 to In re Robbins, 18 Cal.4th 770, 778 (1998) and In re Gallegos, 18 Cal.4th 825, 832-833 (1988).  
7 (Lodged Doc. No. 8.)

8 The fourth petition was filed in the California Supreme Court on March 13, 2008.  
9 (Lodged Doc. No. 9.) On September 10, 2008, the petition was denied with citation to In re  
10 Robbins, 18 Cal.4th at 780. (Lodged Doc. No. 10.)

11 Petitioner filed the instant federal petition on September 15, 2009. (Court Doc. 1.)  
12 Respondent filed the instant motion to dismiss on November 20, 2009. (Court Doc. 12.)  
13 Petitioner filed an opposition on February 18, 2010. (Court Doc. 17.) Respondent filed a reply  
14 on March 29, 2010. (Court Doc. 19.)

## 15 DISCUSSION

### 16 A. Procedural Grounds for Motion to Dismiss

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

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

1 In this case, Respondent's motion to dismiss is based on a violation of 28 U.S.C.  
2 2244(d)(1)'s one-year limitations period. Therefore, the Court will review Respondent's motion  
3 to dismiss pursuant to its authority under Rule 4.

4 B. Limitation Period for Filing a Petition for Writ of Habeas Corpus

5 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act  
6 of 1996 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas  
7 corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059,  
8 2063 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9<sup>th</sup> Cir. 1997) (en banc), *cert. denied*, 118  
9 S.Ct. 586 (1997). The instant petition was filed on September 15, 2009, and thus, it is subject to  
10 the provisions of the AEDPA.

11 The AEDPA imposes a one year period of limitation on petitioners seeking to file a  
12 federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As amended, Section 2244,  
13 subdivision (d) reads:

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

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

18 (B) the date on which the impediment to filing an application created by  
19 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;

20 (C) the date on which the constitutional right asserted was initially recognized  
21 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

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

24 (2) The time during which a properly filed application for State post-  
25 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  
26 subsection.

27 In most cases, the limitation period begins running on the date that the petitioner's direct  
28 review became final. Here, on January 15, 1998, the California Court of Appeal, affirmed the

1 judgment. Petitioner did not file a petition for review in the California Supreme Court. The state  
2 appeal process became “final” within the meaning of § 2244(d)(1)(A) forty days later when the  
3 time for filing a petition for review in the California Supreme Court expired on February 24,  
4 1998. California Rules of Court 24 and 28.<sup>1</sup> Therefore, the one year limitations period began on  
5 the following day, February 25, 1998, and absent tolling, was set to expire on February 24, 1999.  
6 See Patterson v. Stewart, 251 F.3d 1243, 1245 (9<sup>th</sup> Cir. 2001) (holding that Rule 6(a) of the  
7 Federal Rules of Civil Procedure governs the calculation of statutory tolling applicable to the one  
8 year limitations period.)

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

10 Title 28 U.S.C. § 2244(d)(2) states that the “time during which a properly filed  
11 application for State post-conviction or other collateral review with respect to the pertinent  
12 judgment or claim is pending shall not be counted toward” the one year limitation period. 28  
13 U.S.C. § 2244(d)(2). In Carey v. Saffold, the Supreme Court held the statute of limitations is  
14 tolled where a petitioner is properly pursuing post-conviction relief, and the period is tolled  
15 during the intervals between one state court's disposition of a habeas petition and the filing of a  
16 habeas petition at the next level of the state court system. 536 U.S. 214, 215 (2002); see also  
17 Nino v. Galaza, 183 F.3d 1003, 1006 (9<sup>th</sup> Cir. 1999), *cert. denied*, 120 S.Ct. 1846 (2000).  
18 Nevertheless, state petitions will only toll the one-year statute of limitations under § 2244(d)(2) if  
19 the state court explicitly states that the post-conviction petition was timely or was filed within a  
20 reasonable time under state law. Pace v. DiGuglielmo, 544 U.S. 408 (2005); Evans v. Chavis,  
21 546 U.S. 189 (2006). Claims denied as untimely or determined by the federal courts to have been  
22 untimely in state court will not satisfy the requirements for statutory tolling. Id.

23 As just explained, the statute of limitations commenced on February 25, 1998, and  
24 expired on February 24, 1999. Because Petitioner did not file any state post-conviction collateral  
25 actions within the one-year limitations period, it expired on February 24, 1999. The four state  
26 post-conviction collateral petitions do not serve to statutory toll the one-year limitations period  
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28 <sup>1</sup> California Rules of Court, rules 24 and 28 have been amended and renumbered rules 8.264 and 8.500.

1 since the first action was not filed until March 2007-well after the limitations had expired. As a  
2 consequence, the first through fourth petitions cannot serve to statutory toll the limitations  
3 period. Ferguson v. Palmateer, 321 F.3d 820, 823 (9<sup>th</sup> Cir. 2003); Jiminez v. Rice, 276 F.3d 478,  
4 482 ((th Cir. 2001).

5 Moreover, the first, third, and fourth state petitions cannot provide tolling because they  
6 were expressly found untimely by the state courts. In denying the first petition, the Kings County  
7 Superior Court found it untimely by citing, inter alia, to In re Clark, 5 Cal.4th 750. (Lodged Doc.  
8 No. 4.) The California Court of Appeal found the third petition untimely by citing to, inter alia,  
9 In re Robbins, 18 Cal.4th at 778 and In re Gallegos, 18 Cal.4th at 832-833. (Lodged Doc. No. 8.)  
10 The California Supreme Court found the fourth petition untimely by citing to, inter alia, In re  
11 Robbins, 18 Cal.4th at 780. (Lodged Doc. No. 10.) Accordingly, for this additional reason the  
12 first, third, and fourth petitions do not serve to statutory toll the limitations period. Pace v.  
13 DiGuglielmo, 544 U.S. at 413-418 (a petition for writ of habeas corpus rejected by the state court  
14 as untimely is not “properly filed” within the meaning of the statutory tolling provision of  
15 AEDPA.)

16 D. Equitable Tolling

17 The limitations period is subject to equitable tolling if the petitioner demonstrates: “(1)  
18 that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance  
19 stood in his way.” Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005); see also Irwin v. Department  
20 of Veteran Affairs, 498 U.S. 89, 96 (1990); Calderon v. U.S. Dist. Ct. (Kelly), 163 F.3d 530, 541  
21 (9<sup>th</sup> Cir. 1998), citing Alvarez-Machain v. United States, 107 F.3d 696, 701 (9<sup>th</sup> Cir. 1996), cert  
22 denied, 522 U.S. 814 (1997). Petitioner bears the burden of alleging facts that would give rise to  
23 tolling. Pace, 544 U.S. at 418; Smith v. Duncan, 297 F.3d 809 (9<sup>th</sup> Cir.2002); Hinton v. Pac.  
24 Enters., 5 F.3d 391, 395 (9th Cir.1993).

25 In his opposition, Petitioner contends that the substantial delay in filing was due to  
26 extraordinary circumstances beyond his control. He claims he is untrained in the law and  
27 suffered from poor mental health affecting his memory.

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2           1. Mental Incompetency

3           Mental incompetency, if proven, may equitably toll the statute of limitations as an  
4 extraordinary circumstance beyond a prisoner’s control. Kelly, 163 F.3d at 541. However, the  
5 mere demonstration of mental illness is insufficient, alone, to justify tolling the limitations  
6 period, as it must be established that the “illness in fact prevents the sufferer from managing his  
7 affairs and thus from understanding his legal rights and acting upon them.” Miller v. Runyon, 77  
8 F.3d 189, 191 (7<sup>th</sup> Cir. 1996). Accordingly, if a prisoner asserts that the limitations should be  
9 equitably tolled based on mental illness, he must demonstrate that the illness actually rendered  
10 him unable to file the federal petition within the limitations period. See id. at 192; see also  
11 Gaston v. Palmer, 417 F.3d 1030, 1034 (9<sup>th</sup> Cir. 2005) (equitable tolling will only be granted if  
12 “‘extraordinary circumstances’ beyond a prisoner’s control make it impossible to file a petition  
13 on time”) (citation omitted).

14           In Allen v. Lewis, 255 F.3d 798, 801 (9<sup>th</sup> Cir. 2001) (reversed en banc on other grounds  
15 295 F.3d 1046 (2002)), the Ninth Circuit concluded that a petitioner “must show that the  
16 ‘extraordinary circumstances’ were the but-for and proximate cause of his untimeliness.” The  
17 Ninth Circuit recently affirmed this rule in Espinoza-Matthews v. California, 432 F.3d 1021,  
18 1026 (9<sup>th</sup> Cir. 2005). There, the Court pointed out that the determination vis-a-vis equitable  
19 tolling is “highly fact-dependent” and that the petitioner “bears the burden of showing that  
20 equitable tolling is appropriate.” Id.

21           The determination of whether Petitioner is entitled to equitable tolling for the instant  
22 petition is dependent on whether his mental illness began when the limitations period  
23 commenced on February 24, 1998 and March 15, 2007-the date the first state petition was filed.  
24 In the instance, Petitioner claims his mental incompetence was caused by a self-inflicted gunshot  
25 wound to his head. He indicates that after the incident, he was hospitalized for a period of time  
26 and his memory was affected. Petitioner states in 2005 he received his transcripts while housed  
27 at Salinas Valley State Prison and had to reread the transcripts in order to understand them. He  
28 claims it took months for him to read and understand the proceedings.

1 In support of his claim, Petitioner attaches medical reports dated September 5, 1995, and  
2 September 11, 1996-prior to the commencement of the limitations period. (Opposition, Exhibit  
3 C.) Petitioner also submits a list of medications for which he was prescribed. (Id. at Exhibit D.)  
4 Petitioner also submits medical reports from 2008 regarding his medical condition. (Id. at  
5 Exhibit E.)

6 Petitioner has not submitted any evidence to demonstrate a claim for mental  
7 incompetency during the running of the limitations period, subsequent to 1996. Petitioner  
8 submits no evidence to support his condition that he was suffering from a mental condition such  
9 that it prevented him from filing a timely petition. Petitioner has failed to demonstrate how his  
10 the loss of memory was the cause of filing an untimely petition. In fact, the medical reports  
11 dated September 5, 1996, and September 11, 1996, do not support the finding that Petitioner was  
12 suffering from a mental illness during the relevant period of time. The September 5, 1996, report  
13 indicates that a Neurobehavioral Cognitive Screening Exam was conducted and Petitioner “tested  
14 within normal limits” although his performance showed delayed memory for a 4-word list after a  
15 short distraction. (Opposition, Exhibit C.) The September 11, 1996, report indicates that  
16 Petitioner had “mild cognitive deficits.” Nothing in this report indicates that Petitioner suffered  
17 from a mental illness at that time or any time thereafter, much less one that prevented him from  
18 having the ability to file his federal petition during the limitation period.

19 Moreover, on January 22, 1996, Petitioner was found competent to stand trial. (Lodged  
20 Doc. No. 11, at 238.) On July 17, 1996, a medical evaluation was conducted at the request of the  
21 prosecution. (Id. at 297-304.) Petitioner stated that he had short term memory problems which  
22 gradually returned after a couple days. (Id. at 299.) It was found that despite appearing  
23 depressed, Petitioner was alert, oriented, able to converse freely, and presented no evidence of  
24 thought difficulties. (Id. at 303.) On September 24, 1996-subsequent to the medical reports  
25 submitted in support of Petitioner’s claim, Petitioner withdrew his plea of not guilty and entered  
26 a plea of no contest. (Id. at 378, 390-391.) The trial court made the specific finding that  
27 Petitioner “knowingly, intelligently, freely, and voluntarily” entered his plea. (Id. at 391.) Thus,  
28 these events strongly negate Petitioner’s claim that he was mentally incompetent during this time.

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2 In addition, despite his several years of incarceration, Petitioner has never been placed in  
3 the California Department of Corrections and Rehabilitation’s Correctional Clinical Case  
4 Management System for mental impairments. Nor has Petitioner ever been placed in a state  
5 hospital for treatment of a mental condition. In sum, Petitioner provides no specific details of his  
6 claim. Nor does he indicate how his mental health disorders affected his functioning; the  
7 severity of his disability; the effect of any medication he may have been prescribed, or the  
8 limitations that he suffered as a consequence of the mental health illness. The documents  
9 Petitioner attaches to his opposition, as Exhibit C, cover a period of time that occurred before the  
10 one-year statute of limitations, and thus, are of no significance. Accordingly, there is no  
11 evidence that he suffered from a mental impairment which constituted an “extraordinary  
12 circumstance” preventing the timely filing, and Petitioner has not met his burden of  
13 demonstrating entitlement to equitable tolling. Lawrence, 548 U.S. at 337.

14 2. Lack of Knowledge of Law

15 To the extent Petitioner contends that his ignorance of the law justifies tolling the  
16 limitations period, it is without merit. A petitioner’s lack of legal sophistication is not, by itself,  
17 an extraordinary circumstance warranting equitable tolling. Rasberry v. Garcia, 448 F.3d 1150,  
18 1154 (9<sup>th</sup> Cir. 2006). Petitioner has not provided a sufficient basis to equitable toll the limitations  
19 period based on his ignorance and/or understanding of the law.

20 ORDER

21 Based on the foregoing, it is HEREBY ORDERED that:

- 22 1. Respondent’s motion to dismiss the instant petition as untimely is GRANTED;  
23 2. The Clerk of Court is directed to dismiss the petition with prejudice; and  
24 3. The court declines to issue a Certificate of Appealability. 28 U.S.C. § 2253(c); Slack  
25 v. McDaniel, 529 U.S. 473, 484 (2000) (in order to obtain a COA, petitioner must  
26 show: (1) that jurists of reason would find it debatable whether the petition stated a  
27 valid claim of a denial of a constitutional right; and (2) that jurists of reason would  
28 find it debatable whether the district court was correct in its procedural ruling. Slack

