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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

STEFAN E. EVANS,  
Petitioner,  
v.  
SOTO, Warden,  
Respondent.

Case No. 1:12-cv-01652-LJO-BAM-HC

FINDINGS AND RECOMMENDATIONS TO  
DENY RESPONDENT'S MOTION TO DISMISS  
(DOC. 17), DISMISS PETITIONER'S  
MOTIONS AS MOOT (DOCS. 19, 21, 22),  
AND TO REFER THE CASE BACK TO THE  
MAGISTRATE JUDGE

**OBJECTIONS DEADLINE:**  
**THIRTY (30) DAYS**

Petitioner is a state prisoner proceeding pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and Local Rules 302 through 304. Pending before the Court is the Respondent's motion to dismiss the petition as untimely, which was filed on March 28, 2013. Petitioner filed opposition in several documents, including 1) a motion to excuse harmless negligence, which was filed on April 24, 2013, and which related in part to the present motion; 2) a declaration regarding appointment of counsel, which was filed on April 29, 2013; and 3) supplemental opposition filed on June 3, 2013. The Court

1 considers Petitioner's supplemental opposition to be timely because  
2 the matters submitted were not available earlier due to  
3 institutional delays at Petitioner's institution of confinement.  
4 (Doc. 22, 2.) Although the time for filing a reply has passed, no  
5 reply was filed.

6 I. Proceeding by a Motion to Dismiss

7 Respondent has filed a motion to dismiss the petition on the  
8 ground that Petitioner filed his petition outside of the one-year  
9 limitation period provided for by 28 U.S.C. § 2244(d)(1).

10 Rule 4 of the Rules Governing Section 2254 Cases in the United  
11 States District Courts (Habeas Rules) allows a district court to  
12 dismiss a petition if it "plainly appears from the face of the  
13 petition and any exhibits annexed to it that the petitioner is not  
14 entitled to relief in the district court...."

15 The Ninth Circuit has allowed respondents to file motions to  
16 dismiss pursuant to Rule 4 instead of answers if the motion to  
17 dismiss attacks the pleadings by claiming that the petitioner has  
18 failed to exhaust state remedies or has violated the state's  
19 procedural rules. See, e.g., O'Bremski v. Maass, 915 F.2d 418, 420  
20 (9th Cir. 1990) (using Rule 4 to evaluate a motion to dismiss a  
21 petition for failure to exhaust state remedies); White v. Lewis, 874  
22 F.2d 599, 602-03 (9th Cir. 1989) (using Rule 4 to review a motion to  
23 dismiss for state procedural default); Hillery v. Pulley, 533  
24 F.Supp. 1189, 1194 & n.12 (E.D.Cal. 1982) (same). Thus, a  
25 respondent may file a motion to dismiss after the Court orders the  
26 respondent to respond, and the Court should use Rule 4 standards to  
27 review a motion to dismiss filed before a formal answer. See,  
28 Hillery, 533 F. Supp. at 1194 & n.12.

1 In this case, Respondent's motion to dismiss addresses the  
2 untimeliness of the petition pursuant to 28 U.S.C. 2244(d)(1). The  
3 material facts pertinent to the motion are mainly to be found in  
4 copies of the official records of state judicial proceedings which  
5 have been provided by Respondent and Petitioner, and as to which  
6 there is no factual dispute. Because Respondent has not filed a  
7 formal answer, and because Respondent's motion to dismiss is similar  
8 in procedural standing to a motion to dismiss for failure to exhaust  
9 state remedies or for state procedural default, the Court will  
10 review Respondent's motion to dismiss pursuant to its authority  
11 under Rule 4.

## 12 II. Background

13 In the Superior Court of the State of California, County of  
14 Kern (KCSC), Petitioner was convicted of murder, three counts of  
15 attempted murder, and discharge of a firearm at an occupied vehicle  
16 with enhancements for prior convictions. On December 18, 2008,  
17 Petitioner was sentenced to life without the possibility of parole  
18 for the murder, an indeterminate term of 117 years to life, and a  
19 determinate term of twenty-one years. (LD 1; LD 2, 2.)<sup>1</sup>

20 On March 16, 2010, in case number F056825, the Court of Appeal  
21 of the State of California, Fifth Appellate District (CCA) modified  
22 the sentence on the enhancements but otherwise affirmed on appeal  
23 the judgment of conviction and sentence. (LD 2, 40.) The  
24 California Supreme Court (CSC) summarily denied Petitioner's  
25 petition for review on June 30, 2010, without a statement of  
26 reasoning or authority. (LD 4.)

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28 <sup>1</sup> "LD" refers to documents lodged by the Respondent in support of the motion to dismiss.

1           Petitioner's petition for writ of habeas corpus was stamped  
2 filed in the KCSC as of June 28, 2011. The date next to the  
3 signature on the petition form and on Petitioner's proof of service  
4 of the petition by mail is June 6, 2011. (LD 5 at iv, and final  
5 page.) The KCSC denied the petition on August 10, 2011, in a  
6 reasoned decision. (LD 6.)

7           Petitioner's petition for writ of habeas corpus was filed in  
8 case number F063482 in the CCA and stamped filed in that court on  
9 October 14, 2011. (LD 7, i.) The date next to Petitioner's  
10 signature on the petition is October 6, 2011. (Id. at six.)  
11 Petitioner's proof of service of the petition by mail is also dated  
12 October 6, 2011. (LD 7, final page.) On November 21, 2011, the CCA  
13 summarily denied the petition without a statement of reasoning or  
14 authority. (LD 8.)

15           Petitioner's petition for writ of habeas corpus was stamped  
16 filed in the CSC in case number S199665 on January 25, 2012. (LD 9,  
17 i.) The date next to Petitioner's signature on the petition and on  
18 Petitioner's proof of service of the petition by mail is January 17,  
19 2012. (LD 9, iiiii and following page.) The CSC denied the petition  
20 on May 16, 2012. (LD 10.)

21           Petitioner's petition for writ of habeas corpus filed in the  
22 instant action was stamped filed on October 9, 2012. (Doc. 1, 1.)  
23 The date next to Petitioner's signature on the petition form and on  
24 Petitioner's proof of service of the petition by mail is September  
25 28, 2012. (Id. at 7, 116.)

26           III. Timeliness of the Petition

27           The AEDPA provides a one-year period of limitation in which a  
28 petitioner must file a petition for writ of habeas corpus. 28

1 U.S.C. § 2244(d) (1). As amended, subdivision (d) reads:

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

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

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

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

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

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

20 28 U.S.C. § 2244(d).

21 A. Commencement of the Limitations Period

22 Under § 2244(d) (1) (A), the "judgment" refers to the sentence  
23 imposed on the petitioner. Burton v. Stewart, 549 U.S. 147, 156-57  
24 (2007). The last sentence was imposed on Petitioner on December 18,  
25 2008.

26 Under § 2244(d) (1) (A), a judgment becomes final either upon the  
27 conclusion of direct review or the expiration of the time for  
28 seeking such review in the highest court from which review could be

1 sought. Wixom v. Washington, 264 F.3d 894, 897 (9th Cir. 2001).  
2 The statute commences to run pursuant to § 2244(d)(1)(A) upon either  
3 1) the conclusion of all direct criminal appeals in the state court  
4 system, followed by either the completion of certiorari proceedings  
5 before the United States Supreme Court, or 2) if certiorari was not  
6 sought, then by the conclusion of all direct criminal appeals in the  
7 state court system followed by the expiration of the time permitted  
8 for filing a petition for writ of certiorari. Wixom, 264 F.3d at  
9 897 (quoting Smith v. Bowersox, 159 F.3d 345, 348 (8th Cir. 1998),  
10 cert. denied, 525 U.S. 1187 (1999)). Neither party has indicated  
11 that Petitioner sought certiorari from the United States Supreme  
12 Court.

13 Here, Petitioner's direct criminal appeals in the state court  
14 system concluded when his petition for review was denied by the  
15 California Supreme Court on June 30, 2010. The time permitted for  
16 seeking certiorari was ninety days. Supreme Court Rule 13; Porter  
17 v. Ollison, 620 F.3d 952, 958-59 (9th Cir. 2010); Bowen v. Roe, 188  
18 F.3d 1157, 1159 (9th Cir. 1999).

19 The Court will apply Fed. R. Civ. P. 6(a) in calculating the  
20 pertinent time periods. See, Waldrip v. Hall, 548 F.3d 729, 735 n.2  
21 (9th Cir. 2008), cert. denied, 130 S.Ct. 2415 (2010). Applying Fed.  
22 R. Civ. P. 6(a)(1)(A), the day of the triggering event is excluded  
23 from the calculation. Thus, the ninety-day period commenced on July  
24 1, 2010, the day following the California Supreme Court's denial of  
25 review. Further applying Rule 6(a)(1)(A), which requires counting  
26 every day, the ninetieth day was September 28, 2010. Thus, the  
27 judgment became final within the meaning of § 2244(d)(1)(A) on  
28 September 28, 2010.

1           Therefore, the limitation period began to run on the following  
2 day, September 29, 2010, and, absent any tolling, concluded one year  
3 later on September 28, 2011.

4           B. Statutory Tolling

5           Title 28 U.S.C. § 2244(d) (2) states that the "time during which  
6 a properly filed application for State post-conviction or other  
7 collateral review with respect to the pertinent judgment or claim is  
8 pending shall not be counted toward" the one-year limitation period.  
9 28 U.S.C. § 2244(d) (2).

10           An application for collateral review is "pending" in state  
11 court "as long as the ordinary state collateral review process is  
12 "in continuance"- i.e., "'until the completion of' that process."  
13 Carey v. Saffold, 536 U.S. 214, 219-20 (2002). In California, this  
14 generally means that the statute of limitations is tolled from the  
15 time the first state habeas petition is filed until the California  
16 Supreme Court rejects the petitioner's final collateral challenge,  
17 as long as the petitioner did not "unreasonably delay" in seeking  
18 review. Id. at 221-23; accord, Nino v. Galaza, 183 F.3d 1003, 1006  
19 (9th Cir. 1999).

20           The statute of limitations is not tolled from the time a final  
21 decision is issued on direct state appeal and the time the first  
22 state collateral challenge is filed because there is no case  
23 "pending" during that interval. Nino v. Galaza, 183 F.3d at 1006;  
24 see, Lawrence v. Florida, 549 U.S. 327, 330-33 (2007) (holding that  
25 the time period after a state court's denial of state post-  
26 conviction relief and while a petition for certiorari is pending in  
27 the United States Supreme Court is not tolled because no application  
28 for state post-conviction or other state collateral review is

1 pending).

2 Here, the limitation period commenced on September 29, 2010.  
3 Although Petitioner's first state habeas petition was stamped filed  
4 in the KCSC on June 28, 2011, the date the petition was signed was  
5 June 6, 2011.

6 Habeas Rule 3(d) provides that a paper filed by a prisoner is  
7 timely if deposited in the institution's internal mailing system on  
8 or before the last day for filing. The rule requires the inmate to  
9 use the custodial institution's system designed for legal mail;  
10 further, timely filing may be shown by a declaration in compliance  
11 with 28 U.S.C. § 1746 or by a notarized statement setting forth the  
12 date of deposit and verifying prepayment of first-class postage.

13 Id. Habeas Rule 3(d) reflects the "mailbox rule," initially  
14 developed in case law, pursuant to which a prisoner's pro se habeas  
15 petition is "deemed filed when he hands it over to prison  
16 authorities for mailing to the relevant court." Houston v. Lack,  
17 487 U.S. 266, 276 (1988); Huizar v. Carey, 273 F.3d 1220, 1222 (9th  
18 Cir. 2001). The mailbox rule applies to federal and state petitions  
19 alike. Campbell v. Henry, 614 F.3d 1056, 1058-59 (9th Cir. 2010)  
20 (citing Stillman v. LaMarque, 319 F.3d 1199, 1201 (9th Cir. 2003),  
21 and Smith v. Ratelle, 323 F.3d 813, 816 n.2 (9th Cir. 2003)). The  
22 mailbox rule, liberally applied, in effect assumes that absent  
23 evidence to the contrary, a legal document is filed on the date it  
24 was delivered to prison authorities, and a petition was delivered on  
25 the day it was signed. Houston v. Lack, 487 U.S. at 275-76; Roberts  
26 v. Marshall, 627 F.3d 768, 770 n.1 (9th Cir. 2010); Campbell v.  
27 Henry, 614 F.3d 1058-59; Lewis v. Mitchell, 173 F.Supp.2d 1057, 1058  
28 n.1 (C.D.Cal. 2001). The date a petition is signed may be inferred



1 to be the earliest possible date an inmate could submit his petition  
2 to prison authorities for filing under the mailbox rule. Jenkins v.  
3 Johnson, 330 F.3d 1146, 1149 n.2 (9th Cir. 2003), overruled on other  
4 grounds, Pace v. DiGuglielmo, 544 U.S. 408 (2005). However, if  
5 there is a long delay between the alleged mailing and receipt by a  
6 court, a district court may attribute the discrepancy to various  
7 causes, including the court, the postal service, the prison  
8 authorities, or the prisoner himself. See, Koch v. Ricketts, 68  
9 F.3d 1191, 1193 n.3 (9th Cir. 1995) (concerning analogous Fed. R.  
10 App. P. 4(c)).

11 Here, the date on the petition form next to the signature and  
12 on the proof of service is June 6, 2011. Respondent has not  
13 introduced any evidence to rebut the presumption of the mailbox rule  
14 that the date of signature was the date of delivery of the petition  
15 to prison authorities for mailing. The Court will liberally apply  
16 the mailbox rule. It is concluded that pursuant to the mailbox  
17 rule, Petitioner constructively filed the petition in the KCSC on  
18 June 6, 2011.

19 Thus, the statutory limitations period ran from September 29,  
20 2010, until the constructive filing of the first state habeas  
21 petition on June 6, 2011, for a total of 250 days.

22 Respondent does not argue that any of Petitioner's three state  
23 habeas petitions was improperly filed or that there was unreasonable  
24 delay between the filing of the various petitions. (Doc. 17, 4:5-  
25 6.) Although the time after the finality of the state appellate  
26 proceedings and before the filing of the first state habeas petition  
27 in the KCSC was not tolled, Petitioner is entitled to tolling for  
28 the period of time during which the first state habeas petition was

1 pending from June 6, 2011, through August 10, 2011, the date the  
2 KCSC denied the petition, for sixty-six (66) days.

3 In Carey v. Saffold, 536 U.S. 214, the Court liberally  
4 construed the term "pending" in § 2244(d)(2) to mean that in the  
5 absence of undue delay, an application for post-conviction relief is  
6 pending not only between filing and denial, but also during the gaps  
7 or "intervals between a lower court decision and a filing of a new  
8 petition in a higher court" and until the California Supreme Court  
9 denies review. Id. at 223; see, Biggs v. Duncan, 339 F.3d 1045,  
10 1048 (9th Cir. 2003). Here, in filing his state habeas petitions,  
11 Petitioner was proceeding up the hierarchy of state courts with his  
12 claims. Thus, Petitioner is entitled to "gap" tolling for the  
13 period between the denial of his KCSC petition on August 10, 2011,  
14 and the filing of his habeas petition in the CCA in October 2011, a  
15 period of fifty-six (56) days.

16 Pursuant to the mailbox rule, and in the absence of any  
17 evidence to rebut the controlling presumption, Petitioner  
18 constructively filed his petition in the CCA on the date he signed  
19 the petition, namely, October 6, 2011. Petitioner is entitled to  
20 statutory tolling for the period of the pendency of the petition  
21 from October 6, 2011, until November 21, 2011, the date the petition  
22 was denied, for a period of forty-seven (47) days. In addition,  
23 Petitioner is entitled to "gap" tolling between the CCA's denial of  
24 the petition and Petitioner's filing of a petition in the CSC for a  
25 period of fifty-six (56) days.

26 Pursuant to the mailbox rule, and in the absence of evidence to  
27 rebut the presumption, Petitioner constructively filed his petition  
28 in the CSC on January 17, 2012, the date of signature on the

1 petition and the proof of service. Petitioner is entitled to  
2 statutory tolling while the petition was pending in the CSC from  
3 January 17, 2012, until May 16, 2012, the date the petition was  
4 denied by the CSC, for a period of 121 days.

5 In summary, the statutory limitations period ran for 250 days  
6 from September 29, 2010, through June 5, 2011, before the first  
7 state petition was filed. The statute was tolled during the  
8 pendency of state habeas proceedings and the gaps between those  
9 proceedings from June 6, 2011, until May 16, 2012. When the  
10 statutory period began running again on May 17, 2012, after the  
11 denial of the CSC petition, 115 days of the limitations period  
12 remained. The limitations period expired 115 days later on  
13 September 8, 2012.

14 Petitioner's federal petition was stamped filed here on October  
15 9, 2012. (Doc. 1, 1.) The petition form and the proof of deposit  
16 of the petition in the United States mail were dated September 28,  
17 2012 (doc. 1, 7, 116). What appears to be the outgoing mail log for  
18 Petitioner's legal mail reflects that legal mail from the prison was  
19 sent out to the Clerk of this Court on October 4, 2012. (Doc. 22,  
20 26.) Petitioner states in his opposition that Petitioner "proceeded  
21 and sent/submitted (sic) federal habeas On October 4, 2012, but I  
22 assume due too (sic) mail delay petition did not get filed until  
23 October, 9, 2012, 35 days over Petitioner's required deadline."  
24 (Doc. 19, 2.) There is no evidence before the Court concerning the  
25 protocol for prison mailing and the dating of mail logs. It is not  
26 clear whether or not the date a prisoner deposits outgoing mail for  
27 mailing is the same date that the log reflects that mail went out.  
28 The Court notes that in other instances, there is a short time

1 interval between the date Petitioner states that he mailed legal  
2 mail and the date noted on the mail log.<sup>2</sup> Petitioner's declaration  
3 under penalty of perjury is clear that he deposited the petition for  
4 mailing on the same date that he signed the petition. Liberally  
5 applying the mailbox rule, the Court concludes that the petition was  
6 constructively filed here on the date the petition was signed,  
7 namely, September 28, 2012.

8 Thus, the petition was constructively filed twenty days after  
9 the limitations period expired on September 8, 2012.

10 C. Equitable Tolling

11 Petitioner argues that the timely filing of his petition was  
12 prevented by extraordinary circumstances beyond his control,  
13 including 1) the delayed notification of the CSC's denial of his  
14 habeas petition due to Petitioner's transfer to a new institution;  
15 2) obstructed or limited access to the law library combined with  
16 Petitioner's lack of education; and 3) loss of Petitioner's legal  
17 property, including transcripts and other portions of the state  
18 court record, in an effort to obtain counsel that preceded the  
19 filing of the federal petition. Petitioner argues that he was  
20 diligent in his attempts to file a timely petition.

21 The one-year limitation period of § 2244 is subject to  
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23  
24 <sup>2</sup> For example, Petitioner declared under penalty of perjury that he boxed and  
25 addressed documents to an attorney and completed procedures for sending legal mail  
26 on August 7, 2012, but the mail log reflects a date of August 14, 2012. (Doc. 2,  
27 5; doc. 22, 26.) Likewise, Petitioner's consent form filed here on January 14,  
28 2013, is dated December 20, 2012, but the outgoing mail log of mail to the Clerk  
of this Court reflects a date of December 24, 2012. (Doc. 9; doc. 22, 26.)  
Petitioner declares under penalty of perjury that he deposited a motion for  
mailing on April 16, 2013 (doc. 19, 4), whereas it was logged as outgoing on the  
mail log on April 18, 2012 (doc. 22, 26). Because keeping a mail log is generally  
performed by prison staff, there is no basis for assuming that Petitioner had  
control over the mail procedures or the precise dates recorded on the mail log.

1 equitable tolling where the petitioner shows that he or she has been  
2 diligent, and extraordinary circumstances have prevented the  
3 petitioner from filing a timely petition. Holland v. Florida, -  
4 U.S. -, 130 S.Ct. 2549, 2560, 2562 (2010). Petitioner bears the  
5 burden of showing the requisite extraordinary circumstances and  
6 diligence. Chaffer v. Prosper, 592 F.3d 1046, 1048 (9th Cir. 2010).  
7 A petitioner must provide specific facts regarding what was done to  
8 pursue the petitioner's claims to demonstrate that equitable tolling  
9 is warranted. Roy v. Lampert, 465 F.3d 964, 973 (9th Cir. 2006).  
10 Conclusional allegations are generally inadequate. Williams v.  
11 Dexter, 649 F.Supp.2d 1055, 1061-62 (C.D.Cal. 2009). The petitioner  
12 must show that the extraordinary circumstances were the cause of his  
13 untimeliness and that the extraordinary circumstances made it  
14 impossible to file a petition on time. Ramirez v. Yates, 571 F.3d  
15 993, 997 (9th Cir. 2009). Where a prisoner fails to show any causal  
16 connection between the grounds upon which he asserts a right to  
17 equitable tolling and his inability to timely file a federal habeas  
18 application, the equitable tolling claim will be denied. Gaston v.  
19 Palmer, 417 F.3d 1030, 1034-35 (9th Cir. 2005). A prisoner's or  
20 counsel's failure to recognize that a state filing was unreasonably  
21 delayed under California law is not the result of an "external  
22 force" that rendered timeliness impossible, but rather is  
23 attributable to the petitioner as the result of his own actions.  
24 Velasquez v. Kirkland, 639 F.3d 964, 969 (9th Cir. 2011).

25 The diligence required for equitable tolling is reasonable  
26 diligence, not "maximum feasible diligence." Holland v. Florida,  
27 130 S.Ct. at 2565. However, "the threshold necessary to trigger  
28 equitable tolling [under AEDPA] is very high, lest the exceptions

1 swallow the rule.” Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir.  
2 2003) (quoting Miranda v. Castro, 292 F.3d 1063, 1066 (9th Cir.  
3 2002)). A petitioner seeking equitable tolling must demonstrate  
4 reasonable diligence while exhausting state court remedies as well  
5 as while attempting to file a federal petition during the period  
6 after the extraordinary circumstances began. Roy v. Lampert, 465  
7 F.3d at 971. The effort required is what a reasonable person might  
8 be expected to deliver under his or her particular circumstances.  
9 Doe v. Busby, 661 F.3d 1001, 1015 (9th Cir. 2011). Because a pro se  
10 petitioner’s habeas filings must be construed with deference, a  
11 court will construe liberally such a petitioner’s allegations  
12 regarding diligence. Roy v. Lampert, 465 F.3d at 970.

13 A prisoner’s lack of knowledge that the state courts have  
14 reached a final resolution of his case can provide grounds for  
15 equitable tolling if the prisoner has acted diligently in the  
16 matter. Ramirez v. Yates, 571 F.3d at 997; White v. Ollison, 530  
17 F.Supp.2d 1077, 1083-84 (C.D.Cal. 2007) (finding the statute  
18 equitably tolled for approximately two and one-half months between  
19 the superior court’s denial of the petitioner’s habeas petition and  
20 the date on which the petitioner received notice of the court’s  
21 denial, and collecting authorities); Lewis v. Mitchell, 173  
22 F.Supp.2d 1057, 1061-62 (C.D.Cal. 2001) (finding the statute  
23 equitably tolled for the period following a court’s ruling and the  
24 petitioner’s receipt of notice of it, where the petitioner had not  
25 been notified of the state supreme court’s denial of her habeas  
26 petition for more than five months after the denial because the  
27 prison returned the mailed notification of the denial to the state  
28 supreme court because the prisoner’s prison number did not appear on

1 the envelope, despite the petitioner's having provided her prisoner  
2 number to the court); Lopez v. Scribner, 2008 WL 2441362, \*7-\*9 (No.  
3 CV 07-6954-ODW (JTL), C.D.Cal. Apr. 11, 2008) (assuming that the  
4 statute was equitably tolled during the time between a court's  
5 denial of a first state habeas petition and the date the petitioner  
6 learned of the denial, where the petitioner did not receive notice  
7 of the court's September 2006 denial of a petition filed in August  
8 2006 until the petitioner sought a ruling in February 2007, and the  
9 delay made it impossible for the petitioner to file a timely federal  
10 habeas petition). To determine whether a petitioner is entitled to  
11 such tolling, it must be determined on what date the petitioner  
12 received notice, whether the petitioner acted diligently to receive  
13 notice, and whether the alleged delay of notice caused the  
14 untimeliness of the filing and made a timely filing impossible.  
15 Ramirez v. Yates, 571 F.3d at 998.

16 Petitioner submitted a declaration after he filed his  
17 opposition documents in which he stated that the contents of the  
18 "foregoing" documents were true under penalty of perjury under the  
19 laws of the state of California, and he identified his opposition  
20 documents (styled as motions) as the documents to which his  
21 declaration should be attached. (Doc. 21, 1-2.)

22 Further, he has submitted documents that corroborate his  
23 allegations concerning the delay and his diligent efforts to follow  
24 up concerning the state habeas petition that was denied on May 16,  
25 2012. Respondent has not refuted the showing or otherwise  
26 challenged Petitioner's showing.

27 Petitioner states that he arrived at the California State  
28 Prison in Los Angeles County (CSP-LAC) on May 24, 2012. The Court

1 takes judicial notice of the docket and documents filed in Stefan E.  
2 Evans v. Unknown, case number 2:11-cv-1018-GGH, a proceeding  
3 previously filed by Petitioner in the Sacramento division of this  
4 Court, in which on March 14, 2011, Petitioner sought an extension of  
5 time to file a federal petition. (Doc. 1.)<sup>3</sup> The address of  
6 Petitioner set forth on the request for an extension of time was  
7 Kern Valley State Prison, Delano, California. (Id. at 1, 3.) Thus,  
8 Petitioner previously was located at a prison other than CSP-LAC.  
9 Further, in the present proceeding, Petitioner also submitted a copy  
10 of a "CDCR Inmate ID," with the date of May 24, 2012, an address of  
11 "CALIFORNIA STATE PRISON," and Petitioner's CDCR identification  
12 number on it. (Doc. 19, ex. A, 6.) It thus appears that Petitioner  
13 arrived at the CSP-LAC on May 24, 2012.

14 Petitioner states that because of his transfer to a new prison,  
15 he did not receive notification of the CSC's denial of his petition  
16 until on or about June 15, 2012. (Doc. 22, 7.) Petitioner  
17 submitted a copy of the front of an envelope addressed to Petitioner  
18 at the "CA State Prison, Los Angeles Co." in Lancaster, California,  
19 with a partially missing postmark but which includes the word "MAY."  
20 The notation "not here" appears in handwritten script on the  
21 envelope as well as the figures "B1 228." (Petr.'s Ex. A, Doc. 19,  
22 6.)

23 The Court takes judicial notice of a request for an extension  
24 of time to file a federal petition filed on July 2, 2012, in Stefan  
25 E. Evans v. Unknown, case number 2:11-cv-1018-GGH, in which

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27 <sup>3</sup> The Court may take judicial notice of court records. Fed. R. Evid. 201(b);  
28 United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th Cir. 1993); Valerio v. Boise  
Cascade Corp., 80 F.R.D. 626, 635 n.1 (N.D. Cal. 1978), aff'd., 645 F.2d 699 (9th  
Cir. 1981).



1 Petitioner stated that after a delayed bed space assignment due to  
2 temporary placement in an administrative segregation unit because of  
3 overcrowding, he was finally housed in a mainline facility and  
4 informed the CSC of his new address and location; days following, he  
5 received the denial via re-routed mail. (Doc. 8, 2.) Petitioner  
6 appended to the request a copy of a letter written by Petitioner to  
7 the clerk of the CSC dated June 5, 2012, in which Petitioner  
8 informed the CSC of his new address and case number. The document  
9 bears a stamp stating "RECEIVED JUN 11 2012 CLERK SUPREME COURT."  
10 (Id. at 4.) Petitioner also submitted to this Court a copy of what  
11 appears on its face to be a log of outgoing mail that reflects that  
12 mail from Petitioner was sent from the prison to the CSC at San  
13 Francisco, California, on June 7, 2012. (Doc. 22, 18.) Further,  
14 what appears to be a copy of an incoming mail log reflects that  
15 Petitioner received mail from the CSC in San Francisco on June 15,  
16 2012; the log states that Petitioner's yard and housing were "B1"  
17 and "228" respectively. A check of the docket in CSC case number  
18 S199665 show no entries other than the filing of the petition and  
19 the denial order.

20 Petitioner's documentation shows that less than two weeks after  
21 his arrival at CSP-LAC, Petitioner notified the CSC of his new  
22 address in a letter that referred to his case number, adverted to  
23 the Petitioner's uncertainty as to whether or not the court had sent  
24 any mail to his last address, and asked that all current and future  
25 mail be forwarded to the new address. This post-move follow-up by  
26 Petitioner with respect to his address and the pendency of his  
27 petition was prompt. It appears that Petitioner proceeded with  
28 reasonable diligence in advising the CSC of his new location and

1 indicating his uncertainty as to the status of the case and the  
2 possibility of undelivered mail. Further, it may be inferred that  
3 Petitioner received the CSC's denial on June 15, 2012, thirty (30)  
4 days after the date the CSC filed its order of denial.

5 Further events in the chronology leading to the filing of the  
6 petition here will be considered in determining whether Petitioner  
7 has shown that the delay of approximately one month in his receipt  
8 of notification from the CSC actually caused Petitioner to be unable  
9 to file the petition here on time. As previously noted, in the  
10 previous proceeding in this Court, Petitioner renewed his motion for  
11 an extension of time to file a federal petition on July 2, 2012,  
12 after the first extension of time had been dismissed without  
13 prejudice. (Evans v. Unknown, 2:11-cv-01018-GGH, doc. 8, 6.) By  
14 order dated July 31, 2012, the Court denied the motion and stated  
15 that the motion would be placed in the file and disregarded; the  
16 order was served by mail on Petitioner on the same date. (Id. at  
17 doc. 9.) Thus, it appears that within two weeks of having received  
18 notice of the CSC's denial, Petitioner had prepared and filed a  
19 request for an extension of time from the Sacramento Division of  
20 this Court.

21 Petitioner states that after the request for an extension of  
22 time was denied, he sought legal counsel and attempted to retain  
23 attorney Richard R. Williams, making "verbal contact" on or about  
24 August 1, 2012. (Doc. 19, 2.) In a motion for an extension of time  
25 that was stamped as filed in this action on October 9, 2012,  
26 Petitioner declared under penalty of perjury that on August 7, 2012,  
27 he boxed up his only copy of all his trial transcripts, briefs,  
28 petitions, appeal documents, and excess legal paperwork and

1 addressed it to Mr. Williams, an attorney, at a specified address  
2 after having gone through all required protocol to send legal mail,  
3 including trust account authorization for the proper mailing fee.  
4 (Doc. 2, 5.) He informed his family, who were asked to correspond  
5 with Williams and confirm that the mail was delivered, but efforts  
6 to contact the prison, post offices, and Williams were unsuccessful,  
7 and the mail did not arrive at Mr. Williams' office; as of September  
8 28, 2012, the date of the declaration, Mr. Williams had not received  
9 the papers. (Id.) The outgoing legal mail log indicates that on  
10 August 14, 2012, legal mail from Petitioner was sent to "RICK  
11 WILLIAMS ATTY AT LAW." (Doc. 22, 26.) In this action, Petitioner  
12 also submitted 1) a copy of his trust account statement, showing  
13 that on August 16, 2012, the sum of \$53.30 was withdrawn from  
14 Petitioner's trust account for legal mail (doc. 22, 22); and 2)  
15 copies of documentation of his inmate institutional appeal regarding  
16 the loss of his legal mail (doc. 22, 12-24).

17 It thus appears that after his unsuccessful attempt in July  
18 2012 to obtain an extension of time from this Court to file a  
19 federal petition, Petitioner immediately sought to secure counsel to  
20 prepare the petition, including an effort to send his legal papers  
21 to the attorney in early August. Petitioner followed up with family  
22 and the institution when it appeared that the legal papers sent to  
23 the attorney had been lost. Petitioner states that two or three  
24 weeks after he sent the documents to Williams, he realized that all  
25 was lost and that he had no choice but to begin preparation of the  
26 federal habeas petition without a single copy of his documents.  
27 (Doc. 19, 2.)

28 Thus, considering all the documentation, it appears that after

1 unsuccessfully attempting to secure counsel, Petitioner began  
2 preparation of the petition in earnest in early September 2012. He  
3 continued to demonstrate concern with the timeliness of his petition  
4 in late September when he again sought an extension of time to file  
5 the petition.

6 With respect to the period in September 2012 when Petitioner  
7 was attempting to complete his petition, Petitioner states generally  
8 that there was an abundance of paperwork (the petition submitted to  
9 this Court is 116 pages long) in addition to institutional lockdowns  
10 and minimal law library access. Petitioner states that it was thus  
11 nearly impossible for Petitioner to make copies of all the  
12 paperwork; however, Petitioner proceeded. (Doc. 19, 2.) A review  
13 of the petition filed in this Court reflects that it is an amalgam  
14 of the material in Petitioner's habeas petition filed in the CSC and  
15 the issues raised in his direct appeal from the judgment.

16 Petitioner's pro se status is not itself an extraordinary  
17 circumstance. Chaffer v. Prosper, 592 F.3d 1046, 1049 (9th Cir.  
18 2010.) A pro se petitioner's confusion or ignorance of the law is  
19 not alone a circumstance warranting equitable tolling. Rasberry v.  
20 Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006). Further, limited  
21 access to a law library and a copy machine has in some circumstances  
22 been characterized as a routine restriction of prison life and not  
23 necessarily an extraordinary circumstance that renders timely filing  
24 impossible. See, Ramirez v. Yates, 571 F.3d at 998 (where the  
25 petitioner was housed in administrative segregation with limited law  
26 library access and associated routine security restrictions).

27 However, in other circumstances, it has been held that denial  
28 of access to legal papers where there is only a very short portion

1 of the limitations period remaining can in fact render timely filing  
2 by a pro se petitioner impossible. Lott v. Mueller, 304 F.3d 918,  
3 922-23 (9th Cir. 2002) (remanding the matter for a determination of  
4 entitlement to equitable tolling where a petition was untimely for  
5 seven or twenty days, depending on the applicability of the mailbox  
6 rule; the computation of the filing deadline was difficult and  
7 uncertain even for informed legal minds; and the petitioner was  
8 without access to his legal papers for weeks and received them under  
9 circumstances that he could have believed that he had only six days  
10 remaining in which to file a timely petition); Spitsyn v. Moore, 345  
11 F.3d at 801 (holding that an expectation that a prisoner will  
12 prepare a pro se habeas petition is unrealistic where the petitioner  
13 is without his legal papers due to counsel's possession of them and  
14 has been diligent in attempting to secure those papers); see, Sossa  
15 v. Diaz, - F.3d -, 2013 WL 4792941, \*8-\*9 (No. 10-56104, 9th Cir.  
16 Sept. 10, 2013) (remanding the case for a determination of  
17 entitlement to equitable tolling where a petition was filed two days  
18 late, and the petitioner had alleged that despite attempts to grieve  
19 limited law library access, he was unable to use the prison's law  
20 library and copier successfully due to lock-downs, prison staff's  
21 loss of paperwork, and copy machine malfunction).

22 Here, it appears that throughout the period in which Petitioner  
23 filed his collateral state challenges, Petitioner diligently  
24 proceeded. Petitioner's transfer to a new institution, the  
25 relatively lengthy delay in notification of the state court's denial  
26 of his habeas petition, the apparent loss of his legal papers in the  
27 mail en route to potential counsel, the attendant impossibility of  
28 obtaining counsel, and the relatively short period of time remaining

1 for preparation of a federal petition when these circumstances  
2 converged at the end of the limitations period all combined to  
3 prevent timely filing. The present case appears to be a situation  
4 comparable to that recognized in Lott v. Mueller, 304 F.3d 923-24,  
5 in which a "confluence of numerous factors" beyond a prisoner's  
6 control contributed to render timely filing impossible. Id. at 923-  
7 24. The period during which various circumstances operated to  
8 impede Petitioner's progress in the present case exceeds in length  
9 the twenty days that passed between the running of the statute and  
10 Petitioner's filing of his federal petition. The Court is mindful  
11 that the impossibility requirement should not be too strictly  
12 imposed because imposing extraordinarily high evidentiary standards  
13 on pro se prisoner litigants is contrary to the "grain" of our  
14 precedent in light of the unusual and unique obstacles faced by pro  
15 se prisoner litigants, such as difficulty in obtaining  
16 representation by counsel, limitations in access to legal materials  
17 and proof, and other obstacles to complying with procedural  
18 deadlines. Sossa v. Diaz, 2013 WL 4792941 at \*9; see, Rand v.  
19 Rowland, 154 F.3d 952, 958 (9th Cir. 1998).

20 The Court concludes that the documentation before the Court  
21 shows that Petitioner is entitled to equitable tolling of the  
22 statute of limitations sufficient to render his petition timely.

23 Accordingly, it will be recommended that Respondent's motion to  
24 dismiss the petition as untimely be denied.

#### 25 IV. Petitioner's Motions

26 Petitioner's opposition to the motion to dismiss came styled as  
27 a motion to excuse harmless negligence and motion to appoint counsel  
28 (doc. 19), a declaration regarding his motion to appoint counsel

1 (doc. 21), and supplementary opposition (doc. 22). By separate  
2 order the Court has deemed the Petitioner's motion to be in part  
3 opposition to the motion to dismiss and in part a motion for  
4 counsel. The motion for counsel was denied by separate order.  
5 Petitioner's motions have been considered fully as opposition to the  
6 motion to dismiss. Accordingly, it will be recommended that  
7 Petitioner's motions be dismissed as moot.

8 V. Recommendations

9 In accordance with the foregoing, it is RECOMMENDED that:

- 10 1) Respondent's motion to dismiss the petition as untimely be  
11 DENIED; and  
12 2) Petitioner's motions be DISMISSED as moot; and  
13 3) The matter be REFERRED back to the Magistrate Judge for  
14 further proceedings, including directing Respondent to file an  
15 answer to the petition.

16 These findings and recommendations are submitted to the United  
17 States District Court Judge assigned to the case, pursuant to the  
18 provisions of 28 U.S.C. § 636 (b) (1) (B) and Rule 304 of the Local  
19 Rules of Practice for the United States District Court, Eastern  
20 District of California. Within thirty (30) days after being served  
21 with a copy, any party may file written objections with the Court  
22 and serve a copy on all parties. Such a document should be  
23 captioned "Objections to Magistrate Judge's Findings and  
24 Recommendations." Replies to the objections shall be served and  
25 filed within fourteen (14) days (plus three (3) days if served by  
26 mail) after service of the objections. The Court will then review  
27 the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b) (1) (C).  
28 The parties are advised that failure to file objections within the

1 specified time may waive the right to appeal the District Court's  
2 order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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IT IS SO ORDERED.

Dated: September 13, 2013

/s/ Barbara A. McAuliffe  
UNITED STATES MAGISTRATE JUDGE