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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

**JAMES BOONE,**  
  
Petitioner,  
  
**v.**  
  
**DAVE DAVEY,**  
  
Respondent.

Case No. 1:16-cv-00445 AWI MJS (HC)  
**FINDINGS AND RECOMMENDATION ON  
RESPONDENT’S MOTION TO DISMISS**  
  
**[Doc. 9]**

Petitioner is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.<sup>1</sup> Respondent is represented in this action by Rebecca Whitfield, of the Office of the Attorney General for the State of California.

**I. Background**

Petitioner is currently in the custody of the California Department of Corrections pursuant to a judgment of the Superior Court of California, County of Fresno, upon being convicted by a jury on March 15, 2011 of unlawful sexual intercourse by force, unlawful oral copulation by force, and various sentencing enhancements. (See Lodged Doc. 1.)

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<sup>1</sup> Respondent notes that the Warden’s last name was incorrectly spelled by Petitioner. The Court hereby corrects and substitutes the properly spelled name of Respondent.

1 On April 13, 2011, Petitioner was sentenced to an indeterminate state prison term of  
2 twenty-five (25) years to life. (Id.)

3 On January 16, 2013, the California Court of Appeal, Fifth Appellate District,  
4 affirmed the judgment. (Lodged Doc. 2.) Review was denied by the California Supreme  
5 Court on March 27, 2013. (Lodged Docs. 3-4.)

6 Petitioner proceeded to file seven petitions for writ of habeas corpus in the  
7 California state courts as follows:

- 8 1. California Court of Appeal, Fifth Appellate District  
9 Filed: June 19, 2013<sup>2</sup>;  
Denied: July 10, 2013;
- 10 2. Fresno County Superior Court  
11 Filed: July 15, 2013<sup>3</sup>;  
Denied: August 23, 2013;
- 12 3. California Court of Appeal, Fifth Appellate District  
13 Filed: September 18, 2013<sup>4</sup>;  
Denied: November 14, 2013;
- 14 4. California Court of Appeal, Fifth Appellate District  
15 Filed: December 30, 2013<sup>5</sup>;  
Denied: October 1, 2014;
- 16 5. Fresno County Superior Court  
17 Filed: April 13, 2015<sup>6</sup>;  
Denied: May 15, 2015;
- 18 6. California Court of Appeal, Fifth Appellate District

19 \_\_\_\_\_  
20 <sup>2</sup> Under the mailbox rule, the Court deems petitions filed on the date Petitioner handed a petition  
21 to prison authorities for mailing. Houston v. Lack, 487 U.S. 266, 276 (1988); Campbell v. Henry, 614 F.3d  
22 1056 (9th Cir. 2010); see also Rule 3(d) of the Rules Governing Section 2254 Cases. Although the petition  
23 was filed on June 25, 2013, pursuant to the mailbox rule the Court considers the petition filed on June 19,  
24 2013, the date Petitioner signed the petition.

25 <sup>3</sup> Although the petition was filed on July 18, 2013, pursuant to the mailbox rule the Court considers  
26 the petition filed on July 15, 2013, the date Petitioner signed the petition.

27 <sup>4</sup> Although the petition was filed on September 23, 2014, pursuant to the mailbox rule the Court  
28 considers the petition filed on September 18, 2014, the date Petitioner signed the petition.

<sup>5</sup> Although the petition was filed on January 13, 2014, pursuant to the mailbox rule the Court  
considers the petition filed on December 30, 2013, the date Petitioner signed the petition.

<sup>6</sup> Petitioner failed to date the petition. As the Court is unable to determine the date the petition was  
mailed, Petitioner is not entitled to an earlier filing date.

1 Filed: April 13, 2015<sup>7</sup>;  
2 Denied: May 21, 2015;

3 7. California Supreme Court  
4 Filed: August 31, 2015<sup>8</sup>;  
5 Denied: January 13, 2016.

6 (Mot. to Dismiss, Exs. 5-18.)

7 On March 28, 2016, Petitioner filed the instant federal Petition for Writ of Habeas  
8 Corpus in this Court.<sup>9</sup> On May 31, 2016, Respondent filed a Motion to Dismiss the  
9 petition as being filed outside the one-year limitations period prescribed by 28 U.S.C. §  
10 2244(d), and for failure to exhaust state remedies. (Mot. to Dismiss, ECF No. 9.)  
11 Petitioner filed an opposition on June 17, 2016, Respondent filed a reply on June 24,  
12 2016, and Petitioner filed a sur-reply on July 22, 2016. (ECF Nos. 11-12, 17.) The matter  
13 stands ready for adjudication.

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

20 The Ninth Circuit has allowed respondents to file a motion to dismiss in lieu of an  
21 answer if the motion attacks the pleadings for failing to exhaust state remedies or being  
22 in violation of the state’s procedural rules. See, e.g., O’Bremski v. Maass, 915 F.2d 418,  
23 420 (9th Cir. 1990) (using Rule 4 to evaluate motion to dismiss petition for failure to  
24 exhaust state remedies); White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (using

25 <sup>7</sup> Although the petition was filed on April 20, 2015, pursuant to the mailbox rule the Court  
26 considers the petition filed on April 13, 2015, the date Petitioner signed the petition.

27 <sup>8</sup> Although the petition was filed on September 11, 2015, pursuant to the mailbox rule the Court  
28 considers the petition filed on August 31, 2015, the date Petitioner signed the petition.

<sup>9</sup> Although the petition was filed on March 31, 2016, pursuant to the mailbox rule the Court  
considers the petition filed on March 28, 2016, the date Petitioner signed the petition.

1 Rule 4 as procedural grounds to review motion to dismiss for state procedural default);  
2 Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n. 12 (E.D. Cal. 1982) (same). Thus, a  
3 respondent can file a motion to dismiss after the court orders a response, and the Court  
4 should use Rule 4 standards to review the motion. See Hillery, 533 F. Supp. at 1194 &  
5 n. 12.

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

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

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

18 In this case, the petition was filed on March 28, 2016 and is subject to the  
19 provisions of AEDPA. AEDPA imposes a one-year period of limitation on petitioners  
20 seeking to file a federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As  
21 amended, § 2244, subdivision (d) reads:

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

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

26 (B) the date on which the impediment to filing an application  
27 created by State action in violation of the Constitution or laws of the  
United States is removed, if the applicant was prevented from filing  
28 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  
3 recognized by the Supreme Court and made retroactively  
4 applicable to cases on collateral review; or

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

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

12 28 U.S.C. § 2244(d).

13 Under § 2244(d)(1)(A), the limitations period begins running on the date that the  
14 petitioner's direct review became final or the date of the expiration of the time for seeking  
15 such review. In this case, the California Supreme Court denied review on March 27,  
16 2013. The state appeal process became final ninety days later, on June 25, 2013, when  
17 the time for seeking certiorari with the United States Supreme Court expired. U.S.  
18 Supreme Court rule 13; Bowen v. Rowe, 188 F.3d 1157 (9th Cir. 1999). The AEDPA  
19 statute of limitations began to run the following day, on June 26, 2013. Patterson v.  
20 Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001).

21 Petitioner had one year from June 26, 2013, absent applicable tolling, in which to  
22 file his federal petition for writ of habeas corpus. However, Petitioner delayed in filing the  
23 instant petition until March 28, 2016, over a year and a half after the statute of limitations  
24 period expired. Absent the later commencement of the statute of limitations or any  
25 applicable tolling, the instant petition is barred by the statute of limitations.

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

27 28 U.S.C. § 2244(d)(2) states that the "time during which a properly filed  
28 application for State post-conviction or other collateral review with respect to the  
pertinent judgment or claim is pending shall not be counted toward" the one year  
limitation period. 28 U.S.C. § 2244(d)(2). In Carey v. Saffold, the Supreme Court held  
the statute of limitations is tolled where a petitioner is properly pursuing post-conviction  
relief, and the period is tolled during the intervals between one state court's disposition of

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

9 Respondent acknowledges that Petitioner is entitled to tolling during the  
10 pendency of Petitioner's first state court petition. Petitioner's first petition was filed on  
11 June 19, 2013 – a week prior to the commencement of the limitations period. While  
12 Petitioner is not entitled to tolling for the week prior to the limitations period, he is entitled  
13 to tolling from the commencement of the limitations period on June 26, 2013, until the  
14 denial of the petition on July 10, 2013.

15 Petitioner had the entire year limitations period remaining as of July 10, 2013.  
16 Petitioner filed his second state petition with the Fresno County Superior Court on July  
17 15, 2013. While Respondent acknowledges that Petitioner is entitled to tolling during the  
18 pendency of Petitioner's second through fourth state court petitions, he asserts that  
19 Petitioner is not entitled to tolling during the interval period between filing the first and  
20 second petitions. Respondent argues that Petitioner was not pursuing his application up  
21 the ladder of the state court system. Review is "pending" within the meaning of §  
22 2244(d)(2) only where a prisoner is pursuing a single, full round of habeas relief in state  
23 court; thus, no review is "pending" where a prisoner files a second petition in a court  
24 which raises new claims and does not constitute merely an elaboration of the facts  
25 relating to the claims in a prior petition or an attempt to correct the prior petition's  
26 deficiencies. Stancle v. Clay, 692 F.3d 948, 951, 954-56 (9th Cir. 2012); Banjo v. Ayers,  
27 614 F.3d 964, 968-69 (9th Cir. 2010). After seeking review from the California Court of  
28 Appeal in his first petition, Petitioner filed his second action in the Fresno County

1 Superior Court. Accordingly, Petitioner was not ascending up the state court hierarchy.  
2 Biggs v. Duncan, 339 F.3d 1045, 1048 (9th Cir. 2003). Petitioner is not entitled to the  
3 benefit of tolling for the interval period. Therefore four days of the limitation period  
4 expired prior to the filing of the second petition. As Petitioner is entitled to tolling for the  
5 pendency of the second through fourth state petitions, 361 days of the limitation period  
6 remained on October 1, 2014, the date the fourth petition was denied by the Fifth District  
7 Court of Appeal.

8 Respondent again acknowledges that Petitioner is entitled to tolling during the  
9 pendency of his fifth through sixth state petitions, but argues that he is not entitled to  
10 tolling for the interval between the fourth and fifth petitions as Petitioner was not  
11 ascending up the state hierarchy at that time. Respondent is correct. Petitioner  
12 proceeded after the denial of his fourth state petition with the Fifth District Court of  
13 Appeal to appeal to file his fifth petition with the Fresno County Superior Court.  
14 Accordingly, Petitioner was not ascending up the state court hierarchy, and therefore not  
15 entitled to tolling for the interval between petitions. Biggs, 339 F.3d at 1048; Standle, 692  
16 F.3d at 951, 954-56; Banjo, 614 F.3d at 964, 968-69. 194 days of the limitation period  
17 expired between the denial of the fourth petition on October 1, 2014 and the filing of the  
18 fifth petition on April 13, 2015. As Petitioner is entitled to tolling for the pendency of the  
19 fifth through sixth state petitions, 167 days of the limitation period remained on May 21,  
20 2015, the date the sixth petition was denied by the Fifth District Court of Appeal.

21 Petitioner did not file his seventh state habeas petition in the California Supreme  
22 Court until August 31, 2015, which is 101 days after the California Court of Appeal  
23 denied habeas relief to his sixth petition. Given that a habeas petition that is untimely  
24 under state law is not "properly filed," Pace v. DiGuglielmo, 544 U.S. 408, 413 (2005),  
25 "none of the time before or during the state court's consideration of an untimely petition  
26 is tolled for purposes of AEDPA's limitations period," Curiel v. Miller, 2016 U.S. App.  
27 LEXIS 13487, 2016 WL 394172, at \*3 (9th Cir. July 25, 2016) (en banc) (citing Campbell  
28 v. Henry, 614 F.3d 1056, 1061 (9th Cir. 2010)). "[I]f a California court dismisses a

1 habeas petition without comment . . . a federal court 'must itself examine the delay in  
2 each case and determine what the state courts would have held in respect to  
3 timeliness.'" Robinson v. Lewis, 795 F.3d 926, 929 (9th Cir. 2015) (quoting Chavis, 546  
4 U.S. at 197-98). In the instant case, the California Supreme Court summarily denied  
5 Petitioner's state habeas petition without comment. Thus, the Court must examine the  
6 delay and determine whether the petition was timely under state law.

7 California courts apply a general "reasonableness" standard to determine whether  
8 a state habeas petition is timely. Carey v. Saffold, 536 U.S. 214, 222 (2002). Because  
9 "California courts had not provided authoritative guidance on this issue," the Supreme  
10 Court in Chavis "made its own conjecture . . . 'that California's "reasonable time"  
11 standard would not lead to filing delays substantially longer than' between 30 and 60  
12 days." Robinson, 795 F.3d at 929 (quoting Chavis, 546 U.S. at 199). However, if a  
13 petitioner demonstrates good cause, California courts allow a longer delay. Robinson,  
14 795 F.3d at 929 (citing In re Robbins, 18 Cal. 4th 770, 780, 77 Cal. Rptr. 2d 153, 959  
15 P.2d 311 (1998)). The Ninth Circuit has also previously held that unexplained delays of  
16 such duration are unreasonable, and not entitled to statutory tolling. See Velasquez v.  
17 Kirkland, 639 F.3d 964 (9th Cir. 2011) (unexplained eighty and ninety-one day delays in  
18 filing are unreasonable under California law and prevent tolling of AEDPA's one year  
19 statute of limitations.). Petitioner delayed 102 days from the denial of his sixth petition to  
20 the filing of his seventh habeas petition. Such an unexplained delay is unreasonable,  
21 and Petitioner is not entitled to tolling for the period between the filing of the sixth and  
22 seventh petitions or during the pendency of the seventh petition.

23 On May 21, 2015, the date the sixth petition was denied by the Fifth District Court  
24 of Appeal, 167 days of the limitation period remained. The limitations period therefore  
25 expired 167 days later on November 4, 2015, and the present petition was not filed until  
26 March 28, 2016, over four months later. Accordingly, the petition is untimely.

27 **D. Equitable Tolling**

28 The limitations period is subject to equitable tolling if the petitioner demonstrates:



1 “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary  
2 circumstance stood in his way.” Holland v. Florida, 130 S. Ct. 2549, 2560-62 (2010);  
3 quoting Pace v. DiGuglielmo. Petitioner bears the burden of alleging facts that would  
4 give rise to tolling. Pace, 544 U.S. at 418; Hinton v. Pac. Enters., 5 F.3d 391, 395 (9th  
5 Cir. 1993). In his opposition, Petitioner contends that he is entitled to tolling based on his  
6 ignorance in the law.

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

#### 18 **E. Exhaustion**

19 Respondent, in his motion to dismiss, asserts an alternative ground for dismissal  
20 based on failure to exhaust state remedies. (See Mot. to Dismiss at 9-11.) As the petition  
21 is untimely and subject to dismissal, in an exercise of judicial efficiency, the Court will not  
22 address Respondent's claims regarding failure to exhaust judicial remedies.

#### 23 **III. Conclusion**

24 As explained above, Petitioner failed to file the instant petition for habeas corpus  
25 within the one year limitation period required by 28 U.S.C. § 2244(d). Petitioner is not  
26 entitled to the benefit of statutory tolling, but not equitable tolling. Regardless, the  
27 petition remains untimely even with the benefit of statutory tolling. Based on the  
28 foregoing, this Court recommends that Respondent's motion to dismiss be GRANTED.

1 **IV. Recommendation**

2 Accordingly, the Court HEREBY RECOMMENDS that the motion to dismiss for  
3 Petitioner's failure to comply with 28 U.S.C. § 2244(d)'s one year limitation period be  
4 GRANTED.

5 This Findings and Recommendation is submitted to the assigned United States  
6 District Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and  
7 Rule 304 of the Local Rules of Practice for the United States District Court, Eastern  
8 District of California. Within thirty (30) days after the date of service of this Findings and  
9 Recommendation, any party may file written objections with the Court and serve a copy  
10 on all parties. Such a document should be captioned "Objections to Magistrate Judge's  
11 Findings and Recommendation." Replies to the Objections shall be served and filed  
12 within fourteen (14) days after service of the Objections. The Finding and  
13 Recommendation will then be submitted to the District Court for review of the Magistrate  
14 Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(c). Petitioner is advised that failure to  
15 file objections within the specified time may waive the right to appeal the District Court's  
16 order. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014).

17  
18 IT IS SO ORDERED.

19 Dated: August 30, 2016

/s/ Michael J. Seng  
UNITED STATES MAGISTRATE JUDGE

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