

1 **I. Background**

2 Petitioner challenges his convictions and sentences in two criminal cases. Petitioner was
3 convicted of criminal threats in the Kern County Superior Court, Case No. BF159929A, and was
4 sentenced to one year and four months in prison. He was also convicted of carrying a concealed
5 dirk or dagger in the same court, but in another case, Case No. BF165073A, and was sentenced to
6 two years and eight months in prison.

7 In Case No. BF159929A, the court entered judgment on July 20, 2015. In Case No.
8 BF165073A, the court entered judgment on November 29, 2016. Petitioner did not appeal the
9 trial court’s judgment in either case. He did not pursue any post-conviction remedy in state court.
10 He filed the petition in this case on May 21, 2018.

11 **II. Discussion**

12 The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) has a one-year
13 statute of limitations for a state prisoner to file a federal habeas petition. 28 U.S.C. § 2244(d)(1).
14 The one-year period begins on the latest of four dates:

- 15 (A) the date on which the judgment became final by the
16 conclusion of direct review or the expiration of the time for
seeking such review;
- 17 (B) the date on which the impediment to filing an application
18 created by State action in violation of the Constitution or
laws of the United States is removed, if the applicant was
19 prevented from filing by such State action;
- 20 (C) the date on which the constitutional right asserted was
initially recognized by the Supreme Court, if the right has
21 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
23 claims presented could have been discovered through the
exercise of due diligence.

24 *Id.*; see also *Grant v. Swarthout*, 862 F.3d 914, 918 (9th Cir. 2017). The one-year statute of
25 limitations period may be tolled while the petitioner pursues state-court remedies. See *Grant*, 862
26 F.3d at 918. The one-year period may also be tolled in extraordinary circumstances. See *id.*

27 Here, the parties do not argue that Sections 2244(d)(1) Subsections (B), (C), and (D) are
28 relevant. The court will therefore assess the timeliness of the petition under only Subsection (A)

1 and begin the analysis from the date when the state-court judgment became final in each of
2 petitioner's cases.

3 As for Case No. BF159929A, the judgment was entered on July 20, 2015, and the time for
4 petitioner to appeal the trial court's decision ended sixty days later, on September 18, 2015. *See*
5 Cal. R. Ct. 8.308(a); ECF No. 1 at 27. Petitioner did not appeal, so his one-year period for the
6 AEDPA statute of limitations began on September 18, 2015, the day the sixty-day period in
7 which petitioner could appeal lapsed. *See Stancle v. Clay*, 692 F.3d 948, 951 (9th Cir. 2012);
8 *Mendoza v. Carey*, 449 F.3d 1065, 1067 (9th Cir. 2006); Fed. R. Civ.P. 6(a). The AEDPA's one-
9 year statute of limitations period ended on September 19, 2016, absent tolling.

10 As for Case No. BF165073A, the judgment was entered on November 29, 2016, and the
11 time for petitioner to appeal the trial court's decision ended on January 30, 2017. *See* Cal. R. Ct.
12 8.308(a); ECF No. 1 at 25. Petitioner did not appeal, so his one-year period for the AEDPA
13 statute of limitations began on January 30, 2017, when the period in which petitioner could appeal
14 ended. *See Stancle*, 692 F.3d at 951; *Mendoza*, 449 F.3d at 1067; Fed. R. Civ. P. 6(a). His one-
15 year statute of limitations period ended on January 30, 2018, absent tolling.

16 Petitioner filed his Section 2254 petition in this case after the expiration of the one-year
17 statute of limitations period, on May 15, 2018, taking into account the prison-mailbox rule. *See*
18 *Campbell v. Henry*, 614 F.3d 1056, 1059 (9th Cir. 2010); ECF No. 1 at 8. Petitioner must
19 therefore show that he is entitled to tolling; otherwise, his petition is untimely.

20 Petitioner has not shown that he is entitled to tolling. The court has considered whether
21 the alleged failure of petitioner's counsel to provide "good advice" on his right to appeal could
22 entitle petitioner to tolling, *see* ECF No. 1 at 7, even though petitioner has not opposed
23 respondent's motion to dismiss at all. Garden-variety negligence by counsel does not warrant
24 equitable tolling. *See Luna v. Kernan*, 784 F.3d 640, 646 (9th Cir. 2015); *Lopez v. Ndoh*, No. 18-
25 cv-2249, 2018 WL 5623678, at *4 (C.D. Cal. Sept. 24, 2018), *report and recommendation*
26 *adopted*, 2018 WL 5733741 (C.D. Cal. Oct. 30, 2018) (rejecting petitioner's bare allegation that
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1 attorney misled petitioner about his right to appeal).² In limited circumstances, a habeas
2 petitioner can obtain equitable tolling by showing egregious attorney conduct, *see Luna v.*
3 *Kernan*, 784 F.3d 640, 648 (9th Cir. 2015), but the court is satisfied that petitioner has not shown
4 any such conduct here.

5 In sum, the court will dismiss the petition because it is untimely. The court need not reach
6 other arguments raised by respondent.

7 **III. Order**

- 8 1. The clerk of court is directed to amend the case caption to show TR Merickel as the
9 sole respondent in this case.
- 10 2. Respondent's motion to dismiss, ECF No. 8, is granted.
- 11 3. The clerk of court is directed to enter judgment in favor of respondent and close this
12 case.

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14 IT IS SO ORDERED.

15 Dated: March 15, 2019

16 
17 UNITED STATES MAGISTRATE JUDGE

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19 No. 202

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25 _____
26 ² The plea and waiver forms attached to the petition—signed by petitioner—indicate that
27 petitioner discussed with his counsel the strengths of the case against him, any possible defenses,
28 and the possible consequences of entering into plea agreements. *See* ECF No. 1 at 11, 18. And
even if petitioner's counsel gave inadequate advice on petitioner's right to appeal, petitioner does
not explain whether he diligently pursued available remedies after learning about the facts giving
rise to his claims. *See Luna*, 784 F.3d at 649.