IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ANTHONY TAYLOR,

Petitioner, No. CIV S-05-0860 RRB GGH P

vs.

C. EVANS, Warden,

Respondent. FINDINGS AND RECOMMENDATIONS

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Introduction

Petitioner's pending motion for leave to file a second amended petition was filed on April 9, 2007, and came on for hearing on May 10, 2007. Eric Weaver represented petitioner; Peter Smith appeared for respondent. After hearing oral argument, the court set a schedule for further briefing with respect to the question of why petitioner omitted the claim of juror bias from his original federal petition (after having exhausted this "straight" claim in state court), ordering that petitioner's counsel file a declaration from petitioner within thirty days (of the May 10, 2007, hearing), with any response by respondent due within twenty days thereafter. See, Order, filed on May 14, 2007.

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The original petition was filed pro se on May 2, 2005 (April 28, 2005, per the mailbox rule[1]). Counsel for petitioner was appointed by Order, filed on June 10, 2005. Petitioner's present counsel, Eric Weaver, was substituted in by Order, filed on June 23, 2005. The first amended petition was filed on March 9, 2006. Respondent moved for dismissal of the first amended petition for failure to exhaust state court remedies as to one of the five claims therein set forth, a claim of ineffective assistance of appellate counsel for failure to appeal the denial of trial counsel's motion to dismiss Juror No. 4, on the ground that he knew a witness in the case and talked to the witness about the case. The court noted in its findings and recommendations, filed on November 7, 2006, that petitioner had exhausted the "straight" juror misconduct claim in a habeas petition to the state supreme court and that respondent conceded the point. Findings and Recommendations, filed on 11/07/06, pp. 1-2. The court construed respondent's motion as a motion to strike the unexhausted ineffective assistance of appellate counsel claim and recommended granting the motion as so construed and proceeding on the remaining claims. The findings and recommendations were adopted by Order, filed on March 19, 2007.

On that same day, March 19, 2007, petitioner filed a second amended petition with a supporting memorandum, but without an accompanying motion for leave to amend, after which, by Order, filed on 3/30/07, respondent was granted, inter alia, ten days to file any opposition to the filing of the second amended petition request for leave to amend.[2] In the second amended petition, petitioner raised for the first time in federal court, the exhausted straight juror bias claim with respect to the trial court's refusal to dismiss Juror no. 4. Second

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[1] Stillman v. Lamarque, 319 F.3d 1199, 1201 (9th Cir. 2003) (mailbox rule applies to pro se prisoner who delivers habeas petition to prison officials for the court within limitations period).

[2] The court noted therein Fed. R. Civ. P. 15(a) granted a party leave to amend "***once*** as a matter of course at any time before a responsive pleading is served...." Order, filed on 3/30/07 (emphasis added in original order).

Amended Petition, p. 6. Respondent opposed the filing of the second amended petition without petitioner's having sought leave of court, after which petitioner filed a motion for leave to amend, on April 9, 2007, conceding that, pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, counsel should have filed such a motion with the proposed second amended petition. Respondent filed an opposition on April 25, 2007. Thereafter, petitioner filed a reply on May 2, 2007.

Motion for Leave to Amend

Because there is no dispute that the filing of the first amended petition, on March 9, 2006, was untimely under the AEDPA statute of limitations, the court finds it unnecessary to engage in a detailed analysis of precisely when the statute of limitations ran, whether on September 18, 2005, as respondent maintains,[3] or at the latest, on January 21, 2006, as petitioner contends.[4] As the undersigned made clear at the hearing, the pertinent question in this case is whether or not equitable tolling is applicable to render the first amended petition timely filed.

Rule 15(c)(2) of the Federal Rules of Civil Procedure permits an amendment to a pleading filed beyond the statute of limitations to relate back to the date of the original pleading if the asserted claim "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading...." Mayle v. Felix, 545 U.S. 644, 664, 125 S. Ct. 2562, 2574 (2005) ("[s]o long as the original and amended petitions state claims that are tied to a common core of operative facts, relation back will be in order"). The court does not find persuasive respondent's argument that the undisputedly exhausted straight juror bias claim raised for the first time in the second amended petition should not relate back to the first amended petition, at least to the extent that the first amended petition could be deemed timely filed. (Of course, respondent is correct that the claim does not relate back to any claim within the original petition,

[3] Opposition, p. 7.

[4] Reply Brief in Support of Motion for Leave to File Second Amended Petition, p. 6.

as petitioner concedes). As the undersigned observed at the hearing, a straight claim is necessarily encompassed within an ineffective assistance of counsel claim as the second (prejudice) prong of the two-part analysis required for ineffective assistance claims, under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), while the reverse is not true. Nor does the court find meritorious respondent's argument that because the ineffective assistance claim was stricken from the first amended petition there was no claim for the straight juror bias claim to which to relate back. The unexhausted claim was not stricken with prejudice, and the fact that it was stricken in order for the petition to proceed on exhausted claims only does not equate to a finding that the claim was never brought "or attempted to be set forth...." Rule 15(c)(2).

On the other hand, the court also does not find that petitioner's contention that respondent effectively or knowingly waived the statute of limitations argument by failing to include it as a separate ground within the motion to dismiss the first amended petition (as unexhausted). The case cited, Day v. McDonough, 547 U.S. 198, 202, 126 S. Ct. 1675, 1679-81 (2006), in support of the proposition that a district court would be found to have abused its discretion if it attempted to raise the timeliness of habeas petition sua sponte when the statute of limitations has been knowingly waived does not appear apposite. In fact, in Day, supra, at 202, 126 S. Ct. at 1679-80, when confronted with the question of whether a federal court has the authority, sua sponte, to dismiss a petition on grounds of untimeliness, once an answer has been filed without timeliness having been contested, the Supreme Court held that "the federal court had discretion to correct the State's error and, accordingly to dismiss the petition as untimely under AEDPA's one-year limitation."[5] Moreover, the Ninth Circuit authority, Morrison v. Mahoney, 399 F.3d 1042, 1046 (9th Cir. 2005), on which petitioner relies for the holding that the

[5] In Day, supra, in dicta, while the Supreme Court did note that overriding a state's deliberate waiver of the defense would count as an abuse of discretion, the court found in the instance where an answer had been filed to a habeas petition expressly but erroneously stating that the petition was timely filed, that the waiver was not thereby an intelligent waiver.

state waives its right to present a statute of limitations defense if it does not raise that defense in the answer also does not help petitioner because, as petitioner notes an answer has not yet been filed. Petitioner points to no authority requiring that all affirmative defenses in habeas must be raised in an initial motion to dismiss contesting exhaustion.

Equitable Tolling

Thus, the issue that remains is whether petitioner is entitled to equitable tolling for the delay in filing the first amended petition. "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." Pace v. DiGuglielmo, 544 U.S. 408, 418, 12 S. Ct. 1807, 1814 (2005); Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002) (a habeas petitioner bears the burden of proving that equitable tolling should apply to avoid dismissal of an untimely petition). "Equitable tolling is unavailable in most cases," and is only appropriate "if *extraordinary* circumstances beyond a prisoner's control make it impossible to file a petition on time." Miranda, supra, at 1066 (internal quotations/citations omitted [emphasis added in Miranda]). A petitioner must reach a "very high" threshold "to trigger equitable tolling [under AEDPA]...lest the exceptions swallow the rule." Id.

In Calderon v. U.S. District Court (Beeler), 128 F.3d 1283, 1288 (9th Cir. 1997), overruled on other grounds, Calderon v. U.S. District Court for Cent. Dist. of CA. (Kelly), 163 F.3d 530 (9th Cir. 1998) (en banc), itself abrogated by Woodford v. Garceau, 538 U.S.202, 123 S. Ct. 1398 (2003), the Ninth Circuit found that the statute of limitations could be equitably tolled if extraordinary circumstances beyond a prisoner's control made it impossible to file the petition on time. "In addition, '[w]hen external forces, rather than a petitioner's lack of diligence, account for the failure to file a timely claim, equitable tolling may be appropriate.'" Lott v. Mueller**,** 304 F.3d 918, 922 (9th Cir. 2002), quoting Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999).

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Equitable tolling will not be available in most cases because tolling should only be granted if extraordinary circumstances beyond a prisoner's control make it impossible for him to file a petition on time. Beeler, 128 F.3d at 1288-89. As held in Beeler, "[w]e have no doubt that district judges will take seriously Congress's desire to accelerate the federal habeas process, and will only authorize extensions when this high hurdle is surmounted." 128 F.3d at 1289. "Mere excusable neglect" is insufficient as an extraordinary circumstance. Miller v. New Jersey Dept. of Corrections, 145 F.3d 616, 619 (3rd Cir. 1998). Moreover, ignorance of the law does not constitute such extraordinary circumstances. See Hughes v. Idaho State Bd. of Corrections, 800 F.2d 905, 909 (9th Cir. 1986).

In the Calderon (Beeler) case, the Court of Appeals held that the district court properly found equitable tolling to allow Beeler more time to file his petition. Beeler's lead counsel withdrew after accepting employment in another state, and much of the work he left behind was not usable by replacement counsel – a turn of events over which the court found Beeler had no control. The Court of Appeals held that the district court properly found these were "extraordinary circumstances" sufficient to toll the statute of limitations.[6] The Ninth Circuit also found extraordinary circumstances in Calderon v. U.S. Dist. Ct. (Kelly), supra, 163 F.3d 530. The three reasons given which independently justified tolling were: a district court stay which prevented petitioner's counsel from filing a habeas petition, mental incompetency until a reasonable time after the court makes a competency determination, and the fact that petitioner did at one time have timely habeas proceedings pending which were mistakenly dismissed, not as a result of any doing by petitioner. Id. at 541-42. See also Corjasso v. Ayers, 278 F.3d 874 (9th Cir. 2002) (clerk's unjustified rejection of a petition justified partial tolling); Miles v. Prunty, 187 F.3d at 1107 (delay by prison in withdrawing funds from prisoner's trust

[6] See also Baskin v. United States, 998 F. Supp. 188 (D. Conn. 1998), wherein the court applied equitable tolling where petitioner's attorney failed to notify him of the denial of a petition for certiorari until thirteen months after the denial was entered.

account, preparing and mailing filing fee were circumstances beyond his control, qualifying him for equitable tolling).

Conversely, in U.S. v. Van Poyck, 980 F. Supp. 1108, 1110-11(C.D. Cal. 1997), the court found that a petitioner's circumstances were not extraordinary in the following circumstances: inability to obtain transcripts from court reporters, and general prison lockdowns preventing the prisoner's access to the library and a typewriter which were necessary to his motion. See also Tacho v. Martinez, 862 F.2d 1376, 1381 (9th Cir. 1988) (reliance on incompetence of jailhouse lawyer not sufficient to justify cause to excuse procedural default); Turner v. Johnson, 177 F.3d 390, 392 (5th Cir. 1999) (prisoner's unfamiliarity of law did not toll statute); Eisermann v. Penarosa, 33 F. Supp. 2d 1269, 1273 (D.Haw. 1999) (lack of legal expertise does not qualify prisoner for equitable tolling); Henderson v. Johnson, 1 F. Supp. 2d 650, 656 (N.D. Tex. 1998) (same); Fadayiro v. United States, 30 F. Supp. 2d 772, 779-80 (D.N.J. 1998) (delay in receipt of transcripts does not justify equitable tolling).

In Spitsyn v. Moore, 345 F.3d 796 (9th Cir. 2003), on which petitioner seeks to rely, the Ninth Circuit stated that attorney misconduct had to be "sufficiently egregious" to constitute the requisite "extraordinary circumstances" required to justify equitable tolling for a petitioner. Spitsyn, supra, at 800, quotes Ford v. Hubbard, 330 F.3d 1086, 1106 (9th Cir. 2003)[7] ("there are instances in which an attorney's failure to take necessary steps to protect his client's interests is so egregious and atypical that the court may deem equitable tolling appropriate").

As grounds supporting petitioner's request for equitable tolling, petitioner's counsel avers, inter alia, that the claim at issue was the only claim presented in his state habeas petitions proving its signal importance to him, notwithstanding petitioner's failure to include it in the original petition. See Reply, pp. 6-8. Counsel maintains that had petitioner pro se's request for a stay been granted, which pro se request for a stay was vacated by Order, filed on 9/20/05, on

[7] Judgment vacated and case remanded on other grounds by Pliler v. Ford, 542 U.S. 225, 124 S. Ct. 2441 (2004).

the ground that petitioner had been appointed counsel (by Order, filed on 6/10/05), the statute would have been tolled for more than enough time to find the claim timely filed (although, as to this point, the court has noted earlier herein that too vague a basis was set forth for the granting of such a motion to have been warranted; moreover, the claim at issue had been previously exhausted).[8] Petitioner's counsel points to his having informed the court in his unopposed request for an extension of time to file a joint scheduling statement, filed on 7/05/05, that he had written petitioner, on 7/01/05, a second letter for more information about the basis of his request for a stay; that in his 8/16/05 joint status report he explained that he was still investigating potentially unexhausted claims; that, in particular, he notified the court that he had to that date made unsuccessful efforts to obtain a copy of trial counsel's file;[9] that in a second status report, filed on 11/18/05, counsel informed the court that despite repeated phone calls trial counsel had not provided the case file and that he had been compelled to file a state bar complaint to obtain the files; that on 1/17/06, he sought an extension of time for filing amended pleadings, telling the court that the state bar had not begun working to obtain the files until 1/08/06, and that he did not actually obtain the case files until 1/17/06. Petitioner also notes in his reply and a supporting (second) declaration that he was aware of the 1/21/06 date of his own calculation of when the

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[8] The Order, filed on 9/20/05, also contains the following direction as to what must be shown to successfully seek a stay, p. 2, in the third order clause: "Petitioner's counsel must file a further status report on or before November 21, 2005, informing the court whether or not petitioner will stand on his current petition of exhausted claims only, will seek a stay and abeyance of the original petition, pending exhaustion of additional claims, or will file an amended petition; should petitioner's counsel seek a stay and abeyance, he must identify all unexhausted claims on which petitioner intends to proceed and must demonstrate good cause for petitioner's having failed to exhaust state court remedies as to any claim prior to filing his original petition, pursuant to Rhines v. Weber, ___ U.S. ___, 125 S.Ct. 1528 (2005)." The earlier Order, filed 6/10/05, p. 2, appointing counsel, also sets forth the how petitioner's counsel must proceed if seeking a stay, also citing Rhines, supra.

[9] Petitioner does not note herein that in the 8/16/05 joint status report (p. 2), he also referenced petitioner pro se having filed a request for a stay "without specifying which issues he seeks to exhaust," thus implicitly conceding that no adequate basis for a stay had been presented to the court. Also, again, the straight juror bias claim had already been exhausted prior to the filing of the federal petition.

statute would have run. Second Declaration of Eric Weaver, pp. 1-2.[10] Also, petitioner observes that he had informed the court that petitioner had exhausted two claims not alleged in the original petition, which petitioner avers demonstrates his awareness of the pending expiration of time. Petitioner's counsel, contends therefore, that he was "clearly aware" of the status of the claims, but was so focused on meeting the requirement to bring all potential claims in one petition and on compelling trial counsel to turn over the case files, that he failed either to file an amended petition timely or to request a stay and abeyance, a procedure of which he is aware and has followed elsewhere. Second Weaver Dec., p. 2. Moreover, counsel re-emphasizes that at all the relevant times, it was either he or trial counsel, but not petitioner, who had possession of the trial transcripts, files and appellate and habeas filings. Id., at 1.

Petitioner also argues that petitioner himself was unusually diligent in his pro se status in pursuing his own claims through all three levels of state courts, in spite of being allegedly subjected to lockdowns and limited law library access and he filed his federal petition a short time following the denial of his state supreme court petition, and soon thereafter sought a stay.

Petitioner cites an unpublished district court case, Miller v. State of Idaho, No. CV 05-470 C-MHW, 2006 U.S. Dist. Lexis *7-11 [2006 WL 1382201 *2-3], (D. Idaho 2006), wherein a petitioner was granted equitable tolling for a significantly longer period of time than is at issue here, almost three years, when he relied on one written assurance from his counsel that habeas matters are time-consuming and that not hearing from counsel meant nothing was happening.

Petitioner also relies on Spitsyn v. Moore, supra, 345 F.3d at 800-802, wherein the Ninth Circuit weighed a number of factors to support the claim for equitable tolling by a petitioner with counsel, including (1) whether an attorney promised to make timely filings but

[10] Actually, in the declaration, petitioner's counsel sets forth that his calculation in his letter to petitioner was that the statute would run on 1/11/06. Second Weaver Dec. ¶ 3.

did not; (2) whether attorney had control of petitioner's legal files; (3) whether petitioner could reasonably have filed a petition on his own; (4) whether petitioner could reasonably have hired another lawyer. In addition, it was noted that a petitioner who has been denied access to his legal files may qualify for equitable tolling. Spitsyn, 345 F.3d at 801, citing Lott v. Mueller, supra, 304 F.3d at 924.

The circumstances considered in Spitsyn, however, as respondent accurately observes, are of a different order of magnitude than those which occurred herein:

> Though [attorney Huffhines] was hired nearly a full year in advance of the deadline, Huffhines completely failed to prepare and file a petition. Spitsyn and his mother contacted Huffhines numerous times, by telephone and in writing, seeking action, but these efforts proved fruitless. Furthermore, despite a request that he return Spitsyn's file, Huffhines retained it for the duration of the limitations period and more than two months beyond. That conduct was so deficient as to distinguish it from the merely negligent performance of counsel in Frye and Miranda. The fact that the attorney retained by petitioner may have been responsible for the failure to file on a timely basis does not mean that petitioner can never justify relief by equitable tolling. "As a discretionary doctrine that turns on the facts and circumstances of a particular case, equitable tolling does not lend itself to bright-line rules." Fisher v. Johnson, 174 F.3d 710, 713(5th Cir.1999); accord Valverde v. Stinson, 224 F.3d 129, 134 (2d Cir.2000); Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir.2000).

Spitsyn, supra, at 801.

As the court observed at the hearing, despite counsel's strenuous efforts to arrogate unto himself all responsibility for the untimeliness of this filing, the puzzling failure of petitioner to bring the exhausted juror bias claim in his original pro se petition remains the actual Achilles' heel for this claim. In the sworn declaration by petitioner Taylor, he states that he was aware of both the one-year statute of limitations for filing a federal habeas petition and that a state habeas petition would toll the statute. Declaration of Anthony Taylor, filed on 6/01/07, ¶ 2. He sets forth, inter alia, that his petition for writ of habeas corpus, signed on March 8, 2004, and filed on March 17, 2004, in the California Supreme Court, raising the claim of a deprivation of his Sixth Amendment rights when the trial court refused to dismiss Juror no. 4 as biased by

contact with a trial witness, was denied on February 2, 2005, after which he filed his federal petition on May 2, 2005 (signed on April 28, 2005). Taylor Dec., ¶¶ 3, 5-6. He avers that he listed all of the claims that had been presented in state court in his federal petition, and, on page 5, indicated that he had presented his jury claim to both the state superior court and California Supreme Court and thought that listing his state ineffective assistance of counsel habeas claim was adequate to renew it in federal court. Id., ¶¶ 6-7. However, shortly after having filed the original petition in this court, petitioner Taylor declares that he showed it to another inmate who told him that he had to file a separate claim for ineffective assistance of counsel in order to raise it in federal court. Id., ¶ 7. It was in order to add that claim, according to petitioner, that, on May 18, 2005, he filed a request to stay his petition, and he also sought appointment of counsel because he felt he did not have the necessary legal knowledge to pursue the claim. Id.

His request for appointment of counsel was granted on June 10, 2005, after which petitioner, shortly after June 17, 2005, received correspondence from his newly appointed counsel, who asked for his case transcript and files, upon which petitioner immediately forwarded the documents to Mr. Weaver. Taylor Dec., ¶ 8. When, after August 15, 2005, petitioner's counsel wrote outlining his analysis of petitioner's claims, including the jury claim and telling him of his statute of limitations' calculation, his counsel also informed him of difficulties he was encountering in trying to obtain petitioner's trial attorney's file. Id. Because he no longer had his own files and his habeas counsel was pursuing his claims, petitioner states he relied on him to amend the petition to add the jury claim before the statute of limitations ran. Id.

In an excess of caution, the court has again reviewed the original federal pro se petition and finds no hint that petitioner raised therein either a straight claim of bias with respect to Juror no. 4's alleged bias, or an ineffective assistance of counsel claim related to juror bias as a ground to proceed in this court. Moreover, the court observed in its previous finding regarding his juror bias claim that it was only by way of a habeas corpus petition filed in the state supreme

court (Respondent's Lodged Document 11), that this claim was implicated. See, Findings and Recommendations, filed on 11/07/06, p. 2. Nor as the court has also previously noted did petitioner even in his state supreme court habeas petition brief a claim for ineffective assistance of appellate counsel, stating only in generic fashion that "[a]ppellate counsel was ineffective," in response to a form question as to why an appeal as to any claim was not made. Id.

Moreover, as to petitioner's request to stay his original petition, alternatively denominated as a motion for leave to amend, nowhere therein does petitioner specify what actual grounds for which he sought a stay to seek further exhaustion, what claims might yet be pending in state court, or what exhausted grounds he might seek to add in an amended petition. Petitioner makes a vague reference to "each of the additional constitutional claims raised below in state court." Motion for Stay, filed on 5/18/05, p. 5. The closest he comes to providing any further clue as to the basis for his request is expressed in unsatisfactorily broad and open-ended fashion:

> My aim or intentions for seeking a STAY-AND-ABEYANCE of (ALTERNATIVELY) LEAVE-TO-AMEND is for no other purposes than to ensure my one and [sic] opportunity to be heard in federal court pursuant to 28 U.S.C. § 2254 will include [all] of all [sic] my constitutional claims rather than relying on hopeful piecemeal litigation in the future.

Id.

Despite petitioner's counsel's efforts to impute the reasons for any untimely filing of the first amended petition solely to himself, the court finds that petitioner still has not demonstrated an adequate rationale for having omitted the exhausted juror bias claim in the timely original federal petition. Nor has petitioner demonstrated the requisite egregious behavior for which equitable tolling might be appropriate.

> We have not applied equitable tolling in non-capital cases where attorney negligence has caused the filing of a petition to be untimely. [Footnote omitted] In Frye v. Hickman, we considered a petition which was late because petitioner's attorney miscalculated the statute of limitations deadline. We held that "the miscalculation

> of the limitations period by Frye's counsel and his negligence in general do not constitute extraordinary circumstances sufficient to warrant equitable tolling." 273 F.3d at 1146. Less than a year later, we reached a similar conclusion in Miranda v. Castro. The petitioner in that case had been given erroneous information by the attorney serving as his appointed counsel for his direct appeal as to the deadline for filing a habeas petition, and he subsequently filed his habeas petition after the actual limitations period had run. The opinion reiterated Frye's holding that counsel's miscalculation and negligence in general do not constitute "extraordinary circumstances" sufficient to warrant equitable relief and cited numerous sister circuit decisions in accord with this position. 292 F.3d at 1068.

Spitsyn, supra, 345 F.3d at 800.

The court is compelled to agree with respondent that, at most, petitioner's counsel has demonstrated negligence in the delayed filing.[11] As the undersigned indicated at the hearing, when petitioner's counsel valiantly argued that it was his fault, not petitioner's, that he had four months to file an amended exhausted petition before seeking a stay and failed to do so and that with all of his experience the delay in this case precipitated by him constituted more than negligence, counsel's self-assessment of his actions was unduly harsh, noting the irony that attorney negligence is treated more harshly than truly egregious attorney behavior for purposes of evaluating entitlement to equitable tolling. Despite petitioner's counsel's unstinting efforts to heap opprobrium upon himself in service to his client, nothing that occurred in this record approaches the level of egregiousness requisite for this court to find that petitioner should be granted equitable tolling for the delayed filing of the first amended petition. Therefore, the court must recommend denial of the motion for leave to amend the second amended petition.

Accordingly, IT IS RECOMMENDED that petitioner's motion for leave to file a second amended petition, filed on April 9, 2007, be denied, this matter proceed upon the remaining claims of the first amended petition, that respondent be directed to file an answer,

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[11] In most areas of life the less culpable one is, the less the punishment, or at least the greater chance for not losing a benefit. However, for equitable tolling, the more culpable and egregious the actions of the attorney, the more the attorney, and hence the petitioner, benefits. It takes habeas corpus jurisprudence to acquire this seemingly perverse result.

within thirty days of adoption of these findings and recommendations, should that occur, and that petitioner be directed to file a traverse within thirty days thereafter.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: 02/04/08

/s/ Gregory G. Hollows

UNITED STATES MAGISTRATE JUDGE

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