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

SAMUEL E. PARRIS,

Petitioner,

No. CIV S-08-0316 WBS DAD P

vs.

D.K. SISTO, et al.,

Respondents.

FINDINGS AND RECOMMENDATIONS

\_\_\_\_\_ /

Petitioner is a state prisoner proceeding pro se with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Before the court is respondent Sisto’s motion to dismiss this action on the ground that it is barred under the applicable one-year statute of limitations.

I. Procedural Background

On November 5, 2002, a Butte County Superior Court jury found petitioner guilty of first degree murder and found a firearm discharge causing death enhancement allegation to be true. (Pet. at 2.) Petitioner was sentenced to two consecutive terms of 25 years to life. (Id.)

On February 9, 2005, the California Court of Appeal for the Third Appellate District affirmed petitioner’s judgment of conviction. (Id. at 26.) On May 11, 2005, the California Supreme Court summarily denied a petition for review filed on petitioner’s behalf. (Lod. Doc. 3.)

1           On March 3, 2006, petitioner filed a petition for writ of habeas corpus with the  
2 Butte County Superior Court. (Lod. Doc. 4.) The petition was denied on March 6, 2006. (Lod.  
3 Doc. 5.) On March 30, 2006, petitioner filed his habeas petition with the California Court of  
4 Appeal for the Third Appellate District. (Lod. Doc. 6.) The petition was summarily denied on  
5 April 6, 2006. (Lod. Doc. 7.) On May 9, 2006, petitioner filed a habeas petition with the  
6 California Supreme Court. (Lod. Doc. 8.) The petition was denied on December 13, 2006.  
7 (Lod. Doc. 9.) According to the California Supreme Court’s docket, it appears that the mailed  
8 denial of the petition was returned to the court marked as “unable to forward” on January 8, 2007  
9 and the returned mail was re-sent to petitioner on July 26, 2007. (Id.)

10           On February 8, 2008 petitioner signed his federal habeas petition and it was  
11 received by this court for filing on February 11, 2008.

## 12 II. Parties’ Arguments

13           Respondent argues that the federal habeas petition should be dismissed as  
14 untimely. Respondent contends that petitioner’s judgment of conviction became final on August  
15 9, 2005, 90 days after his petition for review was denied by the California Supreme Court.  
16 Counsel argues that the statute of limitations thus began to run on August 10, 2005, and  
17 continued to run until it was tolled on March 3, 2006 by petitioner’s filing of his habeas petition  
18 with the Butte County Superior Court. (Mot. to Dismiss (MTD) at 5.) Therefore, according to  
19 respondent, the statute of limitations ran for 206 days and petitioner then had 159 days left on the  
20 one-year limitations period. (Id.) Respondent contends that tolling of the statute of limitations  
21 for filing a federal petition ended on December 13, 2006 when the California Supreme Court  
22 denied petitioner’s habeas petition filed with that court. (Id.) Under respondent’s calculation,  
23 the statute of limitations ran for 159 days following the December 13, 2006, denial of the petition  
24 for review until it expired on May 22, 2007. (Id.) Respondent contends that since petitioner did  
25 not file his federal petition until February 11, 2008, he has exceeded the one-year period by  
26 almost nine months. (Id.)

1 In opposing the motion to dismiss, petitioner advances several arguments. First,  
2 petitioner argues that he was not aware of the California Supreme Court’s ruling until July 28,  
3 2007. (Pet’r Opp’n, Mem. P. & A. (Pet’r P&A) at 1.) Second, he contends that he did not have  
4 “the record to work from, as well as his own mental defects (no medications) and property  
5 receipt delays, from June 12, 2007 through August of 2007 also contributed to the delay [in filing  
6 his federal petition].” (Id.) Third, he contends that there was fraud upon the court and that this  
7 should prevent any statute of limitations bar. (Id. at 2.) In this regard, petitioner asserts that,

8 [t]he detective in this case lied and failed to inform the court  
9 during a hearing to suppress Petitioner’s confession, that as a  
10 matter of law, Petitioner was not free to leave the police  
11 interrogation room during a non-Mirandized interrogation, because  
12 the detectives had already obtained a warrant for Petitioner’s arrest,  
13 and they were duty-bound to execute that warrant, as a matter of  
14 law.

15 (Id. at 3.) Fourth, petitioner asserts that he is actually innocent of the crime for which he was  
16 convicted. (Id. at 4.) Petitioner contends that he suffers from post-traumatic stress disorder,  
17 chronic alcoholism and drug addiction and that counsel never investigated or addressed his  
18 mental disability at trial. (Id. at 4.) Thus, he argues that “[i]t is reasonably likely that Petitioner  
19 was not guilty by reason of insanity of mental defect at the time of the crime and he is legally and  
20 actually innocent.” (Id.)

### 21 III. The Statute of Limitations under the AEDPA

22 Under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), a  
23 one-year period of limitation applies to a petition for writ of habeas corpus filed in federal court  
24 by a person in custody pursuant to the judgment of a state court. 28 U.S.C. § 2244(d)(1). The  
25 period of limitation applies to all federal habeas petitions filed after the statute was enacted.  
26 Lindh v. Murphy, 521 U.S. 320, 322-23 (1997). Because this action was commenced in 2008,  
the AEDPA period of limitation is applicable to the petition.

Pursuant to 28 U.S.C. § 2244(d)(1), the statute of limitations shall run from the  
latest of:

1 (A) date on which judgment became final by the conclusion of direct  
2 review or that time period;

3 (B) date on which the impediment to filing an application is removed;

4 (C) date on which the constitutional right asserted was initially recognized  
5 by the Supreme Court; or

6 (D) date on which the factual predicate of the claim(s) could have been  
7 discovered

8 Under 28 U.S.C. § 2244(d)(2), the time during which a properly filed habeas  
9 petition is pending before a state court, is not counted towards the one-year limitation period.  
10 The period between the denial of a state petition and the timely filing of a subsequent  
11 petition in a higher court is also tolled. See Evans v. Chavis, 546 U.S. 189, 192 (2006); Carey v.  
Saffold, 536 U.S. 214, 223 (2002).

#### 12 IV. Analysis

##### 13 A. Application of the AEDPA Statute of Limitations

14 The statute of limitations for petitioner's filing of a federal application for a writ  
15 of habeas corpus began to run when his judgment of conviction became final at the conclusion of  
16 the direct review of that judgment on appeal. The California Supreme Court denied the petition  
17 for review filed on his behalf on May 11, 2005 and the judgment of conviction became final 90  
18 days thereafter, on August 10, 2005.<sup>1</sup> Thus, the one-year statute of limitations for the filing of a  
19 federal habeas petition began to run on August 10, 2005.

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22 <sup>1</sup> When a petitioner has sought direct review of the judgment of conviction by the  
23 California Supreme Court, the period of "direct review" includes the period within which a  
24 petitioner can file a petition for a writ of certiorari from the United States Supreme Court,  
25 whether or not the petitioner actually files such a petition. Bowen v. Roe, 188 F.3d 1157, 1159  
26 (9th Cir. 1999). Rule 13 of the Rules of the United States Supreme Court requires that a writ of  
certiorari to review a judgment be filed "within 90 days after entry of the judgment." In addition,  
Rule 6(a) of the Federal Rules of Civil Procedure provides that the day of the event that begins  
the time period, is excluded. Therefore, the 90 day period began to run in petitioner's case on  
May 12, 2005 and concluded on August 10, 2005. See Patterson v. Stewart, 251 F.3d 1243, 1246  
(9th Cir. 2001) (applying Rule 6(a) to computing AEDPA's limitations period).

1           The statute of limitations ran for 205 days, from August 10, 2005, until March 3,  
2 2006, the date petitioner filed his habeas petition with the Butte County Superior Court at which  
3 time it was tolled.<sup>2</sup> Tolling continued while petitioner sought habeas relief in the state courts,  
4 and ended when the California Supreme Court denied his habeas petition on December 13, 2006.  
5 Since petitioner had already used 205 days of the one-year statute of limitations when he began  
6 seeking collateral review of his conviction in the state courts, he had only 160 days to file his  
7 federal petition after the California Supreme Court denied his habeas petition. Thus, the federal  
8 statute of limitations would have expired on May 23, 2007. Assuming the earliest possible filing  
9 date is the date petitioner signed his federal habeas petition, February 8, 2008, petitioner's federal  
10 petition was filed at least eight months after the AEDPA's one-year statute of limitations had  
11 expired.

#### 12           B. Equitable Tolling

13           Petitioner's opposition to the pending motion to dismiss can be interpreted as  
14 arguing that he should be entitled to the equitable tolling of the statute of limitations.<sup>3</sup> The

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16           <sup>2</sup> The lodged copy of petitioner's habeas petition filed with the Butte County Superior  
17 Court is incomplete. It does not include the last page of the petition which would show the date  
18 petitioner signed the petition and which could establish an earlier filing date with the application  
19 of the mailbox rule. However, petitioner has not argued that he is entitled to an earlier filing  
20 date, and additional statutory tolling, with respect to this habeas petition. Moreover, given the  
21 fact that the federal petition in this case was filed more than eight months after the federal statute  
22 of limitations expired, a few additional days or weeks of statutory tolling would be of no  
23 consequence.

24           <sup>3</sup> The Supreme Court has assumed, without deciding, that equitable tolling applies to the  
25 AEDPA statute of limitations. See Lawrence v. Florida, 549 U.S. 327, \_\_\_, 127 S. Ct. 1079,  
26 1085 (2007). Recently, in Bowles v. Russell, 551 U.S. 205, \_\_\_, 127 S. Ct. 2360, 2366-67  
(2007), the Court held that the timely filing of a notice of appeal is a jurisdictional requirement  
for which there are no equitable exceptions. In some quarters this holding perhaps suggested the  
unavailability of equitable tolling with respect to the AEDPA statute of limitations. However,  
courts have continued to apply equitable tolling in the AEDPA context in the wake of the  
decision in Bowles. See Diaz v. Kelly, 515 F.3d 149, 153-54 (2nd Cir. 2008) (concluding that  
even after the Bowles decision equitable tolling remains available to toll the AEDPA limitations  
period and finding that conclusion to be confirmed by the Supreme Court's decision in John R.  
Sand & Gravel Co. v. United States, \_\_\_ U.S. \_\_\_, 128 S. Ct. 750 (2008) which noted that most  
limitation periods are non-jurisdictional affirmative defenses subject to equitable tolling); see  
also Lopez v. Bock, No. CV 07-1192-PHX-JAT, 2008 WL 2545073 at \*3 (D. Ariz. June 23,

1 United States Supreme Court has held that, “a litigant seeking equitable tolling bears the burden  
2 of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that  
3 some extraordinary circumstance stood in his way.” Pace v. DiGuglielmo, 544 U.S. 408, 418  
4 (2005). In order to be entitled to equitable tolling, it is “external forces,” rather than a  
5 petitioner’s lack of diligence that must account for the failure to file a timely petition. Miles v.  
6 Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999). “[T]he threshold necessary to trigger equitable  
7 tolling under AEDPA is very high, lest the exceptions swallow the rule.” Miranda v. Castro, 292  
8 F.3d 1063, 1066 (9th Cir. 2002) (citation omitted). As a consequence, equitable tolling will be  
9 unavailable in most cases. See Calderon (Beeler) v. U.S. Dist. Court for the Cent. Dist. of Cal.,  
10 128 F.3d 1286, 1288 (9th Cir. 1997).

11 1. Lack of Notice of the California Supreme Court’s Decision

12 Petitioner contends that he did not receive the California Supreme Court’s  
13 decision denying his habeas petition filed with that court. The California Supreme Court’s  
14 docket records the following activities:

15 May 9, 2006: Petition for writ of habeas corpus filed

16 December 13, 2006: Petition for writ of habeas corpus denied

17 January 8, 2007: Mail returned (unable to forward)

18 July 26, 2007: Mail returned and re-sent

19 (Lod. Doc. 9.)

20 Petitioner asserts that on June 12, 2007, he was transferred from California State  
21 Prison (CSP)-Lancaster to CSP-Solano and that between June 15, 2007 and June 25, 2007, he  
22 notified the California Supreme Court about his change of address and inquired about the status  
23 of his case. (Opp’n, Decl. (Pet’r Decl.) ¶ 4 at 1.) On July 28, 2007, petitioner received the  
24 California Supreme Court’s response to his inquiry and learned for the first time that his petition

25 \_\_\_\_\_  
26 2008) (noting that “the 9th Circuit has continued to apply equitable tolling to the AEDPA’s  
statute of limitations post-Bowles.”).

1 had been denied by that court. (Id. ¶ 6 at 1.) In his memorandum of points and authorities,  
2 petitioner cites to the decision in Corjasso v. Ayers, 278 F.3d 874 (9th Cir. 2002)<sup>4</sup> and asserts  
3 that the California Supreme Court’s “error in not notifying Petitioner that his petition was  
4 denied” caused considerable “delay.” (Pet’r P&A at 1.)

5           Equitable tolling requires that the petitioner establish that he acted diligently in  
6 filing his federal habeas petition. The court finds that petitioner failed to do so in this case.  
7 After petitioner filed his habeas petition with the California Supreme Court on May 9, 2006, he  
8 took no further action nor made any inquiry about the status of that petition for over a year until  
9 sometime between June 15, 2007 and June 25, 2007. (Pet.’s Decl. ¶ 5 at 1.) Petitioner contends  
10 that on July 28, 2007,<sup>5</sup> he received notification from the California Supreme Court that his  
11 habeas petition had been denied back on December 13, 2006. Nonetheless, he waited another six  
12 months after receiving that notice before filing his federal habeas petition on February 8, 2008.<sup>6</sup>  
13 Such lengthy periods of inaction do not establish diligence. See McGuire v. Mendoza-Powers,  
14 No. 1:07-CV-00086 OWW GSA HC, 2008 WL 1704089 at \*12 (E.D. Cal. April 10, 2008)  
15 (denying equitable tolling because, although petitioner argued that he did not receive notice from  
16 the superior court that his habeas petition was denied, he waited eight months before inquiring on  
17 the status of his petition); Hunter v. Galaza, No. 1:05-cv-01300-OWW-TAG HC, 2007 WL  
18 2812176 at \*6 (E.D. Cal. Sept. 26, 2007) (denying equitable tolling because, although appellate  
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20           <sup>4</sup> In that case the Ninth Circuit found that the petitioner was entitled to equitable tolling  
21 of the AEDPA statute of limitations because the district court had erred in dismissing his original  
22 federal petition. Corjasso v. Ayers, 278 F.3d 874, 878 (9th Cir. 2002).

23           <sup>5</sup> In his declaration submitted to this court, petitioner admits that on July 28, 2007, he  
24 received notice that his habeas petition filed with the California Supreme Court had been denied.  
25 (Pet.’s Decl. ¶ 6 at 1.)

26           <sup>6</sup> The federal habeas petition was signed on February 8, 2008 and received for filing on  
February 11, 2008. The court notes that all of the claims contained in the federal petition were  
fully briefed in petitioner’s petition for review to the California Supreme Court and in the habeas  
petition he filed with the California Supreme Court. Delay of any significance in filing the  
federal petition therefore cannot be attributed to the time needed to draft the federal petition.

1 counsel failed to inform petitioner about the denial of the petition for review by the California  
2 Supreme Court, petitioner did nothing for over a year to verify the status of that petition); Lindo  
3 v. Lefever, 193 F. Supp. 2d 659, 663 (E.D. N.Y. 2002) (denying equitable tolling because,  
4 although petitioner argued that due to his prison transfer he did not receive the notice that his  
5 state petition had been denied, he failed to act diligently once he received the decision); see also  
6 Gillory v. Roe, 329 F.3d 1015, 1018 (9th Cir. 2003) (finding that petitioner was not reasonably  
7 diligent where he waited twenty-seven months to present unexhausted claims to the California  
8 Supreme Court and seven months after that court's decision to return to federal court).

9           2. Lockdowns and Mental Disability

10           Petitioner contends that from June 12, 2007 through August of 2007, numerous  
11 lock-downs at the institution where he was incarcerated prevented him from obtaining his  
12 property and that his post-traumatic stress disorder also interfered with his ability to file his  
13 federal petition. (Pet'r P&A at 1; Pet'r Decl. ¶ 7 at 1.) Petitioner also argues that his property  
14 was withheld from him for that same length of time following his transfer from CSP-Lancaster to  
15 CSP-Solano. (Pet'r Decl. ¶ 3 at 1.) In support of his allegation that his mental health condition  
16 contributed to the delay, petitioner submits a Mental Health Placement Chrono dated June 12,  
17 2008, indicating that he met the criteria for the Mental Health Services Delivery System  
18 (MHSDS) at that time. (Opp'n, Attach. B.)

19           As noted above, the burden is on petitioner to show that he suffered extraordinary  
20 circumstances beyond his control that made it impossible for him to file his petition on time.  
21 Gaston v. Palmer, 417 F.3d 1030, 1034 (9th Cir. 2005). The court is not persuaded that  
22 petitioner has shown a causal connection between his allegations of lock-downs, lack of access to  
23 his property, and his mental condition and his ability to file his federal habeas petition in a timely  
24 manner. See Perez v. Hedgpeth, No. CV F 06-00846 AWI DLB HC, 2009 WL 174145 at \*5  
25 (E.D. Cal. Jan. 23, 2009) ("Petitioner's vague claim that lockdowns hindered his ability to file a  
26 timely petition is insufficient to justify equitable tolling. Occasional lockdowns are experienced



1 by all inmates attempting to file collateral petitions.”); Ross v. Hickman, No. C 00-2887 CRB  
2 (PR), 2001 WL 940911 (N.D. Cal. Aug. 10, 2001) (“Petitioner’s alleged enrollment in a prison  
3 mental health program and receiving psychotropic medication does not in of itself establish that  
4 he was mentally incompetent. Most mental illnesses are treatable, and with proper treatment  
5 many, if not most, sufferers are capable of managing their own affairs. In order to overcome the  
6 limitation barrier, petitioner must show that mental illness or other disability rendered him  
7 incapable of filing a habeas petition before the limitation period expired[.]”); United States v.  
8 Van Poyck, 980 F. Supp. 1108, 1111 (C.D. Cal. 1997) (concluding that defendant failed to  
9 explain why security lockdowns or unavailability of transcripts made it impossible for him to file  
10 his petition on time).

11 For these reasons, the undersigned finds that petitioner has failed to establish that  
12 he is entitled to equitable tolling so as to render the pending petition timely.

### 13 3. Fraud

14 Petitioner argues that the state trial court’s ruling on the admissibility of his  
15 “non-Mirandized’ confession” was obtained by fraud committed by the police and prosecutor.  
16 (Pet’r P&A at 2.) In this regard, petitioner contends:

17 The detective in this case lied and failed to inform the court during  
18 a hearing to suppress Petitioner’s confession, that as a matter of  
19 law, Petitioner as not free to leave the police interrogation room  
20 during a non-Mirandized interrogation, because the detectives had  
already obtained a warrant for Petitioner’s arrest, and they were  
duty-bound to execute that warrant, as a matter of law.

21 (Id. at 3.) Because of this “fraud,” petitioner argues that the AEDPA statute of limitations should  
22 not apply in his case. (Id. at 4.) Whether petitioner’s confession was obtained by fraud has no  
23 bearing on the timeliness of his federal habeas petition and does not provide grounds for  
24 equitable tolling. See Chavez v. Henry, No. CV F 05-00490 OWW DLB HC, 2006 WL  
25 1875442, at \*7 (E.D. Cal. July 3, 2006) (holding that petitioner is not entitled to equitable tolling  
26 based on counsel’s fraudulent representation that she was an attorney when the fraud had no

1 bearing on petitioner’s direct review or the filing of state habeas petitions). Here, the alleged  
2 misconduct, characterized by petitioner as “fraud,” was committed during the underlying  
3 criminal proceedings and long prior to the entry of petitioner’s judgment of conviction. Even if  
4 petitioner were able to prove such allegations, the alleged misconduct obviously had no effect on  
5 petitioner’s ability to timely file a federal habeas petition.

6 4. Actual Innocence

7 Petitioner argues that his post-traumatic stress disorder caused him to suffer from  
8 chronic alcoholism and drug addiction and that, “[i]t is reasonably likely that Petitioner was not  
9 guilty by reason of insanity of mental defect at the time of the crime, and he is legally and  
10 actually innocent.” (Mem. P&A at 4.) Petitioner further contends that his trial counsel failed to  
11 have him examined by a doctor, never reviewed his medical records, and failed to call his  
12 treating physician. (Id.)<sup>7</sup>

13 A habeas petitioner’s “otherwise-barred claims [may be] considered on the merits  
14 . . . if his claim of actual innocence is sufficient to bring him within the ‘narrow class of cases . . .  
15 implicating a fundamental miscarriage of justice.’” Carriger v. Stewart, 132 F.3d 463, 477 (9th  
16 Cir. 1997) (quoting Schlup v. Delo, 513 U.S. 298, 315 (1995)). To qualify under this exception,  
17 the petitioner’s claim of actual innocence must be supported “with new reliable evidence –  
18 whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical  
19 physical evidence – that was not presented at trial.” Schlup, 513 U.S. at 324. The petitioner  
20 “must show that, in light of all the evidence, including evidence not introduced at trial, ‘it is more  
21 likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable  
22 doubt.’” Majoy v. Roe, 296 F.3d 770, 776 (9th Cir. 2002) (quoting Schlup, 513 U.S. at 327).  
23 See also Griffin v. Johnson, 350 F.3d 956, 962-63 (9th Cir. 2003); Sistrunk v. Armenakis, 292  
24 F.3d 669, 672-73 (9th Cir. 2002) (en banc) (concluding that petitioner’s claim of actual

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26 <sup>7</sup> The only evidence of mental disability submitted by petitioner to this court is the  
Mental Health Placement Chrono previously noted above. (Opp’n, Ex. B.)



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

3 DATED: January 28, 2009.

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7 DALE A. DROZD  
8 UNITED STATES MAGISTRATE JUDGE

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