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

JAMES DEAN EGY,

Petitioner,

No. CIV S-08-0694 GEB GGH P

vs.

MICHAEL EVANS, et al.,

Respondents.

FINDINGS AND RECOMMENDATIONS

I. Introduction

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 1999 conviction for several counts of child molestation. He is serving a determinate sentence of 18 years. This action is proceeding on the original petition filed April 2, 2008. Pending before the court is respondent's June 27, 2008, motion to dismiss on grounds that this action is barred by the statute of limitations.

After carefully considering the record, the court recommends that respondent's motion be granted.

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1 II. Motion to Dismiss

2 The statute of limitations for federal habeas corpus petitions is set forth in 28

3 U.S.C. § 2244(d)(1):

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

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

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

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

18 (D) the date on which the factual predicate of the claim or claims
19 presented could have been discovered through the exercise of due
20 diligence.

21 On April 9, 2003, the California Supreme court denied petitioner's petition for
22 direct review. Respondent's Lodged Document 6. Therefore, petitioner's conviction became
23 final when the time for filing a petition for writ of certiorari expired 90 days later on July 8,
24 2003. Bowen v. Roe, 188 F.3d 1157, 1159 (9th Cir.1999). Time began to run the next day, on
25 July 9, 2003. Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001). Petitioner had one year,
26 that is, until July 8, 2004, to file a timely federal petition, absent applicable tolling. The instant
action, filed April 2, 2008, is not timely unless petitioner is entitled to statutory or equitable
tolling.

27 Petitioner filed five state post-conviction collateral actions. The first and second
28 habeas petitions were filed by counsel. The final three habeas petitions were filed pro se:

29 1. October 30, 2003: first habeas petition filed in the Sacramento County
30 Superior Court. Respondent's Lodged Document at 5. On December 3, 2003, the
31 Superior Court denied the first petition with a reasoned opinion. Id., at 6.

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2 2. December 23, 2004: second habeas petition filed in the California Supreme
3 Court. Id., at 7. On January 18, 2006, the California Supreme Court denied the
4 second petition without comment or citation. Id., at 8.

5 3. March 13, 2007: third habeas petition filed in the Sacramento County Superior
6 Court. Id., at 9. On April 27, 2007, the Sacramento County Superior Court
7 denied the third petition, with a reasoned opinion that referred to In re Clark, 5
8 Cal.4th 750 (1993). Id., at 10.

9 4. July 2, 2007: fourth habeas petition filed in the California Court of Appeal,
10 Third Appellate District. Id., at 11. On August 9, 2007, the California Court of
11 Appeal denied the fourth petition, without comment or citation. Id., at 12.

12 5. September 20, 2007: fifth habeas petition filed in the California Supreme
13 Court. Id., at 13. On March 12, 2008, the California Supreme Court denied the
14 fifth petition, with references to In re Clark, 5 Cal.4th 750 (1993); In re Robbins,
15 18 Cal.4th 770, 780 (1998); In re Waltreus, 62 Cal. 2d 218 (1965); In re Dixon, 41
16 Cal.2d 756 (1953); In re Swain, 34 Cal.2d 300, 304 (1949). Id., at 14.

17 Petitioner filed the instant petition on April 2, 2008.

18 Statutory Tolling

19 Under AEDPA, the period of limitation is tolled while a “properly filed”
20 application for state post-conviction or other collateral review is pending. 28 U.S.C. §
21 2244(d)(2). Petitions are properly filed so long as there was no unreasonable delay between the
22 petitions, and if each petition is properly filed, then a petitioner is entitled to a tolling of the
23 statute of limitations in the intervals between a lower court decision and the filing of a petition in
24 a higher court during one complete round of appellate review (“interval tolling”). See Evans v.
25 Chavis, 546 U.S. 189, 193-94, 126 S.Ct. 846, 850 (2006).

26 The Supreme Court has explained that in order for a state habeas petition to be
“properly filed” for purposes of statutory tolling, the petition's delivery and acceptance must be in
compliance with the laws and rules governing such filings. Pace v. DiGuglielmo, 544 U.S. 408,
413-14, 125 S.Ct. 1807 (2005). “[T]ime limits, no matter their form, are ‘filing’ conditions.”
Pace v. DiGuglielmo, 544 U.S. at 417, 125 S.Ct. at 1814. “When a post-conviction petition is
untimely under state law, that is the end of the matter for purposes of § 2244(d)(2).” Id. at 414,
125 S.Ct. at 1812. Under such circumstances, the petitioner is not entitled to statutory tolling.

1 Id. at 417, 125 S.Ct. at 1814.

2 Petitioner’s first petition, filed on October 30, 2003, occurred 113 days after
3 judgment became final. Respondent concedes that petitioner is entitled to statutory tolling during
4 the pendency of the first petition. Motion to Dismiss (MTD) at 4. Petitioner is entitled to tolling
5 for the period from October 30, 2003, the date the first petition was filed, to December 3, 2003,
6 the date the first petition was denied, 35 days. Id. Petitioner was required to file the instant
7 federal petition by August 11, 2004.

8 The first petition was denied on December 3, 2003, but the second petition was
9 not filed for more than a year, on December 23, 2004. Respondent argues that time should not be
10 tolled as the delay was too lengthy. MTD at 5.

11 Petitioner is not entitled to statutory tolling for the more than one-year delay
12 between the denial of his first petition on December 3, 2003, and the filing of the second petition
13 on December 23, 2004. See Evans v. Chavis, 546 U.S. at 201, 126 S.Ct. at 854 (2006); see also
14 Gaston v. Palmer, 447 F.3d 1165, 1167 (9th Cir.2006) (amending 417 F.3d 1030 (9th Cir.2005)
15 (petitioner not entitled to “gap” tolling for intervals between California state habeas filings of 15
16 months, 18 months, and 10 months, given length of delays, lack of clear statement from
17 California legislature or courts that delays of such length were reasonable, and lack of
18 explanation or justification for delays)); Culver v. Director of Corrections, 450 F.Supp.2d 1135,
19 1140-1141 (C.D.Cal.2006) (unexplained, unjustified delays of 97 and 71 days between the denial
20 of one state petition and the filing of the next petition constituted unreasonable delays such that
21 the intervals cannot be tolled under Chavis). Thus, there will be no statutory tolling for the time
22 between the first and second petitions or when the second petition was pending before the
23 California Supreme Court. As is set forth infra, the time period involved here will be tolled for
24 equitable reasons, i.e. egregious lack of competent representation. Although the lack of
25 competent representation “explains” the delay, the undersigned believes that the factors in
26 equitable tolling should not be mixed up with concepts of statutory tolling.

1 In addition, petitioner is not entitled to statutory tolling for the third, fourth and
2 fifth petitions. Petitioner filed his third petition in Sacramento County Superior Court on March
3 13, 2007. The Sacramento County Superior Court denied the third petition as untimely, as the
4 claims presented were previously presented and rejected in earlier petitions or could have been
5 raised in earlier petitioners, citing In re Clark, 5 Cal.4th 750, 770 (1993).¹ Sacramento County
6 Superior Court # 07F02797, April 27, 2007. California rules provide that a successive petition is
7 by necessity a delayed petition. In re Clark, at 770 (holding that, “a successive petition
8 presenting additional claims that could have been presented in an earlier attack on the judgment
9 is, of necessity, a delayed petition”). The Supreme Court has stated, “[w]hen a postconviction
10 petition is untimely under state law, ‘that [is] the end of the matter’ for purposes of §
11 2244(d)(2).” Pace v. DiGuglielmo, 544 U.S. at 414, 125 S.Ct. at 1812 (quoting Carey v. Saffold,
12 536 U.S. 214, 226, 122 S.Ct. 2134 (2002)). The court agrees with respondent that the
13 Sacramento County Superior Court’s finding that petitioner’s habeas corpus petition was
14 untimely under California law means that the petition was not “properly filed” and therefore did
15 not toll the limitations period. See Bonner v. Carey, 425 F.3d 1145, 1149 (9th Cir. 2005)
16 (“[b]ecause the California courts dismissed Bonner’s petition as untimely, his petition was not
17 “properly filed” under AEDPA).

18 Therefore, statutory tolling will not apply from the time of the denial of the first
19 petition, December 3, 2003, to the denial by the California Supreme Court of the fifth petition,
20 March 12, 2008.

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24 ¹ Petitioner’s next petition to the California Court of Appeals was denied without
25 comment or citation. Petitioner’s following petition to the California Supreme Court was denied
26 with citations to In re Clark, 5 Cal.4th 750 (1993); In re Robbins, 18 Cal.4th 770, 780 (1998); In
re Waltreus, 62 Cal. 2d 218 (1965); In re Dixon, 41 Cal.2d 756 (1953); In re Swain, 34 Cal.2d
300, 304 (1949).

1 Equitable Tolling

2 Petitioner argues that he is entitled to equitable tolling due to ineffective
3 assistance of counsel and medical reasons.

4 The AEDPA's one-year statute of limitations is subject to equitable tolling but
5 only if a petitioner can show “ ‘(1) that he has been pursuing his rights diligently, and (2) that
6 some extraordinary circumstance stood in his way’ and prevented timely filing.” Pace v.
7 Diguglielmo, 544 U.S. 408, 418, 125 S.Ct. 1807 (2005). Petitioner bears the burden of alleging
8 facts that would give rise to tolling. Pace, 544 U.S. at 418, 125 S.Ct. at 1814. “Equitable tolling
9 is unavailable in most cases,” and is only appropriate “if *extraordinary* circumstances beyond a
10 prisoner’s control make it impossible to file a petition on time.” Miranda v. Castro, 292 F.3d
11 1063, 1066 (2002) (internal quotations/citations omitted [emphasis added in Miranda]). A
12 petitioner must reach a “very high” threshold “to trigger equitable tolling [under AEDPA]...lest
13 the exceptions swallow the rule.” Id.

14 Petitioner contends that he received ineffective assistance of counsel as
15 petitioner’s counsel for the first and second habeas petitions voluntarily resigned, with charges
16 pending, from the State Bar. In re White, 121 Cal. App.4th 1453, 1459 (Cal. App. 2004). He
17 seeks equitable tolling from December 3, 2003, the date the first petition was denied to June 15,
18 2006, the date petitioner learned from counsel that the second petition was denied.

19 In Calderon v. U.S. District Court (Beeler), 128 F.3d 1283, 1288 (9th Cir. 1997),
20 overruled on other grounds, Calderon v. U. S. District Court (Kelly), 163 F.3d 530 (9th Cir.
21 1998), itself abrogated by Woodford v. Garceau, 538 U.S.202, 123 S. Ct. 1398 (2003), the Ninth
22 Circuit found that the statute of limitations could be equitably tolled if extraordinary
23 circumstances beyond a prisoner’s control made it impossible to file the petition on time. “In
24 addition, ‘[w]hen external forces, rather than a petitioner’s lack of diligence, account for the
25 failure to file a timely claim, equitable tolling may be appropriate.’” Lott v. Mueller, 304 F.3d
26 918, 922 (9th Cir. 2002), quoting Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999).

1 As held in Beeler, “[w]e have no doubt that district judges will take seriously
2 Congress’s desire to accelerate the federal habeas process, and will only authorize extensions
3 when this high hurdle is surmounted.” 128 F.3d at 1289. “Mere excusable neglect” is
4 insufficient as an extraordinary circumstance. Miller v. New Jersey Dept. of Corrections, 145
5 F.3d 616, 619 (3rd Cir. 1998). Moreover, ignorance of the law does not constitute such
6 extraordinary circumstances. See Hughes v. Idaho State Bd. of Corrections, 800 F.2d 905, 909
7 (9th Cir. 1986).

8 In the Calderon (Beeler) case, the Court of Appeals held that the district court
9 properly found equitable tolling to allow Beeler more time to file his petition. Beeler’s lead
10 counsel withdrew after accepting employment in another state, and much of the work he left
11 behind was not useable by replacement counsel – a turn of events over which the court found
12 Beeler had no control. The Court of Appeals held that the district court properly found these
13 were “extraordinary circumstances” sufficient to toll the statute of limitations.²

14 The Ninth Circuit also found extraordinary circumstances in Calderon v. U.S.
15 Dist. Ct. For Cent. Dist. Of Ca. (Kelly), 163 F.3d 530 (9th Cir. 1998) (en banc). The three
16 reasons given which independently justified tolling were: a district court stay which prevented
17 petitioner’s counsel from filing a habeas petition, mental incompetency until a reasonable time
18 after the court makes a competency determination, and the fact that petitioner did at one time
19 have timely habeas proceedings pending which were mistakenly dismissed, not as a result of any
20 doing by petitioner. Id. at 541-42. See also Corjasso v. Ayers, 278 F.3d 874 (9th Cir. 2002)
21 (clerk’s unjustified rejection of a petition justified partial tolling); Miles v. Prunty, 187 F.3d at
22 1107 (delay by prison in withdrawing funds from prisoner’s trust account, preparing and mailing
23 filing fee were circumstances beyond his control, qualifying him for equitable tolling); Stillman

25 ² See also Baskin v. United States, 998 F. Supp. 188 (D. Conn. 1998), wherein the court
26 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.

1 v. Lamarque, 319 F.3d 1199, 1202-03 (9th Cir. 2003) (equitable tolling permitted where litigation
2 coordinator broke a promise to petitioner’s counsel to return a signed petition for timely filing);
3 Spitsyn v. Moore, 345 F.3d 796 (9th Cir. 2003) (sufficiently egregious misconduct by counsel,
4 such as wholly deficient performance, may justify equitable tolling).

5 Conversely, in U.S. v. Van Poyck, 980 F. Supp. 1108, 1110-11 (C.D. Cal. 1997),
6 the court found that a petitioner’s circumstances were not extraordinary in the following
7 circumstances: inability to obtain transcripts from court reporters, and general prison lockdowns
8 preventing the prisoner’s access to the library and a typewriter which were necessary to his
9 motion. See also Frye v. Hickman, 273 F.3d 1144, 1146 (9th Cir. 2001) (counsel’s miscalculation
10 of limitations period “and his negligence in general do not constitute extraordinary circumstances
11 sufficient to warrant equitable tolling”); Tacho v. Martinez, 862 F.2d 1376, 1381 (9th Cir. 1988)
12 (reliance on incompetence of jailhouse lawyer not sufficient to justify cause to excuse procedural
13 default); Turner v. Johnson, 177 F.3d 390, 392 (5th Cir. 1999) (prisoner’s unfamiliarity of law did
14 not toll statute); Eisermann v. Penarosa, 33 F.Supp.2d 1269, 1273 (D.Haw. 1999) (lack of legal
15 expertise does not qualify prisoner for equitable tolling); Henderson v. Johnson, 1 F.Supp.2d
16 650, 656 (N.D. Tex. 1998) (same); Fadayiro v. United States, 30 F.Supp.2d 772, 779-80 (D.N.J.
17 1998) (delay in receipt of transcripts does not justify equitable tolling).

18 Petitioner described his representation from attorney, Richard Dangler, and his
19 associates. Dangler was listed as not eligible to practice law as of June 30, 2004, and resigned
20 with charges pending as of September 3, 2004. In re White, 121 Cal. App.4th 1453, 1459 (Cal.
21 App. 2004).

22 Petitioner retained Dangler for state post-conviction collateral actions, after
23 petitioner’s conviction became final. Opposition to Motion to Dismiss (Opp.) at 2. After the
24 denial of petitioner’s first petition on December 3, 2003, petitioner was still represented by
25 Dangler who was purportedly working on the second petition. Id. On June 11, 2004, petitioner
26 received a letter from Dangler who indicated that he was retiring from the practice of law due to

1 health problems and unspecified other problems. Opp., Exh. 1. Dangler stated that he had been
2 working diligently on petitioner’s second petition, “which is soon ready to be filed.” Id. Dangler
3 did not mention his legal problems with the State Bar, nor was petitioner aware of the situation at
4 that time. Dangler stated that another attorney from his office, Roman Rector, would be
5 assuming responsibility for petitioner’s case. Id.

6 On September 23, 2004, petitioner received a letter from Kathryn Clark, an
7 attorney in Rector’s law office. Opp., Exh. 2. Clark stated that she had just received petitioner’s
8 file for the second petition, but had not reviewed it in depth. Id. The second petition was filed
9 on December 23, 2004, and was denied by the California Supreme Court on January 18, 2006.
10 Petitioner wrote a letter to Rector’s law office, on June 2, 2006, to discover the status of the
11 second petition.³ On June 15, 2006, Rector replied to petitioner and stated that the second
12 petition was denied on January 18, 2006, and they would no longer be representing petitioner.
13 Opp., Exh. 3. Petitioner alleges that this was the first time he became aware of the denial of the
14 second petition.

15 Petitioner seeks equitable tolling from December 3, 2003, the date the first
16 petition was denied to June 15, 2006, the date petitioner learned from counsel that the second
17 petition was denied.

18 This court finds that petitioner should be granted equitable tolling for the entire
19 period of Dangler’s and Rector’s representation. Spitsyn v. Moore, 345 F.3d 796, 800 (9th
20 Cir.2003) (“where an attorney’s misconduct is sufficiently egregious, it may constitute an
21 ‘extraordinary circumstance’ warranting equitable tolling of AEDPA’s statute of limitations.”).
22 In Spitsyn, the Ninth Circuit noted that “[d]etermining whether equitable tolling is warranted is a
23 ‘fact specific’ inquiry.” 345 F.3d at 799. Dangler’s legal history was well documented in, In re:

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26 ³ This letter is not an exhibit nor has the court viewed it.

1 White, 121 Cal. App.4th 1453 (Cal. App. 2004)⁴. In the instant case, the facts reveal that
2 petitioner was under the impression that Dangler and then Rector were diligently working on the
3 second petition. The court finds that petitioner was reasonably diligent in securing habeas
4 counsel in a reasonable time period after petitioner's conviction became final. There is little
5 doubt that Dangler's conduct was, and has been recognized as, wholly deceptive and
6 "spectacularly deficient." For this reason, the court finds that petitioner is entitled to equitable
7 tolling for the period during which he was associated with either Dangler or Rector, from
8 December 3, 2003 through June 15, 2006.

9 Petitioner is entitled to 925 days of equitable tolling. The August 11, 2004,
10 deadline to file the instant petition was tolled until February 22, 2007. Yet, the instant petition
11 was filed more than a year later on April 2, 2008.

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14 ⁴ In White, the California Third District Court of Appeal, in an exhaustive opinion,
15 sanctioned Richard H. Dangler, Jr., for the filing of "such egregious cases," wherein Dangler,
16 inter alia submitted petitions that contained "gross misstatements of fact, misrepresentations of
17 law, and repetitions of appellate contentions long ago resolved.... In addition, ...[to accusing] this
18 court of ignoring the law ... and ...[being] ...biased in favor of the prosecution." The court noted
19 that Dangler's repeated misrepresentations of facts and frivolous contentions in three earlier
20 appeals decided in 1991 and 1992 resulted in his removal from the attorney panel appointed to
21 represent indigents on appeal in the district. Consolidating three petitions subsequently filed by
22 Dangler in White, for a hearing on the case and orders to show cause in 2004, the court found
23 "that Dangler has for some time been operating a writ mill, in which attorneys and essentially
24 unsupervised law students have written petitions for writs of habeas corpus for filing in state and
25 federal courts under Dangler's name. Dangler signed a great number of the petitions without
26 reading them, and on some occasions a clerical employee signed Dangler's name on the petitions.
Dangler generally received a \$7,250 retainer to pursue habeas corpus relief. He paid law students
up to \$2,000 for their virtually unsupervised work on a client's case, or paid attorneys up to
\$2,500 per client. Thus, from each client, Dangler kept close to \$5,000, less other overhead, for
personally providing no legal service whatsoever." The court noted a State Bar disciplinary
action pending against Dangler and his voluntary resignation with pending charges. The state
appellate court dismissed the three petitions as frivolous, denying them without prejudice so that
each petitioner could file a new petition, and imposed monetary sanctions against Dangler. It
was found that far from achieving favorable results as he claimed for a number of his clients, he
was successful in only one out of 53 petitions he had filed over a period of about 12 years. It
appeared to the court "that [Dangler] might be systematically misleading his clients and abusing
the writ process for pecuniary gain." In addition, the court recounted prior contempt proceedings
against Dangler. 121 Cal. App.4th at 1457-1463, 18 Cal. Rpt.3d 444.

