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

ANDERSON P. THURSTON,

Petitioner,

No. CIV S-08-2280-LKK-GGH P

vs.

JAMES YATES,

Respondents.

FINDINGS AND RECOMMENDATIONS

Introduction and Summary

The facts regarding tolling here are complicated enough such that after a text analysis of the facts, the court will make a summary chart. However, the legal analysis of statutory tolling is rather simply based on the fact that the first state habeas petition was filed in the state supreme court on the *last day of the AEDPA limitations period*. Thus, absent equitable tolling, in order to be timely, the federal petition had to be filed on the very day the state supreme court petition was denied. Then, analyzed from an equitable tolling basis, although much of the elapsed time prior to the filing of the federal petition can be equitably tolled because of the conduct of state habeas counsel, petitioner’s desire to unnecessarily file further state petitions pro se after he became aware of his counsel’s actions dooms his present federal petition. The motion to dismiss on the basis of the AEDPA statute of limitations should be granted.

1 Background

2 Petitioner, a state prisoner proceeding pro se, seeks relief in an application
3 pursuant to 28 U.S.C. § 2254. On December 27, 2002, petitioner was sentenced, under the three
4 strikes law, to a total term of 27 years to life for one count of felony evasion of police while in
5 pursuit (25-to-life) plus two consecutive one-year terms for prior convictions. Petition, p. 1,
6 Amended Petition (AP), p. 1; Exh. A, p. 7, to Motion to Dismiss (MTD). Petitioner sets forth the
7 following grounds within his original petition: 1) denial of due process/violation of double
8 jeopardy clause when trial court reneged on plea agreement without sufficient cause forcing
9 petitioner to withdraw his guilty plea; 2) prosecutor wrongly permitted to charge enhancements
10 with life-in-prison exposure after having previously agreed to four-to-eight year maximum
11 sentence; 3) decision to charge petitioner with multiple strikes was in retaliation for his having
12 exercised his constitutional rights; 4) prosecutor violated petitioner's Fourteenth Amendment
13 rights by reneging on a plea deal then using confidential statements made during plea
14 negotiations against petitioner at trial; 5) ineffective assistance of trial and appellate counsel.¹

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17 ¹ Petitioner filed an amended petition substituting or adding, in part, other claims, but there
18 is no "relation back" issue because the initial petition is untimely. That is, an amended petition
19 cannot relate back to initially filed claims which are all untimely themselves. However, for the sake
20 of completeness, the undersigned will finish describing the claims made in this federal case.

21 It is unclear within his original petition what his fifth ground for relief is; petitioner may be
22 seeking to allege that his habeas counsel provided ineffective assistance. Within his putative
23 amended petition, petitioner sets forth the claims of his original petition as his seventh through
24 eleventh grounds for relief, omitting only claim 4 above and adding a purported claim 11) ineffective
25 assistance of habeas counsel. Amended Petition (AP), pp. 66-82. As his first through sixth grounds
26 within the amended petition, petitioner alleges the following grounds: 1) due process violation when
state breached plea contract after petitioner performed his part of the contract; 2) trial court's jury
instruction on Cal. Veh. Code § 2800.2 with CALJIC 12.85 violated due process, substituting a
mandatory presumption for proof of the critical element of the crime; 3) trial court erred by failing
to instruct jury that traffic violations had to involve unsafe operation of a motor vehicle; 4) Cal. Veh.
Code § 2800.2 fails to give notice, in violation of due process, of the precise conduct prohibited by
the "willful and wanton disregard" element; 5) trial court erred by refusing petitioner access to juror
information to determine whether any juror had read a highly prejudicial news article on second day
of trial; 6) trial court violated due process when failing to unseal juror information after defense
counsel showed good cause. AP, pp. 27-65.

1 Pending before the court is respondent's March 30, 2009 (docket # 20), motion to
2 dismiss the petition as barred by the AEDPA statute of limitations, to which petitioner filed an
3 opposition, after which respondent filed a reply. Petitioner's response to the reply, typically not a
4 filing contemplated by the applicable rules, will be considered as it contains a subsequent
5 declaration by the same individual whose declaration is included with respondent's reply.

6 Motion to Dismiss

7 Pending before the court is respondent's motion to dismiss the petition, alleging
8 that the petition was not filed timely. The statute of limitations for federal habeas corpus
9 petitions is set forth in 28 U.S.C. § 2244(d)(1):

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

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

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

20 (C) the date on which the constitutional right asserted was initially
21 recognized by the Supreme Court, if the right has been newly
22 recognized by the Supreme Court and made retroactively
23 applicable to cases on collateral review; or

24 (D) the date on which the factual predicate of the claim or claims
25 presented could have been discovered through the exercise of due
26 diligence.

27 On January 19, 2005, the California First District Court of Appeals in a combined
28 unpublished decision both affirmed petitioner's 2002 conviction and denied his habeas petition.
29 MTD, Exh. A. The appeal had been filed by counsel and the habeas petition was filed pro se.
30 Opposition (Opp.), p. 22. A subsequent order modifying the opinion and denying rehearing (but
31 not changing the judgment) issued on February 17, 2005. Id. at 48-49. Petitioner's appellate
32 counsel filed a petition for review in the state supreme court on February 28, 2005, which was

1 denied on May 11, 2005. MTD, Exh. B; Opp., pp. 2-3. Petitioner's conviction became final 90
2 days later, as respondent contends (MTD, p. 3) and petitioner concedes (Opp., p. 8), on August 9,
3 2005, when the time to file a petition for writ of certiorari in the United States Supreme Court
4 expired. Bowen v. Roe, 188 F.3d 1157 (9th Cir. 1999). As petitioner admits, the AEDPA statute
5 of limitations began to run the next day, on August 10, 2005. Opp., p. 8. Petitioner thus had one
6 year, or until August 9, 2006, to file a timely federal petition, absent applicable tolling. Patterson
7 v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001). Petitioner does not dispute that when his
8 counsel filed the August 9, 2006, habeas petition, there were no days left for the filing of his
9 federal petition. Opp., p. 9.

10 Section 2244(d)(2) provides that the time during which a properly filed
11 application for state post-conviction or other collateral review with respect to the pertinent
12 judgment or claim is pending shall not be counted toward any period of limitation. However, §
13 2244(d)(2) can only pause a clock not yet fully run; it cannot "revive" the limitation period once
14 it has run (i.e., restart the clock to zero). Thus, a state court habeas petition filed beyond the
15 expiration of AEDPA's statute of limitations does not toll the limitation period under §
16 2244(d)(2). See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003); Jiminez v. Rice, 276
17 F.3d 478, 482 (9th Cir.2001).

18 As respondent points out, petitioner filed a petition for writ of habeas corpus in
19 the California Supreme Court on August 9, 2006, the last day of the AEDPA statutory limitations
20 period. MTD, p. 3, Exh. C. Petitioner makes clear that it was his habeas counsel who filed the
21 petition. Opp., pp. 9, Exh. 3, pp. 19-20. The statute was tolled until the petition's denial, on
22 March 14, 2007, which denial evidently included a citation to In re: Clark, 5 Cal.4th 750 (1993),
23 according to the docket sheet submitted and according to petitioner himself. MTD, Exh. C;
24 Opp., p. 20. Respondent contends that at that point petitioner's time for filing a federal petition
25 ran out, but does not make any Pace argument based on the In re: Clark citation (see below).

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1 Petitioner maintains that respondent failed to inform the court that petitioner pro
2 se filed a petition for review and/or rehearing in the state supreme court on September 18, 2007,
3 within 20 days of learning, in August of 2007, from a state supreme court clerk, that his habeas
4 petition had been denied on March 14, 2007; the clerk informed petitioner by a letter he received
5 on September 20, 2007, that there would be no action taken on his rehearing petition. Opp., p. 4,
6 Exhs. 3-4 (see Equitable Tolling discussion below). Petitioner then states that he filed a habeas
7 petition in the superior court within ten days, that was “constructively filed October 10, 2007,”
8 alleging that his habeas counsel, a Mr. Bergerson, was ineffective for, inter alia, failing to file a
9 timely petition in the state supreme court, but petitioner did not maintain a copy of the petition
10 and had no money to obtain a copy from the superior court. Opp., pp. 5-6, Exhs. 5-7. Petitioner
11 faults respondent for failing to lodge that document as well as the December, 2007, denial of that
12 petition. Opp., p. 5.

13 Respondent’s Exh. D is a docket sheet showing that petitioner filed another
14 habeas petition in the California First Appellate District on January 9, 2008, which petition was
15 denied on January 31, 2008. Petitioner avers that that petition again claimed that Bergerson was
16 ineffective for the delayed filing of his habeas petition in the state supreme court, which petition
17 filed by Bergerson claimed “the judge broke the plea contract with petitioner.” Opp., p. 6. A
18 final petition in the state supreme court was filed by petitioner pro se on February 21, 2008,
19 which petition was denied on August 13, 2008 (no citation this time noted in the docket). MTD,
20 Exh. E. Petitioner maintains that this petition set forth the same ineffectiveness claim regarding
21 his habeas counsel. Opp., p. 6. Petitioner’s original petition was filed in this court on September
22 29, 2008, but by application of the mailbox rule deemed filed as of September 23, 2008.²

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24 ² Pursuant to Houston v. Lack, 487 U.S. 266, 275-76, 108 S. Ct. 2379, 2385 (1988)(pro se
25 prisoner filing is dated from the date prisoner delivers it to prison authorities). Stillman v. Lamarque,
26 319 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). Petitioner makes application of
the mailbox rule particularly difficult. The petition itself is signed and dated September 21, 2008.
Petitioner’s declaration attached thereto is signed and dated September 22, 2008. Finally, there is

1 Thus, in summary:

2 August 9, 2005– state conviction final; AEDPA limitations period commences
3 August 9, 2006– First state habeas petition filed in Cal. Supreme Court on *last day*
4 of AEDPA limitations period, i.e. no statutory tolling time remains
5 March 14, 2007– Denial of first state habeas petition; AEDPA limitations period
6 expired
7 August 2007– Petitioner learns from state supreme court clerk that a state petition
8 was filed and denied March 14, 2007
9 September 18, 2007– Petitioner files a rehearing request regarding first state habeas petition
10 September 20, 2007– Petitioner informed that no action would be taken on request for
11 rehearing
12 October 10, 2007– 2nd state habeas petition filed in Superior Court (but no record
13 herein)
14 December 2007– Superior Court petition denied
15 January 9, 2008– 3rd state habeas petition filed in Court of Appeal
16 January 31, 2008– 3rd state habeas petition denied
17 February 21, 2008– 4th state habeas petition filed in Supreme Court
18 August 13, 2008– 4th state habeas petition denied
19 September 23, 2008– Federal petition filed under mailbox rule

20 Of course, even petitioner’s first state habeas petition would not count for
21 statutory tolling because it was not “properly filed,” as it was denied on the basis of untimeliness.
22 Pace v. DiGuglielmo, 544 U.S. 408, 125 S.Ct. 1807 (2005). However, respondent does not raise
23 this issue, and the undersigned will not raise it for him. The first state habeas petition, albeit
24 filed on the last day of the AEDPA limitations period, will count for statutory tolling.
25 Nevertheless, when this petition was denied on March 14, 2007, petitioner had the near
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a note addressed to the court clerk by petitioner that is signed by him and dated September 23, 2008, wherein he states that he is mailing his exhibits to his petition “simultaneously from the prison to your office but separately....” See Petition, p. 12. As petitioner provides no certificate of service, the court will construe his filing as having been made on September 23, 2008.

1 impossible task of filing his federal petition that very day. Even if petitioner's very belated and
2 ineffectual request for rehearing were to be considered part of the first habeas petition resulting
3 in further statutory tolling time from the initial denial, the fact remains that petitioner was
4 informed that no action would be taken on this request, and statutory tolling had ended as of this
5 time. The federal petition was untimely at the latest by September 20, 2007 unless equitable
6 tolling can save the petition.³

7 *Equitable Tolling*

8 In Calderon v. U.S. District Court (Beeler), 128 F.3d 1283, 1288 (9th Cir. 1997),
9 overruled on other grounds, Calderon v. U.S. District Court for Cent. Dist. of CA. (Kelly), 163
10 F.3d 530 (9th Cir. 1998) (en banc), itself abrogated by Woodford v. Garceau, 538 U.S. 202, 123
11 S. Ct. 1398 (2003), the Ninth Circuit found that the statute of limitations could be equitably
12 tolled if extraordinary circumstances beyond a prisoner's control made it impossible to file the
13 petition on time. "In addition, '[w]hen external forces, rather than a petitioner's lack of
14 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
15 (9th Cir. 1999).

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

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25 ³No gap tolling would be possible from the denial of the first state supreme court petition to
26 the filing of the second Superior Court petition in that the grounds of the Superior Court petition
were entirely different from those grounds presented in the state supreme court in the first petition.
See Hemmerle v. Schriro, 495 F.3d 1069, 1075 (9th Cir. 2007).

1 not constitute such extraordinary circumstances. See Hughes v. Idaho State Bd. of Corrections,
2 800 F.2d 905, 909 (9th Cir. 1986).

3 In the Calderon (Beeler) case, the Court of Appeals held that the district court
4 properly found equitable tolling to allow Beeler more time to file his petition. Beeler’s lead
5 counsel withdrew after accepting employment in another state, and much of the work he left
6 behind was not usable by replacement counsel – a turn of events over which the court found
7 Beeler had no control. The Court of Appeals held that the district court properly found these
8 were “extraordinary circumstances” sufficient to toll the statute of limitations.⁴ The Ninth
9 Circuit also found extraordinary circumstances in Calderon v. U.S. Dist. Ct. (Kelly), supra, 163
10 F.3d 530. The three reasons given which independently justified tolling were: a district court
11 stay which prevented petitioner’s counsel from filing a habeas petition, mental incompetency
12 until a reasonable time after the court makes a competency determination, and the fact that
13 petitioner did at one time have timely habeas proceedings pending which were mistakenly
14 dismissed, not as a result of any doing by petitioner. Id. at 541-42. See also Corjasso v. Ayers,
15 278 F.3d 874 (9th Cir. 2002) (clerk’s unjustified rejection of a petition justified partial tolling);
16 Miles v. Prunty, 187 F.3d at 1107 (delay by prison in withdrawing funds from prisoner’s trust
17 account, preparing and mailing filing fee were circumstances beyond his control, qualifying him
18 for equitable tolling); Stillman v. Lamarque, 319 F.3d 1199, 1202-03 (9th Cir. 2003) (equitable
19 tolling permitted where litigation coordinator broke a promise to petitioner’s counsel to return a
20 signed petition for timely filing); Spitsyn v. Moore, 345 F.3d 796 (9th Cir. 2003) (sufficiently
21 egregious misconduct by counsel, such as wholly deficient performance, may justify equitable
22 tolling).

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25 ⁴ 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 Conversely, in U.S. v. Van Poyck, 980 F. Supp. 1108, 1110-11 (C.D. Cal. 1997),
2 the court found that a petitioner’s circumstances were not extraordinary in the following
3 circumstances: inability to obtain transcripts from court reporters, and general prison lockdowns
4 preventing the prisoner’s access to the library and a typewriter which were necessary to his
5 motion. See also Tacho v. Martinez, 862 F.2d 1376, 1381 (9th Cir. 1988) (reliance on
6 incompetence of jailhouse lawyer not sufficient to justify cause to excuse procedural default);
7 Turner v. Johnson, 177 F.3d 390, 392 (5th Cir. 1999) (prisoner’s unfamiliarity of law did not toll
8 statute); Eisermann v. Penarosa, 33 F.Supp.2d 1269, 1273 (D. Haw. 1999) (lack of legal
9 expertise does not qualify prisoner for equitable tolling); Henderson v. Johnson, 1 F.Supp.2d
10 650, 656 (N.D. Tex. 1998) (same); Fadayiro v. United States, 30 F.Supp.2d 772, 779-80 (D.N.J.
11 1998) (delay in receipt of transcripts does not justify equitable tolling).

12 A habeas petitioner bears the burden of proving that equitable tolling should apply
13 to avoid dismissal of an untimely petition. Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir.
14 2002). “Generally, a litigant seeking equitable tolling bears the burden of establishing two
15 elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary
16 circumstance stood in his way.” Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807, 1814;
17 Ramirez v. Yates, 571 F.3d 993, 997 (9th Cir. 2009); see also, see also, Chaffer v. Prosper, ___
18 F.3d ___, 2010 WL 157488 *2 (9th Cir. Jan. 19, 2010). “The petitioner must additionally show
19 that ‘the extraordinary circumstances were the cause of his untimeliness’...and that the
20 ‘extraordinary circumstances ma[de] it impossible to file a petition on time.’” Ramirez, supra,
21 (internal citations omitted). “Equitable tolling is unavailable in most cases,” and is only
22 appropriate “if *extraordinary* circumstances beyond a prisoner’s control make it impossible to
23 file a petition on time.” Miranda, supra, at 1066 (internal quotations/citations omitted [emphasis
24 added in Miranda]). A petitioner must reach a “very high” threshold “to trigger equitable tolling
25 [under AEDPA]...lest the exceptions swallow the rule.” Id.

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1 Petitioner claims entitlement to equitable tolling due to his being “constantly
2 diligent” in efforts to file a timely petition in this court which extraordinary circumstances
3 prevented. Opposition (Opp.), p. 1. In the same month petitioner’s petition for review was
4 denied by the state supreme court, May of 2005, petitioner maintains he mailed his transcripts to
5 an attorney, Donald Bergerson, who had agreed to prepare petitioner’s habeas claims and file
6 them in the California Supreme Court. Opp., p. 2.⁵ According to petitioner, the attorney had told
7 him he needed the transcripts to prepare the petition, but petitioner received no acknowledgment
8 that the transcripts had been received. Id. The next month, in June of 2005, petitioner states that
9 he began to write and phone Bergerson to determine whether his state habeas petition had yet
10 been filed, but received no response to his letters and was unable to penetrate a block on
11 Bergerson’s telephone preventing inmates from calling him. Id. Petitioner indicates that he
12 wrote a friend, Darlynn Bondurant, asking her to phone Bergerson to find out whether Bergerson
13 had filed a petition; while petitioner does not provide the date for his correspondence to her,
14 petitioner includes what appears to be a copy of her response to him (although she identifies
15 herself as “Kanizah” at the end of the letter), dated August 22, 2007, and he confirms that he
16 received her reply in August of 2007. Opp., p. 3, Exhs. 1-2. Within the letter, his friend informs
17 petitioner that Bergerson said that his writ had been denied. Opp., Exh. 1. Petitioner states that
18 he then wrote Bergerson again for a copy of his petition and the return of his transcripts but no
19 response was forthcoming. Opp., p. 4. Petitioner relates that “intermittently, from June, 2005, to
20 August 2007,” he wrote the state supreme court asking whether Bergerson had filed a habeas
21 petition on his behalf. Id. Petitioner maintains that he finally received a letter from the state
22 supreme court clerk, as noted earlier, informing him that Bergerson had filed a habeas petition
23 for petitioner and that it was denied on March 14, 2007. Id. At Exh. 3 to his Opp., petitioner
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25 ⁵ To the extent that petitioner intended his opposition to be a declaration in opposition, it is
26 defective for petitioner’s failure to sign and date it. See Opp., p. 7. He also failed to sign his
opposition argument. Opp., p. 11.

1 includes a copy of his petition for re-hearing to the state supreme court, which as noted, he
2 indicates that he filed within 20 days of learning that his habeas petition had been denied on
3 March 14, 2007. That petition is stamped (not very legibly) as having been received on
4 September 18, 2007. Opp., p. 4, Exh. 3. Once he received the September 20, 2007, response
5 indicating that there would be no action on his petition for re-hearing (received on September 18,
6 2007) of the petition denied on March 14, 2007, petitioner then subsequently, within ten days,
7 filed his habeas petition in Solano County Superior Court (the one he indicates was
8 “constructively filed on October 10, 2007”), to which he states that he attached the court clerk’s
9 August, 2007, letter informing him of the denial of his habeas petition in March of 2007. Opp,
10 pp. 4-5, Exh. 4. Petitioner includes a copy of a letter from the Solano County Superior Court
11 acknowledging the filing of his habeas petition in that court signed by him on October 10, 2007,
12 and filed there on October 16, 2007. Opp., Exh. 5. Petitioner asserts that he attached a copy of
13 the December, 2007, denial of this petition to the January 9, 2008, petition that he filed in the
14 state court of appeals.⁶ Opp., pp. 5-6. Petitioner then goes on to confirm the January 31, 2008,
15 denial by the California Court of Appeal, the February 21, 2008, filing of his petition with the
16 claim of ineffective assistance of habeas counsel in the California Supreme Court and the August
17 13, 2008, denial of same. Opp., pp. 6-7. Petitioner notes that he filed the instant petition (at least
18 the original petition) in this court less than a month and a half later (Opp., p. 7), which the court
19 has construed as having been filed on September 23, 2008.

20 There are somewhat dueling declarations submitted by petitioner’s state court
21 habeas counsel. In his declaration attached to the reply, Mr. Bergerson, while stating that he “at
22 no relevant time ‘refused’” to communicate with petitioner, emphasizes that “our communication
23 was seriously disrupted during a crucial interval,” arising from the unexplained fact that the
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25 ⁶ Petitioner evidently filed his state court of appeal petition without benefit of his superior
26 court petition as he states that he failed to retain a copy of the lower court petition and twice
unsuccessfully sought to have a copy sent to him. Opp., p. 6, Exhs. 6-7.

1 carrier which handled telephone calls placed from petitioner’s prison “placed a ‘block’ on my
2 line.” Reply, Bergerson Declaration (Dec.) I, ¶ 5. Bergerson states parenthetically that he is
3 informed that such blocks “are... a frequent problem for defense lawyers.” Id. The declarant
4 goes on to state:

5 Mr. Thurston and I were able to circumvent the block to a limited
6 extent by the use of “three way” calls, but this was never an
7 adequate substitute for readily available direct telephone service.
8 Letters are too slow, rigid and cumbersome for the give-and-take
required in complicated cases such as Mr. Thurston’s habeas, and
as such, the interruption of telephone service was, as a practical
matter, tantamount to a complete blockage of communication.

9 Reply, Bergerson Dec. I, ¶ 5.

10 Thus, Mr. Bergerson at least implicitly acknowledges that he did not write
11 petitioner to keep him informed about the status of his petition and, although petitioner does not
12 mention any three-way calling communication, his habeas counsel also finds deficient the lack of
13 direct phone contact. Further, Bergerson also acknowledges that while he filed the petition for
14 petitioner on August 9, 2006, and that it was denied on March 14, 2007, he did not communicate
15 this by phone, correspondence or in person (apparently, either the filing or the denial), stating
16 that while he (rather vaguely) recalled “informing one or more of Mr. Thurston’s friends or
17 family about,” presumably, the denial, “I did not write to inform Mr. Thurston.” Reply,
18 Bergerson Dec. I, ¶ 6.⁷ He further declares that petitioner’s “assertion that he was unaware of the
19 denial is, therefore, credible.” Id. Petitioner declares, in his verified amended petition, that the
20 first “personal communication” he had with Bergerson after he took petitioner’s case in May of
21 2005, was not until November, 2008, when they finally had telephone contact. AP, p. 7.

23 ⁷ Petitioner states, in his verified amended petition, that when he received a copy of the state
24 court petition from the state supreme court clerk when he was informed of the March 14, 2007,
25 denial, in August of 2007, that the proof of service attached thereto states that he was mailed a copy
26 of the August 9, 2006, petition. AP, pp. 6-7. However, he insists that he never received a copy at
that time and believes that a review of his mail log would confirm this. Id., at 7. Moreover, in
neither of his declarations, does Mr. Bergerson affirm that he provided a copy of the subject petition
to him at any time.

1 Petitioner further declares that he did not receive his case file back from Bergerson until June,
2 2008. AP, p. 8. Mr. Bergerson, in a footnote to his supplemental declaration, confirms the
3 obvious point that petitioner did not have the case file while he, Bergerson, had it, but he
4 confusingly states that at the time he offered to return it to petitioner, at a point “significantly
5 later than the timeframe at issue in the instant litigation,” petitioner stated that he had it. Sur-
6 reply, Bergerson Dec. II, n. 1. The court will accept petitioner’s declaration that he did not have
7 his case file, from whatever source, until June of 2008.

8 Where Bergerson had initially declared that he received the relevant records for
9 the petition from petitioner’s appellate counsel, Marylou Hillberg (Reply, Bergerson Dec. I, ¶ 4),
10 in his second, or supplemental, declaration attached to petitioner’s response to the reply (Sur-
11 reply), he states that after having received a phone call from petitioner who referenced an
12 exchange of letters which indicated that Ms. Hillberg had actually mailed the case file to
13 petitioner, Bergerson has no reason to doubt that it was actually petitioner who sent it to him.
14 Sur-reply, Bergerson Dec. II, ¶ 2. Mr. Bergerson also reiterates that he failed to communicate
15 the fact of the denial of the petition he had filed for petitioner from the date of denial until the
16 point at which petitioner learned of it. Sur-reply, Bergerson Dec. II, ¶ 3. It, in fact, appears that
17 Bergerson at no relevant point communicated this to petitioner directly.

18 There is no constitutional right to habeas counsel. Coleman v. Thompson, 501
19 U.S. 722, 755-757, 111 S. Ct. 2546, 2568 (1991), citing, inter alia, the holding of Pennsylvania v.
20 Finley, 481 U.S. 551, 557, 107 S. Ct. 1990, 1994 (1987) (no constitutional right to appointed
21 counsel in state post-conviction proceedings). Moreover, respondent is correct that mere attorney
22 negligence does not justify equitable tolling (Reply, p. 2), as noted above. Miranda v. Castro,
23 supra, at 1068, quoting Frye v. Hickman, 273 F.3d 1144, 1146 (9th Cir. 2001) (“attorney’s
24 ‘miscalculation of the limitations period... and ...negligence in general do not constitute
25 extraordinary circumstances sufficient to warrant equitable tolling”). It is also the case that his
26 counsel states expressly that he agreed to file petitioner’s initial state supreme court petition and

1 petitioner does not indicate that Mr. Bergerson was to file his federal petition as well. Reply,
2 Bergerson Dec. I, ¶ 3. However, at least for the period up to and including the time at which
3 petitioner was informed in August of 2007, that a petition had been filed by Bergerson and it had
4 been denied on March 14, 2007, the lack of communication from his counsel might arguably rise
5 to the level of egregious conduct afforded equitable tolling under Spitsyn, supra, at 801, although
6 that case is distinguishable in that counsel in Spitsyn was hired to file a federal, not state, habeas
7 petition and, also unlike counsel herein, he failed to file any petition at all. The cases are similar
8 in that petitioner herein also appears to have made reasonably diligent efforts to contact his
9 counsel, who essentially remained incommunicado. The court, however, need not determine
10 petitioner's entitlement to equitable tolling, at least up until the date upon which he was finally
11 informed by the state supreme court clerk of the denial of the state supreme court habeas filed on
12 his behalf, on the basis that his counsel's lack of communication rose to the Spitsyn level
13 because the Ninth Circuit has determined that "a prisoner's lack of knowledge that the state
14 courts have reached a final resolution of his case can provide grounds for equitable tolling if the
15 prisoner has acted diligently in the matter." Ramirez v. Yates, 571 F.3d 993, 997 (9th Cir. 2009).
16 The court does not agree with respondent that the indirect communication from petitioner's
17 friend with regard to what Bergerson may have told her would be the point at which petitioner
18 was made sufficiently aware but should rather date from the state supreme court clerk's response.
19 However, it appears that the dates of these two events occurred fairly closely in time, as both
20 happened in August, 2007, and petitioner does not provide a copy of the letter with the date upon
21 which he was informed by the state supreme court clerk. Petitioner has maintained that he
22 attached a copy of it to his petition to Solano County Superior Court, but respondent, which is
23 tasked with lodging the relevant records has failed to lodge that document. Therefore, the court
24 will grant petitioner the greatest latitude and deem that he was informed by the clerk on August
25 31, 2007. With his sur-reply, petitioner attaches a copy of a letter from his appellate counsel,
26 dated May 24, 2005. Sur-reply, Exh. 2. Within that letter, petitioner is informed, inter alia, of

1 the need to exhaust any additional claims, other than those raised on direct appeal, through the
2 state supreme court before proceeding on a federal habeas petition, but Ms. Hillberg also
3 thoroughly informed him therein of the one-year AEDPA statute of limitations. *Id.* In speaking
4 of a hypothetical state habeas petition, she states that while the one-year deadline will be tolled
5 until there is a state supreme court decision on any habeas claim that he should not delay in filing
6 a state habeas petition even though there is no actual deadline for doing so “because, if you let
7 too much time go by, the court may refuse to hear the petition due to inexcusable delay.” *Id.*

8 Granting petitioner equitable tolling through August 31, 2007, still leaves a gap of
9 389 days, or more than a year before the instant petition was filed. Even if, under Spitsyn, the
10 court further finds petitioner should be granted equitable tolling until June 30, 2008, the last day
11 of the month during which petitioner states that he received his case file back from Bergerson,
12 that still leaves a gap of 85 days. Had petitioner made diligent efforts at that point at which he
13 learned that his state supreme court habeas petition had been denied to file his federal petition,
14 for example, within a month or so of having affirmatively and expressly learned of the denial, or
15 even if he had done so within a month of having his case file returned, the court could at least
16 arguably extend equitable tolling for petitioner to either of those points, given that his counsel
17 had delayed until the last day of the expiration of AEDPA filing deadline to file the state court
18 petition. But petitioner commenced not only a petition for re-hearing, but thereafter began again
19 in the lower state court on a new round of habeas petitions. That he may have been doing so
20 because he believed he could not proceed on the claims in this court due to procedural
21 deficiencies he believed kept the state supreme court from reaching the merits of his claims in
22 that court and that he may have diligent in pursuing that path, especially in light of the fact that
23 he could believe himself to have been ill-served by his state court habeas counsel (he focuses in
24 his petition for review/re-hearing in the state supreme court on the In re Clark, supra, citation in
25 the petition denial for his conclusion that the merits were not reached due to procedural
26

1 deficiencies which he ascribes to his counsel's failings⁸) simply does not warrant equitable
2 tolling of the AEDPA one-year statute of limitations beyond a certain point in this court.
3 Ignorance of the law, as stated above, does not warrant equitable tolling. Hughes v. Idaho State
4 Bd. of Corrections, supra, at 909. And, in this instance, petitioner appears to have been fairly
5 well-informed as to the deadline and could not reasonably presume that he had carte blanche in
6 this court to commence a new round of state court habeas petitions long after the statutory
7 AEDPA deadline had passed.⁹

8 Accordingly, IT IS HEREBY RECOMMENDED that respondent's motion to
9 dismiss as barred by the AEDPA statute of limitations, filed on March 30, 2009 (docket # 20), be
10 granted.

11 These findings and recommendations are submitted to the United States District
12 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
13 one days after being served with these findings and recommendations, any party may file written
14 objections with the court and serve a copy on all parties. Such a document should be captioned
15 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
16 shall be served and filed within fourteen days after service of the objections. The parties are
17 advised that failure to file objections within the specified time may waive the right to appeal the
18 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

19 DATED: 01/28/2010

/s/ Gregory G. Hollows

20 UNITED STATES MAGISTRATE JUDGE

21 GGH:009
22 thur2280.mtd

23 ⁸ He also therein explains that he could not have filed his re-hearing petition sooner due to
24 his counsel's failure to keep him apprised of the date of filing or denial of his petition. Opp., Exh.
3.

25 ⁹ Although it is not dispositive of the timeliness issue, it does not help petitioner's case that
26 the round of state court habeas petitions that he filed pro se, in raising a claim for ineffective
assistance of habeas counsel, simply did not raise a constitutional issue.