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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

LOUIS JAMES,  
  
                                Petitioner,  
  
                                v.  
  
DAVE DAVEY,<sup>1</sup>  
  
                                Respondent.

No. 2:14-cv-788-GEB-EFB P

FINDINGS AND RECOMMENDATIONS

Petitioner is a state prisoner proceeding without counsel on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent moves to dismiss the petition as untimely. ECF No. 11. Petitioner filed an opposition to respondent’s motion, ECF No. 14, and respondent filed a reply to petitioner’s opposition, ECF No. 16.<sup>2</sup> For the reasons that follow, respondent’s motion to dismiss should be granted.

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<sup>1</sup> Petitioner named “Warden Sandor” as respondent. ECF No. 1. The court substitutes the correct respondent, the Warden of the California State Prison, Corcoran, where petitioner is presently incarcerated. *See Stanley v. Cal. Supreme Court*, 21 F.3d 359, 360 (9th Cir. 1994) (citing Rule 2(a), Rules Governing Section 2254 Cases) (“A petitioner for habeas corpus relief must name the state officer having custody of him or her as the respondent to the petition”); *see also Smith v. Idaho*, 392 F.3d 350, 355-56 (9th Cir. 2004).

<sup>2</sup> After respondent filed the reply, petitioner filed an unauthorized “Statement.” ECF No. 17. The Local Rules provide only for a motion, an opposition, and a reply. E.D. Cal. Local Rule 230. Petitioner neither sought nor obtained court approval before filing his statement. Accordingly, the “Statement” is not considered in resolving respondent’s motion.

1 **I. BACKGROUND**

2 On July 22, 2010, a jury convicted petitioner of murder and possession of marijuana for  
3 sale. ECF No. 15, Notice of Lodging Document in Paper (“Lodg. Doc.”) 1 (Abstract of Judgment  
4 from Nevada County Superior Court). Petitioner appealed to the California Court of Appeal,  
5 Third Appellate District (“Court of Appeal”). On March 7, 2012, the Court of Appeal awarded  
6 petitioner thirteen extra days of credit and affirmed the judgment as modified. Lodg. Doc. 2. The  
7 California Supreme Court denied petitioner’s request for review on May 23, 2012. Lodg. Doc. 4.

8 Petitioner subsequently filed three state habeas corpus petitions. He filed the first in  
9 Nevada County Superior Court on February 1, 2012.<sup>3</sup> Lodg. Doc. 5. The Superior Court denied  
10 that petition on April 9, 2012. Lodg. Doc. 6. Petitioner filed the second state habeas petition in  
11 the Court of Appeal on July 29, 2012. Lodg. Doc. 7. The Court of Appeal denied that petition on  
12 August 9, 2012. Lodg. Doc. 8. Petitioner filed his third state habeas petition in the California  
13 Supreme Court on August 23, 2012. Lodg. Doc. 9. The California Supreme Court denied that  
14 petition on October 31, 2012. Lodg. Doc. 10.

15 Petitioner filed the pending federal habeas petition on March 21, 2014. ECF No. 1.

16 **II. THE LIMITATIONS PERIOD**

17 Under the Anti-terrorism and Effective Death Penalty Act (“AEDPA”), a one-year  
18 limitations period for seeking federal habeas relief begins to run from the latest of: (1) the date  
19 the judgment became final on direct review (or April 25, 1996, if the judgment became final prior  
20 to AEDPA’s enactment), (2) the date on which a state-created impediment to filing is removed,  
21 (3) the date the United States Supreme Court makes a new rule retroactively applicable to cases  
22 on collateral review, or (4) the date on which the factual predicate of a claim could have been  
23 discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1)(A)-(D); *Malcom v.*  
24 *Payne*, 281 F.3d 951, 955 (9th Cir. 2002).

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25 <sup>3</sup> The court deems the filing date for each of petitioner’s habeas petitions to be the date  
26 reflected on the certificate of service for the respective petitions. *See Houston v. Lack*, 487 U.S.  
27 266, 276 (1988) (prisoner’s notice of appeal deemed timely filed on the date it was delivered to  
28 prison staff for delivery to the court); *Smith v. Duncan*, 297 F.3d 809, 814 (9th Cir. 2002)  
(applying mailbox rule to petitions filed in state court), *overruled on other grounds by Pace v.*  
*DiGuglielmo*, 544 U.S. 408, 418 (2005).

1           **A.     Statutory Tolling**

2           No statute tolls the limitations period “from the time a final decision is issued on direct  
3 state appeal [to] the time the first state collateral challenge is filed . . . .” *Nino v. Galaza*, 183  
4 F.3d 1003, 1006 (9th Cir. 1999). However, if a petitioner properly files a state post-conviction  
5 application prior to the expiration of the limitations period, the period is tolled and remains tolled  
6 for the entire time that application is “pending.” 28 U.S.C. § 2244(d)(2). “[A]n application is  
7 ‘properly filed’ when its delivery and acceptance are in compliance with the applicable laws and  
8 rules governing filings.” *Artuz v. Bennett*, 531 U.S. 4, 8 (2000). In California, a properly filed  
9 post-conviction application is “pending” during the intervals between a lower court decision and  
10 the filing of a new petition in a higher court if the second petition was filed within a “reasonable  
11 time” after the denial of the first. *Carey v. Saffold*, 536 U.S. 214, 221 (2002); *Stancle v. Clay*,  
12 692 F.3d 948, 956 (9th Cir. 2012); *see also Velasquez v. Kirkland*, 639 F.3d 964, 968 (9th Cir.  
13 2011) (finding that delays of ninety-one days and eighty-one days are “far longer than the  
14 Supreme Court’s thirty-to-sixty-day benchmark for California’s ‘reasonable time’ requirement,”  
15 and are, without adequate explanation, unreasonable under California law). A federal habeas  
16 application does not provide a basis for statutory tolling, *Duncan v. Walker*, 533 U.S. 167, 181-82  
17 (2001), nor does a state petition filed after the federal limitations period has expired, *Ferguson v.*  
18 *Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003).

19           **B.     Equitable Tolling**

20           The limitations period may also be equitably tolled where a habeas petitioner establishes  
21 two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary  
22 circumstance stood in his way and prevented timely filing. *Holland v. Florida*, 560 U.S. 631, 649  
23 (2010). Petitioner has the burden of showing facts entitling him to equitable tolling. *Smith v.*  
24 *Duncan*, 297 F.3d at 814; *Miranda v. Castro*, 292 F.3d 1063, 1065 (9th Cir. 2002). The threshold  
25 necessary to trigger equitable tolling is very high, “lest the exceptions swallow the rule.”  
26 *Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1011 (9th Cir. 2009). Equitable tolling may be  
27 applied only where a petitioner shows that some external force caused the untimeliness. *Id.*

28       /////

1     **III. ANALYSIS**

2             The California Supreme Court denied petitioner’s petition for review on May 23, 2012.  
3     Lodg. Doc. 4. The conviction became “final” within the meaning of § 2244(d)(1)(A) ninety days  
4     later (i.e., on August 21, 2012), when the time for filing a petition for a writ of certiorari from the  
5     United States Supreme Court expired. Supreme Ct. R. 13; *Bowen v. Roe*, 188 F.3d 1157, 1158-59  
6     (9th Cir. 1999). The one-year limitations period commenced the following day. *Patterson v.*  
7     *Stewart*, 251 F.3d 1243, 1246 (9th Cir. 2001). Petitioner therefore had until August 22, 2013 to  
8     file his federal habeas petition. Because petitioner did not file his federal petition until March 21,  
9     2014, it is barred under AEDPA’s one-year limitations period, absent tolling.

10            **A. Statutory Tolling**

11            Petitioner filed—and the reviewing courts denied—his first two state habeas petitions  
12     before the limitations period even commenced. Lodg. Docs. 5-8. A collateral action filed prior to  
13     the effective date of the limitations period, however, does not toll the limitations period. *See*  
14     *Waldrip v. Hall*, 548 F.3d 729, 735 (9th Cir. 2008) (explaining that although the filing of a state  
15     habeas petition “would otherwise have tolled the running of the federal limitations period, since it  
16     was denied before that period had started to run, it had no effect on the timeliness of the ultimate  
17     federal filing”). Thus, neither of petitioner’s first two state habeas petitions tolled the limitations  
18     period.

19            Petitioner properly filed his third state habeas petition with the California Supreme Court  
20     on August 23, 2012. Lodg. Doc. 9.<sup>4</sup> By filing that petition prior to the expiration of the  
21     limitations period, petitioner tolled the limitations period for the entire time that the application  
22     was “pending.” 28 U.S.C. § 2244(d)(2). Petitioner’s third state habeas petition was pending from  
23     the day he filed it (August 23, 2012) to the day the California Supreme Court denied it (October  
24     31, 2012). Lodg. Docs. 9, 10. Because petitioner tolled the limitations period under § 2244(d)(2)  
25     for those seventy days, he had until October 30, 2013 to file his federal petition. As noted above,  
26     petitioner did not file his federal petition until March 21, 2014. ECF No. 1. Thus, absent

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28     <sup>4</sup> Respondent does not argue that the third state petition was improperly filed. ECF No. 11 at 4.

1 equitable tolling, petitioner’s federal petition is barred under AEDPA’s one-year limitations  
2 period.

3 **B. Equitable Tolling**

4 In his opposition to respondent’s motion to dismiss, petitioner argues that the court should  
5 apply equitable tolling because (1) he has been diligent in seeking collateral relief, (2) he is  
6 “proceeding in pro per, without any formal legal education,” (3) he was in administrative  
7 segregation for a total of eleven months between October 20, 2011 and May 27, 2014, and (4) he  
8 was transferred to five different penal institutions in the last four years. ECF No. 14 at 1-2.

9 **1. Diligence**

10 Petitioner was undeniably diligent in filing his three state habeas petitions: he filed his  
11 first two before the judgment even became “final,” and he filed his third just two weeks after the  
12 Court of Appeal denied his second. Lodg. Docs. 5, 7-9. But the California Supreme Court  
13 denied his third state habeas petition on October 31, 2012, and petitioner did not file his federal  
14 habeas petition until March 21, 2014—more than a year and four months later. Lodg. Doc. 10;  
15 ECF No. 1. While petitioner may have been diligent in seeking habeas relief in the state courts,  
16 he was not diligent in filing his federal habeas petition. *Cf. Zarvela v. Artuz*, 254 F.3d 374, 381  
17 (2d Cir. 2001) (explaining that a “brief interval” between state court exhaustion and federal filing  
18 is “normally 30 days”), cited with approval in *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005).  
19 Because petitioner has not satisfied his burden of demonstrating that he has been pursuing his  
20 rights diligently, equitable tolling is not warranted.

21 **2. Formal Legal Education**

22 Petitioner suggests he is entitled to equitable tolling because he is “proceeding in pro per,  
23 without any formal legal education.” ECF No. 14 at 2. Petitioner fails to appreciate that  
24 prisoners do not have a right to counsel in habeas proceedings, *Miranda v. Castro*, 292 F.3d at  
25 1067-68, and that “a pro se petitioner’s lack of legal sophistication is not, by itself, an  
26 extraordinary circumstance warranting equitable tolling,” *Raspberry v. Garcia*, 448 F.3d 1150,  
27 1154 (9th Cir. 2006). Thus, equitable tolling is not warranted on the grounds that petitioner did  
28 not have any formal legal training or counsel assisting with his petitions.

1                                   **3.     Administrative Segregation**

2             According to petitioner, he was in administrative segregation from October 20, 2011 to  
3     September 11, 2012 and from December 11, 2013 to May 27, 2014. ECF No. 14 at 2. During  
4     those periods, his “access to legal research and materials was extremely limited.” *Id.* Even if  
5     true, petitioner’s claims do not warrant equitable tolling for the period he was in administrative  
6     segregation.

7             First, the limitations period began on August 22, 2012, and, with statutory tolling,  
8     petitioner had until October 30, 2013 to file his federal petition. Because petitioner’s second stint  
9     in administrative segregation (i.e., from December 11, 2013 to May 27, 2014) commenced more  
10    than a month after the limitations period concluded, it could not have affected the timeliness of  
11    his federal habeas petition. Moreover, his first stint of administrative segregation ended twenty  
12    days after the limitations period commenced. Even if equitable tolling were warranted for those  
13    twenty days, petitioner’s federal habeas petition would still be untimely.

14            Second, as noted above, the United States Supreme Court has suggested that a petitioner  
15    should be able to file a federal habeas petition within a brief interval, normally thirty days, after  
16    completing state court exhaustion. *Rhines*, 544 U.S. at 277-78 (citing *Zarvela*, 254 F.3d at 381).  
17    Here, petitioner completed state court exhaustion when the California Supreme Court denied his  
18    third state habeas petition on October 31, 2012, and petitioner did not file his federal habeas  
19    petition until March 21, 2014—more than a year and four months later. Lodg. Doc. 10; ECF No.  
20    1. Even with “extremely limited” access to “legal research and materials,” petitioner could have  
21    filed a basic form federal habeas petition to satisfy the AEDPA deadline. *See Waldron-Ramsey*,  
22    556 F.3d at 1014 (“If diligent, he could have prepared a basic form habeas petition and filed it to  
23    satisfy the AEDPA deadline . . . .”); *see also Ford v. Pliler*, 590 F.3d 782, 790 (9th Cir. 2009)  
24    (finding that a petitioner “is not entitled to equitable tolling on the ground that he did not have his  
25    legal files [when] the record shows that he was aware of the factual basis of his claims without  
26    them.”).

27            Third, the Ninth Circuit has explicitly rejected petitioner’s suggestion that reduced access  
28    to research materials while in administrative segregation warrants equitable tolling. *See Ramirez*

1 v. *Yates*, 571 F.3d 993, 998 (9th Cir. 2009); *Soto v. Lopez*, No. 12-55093, \_\_\_ F. App'x \_\_\_, \_\_\_,  
2 2014 WL 2142215, at \*1 (9th Cir. May 23, 2014). In *Ramirez*, a prisoner seeking federal habeas  
3 relief argued that that he was entitled to equitable tolling for the four months he was in  
4 administrative segregation because he had limited access to the law library and copy machine  
5 during that time. *Id.* The Ninth Circuit explained that “ordinary prison limitations on [the  
6 prisoner’s] access to the law library and copier (quite unlike the denial altogether of access to his  
7 personal legal papers) were neither ‘extraordinary’ nor made it ‘impossible’ for him to file his  
8 petition in a timely manner.” *Id.* Here, petitioner claims only that his “access to legal research  
9 and materials was extremely limited” while in administrative segregation; he does not contend  
10 that he was outright denied access to his personal legal papers during that time. ECF No. 14 at 2.  
11 The court also notes that petitioner filed all three of his state habeas petitions during his first stint  
12 in administrative segregation (i.e., between October 20, 2011 and September 11, 2012). Because  
13 petitioner has not shown that his extremely limited access to legal research and materials was an  
14 extraordinary prison limitation that made it impossible for him to file his federal habeas petition  
15 in a timely manner, equitable tolling for the twenty days that he was in administrative segregation  
16 during the limitations period is not warranted.

#### 17 **4. Transfers Between Prisons**

18 Petitioner also suggests that the court should grant equitable tolling because he was  
19 transferred to five different penal institutions over the course of four years. ECF No. 14 at 1.  
20 According to petitioner, “[e]ach location requires an ‘Orientation’ process which can last from 2  
21 to 4 weeks and is often without personal property, including any legal paperwork, or access to the  
22 law library or research materials.” *Id.* Petitioner does not provide any specific details such as  
23 dates of transfers, what legal paperwork he was deprived of, or the duration of the deprivations,  
24 other than: (1) he arrived at California State Prison, Corcoran on July 31, 2013 and was without  
25 his property until August 26, 2013, (2) he was admitted to the hospital on November 22, 2013,  
26 placed in administrative segregation on December 11, 2013, and was without his property until  
27 January 24, 2014, (3) officials at Calipatria State Prison misplaced his trial discovery documents,  
28 and (4) officials at California State Prison, Corcoran lost all of his trial transcripts.

1 Like placements in administrative segregation, transfers between prisons are ordinary  
2 prison limitations. *See, e.g., Soto*, 2014 WL 2142215, at \*1 (finding that petitioner, despite  
3 claiming that he lacked access to the law library and his legal materials while in administrative  
4 segregation and during a prison transfer, had not demonstrated “that these ordinary prisons  
5 limitations amounted to an extraordinary circumstance beyond his control preventing him from  
6 filing his federal habeas petition”); *Ray v. Marshall*, 376 F. App’x 670, 671 (9th Cir. 2010)  
7 (rejecting argument that lack of access to legal files after a prison transfer justifies equitable  
8 tolling). Petitioner has also failed to identify specific instances in which he needed documents  
9 that he was deprived of as a result of his prison transfers. *See Waldron–Ramsey*, 556 F.3d at  
10 1013-14 (denying equitable tolling based on lack of access to documents because the petitioner  
11 “d[id] not point to specific instances where he needed a particular document, could not have kept  
12 that document within his permitted three boxes had he been cooperative, and could not have  
13 procured that particular document when needed.”).

#### 14 **IV. CONCLUSION**

15 Petitioner has failed to establish both his diligence in seeking federal habeas relief and an  
16 extraordinary circumstance that prevented the timely filing of his federal habeas petition.  
17 Equitable tolling is therefore not warranted. With the seventy days that the limitations period was  
18 tolled under § 2244(d)(2), petitioner had until October 30, 2013 to file his federal petition.  
19 Because petitioner did not file his federal petition until March 21, 2014, it is untimely under  
20 AEDPA.

21 For the reasons stated above, it is hereby RECOMMENDED that:

- 22 1. Respondent’s May 29, 2014 motion to dismiss (ECF No. 11) be granted;
- 23 2. This action be dismissed with prejudice as barred by the limitations period contained  
24 in 28 U.S.C. § 2244(d)(1)(A)-(D); and
- 25 3. The Clerk be directed to close the case.

26 These findings and recommendations are submitted to the United States District Judge  
27 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
28 after being served with these findings and recommendations, any party may file written



1 objections with the court and serve a copy on all parties. Such a document should be captioned  
2 “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections  
3 within the specified time may waive the right to appeal the District Court’s order. *Turner v.*  
4 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991). In  
5 his objections petitioner may address whether a certificate of appealability should issue in the  
6 event he files an appeal of the judgment in this case. *See* Rule 11, Rules Governing Section 2254  
7 Proceedings (the district court must issue or deny a certificate of appealability when it enters a  
8 final order adverse to the applicant).

9 DATED: December 3, 2014.

10   
11 EDMUND F. BRENNAN  
12 UNITED STATES MAGISTRATE JUDGE  
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