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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSE RAMIREZ TORRES,  
Petitioner,  
v.  
J. PRICE,  
Respondent.

No. 2:14-cv-0842 MCE AC P

ORDER AND FINDINGS &  
RECOMMENDATIONS

Petitioner, a state prisoner proceeding through counsel and in forma pauperis, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. ECF No. 1. Pending before the court is respondent’s motion to dismiss on the grounds that petitioner is outside the one-year statute of limitations. ECF No. 16. Petitioner has responded to the motion (ECF No. 20) and respondent has replied (ECF No. 25).

I. Factual and Procedural Background

A jury convicted petitioner of attempted first degree murder, corporal injury on a spouse, and willful harm or injury to a child on March 25, 2004. ECF No. 1 at 1-2; Lodged Doc. No. 1. He was sentenced to an indeterminate state prison term of life with the possibility of parole for the attempted murder conviction, plus an indeterminate term of twenty-five years to life for a firearm enhancement related to the attempted murder conviction and an eight-year determinate term for the conviction of willful injury to a child. ECF No. 1 at 1-2; Lodged Doc. No. 1; Lodged

1 Doc. No. 2 at 18.

2 A. Direct Review

3 Petitioner, with the assistance of counsel, appealed to the California Court of Appeal,  
4 Third Appellate District. ECF No. 1 at 2, 13. The Court of Appeal affirmed judgment on June  
5 March 2, 2006. ECF No. 1 at 2; Lodged Doc. No. 2.

6 On April 3, 2006, again with assistance of counsel, petitioner petitioned for review of the  
7 Court of Appeal's decision in the California Supreme Court. Lodged Doc. No. 3; Lodged Doc.  
8 No. 4. The state Supreme Court denied the petition for review on May 10, 2006. ECF No. 1 at 2;  
9 Lodged Doc. No. 4. Petitioner did not petition the United States Supreme Court for certiorari.  
10 ECF No. 1 at 3.

11 B. State Collateral Review

12 Petitioner did not file an application for state post-conviction or other collateral review in  
13 state court. ECF No. 1 at 3, 6; ECF No. 16 at 2.

14 C. The Federal Actions

15 1. Torres v. Unknown, 2:06-cv-2569 (Torres I)

16 On November 13, 2006,<sup>1</sup> petitioner submitted a letter, written in Spanish, to the United  
17 States District Court in the Eastern District of California where it was docketed as a civil rights  
18 complaint under 42 U.S.C. § 1983 and assigned case number 2:06-cv-2569 (Torres I). Lodged  
19 Doc. No. 9 at 1 [Torres I docket]; 4-6 [Torres I ECF No. 1]. In the letter, petitioner stated that he  
20 had been found guilty of a crime that he did not commit because of his past, and that the state  
21 court had denied his appeal and he had one year to file an appeal in federal court. ECF No. 20-1  
22 (certified translation<sup>2</sup>) at 5. He also stated that he did not know any English and did not have any  
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24 <sup>1</sup> In instances where petitioner was proceeding pro se, he is afforded the benefit of the prison  
25 mailbox rule. See Houston v. Lack, 487 U.S. 266, 276 (1988). Absent evidence to the contrary,  
26 where no certificate of service is present, the court will assume the documents were submitted on  
27 the date they were signed by petitioner. See Jenkins v. Johnson, 330 F.3d 1146, 1149 n.2 (9th  
28 Cir. 2003) (date petition is signed may be considered earliest possible date an inmate could  
submit his petition to prison authorities for filing under the mailbox rule).

<sup>2</sup> See also ECF No. 20-5 (certification of interpreter).

1 money and that was why he needed an attorney. Id. at 5-6. On December 12, 2006, petitioner  
2 was ordered to submit a request for leave to proceed in forma pauperis or to pay the filing fee.  
3 Lodged Doc. No. 9 at 7 [Torres I ECF No. 3].

4 On December 18, 2006, petitioner submitted another letter to the court. Id. at 8-10 [Torres  
5 I ECF No. 4]. This letter was also in Spanish. Id. The letter reiterated that petitioner was in  
6 prison for a crime he did not commit, that he did not understand English, that he needed an  
7 attorney to help him with his case, and that he had only a year to appeal to the federal court. ECF  
8 No. 20-1 (certified translation<sup>3</sup>) at 10-11. He also stated that he had received some papers from  
9 the court, but did not know what they said, which was why he was writing to the court for help.  
10 Id. at 11.

11 On January 18, 2007, petitioner submitted an application to proceed in forma pauperis.  
12 Lodged Doc. No. 9 at 11-18 [Torres I ECF No. 5]. The form used by petitioner was in English  
13 and was filled out in English. Id.

14 On March 28, 2007, petitioner was ordered to submit a certified copy of his inmate trust  
15 account statement. Id. at 19-20 [Torres I ECF No. 6]. On May 7, 2007, the order was returned to  
16 the court by the postal service as undeliverable and the order was re-served on petitioner on May  
17 9, 2007. Id. at 2 [Torres I docket]. The re-served order was not returned. Id. at 2-3. On May 24,  
18 2007, the magistrate judge filed findings and recommendations in which it was recommended that  
19 the case be dismissed for petitioner's failure to keep his address current. Id. at 21-23 [Torres I  
20 ECF No. 9]. Two additional orders related to reassignment of the case were also served and there  
21 is no record of either being returned as undeliverable. Id. at 2-3 [Torres I docket], 24-25 [Torres I  
22 ECF Nos. 10-11].

23 On February 25, 2008, the district judge issued an order dismissing the case and judgment  
24 was entered. Id. at 26-28 [Torres I ECF Nos. 12, 13]. The court found that while it appeared that  
25 petitioner's address had been corrected, dismissal was still appropriate because petitioner had  
26 failed to comply with the March 28, 2007 order to file a certified trust account statement. Id. at

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27 <sup>3</sup> See also ECF No. 20-5 (certification of interpreter).  
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1 26 [Torres I ECF No. 12 at 1].

2 2. Torres v. Unknown, 2:07-cv-0193 (Torres II)

3 On January 29, 2007, during the pendency of Torres I, petitioner submitted another letter  
4 written in Spanish to the court. It was docketed as a new civil rights complaint under § 1983 and  
5 given the case number 2:07-cv-0193 (Torres II). Lodged Doc. No. 12 at 1 [Torres II docket]; 4-5  
6 [Torres II ECF No. 1]. The letter stated that petitioner had been told by another inmate that he  
7 needed to send the court copies of his case, but that he did not have any copies because they were  
8 lost when he was transferred. ECF No. 20-2 (certified translation<sup>4</sup>) at 4. He stated that he did not  
9 know how to obtain copies of the documents or if the court could assist him. Id. He also  
10 provided the name and address of the attorney that handled his appeal. Id.

11 On March 8, 2007, petitioner was ordered to submit an application for leave to proceed in  
12 forma pauperis or pay the filing fee and the letter, construed as a complaint, was dismissed with  
13 leave to amend. Lodged Doc. No. 12 at 6-8 [Torres II ECF No. 3]. The magistrate judge also  
14 advised petitioner that the court did not provide free translation services and encouraged him to  
15 obtain assistance in translating documents and to submit future documents in English. Id. at 6. In  
16 order to assist petitioner in understating the order, the order included an unofficial, rough Spanish  
17 translation of its contents which was obtained from an internet translation service. Id.

18 On May 14, 2007, petitioner filed a motion for enlargement of his time to file a habeas  
19 petition. Id. at 9-11 [Torres II ECF No. 4]. The motion was in English. Id. On May 25, 2007,  
20 the court granted the motion and petitioner was given an additional thirty days to file an amended  
21 pleading and either pay the appropriate filing fee or file a request to proceed in forma pauperis.  
22 Id. at 12-13 [Torres II ECF No. 5]. The court noted that petitioner indicated that his intent was to  
23 file a petition for writ of habeas corpus. Id. at 12 fn.1 [Torres II ECF No. 5 at 1].

24 On August 15, 2007, the magistrate judge issued findings and recommendations in which  
25 he recommended the case be dismissed because petitioner had failed comply with the court's  
26 order that he file an amended pleading and resolve the fee status for the case. Id. at 14-17 [Torres

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28 <sup>4</sup> See also ECF No. 20-5 (certification of interpreter).

1 II ECF No. 6]. The findings and recommendations included an unofficial, rough Spanish  
2 translation of the contents which was obtained from an internet translation service. Id.

3 On August 29, 2007, petitioner filed objections to the findings and recommendations. Id.  
4 at 18 [Torres II ECF No. 7]. The objections were in English and stated that petitioner required  
5 additional time to file an amended complaint because he was illiterate in English, could barely  
6 read or write Spanish, and had finally found another inmate to assist him in filing a “legally  
7 sufficient first amended complaint.” Id. The objections made no mention of whether petitioner  
8 would pay the filing fee or request to proceed in forma pauperis. Id.

9 On November 2, 2007, the magistrate judge vacated the August 15, 2007 findings and  
10 recommendations and ordered petitioner to file a first amended complaint and either pay the filing  
11 fee or file an application to proceed in forma pauperis within thirty days. Id. at 19-20 [Torres II  
12 ECF No. 8]. The Clerk of the Court was directed to send petitioner an application to proceed in  
13 forma pauperis and a § 1983 complaint form. Id. at 20.

14 On November 26, 2007, petitioner filed a motion for a stay and abeyance, again in  
15 English, in which he requested that the case be stayed to allow him to exhaust his state court  
16 remedies. Id. at 21-31 [Torres II ECF No. 9]. Petitioner re-iterated his lack of English language  
17 skills and asserted that he had limited access to the law library, had been unable to obtain his case  
18 records without intervention by the California State Bar, and had “untreated mental health  
19 issue(s),” but made no mention of whether he intended to pay the filing fee or request to proceed  
20 in forma pauperis. Id. Petitioner stated that he sought to exhaust the following claims in state  
21 court: (1) perjury by a witness; (2) ineffective assistance of trial counsel based on failure to  
22 investigate, find exculpatory witnesses, and present a defense; (3) ineffective assistance of  
23 appellate counsel for failure to investigate and appeal meritorious claims and for delaying in  
24 sending him copies of his records; and (4) prosecutorial misconduct. Id. at 24 [Torres II ECF No.  
25 9 at 4]. He also stated that he was preparing a petition and expected to present it within the next  
26 sixty days if the court would issue an order granting him ten hours of law library access a week.  
27 Id. at 28 [Torres II ECF No. 9 at 8]. It is unclear whether the petition was to be filed in state or  
28 federal court.

1           On December 28, 2007, the magistrate judge filed findings and recommendations in  
2 which he recommended dismissing the case “without prejudice, for lack of prosecution and  
3 failure to comply with court rules and orders.” Id. at 32-34 [Torres II ECF No.10]. The findings  
4 and recommendations noted that despite repeated extensions of time, petitioner had failed to  
5 comply with court orders that he file an amended complaint and resolve the fee status of the case.  
6 Id.

7           Petitioner filed objections, in English, to the findings and recommendations on January  
8 21, 2008. Id. at 35-42 [Torres II ECF No.11]. Petitioner argued that because he was not an  
9 English speaking person, it was impossible for him to prosecute his claims “effectively and/or  
10 promptly comply with the court[']s orders and findings.” Id. at 35 [Torres II ECF No. 11 at 1].  
11 The objections appeared to renew the request for a stay, and stated that as much of the petition as  
12 had been completed was attached. Id. Petitioner identified the following issues for his habeas  
13 petition: (1) ineffective assistance of trial counsel; (2) ineffective assistance of appellate counsel;  
14 (3) the existence of a fundamental miscarriage of justice; and (4) actual innocence. Id. There was  
15 no mention of whether petitioner intended to pay the filing fee or submit a request to proceed in  
16 forma pauperis. Id.

17           On February 1, 2008, the district judge adopted the findings and recommendations and  
18 dismissed the case without prejudice for lack of prosecution and failure to comply with court  
19 rules. Id. at 43-44 [Torres II ECF No.12]. In dismissing the case, the court recognized that  
20 petitioner may have been attempting to assert claims pursuant to 28 U.S.C. § 2254. Id. at 43 fn.1  
21 [Torres II ECF No. 12 at 1]. The court also found that despite repeated extensions, petitioner had  
22 failed to resolve the fee status of the case, had not filed a proper operative pleading, and that in  
23 light of the assistance he was receiving, his claim that the language barrier prevented him from  
24 complying rang hollow. Id. at 44 [Torres II ECF No. 12 at 2]. Judgment was entered on  
25 February 4, 2008. Id. at 45 [Torres II ECF No. 13].

26           On February 19, 2008, petitioner filed two identical notices of appeal.<sup>5</sup> Id. at 46-47

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28 <sup>5</sup> It appears the second filed notice of appeal was originally sent to the Ninth Circuit Court of  
(continued)

1 [Torres II ECF Nos. 14, 17]. On March 19, 2008, the Ninth Circuit ordered petitioner to file a  
2 motion to proceed in forma pauperis, pay the filing fee, or otherwise show cause why the appeal  
3 should not be dismissed for failure to prosecute. Lodged Doc. No. 13 at 5-6. On April 4, 2008,  
4 petitioner filed an informal opening brief. Id. at 3. On May 8, 2008, the Ninth Circuit dismissed  
5 the appeal for failure to respond to the March 19, 2008 order. Id. at 7.

6 3. Torres v. Spearman, 2:09-cv-0531 (Torres III)

7 On February 24, 2009, the Clerk of the Court for the Eastern District of California filed a  
8 petition for writ of habeas corpus and a motion for a stay and abeyance from petitioner, and  
9 assigned the petition case number 2:09-cv-0531 (Torres III).<sup>6</sup> Lodged Doc. No. 6 at 2 [Torres III  
10 docket]; Lodged Doc. No. 5 [Torres III ECF No. 1]; Torres III ECF No. 2.<sup>7</sup> The petition was  
11 dated January 25, 2009 (Lodged Doc. No. 5 at 6 [Torres III ECF No. 1 at 6]), and the motion for  
12 stay was dated January 15, 2009 (Torres III ECF No. 2 at 11). The petition sought relief on the  
13 grounds that (1) trial counsel provided ineffective assistance by failing to properly investigate an  
14 alibi defense; (2) appellate counsel provided ineffective assistance by failing to make a claim for  
15 ineffective assistance of trial counsel; (3) his alibi defense would have established his innocence;  
16 and (4) he was denied due process as a result of the cumulative errors. Lodged Doc. No. 5  
17 [Torres III ECF No. 1].

18 On May 5, 2009, the court issued an order directing petitioner to pay the filing fee or  
19 submit an application to proceed in forma pauperis. Torres III ECF No. 7. On May 24, 2009,  
20 petitioner filed a notice of change of address stating that he had been transferred to a different  
21 prison and requesting a new application for in forma pauperis status because he had not been able  
22 to fill it out prior to his transfer. Torres III ECF No. 8. On June 9, 2009, the court directed the  
23 Clerk of Court to provide petitioner another copy of the in forma pauperis application and granted  
24 petitioner an additional thirty days to comply with the May 5, 2009 order. Torres III ECF No. 9.

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26 Appeal and forwarded to the district court. Lodged Doc. No. 12 at 47 [Torres II ECF No. 17].

27 <sup>6</sup> All pro se documents filed in Torres III were in English.

28 <sup>7</sup> “[A] court may take judicial notice of its own records in other cases.” U.S. v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980) (citing Fed. R. Evid. 201(b)(2)).

1 Petitioner filed a completed application for in forma pauperis status on June 15, 2009<sup>8</sup> (Torres III  
2 ECF No. 10), which was granted on June 25, 2009 (Torres III ECF No. 11).

3 On June 29, 2009, the magistrate judge issued findings and recommendations in which he  
4 recommended summary dismissal of the petition because it was untimely and denial of the  
5 motion to stay as moot. Torres III ECF No. 12. Petitioner objected to the findings and  
6 recommendations on July 11, 2009, on the grounds that he was entitled to equitable tolling based  
7 on his lack of English comprehension and his diligent efforts to pursue his case. Torres III ECF  
8 No. 16. The objections referenced both Torres I and Torres II. Id. The findings and  
9 recommendations were adopted in full on September 21, 2009. Torres III ECF No. 19.

10 After obtaining an extension of time, petitioner filed a notice of appeal on October 27,  
11 2009 (Torres III ECF No. 25), and a motion for a certificate of appealability on November 3,  
12 2009 (Torres III ECF No. 27). Petitioner's appeal was ultimately granted on October 18, 2011,  
13 and the case was remanded for further consideration of petitioner's equitable tolling argument.  
14 Torres III ECF No. 35; Torres III ECF No. 39 fn.1. Petitioner was also appointed counsel on  
15 appeal and that representation continued on remand. Torres III ECF No. 35.

16 On remand, proceedings resumed with an order for petitioner to show cause why his  
17 petition should not be summarily dismissed as untimely. Torres III ECF No. 39. On March 27,  
18 2012, petitioner responded to the order to show cause arguing that he was entitled to equitable  
19 tolling on the same grounds argued in the instant case. Torres III ECF No. 47. The magistrate  
20 judge found the equitable tolling issues to be "at best, murky," discharged the order to show  
21 cause, and ordered respondent to respond to the petition. Torres III ECF No. 49.

22 On November 26, 2012, respondent moved to dismiss the petition on the grounds that it  
23 was untimely and none of the claims had been exhausted. Torres III ECF No. 58. On November  
24 28, 2012, the case was transferred to the undersigned. Torres III ECF No. 59. Petitioner opposed  
25 the motion to dismiss on the grounds that he was entitled to equitable tolling. Torres III ECF No.

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27 <sup>8</sup> Petitioner filed another completed application on July 1, 2009, this time with a certified trust  
28 account statement attached. Torres III ECF No. 13.



1 63. Other than re-urging the previously filed motion for stay, petitioner made no argument  
2 regarding whether the claims in the petition had been exhausted. Id. at 14.

3 On June 17, 2013, findings and recommendations were filed recommending that the  
4 petition be dismissed because none of the issues therein had been exhausted, and declining to  
5 reach the issue of equitable tolling. Lodged Doc. No. 7 [Torres III ECF No. 70]. Petitioner filed  
6 objections to the findings and recommendations. Torres III ECF No. 73. The findings and  
7 recommendations were adopted in full on September 16, 2013, and judgment was entered on  
8 September 18, 2013. Torres III ECF Nos. 74-75.

9 4. Torres v. Price, 2:14-cv-0842 (Instant Case)

10 On April 2, 2014, petitioner filed a first amended habeas petition in Torres III. Torres III  
11 ECF No. 76. Because that case was closed and judgment entered, the amended petition was  
12 stricken and the instant case was opened. Torres III ECF No. 77. The new case was assigned  
13 case number 14-cv-0842. The petition states that petitioner is entitled to relief because his due  
14 process rights were violated when four prior instances of domestic violence were admitted into  
15 evidence at trial. ECF No. 1.

16 II. Motion to Dismiss

17 Respondent moves to dismiss the instant petition as untimely. ECF No. 16. Respondent  
18 argues that petitioner's judgment became final on August 8, 2006, and, absent tolling, the last day  
19 to file his federal habeas petition was August 8, 2007. Id. at 2-3. He asserts that petitioner is not  
20 eligible for statutory tolling because petitioner did not file any state post-conviction collateral  
21 actions challenging the judgment at issue. Id. at 3.

22 III. Opposition

23 In response to respondent's motion, petitioner agrees that the one-year statute of  
24 limitations expired on August 8, 2007. ECF No. 20 at 7.<sup>9</sup> Petitioner argues that the court should

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26 <sup>9</sup> Later in his response petitioner identifies August 9, 2007, as the date the statute of limitations  
27 expired. ECF No. 20 at 19. This is likely a typo given the previous concurrence with respondent  
28 that August 8, 2007, was the expiration of the statute of limitations. ECF No. 20 at 3.  
Regardless, the one day difference does not change the statute of limitations analysis.

1 order his petition filed *nunc pro tunc* to November 13, 2006,<sup>10</sup> the date Torres I was initiated,  
2 because the court mishandled his first two petitions by treating them as civil rights complaints and  
3 erred by failing to rule on his motion to stay. Id. at 6-7, 13-15. He further argues that he is  
4 entitled to equitable tolling because (1) he is uneducated; (2) he is Spanish-speaking and did not  
5 have access to Spanish-language materials or a translator; (3) he was on lockdown for the  
6 majority of the time; (4) when he was transferred from Pelican Bay his legal papers were lost and  
7 he was not able to get copies from appellate counsel until the state bar intervened; and (5) he is  
8 factually innocent. Id. at 15-24.

9 IV. Reply

10 Respondent replies that the petition should not be filed *nunc pro tunc* to November 13,  
11 2006, because the Torres I and Torres II were properly dismissed and do not relieve petitioner of  
12 his untimeliness. ECF No. 25 at 7-13. He also argues that petitioner is not entitled to equitable  
13 tolling because he was not diligent in pursuing his rights and he has not established that he was  
14 subject to extraordinary circumstances. Id. at 14-24.

15 V. Discussion

16 Section 2244(d)(1) of Title 28 of the United States Code contains a one-year statute of  
17 limitations for filing a habeas petition in federal court. The one-year clock commences from one  
18 of several alternative triggering dates. See 28 U.S.C. § 2244(d)(1). In this case the applicable  
19 date is that “on which the judgment became final by the conclusion of direct review or the  
20 expiration of the time for seeking such review.” § 2244(d)(1)(A).

21 The parties appear to disagree as to when the statute of limitations in this case began to  
22 run, with respondent identifying August 9, 2006, as the beginning of the one-year period (ECF  
23 No. 16 at 2-3) and petitioner identifying May 10, 2006, as the start date (ECF No. 20 at 19). The  
24 court finds that respondent has identified the correct date that the statute of limitations began to  
25 run. The California Supreme Court denied petitioner’s petition on direct review on May 10,

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26 <sup>10</sup> Petitioner actually requests the petition be filed *nunc pro tunc* to November 16, 2006 (ECF No.  
27 20 at 6), the date the letter in Torres I was filed by the Clerk of the Court, but under the prison  
28 mailbox rule, the date of filing would be November 13, 2006.

1 2006. ECF No. 1 at 2; Lodged Doc. No. 4. From that date, petitioner had ninety days from the  
2 entry of judgment to petition the United States Supreme Court for certiorari. (Sup. Ct. R. 13(1)),  
3 Accordingly, the last day for petitioner to file a petition in the United States Supreme Court was  
4 August 8, 2006. Since petitioner did not file a petition for certiorari with the United States  
5 Supreme Court, the statute of limitations began to run on August 9, 2006. Patterson v. Stewart,  
6 251 F.3d 1243, 1247 (9th Cir. 2001) (citing Fed. R. Civ. P. 6(a)) (the day order or judgment  
7 becomes final is excluded and time begins to run the day after the judgment becomes final).  
8 Despite the disagreement on when the statute of limitations began to run, the parties agree that,  
9 absent any statutory or equitable tolling, the statute of limitations expired on August 8, 2007.  
10 ECF No. 16 at 3; ECF No. 20 at 7.

11 The instant petition was filed on April 2, 2014. ECF No. 1. Without statutory or  
12 equitable tolling, the petition was filed over seven-and-one-half years after the statute of  
13 limitations expired.

14 A. Statutory Tolling

15 Under the AEDPA, the statute of limitations is tolled during the time that a properly filed  
16 application for state post-conviction or other collateral review is pending in state court. 28 U.S.C.  
17 § 2244(d)(2). It is uncontested that petitioner did not file an application for state post-conviction  
18 or other collateral review (ECF No. 1 at 3) and statutory tolling is therefore inapplicable in this  
19 case.

20 B. Equitable Tolling

21 A habeas petitioner is entitled to equitable tolling of AEDPA's one-year statute of  
22 limitations only if the petitioner shows: ““(1) that he has been pursuing his rights diligently, and  
23 (2) that some extraordinary circumstance stood in his way’ and prevented timely filing.” Holland  
24 v. Florida, 560 U.S. 631, 649 (2010) (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005);  
25 Ramirez v. Yates, 571 F.3d 993, 997 (9th Cir. 2009). “[T]he statute-of-limitations clock stops  
26 running when extraordinary circumstances first arise, but the clock resumes running once the  
27 extraordinary circumstances have ended or when the petitioner ceases to exercise reasonable  
28 diligence, whichever occurs earlier.” Luna v. Kernan, 784 F.3d 640, 651 (9th Cir. 2015) (citing

1 Gibbs v. Legrand, 767 F.3d 879, 891-92 (9th Cir. 2014). An “extraordinary circumstance” has  
2 been defined as an external force that is beyond the inmate’s control. Miles v. Prunty, 187 F.3d  
3 1104, 1107 (9th Cir. 1999). “The diligence required for equitable tolling purposes is ‘reasonable  
4 diligence,’ not ‘maximum feasible diligence.’” Holland, 560 U.S. at 653 (internal citations and  
5 additional quotation marks omitted); see also Bills v. Clark, 628 F.3d 1092, 1096 (9th Cir. 2010).

6 A showing of actual innocence can also satisfy the requirements for equitable tolling. Lee  
7 v. Lampert, 653 F.3d 929, 937 (9th Cir. 2011) (en banc); McQuiggin v. Perkins, 133 S. Ct. 1924,  
8 1928 (2013). “[W]here an otherwise time-barred habeas petitioner demonstrates that it is more  
9 likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt,  
10 the petitioner may pass through the Schlup v. Delo, 513 U.S. 298 (1995),]<sup>11</sup> gateway and have  
11 his constitutional claims heard on the merits.” Lee, 653 F.3d at 937; accord, McQuiggin, 133  
12 S.Ct. at 1928.

13 1. Court Error

14 Petitioner argues that the court should exercise its equitable powers and order the petition  
15 in this case filed as of November 13, 2006, because errors by the court contributed to petitioner’s  
16 delay in filing the instant petition. ECF No. 20 at 6-7. According to petitioner, the court erred by  
17 construing petitioner’s November 13, 2006; December 18, 2006; and January 27, 2007 letters as  
18 civil rights complaints under 42 U.S.C. § 1983 and by filing the January 27, 2007 letter as a  
19 separate complaint. Id. at 6-10. Petitioner argues that had the court properly construed the letters  
20 as a habeas petition and followed the Rules Governing Section 2254 Cases (Habeas Rules),  
21 petitioner would have been notified of the deficiencies in his petition so that he could timely  
22 correct them. Id. at 14-15.

23 This argument fails for two very basic and independent reasons. First, the letters could  
24 not permissibly have been construed as habeas petitions for purposes of stopping the running of  
25 the limitations period. Even if the letters should have been construed as requests for assistance

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27 <sup>11</sup> In Schlup, the Supreme Court announced that a showing of actual innocence could excuse a  
28 procedural default and permit a federal habeas court to reach the merits of otherwise barred  
claims for post-conviction relief.

1 related to an anticipated habeas petition, rather than requests related to a putative civil rights  
2 complaint, they would not have stopped the clock. None of the three letters stated claims for  
3 habeas relief, or even clearly indicated what those claims might be. The November 13, 2006  
4 letter stated that petitioner had been wrongfully convicted because of his past. ECF No. 20-1 at  
5 3-6. The December 18, 2006 letter provided some narrative background about petitioner's  
6 relationship with his ex-wife. Id. at 7-10.<sup>12</sup> The January 27, 2007 letter did not refer to  
7 petitioner's conviction or the facts of his case at all. ECF No. 20-2 at 4.

8 The limitations period stops running only when an inmate presents an application to the  
9 federal court for writ of habeas corpus. See 28 U.S.C. § 2244(d)(1). For purposes of the habeas  
10 statute, an "application" means a petition seeking adjudication of the merits of claims. Woodford  
11 v. Garceau, 538 U.S. 202, 207 (2003) (discussing application of AEDPA generally); Smith v.  
12 Mahoney, 611 F.3d 978, 994 (9th Cir.) (applying Garceau to statute of limitations context), cert.  
13 denied, 562 U.S. 965 (2010). Preliminary requests related to *anticipated* petitions, such as  
14 motions for the appointment of counsel, do not constitute applications for habeas relief or  
15 commence a habeas action. Garceau, 538 U.S. 202.<sup>13</sup> Because none of petitioner's letters, no  
16 matter how liberally construed, identified a legal or factual basis for habeas relief, they could not  
17 have been construed as petitions that would have stopped the running of the limitations period.  
18 See Isley v. Arizona Dept. of Corrections, 383 F.3d 1054, 1055 (9th Cir. 2004) (noting that filing  
19 of request for appointment of counsel in federal court did not stop the statute of limitations).  
20 Moreover, the record does not support an inference that if the court had identified the letters as  
21 attempts to pursue habeas relief, petitioner would have followed subsequent orders and filed a  
22 proper petition within the limitations period. This point brings us to the second reason that  
23 petitioner's court error argument fails.

24 The court's preliminary construction of Torres I and II as civil rights complaints has no

25 \_\_\_\_\_  
26 <sup>12</sup> It may be inferred that petitioner's altercations with his ex-wife were the basis of the domestic  
27 violence convictions that he claims in the instant petition were improperly admitted against him.

28 <sup>13</sup> In capital cases, the rules operate somewhat differently. That difference has no bearing on the  
instant case.

1 bearing on why those actions were dismissed. After the November 13, 2006 letter was filed in  
2 Torres I, petitioner was ordered to pay the filing fee or request leave to proceed in forma pauperis.  
3 Lodged Doc. No. 9 at 7 [Torres I ECF No. 3]. Although petitioner filed a request to proceed in  
4 forma pauperis (id. at 11-18 [Torres I ECF No. 5]), the trust account statement he provided only  
5 covered a four-month period and was not certified (id. at 18 [Torres I ECF No. 5 at 8]). Petitioner  
6 was therefore ordered to provide the required certified statement. Id. at 19-20 [Torres I No. 6].  
7 The action was ultimately dismissed because petitioner failed to comply with the order to provide  
8 a certified trust account statement for the six months preceding the filing of the action.<sup>14</sup> Id. at  
9 26-27 [Torres I ECF No. 12].

10 In Torres II, after the January 1, 2007 letter was filed it was dismissed with leave to  
11 amend and petitioner was ordered to submit a request to proceed in forma pauperis or pay the  
12 filing fee. Lodged Doc. No. 12 at 6-3 [Torres II ECF No. 3]. Despite several extensions of time,  
13 petitioner failed to file either an amended pleading or resolve the fee status in the case. Id. at 12-  
14 17, 19-20, 32-34 [Torres II ECF Nos. 5-6, 8, 10]. Though petitioner addressed the filing of the  
15 amended petition, and even filed a partial petition, he never once addressed or complied with the  
16 court's order that he pay the filing fee or submit a request to proceed in forma pauperis. Id. at 9-  
17 11, 18, 21-31, 35-42 [Torres II ECF Nos. 4, 7, 9, 11]. The case was dismissed for lack of  
18 prosecution and failure to comply with court rules and orders because petitioner failed to resolve  
19 the fee status of the case or submit an amended pleading. Id. at 43-44 [Torres II ECF No. 12].

20 When a petitioner files a petition for writ of habeas corpus pursuant to § 2254, the petition  
21 must be accompanied by the applicable filing fee or a motion for leave to proceed in pauperis and  
22 a certificate showing the amount of money in the petitioner's institutional account. Habeas Rule  
23 3(a). Therefore, regardless of whether petitioner was pursuing a civil rights complaint under §  
24 1983 or a habeas petition under § 2254, he was required to pay the filing fee or submit a request

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25 <sup>14</sup> Although the magistrate judge originally recommended the case be dismissed because  
26 petitioner had failed to keep the court apprised of his current address (Lodged Doc. No. 9 at 21-23  
27 [Torres I ECF No. 9]), in dismissing the action the district judge found that the problems with  
28 petitioner's address appeared to have been corrected, but that he had still not submitted the  
required trust account statement (id. at 26-27 [Torres I ECF No. 12]).

1 to proceed in forma pauperis. Even if the letters had been properly construed as petitions for  
2 habeas relief, it would not have been erroneous for the court to dismiss the petitions because  
3 petitioner failed to (1) comply with the order to correct the deficiency in his in forma pauperis  
4 application in Torres I, see Culler v. Bd. of Prison Terms, 405 F. App'x 263, 264 (9th Cir. 2010)  
5 (affirming dismissal of § 2254 habeas petition for failure to pay filing fee or provide in forma  
6 pauperis application in accordance with 28 U.S.C. § 1915(a)(2))<sup>15</sup>; and (2) pay the fee or submit  
7 an application for in forma pauperis status in Torres II, see Scott v. LaMarque, 27 F. App'x 858,  
8 859 (9th Cir. 2001) (affirming dismissal for petitioner's failure to comply with order to pay filing  
9 fee or show cause why he could not pay).

10 ““The power to amend *nunc pro tunc* is a limited one, and may be used only where  
11 necessary to correct a clear mistake and prevent injustice.”” United States v. Sumner, 226 F.3d  
12 1005, 1009-10 (9th Cir. 2000) (quoting Martin v. Henley, 452 F.2d 295, 299 (9th Cir. 1971)). In  
13 reviewing all the facts, the undersigned does not find that the Torres I and II courts were clearly  
14 mistaken or that filing the instant petition *nunc pro tunc* is necessary to prevent injustice.

15 In Torres I, even if the court erred in construing the letter as a civil rights complaint rather  
16 than a habeas petition, it appears that any misinterpretation was likely due to the language barrier  
17 since the letter was submitted entirely in Spanish. Moreover, petitioner failed to notify the court  
18 of any misinterpretation even after he had obtained the assistance of another inmate who was able  
19 to translate court orders for him and draft pleadings in English. Torres I was not dismissed until  
20 February 25, 2008 (Lodged Doc. No. 9 at 26-28 [Torres I ECF Nos. 12-13]), and petitioner  
21 obtained the assistance of a bilingual inmate by at least May 14, 2007 (Lodged Doc. No. 12 at 9-  
22 11 [Torres II ECF No. 4], if not earlier (see Lodged Doc. No. 9 at 11-18 [Torres I ECF No. 5]).<sup>16</sup>  
23 Additionally, petitioner failed to keep the court apprised of his current address, though it appears

24 \_\_\_\_\_  
25 <sup>15</sup> But see Naddi v. Hill, 106 F.3d 275, 277 (9th Cir. 1997) (PLRA amendment to § 1915  
26 requiring prisoners to pay full filing fee even when granted in forma pauperis status does not  
27 apply to habeas cases because they are not “civil action or appeal” as used in § 1915);

28 <sup>16</sup> Petitioner's English-language filings indicate that assistance was largely provided by inmate  
Miguel Diaz, but for the period of time petitioner was not at CSP-Solano, his documents reflect  
that he had the assistance of at least one other inmate.

1 that the issue was resolved without any action by petitioner; he failed to comply with or otherwise  
2 respond to the court's order that he submit a certified trust statement; he did not object to the  
3 recommendation that the case be dismissed, even though the findings and recommendations were  
4 issued after petition had obtained assistance from another inmate; and he did not appeal the  
5 dismissal. Id. at 1-3 [Torres I docket], 26 [Torres I ECF No. 12].

6 Given petitioner's general non-responsiveness in Torres I, even after obtaining assistance,  
7 the court does not find that any errors that may have been made by the court or the dismissal of  
8 the case were the result of clear mistake or that ordering the current petition filed *nunc pro tunc* to  
9 November 13, 2006, is necessary to prevent injustice.

10 In Torres II, the letter that was filed as the initial pleading was entirely in Spanish and not  
11 labeled with the case number from Torres I. Lodged Doc. No. 12 at 4-5 [Torres II ECF No. 1].  
12 Given the vague contents of the letter and the failure to identify the currently existing case (ECF  
13 No. 20-2 at 4), filing the letter as a separate action was not clear error and would not have been  
14 clear error even if the letter had been in English. Additionally, during the course of Torres II,  
15 petitioner failed to acknowledge, much less comply with, the court's multiple orders that he either  
16 pay the filing fee or submit a request to proceed in forma pauperis (id. at 6-8, 12-13, 19-20  
17 [Torres II ECF Nos. 3, 5, 8]) despite the provision of rough Spanish translations by the court (id.  
18 at 6-8, 14-17 [Torres II ECF Nos. 3, 6]) and the assistance of a bilingual inmate for all but the  
19 initial filing (id. at 9-11, 18, 21-31, 35-42, 46-47 [Torres II ECF Nos. 4, 7, 9, 11, 14, 17]). He  
20 also failed to file an amended petition, and any failure to construe the partial petition attached to  
21 his objections as the submission of an amended petition was not clear error. It was not clear  
22 whether the partial petition was intended as evidence that petitioner was working on his claims  
23 for exhaustion in state court, or that he was working on an amended petition for submission in  
24 Torres II. Id. at 35-42 [Torres II ECF No. 11]. This ambiguity was furthered by the fact that the  
25 partial petition identified and briefed only claims that were unexhausted, as identified in  
26 petitioner's motion for stay and abeyance. Id. at 24 [Torres II ECF No. 9 at 4], 35-42 [Torres II  
27 ECF No. 11].

28 Though petitioner filed a notice of appeal (id. at 46-47 [Torres II ECF Nos. 46-47]) and



1 filed an informal opening brief in the Ninth Circuit (Lodged Doc. No. 13 at 3), his appeal was  
2 dismissed for failure to respond to an order directing him to file a motion to proceed in forma  
3 pauperis, pay the appellate filing fee, or otherwise show cause why the appeal should not be  
4 dismissed for lack of prosecution. Id. at 5-7.

5 Finally, petitioner argues that the court erred by not ruling on the motion for stay and  
6 abeyance filed in Torres II. ECF No. 20 at 10-11. Petitioner overlooks the dispositive fact that  
7 there were not any claims, exhausted or unexhausted, before the court at that time. Prior to  
8 petitioner filing the motion for stay, the court had dismissed the initial pleading and given  
9 petitioner leave to file an amended pleading. Lodged Doc. No. 12 at 6-8 [Torres II ECF No. 3].  
10 Moreover, the motion for stay and abeyance did not identify or make reference to any exhausted  
11 claims that could be stayed and that petitioner intended to pursue. See Jiminez v. Rice, 276 F.3d  
12 478, 481 (9th Cir. 2001) (district court obligated to dismiss when petition contains no exhausted  
13 claims); see also Rasberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006) (stay under Rhines v.  
14 Weber, 544 U.S. 269 (2005) not available where federal petition includes only unexhausted  
15 claims, even where exhausted claims existed and could have been included, the court is not  
16 required to inquire into petitioner's intentions).

17 In light of petitioner's failure to respond to or comply with court orders to resolve the fee  
18 status of the case and the apparent abandonment of his appeal, the court does not find that  
19 dismissal of Torres II was a clear mistake or that ordering the current petition filed *nunc pro tunc*  
20 to November 13, 2006, is necessary to prevent injustice.

21 Even if Torres I and II were improperly dismissed, the court declines to file the petition  
22 *nunc pro tunc* to November 13, 2006, because doing so is not necessary to prevent injustice. The  
23 appeal in Torres II was dismissed on May 8, 2008. Lodged Doc. No. 13 at 7. Petitioner did not  
24 initiate Torres III until January 25, 2009 (Lodged Doc. No. 5 [Torres III ECF No. 1]), 262 days --  
25 or approximately eight-and-a-half months -- later, and that petition contained only unexhausted  
26 claims (Lodged Doc. No. 7 [Torres III ECF No. 70]). After judgment was entered in Torres III  
27 on September 18, 2013 (Lodged Doc. No. 8 [Torres III ECF No. 74]), petitioner did not file the  
28 instant petition until April 2, 2014 (ECF No. 1), 196 days -- or approximately six-and-a-half

1 months -- later. These are substantial gaps in petitioner's attempts to obtain habeas relief,  
2 especially given that petitioner knew, from the first filings in Torres I, that he had only a year to  
3 bring a habeas petition in federal court. ECF No. 20-1 at 5, 11. It is also notable that the first gap  
4 occurred after petitioner obtained assistance from a bilingual inmate and the second after  
5 petitioner had counsel.

6 Moreover, even if the court granted petitioner equitable tolling for the time Torres I, II,  
7 and III were pending, the gaps between the close of Torres II and the filing of Torres III and  
8 between the close of Torres III and the filing of the instant petition total 458 days. That number  
9 is further increased by inclusion of the 96 days between August 9, 2006 -- the day the statute of  
10 limitations began to run -- and November 13, 2006, the day petitioner filed the initial document in  
11 Torres I. These gaps, in total, significantly exceed one year.

12 Because the court does not find that filing the instant petition *nunc pro tunc* to November  
13 13, 2006, is necessary to correct a clear error by the court or to prevent injustice, it recommends  
14 that the request to do so be denied.

## 15 2. Diligence

16 "To determine if a petitioner has been diligent in pursuing his petition, courts consider the  
17 petitioner's overall level of care and caution in light of his or her particular circumstances." Doe  
18 v. Busby, 661 F.3d 1001, 1012 (9th Cir. 2011). In light of the circumstances, petitioner fails to  
19 show that he diligently pursued his petition. As discussed above in Section V.B.1., petitioner  
20 failed to comply with, or even acknowledge, orders in Torres I and II related to resolving the fee  
21 status in those cases. Reasonable diligence would include complying with, or at least responding  
22 to, court orders. See Bills v. Clark, 628 F.3d at 1100-01 (factors to consider when evaluating  
23 whether petitioner with mental impairment was diligent include whether impairment made it  
24 impossible to timely file on his own and whether circumstances demonstrate petitioner was  
25 otherwise diligent in attempting to comply with filing requirements). Though petitioner asserts  
26 that he was uneducated, illiterate in English, had no access to Spanish-language law materials or  
27 bilingual assistance, was on lockdown, and had no access to his legal documents, these claims do  
28 little to support a finding of diligence with regard to petitioner's failure to comply with the orders

1 to pay the filing fee or submit a request to proceed in forma pauperis, which led to dismissal of  
2 Torres I and II.

3 Petitioner's argument that he was on lockdown for the majority of the time and therefore  
4 unable to obtain assistance (ECF No. 20 at 21-22), is unavailing. First, petitioner's claim that he  
5 was on lockdown for the first seven months of the statute of limitations (ECF No. 20 at 20) is  
6 inaccurate. Petitioner claims to have been on lockdown only while at Pelican Bay State Prison  
7 and that he was transferred from Pelican Bay on December 14, 2006. Id. The statute of  
8 limitation did not begin to run until August 9, 2006, so at a maximum, based on petitioner's  
9 allegations, he was on lockdown for just over four months. Assuming that petitioner was on  
10 lockdown for those four months,<sup>17</sup> it would have had no bearing on his ability to comply with the  
11 pertinent court orders because the first order to plaintiff regarding the fee status of the case did  
12 not issue until December 12, 2006.

13 Petitioner's claims that he did not have access to Spanish-language legal materials is  
14 similarly unpersuasive with respect to the court orders regarding the fee status of Torres I and II.  
15 Submitting a fee payment or completing a form application to proceed in forma pauperis does not  
16 require legal research. The same applies to petitioner's claim that his legal paperwork was lost  
17 when he was transferred from Pelican Bay. Those records would have had no impact on  
18 petitioner's ability to comply with the court's orders related to paying the filing fee or seeking in  
19 forma pauperis status.

20 The record also shows that petitioner's claims that he was uneducated and illiterate in  
21 English would not have inhibited him from complying with the relevant orders. On December  
22 12, 2006, the court in Torres I ordered petitioner to pay the filing fee or submit an application to  
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24 <sup>17</sup> Respondent argues that the lockdown was lifted and normal programming resumed on October  
25 6, 2006 (ECF No. 25 at 21), and provides documentation of the lockdown (Lodged Doc. No. 17).  
26 He also argues that the next lockdown did not occur until December 30, 2006 (ECF No. 25 at  
27 21), and provides a memorandum regarding its implementation (Lodged Doc. No. 17 at 1), but  
28 the memorandum makes no mention of when the last lockdown ended and petitioner provides no  
other evidence, such as a declaration, showing that there were no lockdowns between October 6,  
2006, and December 30, 2006.

1 proceed in forma pauperis. Lodged Doc. No. 9 at 7 [Torres I ECF No. 3]. On January 18, 2007,  
2 petitioner managed to submit a completed application to proceed in forma pauperis. Id. at 11-18  
3 [Torres I ECF No. 5]. The form was in English, and what little of the form that required a written  
4 response was completed in English. Id.

5 The order directing petitioner to submit a certified copy of his trust account was filed  
6 March 28, 2007, and re-served on May 9, 2007. Id. at 2 [Torres I docket]. Petitioner has never  
7 specified when he first obtained the assistance of a bilingual inmate in pursuing his habeas  
8 litigation, but it was at least as early as May 14, 2007 (Lodged Doc. No. 12 at 9-11 [Torres II  
9 ECF No. 4]), shortly after the March 28, 2007 order was re-served.<sup>18</sup> This also means that  
10 petitioner would have had assistance in understanding and responding to the May 24, 2007  
11 findings and recommendations that recommended dismissing Torres I for failure to keep the court  
12 apprised of his current address. Lodged Doc. No. 9 at 21-23 [Torres I ECF No. 9]. However,  
13 petitioner failed to file anything further in Torres I and the case was dismissed on February 25,  
14 2008. Id. at 26-27 [Torres I ECF No. 12]. With respect to Torres II, the record shows that, with  
15 the possible exception of the first order directing petitioner to pay the filing fee or submit an  
16 application to proceed in forma pauperis (which included a rough Spanish translation), petitioner  
17 had assistance in translating court orders and filing documents with the court (Lodged Doc. No.  
18 12 at 1-3 [Torres II docket]) and petitioner had already demonstrated his ability to complete a  
19 request to proceed in forma pauperis (Lodged Doc. No. 9 at 11-18 [Torres I ECF No. 5]).

20 In light of the relatively simple directives related to resolving the fee status in Torres I and  
21 II, the court cannot find that petitioner was reasonably diligent. He ignored multiple orders to pay  
22 the filing fee or complete a request to proceed in forma pauperis, despite warnings that failure to  
23 comply could result in dismissal of the case. This conduct is inconsistent with diligence.

24 Even if the court were to find equitable tolling appropriate for the time Torres I and II  
25 were pending, petitioner offers no explanation for why he did not bring a petition containing his  
26 exhausted claim until April 2, 2014, despite having known in November 2006 that he had only a

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27 <sup>18</sup> All petitioner's filings from May 14, 2007 onward were submitted in English.  
28

1 year from the conclusion of appeal to bring a federal petition (ECF No. 20-1 at 5, 11), and  
2 knowing that he could only pursue exhausted claims in federal court (Lodged Doc. No. 12 at 21-  
3 31 [Torres II ECF No. 9]; Torres III ECF No. 2). While the letters in Torres I referenced  
4 petitioner's past (ECF No. 20-1 at 5, 10), the petition that was ultimately filed in Torres III  
5 (Lodged Doc. No. 5 [Torres III ECF No. 1]) – like the partial petition submitted in Torres II  
6 (Lodged Doc. No. 12 at 35-42 [Torres II ECF No. 11]) – contained only unexhausted claims and  
7 made no reference to the allegedly inappropriate admission of petitioner's past domestic violence  
8 incidents, which is the sole claim presented in the instant petition.

9 Torres II terminated on May 8, 2008, when the Ninth Circuit dismissed petitioner's  
10 appeal. Petitioner offers no explanation for his apparent abandonment of the prior bad acts claim  
11 during the nearly five years and eleven months that elapsed between May 8, 2008, and the filing  
12 of the instant petition. It should be noted that the last of petitioner's alleged extraordinary  
13 circumstances came to an end no later than November 26, 2007. See infra. Section V.B.3. Under  
14 these circumstances, petitioner cannot be said to have been diligent in pursuing the claim  
15 currently before the court. Pace, 544 U.S. at 419 (petitioner not diligent when he waited years to  
16 file state petition for post-conviction relief and another five months to pursue federal relief after  
17 state petition was decided); McQuiggin, 133 S. Ct. at 1931 (petitioner did not qualify for  
18 equitable tolling after waiting nearly six years to seek federal post-conviction relief).

19 Moreover, even if the court granted petitioner equitable tolling for the time Torres I, II,  
20 and III were pending, he fails to offer any explanation for the respective 262 and 196 day periods  
21 of inactivity between the close of Torres II and opening of Torres III and the close of Torres III  
22 and the filing of the instant case, totaling 458 days.<sup>19</sup> These unexplained gaps are inconsistent  
23 with diligence, especially for an individual who knew in 2006 that he had only a year to file a  
24 federal habeas petition. Although petitioner has alleged extraordinary circumstances, he was no  
25 longer on lockdown and had obtained the assistance of a bilingual inmate well before the close of

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26 <sup>19</sup> That number grows if one includes the 96 days between August 9, 2006, the day the statute of  
27 limitations began to run, and November 13, 2006, the day petitioner filed the initial document in  
28 Torres I.

1 Torres II and the first unexplained period of inactivity. With respect to the alleged loss of his  
2 legal papers, while petitioner fails provide the date he actually received his records, his filings in  
3 Torres II indicate that he was in possession of his records no later than November 26, 2007, again  
4 prior to the close of Torres II. Lodged Doc. No. 12 at 21 [Torres II ECF No. 9 at 1].

5 At that point petitioner could have simply filed a habeas petition in the California  
6 Supreme Court, containing the claim now being pursued in the instant petition. Instead, petitioner  
7 waited 262 days from the close of Torres II to submit a federal habeas petition containing only  
8 unexhausted claims, despite his demonstrated understanding that he needed to exhaust his state  
9 court remedies prior to bringing his claims in federal court. Id. at 21-31 [Torres II ECF No. 9];  
10 Torres III ECF No. 2. Moreover, petitioner makes no representation that he ever attempted to file  
11 a California Supreme Court petition containing the various unexhausted claims listed in his  
12 motions for stay and abeyance and in the petition in Torres III.<sup>20</sup> Petitioner did not need a stay of  
13 his federal case, or leave of this court, to file an exhaustion petition in state court either prior to or  
14 simultaneously with his federal petition.

15 The substantial unexplained gaps in petitioner's attempts to obtain habeas relief are  
16 inconsistent with diligence, especially in light of petitioner's knowledge of the federal statute of  
17 limitations. ECF No. 20-1 at 5, 11. In combination, these gaps significantly exceed one year,  
18 defeating any benefit petitioner might gain from equitable tolling of the time he was pursuing  
19 Torres I, II, and III. In light of the foregoing, the court cannot find that petitioner was diligent in  
20 pursuing habeas relief. Sanchez v. Yates, 503 F. App'x 520, 523 (9th Cir. 2013) (petitioner did  
21 not demonstrate diligence when he waited until ten months after impediment was removed to file  
22 federal habeas petition).

23 For the reasons set forth above, the court finds that petitioner has not been diligent in  
24 pursuing his habeas litigation and is therefore not entitled to equitable tolling.

### 25 3. Extraordinary Circumstances

26 Petitioner that he was subject to extraordinary circumstances because (1) he has no formal

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27 <sup>20</sup> Review of that court's online docketing system indicates that he did not and has not.  
28

1 education; (2) he had no access to Spanish-language legal materials or Spanish-language legal  
2 assistance; (3) he was on lockdown a majority of the time he was at Pelican Bay State Prison; and  
3 (4) he had no access to his legal papers. Although the court has already found that petitioner was  
4 not diligent in pursuing habeas litigation, which defeats equitable tolling, the court further finds  
5 that the alleged extraordinary circumstances cannot render the petition timely. ECF No. 20 at 12-  
6 20.

7 While petitioner offers little in the way of specific facts to establish that the alleged  
8 conditions constituted extraordinary circumstances, for purposes of this analysis the court will  
9 assume without deciding that the alleged conditions, when they existed without mitigation,  
10 constituted extraordinary circumstances. However, even if that were the case, equitable tolling  
11 would not save the current petition from untimeliness because the record shows that nearly all of  
12 the alleged obstacles ceased to rise to the level of extraordinary circumstances as of May 14,  
13 2007, when petitioner secured the assistance of a bilingual inmate in pursuing his habeas action.  
14 The final extraordinary circumstance, lack of access to his legal papers, ceased to be an issue no  
15 later than November 26, 2007.

16 As previously noted, petitioner claims that he was on lockdown only while he was  
17 incarcerated at Pelican Bay State Prison and that he was transferred from Pelican Bay on  
18 December 14, 2006. Id. at 21-22. Therefore, assuming that petitioner's lockdown status  
19 constituted an extraordinary circumstance, he would be entitled to tolling on that ground only up  
20 to December 14, 2006, which is over seven years and three months prior to the filing of the  
21 petition in this case.

22 Next, even if petitioner is uneducated and non-English speaking, both his lack of  
23 education and the lack of Spanish-language legal materials or translation assistance ceased to rise  
24 to the level of an extraordinary circumstance at least as early as May 14, 2007. On May 14, 2007,  
25 petitioner filed a motion for extension of time with the assistance of a bilingual inmate (Lodged  
26 Doc. No. 12 at 9-11 [Torres II ECF No. 4]) and petitioner states that he obtained assistance  
27 preparing his pleadings in May 2007 (ECF No. 20 at 21). Moreover, the dockets in Torres I and  
28 II indicate that after May 2007 petitioner consistently had assistance pursuing his habeas

1 litigation, and he does not claim otherwise.<sup>21</sup> In Mendoza v. Carey, on which petitioner relies  
2 heavily, the Ninth Circuit held that “a petitioner who demonstrates proficiency in English or who  
3 has the assistance of a translator would be barred from equitable relief.” 449 F.3d 1065, 1070  
4 (9th Cir. 2006) (citing Cobas v. Burgess, 306 F.3d 441, 444 (6th Cir. 2002)). By his own  
5 admission, beginning May 14, 2007, petitioner had both translation assistance and assistance in  
6 preparing documents for court, bringing to an end any extraordinary circumstances that may have  
7 existed as a result of his lack of education and inability to understand English. Id.; Raspberry, 448  
8 F.3d at 1154 (“a pro se petitioner's lack of legal sophistication is not, by itself, an extraordinary  
9 circumstance warranting equitable tolling”); Martinez v. Ryan, 133 F. App'x 382, 383 (9th Cir.  
10 2005) (limited education, reliance on other prisoners to file petition, and lack of access to legal  
11 materials and assistance due to custody status do not constitute extraordinary circumstances); see  
12 also Hughes v. Idaho State Bd. of Corr., 800 F.2d 905, 909 (9th Cir. 1986) (pro se prisoner's  
13 illiteracy and lack of knowledge of the law unfortunate but insufficient to establish cause).  
14 Therefore, even if entitled to equitable tolling on these grounds, petitioner waited over six years  
15 and ten months to file the petition in this case and equitable tolling would not make the petition  
16 timely.

17 Finally, petitioner claims that he was without his legal papers when they were lost during  
18 his transfer from Pelican Bay State Prison, and that it took intervention by the California State  
19 Bar to obtain them from appellate counsel. ECF No. 20 at 22. Though petitioner does not specify  
20 when he finally received his records, his motion for a stay in Torres II indicates that he had his  
21 complete file at the time he filed the motion, meaning he had his records no later than November  
22 26, 2007. Lodged Doc. No. 12 at 21-31 [Torres II ECF No. 9]. Even if the statute of limitations  
23 was tolled up to November 26, 2007, it was still another six years and four months until petitioner  
24 filed the instant petition.

25 For all these reasons, even if petitioner was entitled to equitable tolling for his alleged  
26 extraordinary circumstances, it would not make his petition timely and respondent's motion to

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27 <sup>21</sup> All filings from May 2007 onward were in English.  
28



1 dismiss should be granted.

2 4. Actual Innocence

3 In order to warrant equitable tolling, a petitioner claiming actual innocence must satisfy  
4 the Schlup standard by demonstrating ““that it is more likely than not that no reasonable juror  
5 would have convicted him in the light of the new evidence.”” Lee, 653 at 938 (quoting Schlup,  
6 513 U.S. at 327). Actual innocence in the miscarriage of justice context “means factual  
7 innocence, not mere legal insufficiency.” Bousley v. United States, 523 U.S. 614, 623-24 (1998);  
8 Sawyer v. Whitley, 505 U.S. 333, 339 (1992) (citing Smith v. Murray, 477 U.S. 527 (1986));  
9 Jaramillo v. Stewart, 340 F.3d 877, 882-83 (9th Cir. 2003) (accord).

10 While the standard is exacting, permitting review only in an “extraordinary” case,  
11 “absolute certainty” as to a petitioner’s guilt or innocence is not required. House v. Bell, 547  
12 U.S. 518, 538 (2006). To make a credible claim of actual innocence, petitioner must produce  
13 “new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness  
14 accounts, or critical physical evidence—that was not presented at trial.” Schlup, 513 U.S. at 324.  
15 The habeas court then considers all the evidence: old and new, incriminating and exculpatory,  
16 admissible at trial or not. House, 547 U.S. at 538. On this complete record, the court makes a  
17 “probabilistic determination about what reasonable, properly instructed jurors would do.” Id.  
18 (quoting Schlup, 513 U.S. at 329).

19 Petitioners asserting convincing actual innocence claims need not also prove diligence in  
20 order “to cross a federal court’s threshold.” McQuiggin, 133 S. Ct. at 1935. An “unjustifiable  
21 delay on a habeas petitioner’s part” does not constitute “an absolute barrier to relief.” Id. at 1928.  
22 However, timing is a factor that the court should consider “in determining whether actual  
23 innocence has been reliably shown.” Id. “Unexplained delay in presenting new evidence bears  
24 on the determination whether the petitioner has made the requisite showing.” Id. at 1935.

25 The entirety of petitioner’s actual innocence claim is as follows:

26 Mr. Torres has alleged he is factually innocent of the crimes  
27 charged. One of his claims is that trial counsel was ineffective for  
28 failing to investigate the case and failing to present a defense. The  
harsh remedy of dismissal would result in a miscarriage of justice.

1 Mr. Torres should be allowed to litigate this issue, he should be  
2 allowed to investigate this claim and fully present this claim to the  
3 court.

4 ECF No. 20 at 24. As respondent correctly points out, petitioner has not provided any new  
5 evidence in support of his actual innocence claim, nor does he identify what new evidence he may  
6 have or even claim that he has new evidence. ECF No. 25 at 27. Moreover, petitioner's request  
7 to be allowed to investigate the claim indicates that petitioner does not in fact have new evidence  
8 to present and that the existence of any new evidence is purely speculative. Petitioner also has  
9 not presented a claim for ineffective assistance of counsel based on a failure to investigate and  
10 present a defense as he argues. ECF No. 1. The only ground for relief in the instant petition  
11 relates to the alleged improper admission of four previous instances of domestic violence. Id.

12 Petitioner has neither provided new evidence for the court to consider nor hinted at the  
13 existence of new evidence on the matter. Absent new evidence, there are no grounds for the court  
14 to determine that reasonable jurors would find other than they already have. Schlup, 513 U.S. at  
15 327 (without new evidence of innocence, actual innocence exception does not apply). Petitioner  
16 is therefore not entitled to equitable tolling on the ground that he is actually innocent.

#### 16 VI. Request for Evidentiary Hearing

17 A habeas petitioner's motion for an evidentiary hearing should be granted when he makes  
18 "a good-faith allegation that would, if true, entitle him to equitable tolling." Laws v. Lamarque,  
19 351 F.3d 919, 921 (9th Cir. 2003). However, if the petitioner's claim can be resolved on the  
20 existing record, a federal evidentiary hearing is unnecessary. Totten v. Merkle, 137 F.3d 1172,  
21 1176 (9th Cir. 1998). Moreover, conclusory allegations, that are unsupported by specific facts, do  
22 not warrant an evidentiary hearing. Williams v. Woodford, 384 F.3d 567, 589 (9th Cir. 2002)  
23 (citing Phillips v. Woodford, 267 F.3d 966, 973 (9th Cir. 2001); Coleman v. McCormick, 874  
24 F.2d 1280, 1284-85 (9th Cir. 1989). "[A] petitioner's statement, even if sworn, need not convince  
25 a court that equitable tolling is justified should countervailing evidence be introduced." Laws,  
26 351 F.3d at 924. "District courts have limited resources (especially time), and to require them to  
27 conduct further evidentiary hearings when there is already sufficient evidence in the record to  
28

1 make the relevant determination is needlessly wasteful.” Roberts v. Marshall, 627 F.3d 768, 773  
2 (9th Cir. 2010).

3 As set forth above in Section V.B.2, even if extraordinary circumstances did exist,  
4 petitioner was not diligent in pursuing his habeas litigation. Moreover, taking petitioner’s  
5 allegations as true, even if he were granted equitable tolling for the periods of time he was subject  
6 to the allegedly extraordinary circumstances, it would not make the instant petition timely. For  
7 these reasons, petitioner’s request for an evidentiary hearing is denied.

8 VII. Conclusion

9 For the reasons set forth above, respondent’s motion to dismiss should be granted because  
10 the petition is untimely and petitioner is not entitled to equitable tolling. Petitioner’s request for  
11 an evidentiary hearing will be denied.

12 VIII. Certificate of Appealability

13 Pursuant to Rule 11 of the Federal Rules Governing Section 2254 Cases, this court must  
14 issue or deny a certificate of appealability when it enters a final order adverse to the applicant. A  
15 certificate of appealability may issue only “if the applicant has made a substantial showing of the  
16 denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). For the reasons set forth in these  
17 findings and recommendations, a substantial showing of the denial of a constitutional right has  
18 not been made in this case. Therefore, no certificate of appealability should issue.

19 Accordingly, IT IS HEREBY ORDERED that petitioner’s request for an evidentiary  
20 hearing (ECF No. 20) is denied.

21 IT IS FURTHER RECOMMENDED that:


22 1. Respondent’s motion to dismiss (ECF No. 16) be granted and petitioner’s application  
23 for a writ of habeas corpus be denied as untimely.

24 2. This court decline to issue the certificate of appealability referenced in 28 U.S.C. §  
25 2253.

26 These findings and recommendations are submitted to the United States District Judge  
27 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **ten (10)** days  
28 after being served with these findings and recommendations, any party may file written

1 objections with the court, which shall be captioned “Objections to Magistrate Judge’s Findings  
2 and Recommendations.” **Due to exigencies in the court’s calendar, no extensions of time will**  
3 **be granted.** A copy of any objections filed with the court shall also be served on all parties. The  
4 parties are advised that failure to file objections within the specified time may waive the right to  
5 appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

6 DATED: September 17, 2015

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9 ALLISON CLAIRE  
10 UNITED STATES MAGISTRATE JUDGE  
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