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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

ISREAL CERVANTES,  
Petitioner,  
v.  
RONALD RACKLEY, Warden,  
Respondent.

No. 2:14-cv-2901 JAM KJN P

FINDINGS AND RECOMMENDATIONS

I. Introduction

Petitioner is a state prisoner, proceeding without counsel, and in forma pauperis. Petitioner filed an application for petition of writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner does not challenge his underlying conviction; rather, petitioner challenges two prison disciplinary reports. Pending before the court is respondent’s motion to dismiss the habeas petition as barred by the statute of limitations. For the reasons set forth below, respondent’s motion should be granted.

II. Legal Standards

Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition if it “plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court. . . .” Id. The Court of Appeals for the Ninth Circuit has referred to a respondent’s motion to dismiss as a request for the court to dismiss under

1 Rule 4 of the Rules Governing § 2254 Cases. See, e.g., O’Bremski v. Maass, 915 F.2d 418, 420  
2 (1991). Accordingly, the court will review respondent’s motion to dismiss pursuant to its  
3 authority under Rule 4.

4 On April 24, 1996, the Antiterrorism and Effective Death Penalty Act (“AEDPA”) was  
5 enacted. Section 2244(d) of Title 8 of the United States Code provides:

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

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

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

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

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

18 (2) The time during which a properly filed application for State  
19 postconviction or other collateral review with respect to the  
pertinent judgment or claim is pending shall not be counted toward  
any period of limitation under this subsection.

20 28 U.S.C. § 2244(d).

21 The AEDPA statute of limitations is tolled during the time a properly filed application for  
22 post-conviction relief is pending in state court. 28 U.S.C. § 2244(d)(2). The statute of limitations  
23 is not tolled during the interval between the date on which a decision becomes final and the date  
24 on which the petitioner files his first state collateral challenge. Nino v. Galaza, 183 F.3d 1003,  
25 1006 (9th Cir. 1999). Once state collateral proceedings are commenced, a state habeas petition is  
26 “pending” during a full round of review in the state courts, including the time between a lower  
27 court decision and the filing of a new petition in a higher court, as long as the intervals between  
28 petitions are “reasonable.” See Evans v. Chavis, 546 U.S. 189, 192 (2006); Carey v. Saffold, 536

1 U.S. 214, 222-24 (2002).

2 III. Chronology

3 For purposes of the statute of limitations analysis, the relevant chronology of this case is  
4 as follows:

5 1. On May 1, 2012, petitioner was charged with conspiracy to introduce a controlled  
6 substance into a state prison in Rules Violation Report (“RVR”) Log # FOL-512-05-001;  
7 petitioner was subsequently found guilty. (ECF No. 11-1 at 28.) Petitioner filed an  
8 administrative appeal challenging the RVR, which was denied at the final review level on  
9 December 28, 2012, in Third Level Appeal Decision, Log No. FSP-12-00723. (ECF No. 11-1 at  
10 22.)

11 2. On May 24, 2012, petitioner was charged with overfamiliarity with staff in RVR Log #  
12 FOL-512-05-011, and subsequently found guilty. (ECF No. 11-1 at 77.) Petitioner filed an  
13 administrative appeal challenging the RVR, which was denied at the final review level on  
14 December 18, 2012, in Third Level Appeal Decision, Log No. FSP-12-00839. (ECF No. 11-1 at  
15 70.)

16 3. On March 21, 2013,<sup>1</sup> petitioner filed one petition for writ of habeas corpus in the  
17 Sacramento County Superior Court, challenging both RVRs on the grounds that the disciplinary  
18 convictions were not supported by the evidence. (ECF No. 11-1.) On May 16, 2013, the superior  
19 court denied the petition in a reasoned decision. (ECF No. 11-2 at 2-4.)

20 4. On May 29, 2013, petitioner filed a petition for writ of habeas corpus in the California  
21 Court of Appeal, Third Appellate District, again challenging both RVRs on the same grounds as  
22 in the superior court. (ECF No. 11-2 at 6.) On September 12, 2013, the appellate court denied  
23 the petition without comment. (ECF No. 11-3 at 2.)

24 5. On September 24, 2013, petitioner filed a petition for writ of habeas corpus in the  
25 California Supreme Court. (ECF No. 11-3 at 4.) On February 11, 2014, the California Supreme  
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27 <sup>1</sup> All of petitioner’s state court filings were given benefit of the mailbox rule. See Campbell v.  
28 Henry, 614 F.3d 1056, 1059 (9th Cir. 2010) (under the mailbox rule, the petition is deemed filed  
when handed to prison authorities for mailing).

1 Court denied the petition without comment. (ECF No. 11-3 at 97.)

2 6. On December 2, 2014, petitioner signed the instant federal petition and the proof of  
3 service by mail. See Rule 3(d) of the Federal Rules Governing Section 2254 Cases. Respondent  
4 filed the motion to dismiss on February 25, 2015 (ECF No. 11), and petitioner filed an amended  
5 opposition (ECF No. 15) on April 21, 2015. No reply was filed.

#### 6 IV. Statutory Tolling

7 Where, as here, the habeas petitioner challenges administrative decisions, AEDPA's one-  
8 year limitations period commences on "the date on which the factual predicate of the claim or  
9 claims presented could have been discovered through the exercise of due diligence." 28 U.S.C.  
10 § 2244(d)(1)(D); Shelby v. Bartlett, 391 F.3d 1061, 1062 (9th Cir. 2004). "As a general rule, the  
11 state agency's denial of an administrative appeal is the 'factual predicate' for such habeas  
12 claims." Mardesich v. Cate, 668 F.3d 1164, 1172 (9th Cir. 2012), citing Redd v. McGrath, 343  
13 F.3d 1077, 1085 (9th Cir. 2003).

#### 14 A. Conspiracy RVR

15 The RVR for conspiracy to introduce a controlled substance into a state prison was denied  
16 at the final level on December 28, 2012. The statute of limitations period began to run the  
17 following day, on December 29, 2012. See Patterson v. Stewart, 251 F.3d 1243, 1247 (9th Cir.  
18 2001). Absent tolling, the limitations period expired on December 29, 2013.

19 On March 21, 2013, petitioner filed his petition in the superior court. The limitations  
20 period ran from December 29, 2012, until March 21, 2013, a period of 82 days. Petitioner  
21 promptly proceeded from the superior court through the California Supreme Court, so he is  
22 entitled to statutory tolling from March 21, 2013, through February 11, 2014, the date the  
23 California Supreme Court denied the petition.

24 On February 12, 2014, the limitations period began to run again. Because 82 days of the  
25 one-year limitations period had already expired, petitioner had 283 days left to file his federal  
26 petition. Thus, the period expired on Saturday, November 22, 2014, and the federal petition was  
27 due in federal court on Monday, November 24, 2014. Fed. R. Civ. P. 6. However, petitioner did  
28 not file his federal petition until December 2, 2014. Because petitioner did not file his federal

1 petition challenging the conspiracy RVR until after the limitations period expired, his petition is  
2 barred by the statute of limitations.

3 B. Overfamiliarity RVR

4 The RVR for overfamiliarity with staff was denied at the final level on December 18,  
5 2012, and the limitations period began to run the next day, December 19, 2012. Absent tolling,  
6 the limitations period expired on December 19, 2013.

7 On March 21, 2013, petitioner filed his petition in the superior court. The limitations  
8 period ran from December 18, 2012, until March 21, 2013, a period of 92 days. Petitioner  
9 promptly proceeded from the superior court through the California Supreme Court, so he is  
10 entitled to statutory tolling from March 21, 2013, through February 11, 2014, the date the  
11 California Supreme Court denied the petition.

12 On February 12, 2014, the limitations period began to run again. Because 92 days of the  
13 one-year limitations period had already expired, petitioner had 273 days left to file his federal  
14 petition. Thus, the period expired on Wednesday, November 12, 2014. However, petitioner did  
15 not file his federal petition until December 2, 2014. Because petitioner did not file his federal  
16 petition challenging the overfamiliarity RVR until after the limitations period expired, his petition  
17 is barred by the statute of limitations.

18 C. Petitioner's Arguments

19 Petitioner contends that the limitations period began to run on May 16, 2013, "when he  
20 was able to file his first collateral claim" in the superior court. (ECF No. 14 at 5.) Petitioner is  
21 mistaken. Even when applying the other subdivisions of 28 U.S.C. § 2244, the limitations period  
22 does not commence when the habeas petitioner files the first habeas petition in the superior court.  
23 This court is bound by Ninth Circuit authority to find that the limitations period began when the  
24 final decision issued on petitioner's administrative appeals. Redd, 343 F.3d at 1085.

25 In addition, petitioner argues that he could not file his federal petition until after the  
26 California Supreme Court issued its ruling on February 11, 2014. Therefore, he contends that  
27 such ruling was an impediment to his filing, under § 2244(d)(1)(B), and that he had until  
28 February 11, 2015, in which to file in federal court.

1            Subsection B of section 2244(d)(1)(B) is inapplicable. To warrant delayed accrual under  
2 section 2244(d)(1)(B), petitioner must demonstrate that illegal conduct by the state or those acting  
3 for the state “made it impossible for him to file a timely § 2254 petition in federal court.” See  
4 Ramirez v. Yates, 571 F.3d 993, 1000-01 (9th Cir. 2009). Additionally, petitioner must “show a  
5 causal connection between the unlawful impediment and his failure to file a timely habeas  
6 petition.” Bryant v. Arizona Att’y General, 499 F.3d 1056, 1060 (9th Cir. 2007) (citations  
7 omitted). The standard for satisfying § 2244(d)(1)(B) is “far higher” than the standard for  
8 demonstrating an entitlement to equitable tolling.<sup>2</sup> Ramirez v. Yates, 571 F.3d at 1000-01.  
9 Petitioner must show that the alleged impediment “altogether prevented him from presenting his  
10 claims in *any* form, to *any* court.” See id. at 1001 (citation omitted).

11            Here, the ruling by the California Supreme Court was not an impediment that prevented  
12 petitioner from filing in federal court. Rather, in order to demonstrate the exhaustion of state  
13 court remedies, petitioner was required to first present his claims to the California Supreme  
14 Court. Picard v. Connor, 404 U.S. 270, 276 (1971). Therefore, the ruling by the California  
15 Supreme Court enabled petitioner to file in federal court. In addition, the February 11, 2014  
16 ruling did not prevent petitioner from filing in any court; petitioner had until November of 2014,  
17 or at least nine months, in which to file in federal court. Petitioner’s reliance on § 2244(d)(1)(B)  
18 is unavailing.

#### 19 V. Equitable Tolling

20            Equitable tolling is available to toll the one-year statute of limitations available to 28  
21 U.S.C. § 2254 habeas corpus cases. Holland v. Florida, 130 S. Ct. 2549, 2560 (2010). A litigant  
22 seeking equitable tolling must establish: (1) that he has been pursuing his rights diligently; and  
23 (2) that some extraordinary circumstance stood in his way. Pace, 544 U.S. at 418. The Ninth  
24 Circuit has explained:

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26 <sup>2</sup> As discussed below, in this Circuit “[a] petitioner seeking equitable tolling bears the heavy  
27 burden of showing (1) that he has been pursuing his rights diligently, and (2) that some  
28 extraordinary circumstance stood in his way.” Chaffer v. Prosper, 592 F.3d 1046, 1048 (9th Cir.  
2010) (citation and internal quotations omitted).

1 To apply the doctrine in “extraordinary circumstances” necessarily  
2 suggests the doctrine's rarity, and the requirement that extraordinary  
3 circumstances “stood in his way” suggests that an external force  
4 must cause the untimeliness, rather than, as we have said, merely  
5 “oversight, miscalculation or negligence on [the petitioner’s] part,  
6 all of which would preclude the application of equitable tolling.

7 Waldron-Ramsey v. Pacholke, 556 F.3d 1008, 1011 (9th Cir.) (internal citation omitted), cert.  
8 denied, 130 S. Ct. 244 (2009); see also Stillman v. LaMarque, 319 F.3d 1199, 1203 (9th Cir.  
9 2003) (petitioner must show that the external force caused the untimeliness). It is petitioner’s  
10 burden to demonstrate that he is entitled to equitable tolling. Espinoza-Matthews v. California,  
11 432 F.3d 1021, 1026 (9th Cir. 2005).

12 Petitioner argues that he is entitled to equitable tolling. However, other than his  
13 arguments addressed in section IV.C. above, petitioner fails to identify any extraordinary  
14 circumstances that prevented him from filing his federal petition within the statute of limitations  
15 period. Indeed, because petitioner delayed filing in federal court over nine months after the  
16 California Supreme Court denied his state court petition, he has failed to show that he exercised  
17 diligence in pursuing his rights during the limitations period. See Bryant v. Arizona Atty. Gen.,  
18 499 F.3d 1056, 1061 (9th Cir.2007) (“A petitioner must show that his untimeliness was caused by  
19 an external impediment and not by his own lack of diligence.”). On this record, the undersigned  
20 cannot find that petitioner is entitled to equitable tolling.

21 VI. Conclusion

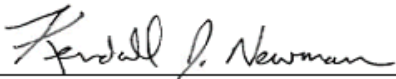
22 Accordingly, IT IS HEREBY RECOMMENDED that:

- 23 1. Respondent’s motion to dismiss (ECF No. 11) be granted; and
- 24 2. This action be dismissed.

25 These findings and recommendations are submitted to the United States District Judge  
26 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
27 after being served with these findings and recommendations, any party may file written  
28 objections with the court and serve a copy on all parties. Such a document should be captioned  
“Objections to Magistrate Judge’s Findings and Recommendations.” If petitioner files objections,  
he shall also address whether a certificate of appealability should issue and, if so, why and as to

1 which issues. A certificate of appealability may issue under 28 U.S.C. § 2253 “only if the  
2 applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C.  
3 § 2253(c)(3). Any response to the objections shall be served and filed within fourteen days after  
4 service of the objections. The parties are advised that failure to file objections within the  
5 specified time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951  
6 F.2d 1153 (9th Cir. 1991).

7 Dated: May 18, 2015

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KENDALL J. NEWMAN  
UNITED STATES MAGISTRATE JUDGE

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