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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

RONALD KEMONI PETERSON,  
Petitioner,  
v.  
SUZAN L. HUBBARD,  
Respondent.

No. 15-cv-0689 KJM KJN P

ORDER

Petitioner is a state prisoner, proceeding without counsel, with an application for a writ of habeas corpus pursuant to 28 U.S.C. 2254. Petitioner challenges his 2009 conviction for robbery and related offenses. Respondent’s motion to dismiss is pending. Respondent claims that the petition must be dismissed because petitioner’s claims are barred by the one-year statute of limitations. (ECF No. 14.) Petitioner opposes the motion, contending that his petition should be considered timely because he is entitled to equitable tolling. After careful consideration of the record before the court, the undersigned finds that additional briefing is warranted in this case.

Equitable Tolling

The one year statute of limitations for filing a federal habeas petition may be equitably tolled if extraordinary circumstances beyond a prisoner’s control prevent the prisoner from filing on time. See Holland v. Florida, 560 U.S. 631, 645 (2010). A petitioner seeking equitable tolling must establish two elements: “(1) that he has been pursuing his rights diligently, and (2) that

1 some extraordinary circumstance stood in his way.” Pace v. DiGuglielmo, 544 U.S. 408, 418  
2 (2005). The diligence required is “reasonable diligence,” not “maximum feasible diligence.” See  
3 Holland, 560 U.S. at 653; see also Bills v. Clark, 628 F.3d 1092, 1096 (9th Cir. 2010).

4 In his opposition to respondent’s motion to dismiss, petitioner contends that equitable  
5 tolling is warranted based on his lack of access to legal materials, his placement in administrative  
6 segregation, and his mental health status.

7 *Mental Impairment*

8 The Ninth Circuit has articulated a specific, two-part test for an equitable tolling claim  
9 based on a petitioner’s mental impairment:

10 (1) *First*, a petitioner must show his mental impairment was an  
11 “extraordinary circumstance” beyond his control by demonstrating  
the impairment was so severe that either

12 (a) petitioner was unable to rationally or factually to personally  
13 understand the need to timely file, or

14 (b) petitioner’s mental state rendered him unable personally to  
prepare a habeas petition and effectuate its filing.

15 (2) *Second*, the petitioner must show diligence in pursuing the  
16 claims to the extent he could understand them, but that the mental  
17 impairment made it impossible to meet the filing deadline under the  
totality of the circumstances, including reasonably available access  
to assistance.

18 Bills v. Clark, 628 F.3d 1092, 1099-1100 (9th Cir. 2010) (citations omitted); see also Orthel v.  
19 Yates, 795 F.3d 935, 938 (9th Cir. 2015) (“A petitioner seeking equitable tolling on the grounds  
20 of mental incompetence must show extraordinary circumstances, such as an inability to rationally  
21 or factually personally understand the need to timely file, or a mental state rendering an inability  
22 personally to prepare a habeas petition and effectuate its filing.”).

23 A petitioner alleging a severe mental impairment during the filing period is not entitled to  
24 an evidentiary hearing unless he or she makes “a good faith allegation that would, if true, entitle  
25 him to equitable tolling.” Laws v. Lamarque, 351 F.3d 919, 921 (9th Cir. 2003) (remanding for  
26 consideration of whether the petitioner's delayed filing was “attributable to psychiatric medication  
27 which deprived Petitioner of any kind of consciousness” where the petitioner had demonstrated  
28 “evidence of serious mental illness” by attaching prison psychiatric and medical records); see

1 Bills, 628 F.3d at 1099-100 (remanding where the petitioner was in the lowest percentile for  
2 verbal IQ, verbal comprehension and working memory, and, according to clinical psychologists,  
3 was incapable of inferential thinking necessary to complete a federal habeas form); see also  
4 Orthel, 795 F.3d at 939-40 (“Where the record is amply developed, and where it indicates that the  
5 petitioner’s mental incompetence was not so severe as to cause the untimely filing of his habeas  
6 petition, a district court is not obligated to hold evidentiary hearings to further develop the factual  
7 record, notwithstanding a petitioner's allegations of mental incompetence.”) (quoting Roberts v.  
8 Marshall, 627 F.3d 768, 773 (9th Cir. 2010).)

9 In the instant case, petitioner alleges that for the past two to three years, he has been  
10 taking Trilyptol for anxiety, depression, and post-traumatic stress disorder, and Zoloft for  
11 depression. (See ECF No. 17 at 7.) Petitioner alleges that these medications “sometimes cause  
12 [petitioner] to lose [his] memory short term [*sic*] and have jumbled thoughts because of their side  
13 effects.” (Id.) However, petitioner has not submitted any medical records or other documentation  
14 in support of his apparent contention that his alleged mental impairment was so severe that it  
15 caused his untimely filing.

16 Petitioner is granted the opportunity to provide additional briefing on his equitable tolling  
17 claim. Specifically, petitioner is directed to file a supplemental brief, signed under penalty of  
18 perjury, addressing his allegations that his medications interfered with his short term memory and  
19 “jumbled” his thoughts. In his brief, petitioner should explain when he started taking each  
20 medication and for what periods of time he was unable to file his federal habeas petition, as a  
21 result of the side effects of the medications. Petitioner must demonstrate by competent evidence  
22 that he suffers from a serious mental illness. Thus, petitioner is encouraged to attach any medical  
23 records he may have in support of his claims, including copies of his prescriptions or progress  
24 notes prepared by medical staff. Specifically, petitioner should submit any documents that would  
25 support his claim that (1) he was actually taking these medications for the period of time alleged,  
26 and (2) that the medications and related side effects interfered with his thought process so  
27 severely that it caused the untimely filing of his federal habeas petition.

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1           *Lack of Access to Legal Materials*

2           In some instances, a petitioner's lack of access to his or her legal files may warrant  
3 equitable tolling. See Waldron-Ramsey v. Pacholke, 556 F.3d 1008, 1013 (9th Cir.), cert. denied,  
4 130 S. Ct. 244 (2009) (“[d]eprivation of legal materials is the type of external impediment for  
5 which we have granted equitable tolling”); Ramirez v. Yates, 571 F.3d 993, 998 (9th Cir. 2009)  
6 (holding that “a complete lack of access to a legal file may constitute an extraordinary  
7 circumstance” and remanding for determination of whether petitioner's lack of access to his legal  
8 file made timely filing impossible). However, the dispositive question is whether the denial of  
9 access to the files was the cause of the delay. United States v. Battles, 362 F.3d 1195, 1197-98  
10 (9th Cir. 2004).

11           In his opposition, petitioner contends that he is entitled to equitable tolling because, on or  
12 about March 11, 2014, he was placed in administrative segregation and thereafter involuntarily  
13 transferred to another prison. (See ECF No. 17 at 6.) Petitioner asserts that he had “several  
14 conflicting issues about obtaining his legal materials,” and was not released from administrative  
15 segregation until approximately January 2015. (See id. at 7.) If petitioner was completely  
16 deprived of access to his legal materials during this time, he may be entitled to equitable tolling.  
17 However, it is not clear from petitioner's opposition if he was denied access to his legal materials  
18 during the entire period of March 11, 2014, through January 2015, or if he had access to his  
19 materials during part of this time. Therefore, in his supplemental brief, petitioner should explain  
20 to the court (1) for what periods of time he was without access to his legal materials, and (2)  
21 whether he had access to some of his legal materials during this time, or if he was completely  
22 denied access to all of his materials.

23           The court also notes that petitioner's federal habeas corpus petition includes as  
24 attachments several letters documenting petitioner's efforts to obtain various legal materials in  
25 late 2012 and early 2013, before his first state habeas petition was filed. These letters suggest that  
26 petitioner may have been without access to his legal materials for some period of time before he  
27 filed his first state habeas petition in the Solano County Superior Court.

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1           Petitioner is advised that the federal statute of limitations was running during the time  
2 before he filed his first state habeas petition. If it is petitioner's position that he is entitled to  
3 equitable tolling for any period of time between October 11, 2011, and the filing of his first state  
4 habeas petition, petitioner should explain this argument in his supplemental briefing.

5           *Delay in Filing State Habeas Petition with the California Supreme Court*

6           In general, the statute of limitations is statutorily tolled during the time after a state habeas  
7 petition has been filed, but before a decision has been rendered. Nedds v. Calderon, 678 F.3d  
8 777, 780 (9th Cir. 2012). However, "a California habeas petitioner who unreasonably delays in  
9 filing a state habeas petition is not entitled to the benefit of statutory tolling during the gap or  
10 interval preceding the filing." Id. at 781 (citing Carey v. Saffold, 536 U.S. 214, 225-27 (2002)).  
11 Thus, "[t]he period between a California lower court's denial of review and the filing of an  
12 original petition in a higher court is tolled -- because it is part of a single round of habeas relief --  
13 so long as the filing is timely under California law." Banjo v. Ayers, 614 F.3d 964, 968 (9th Cir.  
14 2010). Generally, a gap of 30 to 60 days between state petitions is considered a "reasonable  
15 time" during which the statute of limitations is tolled. Evans v. Chavis, 546 U.S. 189, 210 (2006)  
16 (using 30 to 60 days as general measurement for reasonableness based on other states' rules  
17 governing time to appeal to the state supreme court); Carey, 536 U.S. at 219 (same).

18           Here, the court observes that after petitioner's state habeas petition was denied by the  
19 California Court of Appeal on August 2, 2012, petitioner waited 81 days to file his habeas  
20 petition with the California Supreme Court. (See ECF No. 14-2 at 51, 52.) Petitioner is advised  
21 that this length of delay is generally considered unreasonable, unless petitioner provides some  
22 justification for the delay. See Evans v. Chavis, 546 U.S. at 210. If petitioner has an explanation  
23 as to why he delayed in filing his petition in the California Supreme Court, he should provide this  
24 explanation in his supplemental brief. Petitioner is advised that if he cannot adequately justify the  
25 delay, petitioner will not be entitled to tolling during the interval between the California Court of  
26 Appeal's denial of his petition and the filing of his petition in the California Supreme Court.

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1           *Diligence*

2           Finally, petitioner is reminded that petitioner “bears the burden of showing his own  
3 diligence *and* that the hardship caused by lack of access to his materials was an extraordinary  
4 circumstance that caused him to file his petition . . . late.” Waldron-Ramsey, 556 F.3d at 1013  
5 (emphasis added). In determining whether a habeas petitioner has been diligent, courts consider  
6 both whether he was diligent in pursuing his rights “*at the time his efforts* were being thwarted,”  
7 as well as during the “period of time *before* the external impediment.” Roy, 465 F.3d 964, 970-  
8 72 (9th Cir. 2006); see id. (quoting LaCava v. Kyler, 398 F.3d 271, 277 (3d Cir. 2005)) (“This  
9 obligation [to act diligently] does not pertain solely to the filing of the federal habeas petition,  
10 rather it is an obligation that exists during the period appellant is exhausting state court remedies  
11 as well.”). “Equitable tolling may be available ‘[w]hen external forces, rather than a petitioner’s  
12 lack of diligence, account for the failure to file a timely claim.’” McMonagle v. Meyer, 802 F.3d  
13 1093, 1099 (9th Cir. 2015) (quoting Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999)). A  
14 petitioner must provide specific facts regarding what was done to pursue the petitioner’s claims to  
15 demonstrate that equitable tolling is warranted. Roy, 465 F.3d at 973; see also Stillman v.  
16 LaMarque, 319 F.3d 1199, 1203 (9th Cir. 2003) (petitioner must show that the external force  
17 caused the untimeliness); Waldron-Ramsey, 556 F.3d at 1013-14 (prisoner did not point to  
18 specific instances where he needed a particular document and could not procure it when needed  
19 and failed to meet his burden to show his own diligence and that the hardship created by the lack  
20 of access to his materials was an extraordinary circumstance that caused him to file an untimely  
21 petition).

22           Petitioner’s opposition does not make clear whether he was wholly deprived of his legal  
23 materials for periods of time, or whether his access to such materials was limited. For example,  
24 in his declaration, petitioner claims he went to ad seg on March 11, 2014, and “had several  
25 conflicting issues about obtaining [his] legal material.” (ECF No. 17 at 6.) However, petitioner  
26 must explain how he was diligent in seeking such legal materials, and whether he was completely  
27 deprived of pertinent legal materials, or whether he had access to some of his legal materials. In  
28 addition, petitioner must describe the legal materials sought as well as his efforts to obtain such


1 legal materials, how the deprivation of such legal materials prevented him from filing his federal  
2 petition, and the date he obtained access to such materials. Similarly, to the extent petitioner  
3 contends an involuntary transfer constituted an extraordinary circumstance, he must provide  
4 similar factual details as to his diligence and alleged impeded access to necessary legal materials.  
5 The Ninth Circuit has repeatedly held that there must be a “causal link between the lateness [of  
6 the petition] and the extraordinary circumstances” cited for the tardiness. Hartley v. Hall, 335  
7 Fed. App’x 686, 687-88 (citing Bryant v. Schriro, 499 F.3d 1056, 1061 (9th Cir. 2007)  
8 (“Petitioner has failed to establish the requisite causal connection.”)).

9 Therefore, in his supplemental opposition, petitioner must explain, by providing specific  
10 dates and circumstances, his own diligence and how the hardship caused by his lack of access to  
11 specific legal materials constituted an impediment to his timely filing in federal court.

12 In accordance with the above, IT IS HEREBY ORDERED that:

- 13 1. Within thirty days from the date of service of this order, petitioner shall file and serve  
14 a supplemental opposition to respondent’s motion to dismiss. Petitioner shall address  
15 each of the four areas specifically set forth above.
- 16 2. Respondent may file a reply within fourteen days after the filing date of petitioner’s  
17 supplemental opposition.
- 18 3. Petitioner’s failure to comply with this order may result in a recommendation that his  
19 request for equitable tolling be denied.

20 Dated: November 9, 2016

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23 KENDALL J. NEWMAN  
24 UNITED STATES MAGISTRATE JUDGE

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