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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

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

No. 2:15-cv-0689 KJM KJN P

FINDINGS AND RECOMMENDATIONS

I. Introduction

Petitioner is a state prisoner, proceeding pro se, with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 2009 conviction for second degree robbery and related offenses.

Presently before the court is respondent’s motion to dismiss the pending habeas petition as barred by the one-year statute of limitations. Petitioner filed an opposition; respondent did not file a reply. In response to the further briefing order, petitioner filed a supplemental opposition and exhibits; respondent filed a reply. For the reasons set forth below, the undersigned recommends that respondent’s motion to dismiss be granted.

II. Statute of Limitations

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which became law on April 24, 1996, imposed for the first time a statute of limitations on petitions for a writ of

1 habeas corpus filed by state prisoners. This statute of limitations provides that:

2 A 1-year period of limitation shall apply to an application for a writ
3 of habeas corpus by a person in custody, pursuant to the judgment
4 of a State court. The limitation period shall run from the latest of –

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

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

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

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

19 28 U.S.C. § 2244 (d)(1).

20 The relevant chronology of this case is as follows:

21 1. On August 3, 2009, petitioner was convicted of second degree robbery, kidnapping to
22 commit robbery, assault with a semi-automatic firearm, and false imprisonment. (ECF No. 1 at
23 66.) See also People v. Peterson, No. A125802, 2011 WL 1620616, at *1, 2 (Cal. Ct. App. Apr.
24 29, 2011). Petitioner was sentenced to 33 years and 4 months, plus life in state prison. Id.

25 2. Petitioner appealed, and on April 29, 2011, the case was remanded to the trial court for
26 resentencing. (ECF No. 14-2 at 77.) The judgment was affirmed in all other respects. (Id.)

27 3. On May 31, 2011, petitioner filed a petition for review in the California Supreme
28 Court. (ECF No. 14-1 at 3.) The California Supreme Court denied the petition on July 13, 2011.¹
(ECF No. 14-1 at 2.)

4. Petitioner was re-sentenced on September 13, 2011. (ECF No. 29.)

¹ Petitioner states that the original sentence was modified to delete the enhancement under § 12022.53(b) from count three. (ECF No. 1 at 70.) Amended abstracts of judgment reflect the re-sentencing. (ECF No. 29.) Petitioner did not appeal the re-sentencing.

1 5. On March 16, 2012,² petitioner filed a petition for writ of habeas corpus in the Solano
2 Superior Court. (ECF No. 1 at 32.) The petition was denied on June 1, 2012. (ECF No. 14-2 at
3 45.)

4 6. On July 9, 2012,³ petitioner filed a petition for writ of habeas corpus in the California
5 Court of Appeal. (ECF No. 14-2 at 51.) The petition was denied on August 2, 2012, with a
6 citation to In Re Swain, 34 Cal.2d 300, 303-04 (1949), as to Ground One, and In Re Dixon, 41
7 Cal.2d 756, 759 (1953), as to Ground Two.⁴ (ECF No. 14-2 at 52.)

8 7. On October 22, 2012, petitioner filed a petition in the California Supreme Court.⁵
9 (ECF No. 14-2 at 42.) The petition was denied on January 3, 2013. (Id. at 2.)

10 8. On January 8, 2013,⁶ petitioner filed a second petition in the California Supreme Court.

11 _____
12 ² Because petitioner is proceeding pro se, he is afforded the benefit of the prison mailbox rule.
13 See Houston v. Lack, 487 U.S. 266, 276 (1988). Under the prison mailbox rule, the date
14 petitioner signed the petition is considered his filing date absent evidence to the contrary. See
15 Jenkins v. Johnson, 330 F.3d 1146, 1149 n.2 (9th Cir. 2003) (date petition is signed may be
16 considered earliest possible date an inmate could submit his petition to prison authorities for
17 filing under the mailbox rule). Here, the signature date on the petition is March 16, 2012. (ECF
18 No. 1 at 32.) However, the proof of service attached to the petition is dated “April 2012.” (Id. at
19 34.) The exact date is left blank and the proof of service is not signed. See id. It appears that the
20 date was typed on the proof of service in advance, to be filled in later, but was not updated. Thus,
21 it is not clear if petitioner waited any time at all before turning his petition over to prison
22 authorities for mailing. Giving petitioner the benefit of the doubt, the undersigned finds that
23 petitioner filed the petition on the date he signed the petition.

19 ³ Respondent states that the petition was filed on July 23, 2012. (ECF No. 27 at 5.) Respondent
20 did not provide a copy of the entire petition, but the petition is dated “July 9, 2012, at the top left
21 corner of the first page. (ECF No. 14-2 at 51.) Again giving petitioner the benefit of the doubt,
22 the undersigned finds that petitioner filed the petition on July 9, 2012.

22 ⁴ Swain and Dixon concern California state habeas pleading requirements and procedural default
23 concepts not at issue in the instant motion. See Curiel v. Miller, 830 F.3d 864, 869 (9th Cir.
2016) (Swain); Johnson v. Lee, 136 S. Ct. 1802, 1806 (2016) (Dixon).

24 ⁵ Respondent claims that the petition was filed on October 25, 2012, the date the petition was
25 received by the California Supreme Court. (ECF No. 14 at 2.) However, the proof of service is
26 dated October 22, 2012. The undersigned finds that, under the prison mailbox rule, the petition
was filed on October 22, 2012, the date the proof of service was signed.

27 ⁶ Respondent states that the petition was filed on January 11, 2013. (ECF No. 14 at 3.) But,
28 under the mailbox rule, the undersigned finds that the petition was filed on January 8, 2013, the
date the proof of service was signed. (See ECF No. 14-3 at 9.)

1 (ECF No. 14-3 at 9.) The petition was denied on May 1, 2013, with a citation to In Re Miller, 17
2 Cal. 2d. 734, 735 (1941).⁷ (ECF No. 14-3 at 2.)

3 9. The instant action was filed on March 24, 2015.⁸ (ECF Nos. 1; 1-1 at 6.)

4 The statute of limitations begins to run when petitioner's criminal judgment becomes
5 final. However, where the state appellate court remands for re-sentencing, the limitations period
6 does not begin until both the conviction and re-sentencing claims are final on direct review.

7 Burton v. Stewart, 549 U.S. 147, 156-57 (2007) (per curiam).

8 Here, petitioner challenged his underlying conviction in the state appellate courts before
9 he was re-sentenced. The California Supreme Court denied the petition for review on July 13,
10 2011. Petitioner's conviction became final ninety days later, on October 11, 2011, when the time
11 for seeking certiorari with the United States Supreme Court expired. See Bowen v. Roe, 188 F.3d
12 1157 (9th Cir. 1999).

13 Petitioner was re-sentenced on September 13, 2011. (ECF No. 29 at 1.) Where, as here,
14 a defendant's sentence is modified during the state appellate process, the judgment is not final for
15 statute of limitations purposes, even as to claims disposed of in a first round of appeals, until the
16 conclusion of direct review of the modified sentence. Burton, 549 U.S. at 156-57. Petitioner did
17 not appeal the modified sentence. If the defendant does not seek review from the state's highest
18 court, the conviction becomes final when the time for seeking review expires. Espinoza-
19 Matthews v. California, 432 F.3d 1021, 1025 (9th Cir. 2005). Thus, petitioner's re-sentencing
20 became final sixty days later, on November 12, 2011. See Cal. R. Ct. 8.308(a).

21 _____
22 ⁷ The citation to In re Miller indicates that the California Supreme Court denied petitioner's
23 January 8, 2013 petition because a prior petition "was based on the same grounds set forth in the
24 present petition" and since the time the prior petition was denied, "no change in the facts or the
25 law substantially affecting the rights of the petitioner has been disclosed." 17 Cal. 2d at 735.

26 ⁸ The date at the top of the instant petition is March 16, 2012, but the petition was received by
27 this court on March 26, 2015. (See ECF No. 1 at 1.) Petitioner appears to have re-used the cover
28 page from his state habeas petition filed in the Solano Superior Court, and the date on the petition
and proof of service were not updated. (See ECF No. 1 at 33-34.) However, petitioner's
accompanying letter is dated March 24, 2015. (ECF No. 1-1 at 1.) In an abundance of caution,
the undersigned finds that the petition was filed on March 24, 2015, the date the accompanying
letter was signed.

1 For purposes of calculating the limitations period, the later date, November 12, 2011,
2 controls. Under AEDPA, petitioner’s conviction period began to run the following day, on
3 November 13, 2011. See Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001) (the AEDPA
4 limitations period begins to run on the day after the triggering event pursuant to Fed. R. Civ. P.
5 6(a)). Absent tolling, petitioner’s last day to file his federal petition was on November 13, 2012.
6 The instant petition, filed March 24, 2015, is therefore time-barred unless petitioner is entitled to
7 statutory and/or equitable tolling.

8 III. Statutory Tolling

9 Section 2244(d)(2) provides that “the time during which a properly filed application for
10 State post-conviction or other collateral review with respect to the pertinent judgment or claim is
11 pending shall not be counted toward” the limitations period. 28 U.S.C. § 2244(d)(2). The statute
12 of limitations is not tolled during the interval between the date on which a judgment of conviction
13 becomes final and the date on which the petitioner files his first state collateral challenge because
14 there is no case “pending” during that period. See Porter v. Ollison, 620 F.3d 952, 958 (9th Cir.
15 2010) (“The period between when direct review becomes final and the filing of a state habeas
16 petition is not tolled[.]”).

17 In general, the statute of limitations is tolled during the time after a state habeas petition
18 has been filed, but before a decision has been rendered. Nedds v. Calderon, 678 F.3d 777, 780
19 (9th Cir. 2012). However, “a California habeas petitioner who unreasonably delays in filing a
20 state habeas petition is not entitled to the benefit of statutory tolling during the gap or interval
21 preceding the filing.” Id. at 781 (citing Carey v. Saffold, 536 U.S. 214, 225-27 (2002)). Thus,
22 “[t]he period between a California lower court’s denial of review and the filing of an original
23 petition in a higher court is tolled -- because it is part of a single round of habeas relief -- so long
24 as the filing is timely under California law.” Banjo v. Ayers, 614 F.3d 964, 968 (9th Cir. 2010).
25 Generally, a gap of 30 to 60 days between state petitions is considered a “reasonable time” during
26 which the statute of limitations is tolled. Evans v. Chavis, 546 U.S. 189, 210 (2006) (using 30 to
27 60 days as general measurement for reasonableness based on other states’ rules governing time to
28 appeal to the state supreme court); Carey, 536 U.S. at 219 (same). State habeas petitions filed

1 after the one-year statute of limitations has expired do not revive the statute of limitations and
2 have no tolling effect. Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (“section
3 2244(d) does not permit the reinitiation of the limitations period that has ended before the state
4 petition was filed”); Jiminez v. Rice, 276 F.3d 478, 482 (9th Cir. 2001).

5 In the instant case, the statute of limitations began to run on November 13, 2011. The
6 limitations period ran for 123 days until it was tolled on March 16, 2012, when petitioner filed his
7 first state habeas petition in the Solano County Superior Court. The statute of limitations
8 remained tolled while his petition was pending. The petition was denied on June 1, 2012.
9 Because petitioner filed his second state habeas petition in the California Court of Appeal in July
10 2012, petitioner is entitled to tolling during the interval between the time his first petition was
11 denied and the time his second petition was filed, as well for the period his second petition was
12 pending before the Court of Appeal. Similarly, because the Court of Appeal denied relief on
13 August 2, 2012, petitioner is entitled to statutory tolling for the period of March 16, 2012, through
14 August 2, 2012.

15 On October 22, 2012, petitioner filed a third state habeas petition in the California
16 Supreme Court. Respondent cites to authority suggesting that petitioner is not entitled to interval
17 tolling for the time between the denial of the second petition on August 2, 2012, and the filing of
18 the third petition on October 22, 2012.⁹ (ECF No. 14 at 3-4.) As discussed above, a gap of 30 to
19 60 days between state petitions is generally considered a “reasonable time” during which the
20 statute of limitations is tolled. See Evans, 546 U.S. at 210. Here, petitioner delayed by waiting
21 81 days once his second state habeas petition was denied before filing his third habeas petition.
22 Petitioner provides no explanation for the delay during this particular period. (ECF Nos. 17, 22.)
23 Thus, the undersigned finds that 81 days constitutes unreasonable delay. See Livermore v.
24 Sandor, 486 Fed. App’x 342 (9th Cir. 2012) (concluding that delay of 76 days between state
25 habeas petitions was unreasonable); Velasquez v. Kirkland, 639 F.3d 964, 968 (9th Cir. 2011)

26
27 ⁹ Respondent states that petitioner may “arguably” be entitled to statutory tolling during this
28 time, but that the federal petition remains untimely regardless of whether the limitations period is
tolled during this period.

1 (finding delays of 81 and 91 days were unreasonable); Stancle v. Clay, 692 F.3d 948, 956 (9th
2 Cir. 2012) (finding unjustified 82 day delay unreasonable), cert. denied, 133 S. Ct. 1465 (2013).
3 Accordingly, petitioner is not entitled to interval tolling for the time between the denial of his
4 second state habeas petition and the filing of his third state habeas petition, and the statute of
5 limitations ran for 81 days during this period. Thus, by the time petitioner filed in the California
6 Supreme Court, 205 days of the limitation period had expired.

7 Petitioner's third habeas petition was filed on October 22, 2012, and denied by the
8 California Supreme Court on January 1, 2013. Petitioner is entitled to statutory tolling for the
9 time his third petition was pending before the California Supreme Court.

10 On January 8, 2013, petitioner filed a fourth habeas petition, also in the California
11 Supreme Court, which was denied on May 1, 2013. Respondent concedes that petitioner is
12 entitled to tolling during the pendency of his fourth state habeas petition, but asserts that
13 petitioner is not entitled to interval tolling for the time between the denial of the third petition and
14 the filing of the fourth petition. As the undersigned finds that whether petitioner is entitled to
15 tolling during this five day period does not ultimately affect the court's tolling analysis, the
16 undersigned assumes that petitioner is entitled to interval tolling for this period.

17 Thus, petitioner is entitled to statutory tolling from October 22, 2012, through May 1,
18 2013, when the California Supreme Court denied petitioner's fourth state habeas petition. The
19 limitations period began to run again on May 2, 2013, and expired 160 days later on October 8,
20 2013. However, the federal petition was not filed until March 24, 2015; thus, the petition remains
21 untimely unless petitioner is entitled to equitable tolling.

22 IV. Equitable Tolling

23 The one year statute of limitations for filing a habeas petition may be equitably tolled if
24 extraordinary circumstances beyond a prisoner's control prevent the prisoner from filing on time.
25 See Holland v. Florida, 560 U.S. 631, 645 (2010). A petitioner seeking equitable tolling must
26 establish two elements: "(1) that he has been pursuing his rights diligently, and (2) that some
27 extraordinary circumstance stood in his way." Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005).
28 An "extraordinary circumstance" has been defined as an external force that is beyond the

1 prisoner's control. Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999). "The diligence required
2 for equitable tolling purposes is 'reasonable diligence,' not 'maximum feasible diligence.'" Holland,
3 560 U.S. at 653 (internal citations and additional quotation marks omitted). Equitable
4 tolling is justified in few cases, and "the threshold necessary to trigger equitable tolling under the
5 AEDPA is very high, lest the exceptions swallow the rule." Spitsyn v. Moore, 345 F.3d 796, 799
6 (9th Cir. 2003) (internal citation, quotation omitted).

7 Here, petitioner contends that he is entitled to equitable tolling based on his lack of access
8 to his legal materials at various times, petitioner's mental health status, and his reliance on writ
9 writers and/or his lack of legal sophistication. The undersigned addresses each, in turn, below.

10 A. Lack of Access to Legal Materials

11 In some cases, a petitioner's lack of access to his legal materials may constitute an
12 extraordinary circumstance warranting equitable tolling. Ramirez v. Yates, 571 F.3d 993, 998
13 (9th Cir. 2009) (it is "unrealistic to expect a habeas petitioner to prepare and file a meaningful
14 petition on his own within the limitations period without access to his legal file."), quoting
15 Espinoza-Matthews, 432 F.3d at 1027-28.

16 1. First Gap: November 13, 2011 - March 16, 2012¹⁰

17 The undersigned first considers whether petitioner is entitled to equitable tolling for any of
18 the time before his first state habeas petition was filed on March 16, 2012. The record includes a
19 number of letters from 2010 to 2012 regarding his access to legal materials and efforts to obtain
20 transcripts and legal files. (ECF Nos. 14-2 at 84-100; 14-3 at 47-65 (duplicates).)

21 The letters reflect that in September of 2011, petitioner was out to court regarding a
22 modification of one of his enhancements. Petitioner claims he did not have access to his legal
23 materials during this time. (See ECF No. 1 at 70.) In his supplemental opposition, petitioner
24 claims he was without his legal materials for three weeks after he was transferred to Corcoran on
25 March 9, 2011. (ECF No. 22 at 2.) Petitioner states he went to administrative segregation ("ad

26 _____
27 ¹⁰ On July 3, 2012, petitioner left A yard mainline for B yard, and was in orientation for 2 weeks
28 without his property (ECF No. 22 at 3); and the log documents such movement (ECF No. 22 at
7). However, petitioner's state habeas petitions were pending during this period, for which he
received statutory tolling. Thus, no equitable tolling is required.

1 seg”) on August 18, 2011, transferred to court on September 9, 2011, arrived at San Quentin on
2 September 9, 2011, transferred back to Corcoran on October 5, 2011, and remained in ad seg until
3 October 25, 2011. (ECF No. 22 at 2.)

4 However, because the statute of limitations did not begin to run until November 13, 2011,
5 petitioner’s alleged lack of access to legal materials prior to November 13, 2011, does not affect
6 the limitations analysis because it occurred *before* the limitations period commenced.

7 In October of 2011, petitioner wrote to various courts, trial counsel, and appellate counsel,
8 in an apparent attempt to obtain transcripts and other documents. (ECF No. 14-2 at 84-87.) On
9 January 10, 2012, the Solano County Superior Court wrote petitioner, noting receipt of his
10 October 25, 2011 letter requesting copies of all Marsden motions, color photos of the robbery
11 scene, and exhibits 18 and 21. (ECF No. 14-2 at 95-96.) The superior court provided petitioner
12 with a letter explaining the procedure for obtaining copies of the Marsden motions, but noted that
13 the other items petitioner requested could not be provided. (Id.) The superior court forwarded
14 petitioner’s request and the court’s December 15, 2011 order denying his request, to petitioner’s
15 counsel. (ECF No. 14-2 at 96.) On December 16, 2011, petitioner’s trial counsel wrote petitioner
16 and confirmed that she previously sent petitioner his entire file, some of which she claimed was
17 previously sent on multiple occasions. (ECF No. 14-2 at 97.) She also provided copies of her
18 letters dated May 13, 2009, November 3, 2009, and November 18, 2009. (Id.) Petitioner wrote
19 his trial counsel again on January 17, 2012, noting receipt of her December 16, 2011 letter and its
20 enclosures, but denying receipt of other documents from counsel or her staff. (ECF No. 14-2 at
21 98.)

22 In his supplemental opposition, petitioner claims that after his October 5, 2011 transfer
23 back to Corcoran, he remained in ad seg until October 25, 2011, before being placed on “C”
24 status and without property until December 24, 2011, “to the best of [petitioner’s] recollection.”
25 (ECF No. 22 at 2.) Petitioner states he was diligent from December 24, 2011, until June 28,
26 2012. (ECF No. 22 at 4.)

27 Respondent argues that petitioner’s vague claims that he was without his legal materials
28 are insufficient because he fails to set forth specific dates, estimates periods of time, and

1 generalizes the reasons for the alleged deprivations. (ECF No. 27 at 9.) Even liberally accepting
2 petitioner's vague claims, respondent contends that only some part of the two months between
3 October 11 and December 24, 2011, would possibly qualify. (ECF No. 27 at 9-10.)

4 The external movement logs for petitioner reflect no transfers between November 13,
5 2011, and March 16, 2012. (ECF No. 22 at 7.)

6 It may be that petitioner is entitled to equitable tolling during part of this period.
7 However, the court finds it unnecessary to decide this question because even if petitioner were
8 entitled to equitable tolling from the time the limitations period began running on November 13,
9 2011, through the time his first state petition was filed on March 16, 2012, the federal petition is
10 still untimely, as explained below.

11 Including the time for statutory tolling, the statute of limitations period expired on
12 October 8, 2013. If petitioner is entitled to equitable tolling from November 13, 2011, through
13 March 15, 2012, a period of 123 days, the limitations period would be extended from October 8,
14 2013, to February 10, 2014 (because February 8, 2014, was a Saturday). But because the federal
15 petition was filed over one year later, on March 26, 2015, an additional 123 days in equitable
16 tolling would not save the petition.

17 2. Second Gap: August 2, 2012 - October 22, 2012

18 The external movements logs reflect no transfers or movements between July 3, 2012, and
19 October 22, 2012. (ECF No. 22 at 6-7.) As argued by respondent, petitioner provided no facts
20 supporting equitable tolling based on lack of access to legal materials from August 2, 2012,
21 through October 22, 2012, either in his opposition or supplemental opposition. (ECF No. 17, 22.)
22 Thus, no equitable tolling for this 81 day period is warranted based on an alleged lack of legal
23 materials.

24 3. Third Gap: May 1, 2013 - March 24, 2015

25 a. May 1, 2013 - March 10, 2014

26 The external movements logs reflect no transfers between May 1, 2013, and December 13,
27 2013. (ECF No. 22 at 6-7.) The log shows two transfers on December 13, 2013: one permanent
28 transfer from Corcoran to MCSP-Central Service, followed by a change in bed assignments in

1 MCSP Facilities A and C. (ECF No. 22 at 6.) Petitioner states that after his transfer he was in
2 orientation close to 3 weeks and had no legal materials. (ECF No. 22 at 3.) Petitioner’s claim
3 that he was deprived of legal materials for three weeks based on his placement in “orientation,” is
4 too vague without additional information to support equitable tolling. But even if he were
5 granted an additional three weeks of equitable tolling, it would not save the petition because it
6 was filed over a year too late. Moreover, because adding such three weeks would only extend the
7 limitations deadline to March 3, 2014, such tolling would not save the petition based on
8 petitioner’s arguments concerning events that took place after March 10, 2014, because the
9 limitations period had already expired.

10 b. March 11, 2014 - March 24, 2015

11 As set forth above, even liberally applying equitable tolling for petitioner’s alleged lack of
12 access to his legal materials, the limitations period expired on March 3, 2014, prior to the
13 expiration of the third gap. Therefore, petitioner’s placement in ad seg, transfer to Lancaster, and
14 lack of access to his legal materials occurring between March 11, 2014, and March 24, 2015, do
15 not affect the limitations analysis because they occurred *after* the statute of limitations expired on
16 March 3, 2014. Accordingly, the petition remains time-barred absent equitable tolling for other
17 reasons.

18 4. Identical Petitions

19 Finally, as pointed out by respondent, the instant petition (ECF No. 1 at 1-34) looks
20 identical to the same petition he filed in the Solano County Superior Court and the California
21 Supreme Court (ECF No. 1 at 9-42). Indeed, the instant petition bears the caption for the Solano
22 County Superior Court and was signed by petitioner on March 16, 2012. (ECF No. 1 at 1, 32.)
23 Although there are minor differences in the exhibits, petitioner’s allegations are identical.
24 Because the petitions are nearly identical, it is not reasonable that petitioner would require
25 additional time to file a petition that was already prepared. See Velasquez, 639 F.3d at 968 (not
26 reasonable that Velasquez’s counsel would need excess time essentially to re-file an already-
27 written brief); see also Waldrip v. Hall, 548 F.3d 729, 737 (9th Cir. 2008) (because “the
28 December 11 petition was nearly identical to the October 31, 2001 petition . . . counsel could

1 easily have filed it sooner than December 2002.”). Here, because petitioner essentially filed his
2 superior court petition with the federal court, he could have filed such petition any time after the
3 California Supreme Court denied his third state habeas petition on January 3, 2013, or after his
4 fourth state habeas petition was denied on May 13, 2013. But petitioner did not file the instant
5 petition until March 24, 2015.

6 Thus, petitioner fails to demonstrate that the asserted lack of access to his legal materials
7 was the cause of his untimeliness, where he filed the same petition here that he filed in the
8 superior court. Unless petitioner is entitled to equitable tolling for other reasons, his petition is
9 barred by the statute of limitations.

10 B. Mental Illness

11 1. Equitable Tolling Test

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

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

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

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

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

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

27 “The relevant question [is,] ‘[d]id the mental impairment cause an untimely filing?’”
28 Stancle, 692 F.3d at 959 (quoting Bills, 628 F.3d at 1100 n.3.) Bills provides further guidance for

1 applying its two-part test:

2 [T]o evaluate whether a petitioner is entitled to equitable tolling, the
3 district court must: (1) find the petitioner has made a non-frivolous
4 showing that he had a severe mental impairment during the filing
5 period that would entitle him to an evidentiary hearing; (2)
6 determine, after considering the record, whether the petitioner
7 satisfied his burden that he was in fact mentally impaired; (3)
8 determine whether the petitioner’s mental impairment made it
9 impossible to timely file on his own; and (4) consider whether the
10 circumstances demonstrate the petitioner was otherwise diligent in
11 attempting to comply with the filing requirements.

12 Bills, 628 F.3d at 1100-01.

13 A petitioner alleging a severe mental impairment during the filing period is not entitled to
14 an evidentiary hearing unless he or she makes “a good faith allegation that would, if true, entitle
15 him to equitable tolling.” Laws v. Lamarque, 351 F.3d 919, 921 (9th Cir. 2003) (remanding for
16 consideration of whether the petitioner’s delayed filing was “attributable to psychiatric
17 medication which deprived petitioner of any kind of consciousness” where the petitioner had
18 demonstrated “evidence of serious mental illness” by attaching prison psychiatric and medical
19 records). The district court must take care to ensure that the record regarding the petitioner’s
20 mental illness is sufficiently developed to rule on the tolling issue. See Chick v. Chavez, 518
21 Fed. Appx. 567, 568 (9th Cir. 2013) (remanding “for further development of the record as to
22 [petitioner]’s mental competency and, if necessary, an evidentiary hearing”); see Bills, 628 F.3d
23 at 1099-1100 (remanding where the petitioner was in the lowest percentile for verbal IQ, verbal
24 comprehension and working memory, and, according to clinical psychologists, was incapable of
25 inferential thinking necessary to complete a federal habeas form). Nevertheless, “[w]here the
26 record is amply developed, and where it indicates that the petitioner’s mental incompetence was
27 not so severe as to cause the untimely filing of his habeas petition, a district court is not obligated
28 to hold evidentiary hearings to further develop the factual record, notwithstanding a petitioner’s
allegations of mental incompetence.” Roberts v. Marshall, 627 F.3d 768, 773 (9th Cir. 2010); See
also Orthel, 795 F.3d at 939-40.

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2. The Parties' Positions

Respondent argues that petitioner failed to meet his burden to demonstrate he is entitled to equitable tolling on the basis of mental impairment because petitioner did not allege specific days or periods during which he claims he was mentally impaired, or explain why his mental impairment hindered his ability to timely re-file the identical petition he previously filed, or provide mental health records demonstrating he was mentally impaired during the statutory period. (ECF No. 27 at 11, 13.) Further, respondent contends that at numerous intervals throughout the gaps in tolling, petitioner was examined, found to have coherent thought processes, and had “no disabling mental disorders.” (ECF No. 27 at 13.)

In his opposition, petitioner alleges he was placed on an Enhanced Out Patient (“EOP”) program and given new medication for depression, that causes his thinking to be “distorted at times.” (ECF No. 17 at 2.) Petitioner states that the medications Trileptal and Zoloft “sometimes” interfere with his short term memory and cause petitioner to have “jumbled thoughts.” (ECF No. 17 at 2.) In his declaration, petitioner states he was transferred to Lancaster Prison around September of 2014 for mental health observation, and was put on EOP status; when he signed the declaration on March 22, 2015, he was in the CCCMS.¹¹ (ECF No. 17 at 6.) Petitioner declares that he has been taking Trileptal for anxiety, depression, and PTSD for two to three years, and is currently being prescribed Zoloft for depression. (ECF No. 17 at 7.)

In his supplemental opposition, petitioner claims that his chronic pain and his mental disorders, mixed with his medications, leave him “irritable, jumble-minded, and often unable to

¹¹ “CCCMS” is an acronym for the Correctional Clinical Case Management System and inmates designated to this level of care are those “whose symptoms are under control or in partial remission and can function in the general prison population, administrative segregation, or segregated housing units.” Coleman v. Schwarzenegger, 2009 WL 2430820, *15 n.24 (E.D. Cal. 2009). Washington v. McDonald, 2010 WL 1999469 (C.D. Cal. Feb. 19, 2010). The EOP level of care is for inmates who suffer “Acute Onset or Significant Decompensation of a serious mental disorder characterized by increased delusional thinking, hallucinatory experiences, marked changes in affect, and vegetative signs with definitive impairment of reality testing and/or judgment,” and who are unable to function in the general prison population but do not require twenty-four hour nursing care or inpatient hospitalization. Coleman, 2009 WL 2430820, *15 n. 24 (citation omitted). The Mental Health Crisis Bed (“MHCB”) Placement is “for inmates who are markedly impaired and/or dangerous to others as a result of mental illness, or who are suicidal, and who require 24-hour nursing care.” Id. (citation omitted).

1 get out of bed.” (ECF No. 22 at 1.) In support of his supplemental opposition, petitioner
2 provided letters, classification and mental health records, including medications and diagnoses,
3 from September of 2011 to the present. (ECF Nos. 22 at 9-52; 23.) The undersigned summarizes
4 the pertinent records herein.

5 3. Mental Health Records & Other Documents

6 On September 6, 2011, petitioner reported he was in ad seg because he was charged with
7 assault, then went to Mental Health Care Bed for two weeks because he became suicidal; “he has
8 a problem in that he acts immature.” (ECF No. 23 at 61.) Petitioner’s prescription to Citalopram
9 Hydrobromide (Celexa, an antidepressant), 40 mg every morning, was stopped, and the
10 Hydroxyzine parnoate (Vistaril), 50 mg every night, was renewed for 90 days, and he was
11 prescribed Zoloft (antidepressant) 50 mg in the morning, for 90 days. (ECF No. 22 at 45.)
12 Clinician J. Tatomer, M.D., diagnosed petitioner with anxiety disorder and PTSD (Axis I), with a
13 GAF¹² of 60. (ECF No. 23 at 61.) Dr. Tatomer found petitioner’s intellectual functioning to be
14 average; memory intact; and orientation x 2. (Id.)

15 On September 19, 2011, petitioner was seen by Dr. G. Sorosky, a psychiatrist. (ECF No.
16 22 at 38, 52.) Petitioner reported he was depressed, with some anxiety and panic attacks when

17 ¹² “GAF” is an acronym for “Global Assessment of Functioning,” a scale used by clinicians to
18 assess an individual’s overall level of functioning, including the “psychological, social, and
19 occupational functioning on a hypothetical continuum of mental health-illness.” Am. Psychiatric
20 Ass’n, Diagnostic and Statistical Manual of Mental Disorders with Text Revisions 32 (4th ed.
21 2004) (“DSM IV-TR”). A GAF of 61-70 indicates some mild symptoms (e.g., depressed mood
22 and mild insomnia) or some difficulty in social, occupational, or school function (e.g., occasional
23 truancy, or theft within the household), but generally functioning pretty well, has some
24 meaningful interpersonal relationships. Id. A GAF of 51-60 indicates moderate symptoms (e.g.,
25 flat affect and circumstantial speech, occasional panic attacks) or moderate difficulty in social,
26 occupational, or school function (e.g., few friends, conflicts with peers or co-workers.) Id. A 41-
27 50 rating indicates serious symptoms such as suicidal ideation, severe obsessional rituals, or
28 serious impairment in social, work, or school functioning. A GAF of 31-40 indicates: “Some
impairment in reality testing or communication (e.g., speech is at times illogical, obscure, or
irrelevant) OR major impairment in several areas, such as work or school, family relations,
judgment, thinking, or mood (e.g., depressed man avoids friends, neglects family, and is unable to
work; child frequently beats up younger children, is defiant at home, and is failing at school.)”
Id. A GAF of 21-30 indicates: “Behavior is considerably influenced by delusions or
hallucinations OR serious impairment in communication or judgment (e.g., sometimes
incoherent, acts grossly inappropriately, suicidal preoccupation) OR inability to function in
almost all areas (e.g., stays in bed all day; no job, home, or friends).” Id.

1 around large number of people, but full panic attacks “are rare.” (ECF Nos. 22 at 38; 23 at 60.)
2 He did “not want to be separated from the rest of the population and this would be a bigger
3 stressor than staying CCCMS,” and would ask for additional help if he became more hopeless,
4 suicidal or needed more support such as EOP. (ECF No. 22 at 38.) Petitioner was diagnosed
5 with depression; his Zoloft was increased from 50 to 100 mg., and Vistaril was continued at 100
6 mg for sleep; and he was continued in CCCMS. (ECF No. 22 at 38.)

7 On September 23, 2011, petitioner reported that the increased Zoloft may have helped
8 “somewhat,” but that his ad seg housing had added to his stress. (ECF No. 22 at 52.) Petitioner
9 denied having hallucinations, and no evidence of delusions was noted. (Id.) Petitioner reported
10 some improvement in mood and anxiety, but not significant. Petitioner “adamantly denied” any
11 suicidal or homicidal ideation, and his insight and judgment were intact. (ECF No. 22 at 52.) He
12 was monitored daily in CCCMS from September 19, 2011, through September 25, 2011, but had
13 no further signs of distress. (ECF No. 23 at 53.)

14 On September 29, 2011, petitioner reported that the 100 mg Zoloft prescription was not
15 enough. (ECF No. 22 at 49.) Petitioner denied any hallucinations, “indicated his mood was
16 down,” but denied any suicidal or homicidal ideation. (Id.) Petitioner was CCCMS, and his
17 TABE¹³ was noted as 12.9. (Id.)

18 From October 3, 2011, through October 5, 2011, petitioner was monitored daily in
19 CCCMS, and no distress signs were noted. (ECF No. 23 at 54.)

20 On October 12, 2011, petitioner was under the CCCMS level of care. (ECF Nos. 22 at 48;
21 23 at 52.) Upon his release from ad seg, petitioner said “he is a little delusional as a basis for
22 saying he has safety concerns. Said he thought he saw an enemy.” (Id.) But the doctor checked
23 the box finding that petitioner had no impaired thought process, and found petitioner “does not
24 have any mental health symptoms which would preclude his retention in his current living
25 environment.” (Id.)

26 ¹³ TABE stands for “Test of Adult Basic Education,” which measures an inmate’s ability to
27 understand and participate in the disciplinary process. See Cal. Code Regs., tit. 15, § 3000
28 (defining “effective communication”). When an inmate has a TABE score of 4.0 or below, prison
staff must assess whether the inmate requires a Staff Assistant. Id.

1 On December 28, 2011, an Interdisciplinary Treatment Team (“IDTT”) documentation
2 progress note reflects petitioner was provided treatment based on anxiety/depression and was
3 actively participating in the CCCMS level of care. (ECF No. 23 at 55.)

4 Petitioner provided no mental health records for 2012.

5 On April 11, 2013, in a mental health evaluation performed by S. Rosier, Psy.D.,
6 petitioner’s functional impairment was listed as moderate for mental illness symptoms, and
7 medical and behavioral control; mild for interpersonal. (ECF No. 22 at 31.) He was diagnosed as
8 Bipolar DO (Axis I), and Antisocial Personality DO, and Borderline Personality DO (Axis II),
9 with a GAF score of 60, and met the criteria for CCCMS. (ECF Nos. 22 at 31; 23 at 48-51.) Dr.
10 Rosier marked petitioner’s thought processes as within normal limits, and by perception, Dr.
11 Rosier wrote petitioner first heard voices in his head “a few days ago -- never before.” (ECF No.
12 23 at 51.) Petitioner reported no use of substances; the voices told him to “cut on [himself.]”

13 Dr. Rosier found petitioner’s cognition to be within normal limits, noting he is of “average
14 intelligence” per his responses, with a “TABE of 12.9, NCF, HS grad, College courses.” (ECF
15 No. 23 at 51.) Petitioner’s insight and judgment were within normal limits, and Dr. Rosier noted
16 petitioner was compliant with all activities of daily living, and accesses staff appropriately for
17 needed resources (medical, dental, etc.). (ECF No. 23 at 51.)

18 On April 11, 2013, Dr. Rosier completed handwritten interdisciplinary progress notes:
19 petitioner’s thoughts were “organized, linear (backed down on [auditory hallucinations]),” and his
20 affect was calm, alert, and stable. (ECF No. 22 at 39.) Petitioner was retained in CCCMS. (Id.)

21 A Mental Health Treatment Plan from an April 17, 2013 IDTT reflects a diagnosis of
22 Bipolar DO (Axis I); ASPD (“Antisocial Personality Disorder”) and Borderline Personality DO
23 (Axis II), with a GAF of “60 Moderate symptoms of a bipolar/Mood DO affecting Cog/Social
24 functioning.” (ECF No. 23 at 45.) Petitioner’s TABE was “12.9, NCF HS Diploma 2 College
25 AA degrees.” (ECF No. 23 at 45.)

26 On October 29, 2013, S. Rosier, MAC, Psy.D., described petitioner as articulate; his
27 thoughts were organized and linear. (ECF No. 23 at 36.) He was diagnosed as Bipolar, DO, NOS
28 (Axis I); ASPD and borderline personality, DO (Axis II), with a GAF of 60. (ECF No. 23 at 36.)

1 Dr. Rosier noted “moderate symptoms of a bipolar/Mood DO affecting cognitive/social
2 functioning,” and retained petitioner in CCCMS (ECF No. 23 at 36.)

3 On December 13, 2013, petitioner’s new arrival form notes petitioner is CCCMS. (ECF
4 No. 22 at 44.)

5 On March 14, 2014, petitioner received a mental health referral, noting his history of
6 psychiatric care needed re-assessment, “poor appetite, nervous,” and increased anxiety. (ECF No.
7 23 at 35.) The word “unstable,” is handwritten across the form, but without attribution. (ECF
8 No. 23 at 35.)

9 On May 19, 2014, “due to ongoing physical pain and anger due to reported lack of relief
10 with recent change in medication,” petitioner “used a fork to puncture his arm resulting in a
11 superficial wound.” (ECF No. 23 at 42.) On May 21, 2014, petitioner told H. Parks, Psy. D., that
12 petitioner “was feeling pain in my neck at the time and wanted to try and transfer the pain
13 somewhere else.” (Id.) Dr. Parks marked all areas of cognition within normal limits, noting
14 under “fund of information” that petitioner’s TABE score was 12.9, “Clark NCF. Varied reports
15 of GED vs. High School Diploma. History of special ed.” (ECF No. 23 at 38.) Dr. Parks noted
16 petitioner’s intellectual functioning was “adequate. Likely in the low average to average range.”
17 (Id.) Petitioner had no delusions, obsessions or magical thinking, but his thought processes were
18 described as “hypervigilance and paranoid ideation. Catastrophic thinking. Irrational
19 interpretations of others words/gestures. Pattern of distorted cognitions and hypersensitivity to
20 environmental cues.” (ECF No. 23 at 38.) Dr. Parks recommended that petitioner be brought
21 into the Mental Health Department at the CCCMS level of care. (ECF No. 23 at 42.)

22 The Interdisciplinary Treatment Team - Level of Care Decision dated May 21, 2014,
23 marked the “yes” box stating that “as a result of a major mental disorder, [petitioner] [was] unable
24 to adequately function at the current level of care,” and transferred him to the CCCMS level of
25 care. (ECF No. 23 at 46.) The remaining boxes were marked “no,” including in response to the
26 question whether petitioner demonstrated chronic psychiatric symptoms such as disturbed
27 emotions, perceptions, thought processes, or impaired cognitions, that had not responded
28 sufficiently to at least six months of treatment. (ECF No. 23 at 46.)

1 Dr. Parks noted petitioner's thought process/content was coherent, linear, and goal-
2 directed; diagnosis was Adjustment Disorder with mixed anxiety and depressed mood, chronic;
3 rule out posttraumatic stress disorder, chronic (provisional) and rule out bipolar disorder, NOS,
4 by history (Axis I). (ECF No. 23 at 30.) His Axis II diagnosis was Antisocial Personality
5 Disorder; Narcissistic personality disorder, by history; borderline personality disorder, by history,
6 and rule out paranoid personality disorder; GAF was 55. (ECF No. 23 at 30, 47.) Petitioner
7 would receive "psychiatry appointments at regular intervals to address anxiety/PTSD symptoms,
8 effective communication skills, mood instability (currently has an external locus of control where
9 he thinks others directly influence his moods), and depression," at the CCCMS level of care.
10 (ECF No. 23 at 30.) Petitioner had moderate psychological functional impairment. (ECF No. 23
11 at 47.)¹⁴

12 On May 22, 2014, petitioner was prescribed Trileptal 600 bid. (ECF No. 22 at 43.) No
13 other medications were marked. (Id.)

14 On June 3, 2014, petitioner was seen in general psychiatry, under EOP level of care.
15 (ECF No. 22 at 42.) Petitioner was described as a 40 year old with a history of adjustment
16 disorder, anxiety and depression. (Id.) He was taking Trileptal 600 mg bid, but claimed better
17 mood stability at 1200 bid in the past. He denied having hallucinations or suicidal ideation. His
18 TABE was 12.9. (Id.) A medication reconciliation form shows that his prescription for
19 Oxcarbazepine (Trileptal) 600 mg was stopped, and on June 3, 2014, he was prescribed 900 mg
20 Trileptal for 7 days, then increased to 1200 mg for 30 days. (ECF No. 22 at 46.)

21 On June 12, 2014, petitioner reported he was "not too well, I've been in a depressive
22 state," and complained that his pain medications were not working. (ECF No. 22 at 32.) Dr.
23 Parks found petitioner's mood was mildly depressed and frustrated, but "did not display any signs

24
25 ¹⁴ The record reflects petitioner's suicide attempts as 1992 overdose on aspirin; 1993/1997
26 overdose on mental health medication; 2012 cut wrists; and on May 19, 2014, scratched his arm
27 with a fork due to physical pain. (ECF No. 23 at 31; 42; 45.) However, on May 21, 2014,
28 petitioner "adamantly denied" cutting his wrists while at San Quentin in 2012. (ECF No. 23 at
42.) In addition, he denied any suicide attempts or suicidal bodily injury other than the 1994
overdose (reported variously as occurring in 1992-1997), stating "Sometimes I do that when I
need someone to talk to. For attention." (ECF No. 23 at 42.)

1 of impaired cognitive functioning,” was attending to his activities of daily living, his attention and
2 concentration were within normal limits, and “his thought process was clear, coherent, and goal-
3 directed.” (ECF No. 22 at 32.) Dr. Parks found “evidence of numerous cognitive distortions and
4 he has a tendency to make inaccurate meaning of this writer’s comments and gestures. He tends
5 to overanalyze comments and displays a general hypervigilance.” (ECF No. 22 at 32.) Petitioner
6 denied perceptual disturbances, suicidal ideation plan or intent. (Id.)

7 On July 10, 2014, at 1300, petitioner received a mental health referral form for a
8 superficial cut on petitioner’s left wrist. (ECF No. 23 at 33.) At 1600, his GAF was recorded as
9 45 by A. Ferguson, Ph.D. (ECF No. 23 at 34.) On July 10, 2014, at an unknown time, Licensed
10 Clinical Social Worker (“LCSW”) Towner evaluated petitioner’s mental health:

11 [Petitioner’s] current agitation, anger, and frustration regarding his
12 wants (change in PC, wants EOP) not being immediately gratified,
13 combined with poor coping skills, impulsivity, and willingness to
14 harm himself to bring attention & gratify needs appear to raise
acute risk to high at this time. Should [petitioner] calm, engage, &
process risk could decrease.

15 (ECF No. 23 at 39.) Towner noted petitioner’s GAF at 50.

16 On September 22, 2014, petitioner reported he was going to kill himself if returned to ad
17 seg because he couldn’t handle another lengthy placement in ad seg. (ECF No. 23 at 32.) The
18 LCSW found petitioner was oriented x 3 with linear thought processes, no psychotic symptoms,
19 presented as anxious and reported depression due to being in ad seg again. (ECF No. 23 at 32.)
20 The LCSW recorded petitioner’s GAF as 35. (Id.)

21 On January 8, 2015, petitioner was at the CCCMS level of care, and his continued ad seg
22 placement was “increasingly stressful.” (ECF No. 23 at 41.)

23 On January 29, 2015, petitioner’s GAF was noted as 58. (ECF No. 23 at 18; 40.)

24 On March 3, 2015, D. Lisle, Ph.D., noted petitioner is articulate and intelligent. (ECF No.
25 23 at 27.) Denied any hallucinations or homicidal or suicidal ideation; stated he was doing better
26 since “getting rid of a problematic cellie.” (Id.) He reported some suicidal history but currently
27 stable. (Id.) He would continue in CCCMS. (Id.)

28 ///

1 On May 19, 2015, petitioner was CCCMS, his TAFE was listed as 4.9. (ECF No. 23 at
2 26.)

3 On November 22, 2015, petitioner missed 50% of his medication. (ECF No. 23 at 17.)

4 On January 22, 2016, petitioner was EOP, and his axis 1 diagnosis was Mood DO, Axis II
5 diagnosis was ASPD, with a GAF of 65. (ECF No. 23 at 10.)

6 On November 15, 2016, petitioner was seen by Clinician S. Amin, Ph.D., who noted, per
7 record review, that his axis 1 diagnosis was Mood DO, Axis II diagnosis was ASPD, with a GAF
8 of 64, and TAFE 8.4. (ECF No. 23 at 3.)

9 4. Discussion

10 After carefully considering the record, for the reasons stated below, the undersigned finds
11 that petitioner is not entitled to equitable tolling based on mental illness. Petitioner has not
12 demonstrated that he suffered from a severe mental impairment during the limitations period that
13 rendered him unable to rationally or factually understand the need to timely file his federal
14 petition or that rendered him unable to prepare, or obtain assistance in preparing, his federal
15 petition.

16 a. Gaps in Limitations Period

17 Initially, the undersigned examines petitioner's evidence as it applies to his mental health
18 concerns during the gaps in the limitations period. As discussed above, with statutory tolling, the
19 one year limitations period began to run on November 13, 2011. Petitioner suffered suicidal
20 ideation on June 17, 2011, and was transferred to Corcoran Facility 03A and Central Service due
21 to his anxiety and depression. (ECF No. 22 at 2, 7.) Petitioner was released on June 22, 2011.
22 Petitioner might be entitled to equitable tolling for this five day period, but it occurred prior to the
23 commencement of the limitations period on November 13, 2011.

24 The first gap in the limitations period ran from November 13, 2011, to March 16, 2012.
25 However, petitioner provided only one medical record, dated December 28, 2011, which reflects
26 that petitioner was actively participating in the CCCMS level of care, receiving treatment for
27 anxiety and depression. (ECF No. 23 at 55.) This record does not support a finding that
28 petitioner was severely impaired during the first gap in the limitations period.

1 In connection with the second gap, from August 2, 2012, to October 22, 2012, petitioner
2 provided no medical records.

3 Finally, as to the third gap, from May 1, 2013, to March 3, 2014, petitioner provides one
4 medical record reflecting an episode of auditory hallucinations on April 11, 2013, shortly before
5 the third gap began. However, despite petitioner's self-report, Dr. Rosier found petitioner's
6 thoughts were "organized, linear (backed down on [auditory hallucinations])," and his affect was
7 calm, alert, and stable. (ECF No. 22 at 39.) Moreover, on April 17, 2013, petitioner was noted to
8 have moderate symptoms affecting cognitive and social functioning, as he was on October 29,
9 2013. In addition, petitioner's GAF was listed as 60 during this third gap period, confirming such
10 moderate symptoms.

11 Finally, as discussed above, with statutory tolling, the one year limitations period expired
12 on October 8, 2013. Even if petitioner were liberally granted equitable tolling for the lack of
13 access to his legal materials described above, the latest the limitations period would expire was
14 March 3, 2014. Petitioner claims he was on suicide watch from September 24, 2014, until he
15 returned to EOP status at Mule Creek on October 6, 2014. (ECF No. 22 at 3.) However, because
16 the limitations period expired on March 3, 2014, petitioner is not entitled to equitable tolling for
17 mental health crises that occurred after March 3, 2014.

18 b. Psychiatric Medications

19 The court turns now to petitioner's claim that his antidepressant medications warrant
20 equitable tolling. Petitioner claims that for the past two to three years, he has been taking
21 Trileptal for anxiety, depression, and PTSD, and Zoloft for depression, and that such medications
22 "sometimes" interfere with his short term memory, distorts his thinking at times, and cause
23 petitioner to have "jumbled thoughts," or be "jumble-minded." In this court's further briefing
24 order, petitioner was directed to address these allegations, to explain when he started taking each
25 medication and for what periods of time he was unable to file his federal habeas petition as a
26 result of the medications' side effects. (ECF No. 18 at 3.) Despite this order, petitioner failed to
27 address such issues in his supplemental opposition. Rather, he states that his chronic pain and
28 mental disorders mixed with his medications leave him irritable, jumble minded and often unable

1 to get out of bed. (ECF No. 22 at 1.) Petitioner does not identify when he began taking each
2 medication or when he suffered such side effects.

3 Petitioner's prescriptions to Zoloft were noted on September 6, 2011, September 23, 2011,
4 and September 29, 2011. In his October 4, 2011 letter to the Solano County Superior Court,
5 petitioner stated he was "finding it very hard to concentrate on filing a petition for habeas
6 corpus." (ECF No. 1 at 101.) At that time he had been housed at San Quentin for two weeks, and
7 in ad seg for seven months. (ECF Nos. 1 at 101; 22 at 7.) He did not attribute the inability to
8 concentrate to his medication, and the mental health records do not reflect that petitioner
9 complained to his mental health care providers that Zoloft or any other medication caused him
10 such side effects.

11 Also, the first record of a Trileptal prescription is May 22, 2014, after the statute of
12 limitations period expired. Petitioner claims he was placed on the EOP program and given new
13 medication for depression. However, the record reflects petitioner was not placed on EOP until
14 June 3, 2014, after the limitations period expired. Rather, it appears that throughout the
15 limitations period petitioner was treated at the CCCMS level of care until June 3, 2014.
16 Treatment at the CCCMS level of care "suggests that petitioner was able to function despite his
17 mental health problems." Washington, 2010 WL 1999469, at *2 (citing Coleman, 922 F. Supp.
18 2d at 903 n.24 (inmates designated to the CCCMS level of care "are those 'whose symptoms are
19 under control or in partial remission and can function in the general prison population,
20 administrative segregation, or segregated housing unit'").

21 Importantly, petitioner fails to pinpoint when he suffered the alleged side effects, or how
22 such side effects impaired his ability to timely file his federal petition. Rather, he claims the
23 medications "sometimes" interfered with his short term memory, and "at times" distorted his
24 thinking. Such intermittent interference is insufficient, without more, to demonstrate the
25 medications severely impaired his ability throughout the limitations period. The record reflects
26 that petitioner was able to file four state habeas petitions, as well as various letters to courts and
27 his prior attorneys, even while taking medication. Accordingly, the undersigned cannot find that
28 petitioner's medications prevented him from understanding the need to file a timely petition, or

1 made it impossible for him to do so.

2 c. Analysis & Conclusion

3 Viewing the mental health records in their entirety, petitioner adduced evidence that he
4 suffers from various mental impairments such as bipolar disorder, adjustment disorder, and
5 PTSD. However, the records do not reflect that petitioner suffers from such a severe impairment
6 that he was unable to understand the need to prepare and file his federal habeas petition. Mental
7 health professionals often described petitioner's thoughts as organized and linear. He was
8 described as having average intelligence. Petitioner was able to communicate clearly with
9 medical staff, and even articulate when he believed he needed additional medication. The record
10 reflects that he faced suicidal ideation twice in the nineties, and again in 2012 and 2014, but it
11 was not a constant or even frequent occurrence. (See n.14 infra.) Petitioner knew when to seek
12 treatment for his depression and anxiety, and sought treatment appropriately. Such records
13 demonstrate that petitioner's mental impairments were not so severe that they made it impossible
14 for petitioner to timely file his federal habeas petition, either on his own or with assistance.

15 The record does reflect that petitioner's mental state deteriorated by May 19, 2014, when
16 he used a fork to puncture his arm resulting in a superficial wound, or July 10, 2014, when his
17 GAF was recorded as 45 after he was seen for a superficial cut to his wrist. His GAF was
18 recorded as 35 on September 22, 2014, and 58 on January 29, 2015, returning to 65 on January
19 22, 2016, and 64 on November 15, 2016. However, by May 19, 2014, the limitations period had
20 expired.

21 In any event, even if petitioner's mental illness was so severe as to meet the first prong of
22 Bills, petitioner failed to support his claim of diligence. Petitioner "must diligently seek
23 assistance and exploit whatever assistance is reasonably available." Bills, 628 F.3d at 1100. A
24 petitioner may satisfy the diligence prong if "the petitioner's mental impairment prevented him
25 from locating assistance or communicating with or sufficiently supervising any assistance
26 actually found." Id. But, as the Supreme Court noted in Holland, the diligence requirement is not
27 maximum diligence but rather reasonable diligence. 560 U.S. at 653. Thus, the court must
28 examine whether, given petitioner's impairments, he was sufficiently diligent.

1 Here, petitioner asserts that he pursued his rights diligently, and the “impediments” are not
2 simply a pretext for lack of diligence. (ECF No. 17 at 3.) However, petitioner alleged no facts
3 showing that he attempted to obtain assistance in order to file a timely petition, or that his alleged
4 mental impairments prevented him from locating or communicating with others for assistance.
5 Instead records reflect that petitioner sought such legal assistance, filed four state habeas
6 petitions, in three different courts, raising substantive legal challenges. That petitioner may have
7 been assisted by another inmate during this period does not change the analysis. Petitioner
8 apparently knew how to ask for help, as his other state habeas petitions were filed and progressed
9 through the courts. Indeed, in his supplemental opposition, petitioner states that he has “always
10 had prison (inmate) legal assistance.”¹⁵ (ECF No. 22 at 1.) See Roberts, 627 F.3d at 773 (mental
11 incompetence did not cause untimeliness where petitioner filed several petitions in state court
12 during time for which he sought equitable tolling).

13 In addition, petitioner wrote letters inquiring about his case and seeking relevant
14 documents. (ECF No. 1 at 101 (October 4, 2011), 112 (October 25, 2011); No. 14-3 at 55
15 (October 15, 2011); 58 (December 2, 2011); 62-64 (January 17, 2012).) For example, in his
16 October 4, 2011 letter, petitioner asked for a stay or for an extension of time to file his habeas
17 petition. (ECF No. 1 at 101.) All of these letters, as well as his state habeas petitions, support the
18 court’s finding that petitioner was aware of the need to pursue habeas corpus relief, understood
19 the need to timely file his petition, as evidenced by his letters asking where his petition was, what
20 court was it in, and what was the status, and he was also able to obtain assistance to do so. See,
21 e.g., Yeh v. Martel, 751 F.3d 1075, 1078 (9th Cir. 2014) (although petitioner had history of
22 mental illness, it was not severe enough to cause his delay because he repeatedly “sought
23 administrative and judicial remedies, and throughout these proceedings showed an awareness of
24 basic legal concepts.”); Stancle, 692 F.3d at 959 (prisoner failed to demonstrate diligence in
25 pursuing claim and that his mental disorder made it impossible to meet federal deadline where
26

27 ¹⁵ Petitioner added that such assistance “is no longer available,” suggesting a recent turn of
28 events. But in any event, petitioner does not argue that he was unable to obtain assistance to
prepare the instant petition. (ECF Nos. 17, 22.)

1 petitioner had continual assistance of his jail house lawyer in filing both his federal and state
2 habeas corpus petitions).

3 Petitioner must do more than simply assert his mental impairments to establish that he is
4 entitled to equitable tolling. Review of the medical records demonstrate that petitioner was able
5 to communicate clearly with medical professionals. Records also reflect that petitioner, either by
6 himself, or with assistance, was able to file habeas petitions. Aside from his general statement
7 that his chronic pain and mental disorders mixed with his medications leave him irritable, jumble-
8 minded, and often unable to get out of bed, (ECF No. 22 at 1), petitioner alleged no facts
9 demonstrating a causal connection between his alleged mental illness and his inability to file a
10 timely petition before the limitations period expired. “Without any allegation or evidence of how
11 petitioner’s symptoms actually caused him not to be able to file despite his diligence, the court
12 cannot find that he is entitled to equitable tolling.” Taylor v. Knowles, 2009 WL 688615, at *6
13 (E.D. Cal. March 13, 2009), aff’d, 368 Fed. Appx. 796 (9th Cir. 2010) (no equitable tolling where
14 petitioner failed to show his auditory hallucinations, severe depression, and anxiety “actually
15 caused him not to be able to file despite his diligence”); see Howell v. Roe, 2003 WL 403353, *4
16 (N.D. Cal. Feb. 20, 2003) (rejecting equitable tolling where petitioner’s suicidal nature and
17 depression did not make him mentally incompetent). Here, petitioner failed to demonstrate that
18 his mental impairments prevented him from filing this action before March 3, 2014.

19 Because the record is sufficiently developed for the undersigned to conclude that
20 petitioner’s mental illness was not so severe as to cause the untimely habeas petition,¹⁶ petitioner

21 ¹⁶ As respondent noted, petitioner did not claim that there were missing records that could further
22 aid his case. (ECF No. 27 at 14 n.2.) Petitioner also did not submit any mental health records for
23 2012, which was part of the limitations period. However, in his supplemental opposition,
24 petitioner states that he pursued his case diligently from December 24, 2011, until June 28, 2012,
25 when he was returned to ad seg. (ECF No. 22 at 4.) The record confirms that he was filing state
26 habeas petitions throughout 2012, and on January 8, 2013. Petitioner’s concession that he was
27 pursuing his case, in tandem with his multiple court filings, suggest his mental impairment was
28 not severe and did not prevent him from court filings in 2012. In any event, petitioner received
statutory tolling for most of 2012, and the court granted petitioner 123 days of equitable tolling
from November 13, 2011, to March 16, 2012, for his alleged lack of legal materials. The
remaining 81 days for the second gap from August 2, 2012, to October 22, 2012, would not save
the petition, which was filed over a year too late. For all of these reasons, no additional
documentary evidence is required for 2012.

1 is not entitled to an evidentiary hearing. Accordingly, for the reasons discussed above, the
2 undersigned finds that petitioner is not entitled to equitable tolling based on mental illness.

3 C. Writ Writers and/or Lack of Legal Sophistication

4 Finally, the court notes that the reason petitioner did not file a petition at an earlier date
5 may have been in part because he was frequently unaware of the status of his case. Attached to
6 the petition is a letter to the court, dated March 24, 2015, in which petitioner inquired as to
7 whether the court “had [his] writ on stay while the lower courts reviewed it.” (ECF No. 1-1 at 1.)
8 Petitioner indicates that Kenneth Moyer, an inmate at Solano County Prison, was “working on it,”
9 but that they have since “parted ways.” (See id.) Also, on January 16, 2014, petitioner wrote to
10 the California appellate court, which informed petitioner on February 18, 2014, that his habeas
11 petition was denied on August 2, 2012. (ECF No. 1-1 at 2.) In his opposition, petitioner states
12 that in January 2015, he was concerned about his “tolled time,” and sent letters and requests for
13 the status of his habeas case and “tolled time” to the courts, but was told they did not have his
14 case. (ECF No. 17 at 7.) He claims he wrote the county courts as well as Sacramento, but finally
15 received a reply from this court. (Id.)

16 In his supplemental opposition, petitioner states that he has “always had prison (inmate)
17 legal assistance,” but was addressing the supplemental briefing order himself because “assistance
18 is no longer available.” (ECF No. 22 at 1.) Petitioner also states that he tried from March 11,
19 2014, until January 9, 2015, to obtain docket numbers, abstracts, and “habeas corpus,” from
20 correctional officers, apparently to no avail. (ECF No. 22 at 3.)

21 Several courts have rejected claims of equitable tolling based on difficulties with writ
22 writers. In Marsh v. Soares, 223 F.3d 1217, 1220 (10th Cir. 2000), the Tenth Circuit Court of
23 Appeals rejected an inmate’s claim that he was entitled to equitable tolling for the period of time
24 the writ writer was preparing the petition. The Court held that “the fact that an inmate law clerk
25 was drafting the state petition does not relieve Mr. Marsh from the personal responsibility of
26 complying with the law.” In United States v. Cicero, 214 F.3d 199, 204 (D.C. Cir. 2000), the
27 movant had relied on a writ writer whose placement in segregation “separated [petitioner] and his
28 papers for some time before the expiration of the one year grace period until after the filing

1 deadline had passed.” The court found this assertion an insufficient basis for equitable tolling,
2 because movant “entrusted [the writ-writer] with his legal documents at his peril.” *Id.* at 205.
3 Finally, in *Nguyen v. Yates*, 2010 WL 2569246, at *10-11 (C.D. Cal. Apr. 29, 2010), the court
4 held that “any contention that petitioner received inadequate assistance from other inmates in
5 connection with his habeas efforts could not suffice to show an extraordinary circumstance.”
6 Quoting *Henderson v. Johnson*, 1 F.Supp.2d 650, 655 (N.D. Tex. 1998), the court observed:

7 [I]f this court were to approve the ground on which [the petitioner]
8 relies, it would materially ease the high standard necessary to toll
9 AEDPA’s limitation period, thereby undermining Congress’
expressed desire to accelerate the federal habeas process

10 Inmates who assist other prisoners with legal matters are not subject
11 to the ethical and fiduciary obligations of lawyers. If their
12 miscreant, inept or negligent conduct were deemed sufficient of
itself to toll the AEDPA limitations period, the time-bar would be
rendered virtually meaningless.

13 *Id.*

14 Here, petitioner does not identify any misconduct by Mr. Moyer, but merely claims they
15 parted ways. Moreover, the record suggests Mr. Moyer’s involvement as late as January 8, 2013,
16 when he signed the proof of service appended to petitioner’s fourth state habeas petition. (ECF
17 No. 14-3 at 9.) Petitioner does not address when Mr. Moyer became unavailable, and petitioner’s
18 inquiries in January and on March 24, 2015, long after Mr. Moyer’s January 8, 2013 involvement,
19 are insufficient to demonstrate that Mr. Moyer was the extraordinary cause for petitioner’s failure
20 to timely file his federal petition. In addition, absent facts not present here, petitioner’s March 24,
21 2015 letter, written long after the limitations period had expired, does not reflect petitioner’s
22 diligence on his own behalf. Moreover, the record reflects petitioner’s ability to obtain legal
23 assistance or, in the alternative, to inquire as to the status of his case or seek documents.
24 Petitioner does not recount any efforts to obtain assistance once he and Mr. Moyer parted ways,
25 or during the relevant limitations period. Thus, petitioner has failed to demonstrate he is entitled
to equitable tolling based on his reliance on writ writers.

26 To the extent that petitioner contends that the extraordinary circumstance was his lack of
27 legal sophistication or understanding of the law, his claim for equitable tolling must fail.
28 *Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006) (pro se petitioner’s ignorance and

1 confusion about the law not sufficient); see, e.g., Hughes v. Idaho State Bd. of Corr., 800 F.2d
2 905, 909 (9th Cir. 1986) (pro se prisoner’s illiteracy and lack of knowledge of law unfortunate but
3 insufficient to establish cause).

4 Petitioner has failed to demonstrate he is entitled to equitable tolling on the basis of his
5 reliance on writ writers or his lack of legal sophistication.

6 V. Conclusion

7 With statutory tolling, the one year limitations period began to run on November 13, 2011,
8 and expired on October 8, 2013. Liberally applying equitable tolling for petitioner’s alleged lack
9 of access to his legal materials, the limitations period expired, at the latest, on March 3, 2014.
10 Petitioner is not entitled to additional equitable tolling. Therefore, the petition, filed on March 24,
11 2015, was filed over a year after the limitations period expired. Respondent’s motion to dismiss
12 should be granted.

13 Accordingly, IT IS HEREBY RECOMMENDED that:

- 14 1. Respondent’s motion to dismiss (ECF No. 14) be granted; and
- 15 2. Petitioner’s application for a writ of habeas corpus be dismissed.

16 These findings and recommendations are submitted to the United States District Judge
17 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
18 after being served with these findings and recommendations, any party may file written
19 objections with the court and serve a copy on all parties. Such a document should be captioned
20 “Objections to Magistrate Judge’s Findings and Recommendations.” If petitioner files objections,
21 he shall also address whether a certificate of appealability should issue and, if so, why and as to
22 which issues. A certificate of appealability may issue under 28 U.S.C. § 2253 “only if the
23 applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C.
24 § 2253(c)(3). Any response to the objections shall be served and filed within fourteen days after
25 service of the objections. The parties are advised that failure to file objections within the

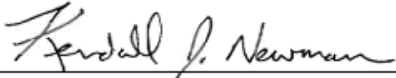
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1 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
2 F.2d 1153 (9th Cir. 1991).

3 Dated: February 21, 2017

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KENDALL J. NEWMAN
6 UNITED STATES MAGISTRATE JUDGE

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