

1 for writ of habeas corpus. In re Bunyard, No. S157098, 2015 Cal. LEXIS 4615 (June 24, 2015).

2 Proceedings commenced in this court with the filing on August 24, 2015 of a Request for
3 Appointment of Counsel and Application for Leave to Proceed in Forma Pauperis. ECF Nos. 1,
4 2. The motions were granted on August 25, 2015, and counsel were appointed on August 31,
5 2015.

6 An initial Case Management Conference was held on September 18, 2015. ECF No. 10.
7 The court indicated that it would require the Attorney General to file a complete digital copy of
8 the state court record via the court's CM/ECF system. This court has for some time anticipated
9 joining other California district courts in requiring electronic filing of the state court record, rather
10 than lodgment in paper, in capital habeas cases. The instant case is the first in this district to
11 involve the uploading of the state court record to CM/ECF. Accordingly, it was understood by
12 the court and the parties that unforeseen logistical and technical problems might arise and make
13 some delay inevitable.

14 A Scheduling Order issued on October 14, 2015. ECF No. 12. The order specified the
15 process for electronic filing of the state court record, with a deadline of December 14, 2015. That
16 deadline was subsequently extended to December 23, 2015. ECF Nos. 21, 22. Electronic filing
17 of the state court record began on December 11, 2015, and concluded on December 15, 2015,
18 only one day after the original deadline. ECF Nos. 23-26.

19 Petitioner had indicated at the initial Case Management Conference his intention to file a
20 motion for equitable tolling, and a date for filing of the motion was set in the initial Scheduling
21 Order. ECF No. 12. Petitioner subsequently obtained a 21-day extension of time. ECF Nos. 18,
22 19. The motion was filed on December 7, 2015. ECF No. 20. Respondent has opposed the
23 motion, ECF No. 29, and petitioner has replied, ECF No. 30.

24 II. The Statute of Limitations and Standards for Equitable Tolling

25 Under the federal habeas statute, prisoners generally have one year from the date on which
26 their convictions become final to file an application for federal habeas relief. 28 U.S.C. §
27 2244(d)(1) & (1)(A); Wixom v. Washington, 264 F.3d 894, 895 (9th Cir. 2001), cert. denied, 534
28 U.S. 1143 (2002). That period is statutorily tolled during the pendency of properly initiated state

1 collateral proceedings. 28 U.S.S. § 2244(d)(2).

2 The running of the limitations period is also subject to equitable tolling. Holland v.
3 Florida, 560 U.S. 631, 645 (2010); Lee v. Lampert, 653 F.3d 929, 933 (9th Cir. 2011). Equitable
4 tolling may be granted where a petitioner shows “(1) that he has been pursuing his rights
5 diligently, and (2) that some extraordinary circumstance stood in his way.” Pace v. DiGuglielmo,
6 544 U.S. 408, 418 (2005). The diligence required is reasonable diligence, not “maximum feasible
7 diligence.” Holland, 560 U.S. at 653. An “extraordinary circumstance” must be outside of
8 petitioner’s control and prevent him from filing within the one-year period. See Fail v. Hubbard,
9 315 F.3d 1059, 1061-62 (9th Cir. 2002).¹

10 III. Discussion

11 The parties agree in this case that the statute of limitations was statutorily tolled under §
12 2244(d)(2) from February 3, 2009, when petitioner’s conviction became final upon the conclusion
13 of direct review, until disposition of his state habeas petition on June 24, 2015. Accordingly,
14 absent equitable tolling the federal petition is due on or before June 24, 2016. See Scheduling
15 Order, ECF No. 12 at 1-2. Petitioner seeks tolling on equitable grounds for a total of 158
16 additional days.² He argues first that the limitations period should be tolled for the 68 days that
17 he was actually unrepresented. He argues further that lack of access to the core state court record
18 until it was electronically filed on December 15, 2015, particularly in the absence of a budget to
19 authorize any expenditures, supports additional tolling. Respondent objects to any equitable
20 tolling.³

21 ¹ Throughout his briefing, petitioner relies on the principle that there is a rebuttable presumption
22 in favor of equitable tolling. See ECF No. 20 at 5; EC No. 30 at 3. If petitioner means to argue
23 that the court must apply a rebuttable presumption in favor of equitable tolling in individual
24 cases, he is wrong. The courts have applied a rebuttable presumption in favor of finding that
AEDPA’s limitations provision is subject to equitable tolling, see Lee, 653 F.3d at 933 (quoting
Holland, 560 U.S. at 645-46), a matter which is well settled and not disputed here.

25 ² Petitioner’s moving papers, filed prior to electronic filing of the state court record, sought a
26 maximum of 173 days. ECF No. 20. In his reply (ECF No. 30), this request was amended to 158
27 days in light of the date the state court record became electronically available on CM/EF in its
entirety.

28 ³ Respondent does not challenge the court’s authority to prospectively extend the filing date for a
capital habeas petition where the standards for equitable tolling are met. Pre-petition equitable
(continued...)

1 A. Tolling for the Time Petitioner Was Without Counsel

2 Petitioner seeks equitable tolling for the 68-day period between June 24, 2015, when the
3 California Supreme Court denied his state habeas petition and the federal statute of limitations
4 otherwise began running, and August 31, 2015, when present counsel were appointed.

5 1. Diligence

6 Petitioner has established the following facts:

7 On July 2, 2015, just over a week after the California Supreme Court’s denial of the state
8 petition, state habeas counsel Geraldine S. Russell sent a request for appointment of federal
9 counsel, request for stay of execution, and request to proceed in forma pauperis to Mr. Bunyard
10 for his signature. Declaration of Geraldine S. Russell (“Russell Decl.”), ECF No. 20 at 16.
11 Petitioner received the forms and cover letter on July 10. He signed the forms that day, and gave
12 them to a prison official for completion of the trust account certification. The papers were
13 returned to Mr. Bunyard on August 9, 2015, and he put them into the outgoing mail the same day.
14 Declaration of Jerry Bunyard (“Bunyard Decl.”), ECF No. 20 at 18. Meanwhile, having not yet
15 received any paperwork back from Mr. Bunyard, state counsel sent him a second copy of the
16 necessary paperwork on August 12. Russell Decl. On August 19, counsel received the
17 documents that had been postmarked on August 11, 2015. Id.

18 Ms. Russell forwarded the paperwork to the Office of the Federal Defender upon receipt.

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20 tolling in capital cases is widely accepted in this circuit. See Calderon v. United States District
21 Court (Beeler), 128 F.3d 1283, 1288 (9th Cir. 1997) (denying warden’s petition for mandamus and
22 noting that district court’s grant of pre-petition equitable tolling was “clearly correct”), overruled
23 on other grounds by Calderon v. United States District Court (Kelly), 163 F.3d 530, 540 (9th Cir.
24 1998) (en banc), abrogated by Woodford v. Garceau, 538 U.S. 202 (2003); Kennedy v. Warden,
25 2014 U.S. Dist. LEXIS 53261 (E.D. Cal. Apr. 16, 2014), Findings and Recommendations
26 adopted, No. 2:13-cv-02041 LKK KJN DP at ECF No. 35 (E.D. Cal. Jun. 17, 2014); Cruz v.
27 Chappell, 2014 U.S. Dist. LEXIS 23673, 2014 WL 693595 (N.D. Cal. Feb. 21, 2014); Williams
28 v. Chappell, 2013 U.S. Dist. LEXIS 103726, 2013 WL 3863942 (E.D. Cal. July 24, 2013); San
Nicolas v. Ayers, 2007 U.S. Dist. LEXIS 21425, 2007 WL 763221 (E.D. Cal. Mar. 9, 2007);
Dickey v. Ayers, 2006 U.S. Dist. LEXIS 89170, 2006 WL 3359231 (E.D. Cal. Nov. 20, 2006);
Holloway v. Wong, 2006 WL 1652388 (E.D. Cal. Jun. 13, 2006). Here, respondent raises the
prospectivity issue only in the context of arguing that petitioner has not established the
impossibility of timely filing absent equitable tolling. ECF No. 29 at 7. That issue is addressed
in discussion of the “extraordinary circumstances” prong of the equitable tolling analysis.

1 Id. The person in the Federal Defender’s Office responsible for filing the request for appointment
2 of counsel was temporarily out of the office. Id. The request for appointment of counsel and for
3 stay of execution, and application for leave to proceed in forma pauperis, were filed on August
4 24, 2015. ECF No. 1. The motion for appointment of counsel was granted on August 25, and the
5 matter was referred to the Eastern District Selection Board for the location of counsel willing and
6 able to accept appointment. ECF No. 5. Mr. Stetler and Mr. Novak were appointed on August
7 31, 2015.

8 The court finds that petitioner acted with reasonable diligence to initiate his federal habeas
9 case and secure the statutorily-guaranteed appointment of counsel upon conclusion of his state
10 habeas proceedings. Accordingly, petitioner has satisfied the first requirement for equitable
11 tolling.

12 2. Extraordinary Circumstances

13 Petitioner contends that the 68 day delay in appointing counsel constitutes an
14 extraordinary circumstance supporting tolling, in light of the age and complexity of the case, the
15 length of the record, and the time accordingly required to investigate and prepare the petition. In
16 general, the timing of the appointment of counsel is a matter entirely outside of a petitioner’s
17 control. See Dennis v. Woodford, 65 F. Supp. 2d 1093, 1097 (N.D. Cal. 1999); Spitsyn v. Moore,
18 345 F.3d 796, 800-02 (9th Cir. 2003). Here petitioner also experienced a month-long delay in the
19 processing of his trust account paperwork by prison officials, and shorter delays related to the
20 inmate mail system, which were equally beyond his control and delayed the filing of the motion
21 for appointment. In this case it was delay by prison officials, rather than delay by the court, that
22 appears to have primarily caused the delay in appointment of counsel.⁴ In any event, petitioner
23 has established that the circumstance of being unrepresented by counsel for 68 days was wholly

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25 ⁴ Under Ninth Circuit precedent, these circumstances entitle petitioner to equitable tolling
26 without regard to the appointment of counsel issue. Miles v. Prunty, 187 F.3d 1104, 1107 (9th
27 Cir. 1999) (reversing denial of equitable tolling where prison officials delayed processing of
28 inmate’s trust account paperwork and outgoing mail). Accordingly, petitioner should be granted
equitable tolling for at least the 30 days period that prison officials had custody of his paperwork
for purposes of certifying his trust account balance on the IFP application.

1 outside his control. The question becomes whether the lack of representation, in context of all the
2 relevant circumstances, prevents timely filing and warrants the court’s exercise of its equitable
3 powers.

4 Respondent argues that petitioner cannot prevail unless he demonstrates that the delay in
5 his case was “extraordinary.” ECF No. 29 at 7. But petitioner does not contend that the delay
6 supports tolling on grounds of its length alone. The 68 day delay here is less egregious, viewed in
7 isolation, than the delays that supported equitable tolling in San Nicolas v. Ayers, No. 1:06-cv-
8 00942 LJO, 2007 U.S. Dist. LEXIS 21425, 2007 WL 763221 (E.D. Cal. Mar. 9, 2007) (188 days)
9 and Hoyos v. Wong, 2010 U.S. Dist. LEXIS 13086, 2010 WL 596443 (S.D. Cal. Feb. 16, 2010)
10 (217 days). However, whether the length of delay alone can be deemed “extraordinary” is not
11 dispositive. The question is whether the combination of circumstances asserted in support of
12 equitable tolling was sufficient to prevent filing by the presumptive due date. Lott v. Mueller,
13 304 F.3d 918, 924-25 (9th Cir. 2002) (“the confluence of numerous factors” may prevent timely
14 filing and support equitable tolling).

15 As noted above, petitioner emphasizes the age and complexity of the case and the size of
16 the record. This case arises from a murder that occurred in San Joaquin County in 1979. There
17 were two trials, the first in 1980 and a penalty phase retrial in 1990. Both verdicts were appealed,
18 and a state habeas petition was filed during the pendency of the appeal from the penalty retrial.
19 Neither federal counsel had been involved in any of the prior proceedings. Accordingly, as of the
20 date of appointment counsel had only the most glancing familiarity with the case.

21 In order to prepare the federal petition, counsel must initially review a trial record that
22 consists of approximately 19,000 pages (inclusive of both the Reporter’s Transcripts and Clerk’s
23 Transcripts), approximately 1,100 pages of appellate briefing, 500 pages of state habeas
24 pleadings, and 2000 pages of state habeas exhibits. The core record accordingly totals
25 approximately 22,600 pages. Counsel must also review approximately 28 banker’s boxes of prior

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1 counsel's files, estimated to contain 78,600 pages of materials.⁵ This is by any measure an
2 extraordinary amount of material to review, analyze, incorporate as appropriate into an
3 investigation plan, and build upon in creating a comprehensive new document, the federal
4 petition.

5 Counsel's obligations in this case include independent investigation that is made
6 particularly challenging by the age of the case. The murder for which petitioner was convicted
7 happened over 36 years ago. There was no physical evidence linking petitioner to the crimes; the
8 prosecution relied primarily on the testimony of two witnesses whose reliability petitioner
9 disputes. The evaluation and development of witness reliability evidence necessarily depends in
10 significant part on human sources and memories which deteriorate over time, unlike physical
11 evidence that can be preserved for future re-evaluation. Counsel contend further that their ability
12 to investigate penalty phase mitigation issues – issues which were undeveloped at both trials, and
13 can therefore be expected to comprise a significant portion of the federal petition – will be
14 severely hampered by the passage of so much time. Counsel's concerns about the continued
15 existence of witnesses and evidence, and their ability locate them, are well-founded. The
16 identification, location, and gathering of extant evidence will undoubtedly be unusually difficult
17 and time-consuming in a case that is unusually old.

18 Respondent contends that petitioner has not established that these circumstances make it
19 literally impossible for him to file a petition by June 24, 2016. While petitioner's moving papers
20 do not include the exact words "Filing by June 24, 2016 is not humanly possible," such talismanic
21 language is not required. Petitioner's entire motion is predicated on the proposition that the
22 necessary work cannot reasonably be accomplished in 297 days. Counsel have expressly
23 represented, based on their capital habeas experience, that the work necessary for this case
24 requires their efforts for the full year provided by the limitations period. ECF No. 30 at 8. That
25 assertion is well supported.

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27 ⁵⁵ There are also electronic files from prior counsel totaling 169 MB. It is unknown at this time
28 how much of this data is duplicative of the paper files.

1 Having carefully reviewed petitioner’s pending budget request, the undersigned finds
2 counsel’s time estimates for record review, investigation, and preparation of the petition to be
3 generally reasonable, notwithstanding any specific line items that may be adjusted by the court or
4 the Capital Case Committee. The court further finds that the review and investigation proposed,
5 in light of the case’s factual and procedural complexity, is necessary to fulfill counsel’s ethical
6 duties to their client and to satisfy petitioner’s right to counsel, and that this work could not
7 reasonably be accomplished by June 24, 2016. There is nothing speculative about the predictable
8 impact, absent tolling, of the delay in appointment on the work to be done. Moreover, counsel
9 cannot have begun the necessary work until they were appointed.

10 Respondent argues that a grant of tolling in this case would effectively and impermissibly
11 rewrite the statute of limitations to run from the appointment of counsel in capital cases. That is
12 not the case. The court does not suggest that 365 days post-appointment is necessarily required in
13 every case for the filing of a federal petition. Rather than adopting any “mechanical rule,” the
14 undersigned has considered all the relevant circumstances on the “case-by-case basis” required by
15 the U.S. Supreme Court. Holland, 560 U.S at 649-650.

16 This case is comparable to others in which district courts in California have granted
17 equitable tolling for delays in the appointment of counsel in light of voluminous records, case
18 complexity, and a general showing by plaintiff’s counsel of the work to be done. See Kennedy v.
19 Warden, No. 2:13-cv-02041 LKK KJN DP, 2014 U.S. Dist. LEXIS 53261 (E.D. Cal. Apr. 16,
20 2014) (recommending tolling for 120 day period between initial filing and appointment of
21 counsel), Findings and Recommendations adopted at ECF No. 35 (E.D. Cal. Jun. 17, 2014);
22 Dykes v. Chappell, 2012 U.S. Dist. LEXIS 122260, 2012 WL 3727263 (N.D. Cal. Aug. 28, 2012)
23 (tolling for 60 day period between initial filing and appointment of counsel); Dickey v. Ayers,
24 No. 1:06-cv-00357 AWI, 2006 U.S. Dist. LEXIS 89170, 2006 WL 3359231 (E.D. Cal. Nov. 20,
25 2006) (tolling for 138 day period between initial filing and appointment of counsel).

26 For all the reasons explained above, the court concludes that the 68-day delay in
27 appointment of counsel in this case, considered in light of the age and complexity of the case
28 (including the fact of the penalty retrial and the size of the record), constitutes an exceptional

1 circumstance outside petitioner's control that prevents him from filing within the one-year period.
2 Moreover, requiring counsel to file a petition in 297 days would, in these circumstances,
3 impermissibly impair Mr. Bunyard's right to counsel, which includes "a right for that counsel
4 meaningfully to research and present [his] habeas claims." McFarland v. Scott, 512 U.S. 849,
5 859 (1994). Accordingly, the undersigned recommends that the statute of limitations be equitably
6 tolled for the 68 days that petitioner was unrepresented by counsel.

7 B. Additional Tolling

8 Petitioner seeks additional tolling through December 15, 2015, on grounds that he was
9 effectively without counsel until the state court record was available in its entirety via CM/ECF.
10 Counsel represent that they were "limited" in the work that they could do earlier, because (1) they
11 had possession of only some of the state court record, and (2) prior counsel's files had been
12 obtained by their paralegal but had not been scanned and transmitted to them because they did not
13 yet have funding authorization for that task. ECF No. 20 at 13. The court is not persuaded that
14 this state of affairs amounts to constructive denial of counsel or otherwise constitutes an
15 extraordinary circumstance that would support equitable tolling.

16 The Ninth Circuit has held that equitable tolling may be appropriate, in some
17 circumstances, where a pro se petitioner is entirely deprived of access to case materials. Ramirez
18 v. Yates, 571 F.3d 993, 998 (9th Cir. 2009) (complete lack of access to a legal file may constitute
19 an extraordinary circumstance); see also Lott v. Muller, supra, 304 F.3d at 924 (lack of access to
20 files during temporary transfers); United States v. Battles, 362 F.3d 1195, 1196-97 (9th Cir. 2004)
21 (transcripts withheld by former counsel). This is not such a situation. Counsel in this case
22 acknowledge that they had some, but not all, case materials prior to the completion of
23 respondent's e-filing. There has been no particularized showing that the portions of the record
24 they lacked were so crucial that nothing else could be done until they were reviewed.

25 It is clear from the procedural history of the case that counsel have in fact been diligently
26 doing what they need to do in order to identify legal issues and preliminarily plan their
27 investigation. Partial access to records did not prevent the drafting of an initial budget proposal.
28 Although initial budgets are always subject to requests for amendment as counsel learn more

1 about their case, it is clear that counsel are not shooting in the dark. They appear to have a
2 preliminary idea of what much of their case will be about, and to be actively working on
3 expanding that understanding.

4 The court rejects the implication that the absence of a budget prevented counsel from
5 obtaining records in the possession of their paralegal. While there may well be expenses that
6 should not be incurred prior to court approval, this is not one of them. The court notes that
7 counsel have not themselves failed to expend time on the case, including the time required to seek
8 equitable tolling, on grounds the budget for those hours has not been approved.

9 The court appreciates the challenges created for counsel by delays in access to case-
10 related materials, and by the need to begin work prior to approval of a budget, but concludes that
11 petitioner has not demonstrated how those challenges, on the specific facts of this case, would
12 actually prevent timely filing of the petition absent additional tolling. Upon consideration of all
13 these matters, the court concludes that petitioner has not supported his burden of establishing
14 extraordinary circumstances for the period from appointment to electronic filing of the state court
15 record. Accordingly, the undersigned recommends that no additional tolling be provided for time
16 following the appointment of counsel.

17 IV. Conclusion

18 For the reasons explained above, IT IS HEREBY RECOMMENDED that petitioner's
19 motion for equitable tolling, ECF No. 20, be GRANTED IN PART, for a period of sixty-eight
20 (68) days, and that the filing date for the petition accordingly be extended to August 31, 2016.

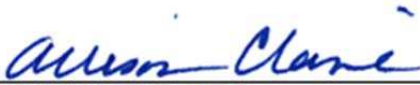
21 These findings and recommendations are submitted to the United States District Judge
22 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within *fourteen* days
23 after being served with these findings and recommendations, any party may file written
24 objections with the court and serve a copy on all parties. Such a document should be captioned
25 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
26 objections shall be served and filed within *seven* days after service of the objections. The parties

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

3 DATED: January 12, 2016

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5 ALLISON CLAIRE
6 UNITED STATES MAGISTRATE JUDGE
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