



1 considered by the court as part of petitioner's request for equitable tolling of the statute of  
2 limitations. Accordingly, the undersigned will amend her prior findings and recommendations to  
3 reflect the information provided in this exhibit.

4 I. Factual and Procedural History

5 Petitioner entered a no contest plea to three counts of Second Degree Robbery in the Solano  
6 County Superior Court on March 27, 2014. ECF No. 1 at 40-43 (plea agreement); see also ECF  
7 No. 1 at 49-55 (change of plea transcript). He was sentenced to a stipulated term of eleven years  
8 in state prison on April 25, 2014. ECF No. 1 at 56-76 (sentencing transcript). He did not file a  
9 direct appeal before the California Court of Appeal.

10 On or about December 16, 2015 petitioner filed a state habeas petition in the Solano County  
11 Superior Court challenging the denial of custody credits and his concurrent sentence.<sup>3</sup> See ECF  
12 No. 28 at 85 (trial court minute entry). It was denied by the trial court on February 10, 2016. Id.  
13 Petitioner filed another state habeas petition raising the same claims in the California Court of  
14 Appeal on March 7, 2016<sup>4</sup> which was denied four days later on March 11, 2016. ECF No. 28 at  
15 87. On March 15, 2016 petitioner filed a habeas corpus petition in the California Supreme Court  
16 which he amended on May 4, 2016 by adding a speedy trial and ineffective assistance of counsel  
17 claim. ECF No. 28 at 33-56 (amended petition),78-84 (original petition). This petition was  
18 denied without citation on June 8, 2016. ECF No.

19 The present federal habeas corpus petition was filed on June 23, 2016 alleging three separate  
20 claims for relief. Petitioner first contends that his right to due process was violated based on the  
21 trial court's denial of custody credits. Secondly, he asserts that due process was violated when  
22 the trial court failed to run his sentence concurrent with a federal robbery conviction. Lastly,  
23 petitioner raises an ineffective assistance of counsel claim based on counsel's failure to raise a

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25 <sup>3</sup> The court notes that respondent did not provide a copy of this petition that was filed in state  
26 court. Therefore, the prison mailbox rule was not applied to it for purposes of calculating the  
27 statute of limitations. However, in this case, it does not alter the conclusions reached herein.

28 <sup>4</sup> Once again, the prison mailbox rule was unable to be applied to this petition due to respondent's  
failure to provide a copy of it. Instead, respondent chose to rely on a printout from the California  
court's website. Application of the prison mailbox rule would not affect the outcome in this case  
for the reasons described herein.

1 speedy trial violation.<sup>5</sup>

2 II. Statute of Limitations

3 Section 2244(d) (1) of Title 28 of the United States Code contains a one year statute of  
4 limitations for filing a habeas petition in federal court. The one year clock commences from  
5 several alternative triggering dates which are described as:

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

8 (B) the date on which the impediment to filing ... is removed, if the  
9 applicant was prevented from filing by such State action;

10 (C) the date on which the constitutional right asserted was initially  
11 recognized by the Supreme Court ... and made retroactively  
applicable to cases on collateral review; or

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

14 28 U.S.C. § 2244(d)(1).

15 Petitioner’s conviction became final on June 24, 2014 following the expiration of time to  
16 seek direct review by the California Court of Appeal. Cal. Rules of Court, rule 8.308(a); see also  
17 Mendoza v. Carey, 449 F.3d 1065, 1067 (9th Cir. 2006). Therefore, the statute of limitations  
18 commenced the next day and expired one year later on **June 24, 2015**. See Patterson v. Stewart,  
19 251 F.3d 1243 (9th Cir. 2001) (using the anniversary date method for calculating the statute of  
20 limitations). Therefore, the instant federal habeas corpus petition filed on June 23, 2016 was  
21 almost one year late to the day, absent any statutory or equitable tolling.

22 A. Statutory Tolling

23 Under the AEDPA, the statute of limitations is tolled during the time that a properly filed  
24 application for state post-conviction or other collateral review is pending in state court. 28 U.S.C.  
25 § 2244(d)(2). A properly filed application is one that complies with the applicable laws and rules  
26 governing filings, including the form of the application and time limitations. Artuz v. Bennett,

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28 <sup>5</sup> It should be noted that pursuant to his plea agreement, petitioner waived his right to a speedy  
trial. ECF No. 1 at 40.

1 531 U.S. 4, 8 (2000). The statute of limitations is not tolled from the time when a direct appeal in  
2 state court becomes final to the time when the first state habeas petition is filed because there is  
3 nothing “pending” during that interval. Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999).  
4 Moreover, the tolling provision of § 2244(d)(2) can only pause a clock not yet fully run; it cannot  
5 “revive” the limitations period once it has run (i.e., restart the clock to zero). Thus, a state court  
6 habeas petition filed after the expiration of AEDPA's statute of limitations does not toll the  
7 limitations period under § 2244(d)(2). See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir.  
8 2003); Jiminez v. Rice, 276 F.3d 478, 482 (9th Cir. 2001).

9 In the instant case, petitioner did not file any state habeas petition until December 16,  
10 2015, almost six months after the statute of limitations had already expired. A state habeas  
11 corpus petition filed after the expiration of the statute of limitations does not revive it. See  
12 Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003). Therefore, as respondent points out,  
13 petitioner is not entitled to any statutory tolling while his state habeas corpus petitions were  
14 pending in state court. His federal petition remains untimely unless petitioner is entitled to an  
15 alternate start date or equitable tolling.

16 B. Alternate Start Date

17 Liberally construing petitioner’s pro se pleadings, he contends that he did not become  
18 aware of “the constitutional claims raised in the California Supreme Court [habeas] petition until  
19 April of 2016 when advised of such by a fellow inmate.” ECF No. 28 at 12. These two new  
20 claims described as “speedy trial and effective counsel” violations were then included in an  
21 amended habeas petition filed in the California Supreme Court on May 4, 2016.<sup>6</sup> Id. at 33-34.

22 Under § 2244(d)(1)(D), AEDPA's statute of limitations begins to run when the petitioner  
23 knows or through diligence could discover the important facts, not when petitioner discovers their  
24 legal significance. Hasan v. Galaza, 254 F.3d 1150, 1154 & n. 3 (9th Cir. 2001). Here, the  
25 factual predicate underlying the asserted new claims for relief concern the date petitioner was  
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27 <sup>6</sup> These claims were merged into a single constitutional violation in the present federal habeas  
28 corpus petition based on counsel’s failure to move for dismissal of the charges based on pretrial  
delay.

1 charged with the armed robbery counts in state court and the date of his eventual transfer from  
2 federal prison into state custody. See ECF No. 28 at 51-52 (Cal. S. Ct. habeas petition).

3 Petitioner argues that he did not become aware that the delay between these two dates  
4 amounted to a speedy trial violation until April of 2016. See ECF No. 28 at 12. However, under  
5 well-established case law, that does not change the start date of the federal statute of limitations  
6 because petitioner was well aware of the factual predicate for his claims. See Ford v. Gonzalez,  
7 683 F.3d 1230, 1236 (9th Cir. 2012) (holding that “the factual predicate of Ford's [Brady] claims  
8 could have been discovered at the time of his trial through the exercise of due diligence.”).  
9 Accordingly, petitioner’s request to start the statute of limitations from April of 2016 should be  
10 denied.

11 C. Equitable Tolling

12 A habeas petitioner is entitled to equitable tolling of AEDPA's one-year statute of  
13 limitations only if the petitioner shows: (1) that he has been pursuing his rights diligently; and (2)  
14 that some extraordinary circumstance stood in his way and prevented timely filing. See Holland  
15 v. Florida, 560 U.S. 631 (2010); Ramirez v. Yates, 571 F.3d 993, 997 (9th Cir. 2009). The  
16 diligence required for equitable tolling purposes is “reasonable diligence,” not “maximum  
17 feasible diligence.” See Holland, 560 U.S. at 2565; see also Bills v. Clark, 628 F.3d 1092, 1096  
18 (9th Cir. 2010). An “extraordinary circumstance” has been defined as an external force that is  
19 beyond the inmate’s control. Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999).

20 Additionally, the petitioner must demonstrate the causal relationship between the  
21 extraordinary circumstance and the untimely filing. Spitsyn v. Moore, 345 F.3d 796, 799 (9th  
22 Cir. 2003). With respect to equitable tolling, “the statute-of-limitations clock stops running when  
23 extraordinary circumstances first arise, but the clock resumes running once the extraordinary  
24 circumstances have ended or when the petitioner ceases to exercise reasonable diligence,  
25 whichever occurs earlier.” Luna v. Kernan, 784 F.3d 640, 651 (9th Cir. 2015) (citing Gibbs v.  
26 Legrand, 767 F.3d 879, 891-92 (9th Cir. 2014)).

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1        1.        Delay in Receiving Case File and Transcripts

2            Petitioner first requests equitable tolling based on counsel's delay in producing his case  
3 file. ECF No. 28 at 16. On October 10, 2014 petitioner sent a letter to his trial counsel and the  
4 clerk of the Superior Court requesting a copy of the judgment, sentencing minute order and plea  
5 agreement. ECF No. 1 at 31, 35. Along with a letter dated December 2, 2014, trial counsel sent  
6 petitioner a copy of the requested documents. Id. at 32. In a separate letter dated September 18,  
7 2015, trial counsel indicated that he had previously sent petitioner a copy of the arrest warrant and  
8 report but not the sentencing transcript. Id. at 34. A subsequent letter from trial counsel indicates  
9 that he sent the sentencing transcript to petitioner on or about December 14, 2015. Id. at 33.  
10 However, The State Bar of California received a complaint from petitioner in January 2016  
11 indicating that he still had not received his sentencing transcripts from trial counsel. ECF No. 33  
12 at 2. In his habeas application, petitioner requested equitable tolling from October 2014 until  
13 December 2015. ECF No. 1 at 14. However, in light of the exhibit submitted to the court on July  
14 28, 2017, the undersigned will extend petitioner's request for equitable tolling until the latest  
15 possible date in which the record reflects that he had obtained the sentencing transcript.<sup>7</sup>

16            Respondent correctly points out that petitioner was able to raise the custody credit and  
17 concurrent sentencing claims before he received any documents from his trial counsel. ECF No.  
18 29 at 5. He simply chose to pursue relief first through administrative prison channels and then  
19 through the state courts before he filed his federal habeas petition.

20            Assuming, without deciding, that petitioner has demonstrated diligence in obtaining his  
21 case file, the undersigned recommends denying equitable tolling on this ground because petitioner  
22 failed to demonstrate that it was the actual cause of his untimely filing. See Bills v. Clark, 628  
23 F.3d 1092, 1100 (9th Cir. 2010) (emphasizing that to be entitled to equitable tolling a petitioner  
24 must demonstrate that a mental impairment was the but-for cause of the delay). Petitioner

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25            <sup>7</sup> The court concludes that the latest possible date that petitioner obtained a copy of his sentencing  
26 transcript was in April 2016. See ECF Nos. 28 at 36 (state habeas petition stating that petitioner  
27 discovered the legal basis for his ineffective assistance of counsel claim in April 2016); 33 (State  
28 Bar of California letter). Once he obtained his entire case file, petitioner then filed an amended  
state habeas corpus petition in the California Supreme Court on May 4, 2016. ECF No. 28 at 31-  
56 (petition); 57-77 (sentencing transcript).

1 received all of the documents he originally requested from counsel by December 2014,  
2 approximately six months before the federal statute of limitations expired. Petitioner does not  
3 explain, nor is it apparent to the court, why a sentencing transcript would be necessary when  
4 filing a challenge to the consecutive nature of the sentence as well as the computation of custody  
5 credits. This same information would have been reflected in the final judgment and sentencing  
6 minute order which petitioner received in December 2014. In this case, the request for, and  
7 receipt of, the sentencing transcript led to an additional year delay. Between December 12, 2014  
8 and December 16, 2015, petitioner made no attempt to file either a state or federal habeas petition  
9 with the documents he already had in his possession. For all these reasons, the undersigned  
10 recommends denying equitable tolling based on delay in receiving petitioner's case file.

11 2. Ineffective Assistance of Counsel

12 Petitioner additionally contends that he is entitled to equitable tolling based on counsel's  
13 failure to file a notice of appeal on the "potentially meritorious issue" related to his request for a  
14 concurrent sentence and pretrial custody credits. ECF No. 28 at 13. However, petitioner fails to  
15 explain how this lack of an appeal actually caused him to file his federal habeas petition in an  
16 untimely manner.

17 In Randle v. Crawford, 604 F.3d 1047, 1057 (2010), the Ninth Circuit rejected a similar  
18 argument raised by a habeas petitioner. "Counsel's failure to perfect an appeal simply meant that  
19 Randle had one year from the expiration of his time to file a notice of appeal in which to initiate a  
20 federal habeas action – it did not prevent him from filing the petition." Id.; see also Luna v.  
21 Kernan, 784 F.3d 640, 646 (9th Cir. 2015) (emphasizing that "[c]ourts have held that run-of-the-  
22 mill mistakes by one's lawyer that cause a filing deadline to be missed do not rise to the level of  
23 extraordinary circumstances justifying equitable tolling" of the statute of limitations).

24 Petitioner's request for equitable tolling on this basis should be denied because he has not  
25 demonstrated that it was the but-for cause of his untimely filed federal habeas petition. See  
26 Spitsyn, 345 F.3d at 799.

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1     3.     Exhaustion of Administrative Remedies

2             In his opposition to the motion to dismiss, petitioner asserts that he “read a habeas manual  
3     which stated the [sentencing] credits issue had to be exhausted through the prison appeals process  
4     before he could proceed to [federal] court.” ECF No. 28 at 13-14. He therefore filed  
5     administrative grievances pertaining to his custody credits and concurrent sentence in June 2014.  
6     Petitioner requests equitable tolling between June 2014 and October 10, 2014 while he was  
7     exhausting administrative remedies.<sup>8</sup> ECF No. 28 at 16.

8             Even assuming arguendo that petitioner is entitled to equitable tolling during this period of  
9     time his federal habeas petition is still untimely. Under this alternate analysis, the statute of  
10    limitations would have commenced in October 2014 and expired one year later in October 2015,  
11    approximately two months before petitioner filed any state habeas challenge to his conviction.  
12    Accordingly, the instant federal habeas petition would still be filed approximately eight months  
13    after the statute of limitations expired.

14    4.     Actual Innocence

15            The Ninth Circuit has determined that the “actual innocence” exception applies to the  
16    AEDPA's statute of limitations. See Lee v. Lampert, 653 F.3d 929, 934 (9th Cir. 2011) (en banc).  
17    “[A] credible claim of actual innocence constitutes an equitable exception to AEDPA's limitations  
18    period, and a petitioner who makes such a showing may pass through the Schlup gateway and  
19    have his otherwise time-barred claims heard on the merits.” Id. at 932. To pass through the  
20    Schlup gateway, a “petitioner must show that it is more likely than not that no reasonable juror

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21            <sup>8</sup> The court has also considered this claim as a request for statutory tolling under 28 U.S.C. §  
22    2244(d)(2). However, an administrative prison grievance does not constitute an “application for  
23    State post-conviction or other collateral review” within the meaning of 28 U.S.C. § 2244(d)(2).  
24    See Duncan v. Walker, 533 U.S. 167 (2001) (rejecting the argument that statutory tolling applies  
25    during the pendency of a federal habeas corpus petition under 28 U.S.C. § 2244(d)(2) because it  
26    does not constitute an “application for State post-conviction or other collateral review”).  
27    Therefore, statutory tolling between October and December 2014 is not warranted. Compare  
28    Kimbrell v. Cockrell, 311 F.3d 361 (5th Cir. 2002) (recognizing that “the timely pendency of  
prison grievance procedures would have tolled the one-year [limitations] period,” when the  
habeas petitioner was challenging a prison disciplinary proceeding and not a criminal conviction),  
with Smith v. Meko, 2016 WL 1411369 (E.D. Ky 2016) (denying statutory tolling for the  
duration of a prisoner’s administrative appeal when his habeas petition challenged a criminal  
conviction because it “ignores the actual language of § 2244(d)(2)).

1 would have convicted him in light of the new evidence....” Id. at 327. Schlup additionally  
2 requires a petitioner “to support his allegations of constitutional error with new reliable  
3 evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or  
4 critical physical evidence— that was not presented at trial.” Lee v. Lambert, 653 F.3d at 937–38.  
5 In this case petitioner asserts that he is actually innocent of the facts necessary to support his  
6 sentence. ECF No. 1 at 14. However, these facts only relate to his custody credits while  
7 incarcerated and the consecutive nature of his sentence and not his actual innocence of the crimes  
8 for which he was convicted. Petitioner has not provided any new evidence in support of his  
9 actual innocence claim and, without new evidence, the actual innocence exception does not apply.  
10 Schlup, 513 U.S. at 327. For this reason, the undersigned recommends denying equitable tolling  
11 based on actual innocence.

12 As petitioner does not meet the high bar for equitable tolling of the AEDPA limitations  
13 period, the undersigned will recommend dismissal of this action for untimeliness.

14 Accordingly, IT IS HEREBY ORDERED that the May 26, 2017 Findings and  
15 Recommendations (ECF No. 30) are vacated.

16 For the reasons cited above, IT IS FURTHER RECOMMENDED that:

- 17 1. Respondent’s motion to dismiss, ECF No. 20, be granted; and,
- 18 2. The petition for writ of habeas corpus be denied with prejudice.

19 These findings and recommendations are submitted to the United States District Judge  
20 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
21 after being served with these findings and recommendations, any party may file written  
22 objections with the court and serve a copy on all parties. Such a document should be captioned  
23 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the  
24 objections shall be served and filed within fourteen days after service of the objections. The  
25 parties are advised that failure to file objections within the specified time may waive the right to  
26 appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

27 If petitioner files objections, he may also address whether a certificate of appealability should  
28 issue and, if so, why and as to which issues. Where, as here, the petition was dismissed on

1 procedural grounds, a certificate of appealability “should issue if the prisoner can show: (1) ‘that  
2 jurists of reason would find it debatable whether the district court was correct in its procedural  
3 ruling’; and (2) ‘that jurists of reason would find it debatable whether the petition states a valid  
4 claim of the denial of a constitutional right.’” Morris v. Woodford, 229 F.3d 775, 780 (9th Cir.  
5 2000) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)).

6 Dated: August 7, 2017



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CAROLYN K. DELANEY  
UNITED STATES MAGISTRATE JUDGE

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