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28UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIAJOSEPH KELLY,  
Petitioner,  
v.  
JEFFREY BEARD,  
Respondent.Case No. [15-cv-01746-EMC](#)**ORDER DENYING PETITIONER'S  
RULE 60(b) MOTION**

Docket No. 30

On June 20, 2016, the Court dismissed Joseph Kelly's *pro se* petition for writ of habeas corpus as barred by the statute of limitations and entered judgment. Just short of a year later, Mr. Kelly filed a motion for relief from the judgment under Federal Rule of Civil Procedure 60(b), asserting several grounds for relief from the judgment. Docket No. 30. Before turning to his specific arguments, it is helpful to summarize the chronology and the analysis in the order of dismissal.

A. The Order Of Dismissal

The order of dismissal provided the chronology of relevant events in state and federal court. Below is a truncated version of the chronology presented at more length in the order of dismissal:

Mr. Kelly was sentenced in March 2011, after being found guilty of first degree murder. His conviction was affirmed on December 21, 2012. The California Supreme Court denied his petition for review on March 27, 2013. Mr. Kelly also filed eight state habeas petitions, including three filed before the appeal had concluded.

Before he was even sentenced, Mr. Kelly filed State Habeas Petition # 1 in the Alameda Superior Court on February 21, 2011; that petition was denied on March 22, 2012 because the

1 appeal had been filed by then and the court file was at the court of appeal. During the pendency of  
2 his appeal, he filed two more state habeas petitions. On December 21, 2012, the California Court  
3 of Appeal affirmed the judgment of conviction, and denied Mr. Kelly's State Habeas Petition # 2,  
4 which had been filed on April 16, 2012. On March 27, 2013, the California Supreme Court denied  
5 Mr. Kelly's petition for review. Mr. Kelly filed State Habeas Petition # 3 in the California  
6 Supreme Court on January 30, 2013; the petition was denied on August 28, 2013.

7 Mr. Kelly filed another round of state habeas petitions after his appeal finished. He filed  
8 State Habeas Petition # 4 on January 14, 2014 in the Alameda County Superior Court; the petition  
9 was denied on March 18, 2014 on several grounds, including that it was untimely. Mr. Kelly filed  
10 State Habeas Petition # 5 in the California Court of Appeal on May 30, 2014; the petition was  
11 denied without comment or citation on June 19, 2014. Mr. Kelly filed State Habeas Petition # 6 in  
12 the California Supreme Court on October 24, 2014; the petition was denied without comment or  
13 citation on January 14, 2015.

14 Mr. Kelly filed a third round of habeas petitions in state court, which partially overlapped  
15 the second round. Mr. Kelly filed State Habeas Petition # 7 in the California Court of Appeal on  
16 September 12, 2014; the petition was denied without comment or citation on October 2, 2014.  
17 Mr. Kelly filed State Habeas Petition # 8 in the California Supreme Court on March 24, 2015; the  
18 petition was denied on July 15, 2015, with a citation to *In re Clark*, 5 Cal. 4th 750, 767, 769  
19 (1993) (successive petitions not permitted).

20 Mr. Kelly then filed his federal habeas petition. His federal habeas petition is deemed to  
21 have been filed on April 9, 2015, the date he mailed it to the courthouse.

22 In the order of dismissal, the Court determined that the limitations period would have  
23 begun on June 26, 2013, the day after the judgment became final upon the expiration of the time  
24 for seeking direct review. *See* Docket No. 22 at 3. "However, Mr. Kelly also had State Habeas  
25 Petition # 3 pending in the California Supreme Court on June 25, 2013, so the clock on his one-  
26 year limitations period which otherwise would have started the next day (i.e., June 26, 2013) was  
27 paused until the California Supreme Court denied Habeas Petition # 3 on August 28, 2013." *Id.* at  
28 4. Once State Habeas Petition # 3 was denied on August 28, 2013, the one-year period in which to

1 file a federal habeas petition resumed (with 365 days left).

2 The order of dismissal mentioned that 28 U.S.C. § 2244(d)(2) provided that the limitations  
3 period could be tolled for the time during which a “properly filed” state habeas petition was  
4 pending. Mr. Kelly received no such statutory tolling under § 2244(d)(2) for State Habeas  
5 Petitions # 4, # 5, and # 6 because they had been rejected as untimely and therefore were not  
6 “properly filed.” He also received no statutory tolling under § 2244(d)(2) for State Habeas  
7 Petitions # 6, # 7 and # 8 because they were filed after the limitations period had expired. (The  
8 statutory tolling ruling is discussed in more detail later in this order.)

9 The order of dismissal also mentioned that the limitations period could be equitably tolled  
10 if the petitioner established ““(1) that he has been pursuing his rights diligently, and (2) that some  
11 extraordinary circumstance stood in his way.”” Docket No. 22 at 6 (quoting *Holland v. Florida*,  
12 560 U.S. 631, 655 (2010)). Mr. Kelly was not entitled to equitable tolling because he “has not  
13 shown any reason to equitably toll the limitations period.” Docket No. 22 at 6.

14 The order of dismissal rejected Mr. Kelly’s argument that his claims were not procedurally  
15 defaulted: “This argument misses the mark because Respondent does not argue that Mr. Kelly’s  
16 federal habeas petition is procedurally defaulted; he only argues that it is untimely.” Docket No.  
17 22 at 6.

18 The order of dismissal concluded that the limitations period expired on August 28, 2014,  
19 and that Mr. Kelly’s federal habeas petition filed on April 9, 2015 was filed more than seven  
20 months too late. *Id.* The petition was dismissed as untimely.

21 This Court and the Ninth Circuit denied a certificate of appealability.

22 B. The Rule 60(b) Motion

23 Mr. Kelly seeks relief from the judgment under Rule 60(b)(1) and (6) based on “excusable  
24 neglect or any other reason justifying relief from operation of judgment.” Docket No. 30 at 3. He  
25 seeks to set aside the order of dismissal and judgment thereon because, after this action was  
26 dismissed, he sought help from another inmate “who pointed out the overlooked facts Kelly  
27 should have used to prove his writ is timely.” Docket No. 30 at 3. His Rule 60(b) motion offers  
28 several reasons why his petition should not have been dismissed.

1 The district court may relieve a party from a final judgment or order for “mistake,  
2 inadvertence, surprise, or excusable neglect.” Fed. R. Civ. P. 60(b)(1). For Rule 60(b) purposes,  
3 “[e]xcusable neglect ‘encompass[es] situations in which the failure to comply with a filing  
4 deadline is attributable to negligence, and includes ‘omissions caused by carelessness.’” *Lemoge*  
5 *v. United States*, 587 F.3d 1188, 1192 (9th Cir. 2009) (second alteration in original) (quoting  
6 *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd.*, 507 U.S. 380, 394 (1993)). The Court assumes  
7 for purposes of argument that Mr. Kelly’s failure on his own to think of reasons he should have  
8 offered in opposition to the motion to dismiss amounts to excusable neglect. The Court will  
9 consider whether any of those reasons that he has now thought of (with the assistance of another  
10 inmate) warrant setting aside the order of dismissal.

11 1. Statutory Tolling

12 The order of dismissal contained the following analysis for its conclusion that Mr. Kelly  
13 was not entitled to any statutory tolling for the pendency of his state habeas petitions:

14 State Habeas Petition # 4 results in no statutory tolling because it  
15 was denied as untimely. The Alameda County Superior Court  
16 rejected State Habeas Petition # 4 as untimely (as well as on the  
17 merits), with a citation to *In re Robbins*, 18 Cal. 4th 770, 780  
18 (1998), and other cases. See Docket No. 1-1 at 37. A *Robbins*  
19 citation is the shorthand used by California courts to signal that a  
20 petition has been rejected as untimely. See *Thorson v. Palmer*, 479  
21 F.3d 643, 645 (9th Cir. 2007) (denial of petition with citation to  
22 *Robbins* at the page on which opinion discusses timeliness  
23 determinations was clear denial on timeliness grounds). “When a  
24 postconviction petition is untimely under state law, ‘that [is] the end  
25 of the matter’ for purposes of § 2244(d)(2).” *Pace v. DiGuglielmo*,  
26 544 U.S. 408, 414 (2005) (citing *Carey v. Saffold*, 536 U.S. 214, 226  
27 (2002)). As in *Pace*, “[b]ecause the state court rejected petitioner’s  
28 [postconviction] petition as untimely, it was not ‘properly filed,’ and  
he is not entitled to statutory tolling under § 2244(d)(2).” *Id.* at 417;  
see also *Lakey v. Hickman*, 633 F.3d 782, 786 (9th Cir. 2011) (no  
statutory tolling for petition rejected as untimely by California  
Supreme Court because petition was not “properly filed”; the fact  
that California’s timeliness rule frequently requires consideration of  
diligence does not matter); *Thorson*, 479 F.3d at 645 (denial of  
petition with citation to *Robbins* at the page on which opinion  
discusses timeliness determinations was clear denial on timeliness  
grounds and therefore petition was neither “properly filed” nor  
“pending”). The Alameda County Superior Court’s denial of Mr.  
Kelly’s State Habeas Petition # 4 as untimely strips that petition of  
any tolling effect. He thus is not entitled to statutory tolling for the  
days during which that petition (Petition # 4) was awaiting decision  
in the Alameda County Superior Court. Mr. Kelly also is not

1 entitled to any tolling for his later state habeas petitions in the  
2 California Court of Appeal and the California Supreme Court during  
3 that round of petitions (i.e., State Habeas Petitions # 5 and # 6)  
4 because their summary denials created a presumption, un rebutted by  
5 Mr. Kelly, that those courts agreed with the lower court's  
6 determination on the timeliness question. *See Curiel v. Miller*, 780  
7 F.3d 1201, 1203-04 (9th Cir. 2015); *id.* at 1204 (when the California  
8 Supreme Court denies the petition summarily, it is presumed that  
9 court agreed with the lower court's determination on the timeliness  
10 question unless "strong evidence" rebuts this presumption).

11 Since State Habeas Petitions # 4, # 5, and # 6 had no tolling effect,  
12 the one-year limitations period for Mr. Kelly to file his federal  
13 habeas petition continued untolled and expired on August 28, 2014,  
14 before State Habeas Petition # 6 was even filed.

15 State Habeas Petitions # 6, # 7 and # 8, filed after the limitations  
16 period expired on August 28, 2014 -- a year after Petition # 3 was  
17 denied -- resulted in no statutory tolling. Petitions filed after the  
18 limitations period has already expired have no tolling effect under §  
19 2244(d)(2). *See Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir.  
20 2003) ("§ 2244(d) does not permit the reinitiation of the limitations  
21 period that has ended before the state petition was filed," even if the  
22 state petition was timely filed).

23 Docket No. 22 at 4-6.

24 Mr. Kelly argues in his Rule 60(b) motion that the California Supreme Court's rejection of  
25 State Habeas Petition # 6 did not rely on the superior court's untimeliness ruling in State Habeas  
26 Petition # 4 because the rejection of State Habeas Petition # 4 was based on erroneous factual  
27 determinations. Docket No. 30 at 5. He is wrong. As the Court explained in the portion of the  
28 order of dismissal block-quoted above, the California Court of Appeal's unexplained rejection of  
State Habeas Petition # 5 and the California Supreme Court's unexplained rejection of State  
Habeas Petition # 6 are deemed to have been based on the same untimeliness conclusion used by  
the superior court to reject State Habeas Petition # 4. Although the conclusion remains the same  
today, the Court notes an update for the citation for the *Curiel* case mentioned in the block quote.  
The panel decision in *Curiel v. Miller*, 780 F.3d 1201 (9th Cir. 2015), has been superseded by an  
en banc decision, *Curiel v. Miller*. 830 F.3d 864 (9th Cir. 2016) (en banc). On the point relevant  
to Mr. Kelly's case, the law remained the same in the *Curiel* en banc opinion: an unexplained  
denial of a habeas petition by the California Supreme Court, with no other action by the California  
Supreme Court, shows that the California Supreme Court agreed with the reasoning of the lower  
court. *Curiel*, 830 F.3d at 871 ("If it agreed with those courts' conclusions, the California

1 Supreme Court could have simply issued a postcard denial without explanation or citation, or  
2 denied Curiel’s petition by citing *Robbins and Clark*.”). Here, the California Court of Appeal  
3 denied State Habeas Petition # 5 without any explanation or citation, and the California Supreme  
4 Court denied State Habeas Petition # 6 without any explanation or citation. The California  
5 Supreme Court’s decision (like that of the California Court of Appeal) therefore is considered to  
6 be a rejection for the same reason as the superior court, i.e., because the petition was untimely.  
7 Mr. Kelly’s disagreement with the superior court’s determination that his State Habeas Petition # 4  
8 was untimely does not aid him here because the federal habeas court does not inquire into the  
9 correctness of the state court’s determination of this matter of state law. “When a postconviction  
10 petition is untimely under state law, ‘that [is] the end of the matter’ for purposes of § 2244(d)(2).”  
11 *Pace v. DiGuglielmo*, 544 U.S. 408, 414 (2005) (alteration in original) (quoting *Carey v. Saffold*,  
12 536 U.S. 214, 226 (2002)).

13 Mr. Kelly next argues that the California Supreme Court did not rely on the superior  
14 court’s untimeliness determination because the California Supreme Court denied a petition based  
15 on the ground that it was successive, not because it was untimely. Docket No. 30 at 5. This  
16 argument does not help Mr. Kelly because he is confusing two different rounds of state habeas  
17 petitions. The petition that was denied by the California Supreme Court as successive was State  
18 Habeas Petition # 8, not State Habeas Petition # 6. As the block quote above explains, the  
19 California Supreme Court’s rejection of State Habeas Petition # 6 is treated as being a rejection for  
20 the same reason as the lower court’s rejection of State Habeas Petition # 4, i.e., untimeliness. The  
21 order of dismissal did not assume that State Habeas Petition # 8 had been rejected as untimely by  
22 the California Supreme Court. State Habeas Petition # 8 was part of a new round of state habeas  
23 petitions, and the fact that the California Supreme Court denied State Habeas Petition # 8 as  
24 successive does not have any bearing on the meaning of the California Supreme Court’s earlier  
25 dismissal of State Habeas Petition # 6.

26 In his Rule 60(b) motion, Mr. Kelly also makes several arguments attempting to overcome  
27 an assumed procedural default. He argues that one of his claims in a state habeas petition “alleged  
28 a miscarriage of justice, not subject to time bar” and therefore the entire petition was “properly

1 filed.” Docket No. 30 at 5. He further argues that California’s procedural bar of untimeliness was  
2 inadequate because it was inconsistently applied. Docket No. 30 at 5. These arguments might be  
3 appropriate to a procedural default question but are irrelevant to the timeliness of Mr. Kelly’s  
4 federal habeas petition. As the Court explained in the order of dismissal, Respondent did not  
5 move to dismiss the federal habeas petition as procedurally defaulted and instead only moved to  
6 dismiss the petition as untimely. *See* Docket No. 22 at 6. *See also Bonner v. Carey*, 425 F.3d  
7 1145, 1148-49 (9th Cir. 2005), *amended*, 439 F.3d 993 (9th Cir. 2006) (state court’s imposition of  
8 procedural bar of untimeliness, even joined with denial on the merits, means petition was not  
9 “properly filed”); *id.* at 1148-49 (the fact that California provides exceptions to its timely-filing  
10 requirement does not prevent an application from being considered not “properly filed”).

11 Mr. Kelly further argues that he is entitled to relief from his procedural default because he  
12 was not represented by an attorney during state habeas proceedings. *See* Docket No. 30 at 5,  
13 citing *Martinez v. Ryan*, 566 U.S. 1 (2012). His reliance on *Martinez* is misplaced because it does  
14 not pertain to the timeliness of a petition. “[T]he equitable rule in *Martinez* ‘applies only to the  
15 issue of cause to excuse the procedural default of an ineffective assistance of trial counsel claim  
16 that occurred in a state collateral proceeding’ and ‘has no application to the operation or tolling of  
17 the § 2244(d) statute of limitations’ for filing a § 2254 petition.” *Lambrix v. Secretary, Fla. Dep’t*  
18 *of Corr.*, 756 F.3d 1246, 1249 (11th Cir. 2014); *see also Arthur v. Thomas*, 739 F.3d 611, 630  
19 (11th Cir. 2014) (“As our discussion shows, the *Martinez* rule explicitly relates to excusing a  
20 procedural default of ineffective-trial-counsel claims and does not apply to AEDPA’s statute of  
21 limitations or the tolling of that period.”).

22 Mr. Kelly has not shown that the Court’s determination that he is not entitled to statutory  
23 tolling for any of his state habeas petitions was incorrect or should be set aside.

24 2. Equitable Tolling

25 Mr. Kelly argues in his Rule 60(b) motion that he should receive 32 days of equitable  
26 tolling for his “mailing mishap” that resulted in State Habeas Petition # 7 going to the California  
27 Court of Appeal rather than the California Supreme Court. Docket No. 30 at 11. He is not  
28 entitled to any equitable tolling for the mailing mishap because the mailing mishap occurred long

1 after the statute of limitations period had expired. Mr. Kelly’s limitations period had expired on  
2 August 28, 2014, a couple of weeks before State Habeas Petition # 7 was mailed on September 12,  
3 2014. An event that occurs after the limitations period has expired cannot support equitable  
4 tolling because the basic reason for equitable tolling is to excuse a petitioner from missing a  
5 deadline because “some extraordinary circumstance stood” in the way of him meeting that filing  
6 deadline. *See Holland*, 560 U.S. at 655. Moreover, Mr. Kelly has not explained why it made any  
7 difference that the petition went to the wrong court. If the petition had been mailed within the  
8 limitations period, the petition would support statutory tolling, regardless of the state court to  
9 which it was sent. He is not entitled to tolling, regardless of which court ultimately received that  
10 petition.

11 Mr. Kelly also argues in his Rule 60(b) motion that he should receive four months of  
12 equitable tolling based on the limited law library access he had at the prison in Susanville from  
13 September through December 2013. *See* Docket No. 30 at 5, 7, 10, 11.<sup>1</sup> In his reply in support of  
14 the Rule 60(b) motion, Mr. Kelly muddles the dates, now claiming he experienced intermittent  
15 access from April 2011 until August 2014, and states that, from August 2013 to March 2014, [he]  
16 was denied full access to the law library.” Docket No. 38 at 11. He admits that he was able to  
17 access the library four or five times during this period. *See* Docket No. 38 at 3, 11. He does not  
18 state how many other times he actually attempted to access the law library during the time period.  
19 He also does not show a causal connection between his alleged inability to visit the library more  
20 frequently and his failure to timely file his federal petition. The Ninth Circuit has clearly stated,  
21 “Ordinary prison limitations on [petitioner’s] access to the law library and copier . . . were neither  
22 ‘extraordinary’ nor made it ‘impossible’ for him to file his petition in a timely manner. Given  
23 even the most common day-to-day security restrictions in prison, concluding otherwise would  
24 permit the exception to swallow the rule . . . .” *Ramirez v. Yates*, 571 F.3d 993, 998 (9th Cir.

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26 <sup>1</sup> In his reply in support of the Rule 60(b) motion, Mr. Kelly muddles the dates, now claiming he  
27 experienced intermittent access from April 2011 until August 2014, and states that, from August  
28 2013 to March 2014, [he] was denied full access to the law library.” Docket No. 38 at 11. He  
does declare, however, that he may have received 4-5 days of access during this period. *Id.* And  
he declares that he had access to outside resources: he “relied on Stanford Law and family  
members to provide the necessary case law to conduct and complete my research.” *Id.*

1 2009). As in *Ramirez*, Mr. Kelly offers no explanation regarding how his limited law library  
2 access during the last four months in 2013 made it impossible for him to file a timely federal  
3 petition, the deadline for which was in August 2014. *See id.*; *see, e.g., Chaffer v. Prosper*, 592  
4 F.3d 1046, 1049 (9th Cir. 2010) (per curiam) (prisoner’s *pro se* status, law library missing a  
5 “handful” of reporter volumes, and reliance on inmate helpers who were transferred away or too  
6 busy to attend to his petitions are not extraordinary circumstances “given the vicissitudes of prison  
7 life”). Mr. Kelly was able to file state habeas petitions starting in January 2014, which suggests  
8 the limitations did not make it impossible to file a federal petition on time. *See Ramirez*, 571 F.3d  
9 at 998 (considering fact that prisoner made substantial legal filings in state court during relevant  
10 time period in concluding that limited law library and copier access did not make it impossible for  
11 him to file federal petition on time). Further, even if he could present evidence that he did not  
12 receive any law library access during those four months, it would not change the outcome here  
13 because four months of equitable tolling would not make his federal petition timely, given that his  
14 federal petition was filed more than seven months too late.

15 In his reply in support of the Rule 60(b) motion, Mr. Kelly adds an argument that he  
16 should receive equitable tolling based on appellate counsel’s “excessive delay in providing him  
17 the October 2012 summary of Erick Jensen.” Docket No. 38 at 4. That summary was provided by  
18 appellate counsel to Mr. Kelly in January 2013, *see* Docket No. 30 at 143-44. But the limitations  
19 period had not even begun by that date (because the direct appeal was still pending), and therefore  
20 could not be equitably tolled.<sup>2</sup>

21 3. Alternative Starting Date For Limitations Period

22 Mr. Kelly urges that the court should use § 2244(d)(1)(D)’s delayed starting date -- rather

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24 <sup>2</sup> Mr. Kelly waited until his reply to add some other arguments, as well. He contends that a  
25 petition may be considered even if the statute of limitations deadline has been missed due to his  
26 actual innocence. But he makes no showing whatsoever of actual innocence. Apart from the  
27 alleged recanting witness, multiple witnesses gave testimony that he was the shooter. Mr. Kelly  
28 does not come close to showing actual innocence. Mr. Kelly also raises in his reply that he is  
entitled to the mailbox rule for his state petitions, as well as his federal petition. To the extent the  
signature dates or mailing dates were on the materials in the file, the Court did apply the prisoner  
mailbox rule to the state as well as federal petitions. He has not identified any petition that the  
Court failed to apply the prisoner mailbox rule where there is a signature date or mailing date in  
the record.

1 than the date the judgment became final, *see* § 2244(d)(1)(A) -- for his claim that the prosecution  
2 presented false evidence, i.e., the testimony of Erick Jensen. Mr. Jensen allegedly recanted after  
3 trial when interviewed by Mr. Kelly’s investigator. Mr. Kelly learned of the recantation sometime  
4 at the end of October 2012, when his investigator provided a written report of his interview of Mr.  
5 Jensen, but Mr. Kelly did not obtain a signed declaration from Mr. Jensen until March 9, 2015.  
6 *See* Docket No. 30 at 25, 70.<sup>3</sup>

7 Under § 2244(d)(1)(D), the one-year limitations period does not start until “the date on  
8 which the factual predicate of the claim or claims presented could have been discovered through  
9 the exercise of due diligence.” The factual predicate of a claim is based on a habeas petitioner’s  
10 knowledge of the facts supporting the claim, and not the evidentiary support for the claim.  
11 *Flanagan v. Johnson*, 154 F.3d 196, 199 (5th Cir. 1998); *see also Bunney v. Mitchell*, 241 F.3d  
12 1151, 1155 (9th Cir.), *opinion withdrawn on other grounds*, 249 F.3d 1188 (9th Cir. 2001)  
13 (“Petitioner’s argument in this case conflates her knowledge of the ‘factual predicate’ of a claim  
14 with the development of sufficient evidentiary support to prove the claim. But the text of AEDPA  
15 answers Petitioner’s argument; under subsection (d)(1)(D), the statute of limitations begins to run  
16 when a petitioner knows (or should know through the exercise of due diligence) *the facts* on which  
17 a claim is predicated, without reference to when (or if) she can muster evidence sufficient to prove  
18 that claim.”).

19 Mr. Kelly argues that the statute of limitations should start on March 9, 2015, when he  
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21 <sup>3</sup> Mr. Kelly’s claims about the allegedly false testimony from Mr. Jensen were first presented in  
22 State Habeas Petition # 4. The superior court determined that the claims were untimely because  
23 the claims had been known to Mr. Kelly since “sometime at [the] end of October 2012, when an  
24 investigator provided a written report of his interview of Eric Jensen,” yet Mr. Kelly had  
25 unjustifiably waited an additional 15 months to file State Habeas Petition # 4. Docket No. 30 at  
26 70. As an alternative basis to reject the claims about Mr. Jensen’s testimony, the superior court  
27 determined that Mr. Kelly failed to state a prima facie case because he “failed to prove by a  
28 preponderance of the evidence that the trial testimony by Jensen was false and that there is a  
reasonable probability that, had it not been introduced, the result would have been different.” *Id.*  
The superior court noted that Mr. Kelly had submitted only a “partial summary of the interview of  
Jensen,” and had not provided a declaration from Mr. Jensen or even a declaration by the  
investigator summarizing his interview of Mr. Jensen. *Id.* at 71. The superior court further  
determined that, even assuming arguendo that Mr. Kelly had met his burden to show that false  
evidence had been presented at trial, he had not demonstrated a reasonable probability of a  
different result had the evidence not been introduced at trial. *Id.*

1 obtained a declaration from Mr. Jensen. Docket No. 30 at 25-26. But he does not dispute that he  
2 knew the important facts supporting the claim before his appeal even concluded and before the  
3 limitations period under § 2244(d)(1)(A) even began; that is, he knew of Mr. Jensen’s alleged  
4 recantation no later than October 2012, when counsel informed him about the investigator’s  
5 report, or no later than January 2013, when counsel sent him the report -- and both of those dates  
6 were before his direct appeal concluded in March 2013 with the denial of his petition for review in  
7 the California Supreme Court. *See* Docket No. 38 at 10. The limitations period under §  
8 2244(d)(1)(D) is of no help to him because that limitations period would have started in October  
9 2012 -- before his appeal even concluded -- when he learned or should have learned of the factual  
10 predicate (i.e., that Mr. Jensen allegedly had recanted). The petitioner’s efforts to gather evidence  
11 for a claim do not delay the deadline for him to get to federal court. *See Flanagan*, 154 F.3d at  
12 199 (§ 2244(d)(1)(D) “does not convey a statutory right to an extended delay . . . while a habeas  
13 petitioner gathers every possible scrap of evidence” that might support a claim); *Earls v.*  
14 *Hernandez*, 403 F. Supp. 2d 985, 989 (C.D. Cal. 2005) (“It is the actual or putative knowledge of  
15 the pertinent facts of a claim that starts the clock running; the accrual of the statute of limitations  
16 does not await the collection of evidence which supports the facts.”) (quoting *Brooks v. McKee*,  
17 307 F. Supp. 2d 902, 906 (E.D. Mich. 2004)); *see generally United States v. Battles*, 362 F.3d  
18 1195, 1198 (9th Cir. 2004) (no delayed start of limitations period under § 2255 for federal  
19 petitioner who was not diligent; even though he did not have access to trial transcripts, the facts  
20 supporting claims that occurred at the time of his conviction could have been discovered if he “at  
21 least consult[ed] his own memory of the trial proceedings”). Mr. Kelly therefore is not entitled to  
22 a later starting date under 28 U.S.C. § 2244(d)(1)(D) for any of his claims.

23 C. No Certificate Of Appealability

24 A certificate of appealability will not issue. *See* 28 U.S.C. § 2253(c). This is not a case in  
25 which "jurists of reason would find it debatable whether the petition states a valid claim of the  
26 denial of a constitutional right and that jurists of reason would find it debatable whether the  
27 district court was correct" in its ruling in the order denying the petition for writ of habeas corpus  
28 or in this order. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The denial of the certificate of

1 appealability is without prejudice to Mr. Kelly seeking a certificate from the United States Court  
2 of Appeals for the Ninth Circuit.

3 D. Conclusion

4 The motion for relief from the order of dismissal and judgment is **DENIED**. Docket No.  
5 30.

6  
7 **IT IS SO ORDERED.**

8  
9 Dated: February 7, 2018

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11 EDWARD M. CHEN  
12 United States District Judge

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