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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ENRIQUE ZAMBRANO,  
Petitioner,  
v.  
VINCENT CULLEN, Warden of  
California State Prison at San Quentin,  
Respondent.

CASE NO. CV 09-04917 SBA  
**DEATH PENALTY**  
  
ORDER GRANTING IN PART  
AND DENYING IN PART WITHOUT  
PREJUDICE PETITIONER’S MOTION  
FOR EQUITABLE TOLLING AND FOR  
A STAY OF FEDERAL LITIGATION

Petitioner is a condemned inmate at San Quentin State Prison. On October 15, 2009, petitioner initiated the present capital habeas action when he asked the Court to appoint counsel and to stay his execution pending the completion of this action. On October 21, 2009, the Court granted Petitioner’s requests and referred the matter to the Court’s Selection Board for the recommendation of counsel to represent petitioner. To date, counsel has not been selected.

On August 10, 2010, petitioner filed a pro se protective habeas petition, as well as a Motion for Equitable Tolling and for a Stay of Federal Litigation Until Appointment of Counsel. According to petitioner, the one-year statute of limitations applicable to federal habeas petitions, see 28 U.S.C. § 2244(d)(1) (2010), unless equitably tolled, expired on August 12, 2010. Petitioner filed his pro se protective petition “in order to protect his rights to pursue federal habeas review and to have

1 assistance of counsel in doing so.” Mot. at 5. He states that the protective petition is “admittedly  
2 deficient; because of extreme time pressures, the Petition has been quickly adapted from the  
3 pleadings filed in state court on appeal and on habeas proceedings.” Id. at 3-4. Petitioner seeks  
4 tolling for two consecutive time periods: 1) the number of days between the date of final judgment  
5 in state court on his conviction and sentence (August 12, 2009), and the date of appointment of  
6 counsel, which has not yet occurred, and 2) one additional year from the date of appointment of  
7 counsel to allow for the preparation of a complete amended petition. Finally, petitioner requests the  
8 Court to stay the litigation of his petition until counsel is appointed.

9       The Supreme Court of the United States recently held that “the timeliness provision in the  
10 federal habeas corpus statute is subject to equitable tolling.” Holland v. Florida, 560 U.S. \_\_\_, No.  
11 09-5327, 2010 WL 2346549, at \*3 (U.S. June 14, 2010). A federal habeas petitioner “is ‘entitled to  
12 equitable tolling’ only if he shows ‘(1) that he has been pursuing his rights diligently, and (2) that  
13 some extraordinary circumstance stood in his way’ and prevented timely filing.” Id., at \*12 (quoting  
14 Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)). “When external forces, rather than a petitioner’s  
15 lack of diligence, account for the failure to file a timely claim, equitable tolling of the statute of  
16 limitations may be appropriate.” Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999).

17       In capital habeas actions, an indigent petitioner has a statutory right to counsel. 18 U.S.C. §  
18 3599(a)(2) (2010). This includes “a right to legal assistance in the preparation of a habeas corpus  
19 application.” McFarland v. Scott, 512 U.S. 849, 856 (1994). An attorney’s assistance in preparing a  
20 capital habeas petition is crucial owing to the complex nature of capital habeas proceedings and the  
21 seriousness of the death penalty. Id. at 855–56. For these reasons, a capital habeas petitioner is  
22 generally entitled to equitable tolling during the time that a court is seeking counsel to appoint to  
23 represent the petitioner. See, e.g., Smith v. Ayers, No. 3-4-cv-3436-CRB (N.D. Cal. Jan. 8, 2009);  
24 Fairbank v. Woodford, No. 3-98-cv-1027-CRB (N.D. Cal. Sept. 26, 1999); Ervin v. Woodford, No.  
25 4-0-cv-1228-CW (N.D. Cal. Nov. 14, 2001); Hughes v. Woodford, No. 3-3-cv-2666-JSW (N.D. Cal.  
26 Dec. 24, 2003). Indeed, it is frequently the case that “were [a c]ourt to hold otherwise, a capital  
27 habeas petitioner’s right to counsel would be thoroughly eviscerated.” Smith, slip op. at 3.

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1           It is also true, however, “that often the exercise of a court’s equity powers must be made on a  
2 case-by-case basis.” Holland, 2010 WL 2346549, at \*12 (internal punctuation and citation omitted).  
3 In the present action, petitioner already has filed a timely pro se protective petition. While it may  
4 seem unlikely, it is possible that petitioner’s counsel, once appointed, will determine that an  
5 amendment of the petition will not be necessary or that any amendment need not include any new  
6 claims, or it may be that any new claims will relate back to claims in the pro se protective petition.  
7 If so, there will be no need for equitable tolling. Even if there turns out to be a need for equitable  
8 tolling, it is entirely speculative at this point that appointed counsel will require a full year to prepare  
9 a petition; it therefore would be inappropriate for the Court to make such a presumption.

10           In light of the above considerations, the Court concludes that petitioner’s request for  
11 prospective equitable tolling is premature. The Court declines to make an equitable determination  
12 encompassing an undefined time period and unknown future events.

13           Accordingly, petitioner’s request for equitable tolling is denied without prejudice to refile  
14 once counsel is appointed. The litigation of petitioner’s petition is stayed until counsel is appointed.  
15 Respondent shall not answer the petition at this time. The Court will revisit the issues of equitable  
16 tolling and the timing of respondent’s answer as necessary after the Court appoints counsel to  
17 represent petitioner in the present action.

18           It is so ordered.

19  
20 **DATED: 9/13/10**

  
\_\_\_\_\_  
Sandra Brown Armstrong  
United States District Judge

1 UNITED STATES DISTRICT COURT  
2 FOR THE  
3 NORTHERN DISTRICT OF CALIFORNIA

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5  
6 ENRIQUE ZAMBRANO,  
7 Plaintiff,

Case Number: CV09-04917 SBA

**CERTIFICATE OF SERVICE**

8 v.

9 ROBERT K. WONG et al,  
10 Defendant.

11  
12 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District  
Court, Northern District of California.

13 That on September 14, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said  
14 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said  
15 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle  
located in the Clerk's office.

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18 Enrique Zambrano H-91800  
San Quentin State Prison  
19 San Quentin, CA 97974

20 Dated: September 14, 2010

21 Richard W. Wieking, Clerk  
By: LISA R CLARK, Deputy Clerk

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