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E-FILED on 8/23/10

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IN THE UNITED STATES DISTRICT COURT

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FOR THE NORTHERN DISTRICT OF CALIFORNIA

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SAN JOSE DIVISION

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ANTHONY M. RAMIREZ,

No. C-03-1817 RMW

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Petitioner,

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v.

ORDER DISMISSING HABEAS PETITION
AS UNTIMELY AND DENYING
CERTIFICATE OF APPEALABILITY

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JAMES A. YATES, Warden, et. al.,

[Re Docket Nos. 39, 74, 79, 81]

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Respondents.

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Petitioner Anthony M. Ramirez petitions for a writ of habeas corpus under 28 U.S.C. § 2254.

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This court previously dismissed the petition as untimely. On appeal, the Ninth Circuit remanded

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with instructions to make necessary findings of fact to resolve petitioner's claims for equitable

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tolling for the periods between May 21, 2002 and August 1, 2002 and between February 26, 2003

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and July 11, 2003. Petitioner also moves: (1) for an evidentiary hearing, (2) for the court to expand

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its factual findings to include whether he is entitled to equitable tolling for the period between

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September 16, 2003 and October 1, 2003, and (3) for appointment of substitute counsel. For the

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following reasons, the court denies each of petitioner's motions, finds that petitioner is not entitled to

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equitable tolling, and dismisses the petition as untimely.

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ORDER DISMISSING HABEAS PETITION AS UNTIMELY AND DENYING CERTIFICATE OF APPEALABILITY—No. C-03-1817
RMW
CCL

1 **II. ANALYSIS**

2 **A. Legal Standard for Equitable Tolling**

3 AEDPA sets a one-year statute of limitations for filing a federal habeas petition. 28 U.S.C. §
4 2244(d)(1). This statute of limitations may be subject to equitable tolling. *Holland v. Florida*, 2010
5 U.S. LEXIS 4946, at *7 (U.S. June 14, 2010). To receive equitable tolling, a petitioner must
6 establish that: (1) he has been pursuing his rights diligently, and (2) some extraordinary
7 circumstance stood in his way. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). In addition, the
8 petitioner must show that the extraordinary circumstance was the cause of his untimeliness and that
9 the extraordinary circumstance had made it impossible to file a petition on time. *Ramirez*, 571 F.3d
10 at 997.

11 **B. May 21, 2002 to August 1, 2002**

12 On April 4, 2002, petitioner delivered his first state habeas petition. On May 8, 2002, his
13 first state habeas petition was denied. On May 21, 2002, petitioner's state court conviction became
14 final. Petitioner alleges that he did not receive notice of the denial of his first state habeas petition
15 until August 1, 2002 and thus seeks equitable tolling during the period between May 21, 2002 and
16 August 1, 2002.

17 A "prisoner's lack of knowledge that the state courts have reached a final resolution can
18 provide grounds for equitable tolling if the prisoner has acted diligently in the matter." *Ramirez*, 571
19 F.3d at 997 (quoting *Woodward v. Williams*, 263 F.3d 1135, 1143 (10th Cir. 2001)). Accordingly,
20 the Ninth Circuit remanded for this court to determine: (1) on what date petitioner actually received
21 notice of the state court's ruling regarding his first state habeas petition, (2) whether petitioner acted
22 diligently to obtain notice, and (3) whether the alleged delay of notice caused the untimeliness of his
23 federal filing and made a timely filing of the instant habeas petition impossible.

24 **1. Receipt of Notice**

25 The record indicates that petitioner received actual notice that his first state habeas petition
26 had been denied on July 22, 2002 and not August 1, 2002. According to petitioner's own motion for
27 extension of time based on equitable tolling, he received notification that his first state habeas
28 petition had been denied on July 22, 2002. *See* Dkt. No. 7 at 4. This is supported by Exhibit 19 to

1 the motion, which contains petitioner's incoming mail log and shows that petitioner received mail
2 from "Superior Cr. Criminal Div. S.F. CA 94103" on July 22, 2002. Dkt. No. 7 Ex. 19. On the
3 mail log, in petitioner's own handwriting, there is a notation indicating that the correspondence
4 received was "notification of denial of habeas writ #4391." *Id.* The court therefore finds that
5 petitioner received notice of the state court's ruling regarding his first state habeas petition on July
6 22, 2002.

7 **2. Diligence**

8 During the intervening period between submitting his habeas petition on April 4, 2002 and
9 receiving notice of denial on July 22, 2002, petitioner sent two inquiries to the San Francisco
10 Superior Court. On May 15, 2002, petitioner mailed a "Request for Notification of Judge Moscone's
11 Disposition on Habeas Corpus Writ No. 4391" to the San Francisco Superior Court. *See* Dkt No. 15
12 Ex. 4. On July 9, 2002, petitioner sent another letter to Judge Moscone inquiring as to the
13 disposition of his habeas petition. *See* Dkt. No. 15 Ex. 5. Based on these two attempts to ascertain
14 the status of his habeas petition, the court finds that petitioner acted diligently to obtain notice.

15 **3. Causation and Impossibility**

16 In order to qualify for equitable tolling for the 62-day period between May 21, 2002 and July
17 22, 2002, petitioner must show that this delay in notification, or this delay combined with other
18 extenuating circumstances, caused the untimeliness of his federal filing and made a timely filing of
19 the instant habeas petition impossible. A 62-day delay in notification, standing alone, would not
20 appear to make timely filing impossible since petitioner would still have ten months remaining to
21 prepare and file a federal habeas petition. Despite the court's explicit request for petitioner to
22 explain how receiving notice in July of 2002 made it impossible for him to file his federal habeas
23 petition on time, petitioner has not provided any explanation in this regard. *See* Dkt. Nos. 76, 77.
24 Petitioner has thus failed to establish that the 62-day delay in notification, by itself, caused his
25 lateness and made timely filing impossible. The court will thus consider whether the combination of
26 this delay in notification and his lack of access to his legal file from February 26, 2003 through July
27 11, 2003 made a timely filing impossible. *See Ramirez*, 571 F.3d at 1000 ("It is enough to show that
28 the two circumstances *together* made a timely filing impossible.").

1 The record shows that petitioner submitted various motions in federal and state court as well
2 as state habeas petitions between July 2003 and March 2004.¹ On November 25, 2003, this court
3 denied petitioner's motion for equitable tolling as premature and expressly directed petitioner to
4 submit a habeas petition identifying the claims that he sought to raise within 30 days of the order.
5 See Dkt No. 13. Rather than filing a federal habeas petition identifying his claims as directed by the
6 court, petitioner filed another motion for equitable tolling as well as state habeas petitions in the
7 California Superior Court, California Court of Appeal, and California Supreme Court. See Dkt. No.
8 15 Ex. 13; Dkt. No. 39 Ex. 6. Petitioner did not file the instant petition until June 16, 2004, more
9 than six months after the court's order issued and over five months after he had submitted another
10 state habeas petition. See Dkt. No. 18. Despite the court's explicit request for petitioner to explain
11 why he was able to file various other court documents (including state habeas petitions) between
12 July 11, 2003 and June 16, 2004, but not a federal habeas petition, petitioner has not provided any
13 explanation in this regard. See Dkt. Nos. 76, 77.

14 In light of these facts, the court finds that petitioner has failed to show that the extraordinary
15 circumstances (in this case, the 62-day delay in notifying him that his first state habeas petition had
16 been denied and the 135-day denial of access to his legal file) caused his lateness in filing a federal
17 petition and made timely filing impossible. See *Hartley v. Hall*, 335 Fed. Appx. 686, 688 (9th Cir.
18 2009) (finding that petitioner failed to establish the necessary causal link between his lateness and
19 the extraordinary circumstance when he filed a state habeas petition eight months after receiving
20 access to his legal file but waited an additional thirteen months before filing his federal habeas
21 petition). Rather than filing a federal habeas petition as soon as possible, petitioner filed various
22 other motions in state and federal court. This may be attributable to oversight, miscalculation, or
23 confusion or ignorance regarding the law. However, to be entitled to equitable tolling, the cause of

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25 ¹ On July 31, 2003, petitioner filed a motion with this court seeking an extension of time to file his
26 federal habeas petition. See Dkt. No. 7. On August 10, 2003, petitioner delivered an application to
27 proceed *in forma pauperis* before this court. See Dkt. No. 8. On September 30, 2003, petitioner
28 filed a successful discovery motion in the California Superior Court. *Ramirez*, 571 F.3d at 996.
Between December 27, 2003 and March 25, 2004, petitioner submitted additional state habeas
petitions to the California Superior Court, California Court of Appeal, and California Supreme
Court. See Dkt. No. 15 Ex. 13; Dkt. No. 39 Ex. 6. On January 6, 2004, petitioner submitted another
motion in this court for extension of time to file his federal habeas petition. See Dkt. No. 15.

1 the delayed filing must be an extraordinary circumstance rather than "merely oversight,
2 miscalculation or negligence on the petitioner's part, all of which would preclude the application of
3 equitable tolling." *Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1011 (9th Cir. 2009) (quotations
4 omitted). Moreover, the Ninth Circuit has held that "a pro se petitioner's confusion or ignorance of
5 the law is not, itself, a circumstance warranting equitable tolling." *Id.* at 1013 n.4.

6 Having found that equitable tolling is not warranted for either period, the court concludes
7 that the petition is untimely. Petitioner's state court judgment became final on May 21, 2002.
8 Taking into account the 39 days of statutory tolling that he is entitled to, he had until June 29, 2003
9 to file a timely federal habeas petition. Petitioner did not file a federal habeas petition stating his
10 claims until June 16, 2004. The court therefore dismisses his petition as untimely.

11 **D. Evidentiary Hearing**

12 Petitioner seeks an evidentiary hearing on factual issues in dispute on his equitable tolling
13 claims. However, respondent has not disputed any of petitioner's factual allegations. In its June 21,
14 2010 order, the court asked petitioner to provide a list of facts that he believes are material to his
15 equitable tolling claims and are in dispute within sixty days. *See* Dkt. No. 76. Petitioner has not
16 pointed to any facts in dispute. *See* Dkt. No. 77. Moreover, a habeas petitioner is entitled to an
17 evidentiary hearing when he makes "a good faith allegation that would, if true, entitle him to
18 equitable tolling." *Roy v. Lambert*, 465 F.3d 964, 969 (9th Cir. 2006). As discussed above,
19 petitioner's allegations fail to entitle him to equitable tolling. The court therefore denies his motion
20 for an evidentiary hearing.

21 **E. Expansion of Factual Findings**

22 Petitioner requests that the court extend its factual findings to include whether petitioner is
23 entitled to equitable tolling for the period between September 16, 2003 and October 1, 2003. The
24 court declines to do so. The Ninth Circuit rejected petitioner's claim that he did not have access to
25 his legal materials during this time and determined that petitioner was not entitled to equitable
26 tolling from July 11, 2003 through October 1, 2003. *See Ramirez*, 571 F.3d at 997 n.2, 998.
27 Moreover, even taking into account the alleged lack of access to his legal file during this time,
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1 petitioner's claim for equitable tolling during this period suffers from the same lack of a causal link
2 with his delayed filing that precludes equitable tolling for the other two periods.

3 **F. Appointment of Substitute Counsel**

4 Petitioner asks the court to replace his court-appointed attorney. Given the facts and the
5 findings set forth above, the court does not feel that appointment of a substitute attorney is
6 necessary. The court grants Maitreya Badami's motion to withdraw as counsel.

7 **III. CERTIFICATE OF APPEALABILITY**

8 The federal rules governing habeas cases brought by state prisoners require a district court
9 that denies a habeas petition to grant or deny a certificate of appealability in its ruling. *See* Rule
10 11(a), Rules Governing § 2254 Cases, 28 U.S.C. § 2254. For the reasons set out in the discussion
11 above, petitioner has not shown "that jurists of reason would find it debatable whether the petition
12 states a valid claim of the denial of a constitutional right [or] that jurists of reason would find it
13 debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529
14 U.S. 473, 484 (2000). Accordingly, a certificate of appealability is denied.

15 **IV. ORDER**


16 For the foregoing reasons, the court:

- 17 1. Denies petitioner's motion for an evidentiary hearing;
- 18 2. Denies petitioner's motion to expand the scope of factual findings;
- 19 3. Denies petitioner's motion to appoint substitute counsel;
- 20 4. Grants Maitreya Badami's motion to withdraw as counsel;
- 21 5. Makes the following factual findings with regard to the period between May 21, 2002
22 and August 1, 2002:
 - 23 • Petitioner received notice of the state court's denial of his first state habeas
24 petition on July 22, 2002;
 - 25 • Petitioner acted diligently to obtain notice;
 - 26 • The delay in notice did not cause the untimeliness of his federal filing and
27 make a timely filing impossible;
- 28 6. Makes the following factual findings regarding the period between February 26, 2003
and July 11, 2003:

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- Petitioner pursued his rights diligently;
 - Lack of access to petitioner's legal file did not cause the untimeliness of his federal filing and make a timely filing impossible;
7. Denies equitable tolling for the periods between May 21, 2002 and August 1, 2002 and between February 26, 2003 and July 11, 2003;
8. Dismisses the petition as untimely; and
9. Denies a certificate of appealability.

DATED: 8/23/10



RONALD M. WHYTE
United States District Judge