



1 following his state court conviction, filed a petition for writ of habeas corpus under 28 U.S.C.  
2 § 2254 on December 30, 2021. Dkt. No. 3. In response to the question on the habeas form “explain  
3 why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your  
4 petition,” Mr. Cail wrote, “Post-conviction review ended on December 1, 2021, so this petition is  
5 timely under 28 U.S.C. section 2244(d)(2).” Dkt. No. 3 at 13.

6 **A. The Report and Recommendation**

7 Judge Christel recommended dismissal of the petition because it was filed after expiration  
8 of the one-year statute of limitations under the federal Antiterrorism and Effective Death Penalty  
9 Act of 1996 (“AEDPA”). Dkt. No. 9 at 3–5. The statute of limitations ran on May 23, 2019, one  
10 year after Mr. Cail’s judgment of conviction became final. *Id.* at 4. Judge Christel explained that  
11 although the statute of limitations is subject to statutory tolling while a properly filed personal  
12 restraint petition is pending, the personal restraint petition that Mr. Cail filed on July 17, 2019 did  
13 not toll the statute of limitations because it was filed after the one-year limitations period expired.  
14 *Id.* at 4 (citing *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003)). Judge Christel explained  
15 that the statute of limitations is also subject to equitable tolling, but Mr. Cail did not argue that he  
16 was entitled to equitable tolling or demonstrate that extraordinary circumstances prevented him  
17 from filing a timely habeas petition. *Id.* at 5. Because Mr. Cail’s petition was untimely, Judge  
18 Christel recommended its dismissal with prejudice. *Id.* at 6.

19 **B. Objections and Motion for an Extension**

20 Mr. Cail filed objections to the Report and Recommendation. Dkt. No. 10. While he does  
21 not dispute that statutory tolling does not save his petition from being untimely, he now argues  
22 that he is entitled to equitable tolling. *Id.* at 1. Mr. Cail argues that he pursued his rights diligently  
23 by “seeking counsel to represent [him] on appeal.” *Id.* He contends that his counsel “has a duty to  
24 represent [him] in a timely manner and notify [him] of any due dates,” and that he was time-barred

1 “d[ue] to [his attorney] John Henry Browne [not] disclos[ing] information of notices in time and  
2 fail[ing] to timely file a response[.]” *Id.* (“Atto[rn]ey received all notices from the courts and failed  
3 to disclose[]/inform me of notices”).

4 After filing his objections, Mr. Cail filed a motion for an extension asking the Court to  
5 delay issuing a ruling on the Report and Recommendation to allow him to file a declaration from  
6 Mr. Browne. Dkt. No. 11 at 1–2. The Court construes the motion as a request for an extension of  
7 time to file objections (including supporting documents) to the Report and Recommendation. In  
8 his motion, Mr. Cail explained that the declaration will “explain that the \_\_\_ [sic] was a result of  
9 miscalculation on the part of petitioner’s former legal counsel, and should not prevent Petitioner  
10 from requesting a pro se writ of habeas corpus.” *Id.* at 2–3. Respondent did not file a response to  
11 the motion, which the Court construes as an admission that it has merit. LCR 7(b)(2). The Court  
12 finds good cause to grant the unopposed motion for an extension so it can consider the declaration,  
13 and it grants Mr. Cail’s motion for an extension. Dkt. No. 11.

14 The declaration Mr. Cail submitted from Mr. Browne states, “I and my law office  
15 represented Petitioner Trayvon R. Cail in his sentencing and direct appeal. After the Court of  
16 Appeals affirmed his conviction, we also prepared Mr. Cail’s Personal Restraint Petition (PRP).”  
17 Dkt. No. 11 at 4. He further states that the attorney in his office who was primarily responsible for  
18 the PRP delayed filing it to find and interview relevant parties, and as a result, the PRP was not  
19 filed until July 17, 2019. *Id.* Mr. Browne states that his office’s delay in filing the PRP “meant that  
20 the statute of limitations for seeking [federal habeas] relief had already expired on May 23, 2019,”  
21 but “[o]ur office failed to recognize this fact or to notify Mr. Cail that he would be time-barred  
22 from seeking habeas relief in the future.” Dkt. No. 11 at 4; *id.* at 5 (“The delay in our office’s filing  
23 of Mr. Cail’s [PRP] prejudiced his opportunity to seek federal review as a *pro se* petitioner.”).

1 **II. DISCUSSION**

2 There is no dispute that unless equitable tolling applies, Mr. Cail’s habeas petition is barred  
3 by AEDPA’s one-year statute of limitations. *See* 28 U.S.C. § 2244(d)(1). However, because  
4 AEDPA’s limitations period is not a jurisdictional bar, it may be equitably tolled. *Holland v.*  
5 *Florida*, 560 U.S. 631, 645 (2010). A petitioner bears the burden of showing that this  
6 “extraordinary” remedy should apply to him. *Miranda v. Castro*, 292 F.3d 1063, 1065 (9th Cir.  
7 2002).

8 A petitioner is entitled to equitable tolling only if he shows “(1) that he has been pursuing  
9 his rights diligently, and (2) that some extraordinary circumstance stood in his way” and prevented  
10 timely filing. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Included within those factors is a  
11 causation component that requires courts to evaluate the petitioner’s diligence “in all time  
12 periods,” including after he is “free from the extraordinary circumstance,” to determine “whether  
13 the extraordinary circumstance actually did prevent timely filing.” *Smith v. Davis*, 953 F.3d 582,  
14 595, 599 (9th Cir. 2020) (en banc). “[I]t is only when an extraordinary circumstance prevented a  
15 petitioner acting with reasonable diligence from making a timely filing that equitable tolling may  
16 be the proper remedy.” *Id.* at 600. “To be clear, this rule does not impose a rigid ‘impossibility’  
17 standard on litigants, and especially not on pro se prisoner litigants—who have already faced an  
18 unusual obstacle beyond their control during the AEDPA limitation period.” *Id.* (cleaned up).  
19 Instead of applying rigid standards or mechanical rules, courts must decide whether extraordinary  
20 circumstances stood in a petitioner’s way and prevented timely filing “based on all the  
21 circumstances of the case before it.” *Id.*

22 Attempting to demonstrate extraordinary circumstances, Mr. Cail alleges that his petition  
23 should not be denied due to his former counsel’s “miscalculation.” Dkt. No. 11 at 2. Attorney  
24 miscalculations leading to missed deadlines and other “garden variety” claims of negligence or

1 excusable neglect are not extraordinary circumstances warranting equitable tolling. *Holland*, 560  
2 U.S. at 652. And although Mr. Cail filed his habeas petition pro se, his pro se status and potential  
3 ignorance of the law are not extraordinary circumstances warranting equitable tolling either. *See*,  
4 *e.g.*, *Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006). However, more egregious attorney  
5 misconduct or attorney abandonment may constitute extraordinary circumstances warranting  
6 tolling. *Holland*, 560 U.S. at 651; *Maples v. Thomas*, 565 U.S. 266, 283 (2012); *Gibbs v. Legrand*,  
7 767 F.3d 879, 885 (9th Cir. 2014). In this case, Mr. Cail alleges more than just a mistake by his  
8 former counsel; he also alleges that his former attorney failed to notify him of due dates or to  
9 disclose “notices in time.” Dkt. No. 10 at 1. Mr. Cail does not explain what those due dates and  
10 notices were or how his former counsel’s alleged failures in those regards resulted in his petition  
11 “being time barred.” *Id.* While in some circumstances the failure to receive timely case status  
12 information could impact a petitioner’s ability to file a timely habeas petition, *Gibbs*, 767 F.3d at  
13 886, the record contains insufficient information for the Court to determine whether that is the case  
14 here. It is also unclear based on the record before the Court whether Mr. Browne was retained or  
15 otherwise agreed to represent Mr. Cail in his federal habeas proceedings or if Mr. Cail believed  
16 Mr. Browne represented him for that purpose.

17         The record is also insufficient for the Court to determine whether Mr. Cail has pursued his  
18 rights diligently. “The diligence required for equitable tolling purposes is reasonable diligence, not  
19 maximum feasible diligence.” *Holland*, 560 U.S. at 653 (cleaned up). Mr. Cail alleges that he  
20 pursued his “right diligently by seeking counsel to represent [him] on appeal,” Dkt. No. 10 at 1,  
21 but the Ninth Circuit has clarified that a petitioner “must show that he has been reasonably diligent  
22 in pursuing his rights not only while an impediment to filing caused by an extraordinary  
23 circumstance existed, but before and after as well, up to the time of filing his claim in federal  
24 court.” *Smith*, 953 F.3d at 598–99. There is no information in the record regarding what additional

1 steps, if any, Mr. Cail took to preserve his rights other than hiring counsel to represent him in his  
2 state court appeal.

3 In light of those deficiencies in the record and because Mr. Cail is proceeding pro se, the  
4 Court gives him another opportunity to present facts to support his request for equitable tolling.

5 The Court requests supplemental briefing from Mr. Cail describing:

6 (1) whether Mr. Cail believed that Mr. Browne represented him for purposes of filing his  
7 federal habeas petition and if so, the basis for that belief and when he learned that Mr.  
8 Browne did not represent him for that purpose;

9 (2) whether Mr. Cail expected to receive notices from Mr. Browne or his office regarding  
10 developments in his state court proceedings and if so, the basis for Mr. Cail's expectation  
11 and how and when he expected to receive such notices;

12 (3) the "notices" Mr. Cail claims Mr. Browne did not send him, Dkt. No. 10 at 1, including  
13 a description of what the notices were and when and how Mr. Cail received them;

14 (4) when and how Mr. Cail learned that the state court of appeals affirmed his conviction  
15 by order dated April 23, 2018;

16 (5) when and how Mr. Cail learned of the "miscalculation on the part of [his] former legal  
17 counsel," Dkt. No. 11 at 2;

18 (6) what Mr. Cail means specifically in his objections stating that Mr. Browne "failed to  
19 file a timely response" and failed to notify him of "due dates," Dkt. No. 10 at 1;

20 (7) the basis for Mr. Cail's belief that he was filing his federal habeas petition on time; and

21 (8) all efforts Mr. Cail made, up to the time he filed his habeas petition in federal court, to  
22 file a timely federal habeas petition.

23 Mr. Cail's memorandum must be no more than 30 pages in length.

### 24 **III. CONCLUSION**

For the foregoing reasons, the Court GRANTS Mr. Cail's motion for an extension, Dkt.  
No. 11, DEFERS ruling on his objections, Dkt. No. 10, and ORDERS Mr. Cail to submit, within  
30 days of this order, supplemental briefing as described above. Respondent may, but is not  
required to, file a response of no more than 12 pages to Mr. Cail's supplemental memorandum

1 within 14 days after receiving it.

2 The Clerk is directed to send uncertified copies of this Order to Mr. Cail at his last known  
3 address and to renote Petitioner's Objections, Dkt. No. 10, for December 29, 2022.

4 Dated this 29th day of November, 2022.

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7 Lauren King  
8 United States District Judge  
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