

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 8 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MICHAEL ACHILLES FRIES,

Petitioner-Appellant,

v.

KAMALA D. HARRIS, Attorney General;
et al.,

Respondents-Appellees.

No. 17-55585

D.C. No. 8:16-cv-01687-R-DFM
Central District of California,
Santa Ana

ORDER

Before: SILVERMAN and IKUTA, Circuit Judges.

The “Petition for Hearing En Banc and/or Reconsideration/Rehearing”

(Docket Entry No. 5) is construed as a motion for reconsideration and reconsideration en banc. The motion for reconsideration is denied and the motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

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Respondents-Appellees.

No. 17-55585

D.C. No. 8:16-cv-01687-R-DFM
Central District of California,
Santa Ana

ORDER

Before: O'SCANNLAIN and GOULD, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not shown that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.”

Slack v. McDaniel, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2);

Gonzalez v. Thaler, 565 U.S. 134, 140-41 (2012).

Any pending motions are denied as moot.

DENIED.

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

MICHAEL FRIES,

Petitioner,

v.

K.D. HARRIS et al.,

Respondents.

No. SA CV 16-01687-R (DFM)

JUDGMENT

Pursuant to the Order Accepting Findings and Recommendations of the
United States Magistrate Judge,

IT IS ADJUDGED that that the petition is denied and this action is
dismissed with prejudice.

Dated: March 22, 2017



MANUEL L. REAL
United States District Judge

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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 SOUTHERN DIVISION

11 MICHAEL FRIES,

12 Petitioner,

13 v.

14 K.D. HARRIS et al.,

15 Respondents.
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17

No. SA CV 16-01687-R (DFM)

Order Accepting Findings and
Recommendation of United States
Magistrate Judge

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19 Pursuant to 28 U.S.C. § 636, the Court has reviewed the petition, the
20 other records on file herein, and the Report and Recommendation of the
21 United States Magistrate Judge. Further, the Court has engaged in a de novo
22 review of those portions of the Report and Recommendation to which
23 objections have been made. The Court accepts the findings and
24 recommendation of the Magistrate Judge.

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1 IT IS THEREFORE ORDERED that Judgment be entered denying the
2 petition and dismissing this action with prejudice.

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4 Dated: March 22, 2017

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7 MANUEL L. REAL
8 United States District Judge
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

MICHAEL FRIES,	}	No. SA CV 16-01687-R (DFM)
Petitioner,		Report and Recommendation of
v.		United States Magistrate Judge
K.D. HARRIS et al.,		
Respondent.		

This Report and Recommendation is submitted to the Honorable Manuel L. Real, United States District Judge, under 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.

BACKGROUND

On September 5, 2016, Michael Fries ("Petitioner") constructively filed a Petition for Writ of Habeas Corpus by a Person in State Custody in this Court. Dkt. 1 ("Petition"). According to Orange County Superior Court records for Case No. 95HF0333, in June 1996, a jury convicted Petitioner of one count of aggravated sexual assault of a child, six counts of forcible lewd acts upon a

1 child, five counts of lewd or lascivious acts with a minor, and three counts of
2 lewd acts upon a child aged 14 or 15. The Petition states that Petitioner was
3 sentenced to 96 years to life in prison. See id. at 2.¹

4 Based on public court records (of which this Court may take judicial
5 notice, see Harris v. Cty. of Orange, 682 F.3d 1126, 1132 (9th Cir. 2012)),
6 Petitioner filed a direct appeal as well as numerous habeas petitions with the
7 state courts:

- 8 • July 19, 1996: Petitioner files direct appeal in California Court of
9 Appeal (Case No. G020110)
- 10 • February 7, 1997: Petitioner files first habeas petition in California
11 Court of Appeal (Case No. G021121)
- 12 • February 20, 1997: California Court of Appeal denies Petitioner's first
13 habeas petition
- 14 • May 12, 1998: California Court of Appeal affirms judgment against
15 Petitioner
- 16 • June 12, 1998: Petitioner petitions for review in direct appeal (Case No.
17 S071121)
- 18 • July 22, 1998: California Supreme Court denies review²
- 19 • September 28, 1998: Petitioner files second habeas petition in
20 California Court of Appeal (Case No. G024134)
- 21 • October 13, 1998: California Court of Appeal denies second habeas
22 petition
- 23 • February 3, 1999: Petitioner files first habeas petition in California
24 Supreme Court (Case No. S076352)

25 ¹ All citations to the Petition use the CM/ECF pagination.

26
27 ² It does not appear that Petitioner petitioned for writ of certiorari in the
28 United States Supreme Court.

- 1 • May 26, 1999: California Supreme Court denies first habeas petition
- 2 • July 20, 1999: Petitioner files habeas petition in this Court (Case No.
- 3 99-7425)
- 4 • November 20, 2000: This Court dismisses habeas petition without
- 5 prejudice for failure to exhaust state remedies
- 6 • May 1, 2015: Petitioner files third habeas petition in California Court
- 7 of Appeal (Case No. G051843)
- 8 • June 12, 2015: California Court of Appeal denies third habeas petition
- 9 • July 24, 2015: Petitioner files second habeas petition in California
- 10 Supreme Court (Case No. S228057)
- 11 • November 10, 2015: California Supreme Court denies second habeas
- 12 petition, citing In re Robbins, 18 Cal. 4th 770 (1998) and In re Clark, 5
- 13 Cal. 4th 750, 767-69 (1993)
- 14 • July 6, 2016: Petitioner files fourth habeas petition in California Court
- 15 of Appeal (Case No. F074104)
- 16 • September 15, 2016: California Court of Appeal denies fourth habeas
- 17 petition
- 18 • November 8, 2016: Petitioner files third habeas petition in California
- 19 Supreme Court (Case No. S238278)
- 20 • January 18, 2017: California Supreme Court denies third habeas
- 21 petition, citing People v. Duvall, 9 Cal. 4th 464, 474 (1995)

22 See Dkt. 1-1 at 30 (listing case numbers).³

23 On September 19, 2016, the Court issued an Order to Show Cause as to
24 why the Court should not recommend that this action be dismissed with
25 prejudice on the ground of untimeliness. Dkt. 4. On October 24, 2016,

26
27 ³ See Appellate Courts Case Information website, <http://appellatecases.courtinfo.ca.gov/search.cfm?dist=0>.

1 Petitioner responded to the Order to Show Cause. Dkt. 6 (“Response”).

2 Based on the Court’s review of the Petition and the Response,
3 Petitioner’s claims are time-barred. The Court therefore recommends that the
4 Petition be dismissed with prejudice.

5 **II.**

6 **DISCUSSION**

7 **A. The Petition Is Facially Untimely**

8 Under the Antiterrorism and Effective Death Penalty Act of 1996
9 (“AEDPA”), a one-year limitation period applies to a federal petition for writ
10 of habeas corpus filed by a person in state custody. See 28 U.S.C. § 2244(d)(1).
11 The limitation period runs from the latest of four alternative accrual dates. See
12 28 U.S.C. § 2244(d)(1)(A)-(D). Based on the Court’s review, Petitioner is not
13 entitled to a later trigger date under § 2244(d)(1)(B)-(D). Thus the limitation
14 period began running on “the date on which the judgment became final by the
15 conclusion of direct review or the expiration of the time for seeking such
16 review.” 28 U.S.C. § 2244(d)(1)(A).

17 Petitioner’s conviction became final on October 20, 1998, 90 days after
18 the California Supreme Court denied review. See Bowen v. Roe, 188 F.3d
19 1157, 1158-59 (9th Cir. 1999). Petitioner had until October 20, 1999, to timely
20 file a federal habeas corpus petition. See Patterson v. Stewart, 251 F.3d 1243,
21 1247 (9th Cir. 2001). While Petitioner’s first federal petition was timely, it was
22 dismissed without prejudice on November 20, 2000. Petitioner waited almost
23 16 years to file the instant Petition. Absent an exception (which Petitioner has
24 not pleaded) or adequate tolling, the Petition is time barred.

25 **B. Any Period of Statutory Tolling Is Insufficient to Make the Petition**
26 **Timely**

27 Under AEDPA, “[t]he time during which a properly filed application for
28 State post-conviction or other collateral review with respect to the pertinent

1 judgment or claim is pending shall not be counted toward any period of
2 limitation under this subsection.” 28 U.S.C. § 2244(d)(2). The entire period of
3 time for a full round of collateral review, from the filing of a first state habeas
4 petition to the time the last state habeas petition is denied, may be deemed
5 “pending” and tolled, so long as the state petitioner proceeds in a hierarchical
6 order from a lower state court to a higher one. See Carey v. Saffold, 536 U.S.
7 214, 222-23 (2002). This includes so-called “gap tolling” for the periods of time
8 between such state habeas petitions, as long as that period is “reasonable.” Id.;
9 Evans v. Chavis, 546 U.S. 189, 191-92 (2006).

10 It is impossible to tell from the Petition what grounds Petitioner raised in
11 his various state court filings. Giving Petitioner the most generous benefit of
12 the doubt—that he is entitled to statutory tolling during his initial round of
13 state habeas petitions—this would toll the limitation period only until May 26,
14 1999, when the California Supreme Court denied his February 1999 state
15 habeas petition. This statutory tolling period is insufficient to render his
16 Petition timely. No period of statutory tolling is warranted for Petitioner’s
17 federal habeas petition. See Duncan v. Walker, 533 U.S. 167, 181-82 (2001)
18 (holding that federal petition doesn’t toll AEDPA limitation period). Nor is
19 any period statutory tolling warranted for Petitioner’s 2015 and 2016 state
20 habeas petitions; he filed these well over a decade after the one-year limitation
21 period had expired. See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir.
22 2003) (holding that § 2244(d) does not permit reinitiation of limitation period
23 that ended before state petition was filed). Thus, even if the Court assumes that
24 Petitioner is entitled to statutory tolling for his first round of state habeas
25 petitions, the Petition was still filed more than 15 years after expiration of
26 AEDPA’s one-year limitation period.

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1 **C. Petitioner Is Not Entitled to Any Period of Equitable Tolling**

2 In Holland v. Florida, 560 U.S. 631, 645 (2010), the Supreme Court held
 3 that AEDPA's one-year limitation period is subject to equitable tolling in
 4 appropriate cases. In order to be entitled to equitable tolling, the petitioner
 5 must show both that (1) he has been pursuing his rights diligently and (2) some
 6 extraordinary circumstance stood in his way and prevented his timely filing.
 7 Id. at 649 (citing Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)). "The
 8 petitioner must show that 'the extraordinary circumstances were the cause of
 9 his untimeliness and that the extraordinary circumstances made it impossible
 10 to file a petition on time.'" Porter v. Ollison, 620 F.3d 952, 959 (9th Cir. 2010)
 11 (as amended) (quoting Ramirez v. Yates, 571 F.3d 993, 997 (9th Cir. 2009)).
 12 "Indeed, 'the threshold necessary to trigger equitable tolling [under AEDPA] is
 13 very high, lest the exceptions swallow the rule.'" Miranda v. Castro, 292 F.3d
 14 1063, 1066 (9th Cir. 2002) (citation omitted, alteration in original).
 15 Consequently, equitable tolling is justified in few cases. Spitsyn v. Moore, 345
 16 F.3d 796, 799 (9th Cir. 2003) (as amended).

17 Petitioner admits that his Petition "would seem . . . untimely," but asks
 18 the Court to consider the merits of his claims. Response at 4. Likewise,
 19 Petitioner criticizes AEDPA's one-year statute of limitations and that the
 20 statute of limitations might run while a prisoner exhausts state remedies. Id. at
 21 8-9. When untimeliness is obvious on the face of a habeas petition, a district
 22 court may raise the issue sua sponte and dismiss the petition on that ground,
 23 after providing the petitioner with adequate notice and an opportunity to
 24 respond. Herbst v. Cook, 260 F.3d 1039, 1042-43 (9th Cir. 2001). This Court
 25 provided Petitioner with this notice and opportunity. Petitioner has not met his
 26 burden of showing that he is entitled to equitable tolling.

27 Petitioner claims that it is "not for lack of intelligence that [he has not]
 28 proceeded, but for lack of access to law libraries." Response at 9. But limited

1 access to the law library is not an extraordinary circumstance. Chaffer v.
2 Prosper, 592 F.3d 1046, 1049 (9th Cir. 2010); Ramirez, 571 F.3d at
3 998. Petitioner also claims that he only recently learned of relevant case
4 authority from a legal newsletter and that he lacks legal expertise. Response at
5 9-12. A prisoner's educational deficiencies, ignorance of the law, and lack of
6 legal expertise are not extraordinary circumstances and therefore do not
7 equitably toll the limitation period. Ford v. Pliler, 590 F.3d 782, 789 (9th Cir.
8 2009); Rasberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006).

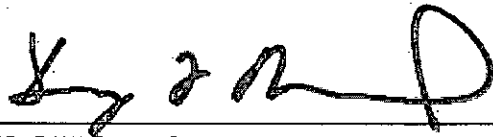
9 Otherwise, Petitioner references various facts and events, such as the
10 filing of his first federal habeas petition in 1999, his participation in the
11 Enhanced Outpatient Program for several years, and events that transpired in
12 2016, as a basis for equitable tolling. None of these circumstances is
13 extraordinary or demonstrates that it was impossible for Petitioner to file a
14 federal habeas petition within the limitation period. The record contains no
15 basis for equitable tolling, much less a period of equitable tolling sufficient to
16 justify the filing of a federal habeas petition over 15 years after expiration of
17 the limitation period. The Court accordingly finds that the Petition was
18 untimely when filed.

19 **III.**

20 **CONCLUSION**

21 IT IS THEREFORE RECOMMENDED that the District Court issue an
22 Order (1) approving and accepting this Report and Recommendation; and (2)
23 directing that Judgment be issued denying the Petition and dismissing this
24 action with prejudice.

25 Dated: January 27, 2017

26 
27 DOUGLAS F. McCORMICK
28 United States Magistrate Judge