

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

ORDER

Before: O'SCANLAIN 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.**

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION

MICHAEL FRIES, } No. SA CV 16-01687-R (DFM)  
Petitioner, } JUDGMENT  
v. }  
K.D. HARRIS et al., }  
Respondents. }

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

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

Dated: March 22, 2017

  
MANUEL L. REAL  
United States District Judge

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION

11 MICHAEL FRIES, } No. SA CV 16-01687-R (DFM)  
12 Petitioner, }  
13 v. } Order Accepting Findings and  
14 K.D. HARRIS et al., } Recommendation of United States  
15 Respondents. } Magistrate Judge

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

11 MICHAEL FRIES, } No. SA CV 16-01687-R (DFM)  
12 Petitioner, } Report and Recommendation of  
13 v. } United States Magistrate Judge  
14 K.D. HARRIS et al., }  
15 Respondent. }  
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18 This Report and Recommendation is submitted to the Honorable  
19 Manuel L. Real, United States District Judge, under 28 U.S.C. § 636 and  
20 General Order 05-07 of the United States District Court for the Central District  
21 of California.

22 I.

23 **BACKGROUND**

24 On September 5, 2016, Michael Fries (“Petitioner”) constructively filed a  
25 Petition for Writ of Habeas Corpus by a Person in State Custody in this Court.  
26 Dkt. 1 (“Petition”). According to Orange County Superior Court records for  
27 Case No. 95HF0333, in June 1996, a jury convicted Petitioner of one count of  
28 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.<sup>1</sup>

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 review<sup>2</sup>
- 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  
26 <sup>1</sup> All citations to the Petition use the CM/ECF pagination.

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

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

<sup>3</sup> See Dkt. 1-1 at 30 (listing case numbers).

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

<sup>3</sup> 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

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

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

III.

## CONCLUSION

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

Dated: January 27, 2017

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DOUGLAS F. McCORMICK  
United States Magistrate Judge