

APPENDIX A

Order: Second Appellate District Court of California (1-29-20) Denial

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

COURT OF APPEAL - SECOND DIST.

DIVISION ONE

FILED

Jan 29, 2020

DANIEL P. POTTER, Clerk

jzelaya

Deputy Clerk

In re

B303794

MICHAEL WOOLEN

(Super. Ct. L.A. County
No. TA070163)

on

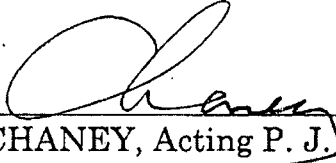
ORDER

Habeas Corpus.

THE COURT*:

The petition for writ of habeas corpus, filed January 23, 2020, has been read and considered.

The petition is denied.


* CHANEY, Acting P. J.


JOHNSON, J.


WEINGART, J.**

** Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX B

Order: Second Appellate District Court of California (1-10-20) Denial

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

COURT OF APPEAL - SECOND DIST.

DIVISION ONE

FILED

Jan 10, 2020

DANIEL P. POTTER, Clerk

JLozano

Deputy Clerk

In re

MICHAEL WOOLEN

on

Habeas Corpus.

B303327

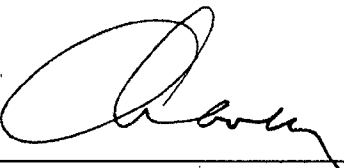
(Super. Ct. L.A. County
No. TA070163)

ORDER


THE COURT*:

The petition for writ of habeas corpus, filed January 2, 2020, has been read and considered.

As petitioner has not shown that petitioner first sought relief in the Los Angeles Superior Court, the petition is denied without prejudice to petitioner's filing a new petition in the Los Angeles Superior Court.



* CHANEY, Acting P. J.



JOHNSON, J.



WEINGART, J.**

** Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX C

Order: Suprior Court of Los Angeles (12-24-19) Summary Denial

CONFORMED COPY
 ORIGINAL FILED
 Superior Court of California
 County of Los Angeles
 DEC 24 2019
 Sherri R. Carria
 ALLEGORIA
 Forest, Executive Officer/Clerk
 Lockett, Deputy
 LES

Case No: TA070163-01

ORDER SUMMARILY DENYING HABEAS CORPUS PETITION

(cal. Rules of Court 4.551(g))

No appearance by a Respondent. Denied.

The *pro se* petition is required to be on Judicial Council form MC-275, and Petitioner has not shown good cause to be excused from this requirement. (Cal. Rules of Court, rule 4.551(a)(1).)

The writ of habeas corpus is reserved for errors of a fundamental jurisdictional or constitutional type, rather than erroneous evidentiary or procedural ruling. (*In re Harris* (1993) 5 Cal.4th 813, 828.) No ground alleged here is of a type cognizable on habeas corpus.

1 Assuming the facts alleged in the petition are true, petitioner fails to allege facts
2 establishing a *prima facie* case for habeas relief. (*People v. Duvall* 1995) 9 Cal.4th 464, 474-475.)

3 The petition is untimely, and Petitioner fails to explain and justify the significant delay in
4 seeking habeas corpus relief. (*In re Burdan* (2008) 169 Cal.App.4th 18, 30-31; *In re Clark* (1993)
5 5 Cal.4th 750, 765; *In re Swain* (1949) 34 Cal.2d 300, 302.) “Substantial delay is measured from
6 the time the petitioner or his or her counsel knew, or reasonably should have known, of the
7 information offered in support of the claim and the legal basis for the claim.” (*In re Robbins*
8 (1998) 18 Cal.4th 770, 780.)

9 The Petition raises issues which could have been raised on appeal, but were not, and
10 Petitioner has failed to allege facts establishing an exception to the rule barring habeas
11 consideration of claim that could have been raised on appeal. (*In re Reno* (2012) 55 Cal.4th 428,
12 490-493; *In re Harris* (1993) 5 Cal.4th 813, 825-826; *In re Dixon* (1953) 41 Cal.2d 756, 759.)

13 The petition raises issues which were raised and rejected on appeal and Petitioner has
14 failed to allege facts establishing an exception to the rule barring habeas consideration of claims
15 that had been raised on appeal. (*In re Harris* (1993) 5 Cal.4th 813, 825; *In re Waltreus* (1965) 62
16 Cal.2d 218, 225.)

17 As to the claim of ineffective assistance of trial counsel, Petitioner has failed to show that
18 but for counsel’s allegedly deficient performance, there is a reasonable probability that a more
19 favorable outcome would have resulted. It is not enough to speculate about possible prejudice to
20 be accorded relief. Petitioner has failed to show that the prejudicial effect of counsel’s errors was
21 a “demonstrable reality.” (*In re Cox* (2003) 30 Cal.4th 974, 1016; *In re Clark* (1993) 5 Cal.4th
22 750, 766; *Strickland v. Washington* (1984) 466 U.S. 668, 697.)

23 As to the claim of ineffective assistance of appellate counsel, during Petitioner’s first
24 appeal of right, Petitioner has failed to show that appellate counsel’s exercise of professional
25 judgment was deficient or that, but for counsel’s errors, the outcome of the appeal would have
26 been different. Appellate counsel is not required to raise every non-frivolous issue and Petitioner
27 alleges no more than a failure to raise issues. (*Smith v. Robbins* (2002) 528 U.S. 259, 288; *Jones*
28 *v. Barnes* (1983) 463 U.S. 745, 750-752.)

1 For all of the foregoing reasons, the Petition for Writ of Habeas Corpus is DENIED.

2 The clerk is ordered to serve a copy of this memorandum upon Petitioner, and upon the
3 District Attorney's Habeas Corpus Litigation Team, 320 West Temple Street, Room 540, Los
4 Angeles, California 90012.

5
6
7 Dated: December 24, 2019

8 151
9 H. CLAY JACKE II
Judge of the Superior Court



1
2
3
4
5 **PROOF OF SERVICE**

6 **Order summarily denying Habeas Corpus Petition**

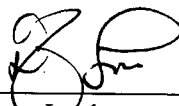
7 filed in the Superior Court of California, County of Los Angeles, filed in the case of In re **Michael**
8 **Woolen, Trial Court No. TA070163-01**, by placing a copy thereof in a separate envelope for each
9 addressee named hereafter, and sealing each envelope and, with the postage thereon fully prepaid,
10 depositing each in the United States mail at Compton, California, each envelope addressed to each such
addressee respectively as follows:

11 Office of the District Attorney
12 Habeas Corpus Litigation Team,
13 320 West Temple Street, Suite 540
Los Angeles, CA 90012

14 Michael Woolen J92882
15 HDSP C2 216
16 P. O. Box 3030
17 Susanville, CA 96127

18 Executed on December 24, 2019 at Compton, California

19 I declare under penalty of perjury under the laws of the State of California that the above is true
20 and correct.

21
22 
23 _____
DeForest Lockett
Judicial assistant
24
25
26
27
28

APPENDIX D

Order: California Supreme Court(5-27-20) Denail

SUPREME COURT
FILED

MAY 27 2020

Jorge Navarrete Clerk

S260733

Deputy

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re MICHAEL WOOLEN on Habeas Corpus.

The petition for writ of habeas corpus is denied. (See *In re Robbins* (1998) 18 Cal.4th 770, 780 [courts will not entertain habeas corpus claims that are untimely].)

CANTIL-SAKAUYE

Chief Justice

S260733

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re MICHAEL WOOLEN on Habeas Corpus.

The petition for writ of habeas corpus is denied.

SUPREME COURT
FILED

MAY 27 2020

Jorge Navarrete Clerk

Deputy

RECEIVED

JUN 22 2020

CLERK SUPREME COURT

CANTIL-SAKAUYE

Chief Justice

APPENDIX E

Order: Superior Court of Los Angeles(10-1-19) Denial of 1054.9

MINUTE ORDER (DRAFT)
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE PRINTED: 10/01/19

CASE NO. TA070163

THE PEOPLE OF THE STATE OF CALIFORNIA
VS.
DEFENDANT 01: MICHAEL SHABOYA WOOLEN

INFORMATION FILED ON 08/12/03.

COUNT 01: 664-187(A) PC FEL

ON 09/19/19 AT 830 AM IN SOUTH CENTRAL DISTRICT DEPT SCF

CASE CALLED FOR JUDICIAL ACTION

PARTIES: H. CLAY JACKE, II (JUDGE) DEFOREST LOCKETT (CLERK)
NONE (REP) NONE (DDA)

DEFENDANT IS NOT PRESENT IN COURT, AND NOT REPRESENTED BY COUNSEL

***** IN CHAMBERS *****

THE COURT HAS READ AND CONSIDERED DEFENDANT'S MOTION PURSUANT TO
PENAL CODE SECTION 1054.9.

THE MOTION IS DENIED WITHOUT PREJUDICE FOR THE FOLLOWING
REASONS:

PROOF OF SERVICE RE: REQUEST FOR RECORDS AND TRANSCRIPTS IN
EXHIBITS 10 (??????) WERE ADDRESSED TO THE LOS ANGELES COUNTY
SHERIFF'S DEPARTMENT, 200 W. COMPTON BOULEVARD #404, COMPTON, CA
90220. THIS DOES NOT DEMONSTRATE DUE DILIGENCE BECAUSE THE
SHERIFF'S DEPARTMENT COULD NOT POSSIBLY PRODUCE SUCH RECORDS,
ETC.

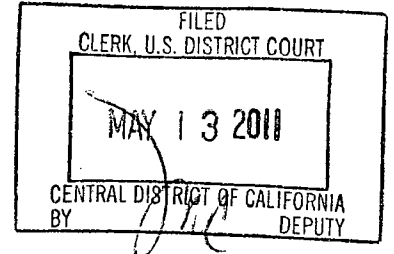
DATED: 09/19/19

/S/ H. CLAY JACKE II
JUDGE OF THE SUPERIOR COURT

CLERK TO GIVE NOTICE.

APPENDIX F

Order: U.S. dist. Court Central Dist. of California(5-13-11) Failure
to obtain authorization from Ninth Circuit



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

MICHAEL WOOLEN,

Petitioner,

v.

M.D. McDONALD, Warden,

Respondent.

Case No. CV 10-04534 GW (AN)

ORDER SUMMARILY DISMISSING
SUCCESSIVE PETITION FOR WRIT
OF HABEAS CORPUS FOR
FAILURE TO OBTAIN PRIOR
AUTHORIZATION FROM THE
NINTH CIRCUIT

I. Background

On June 21, 2010, petitioner Michael Woolen, a state prisoner proceeding *pro se*, filed the pending petition for writ of habeas corpus ("Petition") pursuant to 28 U.S.C. § 2254 ("§ 2254") in this court. By his Petition, Woolen seeks federal habeas relief from his current state custody arising from his 2004 state conviction for attempted murder while personally using a firearm that he sustained following a jury trial in the California Superior Court for Los Angeles County (case no. TA070163). ("2004 Conviction"). (Pet. at 2 (dkt. 1); Official records of California courts.^{1/})

^{1/} The court takes judicial notice of the state appellate court records for Petitioner's case available on the internet at <http://appellatecases.courtinfo.ca.gov>. See

However, the court finds its records^{2/} establish the Petition must be dismissed because it is an unauthorized successive petition.

Specifically, on December 14, 2007, Petitioner filed his first § 2254 petition with this court (CV 07-08161 GW (AN)) for the purpose of challenging his current state custody arising from his 2004 Conviction (“2007 Petition”). The 2007 Petition raised a mental disorder claim, an inadequate law library access claim, and lack of legal training, representation, and/or education claims. The 2007 Petition was dismissed with prejudice as time-barred. (*Id.*, Judgment (dkt. 9).)

The pending Petition and attached exhibits establish Petitioner continues to seek federal habeas relief from his current state custody arising from his 2004 Conviction. The Petition purports to raise three new claims; (1) a right to confrontation and due process claim; (2) a violation of the right to a fair trial, due process, and right to present a defense claim; and (3) a violation of due process and jury trial claim. (Pet. at 5-6.) But neither the Petition nor attached exhibits establish that the United States Court of Appeals for the Ninth Circuit has authorized Petitioner to bring a second or successive petition in this court.

II. Discussion

“A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.” 28 U.S.C. § 2244(b)(1). As for new claims, the United States Supreme Court has held:

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) established a stringent set of procedures that a prisoner “in custody pursuant

^{1/}(...continued)
Smith v. Duncan, 297 F.3d 809, 815 (9th Cir. 2002) (federal courts may take judicial notice of relevant state court records in federal habeas proceedings).

^{2/} The court takes judicial notice of its own records and files. Fed. R. Evid. 201(b)(2); *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980).

1 to the judgment of a State court,” 28 U.S.C. § 2254(a), must follow if he
2 wishes to file a “second or successive” habeas corpus application
3 challenging that custody, § 2244(b)(1). In pertinent part, before filing the
4 application in the district court, a prisoner “shall move in the appropriate
5 court of appeals for an order authorizing the district court to consider the
6 application.” § 2244(b)(3)(A). A three-judge panel of the court of appeals
7 may authorize the filing of the second or successive application only if it
8 presents a claim not previously raised that satisfies one of the two grounds
9 articulated in § 2244(b)(2). § 2244(b)(3)(C); *Gonzalez v. Crosby*, 545 U.S.
10 524, 529-530, 125 S. Ct. 2641, 162 L. Ed.2d 480 (2005); *see also Felker v.*
11 *Turpin*, 518 U.S. 651, 656-657, 664, 116 S. Ct. 2333, 135 L. Ed.2d 827
12 (1996).

13 *Burton v. Stewart*, 549 U.S. 147, 152-53, 127 S. Ct. 793 (2007). District courts lack
14 jurisdiction to consider unauthorized successive petitions and must dismiss such
15 petitions. § 2244(b)(2); *Burton, id.*

16 The Ninth Circuit recently held the dismissal of a § 2254 habeas corpus petition
17 as untimely constitutes a disposition on the merits, and that a further petition challenging
18 the same conviction constitutes a “second or successive” petition for purposes of
19 § 2244(b). *McNabb v. Yates*, 576 F.3d 1028, 1029 (9th Cir. 2009). Based upon
20 *McNabb*, the Court finds Petitioner’s pending Petition clearly constitutes a “second or
21 successive” habeas petition relative to his 2007 Petition. Further, the Petition and
22 records of the Ninth Circuit clearly establish that Petitioner has not sought and been
23 granted authorization by the Ninth Circuit to file a Petition with this Court for the
24 purpose of raising any new federal habeas claims.

25 ///

26 ///

27 ///

28 ///

1 Therefore, the reference to the Magistrate Judge is vacated and the Petition is
2 dismissed for lack of jurisdiction. *See Burton, id.* The clerk is directed to enter the
3 judgment dismissing the Petition. Any and all other pending motions are terminated.

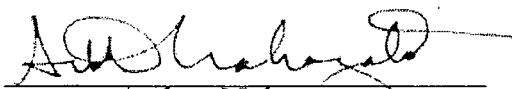
4
5 IT IS SO ORDERED.

6
7 Dated: May 12, 2010



GEORGE H. WU
UNITED STATES DISTRICT JUDGE

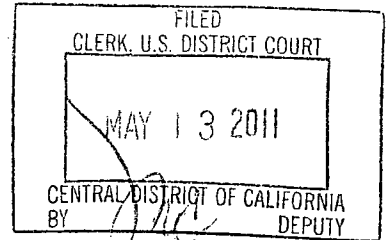
8
9
10 Presented by:

11
12 

Arthur Nakazato
United States Magistrate Judge

APENDIX G

Order: U.S. Dist. Court Central Dist. of California (5-12-11)
COA Denial



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL WOOLEN,

Petitioner,

v.

M.D. McDonald, Warden,

Respondent.

Case No. CV 10-04534 GW (AN)

ORDER DENYING A CERTIFICATE OF
APPEALABILITY

Effective December 1, 2009, Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts was amended to read as follows:

- (a) **Certificate of Appealability.** The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, a party may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

1 (b) **Time to Appeal.** Federal Rule of Appellate Procedure 4(a) governs
2 the time to appeal an order entered under these rules. A timely
3 notice of appeal must be filed even if the district court issues a
4 certificate of appealability. These rules do not extend the time to
5 appeal the original judgment of conviction.

6 Under 28 U.S.C. § 2253(c)(2), a certificate of appealability may issue “only if the
7 applicant has made a substantial showing of the denial of a constitutional right.” The
8 Supreme Court has held that this standard means a showing that “reasonable jurists
9 could debate whether (or, for that matter, agree that) the petition should have been
10 resolved in a different manner or that the issues presented were adequate to deserve
11 encouragement to proceed further.” *See Slack v. McDaniel*, 529 U.S. 473, 483-84, 120
12 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)(internal quotation marks omitted).

13 Here, the court finds the Petition a “second or successive” habeas petition relative
14 to Petitioner’s 2007 Petition, and that it raises three new claims. Therefore, the court
15 finds the Petitioner has not made the requisite showing for the issuance of a certificate
16 of appealability.

17 Accordingly, a certificate of appealability is denied in this case.
18
19

20 Dated: May 12, 2011

George H. Wu
GEORGE H. WU
UNITED STATES DISTRICT JUDGE

22 Presented by:
23

24 Arthur Nakazato
25 Arthur Nakazato
26 United States Magistrate Judge
27
28

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

MICHAEL WOOLEN,
Petitioner,
v.
TOM FELKER,
Respondent.

Case No. CV 07-08161 GW (AN)

**ORDER DENYING MOTION
REQUESTING EQUITABLE
TOLLING AND ORDER TO SHOW
CAUSE RE DISMISSAL OF
PETITION FOR WRIT OF HABEAS
CORPUS BY A PERSON IN STATE
CUSTODY AS TIME-BARRED**

I. BACKGROUND

On December 14, 2007, Michael Woolen ("Petitioner"), a state prisoner proceeding *pro se*, commenced the pending action for federal habeas review pursuant to 28 U.S.C. § 2254 ("Petition") by constructively^{1/} filing his pending Petition. (Pet.

^{1/} Pursuant to the "mailbox rule," a *pro se* prisoner's habeas petition is deemed to be filed on the date the prisoner delivers the petition to prison authorities for mailing to the clerk. *Houston v. Lack*, 487 U.S. 266, 270-71, 108 S. Ct. 2379 (1988); *Huizar v. Carey*, 273 F.3d 1220, 1222 (9th Cir. 2001). The mailbox rule also applies to *pro* (continued...)

1 8.) The Petition raises three claims challenging attempted murder-related convictions
2 and life to twenty-five years to life prison sentence that Petitioner sustained on January
3 24, 2004, following a jury trial in the California Superior Court for the County of Los
4 Angeles (case no. TA070163). (Pet. 2; Official records of California courts.^{2/})

5 The Petition and state court records establish that, on February 24, 2004,
6 Petitioner appealed his judgment of conviction to the California Court of Appeal (case
7 no. B173587) and that court affirmed the judgment on January 31, 2005. (Pet. 2-3;
8 Official records of California courts.) On March 14, 2005, the California Supreme
9 Court received a petition for review (case no. S132152) that was denied without
10 comment on April 20, 2005. (Pet. 3; Official records of California courts.) Petitioner
11 did not seek collateral review in the state courts. (Pet. 3; Official records of California
12 courts.) On December 14, 2007, Petitioner constructively filed his pending Petition
13 along with a Motion Requesting Equitable Tolling ("Motion"). (Pet. 8; Mot.
14 Requesting Equitable Tolling.)

15 For the reasons discussed below, the Motion is DENIED and Petitioner is
16 ordered to show cause why the pending Petition should not be dismissed with prejudice
17 because it is time-barred.

18 ///

19 ///

20 ///

21
22 ^{1/} (...continued)
23 se state habeas petitions. *Stillman v. Lamarque*, 319 F.3d 1199, 1201 (9th Cir. 2003).
24 The pending Petition was signed by Petitioner and filed by the Clerk on December 14,
2007. (Pet. 8.)

25 ^{2/} The Court takes judicial notice of Petitioner's records in the state trial and
26 appellate courts, which are available on the Internet at <http://lasuperiorcourt.org> and
27 <http://appellatecases.courtinfo.ca.gov>. See *Smith v. Duncan*, 297 F.3d 809, 815 (9th
28 Cir. 2002) (federal courts may take judicial notice of relevant state court records in
federal habeas proceedings).

II. DISCUSSION

A. Standard of Review

Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254 (“Rule 4”), states that “the judge to whom [the petition] is assigned” is required to examine the petition promptly and “[i]f it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified.” Further, an untimely habeas petition may be dismissed *sua sponte*, however, the district court must give the prisoner adequate notice and an opportunity to respond before doing so. *Day v. McDonough*, 547 U.S. 198, 209-10, 126 S. Ct. 1675 (2006); *Herbst v. Cook*, 260 F.3d 1039, 1043 (9th Cir. 2001).

B. Statute of Limitations

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) establishes a one-year statute of limitations for state prisoners to file a habeas petition in federal court. 28 U.S.C. § 2244(d)(1). In most cases, the limitation period begins to run from “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A).

As discussed above, Petitioner’s direct appeal in the state courts ended on April 20, 2005, the date the California Supreme Court denied his petition for review. Petitioner did not seek review with the United States Supreme Court. For purposes of AEDPA’s limitation period, his judgment of conviction became final ninety days later, on July 19, 2005. *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S. Ct. 3383 (1983); *Bowen v. Roe*, 188 F.3d 1157, 1158-59 (9th Cir. 1999) (the period of “direct review” in 28 U.S.C. § 2244(d)(1)(A) includes the period within which a petitioner can file a petition for writ of certiorari from the United States Supreme Court). AEDPA’s one-year limitation period then started to run the next day, on July 20, 2005, and ended on

1 July 19, 2006. 28 U.S.C. § 2244(d)(1)(A); *see also Patterson v. Stewart*, 251 F.3d
2 1243, 1245-47 (9th Cir. 2001) (the statute of limitations begins to run on the day
3 following the day of the triggering event pursuant to Federal Rule of Civil Procedure
4 6(a)).

5 Petitioner missed this deadline by failing to constructively file the pending
6 Petition until December 14, 2007-- 513 days (over sixteen months) after the statute
7 expired. Therefore, the pending Petition is time-barred unless Petitioner is entitled to
8 statutory or equitable tolling, or an alternate start date to AEDPA's limitation period
9 under 28 U.S.C. § 2244(d)(1).

10 **C. Statutory Tolling**

11 AEDPA's one-year limitation period may be tolled for "[t]he time during which
12 a properly filed application for State post-conviction or other collateral review with
13 respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2).
14 Petitioner did not seek collateral review in the state courts so he is not eligible to
15 receive statutory tolling. Therefore, this Court concludes this Petition, constructively
16 filed on December 14, 2007, is untimely by 513 days.^{3/}

17 **D. Alternative Start of the Statute of Limitations**

18 **1. State-Created Impediment**

19 In rare instances, AEDPA provides that its one-year limitation period shall run
20 from "the date on which the impediment to filing an application created by State action
21 in violation of the Constitution or laws of the United States is removed, if the applicant
22 was prevented from filing by such State action." 28 U.S.C. § 2244(d)(1)(B). Asserting
23 that the statute of limitations was delayed by a state-created impediment requires a
24 showing of a due process violation. *Lott v. Mueller*, 304 F.3d 918, 925 (9th Cir. 2002).

25
26
27 ^{3/} Specifically, the 513 days represents the untolled time beyond the limitation
28 deadline (July 19, 2006), and the Petition's constructive filing date (December 14,
2007).

1 The face of the Petition and attached Memorandum of Points and Authorities
2 (“Memorandum”) do not set forth any facts showing that Petitioner is entitled to relief
3 under this provision.

4 **2. Newly Recognized Constitutional Right**

5 AEDPA provides that, if a claim is based upon a constitutional right that is
6 newly recognized and applied retroactively to habeas cases by the United States
7 Supreme Court, the one-year limitation period begins to run on the date which the new
8 right was initially recognized by the United States Supreme Court. 28 U.S.C. §
9 2244(d)(1)(c). The face of the Petition and Memorandum do not set forth any facts
10 showing that Petitioner is entitled to relief under this provision.

11 **3. Discovery of Factual Predicate**

12 AEDPA also provides that, in certain cases, its one-year limitation period shall
13 run from “the date on which the factual predicate of the claim or claims presented
14 could have been discovered through the exercise of due diligence.” 28 U.S.C. §
15 2244(d)(1)(D). The face of the Petition and Memorandum do not set forth any facts
16 showing that Petitioner is entitled to relief based upon a late discovery of the factual
17 predicate.

18 **E. Equitable Tolling**

19 “[E]quitable tolling is justified in few cases,” and “the threshold necessary to
20 trigger equitable tolling [under AEDPA] is very high, lest the exceptions swallow the
21 rule.” *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). “Generally, a litigant
22 seeking equitable tolling bears the burden of establishing two elements: (1) that he has
23 been pursuing his rights diligently, and (2) that some extraordinary circumstance stood
24 in his way.” *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807 (2005).

25 By way of his Motion, Petitioner principally proffers three grounds for equitable
26 tolling. As the ensuing analysis demonstrates, none of Petitioner’s asserted grounds
27 satisfy the *Pace* elements for equitable tolling.

28 ///

1 **1. Mental Disability Claim**

2 Petitioner alleges he should be entitled to equitable tolling because of his mental
3 illness. (Mot. 1, 3-5.) In support of his contention, Petitioner has attached numerous
4 medical records (likely every medical exam he has had since he was incarcerated)
5 indicating he suffers from depression and bipolar disorder. (Mot. Ex. A at 1, 4, 5, 17.^{4/})
6 However, none of the mental disorders he claims to have suffered from establish that
7 they prevented him from filing a timely Petition. Moreover, mental disabilities alone
8 do not warrant equitable tolling where other evidence shows the petitioner could still
9 have filed a timely petition. *See Gaston v. Palmer*, 417 F.3d 1030, 1034-35 (9th Cir.
10 2005) (petitioner was not entitled to equitable tolling based upon physical and mental
11 disabilities since he prepared and filed a state habeas petition while suffering from the
12 alleged disabilities). Since his conviction in January 2004, Petitioner's own exhibits
13 and actions establish he not only filed two state habeas petitions during the course of
14 his purported mental disorders but he also maintained constant communication with
15 his mother regarding his appeals, wrote letters to his attorney and prison authorities,
16 tracked down his legal file and sleuthed out any alleged missing documents. (Mot. Ex.
17 A at 21-22, 36-38; Official records of California courts.) Petitioner has quite simply
18 failed to show the slightest causal link between the alleged mental disabilities and his
19 failure to file a federal habeas petition at any time during the nearly five years since his
20 conviction. *See Allen v. Lewis*, 255 F.3d 798, 800-01 (9th Cir. 2001), *amended on*
21 *other grounds by Allen v. Lewis*, 295 F.3d 1046 (9th Cir.2002) (en banc) ("the prisoner
22 must show that the 'extraordinary circumstances' were the but-for and proximate cause
23 of his untimeliness.").

24 In an apparent effort to circumvent this obvious problem, Petitioner asserts his
25

26 ^{4/} Petitioner failed to designate and consecutively number each page of the
27 exhibit in the manner required by Local Rules 11-3.3 and 11.5.2. Consequently, for
28 ease of reference, the Court has designated Petitioner's attachment to the Motion
entitled "Exhibits" as "Exhibit A" and consecutively numbered each page.

1 mother, fellow inmate (former step-father), and the Library Technical Assistant helped
2 him file the pending Petition. (Mot. Ex. A at 36-38.) This argument is unpersuasive.
3 Regardless of *how* Petitioner managed to file two state habeas petitions, write letters,
4 and investigate his case, the fact is he accomplished these things. He has failed to
5 explain why his mother, fellow inmate, and the prison librarian assistant who
6 ostensibly provided valuable aid to him could not have done so while the statute of
7 limitations was running instead of sixteen months after it expired. *Tacho v. Martinez*,
8 862 F.2d 1376, 1381 (9th Cir. 1988) (mental condition of *pro se* prisoner and reliance
9 upon allegedly incompetent jailhouse lawyers did not constitute “cause”). Petitioner
10 has failed to show that his alleged mental disabilities amounted to extraordinary
11 circumstances beyond his control, making it *impossible* to file a petition on time.
12 *Brambles v. Duncan*, 412 F.3d 1066, 1069 (9th Cir. 2005).

13 2. Inadequate Law Library Claim

14 Petitioner also claims equitable tolling is warranted because of restrictions on
15 meaningful law library access in violation of his due process rights. (Mot. 2, 5-6.) The
16 Court notes that such restrictions do not generally qualify as an “extraordinary
17 circumstance” sufficient to equitably toll the statute of limitations for federal habeas
18 petitions. *See Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998) (petitioner’s alleged
19 lack of access to law library materials and resulting unawareness of the limitation
20 period until it was too late did not warrant equitable tolling); *Wilders v. Runnels*, No.
21 C031478 CRB (PR), 2003 WL 22434102, *3 (N.D. Cal. 2003); *Atkins v. Harris*, No.
22 C 98-3188 MJJ (PR), 1999 WL 13719, *2 (N.D. Cal. 1999).

23 * Prison officials typically provide prison law libraries or legal assistants to ensure
24 that prisoners “have a reasonably adequate opportunity to file nonfrivolous legal claims
25 challenging their convictions or conditions of confinement.” *Lewis v. Casey*, 518 U.S.
26 343, 356, 116 S.Ct. 2174 (1996). However, prison officials of necessity must regulate
27 the time, manner and place in which library facilities and legal assistant programs are
28 used. *See Lindquist v. Idaho State Bd. of Corr.*, 776 F.2d 851, 858 (9th Cir. 1985).

1 Not surprisingly, lockdowns, placement in administrative segregation/solitary
2 confinement, and other common restrictions on access to the law library and legal
3 assistant programs, generally do not qualify as “extraordinary circumstances.” *Lindo*
4 *v. Lefever*, 193 F. Supp. 2d 659, 663 (E.D.N.Y. 2002). There is no due process
5 violation so long as an inmate has the basic capability of presenting his claims to the
6 courts, irrespective of the “capability of turning pages in a law library.” *Lewis*, 518
7 U.S. at 356-57.

8 Petitioner’s inadequate law library claim is facially without merit. Aside from
9 his perfunctory, unsupported allegations, he has not shown that he was actually denied
10 access to the law library or why he needed library access to file a timely federal habeas
11 petition. Petitioner’s inadequate law library claim fundamentally ignores the clearly
12 established premise that “prison law libraries and legal assistance programs are not
13 ends in themselves, but only the means for ensuring a reasonably adequate opportunity
14 to present claimed violations of fundamental constitutional rights to the courts.” *Lewis*,
15 518 U.S. at 351. “[M]eaningful access to the courts is the touchstone . . . and the
16 inmate therefore must go one step further and demonstrate that the alleged
17 shortcomings in the library or legal assistance program hindered [his] efforts to pursue
18 a legal claim.” *Id.*

19 Further, even if Petitioner had shown he was denied access to the law library at
20 various times and for various reasons during the relevant period, as noted above, he has
21 failed to meet his burden of establishing the alleged limited access made timely
22 *impossible*. *Brambles*, 412 F.3d 1066, 1069 (9th Cir. 2005).

23 **3. Lack of Legal Training, Representation, and/or Education Claims**

24 Petitioner’s grounds for equitable tolling is also based on his lack of legal
25 training, lack of legal representation, and/or general lack of education. The Court
26 rejects such contention. (Mot. 1.) Neither the lack of assistance nor ignorance of the
27 law qualify as extraordinary circumstances warranting equitable tolling. *See Rasberry*
28 *v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006) (“a pro se petitioner’s lack of legal

sophistication is not, by itself, an extraordinary circumstance warranting equitable tolling” of AEDPA’s limitation period); *Ekenberg v. Lewis*, No. C 98-1450 FMS (PR), 1999 WL 13720, *2 (N.D. Cal. Jan. 12, 1999) (“Ignorance of the law and lack of legal assistance do not constitute such extraordinary circumstances.”); *Bolds v. Newland*, No. C 97-2103 VRW (PR), 1997 WL 732529, *2 (N.D. Cal. Nov. 12, 1997) (same); *see also Hinton v. Pac. Enter.*, 5 F.3d 391, 396-97 (9th Cir. 1993) (mere ignorance of the law generally is an insufficient basis to equitably toll the running of an applicable statute of limitations); *Barrow v. New Orleans S.S. Ass’n*, 932 F.2d 473, 478 (5th Cir. 1991) (neither “lack of knowledge of applicable filing deadlines,” nor “unfamiliarity with the legal process,” nor “lack of representation during the applicable filing period,” nor “illiteracy,” provides a basis for equitable tolling); *cf. Hughes v. Idaho State Bd. of Corr.*, 800 F.2d 905, 909 (9th Cir. 1986) (holding pre-AEDPA that illiteracy of pro se prisoner is insufficient to meet standard of an objective, external factor amounting to “cause” for purposes of avoiding procedural bar on habeas claims).

Accordingly, in light of the foregoing, Petitioner is not entitled to equitable tolling because he has failed to satisfy either of the *Pace* elements. Petitioner has not met his burden to show he was reasonably diligent in pursuing federal habeas relief throughout the time that AEDPA’s limitation period was running, nor has he shown he was prevented from filing a timely petition because of extraordinary circumstances.

ORDER

Based upon the foregoing, the Court finds the Petition, Memorandum, and Motion indicate it is untimely. Accordingly, the Motion is DENIED and Petitioner shall have until **January 31, 2008**, to file a written response and show cause why his Petition should not be dismissed with prejudice because it is time-barred. In responding to this Order, Petitioner must show by declaration and any exhibits what, if any, factual or legal basis he has for claiming that the Court’s foregoing analysis is factually or legally incorrect, or that AEDPA’s one-year statute of limitations should be tolled, or the start date extended. If Petitioner still maintains he is entitled to tolling

1 because of a lack of access to the prison law library due to a purported lockdown or
2 some other state-created impediment, his written response must be supported by a
3 declaration from the warden or prison librarian verifying that the law library and
4 library materials were unavailable throughout the relevant time period because of the
5 lockdown or other stated reason. Further, Petitioner must demonstrate that, during the
6 time that access to the prison law library was allegedly unavailable, he made requests
7 for legal materials to be brought to his cell and those requests were denied.

8 **Petitioner is warned that, if a timely response to this Order is not made,**
9 **Petitioner will waive his right to do so and the Court will, without further notice,**
10 **issue an order dismissing the Petition, with prejudice, as time-barred. Further,**
11 **if Petitioner determines the Court's above analysis is correct and the Petition is**
12 **clearly time-barred, he should file a Request For Voluntary Dismissal of this**
13 **action pursuant to Fed. R. Civ. P. 41(a)(1) in lieu of a response to this Order.**

14
15 IT IS SO ORDERED.

16
17 DATED: January 9, 2008

/s/ ARTHUR NAKAZATO
ARTHUR NAKAZATO
UNITED STATES MAGISTRATE JUDGE