No. _____

IN THE

# Supreme Court of the United States

KELLEY KELLER,

*Petitioner,*

v.

CHRISTIAN PFEIFFER, WARDEN,

*Respondent.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

## APPENDIX

CUAUHTEMOC ORTEGA
Federal Public Defender
ANDREA A. YAMSUAN*
Andrea_Yamsuan@fd.org
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-2854
Facsimile: (213) 894-0081

Attorneys for Petitioner
*Counsel of Record

## APPENDIX INDEX

FILED

FEB 8 2021

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| KELLEY KELLER,<br><br>Petitioner-Appellant,<br><br>v.<br><br>CHRISTIAN PFEIFFER, Warden,<br><br>Respondent-Appellee. | No. 18-55700<br><br>D.C. No.<br>2:16-cv-09197-AG-SP<br>Central District of California,<br>Los Angeles<br><br>ORDER |

Before: CALLAHAN and BUMATAY, Circuit Judges, and M. WATSON,* District Judge.

Appellant's petition for rehearing is denied.

* The Honorable Michael H. Watson, United States District Judge for the Southern District of Ohio, sitting by designation.

**NOT FOR PUBLICATION**

FILED

SEP 9 2020

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| KELLEY KELLER,<br><br>Petitioner-Appellant,<br><br>v.<br><br>CHRISTIAN PFEIFFER, Warden,<br><br>Respondent-Appellee. | No. 18-55700<br><br>D.C. No.<br>2:16-cv-09197-AG-SP<br><br>MEMORANDUM* |

Appeal from the United States District Court
for the Central District of California
Andrew J. Guilford, District Judge, Presiding

Argued and Submitted August 10, 2020
Pasadena, California

Before: CALLAHAN and BUMATAY, Circuit Judges, and M. WATSON,** District Judge.

Kelly Keller appeals from the district court's dismissal of his federal habeas appeal as untimely under the one-year time limit in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244. The district

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Michael H. Watson, United States District Judge for the Southern District of Ohio, sitting by designation.

court ruled that although Keller was entitled to "gap tolling" for the periods of time between the filings of his post-conviction petitions in the California courts, he was not entitled to equitable tolling for the passage of time after the California Supreme Court denied his post-conviction petition. We affirm.

We review de novo the dismissal of a habeas petition as untimely, and review findings of fact made by the district court for clear error. *Stewart v. Cate*, 757 F.3d 929, 934 (9th Cir. 2014); *Ramirez v. Yates*, 571 F.3d 993, 997 (9th Cir. 2009). We review a district court's determination not to hold an evidentiary hearing for abuse of discretion. *Stewart*, 757 F.3d at 934.

The Supreme Court has held that AEDPA's statutory limitation periods may be tolled for equitable reasons. *Holland v. Florida*, 560 U.S. 631, 645 (2010). "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). We recently explained that these are two distinct requirements. *Smith v. Davis*, 953 F.3d 582, 591 (9th Cir. 2020) (en banc) ("[I]f an extraordinary circumstance is not the cause of a litigant's untimely filing, then there is nothing for equity to address."). In *Smith*, we disapproved of an application for equitable tolling "where a litigant has not diligently pursued his rights before, during, and after the existence of an extraordinary circumstance." *Id.* at 598. We explained

that a litigant "must show that he has been reasonably diligent in pursuing his rights not only while an impediment to filing caused by an extraordinary circumstance existed, but before and after as well, up to the time of filing his claim in federal court." *Id.* at 598-99.

Here, the district court first granted Keller "gap tolling" for the periods of time between the filings of his post-conviction petitions in the California courts, without which AEDPA's time limitation would have run before Keller filed his post-conviction petition with the California Supreme Court. The district court also recognized that the days it took for the California Supreme Court's decision to reach Keller made it impossible for him to file a timely federal habeas petition. However, it reasoned that "[t]he Petition was late because petitioner waited over a year following the California Supreme Court's denial of his petition for review on August 27, 2014 before he constructively filed his first state habeas petition in the Superior Court on November 24, 2015, the day before the AEDPA limitation period expired." The district court determined that "[i]t is during that earlier time, while the AEDPA limitation period was running, that petitioner needs equitable tolling in order for [the] instant Petition to be timely, but petitioner has failed to show . . . extraordinary circumstances during that period prevented him from timely filing."

On this record, Keller has not shown that the district court clearly erred in determining that he did not act diligently. The district court considered Keller's actions during the relevant time period, November 2014 to November 2015. It noted that Keller waited two years before requesting additional records, waited six months before filing his state habeas petition, and filed all of his petitions without the additional records he sought. In light of the district court's careful consideration of Keller's actions, Keller has not shown either that the district court erred in dismissing his federal habeas petition as untimely or that the district court abused its discretion in declining to hold an evidentiary hearing.

The district court's order of dismissal is **AFFIRMED**.

**United States Court of Appeals for the Ninth Circuit**

**Office of the Clerk**
95 Seventh Street
San Francisco, CA 94103

**Information Regarding Judgment and Post-Judgment Proceedings**

**Judgment**

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

**Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)**

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

**Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)**
**Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)**

**(1) A. Purpose (Panel Rehearing):**

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

**B. Purpose (Rehearing En Banc)**

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

**(2) Deadlines for Filing:**

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

**(3) Statement of Counsel**

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

**(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))**

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

**Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)**

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

**Attorneys Fees**

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

**Petition for a Writ of Certiorari**

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

**Counsel Listing in Published Opinions**

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

## Form 10. Bill of Costs

*Instructions for this form: http://www.ca9.uscourts.gov/forms/form10instructions.pdf*

**9th Cir. Case Number(s)**

**Case Name**

The Clerk is requested to award costs to (*party name(s)*):

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

**Signature** **Date**

*(use "*s/[typed name]*" to sign electronically-filed documents)*

| **COST TAXABLE** | **REQUESTED** *(each column must be completed)* | | | |
|---|---|---|---|---|
| DOCUMENTS / FEE PAID | No. of Copies | Pages per Copy | Cost per Page | TOTAL COST |
| Excerpts of Record* | | | $ | $ |
| Principal Brief(s) *(Opening Brief; Answering Brief; 1st, 2nd , and/or 3rd Brief on Cross-Appeal; Intervenor Brief)* | | | $ | $ |
| Reply Brief / Cross-Appeal Reply Brief | | | $ | $ |
| Supplemental Brief(s) | | | $ | $ |
| Petition for Review Docket Fee / Petition for Writ of Mandamus Docket Fee | | | | $ |
| | | | **TOTAL:** | $ |

***Example:** Calculate 4 copies of 3 volumes of excerpts of record that total 500 pages [Vol. 1 (10 pgs.) + Vol. 2 (250 pgs.) + Vol. 3 (240 pgs.)] as:*
*No. of Copies: 4; Pages per Copy: 500; Cost per Page: $.10 (or actual cost IF less than $.10);*
*TOTAL: 4 x 500 x $.10 = $200.*

*Feedback or questions about this form? Email us at forms@ca9.uscourts.gov*

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 25 2019

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

| | |
|---|---|
| KELLEY KELLER,<br><br>Petitioner-Appellant,<br><br>v.<br><br>WILLIAM MUNIZ, Warden,<br><br>Respondent-Appellee. | No. 18-55700<br><br>D.C. No. 2:16-cv-09197-AG-SP<br>Central District of California,<br>Los Angeles<br><br>ORDER |

Before: CANBY and GRABER, Circuit Judges.

After reviewing the underlying petition and concluding that it states at least one federal constitutional claim debatable among jurists of reason, namely whether the trial court erred by instructing the jury regarding continued deliberations, and by failing to hold a hearing on juror misconduct, we grant the request for a certificate of appealability with respect to the following issue: whether appellant's 28 U.S.C. § 2254 petition was timely filed, including whether appellant is entitled to equitable tolling. *See* 28 U.S.C. § 2253(c)(3); *Gonzalez v. Thaler*, 565 U.S. 134 (2012); *Slack v. McDaniel*, 529 U.S. 473, 483-85 (2000); *Grant v. Swarthout,* 862 F.3d 914 (9th Cir. 2017); *Lambright v. Stewart*, 220 F.3d 1022, 1026 (9th Cir. 2000); *see also* 9th Cir. R. 22-1(e).

Appellant is granted leave to proceed in forma pauperis based on the application attached to his 28 U.S.C. § 2254 petition, filed in the district court on

December 13, 2016. The Clerk shall change the docket to reflect appellant's in forma pauperis status.

Counsel is appointed sua sponte for purposes of this appeal. *See* 18 U.S.C. § 3006A(a)(2)(B); *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983). Counsel will be appointed by separate order.

If appellant does not wish to have appointed counsel, appellant shall file a motion asking to proceed pro se within 14 days of the date of this order.

The Clerk shall electronically serve this order on the appointing authority for the Central District of California, who will locate appointed counsel. The appointing authority shall send notification of the name, address, and telephone number of appointed counsel to the Clerk of this court at counselappointments@ca9.uscourts.gov within 14 days of locating counsel.

The opening brief is due May 28, 2019; the answering brief is due June 27, 2019; the optional reply brief is due within 21 days after service of the answering brief.

The Clerk shall serve on appellant a copy of the "After Opening a Case - Counseled Cases" document.

If William Muniz is no longer the appropriate appellee in this case, counsel for appellee shall notify this court by letter of the appropriate substitute party within 21 days of the filing date of this order. *See* Fed. R. App. P. 43(c).

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| KELLEY KELLER,<br>Petitioner,<br>v.<br>WILLIAM MUNIZ, Warden,<br>Respondent. | Case No. CV 16-9197-AG (SP)<br><br>ORDER DENYING A CERTIFICATE OF APPEALABILITY |

Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts reads 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, the parties 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.

> (b) **Time to Appeal.** Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

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

Two showings are required "[w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim." *Slack*, 529 U.S. at 484. In addition to showing that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right," the petitioner must also make a showing that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* As the Supreme Court further explained:

> Section 2253 mandates that both showings be made before the court of appeals may entertain the appeal. Each component of the § 2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments.

*Id.* at 485.

Here, the Court has denied the Petition because it is untimely. After duly

considering petitioner's various contentions in support of his argument that the Petition is timely or that he is entitled to additional tolling, including in his objections to the Report and Recommendation, the Court finds that petitioner has failed to make the requisite showing that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling."

Accordingly, a Certificate of Appealability is denied in this case.

Dated: 4/26/18

HONORABLE ANDREW J. GUILFORD
UNITED STATES DISTRICT JUDGE

Presented by:

Sheri Pym
United States Magistrate Judge

JS-6

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

| | |
|---|---|
| KELLEY KELLER,<br>Petitioner,<br>v.<br>WILLIAM MUNIZ, Warden,<br>Respondent. | Case No. CV 16-9197-AG (SP)<br><br>**JUDGMENT** |

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

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

Dated: 4/26/18

HONORABLE ANDREW J. GUILFORD
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

| | |
|---|---|
| KELLEY KELLER,<br>Petitioner,<br>v.<br>WILLIAM MUNIZ, Warden,<br>Respondent. | Case No. CV 16-9197-AG (SP)<br><br>**ORDER ACCEPTING FINDINGS AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE** |

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, records on file, and the Report and Recommendation of the United States Magistrate Judge. Further, the Court has engaged in a de novo review of those portions of the Report to which petitioner has objected. The Court accepts the findings and recommendation of the Magistrate Judge.

In doing so, the Court notes petitioner raises a new argument for equitable tolling in his Objections: that being mentally ill and a layman at law, petitioner had to rely on another inmate for assistance in preparing his petitions, and due to other cases the inmate was working on petitioner was separated from both the inmate and his legal materials from January 2015 through late December 2015. Objections at 12. Petitioner's lay status is not itself an extraordinary circumstance. *See Rasberry*

*v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006) (holding "a pro se petitioner's lack of legal sophistication is not, by itself, an extraordinary circumstance warranting equitable tolling"). And that petitioner chose to seek aid from another inmate who apparently was not able to work on his petitions in a prompt fashion was a circumstance of petitioner's own creation that likewise does not warrant equitable tolling. *See Chaffer v. Prosper*, 592 F.3d 1046, 1049 (9th Cir. 2010) (per curiam) (finding petitioner's "reliance on helpers who were transferred or too busy to attend to his petitions" to be "hardly extraordinary given the vicissitudes of prison life," and not a circumstance that "made it 'impossible' for him to file on time"; and petitioner "'entrusted [his inmate law clerk] with his legal documents at his peril'") (citations omitted). Indeed, petitioner acknowledges that even during this period when he asserts he was separated from his legal materials and still waiting for assistance from the other inmate, he was nonetheless able to file his first state habeas petition in November 2015. *See* Objections at 13. Thus, petitioner has shown no causal connection between his delay in filing and his reliance on and transfer of his files to another inmate, as required for equitable tolling. *See Bryant v. Arizona Att'y Gen.*, 499 F.3d 1056, 1060 (9th Cir. 2007).

Petitioner also has shown no causal connection between his delay in filing and any mental illness. The Ninth Circuit has established a two-part test a petitioner must meet in order to establish a basis for equitable tolling arising from a mental illness. *Bills v. Clark*, 628 F.3d 1092, 1099-1100 (9th Cir. 2010). First, the illness must be shown to be an extraordinary circumstance beyond his control, which requires that either the petitioner was unable "rationally or factually to personally understand the need to timely file," or was unable "personally to prepare a habeas petition and effectuate its filing." *Id.* Second, the petitioner must show diligence in pursuing claims "to the extent he could understand them, but that the mental impairment made it impossible to meet the filing deadline under the totality of the circumstances." *Id.* at 1100. Petitioner here does not contend his mental health

rendered him unable to understand the need to timely file or to prepare a filing, and the record is inconsistent with any such contention.

IT IS THEREFORE ORDERED that respondent's Motion to Dismiss (docket no. 12) is granted, and Judgment will be entered denying the Petition and dismissing this action with prejudice.

DATED: 4/26/18

HONORABLE ANDREW J. GUILFORD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| KELLEY KELLER,<br>Petitioner,<br>v.<br>WILLIAM MUNIZ, Warden,<br>Respondent. | Case No. CV 16-9197-AG (SP)<br>REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE |

This Report and Recommendation is submitted to the Honorable Andrew J. Guilford, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

## I.

## INTRODUCTION

On December 1, 2016, petitioner Kelley Keller, a California state prisoner proceeding pro se, constructively filed a Petition for Writ of Habeas Corpus by a

Person in State Custody ("Petition").[1] Petitioner raises fourteen claims for relief from his 2012 convictions in Los Angeles County Superior Court for murder, attempted murder, assault with a firearm, evading a police officer causing death, possession of a firearm, and resisting an executive officer.

On March 9, 2017, respondent filed a Motion to Dismiss the Petition ("MTD"), asserting that the Petition is barred by the one-year statute of limitations set forth in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(d)(1). Petitioner filed an Opposition to the Motion to Dismiss ("Opp.") on April 12, 2017.

For the reasons discussed below, the court finds the Petition is time-barred. It is therefore recommended that the Motion to Dismiss be granted.

## II.

## PROCEEDINGS

On January 17, 2012, a jury convicted petitioner of one count of second degree murder (Cal. Penal Code § 187(a)), three counts of attempted murder (Cal. Penal Code §§ 187(a)/664), three counts of assault with a firearm (two of which were on a peace officer) (Cal. Penal Code §§ 245(b), 245(d)(2)), one count of evading a police officer causing death (Cal. Veh. Code § 2800.3(b)), one count of possession of a firearm by a felon (Cal. Penal Code § 12021(a)(1)), and two counts of resisting executive officers (Cal. Penal Code § 69). *See* MTD at 1; Lodged

[1] Dates listed as "constructive" filing dates reflect the constructive filing date under the "mailbox rule." Under the mailbox rule, "a legal document is deemed filed on the date a petitioner delivers it to the prison authorities for filing by mail." *Lott v. Mueller*, 304 F.3d 918, 921 (9th Cir. 2002). Courts generally presume a petition was delivered to prison authorities on the day the petition was signed. *Lewis v. Mitchell*, 173 F. Supp. 2d 1057, 1058 n.1 (C.D. Cal. 2001).

Document ("LD") 1 at 1-3, 27-29.[2] Petitioner had pleaded not guilty and not guilty by reason of insanity. On February 6, 2012, the jury found petitioner was sane at the time he committed the crimes. LD 1 at 16-26. The trial court sentenced petitioner to a total of 123 years to life in prison. *Id*. at 27-29.

Petitioner, represented by counsel, appealed his conviction and sentence. *See* LD 2. On December 17, 2013, the California Court of Appeal affirmed petitioner's conviction but found the trial court committed sentencing errors, and therefore modified the sentence. LD 5. On June 6, 2014, the Court of Appeal recalled the remittur and refiled its opinion. MTD at 2; *see* LD E.

Petitioner filed a petition for review in the California Supreme Court. LD 7. The California Supreme Court summarily denied the petition for review on August 27, 2014. LD 8.

On November 24, 2015, petitioner constructively filed a habeas petition in the Superior Court. LD 9. The Superior Court denied the habeas petition in an order filed on January 4, 2016. LD 10.

Petitioner constructively filed a habeas petition in the California Court of Appeal on March 14, 2016. LD 11. The California Court of Appeal summarily denied the habeas petition on March 25, 2016. LD 12-13. Although the order denying the petition states the petition was filed on March 2, 2016 – before even its constructive filing date – that stated date was apparently a typographical error, as the docket shows the petition was actually filed March 21, 2016 and denied four days later. *See* LD 12-13.

On August 26, 2016, petitioner filed a habeas petition in the California Supreme Court. LD 14. The California Supreme Court denied the habeas petition

---

[2] The court references respondent's lodged documents by number, as listed in respondent's Notice of Lodging. The court references petitioner's lodged documents by letter, as given by petitioner on the exhibit cover pages within his Notice of Lodging.

on November 22, 2016. LD 15.

Petitioner constructively filed the instant federal Petition on December 1, 2016.

## III.

## DISCUSSION

### A. The Petition Is Time-Barred Under AEDPA's One-Year Statute of Limitations

AEDPA mandates that a "1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2244(d)(1); *see also Lawrence v. Florida*, 549 U.S. 327, 329, 127 S. Ct. 1079, 166 L. Ed. 2d 924 (2007); *Mardesich v. Cate*, 668 F.3d 1164, 1171 (9th Cir. 2012). After the one-year limitation period expires, the prisoner's "ability to challenge the lawfulness of [his] incarceration is permanently foreclosed." *Lott*, 304 F.3d at 922.

To assess whether a petition is timely filed under AEDPA, it is essential to determine when AEDPA's limitation period starts and ends. By statute, AEDPA's limitation period begins to run from the latest of four possible events:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). Ordinarily, the starting date of the limitation period is the date on which the judgment becomes final after the conclusion of direct review or the expiration of the time allotted for seeking direct review. *See Wixom v. Washington*, 264 F.3d 894, 897 (9th Cir. 2001).

AEDPA may also allow for statutory tolling or equitable tolling. *Jorss v. Gomez*, 311 F.3d 1189, 1192 (9th Cir. 2002). But "a court must first determine whether a petition was untimely under the statute itself before it considers whether equitable [or statutory] tolling should be applied." *Id*.

Here, the California Supreme Court denied the petition for review on August 27, 2014. LD 8. There is no indication petitioner filed a petition for writ of certiorari in the United States Supreme Court. Thus, petitioner's conviction became final on November 25, 2014, ninety days after the California Supreme Court denied his petition for review. *See Miranda v. Castro*, 292 F.3d 1063, 1065 (9th Cir. 2002) (stating that where petitioner does not file a petition for certiorari, his conviction becomes final ninety days after the California Supreme Court denies review); *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999) (same); *see also* U.S. Supreme Court Rule 13.1.

As such, the applicable limitation period here expired on November 25, 2015. Petitioner did not constructively file the instant Petition until December 1, 2016. Consequently, the Petition is untimely by more than a year absent sufficient statutory or equitable tolling.

**B. Petitioner Is Entitled to Statutory and Gap Tolling, But Not Enough to Make the Instant Petition Timely**

Statutory tolling is available under AEDPA during the time "a properly filed

application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2); *accord Evans v. Chavis*, 546 U.S. 189, 191, 126 S. Ct. 846, 163 L. Ed. 2d 684 (2006); *Patterson v. Stewart*, 251 F.3d 1243, 1247 (9th Cir. 2001). But "in order to qualify for statutory tolling during the time the petitioner is pursuing collateral review in the state courts, the prisoner's state habeas petition must be constructively filed *before*, not after, the expiration of AEDPA's one-year limitations period." *Johnson v. Lewis*, 310 F. Supp. 2d 1121, 1125 (C.D. Cal. 2004) (emphasis in original); *see Laws v. Lamarque*, 351 F.3d 919, 922 (9th Cir. 2003) (where petitioner does not file his first state petition until after the eligibility for filing a federal habeas petition has lapsed, "statutory tolling cannot save his claim"). Tolling is also available between a lower court's denial of a post-conviction petition and the filing of a similar petition in a higher court as long as the duration of the "gap" is reasonable or justified. *See Carey v. Saffold*, 536 U.S. 214, 219-21, 122 S. Ct. 2134, 153 L. Ed. 2d 260 (2002); *Chavis*, 546 U.S. at 191-92, 200-01.

**1. The First Two State Petitions and the Gap Between**

Petitioner here constructively filed his first habeas petition in the Superior Court on November 24, 2015. LD 9. Petitioner argues he handed the habeas petition to prison officials on November 19, 2015. Opp. at 3, n.1. Although the habeas petition was signed on November 19, 2015, the proof of service was signed on November 24, 2015. *See* LD 9 at 21, 86. Given the proof of service and the prison outgoing mail log, which shows a mailing on November 25, 2015, the court finds petitioner constructively filed the habeas petition on November 24, 2015. *See* LD M.

The Superior Court denied the habeas petition on January 4, 2016. LD 10. Petitioner then constructively filed a habeas petition in the California Court of Appeal on March 14, 2016, which was denied on March 25, 2016. LD 11-13.

There is no dispute that by filing the first habeas petition one day before the expiration of the AEDPA limitations period, petitioner was able to toll the statute of limitations during the pendency of his habeas petition in the Superior Court. Because petitioner filed the habeas petition in the Superior Court only one day before the limitations period was due to expire, absent gap tolling, the limitations period would have started running again with the Superior Court's January 4, 2016 denial and expired the next day, on January 5, 2016. In that event, petitioner would not be entitled to statutory tolling for any of his later petitions. *See Laws*, 351 F.3d at 922; *Johnson*, 310 F. Supp. 2d at 1125. But with gap tolling – that is, continued statutory tolling between the filing of the state habeas petitions – petitioner would be entitled to continued tolling during the 70 days between the Superior Court's denial and his constructive filing of his second petition in the Court of Appeal, as well as for the subsequent eleven days his second petition was pending in the Court of Appeal. This would extend the limitations period to March 26, 2016.

Respondent argues petitioner is not entitled to gap tolling for the 70-day period between the Superior Court's denial and the filing of the habeas petition in the Court of Appeal, because the gap is unreasonably large. Respondent points to California's 30-to-60-day benchmark for filing a habeas petition after a denial. *See Velasquez v. Kirkland*, 639 F.3d 964, 968 (9th Cir. 2011). Because petitioner did not file a habeas petition in the Court of Appeal until 70 days after the Superior Court denied his habeas petition, respondent maintains petitioner is not entitled to gap tolling, and the limitations period therefore expired on January 5, 2016.[3] MTD at 6-13.

The State of California does not statutorily specify time limits within which an appeal of a post-conviction decision must be made; rather, such appeals are to

[3] Although respondent asserts the limitation period ran on January 6, not January 5, this appears to be an arithmetical error.

be filed in "due diligence" within a "reasonable time," with fact-based explanations and justifications for any substantial delay. *See Saffold*, 536 U.S. at 235 (quoting *In re Harris*, 5 Cal. 4th 813, 828 n.7, 21 Cal. Rptr. 2d 373, 855 P.2d 391 n.7 (1993)); *In re Robbins*, 18 Cal. 4th 770, 795 n.16, 77 Cal. Rptr. 2d 153, 959 P.2d 311 (1998). Although the United States Supreme Court has suggested that a delay that exceeds 60 days would be out of the norm and require an explanation, the Court did not impose a definition of what constitutes a "reasonable time," but held that "the federal court must decide whether the filing . . . was made within what California would consider a 'reasonable time.'" *Chavis*, 546 U.S. at 192, 198 ("[T]he Circuit must itself examine the delay in each case and determine what the state courts would have held in respect to timeliness."). In other words, the "reasonable time" determination for state habeas petitions in California is a fact-based assessment that courts must engage in on a case-by-case basis. *See id.* at 198; *Saffold*, 536 U.S. at 235; *see also In re Harris*, 5 Cal. 4th at 828 n.7; *In re Robbins*, 18 Cal. 4th at 795 n.16.

Petitioner maintains the California Court of Appeal denied his second habeas petition on the merits and therefore must have found it timely. Opp. at 4. But that is not a fair conclusion. The Court of Appeal's order merely states it "read and considered" the petition, also examined the file on petitioner's direct appeal, and concluded "[t]he petition is denied." LD 13. It gave no reasons for its denial, nor did it state it found the petition timely. Even if the Court of Appeal's statement that it read and considered the petition is construed to mean it denied the petition on its merits, that does not mean it was found timely. The Supreme Court has noted that a "court will sometimes address the merits of a claim that it believes was presented in an untimely way," and so a decision on the merits does not by itself "indicate that the petition was timely" so as to preclude a federal court from finding it untimely. *Saffold*, 536 U.S. at 225-26; *accord Chavis*, 546 U.S. at 197; *Velasquez*, 639 F.3d at

969. Consequently, the Court of Appeal's order here settles nothing.

At the same time, the 70-day length of the gap here also is not by itself dispositive of the issue. Although respondent cites the Ninth Circuit's *Stewart v. Cate*, 757 F.3d 929 (9th Cir. 2014), and *Velasquez* decisions as holding that unjustified delays of more than 60 days preclude gap tolling (*see* MTD at 7-8), neither case sets quite so firm a 60-day rule as respondent appears to be asserting. *Velasquez* declares only that gaps that are "*far longer* than the [United States] Supreme Court's thirty-to-sixty-day benchmark for California's 'reasonable time' requirement" (such as the gaps of 91 days and 80 days in that case) do not merit gap tolling if no "adequate explanation" is offered for the delay. *Velasquez*, 639 F.3d at 968 (emphasis added). *Stewart* better supports respondent's argument, as there, in finding a 100-day gap untimely, the Ninth Circuit cited the body of case law developed since *Vasquez* "generally accepting a 30-to-60-day delay as reasonable, but also permitting delay beyond that length of time if the petitioner could establish good cause for the delay." *Stewart*, 757 F.3d at 936 (citation omitted).

*Velasquez* does not indicate whether a gap of 70 days is considered "far longer" than the 30-to-60-day benchmark such that it requires an adequate explanation for the delay, but several courts have found delays between 70 and 80 days require an adequate explanation. *See Livermore v. Sandor*, 487 Fed. Appx. 342, 343-44 (9th Cir. 2012) (76 days was not a reasonable delay); *Johnson v. Kaban-Miller*, 2013 WL 6239373, at *4 (C.D. Cal. Dec. 3, 2013) (79 days is far longer than the 30-to-60-day benchmark); *Smith v. McDonald*, 2012 WL 845275, at *3 (C.D. Cal. Jan. 19, 2012) (finding 77-day gap was far longer than the 30-to-60-day benchmark). Nor has the Ninth Circuit laid out the standards for determining what factors justify a delay. *See Burgoon v. Haviland*, 2010 WL 2771914, at *5 (E.D. Cal. Jul. 13, 2010); *Jordan v. Horel*, 2009 WL 3712716, at *4 (C.D. Cal. Oct. 30, 2009). Here, assuming a 70-day delay requires an adequate explanation,

petitioner has provided two purported justifications for the delay.

First, petitioner argues, it would be unfair to count all 70 days of the delay because he was not aware of the Superior Court decision until January 12, 2016. Opp. at 3-4. Petitioner contends the mail log reflects that the prison did not receive the Superior Court decision until January 11, 2016, and prison officials did not deliver the decision to petitioner until the following day. Opp. at 3-4, 7-9; *see* Ex. M. There is no evidence to refute petitioner's claim that he was unaware of the Superior Court's decision until January 12, 2016. But an eight-day delay in notification is hardly unusual for a pro se prisoner litigant, and does not explain why petitioner needed more than the 30-to-60-day norm. *Cf. Saffold*, 536 U.S. at 226 (finding 4-1/2-month filing gap may have been reasonable where the petitioner "was not notified of the Court of Appeal's decision for several months, and he filed within days after receiving notification"). Even assuming lack of knowledge of the Superior Court's decision may constitute a reasonable justification for delay, it would only account for eight days here. Petitioner still waited another 62 days before filing his next petition. The eight days it took for petitioner to receive notification does not provide adequate, or really any, explanation for the filing delay.

Second, petitioner contends his lack of adequate access to the law library and duplication services reasonable justified the delay. Opp. at 7-8. Petitioner contends he filed a grievance concerning the lack of adequate access, which was at the Third Level Review at the time he filed the Opposition, but failed to attach any evidence that he was provided inadequate library access. Notwithstanding the lack of evidence, petitioner does not argue that he was denied complete access to the law library, only that he was denied "adequate" time. *Id*. at 8. Petitioner fails to explain why the access he had was inadequate. *See Fuschak v. Swarthout*, 588 Fed. Appx. 556, 557 (9th Cir. 2014) (absent an explanation of why petitioner needed more than

two hours of library access per week, petitioner was not entitled to gap tolling and the petition was untimely); *Blankenship v. Cate*, 2010 WL 3733025, at *4 (S.D. Cal. Jul. 2, 2010) (limited but available library access is not a sufficient justification for gap tolling). Petitioner's attempt to use lack of library access as an excuse is particularly unconvincing here, where the habeas petition filed in the Court of Appeal was substantially the same as the one filed in the Superior Court. *Compare* LD 9 and 11. Petitioner did not require additional time to research new claims. *Cf. Maxwell v. Roe*, 628 F.3d 486, 497 (9th Cir. 2010) (fourteen-month delay was reasonable because of the need to review the voluminous record, research complex claims, address the lengthy lower court decision, incorporate findings from the two-year evidentiary hearing, and redraft the habeas petition). As such, petitioner does not have an adequate explanation for the delay.

Nevertheless, whether a gap ten days longer than 60 days is "far longer" than the 30-to-60-day benchmark such that it requires an adequate explanation for the delay as contemplated by *Velasquez* is an open question. And while the petition filed in the Court of Appeal is substantially the same as the petition filed in the Superior Court, petitioner did revise one claim and discard another. *Compare* LD 9 at 13-31 with LD 11 at 13-14, 24-27. Although these changes were very modest and could not have taken more than a few days, the court will give petitioner the benefit of the doubt and find the second petition was filed within a reasonable time after denial of the first.

The court therefore finds petitioner is entitled to tolling for the period between the Superior Court's decision and his constructive filing of the habeas petition in the Court of Appeal. This, in turn, entitles him to statutory tolling while his habeas petition was pending in the Court of Appeal, which extends the limitations period to March 26, 2016. But absent additional statutory or equitable tolling, the Petition is still untimely.

**2. The Third State Petition and Preceding Gap**

The Court of Appeal denied the second habeas petition on March 25, 2016, and petitioner did not file his next habeas petition in the California Supreme Court until August 26, 2016. LD 13-15. Although such a five-month gap between petitions ordinarily would not qualify for gap tolling, petitioner argues the court should find May 25, 2016 to be the constructive filing date of his California Supreme Court habeas petition. Opp. at 9.

Petitioner contends he delivered his third habeas petition for mailing to the California Supreme Court on May 25, 2016. Opp. at 5, 9. The prison's outgoing mail record reflects petitioner mailed something to the California Supreme Court on May 26, 2016, and a letter from the California Supreme Court states it received a habeas petition from petitioner on May 27, 2016, but was returning it due to a missing page. LD M, O. Petitioner received the returned petition on June 2, 2016. Opp. at 5; *see* LD M (incoming mail record). On July 24 or 25, 2016, petitioner, in two separate envelopes, resubmitted the habeas petition along with a letter explaining that the California Supreme Court erred when it returned his habeas petition, as there in fact was no missing page. Opp. at 9; LD M; LD O; LD 14 at 691. Petitioner further explained in the letter that due to a riot on June 1, 2016, the prison suspended law library access so petitioner was unable to access the proper mailing material for petitioner to respond earlier. LD O. On August 10, 2016, one of the envelopes was returned to petitioner. Opp. at 10; LD M; LD R. It was opened, damaged, and marked "Return to Sender." Opp. at 10. Petitioner did not know why one envelope was returned and resent the entire habeas petition to the California Supreme Court, along with a declaration to explain the circumstances. LD R; *see* LD 14 at 692. The California Supreme Court deemed this mailing the filing of the habeas petition, filing it on August 26, 2016. LD 14.

The documents submitted by petitioner support his contention that he

submitted a complete habeas petition to prison officials to mail to the California Supreme Court on May 25, 2016. Thus, although petitioner's third state habeas petition was not actually filed until August 26, 2016, this court finds petitioner constructively filed the petition on May 25, 2016. This was 61 days after the California Court of Appeal denied petitioner's second habeas petition, and thus a day outside the 30-to-60-day benchmark for gap tolling. Although petitioner offers no additional reason for this delay, given that it is only one day past the benchmark, the court will again give petitioner the benefit of the doubt and find petitioner filed the third habeas petition within a reasonable time.

Accordingly, petitioner is entitled to additional statutory and gap tolling from March 25, 2016 through November 22, 2016, when the California Supreme Court denied his third petition. Adding this to the period discussed above gives petitioner statutory tolling for the entire period of November 24, 2015, when he constructively filed his first state habeas petition, to November 22, 2016, when the California Supreme Court denied his third. But because petitioner filed his first habeas petition in the Superior Court on the second to last day of the limitation period, even with statutory tolling through November 22, 2016, the AEDPA limitation period still expired on November 23, 2016. Consequently, even after giving petitioner every benefit of the doubt with respect to statutory and gap tolling, because petitioner did not constructively file the instant Petition until December 1, 2016, the Petition is still untimely by eight days, absent equitable tolling.

**C. Petitioner Is Not Entitled to Equitable Tolling**

Petitioner argues he is entitled to equitable tolling because of extraordinary circumstances beyond his control. Opp. at 10-11. The United States Supreme Court has decided that "§ 2244(d) is subject to equitable tolling in appropriate cases." *Holland v. Florida*, 560 U.S. 631, 645, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010). Tolling is appropriate when "extraordinary circumstances" beyond a

petitioner's control make it impossible to file a petition on time. *Id.* at 649; *see Miranda*, 292 F.3d at 1066 ("[T]he threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the exceptions swallow the rule.") (citation omitted and brackets in original). "When external forces, rather than a petitioner's lack of diligence, account for the failure to file a timely claim, equitable tolling of the statute of limitations may be appropriate." *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999).

A petitioner seeking equitable tolling must establish two elements: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005). Petitioner must also establish a "causal connection" between the extraordinary circumstance and his failure to file a timely petition. *See Bryant v. Arizona Att'y Gen.*, 499 F.3d 1056, 1060 (9th Cir. 2007).

Petitioner does not expressly identify the extraordinary circumstances he argues entitle him to equitable tolling, but indicates they are the circumstances recounted throughout his Opposition. But most of those circumstances occurred during the period in which the court has already found petitioner entitled to statutory tolling, such as the mailing problems discussed above. Petitioner suggests he is entitled to equitable tolling because he was in administrative segregation from June 14, 2016 through sometime in November 2016. Opp. at 5. Petitioner contends he was denied adequate law library access and duplication services during this time. Setting aside the fact that petitioner does not provide evidence of his administrative segregation, petitioner concedes that while it was limited, he had access to the law library and duplication services. Petitioner was able to mail correspondence and file habeas petitions during this period, as evidenced by his mailings to the California Supreme Court. *See* LD M. Under equitable tolling law, petitioner's limited access to the law library access does not constitute an extraordinary

circumstance warranting equitable tolling. *See Ramirez v. Yates*, 571 F.3d 993, 998 (9th Cir. 2009) (petitioner not entitled to equitable tolling simply because he remained in administrative segregation and had limited access to law library and copy machine). Further, this period of time too is when petitioner was already receiving statutory tolling through November 22, 2016. There is no basis to also grant him equitable tolling during this period, which in any effect would have no effect.

The fundamental reason the instant Petition was filed late is not because it took petitioner nine days after the California Supreme Court's denial of his third habeas petition for him to file his federal habeas Petition in this court. The Petition was late because petitioner waited over a year following the California Supreme Court's denial of his petition for review on August 27, 2014 before he constructively filed his first state habeas petition in the Superior Court on November 24, 2015, the day before the AEDPA limitation period expired, effectively leaving himself insufficient time to file a federal Petition after he exhausted his state remedies. It is during that earlier time, while the AEDPA limitation period was running, that petitioner needs equitable tolling in order for instant Petition to be timely, but petitioner has failed to show an extraordinary circumstances during that period prevented him from timely filing.

Petitioner claims his appellate counsel delayed more than six months before informing him the Court of Appeal had ruled on his direct appeal on December 17, 2013. Opp at 2; *see* LD E. But this delay was before the AEDPA limitation period began running on November 25, 2014, and thus not a basis for tolling.

Petitioner also asserts he has been diligently trying to obtain missing records. Opp. at 1-2, 7. The records he mentions fall into two categories. The first are records that were part of the record of his direct appeal, which petitioner requested from his appellate counsel in 2012, and counsel indicated he would send them to

petitioner after the direct appeal concluded. *See* LD B, C. Since petitioner's efforts with respect to these records apparently concluded once his direct appeal did, before the AEDPA limitation period began running, they afford no basis to toll the limitation period.

The second category are records petitioner believes should have been part of the record on appeal, but were not, such as police reports, witness statements, and medical reports. *See* LD C. Putting aside whether these in fact should have been part of the record, petitioner requested these records and, in November 2012, his appellate counsel told him he would need to request them from his trial counsel. *Id.* Petitioner made the request to trial counsel on, according to petitioner, February 22, 2015, but petitioner states he never heard back from trial counsel. *See* LD D, F. Petitioner requested the records from the District Attorney's Office on the same date. LD G. The District Attorney's Office retrieved the records from archives in March 2015, but would not send copies to petitioner unless he paid for the copies, and he lacked the funds to do so. LD H, I, J. Petitioner twice requested a waiver of the copy fees and was twice denied, on April 10 and May 5, 2015. LD I, J. Thus, petitioner never obtained the records and filed his habeas petitions without them.

During the relevant period, then, petitioner tried to obtain the second category of records over a period of less than three months, from February 22 to May 5, 2015. Petitioner failed to act diligently in waiting until February 2015 to request the records, as his appellate counsel told him he must in November 2012. And petitioner's efforts to obtain additional records beyond those in the appellate record hardly constitute an extraordinary circumstance. Petitioner was told that he must request the records, he did so over two years later, and he was promptly told he could get them if he paid $30 in copying fees. Moreover, petitioner has made no showing that this circumstance prevented him from filing the Petition in a timely fashion. His efforts took less than three months and apparently ended in early May

2015, yet petitioner waited another six months before he filed his first state habeas petition. Petitioner was able to file all of his habeas petitions, including the instant federal Petition, without the additional records he sought. As such, neither the lack of these records nor the time petitioner spent trying to get them can be said to have prevented petitioner from filing a timely Petition. There is simply no causal connection that would warrant equitable tolling.

For these reasons, petitioner is not entitled to equitable tolling. Accordingly, even after giving petitioner every benefit of the doubt with respect to statutory and gap tolling, the Petition is still untimely. Respondent's motion to dismiss should therefore be granted.

## IV.

## RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Court issue an Order: (1) approving and accepting this Report and Recommendation; (2) granting respondent's Motion to Dismiss (docket no. 12); and (3) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: February 2, 2018

SHERI PYM
United States Magistrate Judge

Appellate Courts Case Information

CALIFORNIA COURTS
THE JUDICIAL BRANCH OF CALIFORNIA

Supreme Court

Change court

*Court data last updated: 01/17/2017 04:44 PM*

**Docket (Register of Actions)**

**KELLER (KELLEY) ON H.C.**
**Case Number S236837**

| Date | Description | Notes |
|---|---|---|
| 08/26/2016 | Petition for writ of habeas corpus filed | Petitioner: Kelley Keller<br>Pro Per 1 volume of lodged exhibits with petition. |
| 11/22/2016 | Petition for writ of habeas corpus denied | |

**Click here** to request automatic e-mail notifications about this case.