

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FILED

SEP 29 2022

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

JAQUES FEARENCE,

Petitioner-Appellant,

v.

BRENDA M. CASH, Warden,

Respondent-Appellee.

No. 22-55679

D.C. No. 2:10-cv-07152-PA-MRW  
Central District of California,  
Los Angeles

ORDER

Before: CLIFTON and VANDYKE, Circuit Judges.

This appeal is from the denial of appellant's Federal Rule of Civil Procedure 60(b) motion. The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not shown "that (1) jurists of reason would find it debatable whether the district court abused its discretion in denying the Rule 60(b) motion and, (2) jurists of reason would find it debatable whether the underlying section [2254 petition] states a valid claim of the denial of a constitutional right." *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015); *see also* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Lynch v. Blodgett*, 999 F.2d 401, 403 (9th Cir. 1993) (order).

Any pending motions are denied as moot.

**DENIED.**

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9 **IN THE UNITED STATES DISTRICT COURT**  
10 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**  
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13 JAQUES FEARENCE,  
14                      Petitioner,  
15                      v.  
16 B.M. CASH, WARDEN,  
17                      Respondent.  
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Case No. CV 10-7152 PA (MRW)

**ORDER DENYING CERTIFICATE  
OF APPEALABILITY**

19  
20        Rule 11 of the Rules Governing Section 2254 Cases in the United  
21 States District Courts requires a district court to issue or deny a  
22 certificate of appealability when it enters a final order adverse to the  
23 applicant. Under 28 U.S.C. § 2253(c)(2), a COA may issue “only if the  
24 applicant has made a substantial showing of the denial of a constitutional  
25 right.”

26        Here, the Court concluded that Petitioner did not state a basis for  
27 relief from judgment under Rule 60. “When the district court denies a  
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1 habeas petition on procedural grounds without reaching the prisoner's  
2 underlying constitutional claim," the Court's determination of whether a  
3 COA should issue is governed by Slack v. McDaniel, 529 U.S. 473 (2000).  
4 Two showings are required to justify the issuance of a COA. Petitioner  
5 must show that jurists of reason would find it debatable whether: (a) "the  
6 petition states a valid claim of the denial of a constitutional right," and  
7 (b) "the district court was correct in its procedural ruling." Id. at 484.  
8 The Supreme Court further explained:

9       Section 2253 mandates that both showings be made before the  
10       court of appeals may entertain the appeal. Each component of the  
11       § 2253(c) showing is part of a threshold inquiry, and a court may  
12       find that it can dispose of the application in a fair and prompt  
13       manner if it proceeds to first resolve the issue whose answer is  
14       more apparent from the record and arguments.

15       Id. at 485. The COA inquiry is made "without full consideration of the  
16       factual or legal bases adduced in support of the claims." Buck v. Davis,  
17       \_\_\_ U.S. \_\_\_, 137 S. Ct. 759, 773-74 (2017) (quotation marks omitted).

18       The Court concludes that petitioner failed to make the requisite  
19       showing that "jurists of reason would find it debatable whether the  
20       district court was correct in its procedural ruling."

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

22       DATE: June 17, 2022

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24       PERCY ANDERSON  
25       UNITED STATES DISTRICT JUDGE

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9       **IN THE UNITED STATES DISTRICT COURT**  
10      **FOR THE CENTRAL DISTRICT OF CALIFORNIA**  
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13      JAQUES OMAR FEARANCE,

14                      Petitioner,

15                      v.

16      B.M. CASH, Warden,

17                      Respondent.  
18

Case No. CV 10-7152 PA (MRW)

**ORDER DENYING REQUEST  
FOR RELIEF UNDER FRCP 60(b)  
(DOCKET # 84)**

19           1.     Petitioner is a state prisoner. He is serving a life sentence  
20 based on his 2004 conviction on murder, drug, and weapons charges.  
21

22      **Prior Federal Proceedings**

23           2.     In 2010, Petitioner sought habeas relief of that conviction in  
24 this Court. The Court dismissed the earlier habeas petition as untimely  
25 and procedurally barred under AEDPA. (Docket # 48, 59-61).  
26

27           3.     In dismissing the action, the Court noted Petitioner's  
28 contention that his lawyer abandoned Petitioner during the course of direct  
appeal. The previous magistrate judge concluded that Petitioner was

1 entitled to equitable tolling for a period of time before the commencement  
2 of the federal habeas action. (Docket # 48 at 6, 12.)

3 4. That finding was not sufficient to render Petitioner's federal  
4 action timely under AEDPA, though. "After regaining control over his  
5 case" from his former lawyer, Petitioner failed to "litigate this action  
6 promptly, diligently, and in compliance with federal law." (*Id.* at 15.) He  
7 presented and exhausted his direct appeal claims in the state supreme  
8 court. (*Id.* at 13.) However, Petitioner then chose to pursue four more  
9 unsuccessful habeas actions in the state court system. The state courts  
10 denied those actions on state law procedural grounds. The passage of time  
11 associated with those unsuccessful actions, in turn, made his later federal  
12 action untimely under federal law.

13 5. As a result of Petitioner's own litigation decisions after his  
14 discovery of the lawyer's alleged misconduct, Petitioner's claims became  
15 untimely and procedurally defaulted under federal law. This Court  
16 dismissed the action on those grounds. (Docket # 48 at 11-15.) The Ninth  
17 Circuit denied a certificate of appealability as to this Court's ruling to  
18 dismiss the habeas action. (Docket # 67.)

19 6. In 2014, Petitioner filed a second habeas action. Fearance v.  
20 Grounds, No. CV 14-4368 PA (MRW) (C.D. Cal.). The 2014 action asserted  
21 ineffective assistance claims against Petitioner's trial and appellate  
22 lawyers that were "essentially indistinguishable" from claims asserted in  
23 the original habeas action. (2014 Action, Docket # 9.) The Court  
24 summarily dismissed the 2014 Action as unauthorized successive habeas  
25 petition. (*Id.*) Petitioner did not seek appellate review of that decision.

26 7. In 2021, Petitioner moved for "relief from judgment" under  
27 Federal Rule of Civil Procedure 60 in the original 2010 habeas action.  
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1 (2010 Action, Docket # 69.) The gist of Petitioner's motion was that his  
2 appellate attorney abandoned him in 2006 and 2007 by failing to file a  
3 petition for review in the state supreme court to preserve and advance  
4 Petitioner's appellate claims.

5 8. The Court determined that the 2021 motion repeated  
6 Petitioner's arguments from the original federal litigation. The Court held  
7 that there was no basis for Rule 60 relief and denied the motion. (Docket  
8 # 71, 79.) The Ninth Circuit denied a certificate of appealability regarding  
9 that ruling. (Docket # 83.)

#### 10 **The Current Motion**

11 9. In June 2022, Petitioner moved for a second time for relief from  
12 judgment of the dismissal of the original habeas action under Rule 60.  
13 (Docket # 84.) The current motion again complains that his lawyer's  
14 abandonment in 2006-07 "jeopardized" Petitioner's rights on direct appeal.  
15 (Docket # 84 at 4-6.) The motion repeats arguments previously presented  
16 in the original habeas briefing and in the first reconsideration request.  
17 Petitioner offers no new evidence or legal authorities to support his claim  
18 for relief from judgment.

#### 19 **Analysis**

20 10. Rule 60(b) allows a court to relieve a party from a previously  
21 entered judgment. The rule applies to several specific circumstances  
22 (Rule 60(b)(1-5)) and a broader catchall category when the applicant  
23 establishes "any other reason that justifies relief." Rule 60(b)(6).

24 11. A party seeking relief under Rule 60(b)(6) "must show  
25 'extraordinary circumstances' justifying the reopening of a final  
26 judgment." Gonzalez v. Crosby, 545 U.S. 524, 535 (2005). Those  
27 circumstances may occur when "the district court (1) is presented with  
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1 newly discovered evidence, (2) committed clear error or the initial decision  
2 was manifestly unjust, or (3) if there is an intervening change in  
3 controlling law[, or] other, highly unusual, circumstances warranting  
4 reconsideration.” School Dist. No. 1J, Multnomah County, Or. v. ACandS,  
5 Inc., 5 F.3d 1255, 1262-63 (9th Cir. 1993).

6 12. Such extraordinary circumstances “rarely occur in the habeas  
7 context.” Wood v. Ryan, 759 F.3d 1117, 1120 (9th Cir. 2014). A district  
8 court’s evaluation of those “extraordinary circumstances” is reviewed on  
9 appeal for abuse of discretion. Phelps v. Alameida, 569 F.3d 1120, 1131  
10 (9th Cir. 2009).

11 \* \* \*

12 13. Petitioner is not entitled to relief from judgment of the  
13 dismissal of his federal action. Nothing in his motion suggests that this  
14 federal court made any error in its original determination regarding the  
15 untimeliness or procedural defects with Petitioner’s claims. Indeed, the  
16 Court ruled in Petitioner’s favor in finding that Petitioner was entitled to  
17 equitable tolling for part of the AEDPA limitation period based on the  
18 lawyer’s conduct.

19 14. But Petitioner does not convincingly show that the remainder  
20 of the Court’s analysis – which focused on Petitioner’s action after the  
21 lawyer’s exit from his case – was incorrect in any way. Further, he offers  
22 no new evidence or significant change in governing law that demonstrates  
23 extraordinary circumstances in his case. Gonzalez, 545 U.S. at 535; School  
24 Dist. No. 1J, 5 F.3d at 1262-63; Wood, 759 F.3d at 1120. Notably, on  
25 two occasions, the Ninth Circuit has found no appealable issue regarding  
26 this Court’s rulings on the attorney abandonment / untimely petition  
27 questions. (Docket # 67, 83.)  
28

1           15. For the foregoing reasons, the Court exercises its discretion to  
2 deny the request for relief from judgment in the action. The motion is  
3 DENIED. (Docket # 84.)

4           IT IS SO ORDERED.

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7 Dated: June 17, 2022

  
PERCY ANDERSON  
UNITED STATES DISTRICT JUDGE

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10 Presented by:

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14 HON. MICHAEL R. WILNER  
15 UNITED STATES MAGISTRATE JUDGE  
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9 UNITED STATES DISTRICT COURT  
10 CENTRAL DISTRICT OF CALIFORNIA  
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12 JAQUES FEARENCE,

13 Petitioner,

14 vs.

15 B.M. CASH, Warden,

16 Respondent.  
17  
18

) Case No. CV 10-7152 PA (MRW)

) REPORT AND RECOMMENDATION  
) OF UNITED STATES MAGISTRATE  
) JUDGE

19 This Report and Recommendation is submitted to the Honorable  
20 Percy Anderson, United States District Judge, pursuant to 28 U.S.C. § 636 and  
21 General Order 05-07 of the United States District Court for the Central District of  
22 California.

23 I. **SUMMARY OF RECOMMENDATION**

24 This is a state habeas action. Petitioner Jaques Fearence seeks federal  
25 review of his first degree murder conviction. Petitioner filed his action in this  
26 Court nearly five years after his state court conviction became final. Based on the  
27 federal habeas statute and a recent U.S. Supreme Court decision governing habeas  
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1 actions, his claims appear to be time-barred and procedurally defaulted as a matter  
2 of law.

3 In response to an earlier dismissal motion, Petitioner argued that he was  
4 entitled to equitable tolling of the statute of limitations in his habeas action due to  
5 misconduct by his appellate lawyer. Yet, even giving Petitioner the benefit of such  
6 tolling, his habeas action still would fall well outside the time period mandated by  
7 statute. While he may have been poorly served by his former lawyer, Petitioner  
8 waited for years after discovering the attorney's misconduct before pursuing  
9 federal relief. Under the most lenient application of the statutory deadlines and  
10 tolling provisions, Petitioner's federal action is still untimely.

11 The Court previously denied a request to dismiss the action on procedural  
12 grounds. However, after considering a recently-decided Supreme Court case and  
13 reviewing the substance of the lodged documents filed in support of the answer to  
14 the petition, the Court informed the parties that it intended to take up the timeliness  
15 issue again. The Court offered Petitioner an opportunity to state his position, and  
16 provided him with a copy of the relevant Supreme Court decision. Petitioner  
17 declined to submit any response.

18 The Court therefore concludes that this federal habeas action is untenable,  
19 and recommends that the petition be dismissed as untimely and procedurally  
20 barred.

## 21 **II. FACTS AND PROCEDURAL BACKGROUND**

22 Petitioner shot and killed a Long Beach drug dealer in a turf-related dispute.  
23 The evidence at trial included several witnesses to the shooting and an  
24 audiorecording of a telephone call in which Petitioner told police "I'm gonna kill  
25 again, mother f\*\*\*er." (Lodgment # 5.)

26 A jury convicted Petitioner of murder, drug, and weapons charges. In  
27 September 2004, the trial court sentenced Petitioner to a prison term of over  
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1 fifty-one years to life. (Docket # 1 (Petition) at 2.)<sup>1</sup> Petitioner hired a private  
2 attorney (McKinney) to represent him at sentencing and on direct appeal.  
3 Petitioner asserted numerous grounds for relief on appeal. In a detailed, 21-page  
4 decision, the California Court of Appeal affirmed Petitioner's conviction in late  
5 October 2005. (Lodgment # 5.)

6 **A. Petitioner Fails to Seek State Supreme Court Review**

7 Attorney McKinney did not file a petition for review in the California  
8 Supreme Court. The reasons for this are unclear from the record. However,  
9 according to declarations submitted by Petitioner, Petitioner's brother, and  
10 McKinney, it appears that McKinney failed to apprise Petitioner about the status of  
11 his state court appeal while Petitioner was in prison, and was not paid for the  
12 appellate work he performed for Petitioner.

13 In his declaration, Petitioner explains that he knew McKinney filed  
14 Petitioner's direct appeal in 2005. (Docket # 1 at 75.) Petitioner claims that he  
15 sent the lawyer a letter inquiring about the appeal in January 2006 that went  
16 unanswered. Petitioner also asserts that he called the lawyer's office and left  
17 messages regarding his case, but did not hear back from counsel.

18 Petitioner further claims that he relied on family members to contact  
19 counsel. According to the declaration of Petitioner's brother, the brother was  
20 responsible for hiring private counsel for Petitioner after his conviction. (Docket  
21 # 1 at 78.) The brother provided McKinney with some money for his fees in  
22 July 2004 in advance of sentencing, but did not pay McKinney the full amount  
23 owed. Despite trying to contact counsel numerous times, the brother never heard  
24 from counsel again. Petitioner's brother was incarcerated in an unrelated case at  
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27 <sup>1</sup> All page citations to docketed documents refer to the page numbers  
28 assigned via CM/ECF.

1 some point, so other family members left messages with McKinney in November  
2 2005, on several days in 2006, and in early 2007.

3 McKinney tells a somewhat different story. According to a declaration from  
4 the lawyer (submitted after the Court's consideration of the original dismissal  
5 motion (Lodgment # 22)), McKinney was not hired or paid to represent Petitioner  
6 in the state supreme court. McKinney acknowledges that Petitioner's brother hired  
7 him in mid-2004, and that the lawyer handled the sentencing and post-trial motions  
8 in the trial court. McKinney then filed the appellate brief in March 2005.

9 However, Petitioner's family apparently owed the lawyer a portion of his fees.  
10 McKinney contends that he had only one contact with Petitioner's brother in 2005  
11 to deal with the unpaid fee issue, but that McKinney received no further payment  
12 from nor had any additional contact with Petitioner or his family after that.

13 McKinney states that it his practice to file a petition for review in the  
14 California Supreme Court "in every case." In Petitioner's case, though, McKinney  
15 says that he received the adverse appellate court decision and determined that

16 "filing a petition for review [in the state supreme court] would serve no purpose."

17 McKinney believed that Petitioner had no viable claims and no "chance of success  
18 in the federal court if a federal habeas petition was filed." According to  
19 McKinney, due to an undefined "miscommunication" with his staff, the lawyer did  
20 not file a petition for review with the state supreme court. (*Id.* at 4.)

21 McKinney's declaration further states that "because of miscommunication  
22 and inadvertence within my office," McKinney failed to send Petitioner a letter  
23 informing him that the court affirmed Petitioner's conviction. The Court notes that  
24 McKinney has a disciplinary history with the State Bar in this regard. According  
25 to the bar's website, McKinney was the subject of a 2003 private reproof and a  
26 2006 public reproof (the subject of which was failure to ensure that a criminal  
27 defense client was informed of his decision not to pursue an appeal on her behalf).

1 See <http://members.calbar.ca.gov/fal/Member/Detail/66803> (accessed Nov. 2,  
2 2011).

3 **B. Petitioner Tries to Reopen His Appeal**

4 Because no petition for review was filed in the state supreme court,  
5 Petitioner's conviction became final in December 2005 (40 days after the decision  
6 in the state appellate court). After writing to the State Bar and another legal  
7 service agency in 2007, Petitioner contacted the California Appellate Project in Los  
8 Angeles (CAP). An attorney from CAP informed Petitioner in October 2007 that  
9 the Court of Appeals affirmed his conviction several years earlier.

10 The CAP attorney filed a motion in the appellate court to reopen his appeal  
11 so he could then file a petition for review in the state supreme court. The CAP  
12 attorney wrote to Petitioner and explained that she had to show the court that "you  
13 did everything you could to help yourself after sentencing" and diligently pursued  
14 the case. (Docket # 1 at 91.) In his declaration, Petitioner stated that the CAP  
15 lawyer told him that he "could proceed to federal court" if the motion was denied.  
16 (Docket # 1 at 77.) The appellate court denied the motion to reopen the appeal in  
17 February 2008 without discussion. (Docket # 1 at 94.)

18 **C. Petitioner Files Five State Habeas Actions**

19 Later in 2008, Petitioner filed a habeas petition in the supreme court. The  
20 habeas petition asserted the same issues that he presented in his direct appeal to the  
21 Court of Appeal. Petitioner did not appear to have the assistance of the CAP  
22 attorney or any other lawyer in submitting the habeas petition. The California  
23 Supreme Court denied the habeas petition without comment in April 2009.  
24 (Lodgment # 7.)

25 Petitioner then filed three additional habeas petitions in the state supreme  
26 court during 2009 and 2010. In contrast to the first habeas petition, those next  
27 petitions alleged claims that were not presented in Petitioner's original appeal. The  
28

1 supreme court denied each of the three habeas petitions as untimely. The court  
2 signified this by citing to its decisions in In re Clark, 5 Cal. 4th 750 (1993), and  
3 In re Robbins, 18 Cal. 4th 770, 780 (1998). (Lodgment # 9, 11, 13.) Petitioner  
4 subsequently filed a fifth state habeas action in the California Court of Appeal in  
5 March 2010. In a brief order denying the petition, the court noted that Petitioner  
6 was procedurally defaulted from challenging the validity of his 2004 conviction  
7 due to his “inadequately explained delay” in seeking relief. The court also denied  
8 the petition on the merits. (Lodgment # 15.)

9 **D. Petitioner’s Federal Habeas Action**

10 Petitioner ultimately filed this federal habeas action in September 2010. The  
11 petition contains eight claims – four claims that Petitioner presented on direct  
12 appeal (the “Direct Appeal Claims” (grounds 3, 5, 6, and 8 of the petition)), and  
13 four additional claims that Petitioner advanced in his later state habeas actions (the  
14 “State Habeas Claims” (grounds 1, 2, 4, and 7 of the petition)). Petitioner filed his  
15 federal action nearly five years after his conviction became final in late 2005, and  
16 three years after his former lawyer was out of the case. Looked at another way, he  
17 filed the federal petition a year and a half after the state supreme court denied the  
18 habeas petition in April 2009 in which Petitioner asserted his original appellate  
19 claims.

20 Respondent moved to dismiss the federal petition as untimely. (Docket  
21 # 13.) Respondent contended that Petitioner’s federal claims were time-barred and  
22 that he was not entitled to any tolling of the AEDPA limitations period as a result  
23 of his state habeas filings. In response, Petitioner asserted that he was entitled to  
24 equitable tolling of the federal limitations period due to his private attorney’s  
25 conduct. (Docket # 19.)

26 The Court agreed that Petitioner was “entitled to a period of equitable tolling  
27 on the ground of egregious attorney misconduct,” although it did not specify how  
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1 long that period was. (Docket # 20 at 1.) The Court concluded that “dismissal on  
2 untimeliness grounds is not warranted at this time.” However, the Court expressly  
3 granted Respondent leave to renew its dismissal request by motion or in the answer  
4 to the petition. Respondent subsequently answered the petition on the merits in  
5 May 2011. The answer included a renewed argument that the federal action was  
6 time-barred, along with an additional declaration from McKinney. (Docket # 33.)

7 The Court issued its order denying the dismissal request in January 2011. At  
8 the time of the order, the Court did not have the benefit of the U.S. Supreme  
9 Court’s unanimous decision in Walker v. Martin, \_\_\_ U.S. \_\_\_, 131 S. Ct. 1120,  
10 1127 (decided in February 2011). In September 2011, the Court<sup>2</sup> instructed the  
11 parties that they could submit supplemental briefing as to the “applicability (if any)  
12 of the Walker ruling to the claims in this action and to Petitioner’s equitable tolling  
13 argument.” (Docket # 45.) The Court also sent a copy of the Walker decision to  
14 Petitioner. Respondent filed a supplemental brief arguing that the Walker decision  
15 rendered several of Petitioner’s claims procedurally defaulted and barred from  
16 federal review. (Docket # 46.) Petitioner failed to submit any response to the  
17 Court’s order, though.

### 18 **III. DISCUSSION**

19 Petitioner’s habeas petition should be dismissed on procedural grounds. The  
20 Direct Appeal Claims are time-barred under AEDPA. Assuming that Petitioner is  
21 entitled to some amount of equitable tolling due to McKinney’s conduct, that  
22 period ended when Petitioner discovered the misconduct and took control of his  
23 state habeas action. The lawyer was not the cause of Petitioner’s subsequent  
24 failure to file promptly in federal court after the impact of the attorney’s actions  
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26  
27 <sup>2</sup> This case was originally assigned to Magistrate Judge Woehrle. It  
28 was reassigned to Magistrate Judge Wilner in April 2011.

1 ceased. Further, as to the State Habeas Claims, those issues are procedurally  
2 defaulted and barred from federal consideration under Walker.

3 **A. Timeliness Requirements Under AEDPA**

4 Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),  
5 state prisoners have a one-year period within which they must seek federal habeas  
6 review of their habeas claims. 28 U.S.C. § 2244(d)(1). The limitations period is  
7 triggered when state court appellate review becomes final, an unlawful state  
8 impediment to filing is removed, a new constitutional right is made retroactive, or  
9 the factual predicate of the claim(s) presented could have been discovered with  
10 “due diligence.” 28 U.S.C. § 2244(d)(1)(A-D); Lee v. Lampert, 653 F.3d 929, 933  
11 (9th Cir. 2011).

12 The limitations period is tolled when a prisoner properly files an application  
13 for state post-conviction review (statutory tolling) and during the period of time  
14 between such state habeas proceedings (gap tolling). 28 U.S.C. § 2244(d)(2).  
15 However, a habeas petition rejected by a state court as untimely is not “properly  
16 filed” within the meaning of the statutory tolling provisions of AEDPA. Pace v.  
17 DiGuglielmo, 544 U.S. 408, 415 (2005); Lahey v. Hickman, 633 F.3d 782, 785-86  
18 (9th Cir. 2011) (untimely state habeas petition subject to Clark denial “must be  
19 treated as improperly filed, or as though it never existed, for purposes of  
20 section 2244(d)”).

21 AEDPA’s statutory limitations period may also be tolled for equitable  
22 reasons “in appropriate cases.” Holland v. Florida, \_\_\_ U.S. \_\_\_, 130 S. Ct. 2549,  
23 2560 (2010). The Ninth Circuit recognized the availability of equitable tolling of  
24 the one-year statute of limitations in situations where “extraordinary circumstances  
25 beyond a prisoner’s control make it impossible to file a petition on time.”  
26 Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003). A prisoner must establish  
27 that: (1) he has been pursuing his rights diligently; and (2) some extraordinary  
28



1 circumstances caused the delay. Pace, 544 U.S. at 418. This is a highly fact-  
2 dependent determination. Spitsyn, 345 F.3d at 799.

3 The words “extraordinary” and “impossible” suggest the limited availability  
4 of this doctrine. Indeed, equitable tolling is “unavailable in most cases.” Miles v.  
5 Prunty, 187 F.3d 1104, 1007 (9th Cir. 1999). This difficult burden ensures the  
6 exceptions do not swallow the rule. Miranda v. Castro, 292 F.3d 1063, 1066  
7 (9th Cir. 2002). The rare cases warranting relief involve extreme circumstances  
8 beyond a prisoner’s control that directly prevented the petitioner from filing.<sup>3</sup>

9 At some point, though, a prisoner’s entitlement to equitable tolling ends. A  
10 circumstance that prevents a timely federal habeas filing will not “toll the statute of  
11 limitations indefinitely.” Guillory v. Roe, 329 F.3d 1015, 1018 (9th Cir. 2003). A  
12 habeas petitioner bears the burden of demonstrating “the necessary causal link  
13 between counsel’s alleged actions and the untimeliness” of the habeas action filed  
14 in federal court. United States v. Buckles, 647 F.3d 883, 890 (9th Cir. 2011).  
15 Where additional delay in filing a federal habeas action “is not attributable to  
16 counsel,” equitable tolling does not apply. Id.

17 The Ninth Circuit cautions federal courts to closely examine equitable  
18 tolling claims where an attorney’s misconduct in state court “had no bearing on  
19 [the prisoner’s] ability to file a timely federal habeas petition.” Randle v.

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21  
22 <sup>3</sup> See, e.g., Harris v. Carter, 515 F.3d 1051, 1054-57 (9th Cir. 2008)  
23 (petitioner entitled to equitable tolling because he relied on the court’s legally  
24 erroneous holding); Spitsyn, 345 F.3d at 800-02 (equitable tolling available where  
25 the attorney does nothing, is completely unresponsive, and failed to return the  
26 petitioner’s file after the statute of limitations had run); Corjasso v. Ayers,  
27 278 F.3d 874, 877-79 (9th Cir. 2002) (equitable tolling warranted where district  
28 court mishandled a petition causing it to be untimely); Miles, 187 F.3d at 1107  
(equitable tolling available where prison officials delayed mailing an otherwise  
timely petition).

1 Crawford, 604 F.3d 1047, 1058 (9th Cir. 2010) (counsel's failure to file appeal in  
2 state court "simply meant that [petitioner] had one year from the expiration of his  
3 time to file a notice of appeal in which to initiate a federal habeas action – it did  
4 not prevent him from filing the petition"); see also Spitsyn, 345 F.3d at 802  
5 (prisoner must exercise reasonable diligence in attempting to file federal action  
6 after exceptional circumstances began otherwise "the link of causation between the  
7 extraordinary circumstances and the failure to file is broken"); Guillory, 329 F.3d  
8 at 1018 ("the relevant measure of diligence" for determining equitable tolling is  
9 "how quickly a petitioner sought to exhaust" claims in state court after erroneous  
10 federal court dismissal and "how quickly he returned to federal court after doing  
11 so"). Moreover, a pro se prisoner's "confusion or ignorance of the law is not,  
12 itself, a circumstance warranting equitable tolling." Waldron-Ramsay v. Pacholke,  
13 556 F.3d 1008, 1013 n.4 (9th Cir. 2009).

14 **B. Exhaustion and Procedural Default Under AEDPA**

15 A prisoner must ordinarily exhaust remedies available in state court before  
16 seeking federal habeas review. 28 U.S.C. § 2254(b)(1)(A). AEDPA requires that a  
17 prisoner present his claims to the state's highest court for consideration. Rose v.  
18 Lundy, 455 U.S. 509 (1982). The state courts must be afforded the "first  
19 opportunity to address and correct alleged violations of [the] prisoner's federal  
20 rights." Walker v. Martin, \_\_\_ U.S. \_\_\_, 131 S. Ct. 1120, 1127 (2011) (quotation  
21 omitted).

22 A federal court may not consider a state prisoner's habeas claim "if it runs  
23 afoul of the procedural bar doctrine," a concept that is "closely related [to], but  
24 distinct" from, exhaustion. Cooper v. Neven, 641 F.3d 322, 327 (9th Cir. 2011).  
25 A claim is procedurally defaulted when: (1) a state court declines to address a  
26 petitioner's federal claims for failure to comply with a state procedural  
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28

1 requirement; and (2) the state court decision rests on independent and adequate  
2 state procedural grounds. Coleman v. Thompson, 501 U.S. 722, 729-30 (1991).

3 In Walker, the Supreme Court unanimously held that the practice of  
4 California courts to deny habeas petitions as untimely is an adequate and  
5 independent state procedural ground that bars relief in federal court. Walker,  
6 131 S. Ct. at 1124. California courts will “signal that a habeas petition is denied as  
7 untimely by citing the controlling decisions, i.e., Clark and Robbins.” Id. The  
8 Walker Court determined that the state rule established under those cases is “firmly  
9 established” and “regularly followed” by the state court. Id. at 1128-30.  
10 Therefore, when a California court issues a Clark-Robbins denial of a state habeas  
11 petition, the prisoner is procedurally defaulted from raising that claim on federal  
12 habeas review. Id.; see also Alvarez v. Wong, 425 Fed. Appx. 652, 2011 WL  
13 1252307 (9th Cir. Apr. 5, 2011) (applying Walker to affirm dismissal of untimely  
14 petition).

15 As a limited exception to the procedural bar doctrine, a federal court may  
16 still consider the claim if petitioner shows: (1) good cause for his failure to exhaust  
17 the claim and prejudice from the alleged constitutional violation; or  
18 (2) a fundamental miscarriage of justice. Cooper, 641 F.3d at 327. The  
19 miscarriage of justice prong of this test is synonymous with a claim of actual  
20 factual innocence to the offense of conviction. Sawyer v. Whitley, 505 U.S. 333,  
21 339-40 (1992).

### 22 C. Analysis of Timeliness of Petitioner’s Claims

23 Petitioner’s federal action is untimely and certain of his claims are precluded  
24 by the procedural bar rule. The Court starts its analysis with the premise that  
25 Petitioner was not fully aware of the status of his case on state appeal as he was  
26 serving his prison term, and that he was poorly served by his appellate lawyer. The  
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1 Court previously found that Petitioner was entitled to some period of equitable  
2 tolling as a result of the lawyer's misconduct. That finding is the law of the case.<sup>4</sup>

3 From the time of the state appellate court's affirmance of Petitioner's  
4 conviction on direct appeal (October 2005) through his discovery of the actual  
5 status of his case (October 2007), Petitioner is entitled to equitable tolling of the  
6 AEDPA statute of limitations. That time period can be attributed to the attorney's  
7 actions, and continued through the time that the CAP attorney assisted Petitioner in  
8 learning the state of his appeal.

9 After regaining control over his case, Petitioner demonstrated some  
10 diligence in pursuing his claims in state court. He filed an unsuccessful motion for  
11 relief in the state court of appeal and a habeas petition in the state supreme court

12 \_\_\_\_\_  
13 <sup>4</sup> Magistrate Judge Woehrle previously found McKinney's failure to  
14 file a petition for review in the state supreme court to be "egregious attorney  
15 misconduct" analogous to that in Holland. The Court will not revisit that  
16 determination. However, after reviewing the record and the supplemental  
17 materials filed with Respondent's answer, an argument could be made that  
18 Petitioner's circumstance differs considerably from Holland's. In Holland,  
19 petitioner was a death row inmate in a capital case for whom the state specifically  
20 appointed counsel to represent him "in all state and federal postconviction  
21 proceedings." Holland, 130 S. Ct. at 2555. Holland diligently communicated with  
22 the lawyer for the specific purpose of ensuring a timely filing of his federal habeas  
23 petition.

24 By contrast, in the present case: (a) Petitioner did not appear to have hired  
25 McKinney or paid his full fee for representation beyond the original sentencing  
26 and direct appeal to the California Court of Appeal; and (b) Petitioner and his  
27 representatives did not pursue McKinney with the diligence described in Holland  
28 regarding the filing of the state supreme court petition in the years following his  
conviction and appeal. However, given McKinney's admission that he failed to  
communicate properly with his incarcerated client about the status of the appeal –  
and the lawyer's checkered disciplinary past – the Court sees no need to reconsider  
the decision to extend some equitable tolling to Petitioner.

1 that contained the Direct Appeal Claims. Equitable tolling plausibly applies to the  
2 period during which those actions were underway and in progress (October 2007  
3 through April 2009).

4 When the California Supreme Court denied Petitioner's first habeas petition  
5 in early 2009, though, he was obliged to bring his Direct Appeal Claims to federal  
6 court promptly. The supreme court's silent denial of that petition indicated that it  
7 "adjudicated the claim on the merits." Harrington v. Richter, \_\_\_ U.S. \_\_\_, 131 S.  
8 Ct. 770, 785 (2011). The Direct Appeal Claims were then fully exhausted and ripe  
9 for potential federal habeas review with the benefit of equitable tolling as found by  
10 the Court. That comports with the CAP attorney's earlier observation to Petitioner  
11 that he could file a habeas action in federal court following the resolution of his  
12 motion to reopen his appeal in state court.

13 Petitioner chose not to file in federal court, though. Instead, he filed four  
14 additional petitions in the state court of appeal and supreme court in 2009 and 2010  
15 and continued to advance his State Habeas Claims. Petitioner was not entitled to  
16 any tolling during that period. Lakey, 633 F.3d at 785-86. The state courts  
17 repeatedly told him – through the Clark-Robbins denials – that his habeas actions  
18 were untimely. Further, Attorney McKinney was out of the picture years earlier  
19 and was not to blame for Petitioner's post-2007 or post-2009 litigation decisions.  
20 As such, the causal link that previously earned him the extraordinary relief of  
21 equitable tolling was gone. Buckles, 647 F.3d at 890; Randle, 604 F.3d at 1058.

22 Directly put, after the state supreme court's initial adverse decision,  
23 Petitioner filed his next habeas actions in the wrong court. No attorney misadvised  
24 Petitioner or prevented him from promptly filing his petition in this Court.  
25 Petitioner was not entitled to an indefinite amount of time to file this action.  
26 Rather, as a pro se litigant, he was required to act diligently to quickly get into  
27 federal court. Guillory, 329 F.3d at 1018. By the time he did so in September  
28

1 2010, seventeen months passed after the state supreme court's ruling on his Direct  
2 Appeal Claims. The Court finds that delay does not demonstrate diligence.  
3 Equitable tolling does not apply, and the federal petition was not timely filed.

4 \* \* \*

5 In addition, the State Habeas Claims in the petition are procedurally barred  
6 under Walker. Four state courts separately determined that Petitioner's claims in  
7 his numerous state habeas filings were not timely when presented many years after  
8 Petitioner's criminal conviction. Each received Clark-Robbins denials, which, as  
9 Walker explains, bars later federal review of those claims. The direct operation of  
10 the Supreme Court's clear statement to lower federal courts in California prevents  
11 consideration of those claims.

12 Petitioner declined to file a response to this Court's inquiry regarding the  
13 potential impact of Walker on his State Habeas Claims. Nevertheless, the Court  
14 independently reviewed those claims in the petition and concludes that Petitioner  
15 cannot satisfy the cause/prejudice or actual innocence exceptions to the procedural  
16 bar rule under Cooper. Petition Claim 2 alleges a Fourth Amendment violation  
17 that cannot lead to federal habeas relief. See Stone v. Powell, 428 U.S. 465 (1976).  
18 Petition Claim 4 alleges ineffective assistance by Petitioner's appellate lawyer for  
19 failing to file the petition for review in the state court and thereby preventing  
20 federal court review of his claims. Yet, as explained above, Petitioner was entitled  
21 to file a timely petition in this Court asserting the Direct Appeal claims, but chose  
22 not to do so. There can be no prejudice as to the procedural bar of that claim.  
23 Petition Claim 7 alleges a restitution issue under state law that does not mention  
24 any federal constitutional violation. Finally, although Petition Claim 1 is entitled  
25 "Actual/Factual Innocence," it offers no facts or newly-discovered evidence to  
26 support his claim. At best, Petitioner argues that his upper-term sentence was  
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1 unconstitutional. However, despite several pages of legal argument, Petitioner  
2 fails to provide any facts to show how his sentence was imposed illegally.

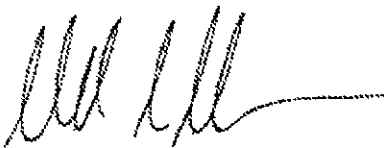
3 The Court finds no basis to avoid the operation of the procedural bar  
4 doctrine to these insubstantial claims. Walker directly prohibits the Court from  
5 considering the State Habeas Claims presented in the federal petition.

6 **IV. RECOMMENDATION**

7 The Court closely reviewed the trial court record and appellate decision in  
8 this case. The prosecution presented considerable evidence of Petitioner's guilt  
9 regarding a particularly cold-blooded killing. The original appellate decision  
10 analyzed the facts, evidence, and legal arguments on appeal in great detail. The  
11 Court recognizes that Petitioner's appellate attorney did not adequately represent  
12 him beyond that stage, but the state supreme court apparently rectified that  
13 situation by considering Petitioner's first direct habeas action. After that, though,  
14 the responsibility to litigate this action promptly, diligently, and in compliance  
15 with federal law fell to Petitioner alone. After careful consideration of the issues,  
16 the Court finds that Petitioner failed to do so.

17 IT IS THEREFORE RECOMMENDED that the District Judge issue an  
18 order accepting the findings and recommendations in the Report and enter  
19 judgment dismissing this case with prejudice.

20  
21 DATED: November 8, 2011

  
\_\_\_\_\_  
MICHAEL R. WILNER  
UNITED STATES MAGISTRATE JUDGE