

Appendix A

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUN 6 2023

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

BRUCE WANZO, Jr.,

Petitioner-Appellant,

v.

CHRISTIAN PFEIFFER, Warden,

Respondent-Appellee.

No. 20-56072

D.C. No.

2:19-cv-05764-JLS-SP

Central District of California,
Los Angeles

ORDER

Before: McKEOWN, GOULD, and IKUTA, Circuit Judges.

Appellant's Motion for Reconsideration (Dkt. 48) will not be entertained because the mandate has issued. No further filings will be entertained in this closed matter.

Appendix B

FILED

NOT FOR PUBLICATION

APR 3 2023

UNITED STATES COURT OF APPEALS

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

FOR THE NINTH CIRCUIT

BRUCE WANZO, Jr.,

No. 20-56072

Petitioner-Appellant,

D.C. No.
2:19-cv-05764-JLS-SP

v.

CHRISTIAN PFEIFFER, Warden,

MEMORANDUM*

Respondent-Appellee.

Appeal from the United States District Court
for the Central District of California
Josephine L. Staton, District Judge, Presiding

Submitted March 30, 2023**
San Francisco, California

Before: McKEOWN, GOULD, and IKUTA, Circuit Judges.

Bruce Wanzo, Jr. appeals from the district court's judgment dismissing his petition for a writ of habeas corpus on the ground that it was untimely pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C.

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See Fed. R. App. P. 34(a)(2).*

§ 2244(d)(1). We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and we affirm.

Wanzo does not contest the district court's dismissal of his claims challenging his 1990 conviction as untimely and has therefore forfeited any objection to the dismissal of those claims. *See Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 738 (9th Cir. 1986).

Wanzo failed to raise any constitutional challenge to the Los Angeles County Superior Court's 2019 denial of his request for resentencing under former section 1170.95 of the California Penal Code¹ in his federal habeas petition. Nor did he raise any such challenge in response to a show cause order of the magistrate judge, in his objections to the magistrate judge's report and recommendation, or in his motion for a Certificate of Appealability (COA). Therefore, Wanzo has forfeited any such challenge, and we affirm on that basis. *See White v. Klitzkie*, 281 F.3d 920, 921–22 (9th Cir. 2002). We deny as moot Wanzo's motion for judicial notice of his state court records, Dkt 25.

AFFIRMED.

¹ The statute was renumbered as section 1172.6 of the California Penal Code..

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

DEC 20 2021

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

BRUCE WANZO, Jr.,

Petitioner-Appellant,

v.

CHRISTIAN PFEIFFER, Warden,

Respondent-Appellee.

No. 20-56072

D.C. No. 2:19-cv-05764-JLS-SP
Central District of California,
Los Angeles

ORDER

Before: CLIFTON and BENNETT, Circuit Judges.

After reviewing the underlying petition and concluding that it states at least one federal constitutional claim debatable among jurists of reason, namely ineffective assistance of counsel, we grant the request for a certificate of appealability with respect to the following issue: whether the district court properly denied appellant's habeas petition as untimely, including whether the denial of appellant's motion for relief under California Penal Code § 1170.95 constituted a new intervening judgment that restarted AEDPA's one-year statute of limitations, *see Smith v. Williams*, 871 F.3d 684, 687 (9th Cir. 2017); *Clayton v. Biter*, 868 F.3d 840, 844 (9th Cir. 2017). *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); *Lambright v. Stewart*, 220 F.3d 1022, 1026 (9th Cir. 2000); *see also* 9th Cir. R. 22-1(e).

A review of this court's docket reflects that the filing and docketing fees for this appeal are due. Within 21 days of the filing date of this order, appellant must either (1) pay to the district court the \$505.00 filing and docketing fees for this appeal and file in this court proof of such payment, or (2) file in this court a motion to proceed in forma pauperis, accompanied by a completed Form CJA 23. Failure to pay the fees or file a motion to proceed in forma pauperis will result in the automatic dismissal of the appeal by the Clerk for failure to prosecute. *See* 9th Cir. R. 42-1.

If appellant moves to proceed in forma pauperis, appellant may simultaneously file a Form 24 motion for appointment of counsel.

The Clerk will serve a copy of Form CJA 23 and Form 24 on appellant.

If appellant pays the fees, the opening brief is due March 21, 2022. There was no appearance by the appellee in the district court. The Clerk will serve an electronic copy of this order on Susan Sullivan Pithey, Senior Assistant Attorney General, Office of the Attorney General, State of California, 300 South Spring Street, Suite 1702, Los Angeles, CA 90013-1230, (213) 269-6194, who is requested to enter a notice of appearance on behalf of appellee in this case. By April 20, 2022, appellee must file an answering brief or a letter indicating that no answering brief will be filed. If appellee files an answering brief, the optional reply brief will be due 21 days after service of the answering brief.

If appellant files a motion to proceed in forma pauperis, the briefing schedule will be set upon disposition of the motion.

The Clerk will serve on appellant a copy of the "After Opening a Case – Pro Se Appellants" document.

If Christian Pfeiffer is no longer the appropriate appellee in this case, counsel for appellee must 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).

Appendix D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BRUCE WANZO, JR.,) Case No. CV 19-5764-JLS (SP)
Petitioner,)
) ORDER DENYING A CERTIFICATE OF
) APPEALABILITY
v.)
)
CHRISTIAN PFEIFFER, Warden,)
)
Respondent.)
)

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

1 notice of appeal must be filed even if the district court issues a certificate of
2 appealability.

3

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

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

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

24 *Id.* at 485.

25 Here, the Court had denied the Petition as untimely. After duly considering
26 petitioner’s contentions in support of the claims alleged in the Petition, including in his
27 objections to the Report and Recommendation, the Court finds and concludes that
28 petitioner has failed to make the requisite showing, or any showing, that “jurists of

1 reason would find it debatable whether the district court was correct in its procedural
2 ruling."

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

4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



DATED: September 6, 2020

HONORABLE JOSEPHINE L. STATON
UNITED STATES DISTRICT JUDGE

Presented by:



Sheri Pym
United States Magistrate Judge

1
2
3
4
5 JS-6
6
7

5 UNITED STATES DISTRICT COURT
6 CENTRAL DISTRICT OF CALIFORNIA
7

8 BRUCE WANZO, JR.,) Case No. CV 19-5764-JLS (SP)
9 Petitioner,)
10) JUDGMENT
11 v.)
12 CHRISTIAN PFEIFFER, Warden,)
13 Respondent.)
14

15
16 Pursuant to the Order Accepting Findings and Recommendation of United States
17 Magistrate Judge,

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

20
21
22 DATED: September 6, 2020

23
24
25
26
27
28 
HONORABLE JOSEPHINE L. STATON
UNITED STATES DISTRICT JUDGE

Appendix E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BRUCE WANZO, JR.,) Case No. CV 19-5764-JLS (SP)
Petitioner,)
v.) ORDER ACCEPTING FINDINGS
CHRISTIAN PFEIFFER, Warden,) AND RECOMMENDATION OF
Respondent.) 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.

IT IS THEREFORE ORDERED that Judgment will be entered denying the Petition and dismissing this action with prejudice.

DATED: September 6, 2020

HONORABLE JOSEPHINE L. STATON
UNITED STATES DISTRICT JUDGE

Joseph Ehr

Appendix F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

11 BRUCE WANZO, JR., } Case No. CV 19-5764-JLS (SP)
12 Petitioner, } REPORT AND
13 v. } RECOMMENDATION OF UNITED
14 CHRISTIAN PFEIFFER, Warden, } STATES MAGISTRATE JUDGE
15 Respondent. }

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

22 I.

23 **INTRODUCTION**

24 On July 2, 2019, petitioner Bruce Wanzo, Jr. filed a Petition for Writ of
25 Habeas Corpus by a Person in State Custody under 28 U.S.C. § 2254 (“Petition”).
26 Petitioner challenges his 1990 conviction for second degree murder in the Los
27 Angeles County Superior Court. Petitioner raises three grounds for relief: (1) there

1 was a conspiracy to keep petitioner from accessing the courts; (2) prosecutorial
 2 misconduct because the prosecutor was related to the victim but failed to recuse
 3 herself; and (3) ineffective assistance of counsel.

4 On July 22, 2019, the court issued an Order to Show Cause Why Petition
 5 Should Not Be Dismissed as Untimely (“OSC”). Petitioner responded to the OSC
 6 on September 23, 2019.

7 For the reasons discussed below, the court finds the Petition is untimely. It
 8 is therefore recommended the Petition be dismissed with prejudice.

9 **II.**

10 **PROCEEDINGS**¹

11 By petitioner’s account, on June 29, 1990, a jury convicted petitioner of
 12 second degree murder, attempted second degree murder, and found true gun and
 13 great bodily injury allegations.² Pet. at 1-2. Petitioner was sentenced to 29 years
 14 to life in prison. *Id.* at 1. On August 20, 1990, petitioner filed a direct appeal in
 15 the California Court of Appeal in case number B054589.³ Pet. at 2. The Court of
 16 Appeal affirmed the trial court’s judgment on April 30, 1992. *Id.* Petitioner
 17

18 ¹ Citations to page numbers in the Petition and OSC Response refer to those
 19 electronically designated by CM/ECF.

20 ² Limited information exists in the record before this court about petitioner’s
 21 underlying criminal proceedings. In his response to the OSC, petitioner attaches a
 22 copy of a February 8, 2019 order from the Los Angeles County Superior Court
 23 denying his petition for recall and resentencing. OSC Response at 8-14. This
 24 order indicates that petitioner was convicted of one count of murder (Cal. Penal
 Code § 187(a)). *Id.*

25 ³ See California Appellate Courts Case Search, available at
 26 <https://appellatecases.courtinfo.ca.gov/search.cfm?dist=2>. The court takes judicial
 27 notice of the information presented in online state court dockets. *See Porter v.*
Ollison, 620 F.3d 952, 954-55 (9th Cir. 2010) (the Ninth Circuit may properly take
 28 judicial notice of state court dockets and pleadings).

1 indicates he did not file a petition for review in the California Supreme Court. *Id.*

2 Petitioner does not state whether he filed a petition for writ of certiorari in
 3 the United States Supreme Court, but indicates he may have filed other petitions,
 4 applications, or motions concerning the judgment of conviction in state court. *Id.*
 5 at 3. Online state court case dockets and petitioner's attachments to the OSC
 6 response indicate that petitioner filed a petition for recall and resentencing in the
 7 Los Angeles County Superior Court that was denied on February 8, 2019. OSC
 8 Response at 9-14. Petitioner filed an appeal of the denial on April 29, 2019 in case
 9 number B297774, in the California Court of Appeal.⁴ Petitioner's appeal of the
 10 denial was dismissed by the Court of Appeal on June 17, 2019 because it was not
 11 timely filed. *Id.* Online case dockets do not show, and petitioner does not indicate,
 12 that he filed any other state or federal habeas petitions.

13 Petitioner filed the instant Petition on July 2, 2019.

14 **III.**

15 **DISCUSSION**

16 **A. The Petition Is Untimely Under AEDPA's One-Year Statute of**
 17 **Limitations**

18 AEDPA mandates that a "1-year period of limitation shall apply to an
 19 application for a writ of habeas corpus by a person in custody pursuant to the
 20 judgment of a State court." 28 U.S.C. § 2244(d)(1); *see also Lawrence v. Florida*,
 21 549 U.S. 327, 329, 127 S. Ct. 1079, 166 L. Ed. 2d 924 (2007); *Mardesich v. Cate*,
 22 668 F.3d 1164, 1171 (9th Cir. 2012). After the one-year limitation period expires,
 23 the prisoner's "ability to challenge the lawfulness of [his] incarceration is
 24 permanently foreclosed." *Lott v. Mueller*, 304 F.3d 918, 922 (9th Cir. 2002).

25 To assess whether a petition is timely filed under AEDPA, it is essential to

27 ⁴ See California Appellate Courts Case Search, available at
 28 <https://appellatecases.courtinfo.ca.gov/search.cfm?dist=2>.

1 determine when AEDPA's limitation period starts and ends. By statute, AEDPA's
2 limitation period begins to run from the latest of four possible events:

- 3 (A) the date on which the judgment became final by the conclusion
4 of direct review or the expiration of the time for seeking such review;
- 5 (B) the date on which the impediment to filing an application
6 created by State action in violation of the Constitution or laws of the
7 United States is removed, if the applicant was prevented from filing
8 by such State action;
- 9 (C) the date on which the constitutional right asserted was initially
10 recognized by the Supreme Court, if the right has been newly
11 recognized by the Supreme Court and made retroactively applicable to
12 cases on collateral review; or
- 13 (D) the date on which the factual predicate of the claim or claims
14 presented could have been discovered through the exercise of due
15 diligence.

16 28 U.S.C. § 2244(d)(1). Ordinarily, the starting date of the limitation period is the
17 date on which the judgment becomes final after the conclusion of direct review or
18 the expiration of the time allotted for seeking direct review. *See Wixom v.*
19 *Washington*, 264 F.3d 894, 897 (9th Cir. 2001).

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

24 Because petitioner did not file a petition for review in the California
25 Supreme Court, petitioner's judgment here became final on June 9, 1992, 40 days
26 after the Court of Appeal affirmed petitioner's conviction on April 30, 1992. *See*
27 Cal. R. Ct. 8.366(b)(1) and 8.500(e)(1) (a Court of Appeal decision is final in that

1 court 30 days after filing, and a petition for review in the California Supreme Court
 2 must be filed within 10 days after the Court of Appeal's decision becomes final).
 3 Under the normal one-year limitation period, petitioner's time for filing the instant
 4 petition would have expired one year after June 9, 1992, on June 9, 1993.

5 Although petitioner argues in the Petition that AEDPA does not apply to
 6 convictions that pre-date the statute's effective date, petitioner is incorrect. Pet. at
 7 5. But convictions that predate AEDPA are entitled to a one-year grace period
 8 after AEDPA's effective date. *See Patterson v. Stewart*, 251 F.3d 1243, 1246 (9th
 9 Cir. 2001). AEDPA became effective on April 24, 1996. *Id.* Accordingly,
 10 applying the one-year grace period means that petitioner's limitation period
 11 expired on April 24, 1997. The instant Petition, which was filed on July 2, 2019, is
 12 therefore untimely by more than 22 years absent a later start date of the limitation
 13 period or sufficient statutory or equitable tolling.

14 **B. Petitioner Is Not Entitled to a Later Start Date of the Limitation Period**

15 Petitioner argues a state-created impediment prevented him from filing a
 16 timely petition. Pet. at 5-7. In the Petition, petitioner identifies the state-created
 17 impediment as the state prosecutor, who allegedly failed to recuse herself from the
 18 case even though she was related to the victim, and obstructed justice by colluding
 19 with the courts to deny petitioner transcripts, claiming that no public records
 20 existed of the case, erasing records, purging evidence from the Compton Police
 21 Department, and filing a false appeal in petitioner's name. *Id.* at 6. In the OSC
 22 response, petitioner expands his argument and contends the state prosecutor, state
 23 courts, and petitioner's trial counsel all colluded to obstruct justice by depriving
 24 petitioner of necessary records and transcripts. OSC Response at 1-4. Petitioner
 25 argues these actions amount to "extraordinary circumstances" that constitute a
 26 state-created impediment. *Id.* at 4. Petitioner also states in a declaration attached
 27 to the OSC response that officials at Pelican Bay State Prison lost or destroyed
 28

1 most of his court transcripts in 1992 and failed to complete an itemized property
 2 list for his transcripts, which prevented petitioner from seeking habeas review.
 3 OSC Response, Wanzo Decl. ¶ 4.

4 Under 28 U.S.C. § 2244(d), the limitation period can begin running on “the
 5 date on which the impediment to filing an application created by State action in
 6 violation of the Constitution or laws of the United States is removed, if the
 7 applicant was prevented from filing by such State action.” 28 U.S.C.
 8 § 2244(d)(1)(B). The scope of state-created impediments that affect the statute of
 9 limitations within the meaning of § 2244(d)(1)(B) is limited. *See Ramirez v. Yates*,
 10 571 F.3d 993, 1001 (9th Cir. 2009) (“[Petitioner] is entitled to the commencement
 11 of a new limitations period under § 2244(d)(1)(B) only if his [difficulty in
 12 obtaining files and materials] altogether prevented him from presenting his claims
 13 in *any* form, to *any* court”). In general, the case law on state-created impediments
 14 that affect the statute of limitations has been limited to the actions of prison
 15 officials who interfere with a prisoner’s ability to file a habeas petition. *See*
 16 *Shannon v. Newland*, 410 F.3d 1083, 1087 (9th Cir. 2005) (reviewing relevant case
 17 law).

18 Petitioner identifies two state-created impediments here – a purported
 19 conspiracy between the state prosecutor, state courts, and trial counsel, and prison
 20 officials losing or destroying his court transcripts in 1992. Petitioner argues the
 21 purported conspiracy was an “extraordinary circumstanc[e]” that prevented him
 22 from filing a timely habeas petition, and contends the court must stay the
 23 proceedings and order respondents to produce necessary documents. Pet. at 4-5.
 24 But petitioner fails to explain how either purported state-created impediment
 25 prevented him from presenting his claims in any form, to any court for over twenty
 26 years. *See Bryant*, 499 F.3d at 1060 (“To obtain relief under § 2244(d)(1)(B), the
 27 petitioner must show a causal connection between the unlawful impediment and

1 his failure to file a timely habeas petition.”). The state-created impediments
2 identified by petitioner – which petitioner indicates are still ongoing – certainly did
3 not prevent him from filing the instant Petition.

4 Because the impediments petitioner identifies did not actually prevent him
5 from filing the Petition, petitioner is not entitled to a later start date of the
6 limitation period under § 2244(d)(1)(B). Accordingly, the AEDPA limitation
7 period commenced running in this case upon AEDPA’s effective date, and expired
8 on April 24, 1997 absent statutory or equitable tolling.

9 **C. Petitioner Is Not Entitled to Statutory Tolling**

10 Statutory tolling is available under AEDPA during the time “a properly filed
11 application for State post-conviction or other collateral review with respect to the
12 pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2); *accord Evans v.*
13 *Chavis*, 546 U.S. 189, 192, 126 S. Ct. 846, 163 L. Ed. 2d 684 (2006); *Patterson*,
14 251 F.3d at 1247. But “in order to qualify for statutory tolling during the time the
15 petitioner is pursuing collateral review in the state courts, the prisoner’s state
16 habeas petition must be constructively filed *before*, not after, the expiration of
17 AEDPA’s one-year limitations period.” *Johnson v. Lewis*, 310 F. Supp. 2d 1121,
18 1125 (C.D. Cal. 2004).

19 Petitioner here did not file any state habeas petitions. To the extent his
20 petition for resentencing may be construed as an attempt to pursue collateral
21 review in state court, that petition did not toll the limitation period because the
22 statute of limitations had long since expired. Although it is not clear exactly when
23 petitioner filed the petition for resentencing, petitioner includes an attachment to
24 his OSC response showing records of his incoming and outgoing legal mail in
25 2018 and 2019 and contends these records demonstrate his petition for
26 resentencing was timely. These records along Los Angeles County Superior Court
27 records showing the petition was received on or about January 2, 2019, and the fact
28

1 the petition sought relief under California Penal Code § 1170.95, which became
 2 effective January 1, 2019, indicate that the petition for resentencing was filed at the
 3 very end of 2018 or beginning of 2019, well outside the scope of the one-year
 4 limitation period. *See Jiminez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001)
 5 (petitioner not entitled to statutory tolling for state habeas petition filed “well after
 6 the AEDPA statute of limitations ended”).

7 Consequently, petitioner is not entitled to any statutory tolling, and the
 8 Petition is untimely absent equitable tolling.

9 **D. Petitioner Is Not Entitled to Equitable Tolling**

10 The United States Supreme Court has decided that “§ 2244(d) is subject to
 11 equitable tolling in appropriate cases.” *Holland v. Florida*, 560 U.S. 631, 645, 130
 12 S. Ct. 2549, 177 L. Ed. 2d 130 (2010). Tolling is appropriate when “extraordinary
 13 circumstances” beyond a petitioner’s control make it impossible to file a petition
 14 on time. *Id.* at 649; *see Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002)
 15 (“[T]he threshold necessary to trigger equitable tolling [under AEDPA] is very
 16 high, lest the exceptions swallow the rule”) (citation and quotations omitted and
 17 brackets in original). “When external forces, rather than a petitioner’s lack of
 18 diligence, account for the failure to file a timely claim, equitable tolling of the
 19 statute of limitations may be appropriate.” *Miles v. Prunty*, 187 F.3d 1104, 1107
 20 (9th Cir. 1999).

21 A petitioner seeking equitable tolling must establish two elements: “(1) that
 22 he has been pursuing his rights diligently, and (2) that some extraordinary
 23 circumstance stood in his way.” *Pace v. DiGugliemo*, 544 U.S. 408, 418, 125 S.
 24 Ct. 1807, 161 L. Ed. 2d. 669 (2005). Petitioner must also establish a “causal
 25 connection” between the extraordinary circumstance and his failure to file a timely
 26 petition. *Bryant v. Arizona Att’y Gen.*, 499 F.3d 1056, 1061 (9th Cir. 2007).

27 As discussed above, petitioner argues two state-created impediments – a
 28

1 conspiracy to deny him records and transcripts, and prison officials losing or
2 destroying transcripts – prevented him from filing a timely petition. In addition to
3 suggesting these impediments are the basis for a later start date of the limitation
4 period, petitioner also argues these same impediments warrant equitable tolling.
5 Petitioner argues the purported conspiracy to deny him records and transcripts was
6 an extraordinary circumstance that prevented him from filing a timely habeas
7 petition.

8 But again, petitioner fails to explain how either state-created impediment
9 stood in his way such that he was unable to file a habeas petition for more than 22
10 years. In some cases, a prisoner's complete lack of access to a legal file may
11 constitute an extraordinary circumstance that warrants some equitable tolling. *See*
12 *Ramirez*, 571 F.3d at 998 (citation omitted). Here, however, petitioner has
13 demonstrated he was well able to file the instant Petition without the records he
14 claims to still be missing. To the extent petitioner was waiting to file any habeas
15 petitions until he was able to gather evidentiary support for his claims, the
16 limitation period is not tolled during the period a petitioner is gathering evidence.
17 *See King v. McEwen*, 2011 WL 6965657, at *2 (N.D. Cal. Dec. 6, 2011) (“The
18 factual predicate of a claim is based on a habeas petitioner’s knowledge of the facts
19 supporting the claim, and not the evidentiary support for the claim.”) (citing
20 *Flanagan v. Johnson*, 154 F.3d 196, 199 (5th Cir. 1998)); *Earls v. Hernandez*, 403
21 F. Supp. 2d 985, 989 (C.D. Cal. 2005) (“It is the actual or putative knowledge of
22 the pertinent facts of a claim that starts the clock running; the accrual of the statute
23 of limitations does not await the collection of evidence which supports the facts.”)
24 (quoting *Brooks v. McKee*, 307 F. Supp. 2d 902, 906 (E.D. Mich. 2004)).

25 Furthermore, petitioner does not explain what efforts he took in the interim
26 period between April 24, 1997, when the limitation period expired, and July 2,
27 2019, when the instant Petition was filed. Although petitioner indicates he was
28

1 busy working on this, he submits nothing to indicate he was diligent through the 22
2 years so as to warrant tolling throughout that entire period. Accordingly, even if
3 the purported conspiracy or loss of court transcripts constituted an “extraordinary
4 circumstance” that stood in petitioner’s way, petitioner has not established that he
5 has been pursuing his rights diligently. *See Pace*, 544 U.S. at 418.

6 Consequently, petitioner is not entitled to equitable tolling and the AEDPA
7 limitation period expired on April 24, 1997. The Petition, which was filed more
8 than 22 years later, is therefore untimely.

9 **IV.**

10 **RECOMMENDATION**

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

15
16
17
18 DATED: May 4, 2020



19 SHERI PYM
20 United States Magistrate Judge

21
22
23
24
25
26
27
28

Appendix G