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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MONTE HOISINGTON,

Petitioner,

v.

ROBIN WILLIAMS,

Respondent.

No. CV-07-332-LRS

**ORDER GRANTING
MOTION TO DISMISS,
INTER ALIA**

BEFORE THE COURT is Respondent’s Motion To Dismiss Petitioner’s Federal Habeas Petition As Time-Barred Under 28 U.S.C. §2244(d). (Ct. Rec. 16). This motion is heard without oral argument.

Petitioner’s Motion For Leave to file an affidavit as a sur-reply to Respondent’s Reply on his Motion To Dismiss (Ct. Rec.38) is **GRANTED**. The affidavit (Ct. Rec. 39) has been considered by the court in determining the Motion To Dismiss. Accordingly, what this court has construed as Petitioner’s “Motion To Strike” Respondent’s Reply (Ct. Rec. 36), is **DENIED**.

I. BACKGROUND

Based on a jury finding that he is beyond a reasonable doubt a Sexually Violent Predator (SVP), RCW 71.09.060, the Petitioner is in custody pursuant to an Order of Commitment entered by the Asotin County Superior Court on July 25,

1 2001. The Petitioner is civilly committed to the Special Commitment Center
2 (SCC) in Steilacoom, Washington. He is in the custody of the Washington
3 Department of Social and Health Services.

4 Petitioner appealed his civil commitment to the Washington Court of
5 Appeals, Division III. The court of appeals affirmed the Order of Commitment.
6 *State v. Hoisington*, 123 Wn. App. 138, 94 P.3d 318 (2004). Petitioner then
7 sought review by the Washington Supreme Court. The state supreme court denied
8 review on March 31, 2005. *State v. Hoisington*, 153 Wn.2d 1031, 110 P.3d 756
9 (2005). The Washington Court of Appeals issued its mandate on May 13, 2005.

10 Subsequently, on September 29, 2005, Petitioner filed a 28 U.S.C. Section
11 2254 habeas corpus petition in the U.S. District Court for the Western District of
12 Washington (C05-5642RBL). Following the filing of the Respondent's answer in
13 that matter, the Petitioner filed a motion to dismiss his petition without prejudice
14 to pursue state court remedies. On April 10, 2006, the Western District of
15 Washington dismissed Petitioner's petition without prejudice.

16 On March 22, 2006, Petitioner filed a *pro se* personal restraint petition with
17 the Washington Court of Appeals, Division III. On October 3, 2006, the court of
18 appeals issued an order dismissing the personal restraint petition. Petitioner
19 sought discretionary review from the state supreme court. On December 26, 2006,
20 the state supreme court denied the motion for discretionary review.

21 On October 18, 2007, Petitioner filed the 28 U.S.C. Section 2254 petition in
22 the captioned matter.

23 24 **II. DISCUSSION**

25 The Aniterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C.
26 §2244(d)(1), provides that a one year period of limitation shall apply to an
27 application for a writ of habeas corpus by a person in custody pursuant to the
28 judgment of a state court. The limitation period runs from the latest of: (A) the

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

11 In this case, there is nothing to indicate that any factor other than the date on
12 which the judgment became final by the conclusion of direct review, or the
13 expiration of the time for seeking such review, should be used to establish the one
14 year limitation period. The period of "direct review" in 28 U.S.C. §2244(d)(1)(A)
15 includes the period within which a petitioner can file a petition for a writ of
16 certiorari from the U.S. Supreme Court, whether or not the petitioner actually files
17 such a petition. When a petitioner fails to seek a writ of certiorari, the one year
18 limitation period begins to run on the date the 90 day period defined by Supreme
19 Court Rule 13 expires. *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999).

20 The order of the state supreme court denying discretionary review on
21 Petitioner's direct appeal was entered on March 31, 2005.¹ Petitioner then had 90
22 days from that date, or until June 29, 2005, to file a petition for writ of certiorari
23 with the U.S. Supreme Court. The one year limitation period began on June 30,
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25 ¹ The 90 days runs from the date the state supreme court filed its decision,
26 rather than from the date the court of appeals subsequently issued its mandate.
27 The state supreme court's decision terminated review on direct appeal, not the
28 mandate that was subsequently issued. *Wixom v. Washington*, 264 F.3d 894, 897-
98 (9th Cir. 2001).

1 2005, and ran for a period of 266 days until March 22, 2006, when Petitioner filed
2 his personal restraint petition with the Washington Court of Appeals. This
3 personal restraint petition had the effect of tolling the limitations period. 28
4 U.S.C. §2244(d)(2). The limitation period remained tolled until December 26,
5 2006 when the state supreme court denied the Petitioner's motion for discretionary
6 review. On December 27, 2006, the one year limitation period began running
7 anew and ran for 296 days until Petitioner filed the habeas corpus petition in the
8 captioned matter on October 18, 2007. Because a total of 562 days (266 + 296)
9 elapsed from the date the one year limitation period commenced on March 31,
10 2005, until the date Petitioner filed his habeas corpus petition in the captioned
11 matter on October 18, 2007, said petition is untimely.²

12 13 **A. Does AEDPA Apply To Civil Commitment Orders?**

14 Petitioner contends the AEDPA and its one year limitation period does not
15 apply to a person who has been civilly committed pursuant to an "order" of a state
16 court because he is not a "person in custody pursuant to the **judgment** of a state
17 court." (Emphasis added). This is a distinction without a difference for federal
18 habeas corpus purposes. Indeed, if Petitioner's argument were accepted, he would
19 not be able to seek habeas corpus relief under Section 2254 because Section
20 2254(a) uses the identical language as that found in Section 2244(d)(1) in stating
21 that "a district court shall entertain an applicable writ of habeas corpus in behalf of
22 a person in custody pursuant to the judgment of a State court only on the ground
23 that he is in custody in violation of the Constitution or laws or treaties of the
24 United States."

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27 ² The one year limitation period expired in early April 2007, 99 days after
28 the state supreme court's December 26, 2006 decision denying discretionary
review regarding Petitioner's personal restraint petition.

1 “Custody pursuant to the judgment of a State court” is broader than merely
2 “imprisonment pursuant to a conviction or a sentence of a state court.”
3 Furthermore, the language of Section 2254(a) refers to “custody,” not to
4 “punishment,” and therefore, is available to those who are held in “custody” for
5 treatment reasons, such as convicted sex offenders. As Respondent also notes,
6 §2244(d)(2) refers to “post-conviction **or other collateral review.**” (Emphasis
7 added). Petitioner is entitled to seek relief under Section 2254 because he is in the
8 physical custody of the State of Washington pursuant to what is, for all intents and
9 purposes, a state court judgment. As such, he is also subject to the AEDPA’s
10 restrictions, including the one year limitation period set forth in Section
11 2244(d)(1). See *Rose v. Mayberg*, 454 F.3d 958 (9th Cir. 2006) (involving Section
12 2254 petition filed by a sex offender who had been civilly committed to state
13 hospital as a sexually violent predator).

14
15 **B. Should The One Year Limitation Period Be Equitably Tolled In**
16 **This Case?**

17 The one year statute of limitations is not a jurisdictional bar, and is subject
18 to equitable tolling. *Calderon v. United States Dist. Court*, 163 F.3d 530, 540-41
19 (9th Cir. 1998). Equitable tolling of the AEDPA limitation period is allowed
20 "only if extraordinary circumstances beyond a prisoner's control make it
21 impossible to file a petition on time." *Id.* at 541. “When external forces, rather
22 than a petitioner’s lack of diligence, account for the failure to timely file a claim,
23 equitable tolling may be appropriate.” *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th
24 Cir. 1999). The determination of whether equitable tolling is warranted is “highly
25 fact-dependent,” and the petitioner “bears the burden of showing that equitable
26 tolling is appropriate.” *Espinoza-Matthews v. California*, 432 F.3d 1021, 1026 (9th
27 Cir. 2005).

28 Petitioner contends he is entitled to equitable tolling because he did not

1 know, and could not have known, of the one year limitation period prior to this
2 court advising him of the same in its February 8, 2008 order (Ct. Rec. 4) directing
3 him to amend his petition. Petitioner contends the law library resources at the
4 SCC are inadequate and therefore, Petitioner could not have discovered that a one
5 year limitation period pertained to his filing of a Section 2254 petition.

6 Petitioner was admitted to the SCC on September 5, 2000. From that date
7 to approximately May or June 2004, Petitioner resided within the McNeil Island
8 Correctional Center (MICC) perimeter. In May or June 2004, he relocated to
9 SCC's current stand-alone facility. Between September 2000 and May or June
10 2004, Petitioner had access to the MICC law library, as well as the assistance of a
11 library clerk. The MICC law library contained copies of statutes relating to
12 AEDPA, and handbooks to assist prisoners with litigation. Petitioner points out
13 that direct review of his state court appeal did not conclude until March 31, 2005,
14 and therefore asserts he would not have had any reason to research federal habeas
15 corpus provisions until after that date.³ His first §2254 petition was filed in
16 September 2005 in the Western District of Washington.

17 The SCC stand-alone facility does not have a law library per se. It has a
18 library in which legal materials are housed. According to Becky Denny, Legal
19 Liaison at the SCC, since locating to the current stand-alone facility in mid-2004,
20 SCC has provided legal computers for resident use on each living unit within the
21 institution. Denny says these computers use Westlaw's Premise application to
22 provide access to statutory materials and case law, and that Section 2254 is
23 included in the subscription. According to Denny, the SCC library contains
24 hardcopy version of materials included within SCC's Premise subscription, and
25

26 ³ Petitioner also claims that during the period he had access to the MICC
27 law library, residents were never specifically informed about the AEDPA.
28 (Declaration of G. Michael Strauss, Attachment 13 to Ct. Rec. 5).

1 contains hard copy versions of *Prisoner's Self-Help Litigation Manual* and *The*
2 *Prisoner's Guide To Survival*, both of which include chapters on habeas corpus.
3 (First Declaration of Becky Denny, Ex. 8 to Ct. Rec. 16).

4 Petitioner claims he was informed that the aforementioned books were not
5 received in the SCC library until November 2, 2007. It is also asserted that on
6 April 28, 2008, Petitioner and another inmate (Daniel Audett) attempted to access
7 28 U.S.C. Section 2244(d)(1) using the SCC legal computers. In his Affidavit
8 (Attachment A to Ct Rec. 23), Audett says they were unable to access the statute.
9 It is noted, however, that in his March 12, 2008 Affidavit included as part of
10 Attachment 13 to his Amended Petition filed in this court (Attachment 13 to Ct.
11 Rec. 5 at p. 51), Petitioner states that he "looked on the SCC computer in the case
12 law book and found 28 U.S.C. §2244(d)(1) but found only case law for prisoners"
13 and "could not find any case law in which the AEDPA applied to people that were
14 civilly committed as a sexually violent predator." Petitioner also provides an
15 Affidavit from Garth Snively (Attachment B to Ct. Rec. 23), resident librarian at
16 SCC, who asserts there has never been any notification to SCC residents regarding
17 the AEDPA.

18 In her Second Declaration (Ex. A to Ct. Rec. 35), Becky Denny claims that
19 since at least January 2006, SCC's Premise subscription has included the U.S.
20 Code Annotated, including 28 U.S.C. Sections 2244 and 2254. According to
21 Denny, Premise training classes were offered during July and September 2004, but
22 Petitioner did not elect to attend the training. Denny says SCC also provides
23 manuals for residents explaining how to use the Premise system. Denny asserts
24 that in July 2004, she sent a memorandum to all SCC living units, including
25 Petitioner's living unit, informing all residents that a copy of the *Prisoner's Self-*
26 *Help Litigation Manual* was available at the staff desk of each living unit within
27 the institution. A copy of the memorandum is appended to her Second
28 Declaration. Denny says that in November 2007, SCC added two more copies of

1 this publication to its central library collection. This would be consistent with the
2 information Petitioner says he received from the unidentified library clerk
3 informing Petitioner that copies were received on November 2, 2007.

4 In his Affidavit filed in sur-reply to Becky Denny's Second Declaration (Ct.
5 Rec. 39), Petitioner claims that in September 2008, Denny instructed her I.T. staff
6 to take out and destroy the hard drives on the SCC legal computers because they
7 were corrupted and did not work. Petitioner does not, however, explain how he
8 has any personal knowledge of this. Petitioner disputes the existence of the memo
9 Denny claims she authored in July 2004, noting that Respondent has not provided
10 any check out slips establishing that residents checked out copies of the *Prisoner's*
11 *Self-Help Litigation Manual* from the living unit staff desks. Petitioner relies on
12 hearsay, however, contending:

13 I spoke with SCC staff and most of the Residents at SCC
14 that were at the SCC new facility in 2004. Not one SCC
15 staff or resident has seen this so-called memo dated 2004
16 constructed by Becky Denny, or the Prisoners['] Self Help
17 Manual that was supposed to be on the units. The SCC
18 staff could not find a policy on how to check out this manual.

19 I was informed that to check anything out of the Staff desk there
20 had to be a policy.

21 (Paragraphs 8 and 9 to Ct. Rec. 39).

22 The one year limitation period for the Petitioner to file his petition for writ
23 of habeas corpus expired in early April 2007. Consequently, events which
24 occurred after that date are of limited, if any, relevance. The AEDPA and its one
25 year limitation period have been in existence since 1996. Petitioner filed his first
26 habeas petition in the Western District of Washington in September 2005. The
27 timeliness of that petition was not at issue and therefore, in its response to the that
28 petition filed February 8, 2006, the State did not specifically discuss the one year
limitation period. The State did, however, discuss the AEDPA and how it "placed
a new restriction on the power of federal courts to grant writs of habeas corpus to
state prisoners." (Ex. B to Ct. Rec. 35 at p. 10, quoting *Williams v. Taylor*, 529

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1 U.S. 362, 399 (2000)). Petitioner contends this did not put him on notice that
2 AEDPA applied to his petition because the cases referred to by the State, and
3 those found by the Petitioner, referred to “prisoners.” Petitioner maintains he is
4 not a “prisoner” and was never informed that the AEDPA applied to non-
5 prisoners.

6 A petitioner’s pro se status, ignorance of the law, and lack of representation
7 **during the applicable filing period** do not constitute extraordinary circumstances
8 justifying equitable tolling because such circumstances are not “extraordinary.”
9 *Raspberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006). As of February 2006, if
10 not sooner, the Petitioner wrongfully assumed the AEDPA did not apply to him
11 because he was not a “prisoner,” even though he remained in the custody of the
12 State of Washington and filed a 2254 petition in the Western District of
13 Washington seeking release from that custody. Petitioner wrongfully assumed that
14 he was entitled to the benefits of 2254, which itself was modified by the AEDPA,
15 without being subject to the accompanying one year limitation period imposed by
16 the AEDPA. Petitioner was not entitled to make these assumptions. He was
17 obligated to act with “reasonable diligence” in ascertaining whether he in fact was
18 subject to the AEDPA and its one year limitation period. There is no evidence that
19 between February 2006 and April 2007, the Petitioner tried to do anything to
20 ascertain whether AEDPA applied to him.

21 A federal habeas petitioner seeking equitable tolling must act with
22 reasonable diligence throughout the period he seeks to toll. *Roy v. Lampert*, 465
23 F.3d 964, 969 (9th Cir. 2006). After December 26, 2006, when the state supreme
24 court denied his motion for discretionary review on his personal restraint petition,
25 the Petitioner waited 10 and a half months to file his present federal habeas
26 petition in this district (Eastern District of Washington), whereas he waited a mere
27 6 months to file his first federal habeas petition in the Western District after the
28 state supreme court had denied his motion for discretionary review regarding his

1 direct appeal. In his Response Brief, Ct. Rec. 23 at p. 4, Petitioner states he did
2 not even start his present federal habeas petition until October 15, 2007. Under
3 these circumstances, there is no basis for equitable tolling. The Petitioner did not
4 act with “reasonable diligence” between February 2006 and April 2007 and
5 indeed, may have been obligated to act with “reasonable diligence” even prior to
6 February 2006.⁴

7
8 **C. Does The Miscarriage Of Justice Exception Apply To A Claim That**
9 **Is Time-Barred?**

10 Petitioner apparently contends the miscarriage of justice exception should
11 apply to salvage his habeas petition from being time-barred.

12 This exception has traditionally been employed in the procedural default
13 context. Where a petitioner who has not properly exhausted state court remedies
14 is now barred from returning to state court by a mandatory rule of state procedure,
15 the exhaustion requirement is satisfied but the claim is procedurally barred from
16 federal review. Review of the merits of procedurally defaulted habeas claims will
17 be allowed, however, if a petitioner demonstrates review of the merits of his
18 claims is necessary to prevent a fundamental miscarriage of justice. *Schlup v.*
19 *Delo*, 513 U.S. 298, 327, 115 S.Ct. 851 (1995). A fundamental miscarriage of
20 justice occurs when a constitutional violation has probably resulted in the
21 conviction of one who is actually innocent. *Id.* at 326-27. To satisfy the
22 “fundamental miscarriage of justice” standard, Petitioner must establish it is more
23

24 ⁴ Petitioner does not assert a “government impediment,” 28 U.S.C. Section
25 2244(d)(1)(B), should result in the one year limitation period commencing at a
26 later date so as to make his petition timely. In any event, such an assertion would
27 not be persuasive since no impediment existed prior to April 2007 so as to prevent
28 the Petitioner from filing his petition before that time. If there was an impediment,
it existed after the one year limitation period expired in April 2007.

1 likely than not that no reasonable juror could have found him guilty of the
2 offenses. *Id.* at 327. A petitioner must present a colorable showing of factual
3 innocence, as opposed to “legal innocence.” *Herrera v. Collins*, 506 U.S. 390,
4 404, 113 S.Ct. 853 (1993). If a petitioner does not present supplementary post-
5 trial evidence establishing he is factually innocent, he may not avoid the
6 procedural bar to consideration of the merits of his habeas claims. *Schlup*, 513
7 U.S. at 315. A finding that a petitioner has presented sufficient evidence of his
8 “actual innocence” must be based on “new,” reliable evidence not presented at
9 trial. *Id.* at 324-25.

10 At the outset, it is noted that neither the U.S. Supreme Court or the Ninth
11 Circuit Court of Appeals has decided whether the AEDPA’s statute of limitations
12 provision may be overridden by a showing of “actual innocence.” *Majoy v. Roe*,
13 296 F.3d 770, 776-77 (9th Cir. 2002); *Lisker v. Knowles*, 463 F.Supp.2d 1008,
14 1032 (C.D. Cal. 2006). Assuming *arguendo* that the “fundamental miscarriage of
15 justice” standard (“actual innocence”) can be employed to avoid the AEDPA’s
16 statute of limitations, this court finds that Petitioner has not met the standard.

17 As Petitioner notes, the question here is not whether he is actually innocent
18 of a crime. Petitioner does not challenge his convictions for sexually violent
19 offenses committed in 1977, 1978 and 1991. The question is whether at
20 Petitioner’s civil commitment trial there was an absence of any credible evidence
21 to support a jury finding that he is a sexually violent predator who would be likely
22 to engage in predatory acts of sexual violence if not confined in a secure facility.
23 Petitioner contends he is “actually ineligible” for civil commitment as a sexually
24 violent predator because of Dr. Doren’s false diagnosis and misrepresentation of
25 the scientific evidence. At the civil commitment trial, Dr. Doren testified that
26 Petitioner suffers from a mental abnormality known as “paraphilia” which
27 predisposes him to committing sexual acts against other people. Petitioner asserts
28 that even if he is required to meet the “new” evidence requirement, he has done so

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1 because “professional criticism of Dr. Doren[‘]s theories was not published until
2 after Petitioner[‘]s [civil commitment] trial in 2001.”

3 This court agrees with Respondent that Petitioner’s arguments suggest no
4 more than an ongoing debate within the scientific community regarding how to
5 predict risk among sex offenders. Petitioner’s arguments do not meet the high bar
6 of establishing “actual ineligibility” for civil commitment. Numerous courts to
7 this day have upheld commitments based on paraphilia NOS (not otherwise
8 specified), or nonconsent. *In re Detention of Post*, 145 Wn.App. 728, 818 and fn.
9 18, 187 P.3d 803 (2008). See also *Brock v. Seling*, 390 F.3d 1088, 1091 (9th
10 Cir.2004)(denying 2254 petition finding it sufficient that jury found that
11 petitioner’s condition evinced “serious difficulty” in controlling his behavior
12 whether predicated on expert testimony that petitioner suffered from a paraphilia
13 that rendered him unable to control his desire to rape, or testimony suggesting an
14 antisocial personality marked by impulsivity).⁵ In *Post*, the State’s witness (Dr.
15 Rawlings) testified that while there is controversy over the paraphilia NOS
16 diagnosis, it is generally accepted in the scientific community of those who treat
17 serious sex offenders and those who evaluate sex offenders under the law. 145

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19 ⁵ Substantive due process is satisfied if a finding of dangerousness is linked
20 to the existence of a mental abnormality or personality disorder that makes it
21 seriously difficult for the person with the abnormality or disorder to control his
22 behavior. *Kansas v. Crane*, 534 U.S. 407, 410, 413, 122 S.Ct. 867 (2002). A
23 diagnosis of mental abnormality or personality disorder, when coupled with
24 evidence of prior sexually violent behavior and testimony from mental health
25 experts, which links these to a serious lack of control, is sufficient for a jury to
26 find that a person represents a serious risk of future sexual violence. Proof of
27 “dangerousness” must be coupled with proof of some additional factor, such as
28 mental illness or mental abnormality. *Kansas v. Hendricks*, 521 U.S. 346, 357-58,
117 S.Ct. 2072 (1997). Proof of total or complete lack of control is not required.
Crane, 534 U.S. at 411. See also *Rose v. Mayberg*, 454 F.3d 958, 965 (9th Cir.
2006)(jury does not have to find complete inability to control conduct).

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1 Wn.2d at 818-19. Petitioner cites to no case in which the diagnosis of paraphilia
2 has been held not to satisfy the *Frye* standard.⁶ There is no “fundamental
3 miscarriage of justice” in this case.
4

5 **III. CONCLUSION**

6 Respondent’s Motion To Dismiss (Ct. Rec. 16) is **GRANTED**. Petitioner’s
7 Cross-Motion For Summary Judgment (Ct. Rec. 24), which is directed to the
8 merits of his Petition, is **DISMISSED as moot**.

9 **IT IS SO ORDERED.** The District Executive shall enter judgment,
10 forward copies of this order to Petitioner and to counsel for Respondent, and close
11 the file.

12 **DATED** this 30th day of October, 2008.

13
14 *s/Lonny R. Suko*

15 _____
16 LONNY R. SUKO
17 United States District Judge
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26 _____
27 ⁶ Washington adheres to the *Frye* “general acceptance” standard for
28 scientific evidence, as opposed to the *Daubert* standard employed in federal
courts. *State v. Copeland*, 130 Wn.2d 244, 260, 922 P.2d 1304 (1996).