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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TAI Q. DANG,)	No. 08-16970
)	
Petitioner – Appellant,)	D.C. No. 3:07-CV-03268-SI
)	
v.)	MEMORANDUM*
)	
D. K. SISTO, Warden,)	
)	
Respondent – Appellee.)	
_____)	

Appeal from the United States District Court
for the Northern District of California
Susan Illston, District Judge, Presiding

Submitted July 12, 2010**
San Francisco, California

Before: FERNANDEZ, W. FLETCHER, and TALLMAN, Circuit Judges.

Tai Dang appeals the district court’s denial of his petition for habeas corpus relief. 28 U.S.C. § 2254. We affirm.

The district court determined that Dang’s petition was barred by the one-

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

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

year statute of limitations. 28 U.S.C. § 2244(d). We agree. Dang's state conviction became final on March 11, 2003,¹ and he did not send his petition for filing until June 19, 2007. He concedes that he is not entitled to statutory tolling,² but asserts that he is entitled to equitable tolling.³ It was his burden to demonstrate his entitlement,⁴ but to do so he had to establish his diligence in pursuing his rights,⁵ and that any claimed impediments caused his untimeliness.⁶

An attorney's conduct can result in equitable tolling,⁷ and we will assume, without deciding, that the district court correctly held that Dang's counsel's conduct did satisfy tolling requirements until January or February 2006, when

¹See Bowen v. Roe, 188 F.3d 1157, 1159 (9th Cir. 1999).

²See 28 U.S.C. § 2244(d)(2).

³See Calderon v. U.S. Dist. Court (Beeler), 128 F.3d 1283, 1289 (9th Cir. 1997).

⁴See Raspberry v. Garcia, 448 F.3d 1150, 1153 (9th Cir. 2006).

⁵See Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807, 1814, 161 L. Ed. 2d 669 (2005).

⁶See Bryant v. Schriro, 499 F.3d 1056, 1060–61 (9th Cir. 2007); Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003).

⁷See United States v. Battles, 362 F.3d 1195, 1198–99 (9th Cir. 2004); Spitsyn, 345 F.3d at 801–02; Ford v. Hubbard, 330 F.3d 1086, 1106 (9th Cir. 2003) rev'd on other grounds sub. nom. Pliler v. Ford, 542 U.S. 225, 231, 124 S. Ct. 2441, 2445–2446, 159 L. Ed. 2d 338 (2004); Calderon, 128 F.3d at 1289.

Dang admits that he received his file from counsel. But that was some sixteen months before he finally filed his petition. We agree with the district court that Dang did not carry his burden of showing that he was diligent during the period after he had his case file in hand.⁸ Therefore, the statute of limitations had run before he filed his petition.⁹

AFFIRMED.

⁸The Supreme Court's recent decision does not change tolling alchemy in the Ninth Circuit, and, therefore, does not affect our decision. See Holland v. Florida, 560 U.S. ___, No. 09-5327, slip op. at 16–19 (June 14, 2010).

⁹Because the petition was untimely, we do not consider whether Dang was entitled to a stay and abeyance order while he sought to exhaust additional claims before the state courts. See Rhines v. Weber, 544 U.S. 269, 277–78, 125 S. Ct. 1528, 1534–35, 161 L. Ed. 2d 440 (2005). A stay would have availed him nothing.