

1  
2  
3  
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

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

MICHAEL L. BANKS,	)	1:09-cv-00152-LJO-JLT HC
	)	
Petitioner,	)	FINDINGS AND RECOMMENDATION RE:
	)	RESPONDENT’S MOTION TO DISMISS
v.	)	THE PETITION (Doc. 1)
	)	
	)	ORDER DIRECTING OBJECTIONS TO BE
DEBRA DEXTER,	)	FILED WITHIN TWENTY DAYS
	)	
Respondent.	)	

**PROCEDURAL HISTORY**

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The instant federal petition for writ of habeas corpus was filed on January 21, 2009.<sup>1</sup> On July 13, 2009, the Court ordered Respondent to file a response to the petition.

---

<sup>1</sup>In Houston v. Lack, the United States Supreme Court held that a pro se habeas petitioner's notice of appeal is deemed filed on the date of its submission to prison authorities for mailing, as opposed to the date of its receipt by the court clerk. Houston v. Lack, 487 U.S. 166, 276, 108 S.Ct. 2379, 2385 (1988). The rule is premised on the pro se prisoner's mailing of legal documents through the conduit of "prison authorities whom he cannot control and whose interests might be adverse to his." Miller v. Sumner, 921 F.2d 202, 203 (9<sup>th</sup> Cir. 1990); see, Houston, 487 U.S. at 271, 108 S.Ct. at 2382. The Ninth Circuit has applied the "mailbox rule" to state and federal petitions in order to calculate the tolling provisions of the AEDPA. Saffold v. Neland, 250 F.3d 1262, 1268-1269 (9<sup>th</sup> Cir. 2000), amended May 23, 2001, vacated and remanded on other grounds sub nom. Carey v. Saffold, 536 U.S. 214, 226 (2002). The date the petition is signed may be considered the earliest possible date an inmate could submit his petition to prison authorities for filing under the mailbox rule. Jenkins v. Johnson, 330 F.3d 1146, 1149 n. 2 (9<sup>th</sup> cir. 2003). Accordingly, for all of Petitioner’s state petitions and for the instant federal petition, the Court will consider the date of signing of the petition (or the date of signing of the proof of service if no signature appears on the petition) as the earliest possible filing date and the operative date of filing under the mailbox rule for calculating the running of the statute of limitation. Petitioner signed the instant petition on January 21, 2009. (Doc. 1, p. 26).

1 (Doc. 11). On September 10, 2009, Respondent filed the instant motion to dismiss the petition as  
2 untimely.<sup>2</sup> (Doc. 17). On September 30, 2009, Petitioner filed his opposition to the motion. (Doc.  
3 21). Respondent then filed a Reply on October 13, 2009. (Doc. 22).

#### 4 DISCUSSION

##### 5 A. Procedural Grounds for Motion to Dismiss

6 As mentioned, Respondent has filed a Motion to Dismiss the petition as being filed outside  
7 the one year limitations period prescribed by Title 28 U.S.C. § 2244(d)(1). Rule 4 of the Rules  
8 Governing Section 2254 Cases allows a district court to dismiss a petition if it “plainly appears from  
9 the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the  
10 district court . . . .” Rule 4 of the Rules Governing Section 2254 Cases.

11 The Ninth Circuit has allowed Respondent’s to file a Motion to Dismiss in lieu of an Answer  
12 if the motion attacks the pleadings for failing to exhaust state remedies or being in violation of the  
13 state’s procedural rules. See, e.g., O’Bremski v. Maass, 915 F.2d 418, 420 (9<sup>th</sup> Cir. 1990) (using Rule  
14 4 to evaluate motion to dismiss petition for failure to exhaust state remedies); White v. Lewis, 874  
15 F.2d 599, 602-03 (9<sup>th</sup> Cir. 1989) (using Rule 4 as procedural grounds to review motion to dismiss for  
16 state procedural default); Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n.12 (E.D. Cal. 1982) (same).  
17 Thus, a Respondent can file a Motion to Dismiss after the court orders a response, and the Court  
18 should use Rule 4 standards to review the motion. See Hillery, 533 F. Supp. at 1194 & n. 12.

19 In this case, Respondent's Motion to Dismiss is based on a violation of 28 U.S.C. §  
20 2244(d)(1)'s one year limitation period. Because Respondent's Motion to Dismiss is similar in  
21 procedural standing to a Motion to Dismiss for failure to exhaust state remedies or for state  
22 procedural default and Respondent has not yet filed a formal Answer, the Court will review  
23 Respondent’s Motion to Dismiss pursuant to its authority under Rule 4.

##### 24 B. Limitation Period for Filing a Petition for Writ of Habeas Corpus

25 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of  
26

---

27  
28 <sup>2</sup>Respondent also contends that Ground One in the petition should be dismissed because it fails to assert a federally  
cognizable habeas claim. (Doc. 17, p. 1). However, because the Court agrees with Respondent that the petition is untimely,  
the Court sees no need to address whether Ground One states a cognizable federal claim.

1 1996 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas  
2 corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063  
3 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9<sup>th</sup> Cir. 1997) (en banc), *cert. denied*, 118 S.Ct. 586  
4 (1997). The instant petition was filed on January 21, 2009, and thus, it is subject to the provisions  
5 of the AEDPA.

6 The AEDPA imposes a one year period of limitation on petitioners seeking to file a federal  
7 petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As amended, § 2244, subdivision (d)  
8 reads:

9 (1) A 1-year period of limitation shall apply to an application for a writ of habeas  
10 corpus by a person in custody pursuant to the judgment of a State court. The  
limitation period shall run from the latest of –

11 (A) the date on which the judgment became final by the conclusion of direct  
12 review or the expiration of the time for seeking such review;

13 (B) the date on which the impediment to filing an application created by  
14 State action in violation of the Constitution or laws of the United States is removed, if  
the applicant was prevented from filing by such State action;

15 (C) the date on which the constitutional right asserted was initially recognized by  
16 the Supreme Court, if the right has been newly recognized by the Supreme Court and made  
retroactively applicable to cases on collateral review; or

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

18 (2) The time during which a properly filed application for State post-conviction or  
19 other collateral review with respect to the pertinent judgment or claim is pending shall  
not be counted toward any period of limitation under this subsection.

20 28 U.S.C. § 2244(d).

21 In most cases, the limitation period begins running on the date that the petitioner’s direct  
22 review became final. Here, Petitioner alleges that he was convicted in the Kern County Superior  
23 Court of various controlled substance charges on February 18, 2004. (Doc. 1, p. 1). Respondent has  
24 lodged documents with the Court establishing that Petitioner was convicted of possession and  
25 purchase of cocaine base for sale, possession of marijuana for sale, and keeping a place to sell a  
26 controlled substance, in violation, respectively, of California Health & Safety Code §§ 11351.1,  
27 11359, and 11366. (Lodged Document (“LD”) 3). Petitioner was sentenced to a term twenty-five  
28 years to life on the first two counts, with the third count stayed. (Id.). Petitioner then filed a direct

1 appeal, which concluded when his petition for review in the California Supreme Court was denied on  
2 February 28, 2007. (LD 6). Thus, direct review would have concluded on May 29, 2007, when the  
3 ninety day period for seeking review in the United States Supreme Court expired. Barefoot v.  
4 Estelle, 463 U.S. 880, 887 (1983); Bowen v. Roe, 188 F.3d 1157, 1159 (9<sup>th</sup> Cir.1999); Smith v.  
5 Bowersox, 159 F.3d 345, 347 (8<sup>th</sup> Cir.1998). Petitioner would then have one year from the following  
6 day, i.e., May 30, 2007, or until May 29, 2008, absent applicable tolling, within which to file his  
7 federal petition for writ of habeas corpus. As mentioned, the instant petition was filed on January  
8 21, 2009, approximately eight months after the one-year period would have expired. Thus, unless  
9 Petitioner is entitled to either statutory tolling or equitable tolling, the petition is untimely and should  
10 be dismissed.

11 C. Tolling of the Limitation Period Pursuant to 28 U.S.C. § 2244(d)(2)

12 Under the AEDPA, the statute of limitations is tolled during the time that a properly filed  
13 application for state post-conviction or other collateral review is pending in state court. 28 U.S.C.  
14 § 2244(d)(2). A properly filed application is one that complies with the applicable laws and rules  
15 governing filings, including the form of the application and time limitations. Artuz v. Bennett, 531  
16 U.S. 4, 8, 121 S. Ct. 361 (2000). An application is pending during the time that ‘a California  
17 petitioner completes a full round of [state] collateral review,’ so long as there is no unreasonable  
18 delay in the intervals between a lower court decision and the filing of a petition in a higher court.  
19 Delhomme v. Ramirez, 340 F. 3d 817, 819 (9th Cir. 2003), abrogated on other grounds as recognized  
20 by Waldrip v. Hall, 548 F. 3d 729 (9th Cir. 2008)(per curium)(internal quotation marks and citations  
21 omitted); see Evans v. Chavis, 546 U.S. 189, 193-194, 126 S. Ct. 846 (2006); see Carey v. Saffold,  
22 536 U.S. 214, 220, 222-226, 122 S. Ct. 2134 (2002); see also, Nino v. Galaza, 183 F.3d 1003, 1006  
23 (9th Cir. 1999).

24 Nevertheless, there are circumstances and periods of time when no statutory tolling is  
25 allowed. For example, no statutory tolling is allowed for the period of time between finality of an  
26 appeal and the filing of an application for post-conviction or other collateral review in state court,  
27 because no state court application is “pending” during that time. Nino, 183 F.3d at 1006-1007.  
28 Similarly, no statutory tolling is allowed for the period between finality of an appeal and the filing of

1 a federal petition. Id. at 1007. In addition, the limitation period is not tolled during the time that a  
2 federal habeas petition is pending. Duncan v. Walker, 563 U.S. 167, 181-182, 121 S.Ct. 2120  
3 (2001); see also, Fail v. Hubbard, 315 F. 3d 1059, 1060 (9th Cir. 2001)(as amended on December 16,  
4 2002). Further, a petitioner is not entitled to statutory tolling where the limitation period has already  
5 run prior to filing a state habeas petition. Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003)  
6 (“section 2244(d) does not permit the reinitiation of the limitations period that has ended before the  
7 state petition was filed.”); Jiminez v. White, 276 F. 3d 478, 482 (9th Cir. 2001). Finally, a petitioner  
8 is not entitled to continuous tolling when the petitioner’s later petition raises unrelated claims. See  
9 Gaston v. Palmer, 447 F.3d 1165, 1166 (9th Cir. 2006).

10 Here, the documents lodged with the Court by Respondent establish that Petitioner filed the  
11 following state habeas petitions: (1) filed January 29, 2004 in the Kern County Superior Court and  
12 denied on March 22, 2004 (LD 7, 8); (2) filed January 12, 2005 in the Kern County Superior Court  
13 and denied on January 26, 2005 (LD 9, 10); (3) filed on February 1, 2005 in the California Court of  
14 Appeal, Fifth Appellate District (“5<sup>th</sup> DCA”) and denied on February 24, 2005 (LD 11, 12); (4) filed  
15 on March 28, 2005 in the California Supreme Court and denied on March 15, 2006 (LD 13, 14); (5)  
16 filed on March 17, 2005 in the Kern County Superior Court and denied on April 26, 2005 (LD 15,  
17 16); (6) filed on March 17, 2005 in the 5<sup>th</sup> DCA and denied on May 26, 2005 (LD 17, 18); (7) filed  
18 on June 6, 2005 in the California Supreme Court and voluntary withdrawal granted on August 19,  
19 2005 (LD 19-21); (8) filed on July 20, 2005 in the California Supreme Court and voluntary  
20 withdrawal granted on January 24, 2006 (LD 22-24); (9) filed on October 24, 2006 in the California  
21 Supreme Court and voluntary withdrawal granted on December 15, 2006 (LD 25, 26); (10) filed on  
22 May 26, 2007 in the Kern County Superior Court and denied on August 1, 2007 (LD 27, 28); (11)  
23 filed on September 13, 2007 in the California Supreme Court, amended petition filed on October 25,  
24 2007, and denied on March 12, 2008 (LD 29-31); (12) filed on June 19, 2008 in the California  
25 Supreme Court, various amended petitions filed thereafter, and relief denied on December 17, 2008  
26 (LD 32-37); (13) filed on August 12, 2008 in the Kern County Superior Court and denied on  
27 November 12, 2008 (LD 38, 39, 40); (14) filed on January 7, 2009 in the California Supreme Court  
28 and denied on June 24, 2009. (LD 41, 42).

1 Respondent contends that Petitioner is not entitled to statutory tolling for the first through  
2 ninth state petitions because they were filed and denied prior to the commencement of the one-year  
3 period. (Doc. 17, p. 6). The Court agrees.

4 As mentioned, the one-year period did not commence to run until May 30, 2007. Petitioner's  
5 first nine state petitions were all filed and denied prior to that date. A tolling provision has no  
6 applicability where the period to be tolled has not commenced. See Hill v. Keane, 984 F.Supp. 157,  
7 159 (E.D.N.Y. 1997), *abrogated on other grounds*, Bennett v. Artuz, 199 F.3d 116, 122 (2d Cir.  
8 1999) (state collateral action filed before commencement of limitations period does not toll  
9 limitation period), *affirmed*, 531 U.S. 4, 121 S.Ct. 361, 148 L.Ed.2d 213. Thus, a state habeas  
10 petition filed prior to the commencement date of the statute of limitation has no tolling effect.  
11 Waldrip v. Hall, 548 F.3d 729, 735 (9<sup>th</sup> Cir. 2008). Although it may seem self-evident, a properly  
12 filed state petition cannot toll a limitation period that, as here, has not even commenced to run. This  
13 is necessarily so because the period of pendency of the state petition, which defines the amount of  
14 tolling to be accorded the petition, and the period of the statute of limitation, which defines the actual  
15 period during which a petitioner may file a federal petition, do not intersect or overlap at any point.  
16 Thus, the first through ninth state petitions had no tolling consequences for Petitioner because the  
17 AEDPA's tolling provision does not apply to state petitions that have already been denied.

18 Next, Respondent argues that Petitioner is not entitled to statutory "interval" tolling for the  
19 period between the denial of his ninth petition on December 15, 2006 and the filing of the tenth  
20 petition on May 26, 2007.<sup>3</sup> The Court agrees.

21 In reviewing habeas petitions originating from California, the Ninth Circuit formerly  
22 employed a rule that when the California courts did not explicitly dismiss for lack of timeliness, the  
23 petition was presumed timely and was deemed "pending." In Evans v. Chavis, 549 U.S.189 (2006),  
24 the Supreme Court rejected this approach, requiring instead that the lower federal courts determine  
25 whether a state habeas petition was filed within a reasonable period of time. 549 U.S. at 198 ("That  
26 is to say, without using a merits determination as an 'absolute bellwether' (as to timeliness), the

---

27  
28 <sup>3</sup>Respondent states that the tenth petition contains a proof of service dated June 1, 2007. (Doc. 17, p. 6, fn. 3).  
However, in order to give Petitioner every benefit of the doubt, the Court will use the date of May 26, 2007, which is the date  
Petitioner signed the petition itself as well as the attached brief. (LD 27, p. 6; attached brief, p. 62).

1 federal court must decide whether the filing of the request for state court appellate review (in state  
2 collateral review proceedings) was made within what California would consider a ‘reasonable  
3 time.’”). However, “[w]hen a post-conviction petition is untimely under state law, that [is] the end  
4 of the matter for purposes of § 2244(d)(2).” Bonner v. Carey, 425 F.3d 1145, 1148 (9<sup>th</sup> Cir.  
5 2005)(*quoting* Pace v. DiGuglielmo, 544 U.S. 408, 414 (2005)). See also Carey, 536 U.S. at 226.

6 Therefore, under the analysis mandated by the Supreme Court’s decisions in Pace and Evans,  
7 this Court must first determine whether the state court denied Petitioner’s habeas application(s) as  
8 untimely. If so, that is the end of the matter for purposes of statutory tolling because the petition was  
9 then never properly filed and Petitioner would not be entitled to any period of tolling under §  
10 2242(d)(2), either for the pendency of the petition itself or for the interval between that petition and  
11 the denial of the previous petition. Bonner, 425 F.3d at 1148-1149.

12 However, if the state court did not expressly deny the habeas petition as untimely, this Court  
13 is charged with the duty of independently determining whether Petitioner’s request for state court  
14 collateral review was filed within what California would consider a “reasonable time.” Evans, 546  
15 U.S. at 198. If so, then the state petition was properly filed and Petitioner is entitled to interval  
16 tolling.<sup>4</sup>

17 In Evans, the Supreme Court found that a six-month delay was unreasonable. Id. The  
18 Supreme Court, recognizing that California did not have strict time deadlines for the filing of a  
19 habeas petition at the next appellate level, nevertheless indicated that most states provide for a  
20 shorter period of 30 to 60 days within which to timely file a petition at the next appellate level.  
21 Evans, 546 U.S. at 201. After Evans, however, it was left to the federal district courts in California  
22 to carry out the Supreme Court’s mandate of determining, in appropriate cases, whether the  
23 petitioners’ delays in filing state petitions were reasonable. Understandably, given the uncertain  
24 scope of California’s “reasonable time” standard, the cases have not been entirely consistent.  
25 However, a consensus appears to be emerging in California that any delay of sixty days or less is per  
26 se reasonable, but that any delay “substantially” longer than sixty days is not reasonable. Compare

---

27  
28 <sup>4</sup>Neither the Ninth Circuit nor the United States Supreme Court has addressed whether a delay in filing may deprive  
a petitioner of statutory tolling for the pendency of an otherwise properly filed state petition itself when the state court does  
not expressly indicate that the petition was untimely. Presently, Evans only affects entitlement to interval tolling.

1 Culver v. Director of Corrections, 450 F.Supp.2d 1135, 1140-1141 (C.D. Cal. 2006)(delays of 97  
2 and 71 days unreasonable); Forrister v. Woodford, 2007 WL 809991, \*2-3 (E.D. Cal. 2007)(88 day  
3 delay unreasonable); Hunt v. Felker, 2008 WL 364995 (E.D. Cal. 2008)(70 day delay unreasonable);  
4 Swain v. Small, 2009 WL 111573 (C.D.Cal. Jan. 12, 2009)(89 day delay unreasonable); Livermore  
5 v. Watson, 556 F.Supp. 2d 1112, 1117 (E.D.Cal. 2008)(78 day delay unreasonable; Bridges v.  
6 Runnels, 2007 WL 2695177 \*2 (E.D.Cal. Sept. 11, 2007)(76 day delay unreasonable), with Reddick  
7 v. Felker, 2008 WL 4754812 \*3 (E.D.Cal. Oct. 29, 2008)(64 day delay not “substantially” greater  
8 than sixty days); Payne v. Davis, 2008 WL 941969 \*4 (N.D.Cal. Mar. 31, 2008 (63-day delay “well  
9 within the ‘reasonable’ delay of thirty to sixty days in Evans”). Moreover, even when the delay  
10 “significantly” exceeds sixty days, some courts have found the delay reasonable when the subsequent  
11 petition is substantially rewritten. E.g., Osumi v. Giurbino, 445 F.Supp 2d 1152, 1158-1159  
12 (C.D.Cal. 2006)(3 month delay not unreasonable given lengthy appellate briefs and petitioner’s  
13 substantial re-writing of habeas petition following denial by superior court); Stowers v. Evans, 2006  
14 WL 829140 (E.D.Cal. 2006)(87-day delay not unreasonable because second petition was  
15 substantially re-written); Warburton v. Walker, 548 F.Supp.2d 835, 840 (C.D. Cal. 2008)(69-day  
16 delay reasonable because petitioner amended petition before filing in Court of Appeal).

17 Here, the Kern County Superior Court did not discuss the timeliness of the tenth petition.  
18 Accordingly, this Court must independently determine whether Petitioner’s request for state court  
19 collateral review was filed within what California would consider a “reasonable time.” Evans, 546  
20 U.S. at 198. It seems clear that the lengthy delay between the denial of the ninth petition on  
21 December 15, 2006 and the filing of the tenth petition on May 26, 2007, a period of over five  
22 months, was well outside the range of what district courts, the Ninth Circuit, and the United States  
23 Supreme Court have considered reasonable for California inmates. Evans, 546 U.S. at 198. Thus, in  
24 the Court’s view, Petitioner is not entitled to interval tolling during that period.

25 Respondent, however, does not contend that the tenth petition itself was not “properly filed.”  
26  
27  
28



1 (Doc. 17, p. 7).<sup>5</sup> Thus, its filing on May 26, 2007 would have entitled Petitioner to statutory tolling  
2 once the one-year period commenced on May 30, 2007, and the one-year period would have  
3 continued to toll the running of the statute of limitation until at least August 1, 2007, when the tenth  
4 petition was denied.

5 Respondent argues that Petitioner’s next collateral action, his eleventh state petition, was not  
6 “properly filed” under the AEDPA, and therefore Petitioner is not entitled to statutory tolling for  
7 either the pendency of the eleventh petition *or for the interval preceding* it after denial of the tenth  
8 petition. This is so because the eleventh petition was expressly denied as untimely by the state court.  
9 Once more, the Court agrees.

10 As discussed above, if, as is the case with the eleventh petition, the state court expressly finds  
11 a petition untimely, that is the “end of the matter” for purposes of statutory tolling, either for the  
12 pendency of the petition itself or for the interval preceding it. Bonner, 425 F.3d at 1148-1149.  
13 Moreover, since the eleventh petition was not “properly filed” because it was untimely, Artuz v.  
14 Bennett, 531 U.S. 4, 8 (2000)(a “properly filed” state petition complies with the applicable laws and  
15 rules governing filings, including the form of the application and time limitations), it not only  
16 deprives Petitioner of tolling during the pendency of the eleventh petition, but also during the  
17 preceding interval period after denial of the tenth petition. See Carey, 536 U.S. at 222-224 (a state  
18 habeas petition is “pending” during a full round of review in the state courts, a period that includes  
19 the time between a lower court decision and filing a new petition in a higher court *as long as those*  
20 *intervals are “reasonable.”* ). The state court’s de facto finding that Petitioner’s delay in filing the  
21 eleventh petition was unreasonable thus denies Petitioner statutory tolling for the pendency of the  
22 eleventh petition as well as for the interval preceding its filing.

23 Based on the foregoing, the tolling of the one-year period would have ended the day  
24 following the denial of the tenth petition on August 1, 2007, i.e., on August 2, 2007, and, since  
25 Petitioner had his full 365 days remaining, it would have expired on August 1, 2008, barring any  
26 state collateral actions that would have entitled Petitioner to additional statutory tolling. As

---

27  
28 <sup>5</sup>The denial of interval tolling between the ninth and tenth petitions does not, in the end, affect the Court’s analysis  
at all, since, as discussed below, Petitioner filed his tenth petition four days before the one-year period would have  
commenced, thus effectively delaying the commencement of the one-year period until August 2, 2007.

1 discussed above, neither the pendency of the eleventh petition nor the interval preceding it entitled  
2 Petitioner to such tolling. Thus, the next event that could have interrupted the running of the one-  
3 year period, and thus afforded Petitioner statutory tolling, would have been the filing of the twelfth  
4 petition on June 19, 2008. However, Respondent contends that the twelfth petition does not afford  
5 Petitioner any tolling effect because it too was denied by the state court as untimely.<sup>6</sup> The Court  
6 agrees in light of the express findings of untimeliness by the California Supreme Court in denying  
7 the twelfth petition. Bonner, 425 F.3d at 1148-1149.

8 In the absence of any “properly filed” state petition that would interrupt the running of the  
9 one-year period and thus entitle Petitioner to statutory tolling, the one-year period continued to run  
10 unabated until it expired on August 1, 2008. Thereafter, Petitioner filed his thirteenth and fourteenth  
11 state petitions; however, those actions do not entitle him to additional tolling. A petitioner is not  
12 entitled to tolling where the limitations period has *already run* prior to filing a state habeas petition.  
13 Green v. White, 223 F.3d 1001, 1003 (9<sup>th</sup> Cir. 2000); see Webster v. Moore, 199 F.3d 1256, 1259  
14 (11<sup>th</sup> Cir. 2000)(same); Ferguson v. Palmateer, 321 F.3d 820 (9<sup>th</sup> Cir. 2003)(“section 2244(d) does  
15 not permit the reinitiation of the limitations period that has ended before the state petition was  
16 filed.”); Jackson v. Dormire, 180 F.3d 919, 920 (8<sup>th</sup> Cir. 1999) (petitioner fails to exhaust claims  
17 raised in state habeas corpus filed after expiration of the one-year limitations period). Here, as  
18 mentioned, the limitations period expired on August 1, 2008, eleven days before Petitioner filed his  
19 thirteenth state habeas petition on August 12, 2008. Accordingly, he cannot avail himself of the  
20 statutory tolling provisions of the AEDPA for either the thirteenth or fourteenth state petitions.

21 Thus, the one-year period expired on August 1, 2008 and Petitioner did not file the instant  
22 petition until January 21, 2009, approximately five and one-half months after the limitation period  
23 had ended. Therefore, unless Petitioner is entitled to equitable tolling, the petition is untimely after  
24 all allowable statutory tolling has been considered.

#### 25 D. Equitable Tolling

26 The limitation period is subject to equitable tolling when “extraordinary circumstances  
27

---

28 <sup>6</sup>The California Supreme Court denied both the eleventh and twelfth petitions citing In re Clark, 5 Cal. 4<sup>th</sup> 750 (1993), which holds that repetitious or dilatory claims will not be condoned. (LD 31, 37).

1 beyond a prisoner’s control make it impossible to file the petition on time.” Shannon v. Newland,  
2 410 F. 3d 1083, 1089-1090 (9th Cir. 2005)(internal quotation marks and citations omitted). “When  
3 external forces, rather than a petitioner’s lack of diligence, account for the failure to file a timely  
4 claim, equitable tolling of the statute of limitations may be appropriate.” Miles v. Prunty, 187 F.3d  
5 1104, 1107 (9th Cir. 1999). “Generally, a litigant seeking equitable tolling bears the burden of  
6 establishing two elements: “(1) that he has been pursuing his rights diligently, and (2) that some  
7 extraordinary circumstance stood in his way.” Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct.  
8 1807 (2005). “[T]he threshold necessary to trigger equitable tolling under AEDPA is very high, lest  
9 the exceptions swallow the rule.” Miranda v. Castro, 292 F. 3d 1062, 1066 (9th Cir. 2002)(citation  
10 omitted). As a consequence, “equitable tolling is unavailable in most cases.” Miles, 187 F. 3d at  
11 1107.

12 Here, Petitioner makes no claim of entitlement to equitable tolling and, in reviewing the  
13 entire record, the Court sees no basis for such tolling. In his opposition to Respondent’s motion to  
14 dismiss, Petitioner argues that Ground One states a cognizable claim and that his trial counsel’s  
15 ineffectiveness at the pre-trial suppression hearing denied Petitioner a full and fair opportunity to  
16 litigate what Petitioner contends was an illegal parole search. (Doc. 21, p. 1). Significantly,  
17 however, Petitioner does not offer any substantive arguments to rebut Respondent’s claim that the  
18 petition is untimely, nor does Petitioner provide any bases justifying the use of equitable tolling  
19 principles to make the instant petition timely. Petitioner does not contend that he is factually  
20 innocent; rather, he contends that the parole search was unconstitutional and that his constitutional  
21 rights were violated thereby. Under such circumstances, the Court finds no basis for equitable  
22 tolling.

23 Accordingly, the Court concludes that the petition is untimely and should be dismissed.

24 **RECOMMENDATION**

25 For the foregoing reasons, the Court HEREBY RECOMMENDS that Respondent’s motion  
26 to dismiss (Doc. 17), be GRANTED and the habeas corpus petition (Doc. 1), be DISMISSED for  
27 Petitioner’s failure to comply with 28 U.S.C. § 2244(d)’s one year limitation period.

28 This Findings and Recommendation is submitted to the United States District Court Judge

1 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the  
2 Local Rules of Practice for the United States District Court, Eastern District of California.  
3 Within twenty (20) days after being served with a copy, any party may file written objections with  
4 the court and serve a copy on all parties. Such a document should be captioned “Objections to  
5 Magistrate Judge’s Findings and Recommendation.” Replies to the objections shall be served and  
6 filed within ten (10) court days (plus three days if served by mail) after service of the objections.  
7 The Court will then review the Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The  
8 parties are advised that failure to file objections within the specified time may waive the right to  
9 appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9<sup>th</sup> Cir. 1991).

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IT IS SO ORDERED.

Dated: March 31, 2010

/s/ Jennifer L. Thurston  
UNITED STATES MAGISTRATE JUDGE