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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

KEVIN LANCE WILLIAMS,

Petitioner,

No. 2:09-cv-01691 MCE KJN P

vs.

CLAUDE E. FINN,

Respondent.

FINDINGS AND RECOMMENDATIONS

\_\_\_\_\_ /

Respondent moves to dismiss the petition for writ of habeas corpus filed by petitioner, a state prisoner who proceeds without counsel in this action filed pursuant to 28 U.S.C. § 2254.<sup>1</sup> On May 26, 2010, this court directed petitioner to file supplemental briefing, which petitioner timely filed on June 3, 2010. Respondent was given the opportunity to respond, but did not file a reply.

Pursuant to his petition for writ of habeas corpus filed June 15, 2009,<sup>2</sup> petitioner

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<sup>1</sup> This action is referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), Local General Order No. 262, and E.D. Cal. L.R. (“Local Rule”) 302, and was reassigned to the undersigned on February 9, 2010.

<sup>2</sup> Although the court docket indicates a filing date of June 18, 2009 (Dkt. No. 1), June 15, 2009 is the date on which petitioner signed and delivered the instant petition to prison officials for mailing (*id.* at 7). Pursuant to the mailbox rule, that date is considered the filing date of the

1 challenges the 2006 and 2007 decisions of the California Board of Parole Hearings denying  
2 petitioner parole. Respondent filed a motion to dismiss on September 2, 2009, based on the  
3 contention that the petition is barred by the one-year statute of limitations set forth in the  
4 Antiterrorism and Effective Death Penalty Act (“AEDPA”), 28 U.S.C. § 2244(d)(1). (Dkt. No.  
5 16.) For the following reasons, the court recommends that respondent’s motion be denied.

6 LEGAL STANDARDS

7 AEDPA’s one-year statute of limitations, set forth in 28 U.S.C. § 2244,<sup>3</sup> “applies  
8 to all habeas petitions filed by persons in ‘custody pursuant to the judgment of a State court,’  
9 even if the petition challenges an administrative decision rather than a state court judgment.”  
10 Shelby v. Bartlett, 391 F.3d 1061, 1062 (9th Cir. 2004) (citation omitted); see also Redd v.

11 \_\_\_\_\_  
12 petition. See Stillman v. Lamarque, 319 F.3d 1199, 1201 (9th Cir. 2003).

13 <sup>3</sup> 28 U.S.C. § 2244(d)(1) provides in full:

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

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

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

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

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

25 Section 2244(d)(2) provides that “the time during which a properly filed application for State  
26 post-conviction or other collateral review with respect to the pertinent judgment or claim is  
pending shall not be counted toward” the limitations period.

1 McGrath, 343 F.3d 1077, 1080-83 (9th Cir. 2003) (assuming without deciding that the AEDPA  
2 statute of limitations applies to collateral attacks on parole board decisions). When a habeas  
3 petitioner challenges an administrative decision, § 2244(d)(1)(D) governs the date on which the  
4 one-year limitation period begins to run. Shelby, 391 F.3d at 1066; Redd, 343 F.3d at 1081-83.  
5 Thus, the limitation period begins to run on “the date on which the factual predicate of the claim  
6 or claims presented could have been discovered through the exercise of due diligence,” 28 U.S.C.  
7 § 2244(d)(1)(D), or in this context, the date of the Board’s final decision. See Redd, 343 F.3d at  
8 1084-85; Shelby, 391 F.3d at 1065-66.<sup>4</sup>

9           Generally, this limitation period is statutorily tolled from the filing date of the first  
10 state habeas petition until the California Supreme Court rejects the final collateral challenge.  
11 Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999); see 28 U.S.C. § 2244(d)(2) (period tolled  
12 during the pendency of a “properly filed application for State post-conviction or other collateral  
13 review with respect to the pertinent judgment or claim”).

14           In addition, equitable tolling is available “when extraordinary circumstances  
15 beyond a prisoner’s control make it impossible” to timely file the federal petition. Espinoza-  
16 Matthews v. California, 432 F.3d 1021, 1026 (9th Cir. 2005) (internal quotation marks and  
17 citations omitted). “That determination is highly fact-dependent and [petitioner] bears the burden  
18 of showing that equitable tolling is appropriate.” Id. The Ninth Circuit has stated that, because  
19 of Congress’s desire to speed up the federal habeas process, this standard presents a “high  
20 hurdle” for petitioners. Calderon v. United States District Court (Beeler), 128 F.3d 1283, 1289  
21 (9th Cir. 1997) overruled in part on other grounds by Calderon v. United States District Court

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23           <sup>4</sup> Both Redd and Shelby were decided before California eliminated administrative  
24 appeals for parole board decisions. See, e.g., Jacobson v. Schwarzenegger, 357 F. Supp. 2d  
25 1198, 1208 (C.D. Cal. 2004); Lawson v. Woodford, 2005 WL 1489859, \*3 (E.D. Cal. 2005);  
26 Stratton v. Marshall, \_\_\_ F. Supp. \_\_\_, 2009 WL 1759694, \*4 (E.D. Cal. 2009) (citing Cal. Admin.  
Code, tit. 15 § 2050). Although there is not yet a Ninth Circuit case addressing the impact of this  
change, if any, on Redd and Shelby, this court recently found that the appropriate trigger date  
remains the date on which the parole decision became administratively final. See Tafoya v.  
Subia, No. 2:07-cv-2389 GEB KJN P (Dkt. Nos. 24, 27).

1 (Kelly), 163 F.3d 530 (9th Cir. 1998). “A petitioner must show that his untimeliness was caused  
2 by an external impediment and not by his own lack of diligence.” Bryant v. Arizona Attorney  
3 General, 499 F.3d 1056, 1061 (9th Cir. 2007), citing Roy v. Lampert, 465 F.3d 964, 973 (9th Cir.  
4 2006); see also Shannon v. Newland, 410 F.3d 1083, 1090 (9th Cir. 2005) (observing that in each  
5 of the cases in which equitable tolling has been applied the requisite “extraordinary  
6 circumstances” have been based on the “wrongful conduct” of another that “actually prevented  
7 the prisoner from preparing or filing a timely habeas petition”).

#### 8 DISCUSSION

9 Respondent contends that the instant petition is necessarily untimely because  
10 more than one year passed between the California Supreme Court’s denial of review on June 11,  
11 2008,<sup>5</sup> and the date petitioner filed the instant petition on June 15, 2009, and that there is no basis  
12 for equitable tolling. Thus, respondent does not frame his statute of limitations contention  
13 commencing with the operative date of the Board’s decision (the “factual predicate” described in  
14 28 U.S.C. § 2244(d)(1)(D)), but argues that such analysis is unnecessary.

15 Petitioner responds that the limitation period should be equitably tolled for the  
16 following reasons and periods: (1) petitioner did not receive the June 11, 2008 order of the  
17 California Supreme Court until “July 2008” (date not provided); (2) petitioner was housed in  
18 administrative segregation from April 23, 2008 through September 11, 2008, and did not  
19 received his legal materials until September 20, 2008; (3) petitioner was again placed in  
20 administrative segregation on December 4, 2008, and although released to the regular population  
21 on December 17, 2008, did not again receive his legal materials until January 2, 2009;  
22 (4) petitioner was placed on “out to court” status without access to his legal materials from  
23 February 5, 2009 until March 2, 2009, and again from March 17, 2009 until May 7, 2009.  
24 (Petitioner’s Supplemental Brief (hereafter “PSB”), at pp. 4-5, and attached exhibits.)

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25 <sup>5</sup> The decision of the California Supreme Court was final upon issuance. See Cal. Rules  
26 of Court, Rule 8.532(b)(2)(C).

1           The court’s analysis herein is premised on the factual predicate of the Board’s  
2 parole decisions for which the following chronology is relevant:

3           1. Petitioner is serving a prison sentence of 17-years-to-life based on a second-  
4 degree homicide conviction and firearm enhancement. (Petition, Dkt. No. 1, at 2, 9.)

5           2. The Board of Parole Hearings denied petitioner parole on March 23, 2006,  
6 indicating that the decision would be final on July 21, 2006. (Dkt. No. 1, Exh. A.) Petitioner  
7 challenged the ruling by filing a petition for writ of habeas corpus in the Los Angeles Superior  
8 Court on December 5, 2006. (Id., Exh. M.)

9           3. During the pendency of his writ in superior court, petitioner was again denied  
10 parole on February 22, 2007 (id.), which became final ninety days thereafter, on May 23, 2007.  
11 On July 9, 2007, petitioner filed a supplemental brief in superior court, thus challenging both  
12 Parole Board decisions. (Id.)

13           4. The California Supreme Court denied review on June 11, 2008. (Dkt. No. 1, at  
14 4.)

15           5. Petitioner filed the instant petition for writ of habeas corpus on June 15, 2009.

16           Calculating the commencement of AEDPA’s one-year limitation period relative to  
17 the Parole Board’s 2006 decision on July 21, 2006, when the decision became final (see n. 4 and  
18 related text, *supra*), 137 days lapsed before petitioner filed his first state court habeas petition on  
19 December 5, 2006. The limitation period was then statutorily tolled during the pendency of  
20 petitioner’s state court filings, December 5, 2006 until June 11, 2008, when the California  
21 Supreme Court denied review. Petitioner thereafter had, absent equitable tolling, 228 days  
22 remaining on the one-year limitation period, or until January 26, 2009,<sup>6</sup> to file the instant  
23 petition. Petitioner filed this petition on June 15, 2009, more than 4 months thereafter.

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25           <sup>6</sup> This calculated deadline was actually Sunday, January 25, 2007. However, pursuant to  
26 former Fed. R. Civ. P. 6(a)(3), the relevant “period runs until the end of the next day that is not a  
Saturday, Sunday, [or] legal holiday.”

1 Similar timing attaches to petitioner's challenge of his 2007 parole denial. The  
2 Parole Board's decision became final on May 23, 2007. Petitioner filed his supplemental brief in  
3 superior court on July 9, 2007, 47 days later. When the Supreme Court denied review on June  
4 11, 2008, 318 days remained, absent equitable tolling, within which petitioner could file a federal  
5 instant petition, or by April 25, 2009. Petitioner filed the instant petition on June 15, 2009, more  
6 than 7 weeks later.

7 Petitioner first contends that these periods should be equitably tolled because he  
8 did not receive the June 11, 2008 order of the California Supreme Court until "July 2008."  
9 As the court noted in its prior order, the Ninth Circuit has held that "'a prisoner's lack of  
10 knowledge that the state courts have reached a final resolution of his case can provide grounds  
11 for equitable tolling if the prisoner has acted diligently in the matter.'" Ramirez v. Yates, 571  
12 F.3d 993, 997-98 (9th Cir. 2009), quoting Woodward v. Williams, 263 F.3d 1135, 1143 (10th  
13 Cir. 2001). To determine whether a petitioner is entitled to tolling under these circumstances, the  
14 district court must know the date that petitioner actually received the notice, whether petitioner  
15 acted diligently to obtain such notice, and whether the delay of notice contributed to the  
16 untimeliness of petitioner's filing. Ramirez, 571 F.3d at 998 (citations omitted).

17 Petitioner remains unable to identify the date he received the denial of review. He  
18 states that he does not have access to the "legal mail log." (Dkt. No. 23, at 7.) He previously  
19 implied that the delay was attributable to an institutional failure within the courts or prison  
20 system in timely processing or delivering the mail. (Dkt. No. 17, at 4.) However, these matters  
21 are now subsumed by petitioner's un rebutted statement that he was placed in administrative  
22 segregation from April 23, 2008 through September 11, 2008, and that did not receive his legal  
23 materials until September 20, 2008. (PSB at 4, Exh. C, D, E.) This period comprised 150 days,  
24 but only 101 days are relevant because they occurred after the June 11, 2008 denial of review by  
25 the California Supreme Court. Petitioner has also demonstrated that he was again placed in  
26 administrative segregation for the period December 4 to December 17, 2008, but did not receive

1 his property until January 2, 2009, a period of 29 days. (Id. at 4-5, Exh. G, H, I.)<sup>7</sup> Finally,  
2 petitioner states, substantially supported by the docket in this action, that his legal property  
3 remained at Deuel Vocational Institute (“DVI”) when he was placed on “Out-To-Court [‘OTC’]  
4 Status” requiring a transfer to California State Prison-Sacramento (“CSP-S”) from February 5,  
5 2009 to March 2, 2009, and was returned to OTC status at CSP-S from March 17, 2009 to May  
6 7, 2009 (a total period of 76 days). (PSB, at 5.)

7           The Ninth Circuit has held “that a complete lack of access to a legal file may  
8 constitute an extraordinary circumstance, and that it is ‘unrealistic to expect a habeas petitioner to  
9 prepare and file a meaningful petition on his own within the limitations period without access to  
10 his legal file.’” Ramirez, supra, 571 F.3d at 998 (quoting Espinoza-Matthews v. California, 432  
11 F.3d 1021, 1027-28 (9th Cir. 2005) (internal alteration and quotations omitted)). The essential  
12 inquiry in determining whether a petitioner’s lack of access to his legal file warrants equitable  
13 tolling is whether such lack of access made a timely filing impossible despite petitioner’s diligent  
14 pursuit of his rights. Id.

15           Petitioner’s exhibits demonstrate diligence in attempting to obtain his legal  
16 materials during the last period of his placement in administrative segregation. The January 5,  
17 2009 letter from Chief Deputy Warden Rackley acknowledged petitioner’s December 30, 2008  
18 letter seeking the return of his personal property taken December 4, 2008, states that it had been  
19 “necessary to retain control of your property for security reasons” during this period, and noted  
20 that petitioner’s property had been returned January 2, 2009. (Dkt. No. 23, Exh. I.) Respondent  
21 does not challenge this or any other representation of petitioner relative to the periods he asserts  
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23           <sup>7</sup> Petitioner previously provided the following chronology of his placements:  
24 administrative segregation at California Medical Facility from “April 2008” until September 11,  
25 2008; transferred “while in Ad-Seg” to Deuel Vocational Institute “on October 2008;” released to  
26 “the Main-Line” “on November 2008;” “placed back in the hold” “on December 2008;” “placed  
on Out-To-Court Status” and transferred to California State Prison-Sacramento “on January  
2009;” placed on the “MainLine at D.V.I.” “on February and March 2009;” and “back on Out-  
To-Court Status” “on March 2009” and “on May 2009.” (Dkt. No. 17, at 2.)

1 he was without his legal materials. Absent refutation of petitioner's representations, the court  
2 assumes their accuracy. The court therefore accepts petitioner's representations that he was  
3 without his legal property, despite his due diligence in seeking to obtain it, for a total relevant  
4 period of 206 days.<sup>8</sup> Additionally, it is reasonable to infer that this lack of access rendered it  
5 impossible for petitioner to timely file his federal habeas petition absent equitable tolling.

6 The court therefore finds that petitioner has met his burden of demonstrating  
7 entitlement to equitable tolling of AEDPA's one-year statute of limitations based upon his  
8 placements in administrative segregation and "out to court" status without access to his legal  
9 materials. It is appropriate to equitably toll, for a total period of 206 days, the filing deadlines for  
10 petitioner's federal challenges to the Parole Board's 2006 and 2007 decisions, rendering the  
11 effective deadlines, respectively, August 20, 2009 (January 26, 2009, plus 206 days), and  
12 November 17, 2009 (April 25, 2009, plus 206 days). Thus, petitioner's instant petition for a writ  
13 of habeas corpus, challenging both decisions, was timely filed June 15, 2009.

14 Accordingly, IT IS HEREBY RECOMMENDED that respondent's motion to  
15 dismiss (Dkt. No. 16) be denied.

16 These findings and recommendations are submitted to the United States District  
17 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 21 days  
18 after being served with these findings and recommendations, any party may file written  
19 objections with the court and serve a copy on all parties. Such a document should be captioned  
20 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the  
21 objections shall be filed and served within 14 days after service of the objections. The parties are  
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23 <sup>8</sup> To summarize, this 206-day period is calculated as follows: (a) 101 days from June 11,  
24 2008 to September 20, 2008 (denial of access to legal materials while petitioner was placed in  
25 administrative segregation); (b) 29 days from December 4, 2008 to January 2, 2009 (denial of  
26 access to legal materials while petitioner was placed in administrative segregation and for several  
days thereafter); and (c) 76 days from February 5, 2009 to March 2, 2009, and from March 17,  
2009 to May 7, 2009 (placement in OTC Status at other facilities without access to his legal  
property which remained at DVI).



1 advised that failure to file objections within the specified time may waive the right to appeal the  
2 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: July 9, 2010

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KENDALL J. NEWMAN  
UNITED STATES MAGISTRATE JUDGE

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