

1 *Smith v. Duncan*, 297 F.3d 809, 812-13 (9th Cir. 2002), *abrogation on other*
2 *grounds recognized by Moreno v. Harrison*, 245 Fed. Appx. 606 (9th Cir. 2007).

3 The present proceedings were initiated after the April 24, 1996 effective
4 date of the Antiterrorism and Effective Death Penalty Act (“AEDPA”).

5 Accordingly, the AEDPA’s timeliness provisions apply, including a one-year
6 limitations period which is subject to both statutory and equitable tolling. *See* 28
7 U.S.C. § 2244(d)(1). For those prisoners, like petitioner, whose convictions
8 became final post-AEDPA, the one-year period starts running from the latest of
9 four alternative dates set forth in 28 U.S.C. § 2244(d)(1)(A)-(D). *See, e.g.,*
10 *Patterson v. Stewart*, 251 F.3d 1243, 1245-47 (9th Cir. 2001). The operative
11 provision which appears to apply in this case is set forth in 28 U.S.C. §
12 2244(d)(1)(A). That subparagraph provides that the one-year period begins to run
13 from “the date on which the judgment became final by the conclusion of direct
14 review or the expiration of the time for seeking such review.” Here, as shown
15 above, petitioner’s judgement became final on July 30, 2008. Accordingly, the
16 one-year limitations period expired on July 30, 2009. However, petitioner did not
17 initiate the present proceedings until over a year after the limitations period
18 expired. As a result, the present action is untimely, absent statutory or equitable
19 tolling. *See* 28 U.S.C. § 2244(d)(1); Fed. R. Civ. Proc. 6(a).

20 Title 28 U.S.C. § 2244(d)(2) provides that “[t]he time during which a
21 properly filed application for state post-conviction or other collateral review with
22 respect to the pertinent judgment or claim is pending shall not be counted toward
23 any period of limitation under this subsection.”

24 The statute of limitations is not tolled between the date on which a
25 judgment becomes final and the date on which the petitioner filed his first state
26 collateral challenge because there is no case “pending.” *Nino v. Galaza*, 183 F.3d
27 1003, 1006 (9th Cir. 1999). Once an application for post-conviction review
28 commences, it is “pending” until a petitioner “complete[s] a full round of [state]

1 collateral review.” *Delhomme v. Ramirez*, 340 F.3d 817, 819 (9th Cir. 2003)
2 (citing *Biggs v. Duncan*, 339 F.3d 1045, 1048 (9th Cir. 2003)). “One full round”
3 generally means that the statute of limitations is tolled while a petitioner is
4 properly pursuing post-conviction relief, from the time a California prisoner files
5 his first state habeas petition until the California Supreme Court rejects his final
6 collateral challenge. *Carey v. Saffold*, 536 U.S. 214, 219-20, 122 S. Ct. 2134, 153
7 L. Ed. 2d 260 (2002); *see also Nino*, 183 F.3d at 1006; *Delhomme*, 340 F.3d at
8 819. The period tolled includes the time between a lower court decision and the
9 filing of a new petition in a higher court, as long as the intervals between the filing
10 of those petitions are “reasonable.” *Delhomme*, 340 F.3d at 819 (citing *Biggs*, 339
11 F.3d at 1048 n.1).

12 Here, petitioner is not entitled to any statutory tolling. Petitioner did not
13 file his first state habeas petition until November 13, 2009. But by that time, three
14 months had passed since the July 30, 2009 cutoff date. Given the passing of the
15 cutoff date, the November 13, 2009 state habeas petition could not toll the statute
16 of limitations. *See Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003)
17 (“[S]ection 2244(d) does not permit the reinitiation of a limitations period that has
18 ended before the state petition was filed.”); *Green*, 223 F.3d at 1003 (holding that
19 state habeas petition filed after expiration of AEDPA limitation period could not
20 toll limitation period “because the limitations period had already run”); *Vroman v.*
21 *Brigano*, 346 F.3d 598, 602 (6th Cir. 2003) (application of section 2244(d)(2)
22 “tolling provision does not . . . ‘revive’ the limitations period (i.e., restart the
23 clock at zero); it can only serve to pause a clock that has not yet fully run”)
24 (citation omitted).

25 Because the Petition does not demonstrate any basis for tolling the statute,
26 the Court orders petitioner to show cause in writing within 15 days of the date of
27 this order why the Petition should not be dismissed as time-barred. If petitioner
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1 fails to provide a timely response to this order, the Court will recommend that the
2 Petition be dismissed as time-barred and/or for failure to prosecute.

3 The Court also notes that petitioner has failed to sign the Petition. Thus, the
4 Petition is not properly verified, as required by Rule 2(c) of the Rules Governing
5 Section 2254 Cases in the United States District Courts and Central District of
6 California Local Rule 83-16.2. Therefore, the Petition is dismissed with leave to
7 amend. Petitioner is ordered to file a properly signed Petition within 30 days of
8 the date of this order. If petitioner fails to timely file a properly verified petition,
9 the Court will recommend that the Petition be dismissed for failure to comply with
10 Rule 2(c) of the Rules Governing Section 2254 Cases in the United States District
11 Courts and Central District of California Local Rule 83-16.2 and for failure to
12 prosecute.

13
14 **CONCLUSION**

15 Petitioner is ordered to show cause in writing within 15 days of the date of
16 this order why the Petition should not be dismissed with prejudice as time-barred.

17 Petitioner is also ordered to file within 15 days of the date of this order a
18 properly signed petition.

19 IT IS SO ORDERED.

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21 DATED: January 6, 2011

22
23 / s / FREDERICK F. MUMM
24 FREDERICK F. MUMM
25 United States Magistrate Judge
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