

1 January 28, 2013.

2
3 **BACKGROUND**

4
5 On March 17, 2004, in the Los Angeles County Superior Court, a
6 jury found Petitioner guilty of one count of kidnapping, two counts of
7 infliction of corporal injury on a former cohabitant, one count of
8 residential burglary, two counts of dissuading a witness by force or
9 threat, one count of aggravated assault, one count of making a
10 criminal threat, one count of sexual penetration with a foreign
11 object, one count of forcible oral copulation, three counts of
12 forcible rape, two counts of battery inflicting injury upon a peace
13 officer, and one count of resisting an officer by force or violence
14 (Respondent's Lodgment 1; see People v. Niebla, 2008 WL 5395113, at *1
15 (Cal. App. Dec. 23, 2008)). The jury also found Petitioner guilty of
16 the misdemeanor offenses of assault and committing a lewd act in the
17 presence of a minor (see People v. Niebla, 2008 WL 5395113, at *1).
18 The jury found true the allegations that the rapes, oral copulation,
19 and sexual penetration with a foreign object were committed during a
20 burglary (see People v. Niebla, 2008 WL 5395113, at *1). The court
21 sentenced Petitioner to a term of thirty-nine years and eight months
22 plus five consecutive terms of fifteen years to life (Respondent's
23 Lodgment 1; People v. Niebla, 2008 WL 5395113, at *1).

24
25 On August 20, 2007, the California Court of Appeal affirmed the
26 conviction but remanded the case to the Superior Court for
27 resentencing (Respondent's Lodgment 5). On October 24, 2007, the
28 California Supreme Court denied Petitioner's petition for review

1 summarily (Respondent's Lodgment 7).

2
3 On January 2, 2008, the Superior Court resentenced Petitioner
4 (Respondent's Lodgment 8).¹ On December 23, 2008, the Court of Appeal
5 again remanded for resentencing but otherwise affirmed the judgment
6 (Petition, Ex. C; Respondent's Lodgment 12; see People v. Niebla, 2008
7 WL 5395113 (Cal. App. Dec. 23, 2008)).

8
9 On June 24, 2009, the Superior Court resentenced Petitioner to a
10 term of 39 years and 8 months plus 15 years to life (Petitioner, Ex.
11 B; Respondent's Lodgments 13, 14, 15). The Court of Appeal affirmed
12 the judgment on February 26, 2010 (Petition, Ex. E; Respondent's
13 Lodgment 17; see People v. Niebla, 2010 WL 670539, at *1 (Cal. App.
14 Feb. 26, 2010)). The California Supreme Court denied Petitioner's
15 petition for review summarily on May 12, 2010 (Petition, Ex. F;
16 Respondent's Lodgment 19).

17
18 Petitioner filed a pro se habeas corpus petition in the Superior
19 Court, bearing a service date of July 18, 2010 (Respondent's Lodgment
20 20).² On August 5, 2010, the Superior Court denied the petition,
21 directing the clerk to give notice (Respondent's Lodgment 21).

22
23 On or after December 19, 2010, Petitioner sent a letter to the
24 Superior Court, stating that he had not received any verification that

25
26 ¹ Although the abstract of judgment bears the date of
27 January 1, 2010, a court holiday, the document bears a signature
date of January 2, 2010 (see Respondent's Lodgment 8, p. 3).

28 ² The copy of this document lodged by Respondent does not
bear a file stamp showing the date of filing.

1 the court had filed his petition, and requesting proof of filing
2 (Respondent's Lodgment 22). A copy of the envelope attached to this
3 letter bears a prison postmark of December 21, 2010 (Respondent's
4 Lodgment 22).

5
6 On March 9, 2011, Petitioner filed a habeas corpus petition in
7 the Court of Appeal, bearing a signature and service date of March 4,
8 2011 (Respondent's Lodgment 23). In that Petition, Petitioner
9 challenged his conviction and sentence, and also alleged, inter alia,
10 that he had not been "served" with the Superior Court's August 5, 2010
11 order until January 6, 2011 (Respondent's Lodgment 23, "Addendum to
12 Instant Petition for Writ of Habeas Corpus," p. iii). Petitioner
13 attached to the Court of Appeal petition a copy of a Superior Court
14 nunc pro tunc minute order, dated August 5, 2010, denying the Superior
15 Court petition (Respondent's Lodgment 23, Ex. G thereto). The minute
16 order bore a print date of January 3, 2011 (id.). Also attached to
17 the Court of Appeal petition was a copy of an envelope addressed to
18 Petitioner, bearing the Superior Court's return address and a postmark
19 of January 4, 2011 (id.). Petitioner's prison mail log shows
20 Petitioner received mail from the Superior Court on January 7, 2011
21 (Respondent's Lodgment 30, p. "4 of 5").

22
23 On April 21, 2011, the Court of Appeal issued an order:
24 (1) requiring the Director of the California Department of Corrections
25 and Rehabilitation to show cause in the Superior Court why the
26 abstract of judgment should not be corrected; and (2) otherwise
27 denying the petition (Respondent's Lodgment 24).

28 ///

1 On June 21, 2011, the Superior Court issued a minute order
2 appointing counsel for Petitioner "pursuant to defendant's request"
3 and correcting the abstract of judgment to reflect a sentence of
4 thirty-three years and eight months plus an additional term of 15
5 years to life (Respondent's Lodgment 28, Ex. J).³ On June 29, 2011, a
6 Superior Court deputy clerk issued an amended abstract of judgment
7 reflecting Petitioner's correct sentence (Respondent's Lodgment 25).
8

9 On July 27, 2011, Petitioner filed a petition for writ of mandate
10 in the Court of Appeal, bearing a signature and service date of
11 July 24, 2011 (Respondent's Lodgment 26). Petitioner alleged that the
12 Superior Court had failed to conduct proceedings regarding the Court
13 of Appeal's April 21, 2011 order to show cause and had failed to
14 respond to Petitioner's motions (Respondent's Lodgment 26, pp. 2-3).
15 On August 28, 2011, the Court of Appeal denied the petition on the
16 ground that the relief sought had been granted by the Superior Court's
17 June 21, 2011 minute order, and directed the clerk to serve a copy of
18 that minute order on Petitioner (Respondent's Lodgment 27).
19

20 On November 23, 2011, Petitioner filed a habeas corpus petition
21 in the California Supreme Court, bearing a signature date of
22 November 17, 2011 (Respondent's Lodgment 28). The California Supreme
23 Court denied the petition summarily on April 18, 2012 (Respondent's
24 Lodgment 29).
25

26 ///

27 ³ Although Respondent did not lodge this document, a copy
28 of the document is attached to Petitioner's subsequent California
Supreme Court habeas petition (Respondent's Lodgment 28, Ex. J).

1 been newly recognized by the Supreme Court and made
2 retroactively applicable to cases on collateral review; or

3
4 (D) the date on which the factual predicate of the claim or
5 claims presented could have been discovered through the
6 exercise of due diligence.

7
8 (2) The time during which a properly filed application for
9 State post-conviction or other collateral review with
10 respect to the pertinent judgment or claim is pending shall
11 not be counted toward any period of limitation under this
12 subsection.

13
14 "AEDPA's one-year statute of limitations in § 2244(d)(1) applies to
15 each claim in a habeas application on an individual basis." Mardesich
16 v. Cate, 668 F.3d 1164, 1171 (9th Cir. 2012).

17
18 Petitioner's conviction became final on August 10, 2010, upon the
19 expiration of 90 days from the California Supreme Court's May 12, 2010
20 denial of Petitioner's second petition for review. See Jimenez v.
21 Quarterman, 555 U.S. 113, 119 (2009) ("direct review cannot conclude
22 for purposes of § 2244(d)(1)(A) until the availability of direct
23 appeal to the state courts, [citation], and to this Court, [citation]
24 has been exhausted"); Bowen v. Roe, 188 F.3d 1157, 1159 (9th Cir.
25 1999) (period of "direct review" after which state conviction becomes
26 final for purposes of section 2244(d)(1) includes the 90-day period
27 for filing a petition for certiorari in the United States Supreme
28 Court); see also Burton v. Stewart, 549 U.S. 147, 156-57 (2007)

1 (AEDPA's limitations period begins to run after entry of an amended
2 judgment following resentencing). Hence, the statute of limitations
3 began running on August 11, 2010, unless subsections B, C, or D of 28
4 U.S.C. section 2244(d)(1) furnish a later accrual date. See Patterson
5 v. Stewart, 251 F.3d 1243, 1246 (9th Cir.), cert. denied, 534 U.S. 978
6 (2001); see also Porter v. Ollison, 620 F.3d 952, 958 (9th Cir. 2010)
7 (AEDPA statute of limitations is not tolled between the conviction's
8 finality and the filing of the first state collateral challenge).

9
10 Subsection B of section 2244(d)(1) is inapplicable. Petitioner
11 does not allege, and the record does not show, that any illegal
12 conduct by the state or those acting for the state "made it impossible
13 for him to file a timely § 2254 petition in federal court." See
14 Ramirez v. Yates, 571 F.3d 993, 1000-01 (9th Cir. 2009).⁴

15
16 Subsection C of section 2244(d)(1) is also inapplicable.
17 Petitioner does not assert any claim based on a constitutional right
18 "newly recognized by the Supreme Court and made retroactively
19 applicable to cases on collateral review." See Dodd v. United States,
20 545 U.S. 353, 360 (2005) (construing identical language in section
21 2255 as expressing "clear" congressional intent that delayed accrual
22 inapplicable unless the United States Supreme Court itself has made

23
24 ⁴ As discussed below, Petitioner argues that the Superior
25 Court's failure to notify Petitioner of its August 5, 2010 denial
26 order warrants equitable tolling. Petitioner does not argue, and
27 the record does not show, that any alleged failure by the
28 Superior Court to provide notice was the result of any illegal
conduct by the State or its representatives. Moreover, as
discussed below, Petitioner has not shown that the Superior
Court's alleged failure to give timely notice made it
"impossible" for Petitioner to file a timely federal petition.

1 the new rule retroactive); Tyler v. Cain, 533 U.S. 656, 664-68 (2001)
2 (for purposes of second or successive motions under 28 U.S.C. section
3 2255, a new rule is made retroactive to cases on collateral review
4 only if the Supreme Court itself holds the new rule to be
5 retroactive); Peterson v. Cain, 302 F.3d 508, 511-15 (5th Cir. 2002),
6 cert. denied, 537 U.S. 1118 (2003) (applying anti-retroactivity
7 principles of Teague v. Lane, 489 U.S. 288 (1989), to analysis of
8 delayed accrual rule contained in 28 U.S.C. section 2244(d) (1) (C)).
9

10 Section 2244(d) (1) (D) does not furnish an accrual date later than
11 August 11, 2010, for Petitioner's claims. Under section
12 2244(d) (1) (D), the "'due diligence' clock starts ticking when a person
13 knows or through diligence could discover the vital facts, regardless
14 of when their legal significance is actually discovered." Ford v.
15 Gonzalez, 683 F.3d 1230, 1235 (9th Cir.), cert. denied, 133 S. Ct. 769
16 (2012); Hasan v. Galaza, 254 F.3d 1150, 1154 n.3 (9th Cir. 2001); see
17 also United States v. Pollard, 416 F.3d 48, 55 (D.D.C. 2005), cert.
18 denied, 547 U.S. 1021 (2006) (habeas petitioner's alleged "ignorance
19 of the law until an illuminating conversation with an attorney or
20 fellow prisoner" does not satisfy the requirements of section
21 2244(d) (1) (D)). Petitioner knew or should have known, prior to or
22 during trial, the "vital facts" underlying his claims of alleged
23 ineffective assistance of trial counsel (all of which concern
24 counsel's alleged errors before and during trial). Petitioner knew or
25 should have known, no later than the conclusion of sentencing, the
26 "vital facts" underlying his claim of alleged sentencing error.
27 Petitioner knew or should have known, by the conclusion of his appeal
28 in the Court of Appeal, the "vital facts" underlying his claim of

1 ineffective assistance of appellate counsel.

2
3 Accordingly, the one-year statute of limitations began running on
4 August 11, 2010. Petitioner constructively filed the present Petition
5 on May 10, 2012.⁵ Absent sufficient tolling, the Petition is
6 untimely. See Patterson v. Stewart, 251 F.3d at 1246. As discussed
7 below, there does not exist sufficient tolling to render the present
8 Petition timely.

9
10 Section 2244(d)(2) tolls the statute of limitations during the
11 pendency of "a properly filed application for State post-conviction or
12 other collateral review." The statute ran for 205 days until
13 Petitioner constructively filed his Court of Appeal habeas petition on
14 March 4, 2011. See Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir.
15 1999), cert. denied, 529 U.S. 1104 (2000) (AEDPA statute of
16 limitations is not tolled between the conviction's finality and the
17 filing of the first state collateral challenge).⁶ Petitioner is
18 entitled to statutory tolling for the time during which his Court of
19 Appeal habeas petition was pending, from March 4, 2011, through

20
21 ⁵ The Court assumes arguendo that Petitioner filed the
22 present Petition on its signature and service date of May 10,
23 2012. See Porter v. Ollison, 620 F.3d at 958 (prison mailbox
rule applies to federal habeas petitions).

24 ⁶ Petitioner's first state habeas corpus petition in the
25 Superior Court was filed on July 18, 2010, and denied on
26 August 5, 2010, prior to the date his conviction became final on
27 August 10, 2010. Therefore, this petition cannot support
28 statutory tolling. See Thomas v. Salazar, 559 F. Supp. 2d 1063,
1067 (C.D. Cal. 2008) (where Superior Court denied habeas
petition before petitioner's conviction became final, "this
habeas petition did not toll the statute of limitations, which
had not yet begun to run") (citations omitted).

1 April 21, 2011.⁷ As of April 21, 2011, 160 days remained in the
2 limitations period.

3
4 Petitioner is not entitled to statutory tolling during the period
5 from the Court of Appeal's April 21, 2011 order through the Superior
6 Court's June 21, 2011 order amending the abstract of judgment. In
7 Wall v. Kholi, 131 S. Ct. 1278, 1282 (2011), the Supreme Court held
8 that statutory tolling applied during the pendency of a post-
9 conviction motion for reduction of sentence. The Court reasoned that
10 "collateral review" in section 2244(d)(2) meant "judicial review of a
11 judgment in a proceeding that is not part of direct review," and that
12 "review" meant "an act of inspecting or examining," or a "judicial
13 reexamination." Id. at 1284-85. Under Wall v. Kholi, "'review'
14 occurs when a reviewing court reconsiders the work of the original
15 court to correct any error or infelicity committed by that original
16 court - or rather, submits that original court's work to examination
17 for potential revision." Collins v. Ercole, 667 F.3d 247, 251 (2d
18 Cir.), cert. denied, 133 S. Ct. 149 (2012).

19
20 In the present case, the Court of Appeal's April 21, 2011
21 decision denied the petition on the merits, but also issued an order
22 to show cause to the Director of the California Department of
23 Corrections and Rehabilitation regarding clerical errors in the
24 abstract of judgment, returnable in the Superior Court. Because the
25 Court of Appeal had completed its review of the merits and directed

26
27 ⁷ The Court assumes arguendo Petitioner filed this state
28 petition on its signature date. See Porter v. Ollison, 620 F.3d
at 958 (prison mailbox rule applies to federal habeas petitions).

1 further proceedings only because of clerical errors in the abstract of
2 judgment, during the period from April 21, 2011, to June 21, 2011,
3 there existed no "application for State post-conviction or other
4 collateral review with respect to the relevant judgment or claim"
5 within the meaning of section 2244(d)(2). See Harrelson v. Swan, 381
6 Fed. App'x 336, 338-39 (5th Cir.), cert. denied, 131 S. Ct. 824 (2010)
7 (proceedings seeking entry of nunc pro tunc judgment following date
8 conviction became final did not warrant statutory tolling, where such
9 proceedings were limited to correction of clerical errors in the
10 judgment); cf. Brumfield v. Cate, 2010 WL 2267504, at *2 (N.D. Cal.
11 June 4, 2010) (rejecting argument that judgment became final when
12 Superior Court amended abstract of judgment to correct clerical error;
13 "the correction was not and could not have been used to change the
14 effect of the original judgment"); cf. also Speller v. Johnson, 2012
15 WL 1038624, at *9 n.21 (E.D. Va. Mar. 27, 2012) ("the courts have
16 uniformly held that when a court corrects a clerical error in a
17 criminal judgment, the AEDPA's one-year limitations period does not
18 begin anew when the court corrects the clerical error") (citations and
19 internal quotations omitted); Hamlin v. Swarthout, 2010 WL 5348754, at
20 *3 n.6 (C.D. Cal. Sept. 8, 2010), adopted, 2010 WL 5367554 (C.D. Cal.
21 Dec. 18, 2010) (rejecting argument that conviction became final when
22 Superior Court filed an amended abstract of judgment); Martin v.
23 Province, 2010 WL 5093403, at *2 n.1 (N.D. Okla. Dec. 8, 2010)
24 (amendment of judgment to correct clerical error did not restart
25 limitations period).

26
27 Petitioner also is not entitled to statutory tolling during the
28 pendency of Petitioner's subsequent petition for writ of mandate in

1 the Court of Appeal. See Meadows v. Jacquez, 242 Fed. App'x 453, 455
2 (9th Cir. 2007), cert. denied, 552 U.S. 1192 (2008) (mandamus
3 petitions to compel discovery did not warrant statutory tolling
4 because "they were not applications for State post-conviction or other
5 collateral review within the meaning of AEDPA") (original emphasis);
6 Westin v. Harris, 2012 WL 2860511, at *4 (C.D. Cal. July 3, 2012),
7 adopted, 2012 WL 2849394 (C.D. Cal. July 11, 2012) ("petitioner's
8 various petitions for writ of mandamus relating to the restitution
9 orders, his supposed inability to file pleadings in the superior
10 court, and the conditions of probation did not statutorily toll the
11 limitations period") (citations omitted); Thomas v. Salazar, 559 F.
12 Supp. 2d at 1067-68 (petitions for mandamus, including petition
13 seeking order requiring superior court to rule on petitioner's habeas
14 petition, did not qualify for statutory tolling); see also Moore v.
15 Cain, 298 F.3d 361, 366-67 (5th Cir. 2002), cert. denied, 537 U.S.
16 1236 (2003) (mandamus application seeking to compel trial court to
17 perform its duty did not seek review of the judgment, and hence did
18 not qualify for statutory tolling).

19
20 Petitioner next constructively filed his California Supreme Court
21 petition on November 17, 2011. In certain circumstances, a habeas
22 petitioner may be entitled to "gap tolling" between the denial of a
23 state habeas petition and the filing of a "properly filed" habeas
24 petition in a higher state court. See Carey v. Saffold, 536 U.S. 214,
25 219-221 (2002). However, an untimely state habeas petition is not a
26 "properly filed" petition for purposes of statutory tolling under
27 section 2244(d)(2). Pace v. DiGuglielmo, 544 U.S. 408, 412-13 (2005);
28 Carey v. Saffold, 536 U.S. at 225 (California state habeas petition

1 filed after unreasonable delay not "pending" for purposes of section
2 2244(d)(2)); see also Evans v. Chavis, 546 U.S. 189, 191 (2006) ("The
3 time that an application for state postconviction review is 'pending'
4 includes the period between (1) a lower court's adverse determination,
5 and (2) the prisoner's filing of a notice of appeal, *provided that* the
6 filing of the notice of appeal is timely under state law") (citation
7 omitted).

8
9 The California Supreme Court denied Petitioner's petition
10 summarily. Where, as here, a state court denies a habeas petition
11 without a "clear indication" that the petition was timely or untimely,
12 a federal habeas court "must itself examine the delay in each case and
13 determine what the state courts would have held in respect to
14 timeliness." Evans v. Chavis, 546 U.S. at 198; see also Banjo v.
15 Ayers, 614 F.3d 964, 969 (9th Cir. 2010), cert. denied, 131 S. Ct.
16 3023 (2011) ("We cannot infer from a decision on the merits, or a
17 decision without explanation, that the California court concluded that
18 the petition was timely.") (citation omitted).

19
20 In California, a petition is timely if filed within a "reasonable
21 time" after the petitioner learns of the grounds for relief. Carey v.
22 Saffold, 536 U.S. at 235 (citations omitted). In Evans v. Chavis, the
23 petitioner delayed over three years before filing his state court
24 habeas petition, and failed to provide justification for six months of
25 the delay. Evans v. Chavis, 546 U.S. at 192, 201. The Supreme Court
26 deemed the petition untimely, finding "no authority suggesting, . . .
27 [or] any convincing reason to believe, that California would consider
28 an unjustified or unexplained 6-month filing delay 'reasonable.'" Id.

1 at 201. In the present case, Petitioner delayed almost seven months
2 following the Court of Appeal's denial of Petitioner's habeas petition
3 on April 21, 2011, before constructively filing his California Supreme
4 Court petition on November 17, 2011. The Ninth Circuit has held to be
5 unreasonable gaps much shorter than the gap in the present case. See
6 Velasquez v. Kirkland, 639 F.3d 964, 968 (9th Cir.), cert. denied, 132
7 S. Ct. 554 (2011) (unjustified gaps of 91 and 81 days unreasonable);
8 Banjo v. Ayers, 614 F.3d at 970 (unexplained gap of 146 days
9 unreasonable); Chaffer v. Prosper, 592 F.3d 1046, 1048 (9th Cir. 2010)
10 (unjustified gaps of 115 and 101 days unreasonable). In accordance
11 with these authorities, Petitioner is not entitled to gap tolling
12 between the Court of Appeal's denial of Petitioner's habeas petition
13 on April 21, 2011, and the constructive filing of his California
14 Supreme Court petition on November 17, 2011.

15
16 Therefore, the statute of limitations resumed running on
17 April 22, 2011, and expired 160 days later on September 28, 2011.
18 Petitioner's subsequently-filed California Supreme Court petition
19 cannot revive the expired statute. See Ferguson v. Palmateer, 321
20 F.3d 820, 823 (9th Cir.), cert. denied, 540 U.S. 924 (2003) ("section
21 2244(d) does not permit the reinitiation of the limitations period
22 that has ended before the state petition was filed"); Jiminez v. Rice,
23 276 F.3d 478, 482 (9th Cir. 2001), cert. denied, 538 U.S. 949 (2003)
24 (filing of state habeas petition "well after the AEDPA statute of
25 limitations ended" does not affect the limitations bar); Webster v.
26 Moore, 199 F.3d 1256, 1259 (11th Cir.), cert. denied, 531 U.S. 991
27 (2000) ("[a] state-court petition . . . that is filed following the
28 expiration of the limitations period cannot toll that period because

1 there is no period remaining to be tolled"); see also Nino v. Galaza,
2 183 F.3d 1003, 1006 (9th Cir. 1999), cert. denied, 529 U.S. 1104
3 (2000) (AEDPA statute of limitations is not tolled between the
4 conviction's finality and the filing of the first state collateral
5 challenge). Moreover, due to Petitioner's unreasonable delay, the
6 Supreme Court habeas petition was not "properly filed" and thus would
7 fail to trigger statutory tolling in any event. Therefore, absent
8 equitable tolling, the present Petition is untimely.

9
10 AEDPA's statute of limitations is subject to equitable tolling
11 "in appropriate cases." Holland v. Florida, 130 S. Ct. 2549, 2560
12 (2010) (citations omitted). "[A] 'petitioner' is entitled to
13 'equitable tolling' only if he shows '(1) that he has been pursuing
14 his claims diligently, and (2) that some extraordinary circumstance
15 stood in his way' and prevented timely filing." Id. at 2562 (quoting
16 Pace v. DiGuglielmo, 544 U.S. at 418); see also Lawrence v. Florida,
17 549 U.S. 327, 336 (2007). The threshold necessary to trigger
18 equitable tolling "is very high, lest the exceptions swallow the
19 rule." Waldron-Ramsey v. Pacholke, 556 F.3d 1008, 1011 (9th Cir.),
20 cert. denied, 130 S. Ct. 244 (2009) (citations and internal quotations
21 omitted). Petitioner bears the burden of proving entitlement to
22 equitable tolling. See Zepeda v. Walker, 581 F.3d 1013, 1019 (9th
23 Cir. 2009). Petitioner must prove that the alleged "extraordinary
24 circumstances" were the "cause of [the] untimeliness." Roy v.
25 Lampert, 465 F.3d 964, 969 (9th Cir. 2006), cert. denied, 549 U.S.
26 1317 (2007) (brackets in original; quoting Spitsyn v. Moore, 345 F.3d
27 796, 799 (9th Cir. 2003)). Petitioner must prove that an "external
28 force" caused the untimeliness, rather than "oversight, miscalculation

1 or negligence." Waldron-Ramsey v. Pacholke, 556 F.3d at 1011
2 (citation and internal quotations omitted).

3
4 Petitioner argues that the Superior Court's asserted failure to
5 inform Petitioner of the Superior Court's August 5, 2010 denial
6 justifies equitable tolling through January 7, 2011, the date
7 Petitioner assertedly learned that the Superior Court had denied
8 Petitioner's habeas petition (Reply, pp. 2-4). The Ninth Circuit has
9 recognized that "a prisoner's lack of knowledge that the state courts
10 have reached a final resolution of his case can provide grounds for
11 equitable tolling if the prisoner has acted diligently in the matter."
12 Ramirez v. Yates, 571 F.3d 993, 997 (2009) (citations and internal
13 quotations omitted). To evaluate Petitioner's equitable tolling
14 argument, the Court must determine: (1) the date Petitioner received
15 notice; (2) whether Petitioner acted diligently to obtain notice; and
16 (3) whether the alleged delay of notice "caused the untimeliness of
17 his filing and made a timely filing impossible." Id. at 997-98.

18
19 Respondent does not dispute that Petitioner was unaware of the
20 Superior Court's August 5, 2010 order until he received the order in
21 January of 2011.⁸ As indicated above, Petitioner's prison mail log
22 shows Petitioner received mail from the Superior Court on January 7,
23 2011 (Respondent's Lodgment 30, p. "4 of 5"). Therefore, it appears

24
25 ⁸ Respondent contends that Petitioner "may argue" that he
26 did not receive notice of the Superior Court's denial order until
27 "January 6, 2012 [sic]," but references a footnote acknowledging
28 that Petitioner's prison mail log shows the only mail from the
Superior Court in the relevant period "was received on January 7,
2011" (Answer, p. 12 & n.7). It thus appears that the first
quoted date may be a typographical error.

1 from the present record that Petitioner became aware of the Superior
2 Court's order by January 7, 2011, at the latest.

3
4 Respondent contends that Petitioner did not act diligently
5 because Petitioner apparently did not make any inquiry to the Superior
6 Court concerning the fate of his petition until December 19, 2010,
7 some five months after he had filed the petition. This Court need
8 not, and does not decide this issue, because Petitioner has failed to
9 demonstrate that the alleged delay of notice caused the untimeliness
10 of the present Petition and made a timely filing "impossible." See
11 Ramirez v. Yates, 571 F.3d at 997. When Petitioner assertedly
12 received notice of the Superior Court's August 5, 2010 order on
13 January 7, 2011, approximately seven months remained in the
14 limitations period. Even after the Court of Appeal denied
15 Petitioner's March 4, 2011 Court of Appeal petition on April 21, 2011,
16 Petitioner still had over five months to file a timely federal
17 petition. Petitioner failed to do so, instead squandering some of his
18 remaining time in the pursuance of a petition for writ of mandate
19 that did not toll the AEDPA statute of limitations.⁹ Furthermore,
20 even after the Court of Appeal denied the petition for mandate on
21 August 28, 2011, Petitioner delayed three more months before filing

22
23 ⁹ Any alleged ignorance of the law, lack of legal
24 sophistication or lack of legal assistance in this regard cannot
25 justify equitable tolling. See Waldron-Ramsey v. Pacholke, 556
26 F.3d at 1013 n.4 ("we have held that a pro se petitioner's
27 confusion or ignorance of the law is not, itself, a circumstance
28 warranting equitable tolling") (citation omitted); Raspberry v.
Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006) ("we now join our
sister circuits and hold that a pro se petitioner's lack of legal
sophistication is not, by itself, an extraordinary circumstance
warranting equitable tolling").

1 his California Supreme Court petition. The statute expired during
2 this time. Therefore, any alleged lack of notice of the Superior
3 Court's August 4, 2010 order cannot have been "the cause of
4 [Petitioner's] untimeliness." See Spitsyn v. Moore, 345 F.3d at 799;
5 Ramirez v. Yates, 2010 WL 3325610, at *4 (N.D. Cal. Aug. 23, 2010) (on
6 remand from Ninth Circuit, petitioner failed to show an entitlement to
7 equitable tolling where, "[r]ather than filing a federal habeas
8 petition as soon as possible [after he received notice of state court
9 ruling], petitioner filed various other motions in state and federal
10 court"). The Petition is untimely.

11
12 **RECOMMENDATION**

13
14 For the reasons discussed above, IT IS RECOMMENDED that the Court
15 issue an order: (1) approving and accepting this Report and
16 Recommendation; (2) directing that Judgment be entered denying and
17 dismissing the Petition with prejudice.

18
19
20 DATED: February 20, 2013.

21
22
23 _____/S/
24 CHARLES F. EICK
25 UNITED STATES MAGISTRATE JUDGE
26
27
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1 **NOTICE**

2 Reports and Recommendations are not appealable to the Court of
3 Appeals, but may be subject to the right of any party to file
4 objections as provided in the Local Rules Governing the Duties of
5 Magistrate Judges and review by the District Judge whose initials
6 appear in the docket number. No notice of appeal pursuant to the
7 Federal Rules of Appellate Procedure should be filed until entry of
8 the judgment of the District Court.

9 If the District Judge enters judgment adverse to Petitioner, the
10 District Judge will, at the same time, issue or deny a certificate of
11 appealability. Within twenty (20) days of the filing of this Report
12 and Recommendation, the parties may file written arguments regarding
13 whether a certificate of appealability should issue.

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