

1 conviction in the Superior Court of the County of Los Angeles for second degree murder. (Doc. 1, p.
2 2). Petitioner alleges that he was denied his constitutional rights by virtue of a July 7, 2005 decision
3 of the Board of Parole Hearings (“BPH”) that found Petitioner unsuitable for parole. (Id. at p. 15).
4 On October 17, 2008, the Court ordered Respondent to file a responsive pleading. (Doc. 9). On
5 December 16, 2008, Respondent filed the instant motion to dismiss, contending that the petition was
6 untimely. (Doc. 14). To date, Petitioner has not responded or opposed the motion to dismiss.

7 DISCUSSION

8 A. Procedural Grounds for Motion to Dismiss

9 Respondent has filed a Motion to Dismiss the petition as being untimely. Rule 4 of the Rules
10 Governing Section 2254 Cases allows a district court to dismiss a petition if it “plainly appears from
11 the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the
12 district court” Rule 4 of the Rules Governing Section 2254 Cases.

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

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

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

27 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of
28 1996 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas

1 corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063
2 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc), *cert. denied*, 118 S.Ct. 586
3 (1997). The instant petition was filed on August 5, 2008, and thus, it is subject to the provisions of
4 the AEDPA.

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

8 (1) A 1-year period of limitation shall apply to an application for a writ of habeas
9 corpus by a person in custody pursuant to the judgment of a State court. The
10 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
15 the applicant was prevented from filing by such State action;

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

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

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

24 28 U.S.C. § 2244(d).

25 Here, Petitioner challenges the denial of parole eligibility at a BPH hearing on July 7, 2005.
26 The AEDPA's one year statute of limitations, as embodied in § 2244(d)(1), applies to habeas
27 petitions challenging an administrative decision in the context of a parole board determination.
28 Shelby v. Bartlett, 391 F.3d 1061, 1063 (9th Cir. 2004); see Redd v. McGrath, 343 F.3d 1077, 1080
n. 4 (9th Cir. 2003). Under subsection (d), the limitation period begins to run on “the date on which
the factual predicate of the claim or claims presented could have been discovered through the
exercise of due diligence.” In the context of a parole board decision, the factual basis is the parole
board's denial of a petitioner's administrative appeal. Shelby, 391 F.3d at 1066; Redd, 343 F.3d at
1082-1083. Thus, the statute of limitations begins to run the day following a petitioner's notification

1 of the parole board's decision. Id. Where the date Petitioner received notice of the parole board's
2 hearing is not part of the record, Shelby rejected the notion that remand for an evidentiary hearing
3 was required to determine the date on which a petitioner found out about the hearing, apparently
4 establishing instead a presumption that an inmate will in fact receive notice on the day the denial is
5 issued, and that date will be used to calculate the statute of limitations unless the petitioner rebuts
6 that presumption:

7 "Here, as in Redd, Shelby does not dispute that he received timely notice of the denial of his
8 administrative appeal on July 12, 2001, and he offers no evidence to the contrary. Therefore,
the limitation period began running the next day."

9
10 Shelby, 391 F.3d at 1066.

11 The BPH's decision indicates that it would become final 120 days after the July 7, 2005
12 hearing, or on November 4, 2005. (Doc. 1, pt. 2, p. 94). Accordingly, Petitioner would have been
13 aware of the factual predicate for his claim, i.e., that the BPH had denied him parole eligibility, *no*
14 *later than* November 4, 2005. Thus, the one year period would have commenced the following day,
15 on November 5, 2005, and would have ended 365 days later, on November 4, 2006.

16 As mentioned, the instant petition was filed on August 5, 2008, twenty-one months after the
17 date the one-year period would have expired. Thus, unless Petitioner is entitled to either statutory or
18 equitable tolling, the instant petition is untimely and should be dismissed.

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

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

1 536 U.S. 214, 220, 222-226, 122 S. Ct. 2134 (2002); see also, Nino v. Galaza, 183 F.3d 1003, 1006
2 (9th Cir. 1999).

3 Nevertheless, there are circumstances and periods of time when no statutory tolling is
4 allowed. For example, no statutory tolling is allowed for the period of time between finality of an
5 appeal and the filing of an application for post-conviction or other collateral review in state court,
6 because no state court application is “pending” during that time. Nino, 183 F.3d at 1006-1007.
7 Similarly, no statutory tolling is allowed for the period between finality of an appeal and the filing of
8 a federal petition. Id. at 1007. In addition, the limitation period is not tolled during the time that a
9 federal habeas petition is pending. Duncan v. Walker, 563 U.S. 167, 181-182, 121 S.Ct. 2120
10 (2001); see also, Fail v. Hubbard, 315 F. 3d 1059, 1060 (9th Cir. 2001)(as amended on December 16,
11 2002). Further, a petitioner is not entitled to statutory tolling where the limitation period has already
12 run prior to filing a state habeas petition. Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003)
13 (“section 2244(d) does not permit the reinitiation of the limitations period that has ended before the
14 state petition was filed.”); Jiminez v. White, 276 F. 3d 478, 482 (9th Cir. 2001). Finally, a petitioner
15 is not entitled to continuous tolling when the petitioner’s later petition raises unrelated claims. See
16 Gaston v. Palmer, 447 F.3d 1165, 1166 (9th Cir. 2006).

17 The record before the Court indicates that Petitioner filed the following state habeas petitions
18 that, Respondent concedes for purposes of this motion, were entitled to statutory tolling as “properly
19 filed” under the AEDPA: (1) filed in the Superior Court for the County of Los Angeles on June 21,
20 2006, and denied on January 17, 2007 (Doc. 14, Exs. 2 & 3); (2) filed in the California Court of
21 Appeal, Second Appellate District, on May 9, 2007, and denied on June 6, 2007 (Id., Exs. 4 & 5);
22 and (3) filed in the California Supreme Court on August 19, 2007, and denied on February 27, 2008.
23 (Id., Exs. 6 & 7).

24 As mentioned, the one-year period commenced on November 5, 2005 and continued to run
25 until Petitioner filed his first state habeas petition on June 21, 2006, a period of 228 days, leaving
26 137 days remaining on the one-year period. The one-year period was then statutorily tolled
27 throughout the pendency of the three state petitions until the California Supreme Court denied
28 Petitioner’s last state petition on February 27, 2008. The one-year period then re-commenced the

1 following day, on February 28, 2008, and continued to run unabated until it expired 137 days later,
2 on July 14, 2008. As mentioned, the instant petition was filed on August 5, 2008. Thus, the most
3 charitable interpretation of the AEDPA's statutory tolling still leaves the petition untimely by
4 twenty-two days.

5 D. Equitable Tolling

6 The limitation period is subject to equitable tolling when "extraordinary circumstances
7 beyond a prisoner's control make it impossible to file the petition on time." Shannon v. Newland,
8 410 F. 3d 1083, 1089-1090 (9th Cir. 2005)(internal quotation marks and citations omitted). "When
9 external forces, rather than a petitioner's lack of diligence, account for the failure to file a timely
10 claim, equitable tolling of the statute of limitations may be appropriate." Miles v. Prunty, 187 F.3d
11 1104, 1107 (9th Cir. 1999). "Generally, a litigant seeking equitable tolling bears the burden of
12 establishing two elements: "(1) that he has been pursuing his rights diligently, and (2) that some
13 extraordinary circumstance stood in his way." Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct.
14 1807 (2005). "[T]he threshold necessary to trigger equitable tolling under AEDPA is very high, lest
15 the exceptions swallow the rule." Miranda v. Castro, 292 F. 3d 1062, 1066 (9th Cir. 2002)(citation
16 omitted). As a consequence, "equitable tolling is unavailable in most cases." Miles, 187 F. 3d at
17 1107.

18 Here, Petitioner has made no claim of entitlement to equitable tolling nor does he make any
19 allegation that "extraordinary circumstances" prevented him from timely filing the instant petition.
20 Indeed, Petitioner failed to respond or oppose the allegation of untimeliness in Respondent's motion
21 to dismiss in any way. After reviewing this record, the Court is unaware of any extraordinary
22 circumstances that prevented Petitioner from filing his petition in a timely manner. Thus, the Court
23 finds that Petitioner is not entitled to equitable tolling. Accordingly, the petition is in violation of 28
24 U.S.C. § 2244(d)(1) and should be dismissed.

25 **RECOMMENDATION**

26 Accordingly, for all of these reasons, the Court HEREBY RECOMMENDS that
27 Respondent's motion to dismiss (Doc. 14), be GRANTED and that the petition for writ of habeas
28 corpus (Doc. 1), be DISMISSED as untimely.

1 This Findings and Recommendation is submitted to the United States District Court Judge
2 assigned to the case pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 72-304 of the
3 Local Rules of Practice for the United States District Court, Eastern District of California. Within
4 fifteen (15) days after being served with a copy, any party may file written objections with the court
5 and serve a copy on all parties. Such a document should be captioned “Objections to Magistrate
6 Judge’s Findings and Recommendations.” Replies to the objections shall be served and filed within
7 ten (10) court days (plus three days if served by mail) after service of the objections. The Court will
8 then review the Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are
9 advised that failure to file objections within the specified time may waive the right to appeal the
10 District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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IT IS SO ORDERED.

Dated: September 17, 2009

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE