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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

ANTHONY LEE CORLEY,	)	1:09-cv-01607-SKO-HC
	)	
Petitioner,	)	ORDER DENYING PETITIONER'S MOTION
	)	FOR THE APPOINTMENT OF COUNSEL
	)	(DOC. 28)
v.	)	
	)	ORDER GRANTING RESPONDENT'S
MATTHEW CATE, Secretary of	)	MOTION TO DISMISS THE PETITION AS
the California Department of	)	UNTIMELY (DOC. 15)
Corrections and	)	
Rehabilitation,	)	ORDER DIRECTING THE CLERK TO
	)	ENTER JUDGMENT IN FAVOR OF
Respondent.	)	RESPONDENT
	)	
	)	ORDER DECLINING TO ISSUE A
	)	CERTIFICATE OF APPEALABILITY

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pursuant to 28 U.S.C. § 636(c)(1), the parties have consented to the jurisdiction of the United States Magistrate Judge to conduct all further proceedings in the case, including the entry of final judgment, by manifesting their consent in writings signed by the parties or their representatives and filed by Petitioner on September 21, 2009, and on behalf of Respondent on February 10, 2010.

Pending before the Court is Respondent's motion to dismiss

1 the petition for untimeliness, which was filed on March 9, 2010,  
2 along with lodged documents. Petitioner filed an opposition with  
3 numerous exhibits on March 26, 2010. Respondent filed a reply on  
4 May 5, 2010. Thereafter, in response to the Court's direction,  
5 Respondent filed a supplemental brief and additional  
6 documentation of the state court proceedings on July 12, 2010;  
7 Petitioner filed a response and a request for appointment of  
8 counsel on July 22, 2010.

9 I. Motion for Appointment of Counsel

10 In the forty-five-page supplemental response filed on July  
11 22, 2010, Petitioner requests that counsel be appointed in order  
12 for him to be fairly represented in this Court. (Doc. 28, 2.)

13 There currently exists no absolute right to appointment of  
14 counsel in habeas proceedings. See e.g., Anderson v. Heinze, 258  
15 F.2d 479, 481 (9th Cir.), cert. denied, 358 U.S. 889 (1958);  
16 Mitchell v. Wyrick, 727 F.2d 773 (8th Cir.), cert. denied, 469  
17 U.S. 823 (1984).

18 A Magistrate Judge may appoint counsel at any stage of a  
19 habeas corpus proceeding if the interests of justice require it.  
20 18 U.S.C. § 3006A; Rule 8(c) of the Rules Governing Section 2254  
21 Cases (Habeas Rules). A district court evaluates the likelihood  
22 of a petitioner's success on the merits and the ability of a  
23 petitioner to articulate his claims pro se in light of the  
24 complexity of the legal issues involved. Weygandt v. Look, 718  
25 F.2d 952, 954 (9th Cir. 1983).

26 Here, the Respondent has not filed a response to the  
27 petition concerning the merits of the case, but it does not  
28 appear that an evidentiary hearing is necessary. The issues

1 raised in the motion to dismiss have been the subject of  
2 extensive briefing and documentation. At this stage of the case,  
3 it does not appear that the interests of justice require the  
4 appointment of counsel.

5 Accordingly, Petitioner's motion for the appointment of  
6 counsel will be denied.

7 II. Motion to Dismiss for Untimeliness

8 Respondent has filed a motion to dismiss the petition on the  
9 ground that Petitioner filed his petition outside of the one-year  
10 limitation period provided for in 28 U.S.C. § 2244(d).

11 Habeas Rule 4 allows a district court to dismiss a petition  
12 if it "plainly appears from the face of the petition and any  
13 exhibits annexed to it that the petitioner is not entitled to  
14 relief in the district court...."

15 The Ninth Circuit has allowed respondents to file motions to  
16 dismiss pursuant to Rule 4 instead of answers if the motion to  
17 dismiss attacks the pleadings by claiming that the petitioner has  
18 failed to exhaust state remedies or has violated the state's  
19 procedural rules. See, e.g., O'Bremski v. Maass, 915 F.2d 418,  
20 420 (9th Cir. 1990) (using Rule 4 to evaluate a motion to dismiss  
21 a petition for failure to exhaust state remedies); White v.  
22 Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (using Rule 4 to  
23 review a motion to dismiss for state procedural default); Hillery  
24 v. Pulley, 533 F.Supp. 1189, 1194 & n.12 (E.D. Cal. 1982) (same).  
25 Thus, a respondent may file a motion to dismiss after the Court  
26 orders the respondent to respond, and the Court should use Rule 4  
27 standards to review a motion to dismiss filed before a formal  
28 answer. See, Hillery, 533 F. Supp. at 1194 & n. 12.

1 In this case, Respondent's motion to dismiss addresses the  
2 filing of a petition outside of the one-year limitation period of  
3 28 U.S.C. 2244(d)(1). The material facts pertinent to the motion  
4 are mainly to be found in copies of the official records of state  
5 judicial proceedings which have been provided by Respondent and  
6 Petitioner, and as to which there is no factual dispute. Because  
7 Respondent has not filed a formal answer, and because  
8 Respondent's motion to dismiss is similar in procedural standing  
9 to a motion to dismiss for failure to exhaust state remedies or  
10 for state procedural default, the Court will review Respondent's  
11 motion to dismiss pursuant to its authority under Rule 4.

12 III. The Limitations Period

13 On April 24, 1996, Congress enacted the Antiterrorism and  
14 Effective Death Penalty Act of 1996 (AEDPA), which applies to all  
15 petitions for writ of habeas corpus filed after its enactment.  
16 Lindh v. Murphy, 521 U.S. 320, 327 (1997); Jeffries v. Wood, 114  
17 F.3d 1484, 1499 (9th Cir. 1997). Petitioner filed his petition  
18 for writ of habeas corpus on June 24, 2009. Thus, the AEDPA  
19 applies to the petition.

20 The AEDPA provides a one-year period of limitation in which  
21 a petitioner must file a petition for writ of habeas corpus. 28  
22 U.S.C. § 2244(d)(1). It further identifies the pendency of some  
23 proceedings for collateral review as a basis for tolling the  
24 running of the period. As amended, subdivision (d) provides:

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

28 (A) the date on which the judgment became final by  
the conclusion of direct review or the expiration

1 of the time for seeking such review;

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

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

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

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

14 28 U.S.C. § 2244(d).

15 IV. Commencement of the Running of the Statutory Period

16 Pursuant to § 2244(d) (1) (A), the limitation period runs from  
17 the date on which the judgment became final.

18 The parties disagree on the date of the finality of the  
19 judgment and, specifically, the date on which direct review was  
20 concluded, or the point at which the time for seeking direct  
21 review expired within the meaning of § 2244(d) (1) (A). Respondent  
22 contends that the statute began to run on the date the time for  
23 seeking direct review expired, namely, sixty days after  
24 sentencing pursuant to state law<sup>1</sup> that sets forth the time limit,

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25 <sup>1</sup> Cal. Rules of Court, Rule 8.308 provides in part that except as  
26 otherwise provided by law, a notice of appeal and any statement required by  
27 Cal. Pen. Code § 1237.5 must be filed within sixty (60) days after the  
28 rendition of the judgment or the making of the order being appealed. Except  
as provided in rule 8.66 (emergencies), no court may extend the time to file a  
notice of appeal.

1 or on January 16, 2006. Petitioner asserts that he filed in the  
2 Superior Court a "Notice of Appeal/Certificate of Probable Cause"  
3 on December 22, 2005 pursuant to Cal. Pen. Code § 1237.5 and thus  
4 filed a timely appeal from the judgment of November 17, 2005;  
5 therefore, direct review did not conclude, or if it did, he was  
6 denied his right to appeal.

7 A. Factual Summary

8 An abstract of judgment of the Superior Court of the County  
9 of Stanislaus in cases numbered 1086806 and 1099101 that was  
10 filed on November 17, 2005, reflects that upon his plea of  
11 guilty, Petitioner was convicted of selling in 2004 a controlled  
12 substance in violation of Cal. Health & Saf. Code § 11352(a), and  
13 possessing in 2005 marijuana in jail in violation of Cal. Pen.  
14 Code § 4573.6. (LD 1, Petr's Opp., Ex. 1.)<sup>2</sup> On November 17,  
15 2005, Petitioner was sentenced to a determinate term of thirteen  
16 years in prison. (Id.)

17 Petitioner has submitted a copy of a Superior Court form for  
18 a notice of appeal and request for certificate of probable cause  
19 that bears the case number pertaining to the charge of sale of a  
20 controlled substance, Petitioner's signature, and a date of  
21 December 22, 2005. (Petr.'s Opp., Ex. 3, Doc. 16, 11-20.) In  
22 the request for certificate of probable cause, Petitioner stated  
23 that the legality of his plea was affected by his public  
24 defender's failure to move to suppress unspecified evidence, move  
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26 <sup>2</sup> References to the documentation lodged by Respondent in support of the  
27 motion will be to "LD" (lodged documents) and to the numbers assigned in  
28 Respondent's notice of lodging documents received on April 7, 2010.  
References to the exhibits submitted by Petitioner in support of, and as part  
of, his opposition to the motion will be to the exhibits by the numbers  
assigned by Petitioner.

1 to dismiss the case, and seek reduced bail, requests which the  
2 state court had denied when Petitioner himself requested them.  
3 Petitioner criticized the evidence of the drug transaction (a  
4 videotaped transfer of funds to Petitioner which Petitioner says  
5 does not disclose a drug transaction) and the potential use of  
6 prior robbery convictions or "strikes" to enhance his sentence.  
7 A copy of a memo dated January 4, 2006, to an unspecified  
8 recipient, states that Petitioner was sending a copy of his  
9 appeal that he had already sent on December 22, 2005, and was  
10 notifying the Superior Court that he had been moved to Vacaville.  
11 (Petr.'s Ex. II, Doc. 16, 11-20.)

12 A copy of a minute order and an appellate department  
13 memorandum of the Stanislaus County Superior Court (SCSC) dated  
14 January 10, 2006, reflects that the request for probable cause  
15 was denied. (Petr.'s Exh. 2, Doc. 16, pp. 22-23.) A deputy  
16 clerk of the SCSC wrote Petitioner on January 12, 2006, informing  
17 him that his notice of appeal was "inoperative pursuant to CRC  
18 Rule 30(b)(1) as your Request for Certificate of Probable Cause  
19 was denied." The deputy returned the notice to Petitioner marked  
20 as inoperable. (LD 3.)

21 On January 3, 2006, Petitioner moved in the SCSC for an  
22 order directing his public defender at the trial level to furnish  
23 his trial files to Petitioner because despite attempts by  
24 Petitioner and his wife to contact counsel by telephone or to  
25 obtain the case files during a few attorney visits, Petitioner  
26 did not obtain the files; Petitioner sought to present a direct  
27 or collateral challenge to his conviction and sentence. (Doc.  
28 28, 24-27.) Petitioner simultaneously moved for production of a

1 transcript of the proceedings in order to prepare a petition for  
2 writ of habeas corpus. (Id. at 29-34.) The motions were denied  
3 by an undated order. (Id. at 35.)

4 A docket (register of actions) of the Court of Appeal of the  
5 State of California, Fifth Appellate District (DCA) lodged by  
6 Respondent (LD 2) reflects that a notice of appeal was lodged or  
7 received by the DCA on February 22, 2006, along with a motion to  
8 withdraw a guilty plea and notice of motion to appeal. A ruling  
9 of February 22, 2006 is described as "Ruling on motion," and the  
10 notes state, "To withdraw guilty plea & motion to appeal -  
11 timeless." No order of that date is submitted. However, an  
12 order of the DCA filed on February 24, 2006, set a deadline for  
13 briefing the issue of the timeliness of the filing of the notice  
14 of appeal. (LD 2.) In that order, it is stated that although the  
15 abstract of judgment was filed on November 17, 2005, "... the  
16 notice of appeal was filed on February 16, 2006...." (Id.) In  
17 the order, the DCA requested briefing on whether or not the  
18 notice of appeal was timely filed and, if the answer to the first  
19 question was negative, then whether the appeal should be  
20 dismissed as untimely. (Id.) In the same order, citing People  
21 v. Everett, 186 Cal.App.3d 274, 279 (1986), the DCA denied  
22 Petitioner's request for the DCA to issue a certificate of  
23 probable cause "without prejudice to petitioner filing a petition  
24 for writ of mandate challenging the superior court's denial of  
25 the request filed in that court." (Id.)

26 When no response to the briefing order was received by the  
27 DCA, it ordered the appeal dismissed by order filed on March 20,  
28 2006, and docketed on March 21, 2006. (Id.)

1 By order filed on April 19, 2006, the DCA issued the  
2 following order concerning subsequently filed motions:

3 The appeal in the above-entitled action was dismissed  
4 on March 20, 2006, due to appellant's failure to [sic]  
5 timely respond to this court's order of February 24,  
6 2006. In the three motions filed in this court on  
7 April 5, 2006, appellant has failed to show the notice  
8 of appeal was timely filed.

9 The "Motion To Proceed On Appeal," filed on April 5,  
10 2006, is denied.

11 The "Motion for Request [For] An Order Extending  
12 Time..." filed on April 5, 2006, is denied.

13 The "Motion To Furnish Appellant With The State  
14 Record..." filed on April 5, 2006, is denied.

15 The above motions are denied without prejudice to  
16 appellant filing a petition for writ of habeas corpus  
17 in this court in which the relief sought is permission  
18 to file a belated notice of appeal. This court expresses  
19 no opinion on whether relief will be granted in the  
20 event a petition is filed. (Emphasis added.)

21 (LD 2.) The docket indicates that on May 22, 2006, the  
22 remittitur issued.

23 In March 2007, an entry reflects that a letter was sent to  
24 Petitioner in response to an inquiry from Petitioner in  
25 connection with a request for counsel and for rules. The letter  
26 referred to the previous dismissal of his appeal and denial of  
27 his motions, and it was suggested that Petitioner's remaining  
28 remedy might be a petition for writ of habeas corpus seeking to  
file a belated appeal. (LD 2.)

#### 29 B. Analysis

30 The Superior Court declined to issue a certificate of  
31 probable cause in early January. Although Petitioner argues that  
32 he had begun appellate proceedings in a proper fashion, Cal. Pen.  
33 Code § 1237.5 prohibits a defendant's taking an appeal from a  
34

1 judgment of conviction upon a plea of guilty except where 1) the  
2 defendant has filed with the trial court a written statement,  
3 executed under oath or penalty of perjury showing reasonable  
4 constitutional, jurisdictional, or other grounds going to the  
5 legality of the proceedings, and 2) the trial court has executed  
6 and filed a certificate of probable cause for such appeal with  
7 the clerk of the court. Even if the initial filing of a notice  
8 of appeal in the Superior Court occurred within the sixty-day  
9 period for filing a notice of appeal, the trial court declined to  
10 issue a certificate of probable cause for Petitioner's appeal  
11 from his guilty plea and returned his notice of appeal marked as  
12 "inoperative." A few days later, the time for filing a notice of  
13 appeal expired.

14         Petitioner has not demonstrated that he sought relief from  
15 the Superior Court's denial of a certificate of probable cause or  
16 heeded the very specific suggestion of the DCA to seek a writ of  
17 mandate directing the Superior Court to issue a certificate of  
18 probable cause.

19         It thus does not appear that Petitioner has shown that he  
20 timely filed an operative notice of appeal from the judgment of  
21 conviction.

22         With respect to the out-of-time notice of appeal filed in  
23 the DCA in February 2006, the DCA expressly considered whether  
24 the notice of appeal was timely and concluded that Petitioner had  
25 not shown that it was timely.

26         Under § 2244(d)(1)(A), the "judgment" refers to the sentence  
27 imposed on the petitioner. Burton v. Stewart, 549 U.S.147, 156-  
28 57 (2007). Petitioner failed to obtain a certificate of probable

1 cause to proceed with an appeal from the judgment in the Superior  
2 Court, suffered a dismissal of the appeal in the DCA after  
3 failing to respond to the Court's orders, and ultimately received  
4 an express ruling from the DCA that his appeal was not shown to  
5 have been timely.

6 In Randle v. Crawford, 578 F.3d 1177 (9th Cir. 2009), the  
7 petitioner failed to file a timely notice of direct appeal but  
8 argued that the running of § 2244(d) was tolled by the pendency  
9 of an untimely appeal until the appeal was dismissed by the state  
10 court as untimely. The court in Randle concluded that a state  
11 court's dismissal of an untimely appeal does not constitute the  
12 conclusion of direct review within the meaning of 28 U.S.C.  
13 § 2244(d) (1) (A). The court noted that if the commencement of the  
14 one-year limitations period was contingent on the resolution of a  
15 petitioner's attempt to file an untimely notice of appeal, a  
16 petitioner could indefinitely delay the commencement of the  
17 one-year period by simply waiting to file a notice until after  
18 the normal expiration date. Sanctioning this procedure would  
19 undermine the statute of limitations for federal habeas  
20 petitions. Randle, 578 F.3d at 1183.

21 Because in the instant case Petitioner's appeal was  
22 determined not to have been timely, the judgment of November 17,  
23 2005, became final at the expiration of the time for seeking  
24 direct review, or on January 16, 2006, sixty days after the date  
25 of the judgment. The one-year limitations period began to run on  
26 the following day, January 17, 2006.

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1 V. Statutory Tolling for Petitioner's State Post-Conviction  
2 Petitions for Collateral Relief

3 Title 28 U.S.C. § 2244(d)(2) states that the "time during  
4 which a properly filed application for State post-conviction or  
5 other collateral review with respect to the pertinent judgment or  
6 claim is pending shall not be counted toward" the one-year  
7 limitation period. 28 U.S.C. § 2244(d)(2). Once a petitioner is  
8 on notice that his habeas petition may be subject to dismissal  
9 based on the statute of limitations, he has the burden of  
10 demonstrating that the limitations period was sufficiently tolled  
11 by providing the pertinent facts, such as dates of filing and  
12 denial. However, the state must affirmatively argue that the  
13 petitioner failed to meet his burden of alleging the tolling  
14 facts; simply noting the absence of such facts is not sufficient.  
15 Smith v. Duncan, 297 F.3d 809, 814-15 (9th Cir. 2002).

16 A. Facts

17 It is undisputed that Petitioner filed, and received rulings  
18 with respect to, numerous post-conviction petitions in the state  
19 courts and in this Court.

20 A first petition for habeas corpus was filed in the DCA on  
21 July 12, 2006 (no. F050826), in which Petitioner sought a late  
22 appeal. (LD 3.) On October 5, 2006, the petition was denied  
23 without prejudice to Petitioner's raising the issue of  
24 ineffective assistance of counsel, including but not limited to  
25 representation at sentencing and failure to file a motion to  
26 suppress, in a petition for writ of habeas corpus filed first in  
27 the Superior Court. (LD 4.)

28 Before the first petition was denied by the DCA, Petitioner

1 filed on August 2, 2006, a second petition (no. F050971) in the  
2 DCA in which he sought a late appeal. (LD 5.) On October 5,  
3 2006, the same day on which the first petition was denied, the  
4 second petition was denied as moot. (LD 6.)

5 On October 24, 2006, Petitioner filed a third state  
6 petition, but this time the petition was filed in the SCSC (no.  
7 1086806, stamped filed on November 6, 2006). (Supp. LD 34.)  
8 Petitioner requested allowance of a late notice of appeal to  
9 raise issues including, but not limited to, ineffective  
10 assistance of counsel at sentencing, failure to file a motion to  
11 suppress, and failure to perform his promise to file an appeal.  
12 (LD 34.) On November 15, 2006, the SCSC denied the petition,  
13 determining that the Superior Court no longer had jurisdiction  
14 over the issue of a late appeal, Petitioner's counsel was not  
15 ineffective because there was no basis for any motion to  
16 suppress, and Petitioner's counsel was not ineffective at  
17 sentencing because Petitioner had faced a sentence of twenty-  
18 eight (28) years to life but received only thirteen (13) years.  
19 (LD 35.)

20 On November 15, 2006, the same date the third petition was  
21 denied by the SCSC, Petitioner filed a fourth state petition for  
22 writ of habeas corpus in the SCSC (no. 1086806, stamped filed on  
23 November 29, 2006), challenging the trial court's rulings at the  
24 preliminary hearing and on discovery issues, the validity of  
25 Petitioner's plea, and the conduct of the prosecutor and  
26 Petitioner's counsel. (LD 7.) The petition was denied on  
27 January 3, 2007. (LD 8.)

28 Although Petitioner purported to file in the DCA an appeal

1 of the SCSC's denial of his fourth petition (no. F052146,  
2 docketed as filed on February 1, 2007), it was dismissed by order  
3 dated April 12, 2007, because under California law, the denial of  
4 a petition for a writ of habeas corpus was not an appealable  
5 order. Petitioner was instructed to file a new petition for writ  
6 of habeas corpus in the appellate court raising the same issues  
7 as those first raised in the Superior Court. (LD 9.)

8 Petitioner's fifth state petition was filed in the DCA on  
9 April 24, 2007 (no. F052772, stamped filed on May 2, 2007). In  
10 the petition, Petitioner raised the issues that had been raised  
11 before the SCSC that had been denied in January 2007. (LD 10.)  
12 The petition was denied without any statement of reasons or  
13 citation to any authority on May 17, 2007. (LD 11.)

14 Petitioner's sixth state petition was filed in the  
15 California Supreme Court on June 13, 2007 (no. S153676, stamped  
16 filed on June 21, 2007). (LD 12.) Petitioner raised the issues  
17 raised and denied in the DCA. The petition was denied on  
18 December 19, 2007, with citation of In re Swain, 34 Cal.2d 300,  
19 304 (1949) and People v. Duvall, 9 Cal.4th 464, 474 (1995). (LD  
20 13.)

21 Petitioner filed a seventh state petition on August 21,  
22 2007, in the SCSC (no. 1086807, stamped filed on August 27,  
23 2007), in which he raised sentencing error concerning the choice  
24 of term and use of prior convictions, including error pursuant to  
25 Cunningham v. California, 549 U.S. 270 (2007). (LD 14.) The  
26 petition was denied by order dated September 7, 2007. (LD 15.)

27 On September 29, 2007, Petitioner filed an eighth state  
28 petition (no. F053873, stamped filed on October 4, 2007), seeking

1 in the DCA relief with respect to the sentencing errors and  
2 Cunningham issues previously raised in the SCSC. (LD 16.) The  
3 petition was denied by the DCA on October 18, 2007, without any  
4 statement of reasons or citation to authority. (LD 17.)

5 Petitioner filed a ninth state petition in the DCA on April  
6 1, 2009 (no. F057342, stamped filed on April 10, 2009), in which  
7 he challenged the denial of his right to counsel with respect to  
8 issuance of a certificate of probable cause for the appeal from  
9 the trial court's judgment. (LD 18.) The petition was denied  
10 without any statement of reasons on April 23, 2009.

11 Petitioner filed a tenth petition for writ of habeas corpus  
12 in the California Supreme Court on June 21, 2009 (no. S174166,  
13 stamped filed on June 25, 2009), in which he raised all his  
14 claims concerning the pre-plea, plea, and sentencing proceedings,  
15 and sought reinstatement of his direct appeal. (LD 20.) The  
16 petition was denied on November 10, 2009, without notations. (LD  
17 21.)

18 Petitioner also filed three petitions for habeas relief in  
19 this Court, which were denied.

20 A petition in Corley v. Smith, 1:07-cv-01540-YNP, was filed  
21 on September 29, 2007 (stamped filed on October 3, 2007), and was  
22 dismissed for failure to state a claim upon which relief could be  
23 granted on June 10, 2008. (LD 22-25.)

24 A petition in Corley v. Knowles, 1:08-cv-00266-TAG, was  
25 filed on January 6, 2008 (stamped filed on February 7, 2008), and  
26 was dismissed on February 26, 2009, for failure to exhaust state  
27 court remedies. (LD 26-29.)

1 A petition in Corley v. Knowles 1:08-cv-00544-YNP was filed  
2 on February 23, 2008 (stamped filed on April 7, 2008), and was  
3 dismissed for failure to exhaust state court remedies on January  
4 13, 2009. (LD 30-33.)

5 B. Analysis

6 As previously discussed, the statutory period began running  
7 on January 17, 2006.

8 Petitioner filed<sup>3</sup> his first state petition on July 12, 2006.  
9 A total of 176 days of the limitation period passed before  
10 Petitioner filed his first petition.

11 Pursuant to § 2244(d)(2), the time during which a properly  
12 filed application for state post-conviction or other collateral  
13 review is pending shall not be counted toward the one-year  
14 limitation period. 28 U.S.C. § 2244(d)(2); Pace v. DiGuglielmo,  
15 544 U.S. 408, 410 (2005). Thus, Respondent correctly contends  
16 that Petitioner is entitled to tolling pursuant to § 2244(d)(2)  
17 for the time during which Petitioner's properly filed first  
18 petition was pending, namely, from July 12, 2006, through October  
19 5, 2006, the date on which it was denied.

20 With respect to Petitioner's second state petition, the  
21 Court notes that the second petition was filed in August 2006  
22 while the first state petition was pending, and the second  
23 petition was denied on October 5, 2006, the same date on which  
24 the first state petition was denied. Thus, the pendency of the

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25  
26 <sup>3</sup>The Court affords petitioner application of the mailbox rule as to all  
27 his habeas filings in state and federal courts. Houston v. Lack, 487 U.S.  
28 266, 275-76 (1988) (pro se prisoner filing is dated from the date prisoner  
delivers it to prison authorities); Stillman v. Lamarque, 319 F.3d 1199, 1201  
(9th Cir. 2003) (mailbox rule applies to pro se prisoner who delivers habeas  
petition to prison officials for the Court within limitations period).

1 second state petition did not affect the tolling of the statute,  
2 which was already occurring by virtue of the pendency of the  
3 first state petition.

4 Petitioner's first and second petitions were filed in the  
5 DCA. Petitioner's third state petition was filed on October 24,  
6 2006, in the SCSC. Petitioner might seek to establish continuous  
7 tolling between the denials of the first and second state  
8 petitions on October 5, 2006, and the filing of the third state  
9 petition in the SCSC. However, reference to the pertinent legal  
10 principles forecloses such an application of § 2244(d).

11 In Carey v. Saffold, 536 U.S. 214 (2002), the Court held  
12 that an application is "pending" until it "has achieved final  
13 resolution through the State's post-conviction procedures." 536  
14 U.S. 220. An application does not achieve the requisite finality  
15 until a state petitioner "completes a full round of collateral  
16 review." Id. at 219-20. Accordingly, in the absence of undue  
17 delay, an application for post conviction relief is pending  
18 during the "intervals between a lower court decision and a filing  
19 of a new petition in a higher court" and until the California  
20 Supreme Court denies review. Id. at 223; Biggs v. Duncan, 339  
21 F.3d 1045, 1048 (9th Cir. 2003).

22 However, when one full round up the ladder of the state  
23 court system is complete and the claims in question are  
24 exhausted, a new application in a lower court begins a new round  
25 of collateral review. Biggs v. Duncan, 339 F.3d at 1048. For  
26 example, the statute of limitations is not tolled from the time a  
27 final decision is issued on direct state appeal and the time the  
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1 first state collateral challenge is filed because there is no  
2 case "pending" during that interval. Nino v. Galaza, 183 F.3d  
3 1003, 1006 (9th Cir. 1999).

4 Here, when Petitioner filed the third state petition in the  
5 state trial court, Petitioner began a new round of collateral  
6 review. Thus, the Court concludes that during the period of  
7 eighteen (18) days between the DCA's denials of the first and  
8 second state petitions on October 6, 2006, and Petitioner's  
9 filing of a third state petition in the SCSC on October 24, 2006,  
10 the running of the statute of limitations was not tolled.

11 It is not contended that the third state petition was  
12 improperly filed. Thus, once the third state petition was filed  
13 in the SCSC on October 24, 2006, the running of the statute was  
14 tolled until the denial of that petition on November 15, 2006.

15 Respondent does not contend that the fourth state petition  
16 filed on November 15, 2006, was not properly filed, although  
17 Respondent states that the petition is successive; Respondent  
18 assumes "for the sake of argument that Petitioner receives  
19 statutory tolling for his fourth petition" (Supp. Brf., doc. 26,  
20 8), which was pending until January 3, 2007.

21 The Court notes that although the SCSC denied the fourth  
22 petition, the SCSC did not decline to consider the petition  
23 because it was successive. Instead, the court considered  
24 numerous issues on the merits, and it denied the petition with  
25 respect to some of the other issues because the issues had been  
26 raised previously and had been addressed by the court. (LD 8.)  
27 It does not appear that the SCSC considered the petition to be  
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1 successive. Therefore, the Court will accept the Respondent's  
2 assumption that the pendency of the fourth state petition from  
3 November 15, 2006, through January 3, 2007, tolled the running of  
4 the statute.

5 With respect to tolling of the time period between the  
6 denial of his fourth state petition on January 3, 2007, and the  
7 filing of his fifth state petition on April 24, 2007, the Court  
8 notes that the time interval was 110 days.

9 An application for collateral review is "pending" in state  
10 court "as long as the ordinary state collateral review process is  
11 'in continuance'-i.e., 'until the completion of' that process."  
12 Carey v. Saffold, 536 U.S. 214, 219-20 (2002). In California,  
13 this means that the statute of limitations is tolled from the  
14 time the first state habeas petition is filed until the  
15 California Supreme Court rejects the petitioner's final  
16 collateral challenge, as long as the petitioner did not  
17 "unreasonably delay" in seeking review. Id. at 221-23; accord,  
18 Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999).

19 Thus, the Court must determine whether a petitioner "delayed  
20 'unreasonably' in seeking [higher state court] review." Carey,  
21 536 U.S. at 225. If a petition is deemed unreasonably delayed,  
22 the application would no longer have been "pending" during the  
23 period at issue. Id. If the state court does not clearly rule  
24 on a petitioner's delay, as is the case here where the fifth  
25 petition was denied without any statement of reasoning or  
26 authority, the federal court must evaluate all "relevant  
27 circumstances" and independently determine whether the delay was  
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1 "unreasonable." Id. at 226.

2 A delay of six months has been found to be unreasonable  
3 because it is longer than the relatively short periods of thirty  
4 (30) or sixty (60) days provided by most states for filing  
5 appeals. Evans v. Chavis, 546 U.S. 189, 201 (2006). Delays of  
6 one hundred fifteen (115) and one hundred one (101) days between  
7 denial of one petition and the filing of a subsequent petition  
8 have been held to be excessive, Chaffer v. Prosper, 592 F.3d.  
9 1046, 1048 (9th Cir. 2010). Unexplained, unjustified periods of  
10 ninety-seven (97) and seventy-one (71) days have been found to be  
11 unreasonable, Culver v. Director of Corrections, 450 F.Supp.2d  
12 1135, 1140 (C.D.Cal. 2006).

13 The Court therefore concludes that the unexplained delay of  
14 110 days before the filing of the fifth petition on April 24,  
15 2007, was unreasonable, and the running of the statute was not  
16 tolled between denial of the fourth state petition and the filing  
17 of the fifth state petition.

18 Petitioner's attempt to appeal the SCSC's denial of the  
19 fourth state petition does not serve to toll the running of the  
20 limitations period because it was not properly filed. An  
21 application is "properly filed" within the meaning of § 2244(d)  
22 when its delivery and acceptance are in compliance with the  
23 applicable laws and rules governing filings, including time  
24 limits upon its delivery. Artuz v. Bennett, 531 U.S. 4, 8, 11  
25 (2000). The DCA dismissed Petitioner's purported appeal because  
26 it was taken from a nonappealable order. Thus, the state court  
27 determined that Petitioner's ineffective appeal was not properly  
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1 filed.

2 Respondent does not challenge the propriety of Petitioner's  
3 filing of the fifth and sixth state petitions in the DCA and  
4 California Supreme Court, respectively. The fifth state petition  
5 was signed by Petitioner on April 24, 2007, and it remained  
6 pending until it was denied on May 17, 2007. The sixth state  
7 petition was signed on June 13, 2007, and it was denied on  
8 December 19, 2007. In view of the reasonable time interval  
9 between the denial of the fifth in mid-May and the filing of the  
10 sixth in mid-June, Petitioner is entitled to statutory tolling  
11 based on the pendency of the fifth and sixth petitions from April  
12 24, 2007, through December 19, 2007.

13 Pursuant to Cal. Rules of Court, Rule Rule 8.532(b)(2)(C),  
14 the decision of the California Supreme Court denying the petition  
15 for writ of habeas corpus on December 19, 2007, was final  
16 immediately upon filing. Thus, tolling ceased on December 20,  
17 2007, the first day following the denial of the petition for writ  
18 of habeas corpus.

19 Further, the fourth through sixth petitions constituted one  
20 round of review; after the denial of the sixth petition by the  
21 California Supreme Court on December 19, 2007, no petition was  
22 then pending. The time between the completion of a first round  
23 and the beginning of a second round is not tolled. Delhomme v.  
24 Ramirez, 340 F.3d 817, 820 (9th Cir. 2003).

25 The periods during which the seventh and eighth petitions  
26 were pending (August 21, 2007 through September 7, 2007, in the  
27 SCSC, and September 29, 2007 through October 18, 2007, in the  
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1 DCA, respectively) occurred within the period of time within  
2 which the fifth and sixth petitions were pending. Thus, the  
3 pendency of the seventh and eighth state petitions had no  
4 additional effect on the running of the statute, which was tolled  
5 until the denial of the sixth petition on December 19, 2007.

6 In summary, three hundred and four (304) days of the one-  
7 year period ran as follows: 176 days from January 17, 2006,  
8 through July 11, 2006, when the first petition was filed;  
9 eighteen (18) days between October 6, 2006 and October 23, 2006,  
10 after which the third petition was filed; and 110 days between  
11 the denial of the fourth petition on January 3, 2007, and the  
12 filing of the fifth petition on April 24, 2007. Thereafter, upon  
13 the denial by the California Supreme Court of the sixth petition  
14 on December 19, 2007, the statutory period began to run again,  
15 with the year-long limitations period concluding sixty-one days  
16 later on February 18, 2008.

17 Petitioner's ninth petition was not filed in the DCA until  
18 April 1, 2009. Thus, the one-year limitations period had passed  
19 before Petitioner's ninth petition was filed.

20 Although Petitioner filed three previous habeas petitions  
21 here, the pendency of a petition in a federal court does not toll  
22 the running of the statute under 28 U.S.C. § 2244(d)(2). Duncan  
23 v. Walker, 533 U.S. 167, 172 (2001).

24 In summary, the Court concludes that considering statutory  
25 tolling, Petitioner's petition for writ of habeas corpus, filed  
26 here on June 21, 2009 (Pet. 7), was filed outside of the one-year  
27 limitations period and is therefore untimely.

1 VI. Equitable Tolling

2 Petitioner alleged in a declaration in the petition that  
3 after his conviction, he requested his counsel, Gary Smith, to  
4 file a notice of appeal, but Smith failed to do so. (Pet. 84.)  
5 Petitioner declared that if his appeal had been filed, counsel  
6 would have been appointed, the direct appeal would have gone  
7 forward, and Petitioner would have had the benefit of a more  
8 favorable standard of prejudicial error. (Id.)

9 In the opposition to the motion, Petitioner asserted that he  
10 was denied the effective assistance of counsel on appeal as well  
11 as the right to appeal, and that he did what was necessary to  
12 file a timely appeal and to attempt repeatedly to obtain his  
13 trial counsel's trial files in order to permit the perfection of  
14 an appeal or petition for writ of habeas corpus. However, the  
15 trial court denied his application for an order to obtain the  
16 files on January 3, 2006. (Opp. Doc. 16, 2-4, 25; Supp. Brief.  
17 In Opp., doc. 28.) The Court understands these assertions to  
18 pertain to Petitioner's first appeal of right in the state court  
19 system. In his supplemental briefing, Petitioner resubmits his  
20 documentation of the pertinent facts concerning the trial court's  
21 denial of a certificate of probable cause and Petitioner's  
22 motions to obtain transcripts and counsel's legal files in order  
23 to perfect a habeas corpus petition.

24 The Court will consider these allegations as the basis of an  
25 assertion of the doctrine of equitable tolling.

26 The one-year limitations period of § 2244 is subject to  
27 equitable tolling where the petitioner has been diligent, and  
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1 extraordinary circumstances, such as the egregious misconduct of  
2 counsel, have prevented the petitioner from filing a timely  
3 petition. Holland v. Florida, 130 S.Ct. 2549, 2560 (2010). The  
4 petitioner must show that the extraordinary circumstances were  
5 the cause of his untimeliness and that the extraordinary  
6 circumstances made it impossible to file a petition on time.  
7 Ramirez v. Yates, 571 F.3d 993, 997 (9th Cir. 2009). The  
8 diligence required for equitable tolling is reasonable diligence,  
9 not "maximum feasible diligence." Holland v. Florida, 130 S.Ct.  
10 2565.

11 "[T]he threshold necessary to trigger equitable tolling  
12 [under AEDPA] is very high, lest the exceptions swallow the  
13 rule." Spitsyn v. Moore, 345 F.3d 796, 799 (quoting Miranda v.  
14 Castro, 292 F.3d 1063, 1066 (9th Cir. 2002)).

15 Here, Petitioner relies on his entitlement to counsel on a  
16 first appeal of right. However, Petitioner has not shown how the  
17 absence of counsel and the denial of his certificate of probable  
18 cause or appeal in December 2005 and January 2006 were  
19 responsible for Petitioner's failure to file a timely federal  
20 petition years later. Petitioner was advised to seek a writ of  
21 mandate directing the trial court to issue a certificate of  
22 probable cause. However, Petitioner has not explained what  
23 caused his failure to do so, or how the preceding absence of  
24 counsel contributed to his failure to seek relief. Likewise,  
25 Petitioner has not explained his delay in filing a petition for  
26 writ of habeas corpus seeking a late appeal. Similarly,  
27 Petitioner has not demonstrated that any extraordinary  
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1 circumstance prevented him from filing any post-conviction  
2 petitions in the state courts at any point in time or from filing  
3 a timely federal petition.

4 Thus, even assuming that counsel's conduct in failing to  
5 file a notice of appeal was substandard conduct, Petitioner has  
6 not shown how that failure prevented the filing of a timely  
7 petition. The instant case is similar to Randle v. Crawford, 604  
8 F.3d 1057 (9th 2010), in which counsel's failure to perfect a  
9 state appeal of right and incorrect advice on the time limit for  
10 filing a state post-conviction petition were found to have little  
11 to no bearing on the petitioner's failure to file timely a  
12 federal petition. Randle v. Crawford, 604 F.3d 1047, 1058 (9th  
13 Cir. 2010.) This case is also similar because there is no  
14 indication that counsel's failure to turn over timely a legal  
15 file had any specific effect on the ability of Petitioner to file  
16 a timely federal petition. Id.

17 Petitioner's pro se status is not an extraordinary  
18 circumstance. Chaffer v. Prosper, 592 U.S. 1046, 1049 (9th Cir.  
19 2010).

20 With respect to Petitioner's lack of transcripts or his  
21 attorney's legal files, it is established that in some  
22 circumstances, lack of access to legal files can constitute an  
23 external impediment sufficiently extraordinary to support  
24 equitable tolling. Chaffer v. Prosper, 592 U.S. 1046, 1049 (9th  
25 Cir. 2010). However, it is necessary for a petitioner to  
26 demonstrate his own diligence and that the lack of access was the  
27 extraordinary circumstance that caused his petition to be filed  
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1 as late as it was. Id. This means that a petitioner must point  
2 to specific instances in which he was unable to file a timely  
3 federal petition because of the lack of access to a particular  
4 document. Id. Petitioner makes no such showing. Petitioner has  
5 alleged numerous claims concerning the pre-plea, plea, and  
6 sentencing proceedings of his case without difficulty, and he  
7 does not point out a single instance of need for a particular  
8 document.

9 Although Petitioner has demonstrated that during the period  
10 for filing an appeal he diligently requested a counsel's files  
11 and transcripts, he never specified any particular documents that  
12 were needed. He has not alleged that he continued to attempt to  
13 obtain specific documents from counsel or that he needed  
14 particular documents in order to file a federal petition.  
15 Petitioner has attached some transcripts and records from his  
16 trial court proceedings; thus, it appears that he has had access  
17 to some papers. Under the circumstances, Petitioner has not  
18 shown that any absence of papers resulted in the inability to  
19 file a timely federal petition.

20 Likewise, Petitioner has not established his diligence more  
21 generally throughout the state court proceedings in attempting to  
22 file a timely federal petition. Petitioner has failed to set  
23 forth affirmative allegations showing his diligent efforts to  
24 file the necessary documents. Cf., Chaffer v. Prosper, 592 F.3d  
25 at 1049.

26 The Court notes that because Petitioner was not entitled to  
27 counsel with respect to collateral, state post-conviction  
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1 proceedings, the absence of counsel during those proceedings  
2 cannot be the basis of an ineffective assistance claim. Coleman  
3 v. Thompson, 501 U.S. 722, 752 (1991).

4 In summary, the Court concludes that Petitioner's lack of  
5 reasonable diligence as well as the absence of a causal  
6 connection between any external circumstances and Petitioner's  
7 untimely filing, warrant rejection of Petitioner's arguments  
8 concerning equitable tolling.

9 VII. State Impediment to Filing

10 Petitioner argues that the denial of his right to appeal was  
11 the fault of the state. (Opp., doc. 16, 4.) It is not clear  
12 whether Petitioner is attributing to the state any alleged error  
13 of the trial court or is arguing that because his counsel was  
14 appointed (doc. 16, 8), the state was at fault.

15 Title 28 U.S.C. § 2244(d)(1)(B) provides that the  
16 limitations period begins on "the date on which the impediment to  
17 filing an application created by State action in violation of the  
18 Constitution or laws of the United States is removed, if the  
19 applicant was prevented from filing by such State action." 28  
20 U.S.C. § 2244(d)(1)(B). Petitioner may be attempting to argue  
21 that his appointed counsel failed to perfect a direct appeal of  
22 his conviction and sentence, and that this failure prevented him  
23 from filing his federal habeas petition until Petitioner's last  
24 attempt to obtain a belated appeal was denied, or on November 10,  
25 2009. This argument has been rejected in circumstances analogous  
26 to Petitioner's.

27 In Randle v. Crawford, 604 F.3d 1047, 1058 (9th Cir. 2010),  
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1 the court found no impediment had been made out where the  
2 petitioner had failed to show a causal connection between any  
3 failure of counsel and the untimeliness of the federal filing.

4 The Court thus concludes that Petitioner has not shown that  
5 he was entitled to tolling under 28 U.S.C. § 2244(d)(1)(B).

6 VIII. Certificate of Appealability

7 Unless a circuit justice or judge issues a certificate of  
8 appealability, an appeal may not be taken to the court of appeals  
9 from the final order in a habeas proceeding in which the  
10 detention complained of arises out of process issued by a state  
11 court. 28 U.S.C. § 2253(c)(1)(A); Miller-El v. Cockrell, 537  
12 U.S. 322, 336 (2003). A certificate of appealability may issue  
13 only if the applicant makes a substantial showing of the denial  
14 of a constitutional right. § 2253(c)(2). Under this standard, a  
15 petitioner must show that reasonable jurists could debate whether  
16 the petition should have been resolved in a different manner or  
17 that the issues presented were adequate to deserve encouragement  
18 to proceed further. Miller-El v. Cockrell, 537 U.S. at 336  
19 (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). A  
20 certificate should issue if the Petitioner shows that jurists of  
21 reason would find it debatable whether the petition states a  
22 valid claim of the denial of a constitutional right and that  
23 jurists of reason would find it debatable whether the district  
24 court was correct in any procedural ruling. Slack v. McDaniel,  
25 529 U.S. 473, 483-84 (2000). In determining this issue, a court  
26 conducts an overview of the claims in the habeas petition,  
27 generally assesses their merits, and determines whether the  
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1 resolution was debatable among jurists of reason or wrong. Id.  
2 It is necessary for an applicant to show more than an absence of  
3 frivolity or the existence of mere good faith; however, it is not  
4 necessary for an applicant to show that the appeal will succeed.  
5 Miller-El v. Cockrell, 537 U.S. at 338.

6 A district court must issue or deny a certificate of  
7 appealability when it enters a final order adverse to the  
8 applicant. Rule 11(a) of the Rules Governing Section 2254 Cases.

9 Here, it does not appear that reasonable jurists could  
10 debate whether the petition should have been resolved in a  
11 different manner. Petitioner has not made a substantial showing  
12 of the denial of a constitutional right. Accordingly, the Court  
13 DECLINES to issue a certificate of appealability.

14 IX. Disposition

15 In summary, the Court concludes that the petition was  
16 untimely. The uncontested facts demonstrate Petitioner's lack of  
17 diligence and the absence of any causal connection between  
18 counsel's alleged failings and Petitioner's untimely filing of  
19 the petition. The facts are inconsistent with statutory or  
20 equitable relief. Further, no facts suggest any state impediment  
21 to timely filing a petition here.

22 Accordingly, it is ORDERED that:

23 1) Respondent's motion to dismiss the petition as untimely  
24 is GRANTED; and

25 2) The petition is DISMISSED; and

26 3) The Clerk is DIRECTED to enter judgment in favor of  
27 Respondent; and

1           4) The Court DECLINES to issue a certificate of  
2 appealability.

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4 IT IS SO ORDERED.

5 **Dated: October 19, 2010**

**/s/ Sheila K. Oberto**  
**UNITED STATES MAGISTRATE JUDGE**

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