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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

CHERI L. GLOVER,  
Petitioner,  
v.  
DERRAL ADAMS, Warden  
Respondent.

Case No. 1:17-cv-00405-DAD-MJS (HC)  
**FINDINGS AND RECOMMENDATIONS TO:**  
**(1) GRANT RESPONDENT’S MOTION TO DISMISS THE PETITION AS TIME-BARRED (ECF NO. 16); AND**  
**(2) DENY PETITIONER’S MOTION TO STAY AS MOOT (ECF NO. 2)**  
**THIRTY (30) DAY OBJECTION DEADLINE**

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus under 28 U.S.C. § 2254. Respondent Derral Adams, Warden of Central California Women’s Facility, is represented by Justain P. Riley of the Office of the California Attorney General.

**I. Procedural History**

Petitioner is currently in the custody of the California Department of Corrections and Rehabilitation pursuant to a judgment of the Superior Court of California, County of Kern for first degree murder by lying in wait. (Lodged Doc. 1.) On October 1, 2012, she was sentenced to a state prison term of life without the possibility of parole. (Id.)

1 On January 27, 2015, the California Court of Appeal for the Fifth Appellate District  
2 struck a parole revocation fine but otherwise affirmed the judgment. (Lodged Doc. 2).  
3 The California Supreme Court denied review on April 29, 2015. (Lodged Docs. 3-4.)

4 Petitioner proceeded to file three petitions for writ of habeas corpus in the  
5 California state courts as follows<sup>1</sup>:

- 6 1. Kern County Superior Court  
7 Filed: July 5, 2016;  
8 Denied: October 12, 2016;
- 9 2. California Court of Appeal, Fifth Appellate District  
10 Filed: November 11, 2016;  
11 Denied: January 12, 2017;
- 12 3. California Supreme Court  
13 Filed: February 23, 2017;  
14 Denied: May 17, 2017.

15 (Lodged Docs. 5-10.)

16 On March 9, 2017, Petitioner filed the instant federal petition for writ of habeas  
17 corpus, as well as a motion to stay the petition and hold it in abeyance pending  
18 resolution of her petition in the California Supreme Court.<sup>2</sup> On June 21, 2017,  
19 Respondent filed a motion to dismiss. (ECF No. 16.) On July 7, 2017, Petitioner filed an  
20 opposition. (ECF No. 19.) On July 14, 2017, Respondent filed a reply. (ECF No. 21.) The  
21 matter stands ready for adjudication.

## 22 **II. Procedural Grounds for Motion to Dismiss**

23 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to  
24 dismiss a petition if it “plainly appears from the petition and any attached exhibits that the  
25 petitioner is not entitled to relief in the district court . . . .” Rule 4 of the Rules Governing  
26 Section 2254 Cases.

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27 <sup>1</sup> Under the mailbox rule, the Court deems petitions filed on the date Petitioner handed a petition to prison  
28 authorities for mailing. Houston v. Lack, 487 U.S. 266, 276 (1988); Campbell v. Henry, 614 F.3d 1056 (9th  
Cir. 2010); see also Rule 3(d) of the Rules Governing Section 2254 Cases.

<sup>2</sup> Although docketed on March 13, 2017, the petition and motion are deemed filed on March 9, 2017  
pursuant to the mailbox rule. See supra n.1.

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

11           In this case, Respondent’s motion to dismiss is based on a violation of the one-  
12 year limitations period. 28 U.S.C. § 2244(d)(1). Because Respondent’s motion to dismiss  
13 is similar in procedural standing to a motion to dismiss for failure to exhaust state  
14 remedies or for state procedural default and Respondent has not yet filed a formal  
15 answer, the Court will review Respondent’s motion to dismiss pursuant to its authority  
16 under Rule 4.

### 17       **III. Statute of Limitations**

#### 18           **A. Commencement of the Statute of Limitations**

19           The instant petition was filed on February 12, 2017, and is governed by the  
20 Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter “AEDPA”). Lindh v.  
21 Murphy, 521 U.S. 320, 322-23 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir.  
22 1997). AEDPA imposes a one-year statute of limitations on state prisoners seeking to file  
23 a federal habeas petition. 28 U.S.C. § 2244(d)(1). The commencement of the statute of  
24 limitations is governed by section 2244(d)(1).

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

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

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review;

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

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

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

28 U.S.C. § 2244(d).

Under § 2244(d)(1)(A), the limitations period begins to run on the date that the petitioner’s direct review became final or the date of the expiration of the time for seeking such review.<sup>3</sup> Here, the California Supreme Court denied review on April 29, 2015. (Lodged Doc. 4.) The state appeal process became final ninety days later, on July 28, 2015, when the time for seeking certiorari with the United States Supreme Court expired. U.S. Supreme Court rule 13; Bowen v. Rowe, 188 F.3d 1157 (9th Cir. 1999). The AEDPA statute of limitations began to run the following day, on July 29, 2015. Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001). Under § 2244(d)(1)(A), the last day to file a federal petition was July 28, 2016, absent any applicable tolling. However, Petitioner delayed in filing the instant petition until March 9, 2017, more than seven months after the statute of limitations period expired. Thus, absent any applicable tolling, the instant petition is time-barred.

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

28 U.S.C. § 2244(d)(2) states that the “time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward” the one year

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<sup>3</sup> Petitioner does not set forth any facts to trigger an alternate commencement of the statute of limitations under 28 U.S.C. § 2244(d)(B)-(D) and the Court finds nothing in the record entitling her to a later start date.

1 limitation period. Thus, the statute of limitations is tolled where a petitioner is properly  
2 pursuing post-conviction relief, and during the intervals between one state court's  
3 disposition of a habeas petition and the filing of a habeas petition at the next level of the  
4 state court system. Carey v. Saffold, 536 U.S. 214, 216 (2002); see also Nino v. Galaza,  
5 183 F.3d 1003, 1006 (9th Cir. 1999).

6 However, the statute of limitations is not tolled during the period between finality  
7 of direct review and the filing of an application for post-conviction relief. Nino, 183 F.3d at  
8 1007. Here, Petitioner filed her first state habeas petition on July 5, 2016. (Lodged Doc.  
9 5.) Thus, 342 days of the limitations period expired before Petitioner filed her first state  
10 petition.

11 Petitioner appears to be entitled to tolling of 192 days from the date the first state  
12 petition was filed – July 5, 2016 – through the date the second petition was denied –  
13 January 12, 2017. This interval tolling extends the statute of limitations from July 28,  
14 2016 through February 5, 2017. See Carey, 536 U.S. at 216.

15 However, Petitioner is not entitled to interval tolling for the time period between  
16 the denial of her second petition and the filing of her third petition, nor is she entitled to  
17 statutory tolling for the time the third petition was pending before the California Supreme  
18 Court. This is because Petitioner's third petition was denied by the California Supreme  
19 Court as follows: "The petition for writ of habeas corpus is denied. (See In re Robbins  
20 (1998) 18 Cal.4th 770, 780.)" (ECF No. 10.) The court's citation to Robbins indicates that  
21 the California Supreme Court determined that the petition was not timely filed. Thorson  
22 v. Palmer, 479 F.3d 643, 645 (9th Cir. 2007) (holding that a citation to page 780 of the  
23 Robbins decision is a "clear ruling" that the petition was untimely). The California  
24 Supreme Court's determination that the petition was untimely is dispositive of this  
25 question. Pace v. DiGuglielmo, 544 U.S. 408, 414-15 (2005); Banjo v. Ayers, 614 F.3d  
26 964, 968 (9th Cir. 2010) ("A California court's determination that a filing was untimely . . .  
27 is dispositive." Thus, Petitioner's third habeas petition "must be treated as improperly  
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1 filed, or as though it never existed for purposes of section 2244(d).” Lakey v. Hickman,  
2 633 F.3d 782, 786 (9th Cir. 2011). It cannot extend the limitations period beyond  
3 February 5, 2017.

4 Petitioner argues that the California Supreme Court’s determination of  
5 untimeliness should not be applied to her. (ECF No. 19 at 2-3.) She points out that she  
6 filed her California Supreme Court petition less than sixty days after the denial of her  
7 Court of Appeal petition. However, this Court need not determine whether the California  
8 Supreme Court’s determination of untimeliness was based on the 42-day interval  
9 between the disposition of her second petition and the filing of her third petition, or the  
10 433-day interval between the disposition of her direct appeal and the filing of her first  
11 petition.<sup>4</sup> Either way, the California Supreme Court’s determination is “the end of the  
12 matter for purposes of § 2244(d)(2).” Pace, 544 U.S. at 414-15 (internal quotation marks  
13 omitted). Furthermore, Petitioner’s citation to the law of procedural default, which  
14 requires adequate and consistent application of procedural bars to federal habeas  
15 review, is not relevant to the statute of limitations analysis. White v. Martel, 601 F.3d  
16 882, 884 (9th Cir. 2010) (“[T]he adequacy analysis used to decide procedural default  
17 issues is inapplicable to the issue of whether a state petition was ‘properly filed’ for  
18 purposes of § 2244(d)(2).”). Thus, the Court cannot excuse untimely filing on the  
19 grounds articulated by Petitioner.

20 Under the most generous view of Petitioner’s filings, the statute of limitations  
21 expired on February 5, 2017, a Sunday. The last day to file Petitioner’s federal habeas  
22 petition was therefore Monday, February 6, 2017. Petitioner did not file her petition until  
23 March 9, 2017, more than a month later. Even with the benefit of statutory tolling, the  
24 petition is untimely.

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27 <sup>4</sup> The Court notes, however, that if the California Supreme Court decision rested on the latter interval,  
28 none of the state court petitions were properly filed, Petitioner would not be entitled to any statutory tolling,  
and the statute of limitations would have expired on July 28, 2016. See Thorson, 479 F.3d at 645.

1           **D.     Equitable Tolling**

2           The limitations period is subject to equitable tolling if the petitioner demonstrates:  
3           “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary  
4           circumstance stood in his way.” Holland v. Florida, 130 S. Ct. 2549, 2560-62 (2010)  
5           (citation omitted). Petitioner bears the burden of alleging facts that would give rise to  
6           tolling. Pace, 544 U.S. at 418; Hinton v. Pac. Enters., 5 F.3d 391, 395 (9th Cir. 1993).  
7           Here, Petitioner does not set forth any facts or argument to suggest she is entitled to  
8           equitable tolling and the Court finds nothing in the record entitling her to equitable tolling.

9           To the extent Petitioner claims she should be entitled to equitable tolling because  
10          she lacks knowledge of the law or misunderstood California’s timeliness requirements,  
11          her claim for equitable tolling fails. Rasberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir.  
12          2006) (lack of legal sophistication is not an extraordinary circumstance warranting  
13          equitable tolling); Turner v. Johnson, 177 F.3d 390, 392 (5th Cir. 1999) (inmate's lack of  
14          legal training, a poor education, or illiteracy does not give a court reason to toll the  
15          limitations period); Shoemate v. Norris, 390 F.3d 595, 598 (8th Cir. 2004); Marsh v.  
16          Soares, 223 F.3d 1217, 1220 (10th Cir. 2000). Petitioner's circumstances and lack of  
17          knowledge of the law are no different than the majority of incarcerated prisoners  
18          attempting to file petitions for writ of habeas corpus. Accordingly, her ignorance of the  
19          law is not an extraordinary circumstance entitling Petitioner to equitable tolling.

20           **E.     Conclusion**

21          Petitioner failed to file the instant petition within the one year limitations period  
22          required by 28 U.S.C. § 2244(d). The petition remains untimely even with the benefit of  
23          statutory tolling. Furthermore, Petitioner is not entitled to the benefit of equitable tolling.

24          Accordingly, the motion to dismiss should be granted and the petition should be  
25          dismissed as time-barred.

26           **IV.    Motion to Stay and Abey**

27          Upon filing the petition, Petitioner moved to stay the case and hold it in abeyance  
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1 pending resolution of her petition in the California Supreme Court. (ECF No. 2.)  
2 However, the Court has concluded that the petition is untimely and should be dismissed.  
3 Accordingly, there would be no purpose in granting a stay of proceedings. The motion to  
4 stay is moot.

5 **III. Conclusion and Recommendations**

6 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 7 1. Respondent's motion to dismiss be GRANTED;
- 8 2. Petitioner's motion to stay be DENIED; and
- 9 3. The petition for writ of habeas corpus be dismissed with prejudice as  
10 time-barred.

11 The findings and recommendations are submitted to the United States District  
12 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within  
13 **thirty** (30) days after being served with the findings and recommendations, any party  
14 may file written objections with the Court and serve a copy on all parties. Such a  
15 document should be captioned "Objections to Magistrate Judge's Findings and  
16 Recommendations." Any reply to the objections shall be served and filed within fourteen  
17 (14) days after service of the objections. The parties are advised that failure to file  
18 objections within the specified time may result in the waiver of rights on appeal.  
19 Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923  
20 F.2d 1391, 1394 (9th Cir. 1991)).

21  
22 IT IS SO ORDERED.

23 Dated: July 22, 2017

24 1st Michael J. Seng  
25 UNITED STATES MAGISTRATE JUDGE  
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