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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

PETER A. TAYLOR,

Petitioner,

No. CIV S-08-1194 GEB DAD

vs.

D.K. SISTO, Warden,

Respondent.

FINDINGS AND RECOMMENDATIONS

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Petitioner, a state prisoner proceeding pro se, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging the July 25, 2006 decision of the California Board of Parole Hearings (“Board”) to deny him parole. On July 1, 2008, the undersigned ordered respondent to file and serve a response to the petition. On October 2, 2008, respondent filed the pending motion to dismiss, arguing that petitioner’s habeas petition is time-barred under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). Petitioner has filed a timely opposition to respondent’s motion to dismiss. Respondent has not filed a reply.

**BACKGROUND**

On July 25, 2006, the Board found petitioner unsuitable for parole. (Pet., Ex. A.) On October 23, 2007, petitioner filed a petition for writ of habeas corpus in the San Francisco County Superior Court challenging the Board’s 2006 decision. (Resp’t’s Ex. 1.) On January 23,

1 2008, the Superior Court denied the petition. (Pet., Ex. E.) Petitioner subsequently filed a  
2 petition for writ of habeas corpus in the California Court of Appeal which was denied on  
3 February 8, 2008. (Pet., Ex. F.) Finally, on February 20, 2008, petitioner filed a petition for writ  
4 of habeas corpus in the California Supreme Court. (Resp't's Ex. 2.) On April 16, 2008, the  
5 California Supreme Court denied the petition. (Pet., Ex. G.) Petitioner filed his federal petition  
6 on May 21, 2008.

7 **RESPONDENT'S MOTION TO DISMISS**

8 Respondent moves to dismiss arguing that petitioner's federal habeas petition is  
9 time-barred. Specifically, respondent argues that the Board's decision to deny petitioner parole  
10 became final on November 22, 2006 and that petitioner had one year thereafter in which to file a  
11 federal habeas petition challenging that decision. (Resp't's Mot. to Dismiss at 3.)

12 Respondent acknowledges that the proper filing of a state post-conviction  
13 application presenting the pertinent claims tolls the one-year federal statute of limitations period.  
14 However, respondent argues that petitioner did not file his first state habeas petition in the San  
15 Francisco County Superior Court until October 23, 2007, after 335 days of the federal limitations  
16 period had run. Respondent notes that the California Supreme Court denied petitioner's final  
17 state habeas petition on April 16, 2008, and that the statute of limitations for the filing of a  
18 federal petition began to run again on that date until it expired on May 16, 2008. Respondent  
19 observes that petitioner did not file his federal petition until May 21, 2008. Accordingly,  
20 respondent concludes petitioner's federal petition is time-barred, having been filed five days after  
21 the statute of limitations expired. (Resp't's Mot. to Dismiss at 4.)

22 **PETITIONER'S OPPOSITION**

23 Petitioner has filed an opposition to respondent's motion to dismiss arguing that  
24 he faced various circumstances, some of them extreme, that prevented him from timely filing his  
25 federal habeas petition. Petitioner has attached to his opposition a copy of a CSP-Solano  
26 program status report effective January 23, 2008, stating that Facilities 3 and 4 would be on a

1 modified program until all Level II inmates had a tuberculosis test. According to the status  
2 report, only inmates with approved court deadlines could access the law library. Petitioner  
3 argues that from January 2008 to May 2008, he was “quarantine[d]” on numerous occasions, was  
4 finally diagnosed with tuberculosis and is now receiving treatment. Petitioner contends that  
5 “standing in long medication lines and trying to make it to the law library to do research on  
6 medication day is sometimes impossible.” (Pet’r’s Opp’n to Resp’t’s Mot. to Dismiss at 1-2 &  
7 Ex. A.)

8 In addition, petitioner has attached to his opposition copies of CSP-Solano  
9 program status reports effective March 24, 2008, and March 27, 2008, which state that various  
10 facilities would be on a modified program because staff discovered an anonymous note  
11 indicating that there was a possible “zip gun” within the facility. The reports again indicate that  
12 only inmates with approved court deadlines could access the library during this time. Finally,  
13 petitioner has submitted a copy of a CSP-Solano program status report effective April 1, 2008,  
14 which states that CSP-Solano would be on lockdown because of the existing “zip gun” threat.  
15 This report also indicates that while the lockdown was in place, only inmates with approved  
16 court deadlines could access the library. Based on these circumstances, petitioner argues that the  
17 court should allow his case to move forward and decide his petition on the merits. (Pet’r’s Opp’n  
18 to Resp’t’s Mot. to Dismiss at 1-2 & Exs. B-D.)

## 19 ANALYSIS

### 20 I. The AEDPA Statute of Limitations

21 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death  
22 Penalty Act (“AEDPA”). AEDPA amended 28 U.S.C. § 2244 by adding the following provision:

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

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1 (A) the date on which the judgment became final by the  
2 conclusion of direct review or the expiration of the time for  
3 seeking such review;

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

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

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

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

19 The one-year AEDPA statute of limitations applies to all federal habeas corpus petitions filed  
20 after the statute was enacted and therefore applies to pending petition. See Lindh v. Murphy, 521  
21 U.S. 320, 322-23 (1997).

## 22 II. Application of § 2244(d)(1)(D)

23 The Ninth Circuit Court of Appeals has determined that the one-year period of  
24 limitation set forth in 28 U.S.C. § 2244 “applies to all habeas petitions filed by persons in  
25 ‘custody pursuant to the judgment of a State court,’ even if the petition challenges an  
26 administrative decision rather than a state court judgment.” Shelby v. Bartlett, 391 F.3d 1061,  
1062 (9th Cir. 2004) (citation omitted). See also Redd v. McGrath, 343 F.3d 1077, 1080-83 (9th  
Cir. 2003) (assuming without deciding that the AEDPA statute of limitations applies to collateral  
attacks on Parole Board decisions). When a habeas petitioner challenges an administrative  
decision, § 2244(d)(1)(D) governs the date on which the limitation period begins to run. Shelby,  
391 F.3d at 1066; Redd, 343 F.3d at 1081-83. Under § 2244(d)(1)(D), the limitation period

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1 begins to run once “the factual predicate of the claim or claims presented could have been  
2 discovered through the exercise of due diligence.” 28 U.S.C. § 2244(d)(1)(D).

3 In this case, the parties do not dispute that the Board conducted a parole hearing  
4 and found petitioner unsuitable for parole on July 25, 2006. The parties also do not dispute that  
5 the Board’s decision became final on November 22, 2006. For purposes of federal habeas relief,  
6 the one-year statute of limitations therefore began to run no later than November 23, 2006, the  
7 day after the Board’s decision became final, and expired one year later on November 22, 2007.  
8 See Shelby, 391 F.3d at 1066 (limitation period began running day after petitioner received  
9 notice of denial of appeal); Redd, 343 F.3d at 1082 (same). Petitioner filed his federal habeas  
10 petition on May 21, 2008, approximately six months later. Accordingly, the petition is untimely  
11 unless petitioner is entitled to statutory or equitable tolling.

### 12 III. Statutory Tolling

13 “The time during which a properly filed application for State post-conviction or  
14 other collateral review with respect to the pertinent judgment or claim is pending shall not be  
15 counted” toward the AEDPA statute of limitations. 28 U.S.C. § 2244(d)(2). The statute of  
16 limitations is not tolled during the interval between the date on which a judgment becomes final  
17 and the date on which the petitioner files his first state collateral challenge because there is no  
18 case “pending.” Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). Once a petitioner  
19 commences state collateral proceedings, a state habeas petition is “pending” during a full round  
20 of review in the state courts, including the time between a lower court decision and the filing of a  
21 new petition in a higher court, as long as the intervals between the filing of those petitions are  
22 “reasonable.” Carey v. Saffold, 536 U.S. 214, 222-24 (2002).

23 In this case, petitioner filed his first state habeas petition in the San Francisco  
24 County Superior Court on October 23, 2007, after eleven months of the federal limitations period  
25 had elapsed. Petitioner then filed his state habeas petitions in the California Court of Appeal and  
26 the California Supreme Court. Assuming petitioner is entitled to statutory tolling for the period

1 of time his state habeas petitions were pending in the California Court of Appeal and the  
2 California Supreme Court, more than a month elapsed under the statute of limitations between  
3 the California Supreme Court's denial of his habeas petition and the filing of his federal petition.  
4 Accordingly, by the time petitioner filed his federal petition on May 21, 2008, more than one  
5 year had elapsed under the statute of limitations, rendering petitioner's federal habeas petition  
6 time-barred.

#### 7 IV. Equitable Tolling

8           The U.S. Supreme Court has held that, "a litigant seeking equitable tolling bears  
9 the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and  
10 (2) that some extraordinary circumstance stood in his way." Pace v. DiGuglielmo, 544 U.S. 408,  
11 418 (2005). See also Lawrence v. Florida, 549 U.S. 327, 328 (2007) (assuming without deciding  
12 that equitable tolling applies to § 2244(d)). The Ninth Circuit has stated that "the purpose of  
13 equitable tolling 'is to soften the harsh impact of technical rules which might otherwise prevent a  
14 good faith litigant from having a day in court.'" Harris v. Carter, 515 F.3d 1051, 1055 (9th Cir.  
15 2008). Nonetheless, equitable tolling of the AEDPA statute of limitations will be unavailable in  
16 most cases. See Corjasso v. Ayers, 278 F.3d 874, 877 (9th Cir. 2002); Miles v. Prunty, 187 F.3d  
17 1104, 1107 (9th Cir. 1999). Moreover, a habeas petitioner seeking equitable tolling must show  
18 that the extraordinary circumstances alleged were the "but for" proximate cause of the untimely  
19 filing of his federal petition. Bryant v. Arizona Atty. Gen., 499 F.3d 1056, 1061 (9th Cir. 2007);  
20 Allen v. Lewis, 255 F.3d 798, 800-01 (9th Cir. 2001).

21           Here, even assuming petitioner has been pursuing his claims diligently, he has  
22 failed to demonstrate that he encountered extraordinary circumstances that warrant equitable  
23 tolling. Petitioner alleges that from January 2008 to May 2008, he was quarantined on numerous  
24 occasions. He also alleges that he has been diagnosed with tuberculosis and is now receiving  
25 treatment. To be sure, contracting tuberculosis could represent an extraordinary circumstance.  
26 But in this case, petitioner has not explained what specific dates he was quarantined nor has he

1 provided the court with the specific timing of his illness. Petitioner has also failed to explain in  
2 any way how having contracted tuberculosis or being quarantined affected or interfered with his  
3 ability to timely file his habeas petition in this court.<sup>1</sup> See Gaston v. Palmer, 417 F.3d 1030,  
4 1034-35 (9th Cir. 2005) (upholding a finding that equitable tolling was inapplicable where  
5 prisoner failed to show causal connection between physical and mental disabilities and inability  
6 to timely file petition), modified on other grounds by, 447 F.3d 1165 (9th Cir. 2006).

7           Petitioner also alleges that he encountered scheduling difficulties on days he  
8 wanted to go to the law library and still pick up his tuberculosis medication. In addition,  
9 petitioner has submitted reports indicating that prison officials limited inmate law library access  
10 on or around January 23, 2008, until they finished testing Level II inmates for tuberculosis.  
11 Limited law library access, however, does not provide a ground for equitable tolling. See, e.g.,  
12 United States v. Van Poyck, 980 F. Supp. 1108, 1111 (C.D. Cal. 1997) (holding that lockdowns  
13 lasting more than one week and eliminating access to law library were not extraordinary  
14 circumstances warranting equitable tolling). Moreover, the petition pending before this court is  
15 identical to the petition petitioner previously filed in the California Supreme Court, indicating  
16 that petitioner did not need as much library access as he suggests to submit his federal petition.

17           Finally, petitioner has submitted CSP-Solano status reports indicating that prison  
18 officials placed the facility on a modified program or lockdown at the end of March 2008 and  
19 part of April 2008, because of a possible “zip gun” threat. However, as noted above, lockdowns  
20 and library closures do not constitute extraordinary circumstances warranting equitable tolling.  
21 See Van Poyck, 980 F. Supp. at 1111. “Prisoners familiar with the routine restrictions of prison  
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23           <sup>1</sup> The court also notes that petitioner has submitted with his opposition a copy of his  
24 legal mail log. (Pet’r’s Ex. G.) The log shows that from January 2008 to May 2008, petitioner  
25 mailed his petition for writ of habeas corpus to the California Supreme Court and also submitted  
26 an inmate appeal to the director’s level of review. Insofar as petitioner was adversely affected by  
having contracted tuberculosis and by the related conditions of his confinement, his record of  
activities during the same time period nonetheless suggests that he was not incapable of timely  
filing a federal petition.

1 life must take such matters into account when calculating when to file a federal [habeas]  
2 petition.” Boyd v. Kramer, No. Civ. S-05-00988 ALA HC, 2008 WL 782766, \*6 (E.D. Cal. Mar.  
3 21, 2008) (quoting Atkins v. Harris, No. C 98-3188 MJJ (PR), 1999 WL 13719, \*2 (N.D. Cal.  
4 Jan. 7, 1999) (reasoning that lockdowns, restricted library access and transfers do not constitute  
5 extraordinary circumstances)).

6 Under these circumstances, the court concludes that petitioner’s federal petition  
7 for a writ of habeas corpus is time-barred. Respondent’s motion to dismiss should therefore be  
8 granted, and petitioner’s federal petition for writ of habeas corpus should be dismissed with  
9 prejudice.

10 **CONCLUSION**

11 Accordingly, IT IS HEREBY RECOMMENDED that:

- 12 1. Respondent’s October 2, 2008 motion to dismiss (Doc. No 13) be granted; and  
13 2. This action be closed.

14 These findings and recommendations are submitted to the United States District  
15 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty  
16 days after being served with these findings and recommendations, any party may file written  
17 objections with the court and serve a copy on all parties. Such a document should be captioned  
18 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections  
19 shall be served and filed within ten days after service of the objections. The parties are advised  
20 that failure to file objections within the specified time may waive the right to appeal the District  
21 Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

22 DATED: August 11, 2009.

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26 DALE A. DROZD  
UNITED STATES MAGISTRATE JUDGE

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