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

SHAWN CONLEY,

Petitioner,

No. 2:11-cv-0126 LKK-DAD P

vs.

L.S. McEWEN,

Respondent.

ORDER AND

FINDINGS AND RECOMMENDATIONS

\_\_\_\_\_ /

Petitioner is a state prisoner proceeding pro se with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges a 2003 judgement of conviction entered against him in the Sacramento County Superior Court on three counts of robbery in the second degree, six counts of assault with a firearm, six counts of false imprisonment, one count of vehicle theft and various sentencing enhancements. Before the court is respondent’s motion to dismiss the pending federal habeas petition on the ground that it was filed beyond the applicable one-year statute of limitations. Petitioner has filed an opposition to the motion and respondent has filed a reply.

**BACKGROUND**

On February 18, 2003, following a jury trial, petitioner was convicted of the offenses noted above and was sentenced to a determinate prison term of thirty-one years and four

1 months. (Lod. Doc. No. 1.) On March 29, 2005, the California Court of Appeal for the Third  
2 Appellate District affirmed that judgment of conviction. (Lod. Doc. 2.)

3 On April 28, 2005, petitioner filed a petition for review with the California  
4 Supreme Court. (Lod. Doc. 3.) On June 8, 2005, the petition for review was denied by the  
5 California Supreme Court “without prejudice to any relief to which defendant might be entitled  
6 after this court determines in *People v. Black*, S126182, and *People v. Towne*, S125677, the  
7 effect of *Blakely v. Washington* (2004) \_\_ U.S. \_\_, 124 S.Ct. 2531, on California law.” (Lod. Doc.  
8 4.)

9 On or about October 23, 2007, petitioner’s appellate counsel filed a motion to  
10 recall the remittitur with the California Court of Appeal for the Third Appellate District. (Doc.  
11 No. 17 at 12.) On October 30, 2007, that motion was denied. (*Id.* at 23.) Thereafter, petitioner  
12 filed three habeas petitions in state court. First, On March 31, 2008, petitioner signed a habeas  
13 petition that he filed with the Sacramento County Superior Court.<sup>1</sup> (Lod. Doc. 5.) On May 28,  
14 2008, that petition was denied on the merits. (Lod. Doc. 6.) Second, on June 25, 2008,  
15 petitioner signed a habeas petition that he filed with the California Court of Appeal for the Third  
16 Appellate District. (Lod. Doc. 7.) On July 3, 2008, that petition was summarily denied. (Lod.  
17 Doc. 8.) Third, on April 22, 2009, petitioner signed a habeas petition that he filed with the  
18 California Supreme Court. (Doc. No. 9.) On October 14, 2009, that petition was denied with a  
19 citation to the decision in *People v. Duvall*, 9 Cal. 4th 464, 474 (1995). (Doc. No. 10.)

20 The federal habeas petition now pending before this court was signed by petitioner  
21 on January 5, 2011. (Doc. No. 1 at 14.)

22 ////

23 \_\_\_\_\_  
24 <sup>1</sup> The court applies the mailbox rule in determining the date of filing of petitioner’s state  
25 and federal habeas petitions. See *Houston v. Lack*, 487 U.S. 266, 276 (1988); *Campbell v.*  
26 *Henry*, 614 F.3d 1056, 1058-59 (9th Cir. 2010) (applying the mailbox rule to both state and  
federal filings by incarcerated inmates). Under the mailbox rule, the Court deems petitions filed  
on the date the petitioner presumably handed her petition to prison authorities for mailing or the  
date the petition in question was signed by the petitioner.

1 **PARTIES' ARGUMENTS**

2 **I. Respondent's Motion to Dismiss**

3 Respondent contends that petitioner's judgment of conviction became final on  
4 September 6, 2005 when the ninety-days to file a petition for writ of certiorari with the U.S.  
5 Supreme Court expired. (Doc. No. 14 at 3.) Respondent argues that the one-year statute of  
6 limitations for the filing of a federal habeas petition therefore began to run on September 7, 2005  
7 and the last day for petitioner to file an application for federal habeas relief was September 6,  
8 2006, plus any time for tolling. (Id.)

9 Because petitioner did not file his state habeas petitions during the one-year  
10 limitation period for the filing of his federal petition (September 7, 2005 to September 6, 2006),  
11 respondent argues that there is no tolling of the limitations period under 28 U.S.C. § 2244(d)(2).  
12 (Id.) In addition, respondent argues that the federal habeas petition before the court was filed  
13 over four years after the statute of limitations for doing so had expired. (Id.) Because the state  
14 habeas petitions were filed after the statute of limitations for the filing of a federal petition had  
15 expired, they do not operate so as to toll that statute of limitations and cannot save petitioner's  
16 present claims from being time-barred. (Id. at 4.)

17 **II. Petitioner's Opposition**

18 Petitioner argues that he is entitled to both statutory and equitable tolling and "to a  
19 later triggering date" with respect to the applicable statute of limitations for the following  
20 reasons. (Doc. No. 17 at 1.)

21 Petitioner contends that he never received the June 8, 2005 decision by the  
22 California Supreme Court denying his petition for review. (Doc. No. 17 at 2.) According to  
23 petitioner, from May 2004 to October 2008, he was incarcerated at the Sacramento County Main  
24 Jail and has attempted, unsuccessfully, to obtain the relevant mail logs from the Jail. (Id. at 2.)

25 Petitioner states that from July 15, 2004 through December of 2004, he "made  
26 several attempts, in writing and by phone" to contact his appellate counsel regarding the status of

1 his direct appeal. (Id.) Petitioner represents that on August 5, 2007, he contacted the Central  
2 California Appellate Program (CCAP) to obtain their assistance in inquiring about the status of  
3 his direct appeal. (Id.) According to petitioner, his letter to CCAP was forwarded to his  
4 appointed appellate counsel. (Id. at 10.) Petitioner claims that on August 29, 2007, he received a  
5 letter from his appointed appellate counsel. (Id. at 2 & 25.) In that letter his appellate counsel  
6 apologized for the “gap in communication” and advised petitioner that she was assessing what  
7 action to take in light of the California Supreme Court decisions concerning Blakely v.  
8 Washington, 542 U.S. 296 (2004). (Id. at 2-3 & 25.) However, petitioner states that he had no  
9 other communication from his appellate counsel until she assisted with the filing of his state  
10 habeas petition with Sacramento County Superior Court on March 31, 2008. (Id. at 3.)

11 Petitioner contends that he has been diligent in filing his federal habeas petition  
12 “in the face of these impediments” and being “challenged by the hardships of being incarcerated,  
13 where he was required to seek the assistance of other inmates to assist him in the litigation in the  
14 Courts.” (Id. at 5-6.)

15 Petitioner also argues that this court must hold an evidentiary hearing to determine  
16 whether equitable tolling is appropriate for the period between the denial of his petition for  
17 review by the California Supreme Court and the date he received notice of that denial. (Id. at 6-  
18 7.) Petitioner cites the decision in Ramirez v. Yates, 571 F.3d 993, 997 (9th Cir. 2009), in  
19 arguing that there the court held that equitable tolling is appropriate if a prisoner lacks  
20 knowledge that the state court has reached a final resolution of his state petition. (Id. at 7.) Here,  
21 petitioner argues that an evidentiary hearing is needed to make the following “factual  
22 determinations”: (1) the date petitioner “actually received the notice from the California  
23 Supreme Court”, (2) whether and when the California Supreme Court sent its decision to  
24 petitioner, (3) whether petitioner was diligent in obtaining the notice, and (4) “[w]hether the  
25 alleged delay of the notice caused the untimeliness of his filing and made a filing impossible.”  
26 (Id. at 7-8.)

1 **III. Respondent's Reply**

2 In reply, respondent contends that petitioner has failed to come forward with any  
3 proof that he attempted to contact his appellate attorney in 2004 to learn the status of his state  
4 appeal and that, in any event the four-month time period during 2004 when petitioner claims to  
5 have done so was before the statute of limitations for his filing of a federal habeas petition began  
6 to run. (Doc. No. 20 at 3.)

7 Respondent also argues that petitioner has failed to demonstrate that he acted  
8 diligently in pursuing his remedies. (Id.) Respondent points out that petitioner has failed to  
9 explain why it took him over two years to contact CCAP (from December 2004 until August 5,  
10 2007). (Id. at 4.) In addition, respondent points out, that by the time petitioner contacted CCAP,  
11 the limitations period for his filing of a federal habeas petition had already expired and cannot  
12 “be revived by diligent efforts that came too late.” (Id.)

13 Next, respondent argues that under petitioner’s best case scenario, even if he did  
14 not learn of the factual predicate for his habeas claims until October 30, 2007 (the date his  
15 motion to recall the remittitur was denied by the state appellate court), he would had until  
16 October 30, 2008 to file his federal habeas petition. (Id.) Respondent contends that even with  
17 tolling of the federal statute of limitations for the time petitioner’s state habeas petitions were  
18 pending before the Sacramento County Superior Court and California Court of Appeal, the  
19 limitations period for the filing of a federal petition would have expired on February 2, 2009.  
20 Respondent notes , however, that petitioner then delayed 293 days before filing a habeas petition  
21 with the California Supreme Court, and waited another 448 days after the California Supreme  
22 Court’s denied that petition before filing the pending federal petition. (Id. at 4-5.)

23 Finally, respondent argues that an evidentiary hearing is not appropriate or  
24 necessary here because there are multiple gaps in time demonstrating that equitable tolling is not  
25 appropriate in this case and that petitioner’s federal petition is time-barred. (Id. at 5.)

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1 ANALYSIS

2 I. The AEDPA Statute of Limitations

3 On April 24, 1996, Congress enacted AEDPA which amended 28 U.S.C. § 2244  
4 by adding the following provision:

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

9 (A) the date on which the judgment became final by the  
10 conclusion of direct review or the expiration of the time for  
11 seeking such review;

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

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

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

23 (2) The time during which a properly filed application for State  
24 post-conviction or other collateral review with respect to the  
25 pertinent judgment or claim is pending shall not be counted toward  
26 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 the pending petition. See Lindh v. Murphy,  
21 521 U.S. 320, 322-23 (1997).

22 II. Application of § 2244(d)(1)

23 Petitioner argues that he is entitled to a delayed start date for the running of the  
24 one year statute of limitations under the AEDPA because of impediments he encountered in  
25 pursuing habeas relief. Specifically, petitioner describes those impediments as the lack of notice  
26 from the California Supreme Court of the denial of his petition for review and his appellate

1 counsel’s failure to advise petitioner regarding the status of his direct appeal. For purposes of  
2 tolling the AEDPA statute of limitations, however, such an argument may prevail only when (1)  
3 the state has created an impediment to seeking federal habeas relief that also violates the U.S.  
4 Constitution or other federal law, and (2) that impediment actually prevented the prisoner from  
5 filing a federal habeas petition. 28 U.S.C. § 2244(d)(1)(B). As the Ninth Circuit has recognized,  
6 “[t]he limited case law applying § 2244(d)(1)(B) has dealt almost entirely with the conduct of  
7 state prison officials who interfere with inmates’ ability to prepare and to file habeas petitions by  
8 denying access to legal materials.” Shannon v. Newland, 410 F.3d 1083, 1087 (9th Cir. 2005).  
9 Here, there was no such impediment caused by a state official. In addition, petitioner has not  
10 shown a causal connection between the impediments he allegedly encountered and his failure to  
11 file a timely federal habeas petition. See Randle v. Crawford, 604 F.3d 1047, 1055 (9th Cir.),  
12 cert. denied sub nom Randle v. Skolnik, \_\_\_ U.S. \_\_\_, 131 S. Ct. 474 (2010) (“Randle has not  
13 suggested any such causal connection between his state-appointed counsel’s failure to perfect a  
14 direct appeal timely and his own failure to file his federal habeas petition timely. He alleges only  
15 that his counsel’s failure to file a timely notice of appeal denied him his right to *direct appeal*,  
16 not that it prevented him from filing a federal habeas petition.”); Bell v. Fakhoury, No. CV 10-  
17 9767-SJO (E), 2011 WL 3809889 (C.D. Cal. May 4, 2011), findings and recommendations  
18 adopted by 2011 WL 3810263, at \*3 (C.D. Cal. Aug. 24, 2011) (concluding that 2244(d)(1)(B)  
19 was not applicable because the petitioner did not show that her counsel acted on behalf of the  
20 state and “ failed to prove that her appellate attorney’s alleged failure to inform Petitioner that  
21 she could file an appeal prevented Petitioner from filing a timely federal habeas petition.”). For  
22 these reasons, the court finds that § 2244(d)(1)(B) is inapplicable in this case and that petitioner  
23 is not entitled to delayed commencement of the statute of limitations for the filing of a federal  
24 habeas petition.

25           In this case petitioner’s judgment of conviction became final on September 7,  
26 2005, ninety days after the California Supreme Court denied his petition for review. See

1 Summers v. Schriro, 481 F.3d 710, 717 (9th Cir. 2007); Bowen v. Roe, 188 F.3d 1157, 1158-59  
2 (9th Cir. 1999). The statute of limitations for the filing of a federal habeas petition began to run  
3 on September 8, 2005 and expired one year later on September 7, 2006. Petitioner did not file  
4 his federal habeas petition in this case until January 5, 2011, more than four years after the statute  
5 of limitations for doing so had expired.

## 6 **II. Equitable Tolling/Unexplained Delay**

7 The record before the court establishes that for two years after his judgment of  
8 conviction became final, petitioner did not pursue any post-conviction relief of any kind until he  
9 filed a motion to recall the remittitur with the California Court of Appeal on or about October 23,  
10 2007. That motion to recall the remittitur was filed after the statute of limitations for the seeking  
11 of federal habeas relief had expired. Recognizing this fact, petitioner argues that he is entitled to  
12 equitable tolling of the AEDPA statute of limitations and to an evidentiary hearing so that he can  
13 establish facts in support of that claim.

14 The United States Supreme Court has confirmed that the AEDPA statute of  
15 limitations “is subject to equitable tolling in appropriate cases.” Holland v. Florida, \_\_\_ U.S. \_\_\_,  
16 \_\_\_, 130 S. Ct. 2549, 2560 (2010). See also Doe v. Busby, 661 F.3d 1001, 1011 (9th Cir. 2011);  
17 Lakey v. Hickman, 633 F.3d 782, 784 (9th Cir. 2011); Porter v. Ollison, 620 F.3d 952, 959 (9th  
18 Cir. 2010).<sup>2</sup> Indeed, because § 2244(d) is not jurisdictional, it is “subject to a ‘rebuttable  
19 presumption’ in favor of ‘equitable tolling’” Holland, 130 S. Ct. at 2560 (quoting Irwin v. Dep’t  
20 of Veterans Affairs, 498 U.S. 89, 95-96 (1990)). See also Lee v. Lampert, 653 F.3d 929, 933  
21 (9th Cir. 2011) (en banc).

22 However, “a ‘petitioner’ is ‘entitled to equitable tolling’ only where he shows ‘(1)  
23 that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance

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24 <sup>2</sup> The Ninth Circuit had previously so held. See Ramirez v. Yates, 571 F.3d 993, 997  
25 (9th Cir. 2009); Waldron-Ramsey v. Pacholke, 556 F.3d 1008, 1011 n.2 (9th Cir. 2009);  
26 Calderon v. U.S. District Court for the Central District of California (Kelly), 163 F.3d 530, 541  
(9th Cir. 1998) (en banc).



1 stood in his way’ and prevented timely filing.” Holland 130 S. Ct. at 2562 (quoting Pace v.  
2 DiGuglielmo, 544 U.S. 408, 418 (2005)).<sup>3</sup> See also See also Doe, 661 F.3d at 1011; Lakey, 633  
3 F.3d at 784; Porter, 620 F.3d at 959; Harris v. Carter, 515 F.3d 1051, 1054 (9th Cir. 2008);  
4 Stillman v. LaMarque, 319 F.3d 1199, 1202 (9th Cir. 2003). Thus, equitable tolling is  
5 appropriate only when external forces, rather than a petitioner’s lack of diligence, account for the  
6 failure to file a timely petition. See Velasquez v. Kirkland, 639 F.3d 964, 969 (9th Cir. 2011);  
7 Ramirez v. Yates, 571 F.3d 993, 997 (9th Cir. 2009) (The petitioner must show that “the  
8 extraordinary circumstances made it impossible to file the petition on time.”); Miles v. Prunty,  
9 187 F.3d 1104, 1107 (9th Cir. 1999). To meet this standard a petitioner must demonstrate that  
10 some extraordinary circumstance stood in his way of filing a timely federal habeas petition and  
11 that any such extraordinary circumstance was the cause of his late-filed petition. See Lakey, 633  
12 F.3d at 786; Bryant v. Ariz. Atty. Gen., 499 F.3d 1056, 1061 (9th Cir. 2007); Allen v. Lewis, 255  
13 F.3d 798, 800-01 (9th Cir. 2001). It is the petitioner who bears the burden of demonstrating the  
14 existence of grounds for equitable tolling. See Pace, 544 U.S. at 418; Doe, 661 F.3d at 1011;  
15 Roberts v. Marshall, 627 F.3d 768, 772 (9th Cir. 2010); Espinoza-Matthews v. California, 432  
16 F.3d 1021, 1026 (9th Cir. 2005); Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002).

17 Courts are expected to “take seriously Congress’s desire to accelerate the federal  
18 habeas process.” Calderon v. United States Dist. Court (Beeler), 128 F.3d 1283, 1289 (9th Cir.  
19 1997), overruled in part on other grounds by Calderon v. United States Dist. Court (Kelly), 163  
20 F.3d 530 (9th Cir. 1998). See also Lakey, 633 F.3d at 786 (“The high threshold of extraordinary  
21 circumstances is necessary ‘lest the exceptions swallow the rule.’”); Porter, 620 F.3d at 959;  
22 Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003) (“[T]he threshold necessary to trigger  
23 equitable tolling [under the AEDPA] is very high, lest the exception swallow the rule.”);  
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25 <sup>3</sup> “The diligence required for equitable tolling purposes is ‘reasonable diligence’ . . . not  
26 ‘maximum feasible diligence.’” Holland v. Florida, \_\_ U.S. \_\_, \_\_\_, 130 S. Ct. 2549, 2565  
(2010).

1 Corjasso v. Ayers, 278 F.3d 874, 877 (9th Cir. 2002) (describing the Ninth Circuit’s standard as  
2 setting a “high hurdle” to the application of equitable tolling). To this end, “the circumstances of  
3 a case must be ‘extraordinary’ before equitable tolling can be applied[.]” Holland, 130 S. Ct. at  
4 2564. Whether a party is entitled to equitable tolling “turns on the facts and circumstances of a  
5 particular case.” Spitsyn v. Moore, 345 F.3d 796, 801 (9th Cir. 2003) (quoting Fisher v.  
6 Johnson, 174 F.3d 710, 713 (5th Cir. 1999)). See also Holland, 130 S. Ct. at 2565 (leaving “to  
7 the Court of Appeals to determine whether the facts in this record entitle Holland to equitable  
8 tolling, or whether further proceedings, including an evidentiary hearing, might indicate that  
9 respondent should prevail”); Doe, 661 F.3d at 1012.

10           Here, the court finds, however, that even assuming petitioner were found to be  
11 entitled to equitable tolling of the AEDPA statute of limitations from September 7, 2005 to  
12 October 23, 2007 (i.e. from the day the federal statute of limitations began to run until the day  
13 petitioner’s motion to recall the remittitur was denied by the California Court of Appeal), his  
14 federal habeas petition would still be untimely. The court reaches this conclusion based upon the  
15 lengthy gaps between petitioner’s state and federal habeas filings which, when combined, far  
16 exceed 365 days. In this regard, after the California Court of Appeal denied petitioner’s habeas  
17 petition, the record reflects that he waited 292 days (from July 4, 2008 to April 22, 2009) before  
18 filing his next habeas petition with the California Supreme Court. In addition, after the  
19 California Supreme Court denied him habeas relief, petitioner waited another 447 days (from  
20 October 14, 2009 to January 5, 2011) before filing his pending federal habeas petition. Petitioner  
21 asserts that he acted diligently in attempting to contact his appellate counsel and in attempting to  
22 determine the status of his direct appeal from 2004 to 2007. However, he has come forward with  
23 no explanation or proffer concerning these lengthy periods of time between his attempts to seek  
24 habeas relief. See White v. Martel, 601 F.3d 882, 885 (9th Cir. 2010) (“Such delay does not  
25 demonstrate the diligence required for application of equitable tolling.”) Accordingly, the court  
26 concludes that petitioner has not made the requisite showing of diligence to warrant equitable

1 tolling of the statute of limitations.

2 For the reasons set forth above, the court will recommend that respondent's  
3 motion to dismiss be granted and that petitioner's request for an evidentiary hearing be denied.

4 **III. Other Matters**

5 On June 4, 2012, petitioner filed his second motion for an extension of time to file  
6 a reply to respondent's reply. (Doc. No. 23.) Therein, petitioner explained that he was  
7 attempting to obtain copies of "log sheets for incoming/outgoing Legal Mail from Sacramento  
8 County Main Jail" where he was incarcerated from May 2004 to October 2008. (Doc. No. 23 at  
9 3; Doc. No. 17 at 2.) On May 31, 2012, the court denied petitioner's first request for an  
10 extension of time, explaining that the Federal Rules of Civil Procedure do not provide for the  
11 filing of a response to a reply, and because "the court is not persuaded that the legal mail log  
12 petitioner seeks from the Sacramento County Main Jail to include in his proposed response  
13 would be either critical or helpful to the court in resolving respondent's pending motion to  
14 dismiss." (Doc. No. 22 at 1.)

15 For those same reasons, petitioner's second motion seeking an extension of time  
16 to file an unauthorized response to respondent's reply will be denied.

17 **CONCLUSION**

18 In accordance with the above, IT IS HEREBY ORDERED that petitioner's June  
19 4, 2012 motion to extend time to file a reply (Doc. No. 23) is denied.

20 Also, IT IS HEREBY RECOMMENDED that:

21 1. Respondent's January 18, 2012 motion to dismiss the pending petition for writ  
22 of habeas corpus on the ground that it was filed beyond the applicable one-year statute of  
23 limitations (Doc. No. 14) be granted;

24 2. Petitioner's March 2, 2012 request for an evidentiary hearing, submitted with  
25 his opposition to the motion to dismiss (Doc. No. 17), be denied; and

26 3. This action be dismissed.

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

9 DATED: June 23, 2012.

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12 \_\_\_\_\_  
13 DALE A. DROZD  
14 UNITED STATES MAGISTRATE JUDGE

13 DAD:4  
14 conl0126.mtd