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

ROBERT STAYER,

Petitioner,

No. 2:11-cv-1170 KJN P

vs.

A. HEDGEPEETH, Warden,

Respondent.

ORDER

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I. Introduction

Petitioner is a state prisoner, proceeding without counsel, with an application for petition of writ of habeas corpus pursuant to 28 U.S.C. § 2254. Both parties consented to proceed before the undersigned for all purposes. See 28 U.S.C. § 636(c). Before the court is respondent’s motion to dismiss the pending habeas petition as barred by the statute of limitations. For the reasons set forth below, the undersigned finds that respondent’s motion to dismiss should be granted.

II. Statutory Filing Deadlines

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act (“AEDPA”) was enacted. Section 2244(d)(1) of Title 8 of the United States Code provides:

A 1-year period of limitation shall apply to an application for a writ

1 of habeas corpus by a person in custody pursuant to the judgment  
2 of a State court. The limitation period shall run from the latest of –

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

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

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

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

17 28 U.S.C. § 2244(d)(1). Section 2244(d)(2) provides that “the time during which a properly filed  
18 application for State post-conviction or other collateral review with respect to the pertinent  
19 judgment or claim is pending shall not be counted toward” the limitations period. 28 U.S.C.  
20 § 2244(d)(2).

21 For purposes of the statute of limitations analysis, the relevant chronology of this  
22 case is as follows:

23 1. Petitioner was convicted on September 8, 2006, of murder, torture, conspiracy  
24 to torture, kidnapping, and destruction of evidence, with special aggravating circumstances.

25 (Dkt. No. 13 at 15.) Petitioner was sentenced to life without the possibility of parole. (Dkt. No.  
26 1 at 1.)

27 2. Petitioner filed a timely appeal of the conviction. On June 13, 2008, the  
28 California Court of Appeal for the Third Appellate District affirmed petitioner’s judgment. (Dkt.  
29 No. 13 at 15.)

30 3. On July 15, 2008, petitioner filed a petition for review in the California  
31 Supreme Court, which was denied without comment on September 24, 2008. (Dkt. No. 13 at

1 29.)

2 4. On September 14, 2009,<sup>1</sup> petitioner filed a petition for writ of habeas corpus in  
3 the California Supreme Court. (Dkt. No. 13 at 33-34.) The California Supreme Court denied the  
4 petition without comment on March 18, 2010. (Dkt. No. 13 at 36.)

5 5. Pursuant to Rule 3(d) of the Federal Rules Governing Section 2254 Cases, the  
6 instant action was constructively filed on February 21, 2011. (Dkt. No. 1.)

7 The California Supreme Court denied the petition for review on September 24,  
8 2008. Petitioner's conviction became final ninety days later, on December 23, 2008, when the  
9 time for seeking certiorari with the United States Supreme Court expired. Bowen v. Roe, 188  
10 F.3d 1157 (9th Cir. 1999). The AEDPA statute of limitations period began to run the following  
11 day, on December 24, 2008. Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001). Absent  
12 tolling, petitioner's last day to file his federal petition was on December 24, 2009.

13 Petitioner is not entitled to interval tolling from the date when his conviction  
14 became final until when he filed any state habeas petition. Porter v. Ollison, 620 F.3d 952, 958  
15 (9th Cir. 2010) ("tolling begins when the state habeas petition is filed.") Petitioner did not file  
16 his state petition until September 14, 2009. Because petitioner is not entitled to tolling for the  
17 time no petition was pending from December 24, 2008, to September 13, 2009, 263 days of the  
18 limitations period expired, and 102 days remained.

19 Petitioner is entitled to tolling during the pendency of his first state petition. Pace  
20 v. DiGuglielmo, 544 U.S. 408, 414 (2005). Thus, the statute of limitations period was tolled  
21 from September 14, 2009, until March 18, 2010. Because of this tolling, 102 days remained in  
22 the limitations period. Petitioner filed no other collateral petitions in state court, so no additional  
23 tolling is available. Therefore, the statute of limitations period expired on June 28, 2010, which  
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25 <sup>1</sup> The certificate of service reflects petitioner mailed the petition on September 14, 2009.  
26 See Houston v. Lack, 487 U.S. 266, 275-76 (1988) (pro se prisoner filing is dated from the date  
prisoner delivers it to prison authorities).

1 was 102 days after March 18, 2010.

2           Petitioner filed the instant action on February 21, 2011, over seven months after  
3 the limitations period expired. Accordingly, this action is time-barred unless petitioner can  
4 demonstrate he is entitled to equitable tolling.

5 III. Equitable Tolling

6           Neither party addressed the issue of equitable tolling.

7           In Holland v. Florida, 130 S. Ct. 2549, 2560, 2562, 2564 (2010), the Supreme  
8 Court recognized that the AEDPA statute of limitations “may be tolled for equitable reasons”  
9 when the petitioner has made a showing of “extraordinary circumstances.” Id. To be entitled to  
10 equitable tolling, petitioner must demonstrate “(1) that he has been pursuing his rights diligently,  
11 and (2) that some extraordinary circumstance stood in his way.” Pace, 544 U.S. at 418. It is  
12 petitioner’s burden to show that he is entitled to equitable tolling. Espinoza-Matthews v. People  
13 of the State of California, 432 F.3d 1021, 1026 (9th Cir. 2005). “The high threshold of  
14 extraordinary circumstances is necessary lest the exceptions swallow the rule.” Lakey v.  
15 Hickman, 633 F.3d 782, 786 (9th Cir. 2011) (citations and internal quotation marks omitted).

16           Petitioner filed the instant petition over seven months beyond the date the statute  
17 of limitations period expired. Petitioner has failed to allege any facts demonstrating that he is  
18 entitled to equitable tolling. (Dkt. No. 17.)

19 IV. Conclusion

20           In accordance with the above, IT IS HEREBY ORDERED that:

- 21           1. Respondent’s June 9, 2011 motion to dismiss (dkt. no. 13) is granted; and  
22           2. The court declines to issue the certificate of appealability referenced in 28

23 U.S.C. § 2253.

24 DATED: November 14, 2011

25   
26 KENDALL J. NEWMAN  
UNITED STATES MAGISTRATE JUDGE