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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JUSTIN STEELE,  
Petitioner,  
v.  
JOHN N. KATAVICH, Warden,  
Respondent.

No. 2:15-cv-1836 TLN KJN P

ORDER

Petitioner, a state prisoner without counsel, is proceeding with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent filed a motion to dismiss this action as barred by the statute of limitations and on the grounds that petitioner failed to exhaust his state court remedies as to claims one through six, nine, ten and twelve. After receiving an extension of time, petitioner filed a motion to stay this action so that he can return to state court and exhaust all remedies. However, petitioner did not address the limitations bar, and did not provide facts or argument in support of his motion for stay.

Here, petitioner appears to concede that he failed to exhaust his state court remedies, but he did not address the statute of limitations issue. Specifically, respondent argues that allowing petitioner to exhaust any unexhausted claim would be futile because the statute of limitations has run with regard to such unexhausted claims, citing see Jiminez v. Rice, 276 F.3d 478, 482 (9th Cir. 2001) (because petitioner filed his state habeas petition after the AEDPA statute of

1 limitations ended, the delay “resulted in an absolute time bar to refiling after his state claims  
2 were exhausted”). (ECF No. 11 at 4.)

3 The standards governing the statute of limitations are as follows. On April 24, 1996, the  
4 Antiterrorism and Effective Death Penalty Act (“AEDPA”) was enacted. Section 2244(d)(1) of  
5 Title 8 of the United States Code provides:

6 A 1-year period of limitation shall apply to an application for a writ  
7 of habeas corpus by a person in custody pursuant to the judgment of  
8 a State court. The limitation period shall run from the 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 seeking  
11 such review;

12 (B) the date on which the impediment to filing an application  
13 created by State action in violation of the Constitution or laws of  
14 the United States is removed, if the applicant was prevented from  
15 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 claims  
21 presented could have been discovered through the exercise of due  
22 diligence.

23 28 U.S.C. § 2244(d)(1). Section 2244(d)(2) provides that “the time during which a properly filed  
24 application for State post-conviction or other collateral review with respect to the pertinent  
25 judgment or claim is pending shall not be counted toward” the limitations period. 28 U.S.C.  
26 § 2244(d)(2).

27 Section 2244(d)(2) provides that “the time during which a properly filed application for  
28 State post-conviction or other collateral review with respect to the pertinent judgment or claim is  
pending shall not be counted toward” the limitations period. 28 U.S.C. § 2244(d)(2). Generally,  
this means that the statute of limitations is tolled during the time after a state habeas petition has  
been filed, but before a decision has been rendered. Nedds v. Calderon, 678 F.3d 777, 780 (9th  
Cir. 2012). However, “a California habeas petitioner who unreasonably delays in filing a state  
habeas petition is not entitled to the benefit of statutory tolling during the gap or interval  
preceding the filing.” Id. at 781 (citing Carey v. Saffold, 536 U.S. 214, 225-27 (2002)).

1 Furthermore, the AEDPA “statute of limitations is not tolled from the time a final decision is  
2 issued on direct state appeal and the time the first state collateral challenge is filed because there  
3 is no case ‘pending’ during that interval.” Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999),  
4 overruled on other grounds by Carey, 536 U.S. at 214. Thus, “[t]he period between a California  
5 lower court’s denial of review and the filing of an original petition in a higher court is tolled --  
6 because it is part of a single round of habeas relief -- so long as the filing is timely under  
7 California law.” Banjo v. Ayers, 614 F.3d 964, 968 (9th Cir. 2010).

8 Equitable tolling is available to toll the one-year statute of limitations available to 28  
9 U.S.C. § 2254 habeas corpus cases. Holland v. Florida, 130 S. Ct. 2549, 2560 (2010). A litigant  
10 seeking equitable tolling must establish: (1) that he has been pursuing his rights diligently; and  
11 (2) that some extraordinary circumstance stood in his way. Pace, 544 U.S. at 418. The Ninth  
12 Circuit has explained:

13 To apply the doctrine in “extraordinary circumstances” necessarily  
14 suggests the doctrine’s rarity, and the requirement that  
15 extraordinary circumstances “stood in his way” suggests that an  
16 external force must cause the untimeliness, rather than, as we have  
17 said, merely “oversight, miscalculation or negligence on [the  
18 petitioner’s] part, all of which would preclude the application of  
19 equitable tolling.

20 Waldron-Ramsey v. Pacholke, 556 F.3d 1008, 1011 (9th Cir.) (internal citation omitted), cert.  
21 denied, 130 S. Ct. 244 (2009); see also Stillman v. LaMarque, 319 F.3d 1199, 1203 (9th Cir.  
22 2003) (petitioner must show that the external force caused the untimeliness). It is petitioner’s  
23 burden to demonstrate that he is entitled to equitable tolling. Espinoza-Matthews v. California,  
24 432 F.3d 1021, 1026 (9th Cir. 2005).

25 Courts are expected to “take seriously Congress’s desire to accelerate the federal habeas  
26 process.” Calderon v. United States Dist. Court (Beeler), 128 F.3d 1283, 1289 (9th Cir. 1997),  
27 overruled in part on other grounds by Calderon v. United States Dist. Court (Kelly), 163 F.3d 530  
28 (9th Cir. 1998). See also Corjasso v. Ayers, 278 F.3d 874, 877 (9th Cir. 2002) (describing the  
Ninth Circuit’s standard as setting a “high hurdle” to the application of equitable tolling). To this  
end, “the circumstances of a case must be ‘extraordinary’ before equitable tolling can be  
applied[.]” Holland, 560 U.S. at 652. Whether a party is entitled to equitable tolling “turns on

1 the facts and circumstances of a particular case.” Spitsyn v. Moore, 345 F.3d 796, 801 (9th Cir.  
2 2003) (quoting Fisher v. Johnson, 174 F.3d 710, 713 (5th Cir. 1999)). See also Holland, 560 U.S.  
3 at 654 (leaving “to the Court of Appeals to determine whether the facts in this record entitle  
4 Holland to equitable tolling, or whether further proceedings, including an evidentiary hearing,  
5 might indicate that respondent should prevail”); Doe v. Busby, 661 F.3d 1001, 1012 (9th Cir.  
6 2011) (“[W]hether a prisoner is entitled to equitable tolling under AEDPA will depend on a fact  
7 specific inquiry by the habeas court which may be guided by ‘decisions made in other similar  
8 cases.’”) (citing Holland, 560 U.S. at 650).

9 If petitioner’s claims are untimely and barred by the statute of limitations, a motion for  
10 stay would be futile. Thus, the undersigned finds that petitioner’s motion for stay is premature.  
11 Petitioner’s motion for stay is denied without prejudice to its renewal should respondent’s motion  
12 to dismiss be denied. However, petitioner is not required to await resolution of the pending  
13 motion to dismiss before returning to state court to properly exhaust his state court remedies. In  
14 the event that petitioner exhausts any claims in the California Supreme Court prior to resolution  
15 of the pending motion, petitioner is advised to file a notice of exhaustion in this court.

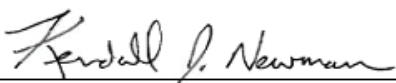
16 Petitioner is granted a second extension of time in which to file an opposition to  
17 respondent’s motion to dismiss. Petitioner is cautioned that failure to oppose the motion will  
18 result in a recommendation that the motion be granted. No further extensions of time will be  
19 granted.

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

- 21 1. Petitioner’s motion for stay is denied without prejudice; and
- 22 2. Petitioner shall file his opposition to respondent’s motion to dismiss within thirty days.

23 No further extensions of time will be granted.

24 Dated: February 16, 2016

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27 KENDALL J. NEWMAN  
28 UNITED STATES MAGISTRATE JUDGE

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