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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMES C. WASHINGTON,  
Petitioner,  
v.  
FRED FIGUEROA,  
Respondent.

No. 2:16-cv-01899 MCE AC P

FINDINGS AND RECOMMENDATIONS

Petitioner is a state prisoner without counsel, seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Now pending before the court is respondent’s motion to dismiss (ECF No. 12) which argues that the current petition is untimely. Petitioner has responded to the motion (ECF No. 17) and respondent has filed a reply (ECF No. 20). After review of the pleadings, the court recommends that respondent’s motion be granted.

**I. Procedural Background**

Petitioner was convicted in the Sacramento County Superior Court of second degree robbery pursuant to California Penal Code § 211 and receiving stolen property pursuant to Cal. Penal Code § 496(a). Lodg. Doc. No. 1. On January 16, 2013, that court sentenced him to a determinate term of seventeen years. Id.

On April 29, 2014, the court of appeal reversed petitioner’s stolen property conviction and otherwise affirmed the judgment. Lodg. Doc. No. 2. Petitioner did not seek review with the

1 California Supreme Court of that decision.

2 Petitioner filed his first state habeas petition with the Sacramento County Superior Court  
3 on August 14, 2014.<sup>1</sup> Lodg. Doc. No. 3. That petition was denied on the merits on October 27,  
4 2014. Lodg. Doc. No. 4.

5 Then, on January 20, 2015, petitioner filed a second habeas petition with the court of  
6 appeal for the third appellate district. Lodg. Doc. No. 5. That petition was summarily denied on  
7 February 5, 2015. Lodg. Doc. No. 6.

8 On March 1, 2015 petitioner returned to the Sacramento County Superior Court with a  
9 third petition. Lodg. Doc. No. 7. This petition was denied on May 4, 2015. Lodg. Doc. No. 8.  
10 The court declined to consider petitioner's claim of ineffective assistance of trial counsel,  
11 reasoning that petitioner had previously brought such a claim in his August 2014 petitioner and  
12 failed to include his current claims therein. Id. at 1. The court then dismissed petitioner's claim  
13 of ineffective assistance of appellate counsel on the merits. Id. at 1-2.

14 A fourth petition was filed on May 18, 2015 with the court of appeal for the third  
15 appellate district. Lodg. Doc. No. 9. That petition was summarily denied on May 28, 2015.  
16 Lodg. Doc. No. 10.

17 A fifth petition, identical to the fourth, was filed simultaneously with the California  
18 Supreme Court on May 18, 2015. Lodg. Doc. No. 11. That petition was summarily denied on  
19 August 12, 2015. Lodg. Doc. No. 12.

20 A sixth petition was filed with the Sacramento County Superior Court on September 21,  
21 2015. Lodg. Doc. No. 13. The petition was denied as successive and delayed. Lodg. Doc. No.  
22 14.

23 A seventh petition was filed on December 20, 2015 with the court of appeal for the third  
24 appellate district. Lodg. Doc. No. 15. The petition was summarily denied on December 31,  
25 2015. Lodg. Doc. No. 16.

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26 <sup>1</sup> The petition was filed with the superior court on August 26, 2014. Lodg. Doc. No. 3. As  
27 respondent correctly points out, however, the "mailbox rule" dictates that a prisoner's petition is  
28 deemed filed upon delivery to prison officials for filing. Accordingly, the court will refer to the  
delivery dates for the ensuing petitions.

1           The eighth and last state habeas petition was filed with the California Supreme Court on  
2 February 24, 2016. Lodg. Doc. No. 17. That petition was denied with a citation to In re Miller,  
3 17 Cal.2d 734, 735 (1941) on May 11, 2016. Lodg. Doc. No. 18.

4           The instant petition was filed on July 6, 2016. ECF No. 1.

## 5           **II.       Applicable Legal Standards**

### 6           **A.       Motion to Dismiss**

7           In the context of federal habeas claims, a motion to dismiss is construed as arising under  
8 Rule 4 of the Rules Governing Section 2254 Proceedings in the United States District Courts  
9 which “explicitly allows a district court to dismiss summarily the petition on the merits when no  
10 claim for relief is stated.” O’Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990) (quoting  
11 Gutierrez v. Griggs, 695 F.2d 1195, 1198 (9th Cir. 1983)). Accordingly, a respondent is  
12 permitted to file a motion to dismiss after the court orders a response, and the court should use  
13 Rule 4 standards in reviewing the motion. See Hillery v. Pulley, 533 F. Supp. 1189, 1194 & n. 12  
14 (E.D. Cal. 1982). Rule 4 specifically provides that a district court may dismiss a petition if it  
15 “plainly appears from the face of the petition and any exhibits annexed to it that petitioner is not  
16 entitled to relief in the district court . . . .” Rule 4 of the Rules Governing Section 2254 Cases.  
17 The court may, however, take judicial notice of court records and does so here. See Porter v.  
18 Ollison, 620 F.3d 952, 954-55 (9th Cir. 2010).

### 19           **B.       Statute of Limitations**

20           A federal habeas petition must be filed within one year of: (1) the date the state court  
21 judgment became final, either by conclusion of direct review or the expiration of time to seek  
22 such review; (2) the date on which an impediment to filing created by state action is removed (if  
23 the applicant was prevented from filing by that action); (3) the date on which a constitutional  
24 right is newly recognized by the Supreme Court and made retroactive on collateral review; or (4)  
25 the date on which the factual predicate of the claim could have been recognized through the  
26 exercise of due diligence. See 28 U.S.C. § 2244(d). In most cases the statute of limitations  
27 begins to run after the state court judgment becomes final, pursuant to 28 U.S.C. § 2244(d)(1).

28           The limitations period is tolled while a properly filed application for post-conviction relief

1 is pending in state court. See 28 U.S.C. § 2244(d)(2). An application for such relief is only  
2 “properly filed,” however, if it is authorized by and in compliance with state law. See Artuz v.  
3 Bennett, 531 U.S. 4, 8 (2000) (“[A]n application is ‘properly filed’ when its delivery and  
4 acceptance are in compliance with the applicable laws and rules governing filings.”). It bears  
5 noting that there is no tolling for periods of unreasonable delay between state court applications.  
6 See Carey v. Saffold, 536 U.S. 214, 225 (2002).

### 7 **III. Analysis**

8 As noted above, court records indicate that petitioner’s conviction was reversed in part on  
9 direct review by the court of appeal on April 29, 2014. Lodg. Doc. No. 2. Petitioner did not  
10 appeal this decision to the California Supreme Court and, consequently, the state judgment  
11 became final forty days later on June 8, 2014. See California Rules of Court 8.264, 8.500; see  
12 also Smith v. Duncan, 297 F.3d 809, 813 (9th Cir. 2001). The one year statute of limitations  
13 began to run the following day, and petitioner therefore had until June 9, 2015 to file his federal  
14 habeas petition. The instant petition was not filed until July 14, 2016. ECF No. 1. The question,  
15 then, is what tolling petitioner is entitled to.

16 Respondent argues that petitioner is not entitled to interval tolling between the finality of  
17 direct review and the first state habeas action filed on August 14, 2014. The court agrees. The  
18 Ninth Circuit has noted that “AEDPA’s statute of limitations is not tolled from the time a final  
19 decision is issued on direct state appeal and the time the first state collateral challenge is filed  
20 because there is no case ‘pending’ during that interval.” Nino v. Galaza, 183 F.3d 1003, 1006  
21 (9th Cir. 1999), overruled on other grounds by Carey, 536 U.S. at 214. Accordingly, sixty-six  
22 days of the limitation period elapsed between the conclusion of direct review and the filing of the  
23 first habeas petition.

24 There is no dispute that the first habeas petition was properly filed. The only claims  
25 raised therein pertained to the performance of petitioner’s trial counsel. Lodg. Doc. No. 3 at 3.  
26 As noted above, this petition was filed on August 14, 2014 and denied on October 27, 2014.

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1 Lodg. Docs. Nos. 3 & 4. This extended the limitations period from June 9, 2015 to August 24,  
2 2015.<sup>2</sup>

3 Petitioner filed his second state petition on January 20, 2015 – eighty-four days after the  
4 denial of his first petition. Lodg. Doc. No. 5. This petition was summarily denied. Lodg. Doc.  
5 No. 6. Respondent contends that petitioner is not entitled to interval tolling during this period  
6 because eighty-four days is an unreasonable delay. In evaluating whether a delay in filing a  
7 California application for post-conviction relief is unreasonable, a federal habeas court must  
8 compare the delay to “the short period[s] of time, 30 to 60 days, that most States provide for  
9 filing an appeal.” Velasquez v. Kirkland, 639 F.3d 964, 967 (9th Cir. 2011) (internal quotations  
10 and citations omitted). In Velasquez, the Ninth Circuit noted that a delay of eighty-one days was,  
11 absent some adequate explanation, unreasonable insofar as it was “nearly a full month beyond the  
12 deadline in most states.” Id. at 968. Petitioner has not offered any justification for his eighty-four  
13 day delay. Accordingly, Velasquez governs and compels the conclusion that the delay here was  
14 unreasonable. One hundred and fifty days of the limitations period had elapsed on January 20,  
15 2015.

16 The third petition did not proceed to the next appellate level because it was filed in the  
17 Sacramento County Superior Court. Accordingly, petitioner is not entitled to interval tolling  
18 between the court of appeal’s denial of his second petition on February 5, 2015 and the filing of  
19 his third petition on March 1, 2015. See Carey, 536 U.S. at 223 (“We find that California's  
20 system functions in ways sufficiently like other state systems of collateral review to bring  
21 intervals between a lower court decision and a filing of a new petition in a higher court within the  
22 scope of the statutory word ‘pending.’”); Biggs v. Duncan, 339 F.3d 1045, 1048 (9th Cir. 2003)  
23 (“an application for post conviction relief is pending during the ‘intervals between a lower court  
24 decision and a filing of a new petition in a *higher* court.’”). Accordingly, 174 days had elapsed at  
25 the time petitioner filed his third petition. One hundred and ninety-one days remained.

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27 <sup>2</sup> Seventy-five days of tolling moves the deadline to August 22, 2015, which was a Saturday.  
28 Accordingly, the petition would be due the following Monday – August 24, 2015. See Fed. R.  
Civ. P. 6(a).

1           The third petition also represented a new round of collateral review. See Delhomme v.  
2 Ramirez, 340 F.3d 817, 820 (9th Cir. 2003), abrogated on other grounds by Evans v. Chavis, 546  
3 U.S. 189 (2006) (“Each time a petitioner files a habeas petition at the same or a lower level . . .  
4 the subsequent petition . . . triggers an entirely separate round of review.”). Unlike the first  
5 petition, it argued that *both* petitioner’s trial and appellate counsel had rendered ineffective  
6 assistance. Lodg. Doc. No. 7 at 6. Petitioner is entitled to tolling during the pendency of this  
7 petition – from March 1, 2015 until May 4, 2015, when it was denied.

8           The fourth petition, filed May 22, 2015 in the court of appeal, raised the same claims as  
9 third and was denied on May 28, 2015. The fifth petition, which was identical to the fourth and  
10 also filed on May 22, 2015, was submitted to the California Supreme Court and denied on August  
11 12, 2015. Petitioner is entitled to tolling for the periods during which the fourth and fifth  
12 petitions were pending. On August 12, 2015, 191 days still remained of the limitations period.

13           The sixth petition was filed on September 21, 2015 in the Sacramento Superior Court and  
14 raised, for the first time: (1) a claim attacking the sufficiency of the evidence underlying  
15 petitioner’s robbery conviction; (2) a claim that petitioner should have been charged with “grand  
16 theft” rather than robbery; and (3) a claim that petitioner’s conviction for receiving stolen  
17 property is no longer a felony under California law. Lodg. Doc. No. 13. The superior court cited  
18 In re Clark, 5 Cal 4th 750,744 (1993) and denied the petition on the grounds that it was untimely.  
19 Lodg. Doc. No. 14. Petitioner is not entitled to tolling during the pendency of this petition  
20 because untimely petitions are not “properly filed” for the purposes of 28 U.S.C. § 2244(d)(2).  
21 See Pace v. DiGuglielmo, 544 U.S. 408, 417 (2005) (“[W]e hold that time limits, no matter their  
22 form, are ‘filing’ conditions. Because the state court rejected petitioner’s PCRA petition as  
23 untimely, it was not ‘properly filed,’ and he is not entitled to statutory tolling under §  
24 2244(d)(2).”); see also White v. Martel, 601 F.3d 882, 884 (9th Cir. 2010) (“[T]olling under  
25 section 2244(d)(2) is unavailable where a state habeas petition is deemed untimely under  
26 California’s timeliness standards.”). Nor is petitioner entitled to gap tolling for the intervals  
27 before or after the filing and denial of this petition. See Thorson v. Palmer, 479 F.3d 643, 646  
28 (9th Cir. 2007) (quoting Bonner v. Carey, 425 F.3d 1145, 1149 (9th Cir. 2005)) (“Under Pace, if a

1 state court denies a petition as untimely, none of the time before or during the court's  
2 consideration of that petition is statutorily tolled.”).

3 Petitioner's seventh and eighth petitions raised the same claims as his sixth. Lodg. Docs.  
4 Nos. 15 & 17. The court of appeal summarily denied the seventh. Lodg. Doc. No. 16. The  
5 California Supreme Court denied the eighth with a citation to In re Miller, 17 Cal. 2d 734, 735  
6 (1941). Lodg. Doc. No. 18. In re Miller stands for the proposition that the current petition is  
7 denied for the same reasons that the court denied the previous petition. See Kim v. Villalobos,  
8 799 F.2d 1317, 1319 n.1 (9th Cir. 1986). The court looks through these denials to the superior  
9 court's holding that the petition was untimely. See Townsend v. Knowles, 562 F.3d 1200, 1205  
10 (9th Cir. 2009). The Supreme Court's citation to In re Miller does not alter this conclusion. See  
11 Ylst v. Nunnemaker, 501 U.S. 797, 804 n.3 (1991) (state court decision “based on ineligibility for  
12 further state review” has no effect on availability of federal habeas and a court should look  
13 through the later decision to the last reasoned state court opinion). These untimely petitions do  
14 not support statutory tolling.

15 Based on the foregoing, the court concludes that petitioner had until February 19, 2016  
16 (191 days from August 12, 2015) to file his federal habeas petition. The instant petition,  
17 however, was not filed until July 14, 2016. ECF No. 1.

18 The only question that remains is whether petitioner is entitled to equitable tolling. The  
19 only argument raised by petitioner to that effect concerns the sixty-six day period between the  
20 completion of direct review and the filing of his first habeas petition. In his response, petitioner  
21 argues that he did not file his first petition until August 14, 2014 because he was not given notice  
22 that his direct appeal was complete. ECF No. 17 at 4. He claims that, after not receiving any  
23 notice from the court of appeal, he began to research “the law and his case” and, only then,  
24 concluded that he could not have been guilty of second degree robbery. Id. Petitioner's  
25 contentions are inconsistent with state court records lodged by respondent, which reflect that a  
26 copy of the court of appeal's opinion was sent to the petitioner on April 29, 2014. Lodg. Doc.  
27 No. 19. Additionally, when the court of appeal issued remittitur on July 1, 2014, it noted that  
28 copies of the opinion had previously been provided to the parties. Lodg. Doc. No. 21.

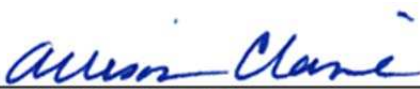
1 Respondent also persuasively argues that petitioner need not have waited to receive the court of  
2 appeal's opinion before researching the legal issues pertaining to his second degree robbery  
3 conviction. Only the conviction for receiving stolen property was challenged on direct appeal.  
4 Lodg. Doc. No. 2. Finally, the court notes that the extension of the filing deadline by sixty-six  
5 days would not render the petition timely.

6 **IV. Conclusion**

7 Accordingly, it is RECOMMENDED that respondent's motion to dismiss (ECF No. 12)  
8 be granted and the petition be dismissed as untimely.

9 These findings and recommendations are submitted to the United States District Judge  
10 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty one days  
11 after being served with these findings and recommendations, any party may file written  
12 objections with the court and serve a copy on all parties. Such a document should be captioned  
13 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections  
14 within the specified time may waive the right to appeal the District Court's order. Turner v.  
15 Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991). In  
16 his objections petitioner may address whether a certificate of appealability should issue in the  
17 event he files an appeal of the judgment in this case. See Rule 11, Federal Rules Governing  
18 § 2254 Cases (the district court must issue or deny a certificate of appealability when it enters a  
19 final order adverse to the applicant).

20 DATED: May 26, 2017

21   
22 ALLISON CLAIRE  
23 UNITED STATES MAGISTRATE JUDGE  
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