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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

PAUL LEE JONES,  
  
                                    Petitioner,  
  
                    v.  
  
J. LONG, et al.,  
  
                                    Respondents.

No. 2: 19-cv-1261 TLN KJN P

FINDINGS & RECOMMENDATIONS

Petitioner is a prisoner, proceeding without counsel, with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. In 1978, petitioner was convicted of murder and sentenced to 7 years to life. (ECF No. 1 at 2.) This action proceeds on the original petition filed June 13, 2019, pursuant to the mailbox rule, as to claim one alleging that the Tehama County District Attorney violated petitioner’s plea agreement by opposing his request for parole and alleging aggravating circumstances at petitioner’s August 5, 2009 parole suitability hearing.<sup>1</sup> (Id. at 8-9.)

Pending before the court is respondent’s motion to dismiss on the grounds that petitioner’s claim is barred by the statute of limitations and not exhausted. (ECF No. 18.) On November 17, 2020, petitioner filed an amended opposition. (ECF No. 23.) On November 24, 2020, respondent

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<sup>1</sup> On March 25, 2020, the undersigned recommended that claims two, three, four and five raised in the petition be dismissed. (ECF No. 5.) On August 4, 2020, the Honorable Troy L. Nunley adopted the March 25, 2020 findings and recommendations. (ECF No. 17.)

1 filed a reply. (ECF No. 24.)

2 For the reasons stated herein, the undersigned recommends that respondent's motion to  
3 dismiss be granted.

4 Statute of Limitations

5 The Anti-Terrorism and Effective Death Penalty Act ("AEDPA") imposes a one-year  
6 statute of limitations for the filing of a federal habeas petition:

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

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

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

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

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

18 28 U.S.C. § 2244(d)(1).

19 As stated above, in claim one, petitioner alleges that the Tehama County District Attorney  
20 violated his plea agreement by opposing his request for parole and alleging aggravating  
21 circumstances at petitioner's August 5, 2009 parole suitability hearing. Therefore, the  
22 undersigned finds that the statute of limitations for this claim is calculated pursuant to 28 U.S.C.  
23 § 2244(d)(1)(D), i.e., the date on which the factual predicate of the claim could have been  
24 discovered through due diligence.

25 Because petitioner was present at the August 5, 2009 parole suitability hearing where the  
26 alleged breach of his plea agreement occurred, the undersigned finds that the statute of limitations  
27 began to run on August 6, 2009. Petitioner had one year from August 6, 2009, i.e., until August  
28 7, 2010, to file a timely federal petition. The instant action is not timely unless petitioner is

1 entitled to statutory or equitable tolling.

2 *Statutory Tolling*

3 AEDPA's statute of limitations is suspended for the time during which a "properly-filed"  
4 application for post-conviction relief is pending in state court, i.e., statutory tolling. See 28  
5 U.S.C. § 2244(d)(2).

6 According to respondent, petitioner did not start the state court review process until  
7 October 15, 2017. (ECF No. 18 at 3.) Respondent cites page 3 of petitioner's habeas corpus  
8 petition in support of this claim. (Id.) Respondent argues that petitioner is not entitled to  
9 statutory tolling because he did not start the state court review process until seven years after the  
10 expiration of the statute of limitations. Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003)  
11 (no statutory tolling if AEDPA time period expired before starting the state court review process).

12 Respondent is correct that in the petition form, petitioner alleges that he began the state  
13 court review process by filing a habeas corpus petition in the Tehama County Superior Court on  
14 October 15, 2017. (ECF No. 1 at 3.) However, attached to the petition is a copy of an order by  
15 the Tehama County Superior Court dated January 28, 2011 denying a habeas corpus petition filed  
16 by petitioner on December 7, 2010 raising petitioner's claim that the district attorney violated his  
17 plea agreement by opposing his request for parole. (ECF No. 1 at 22-24.) In his amended  
18 opposition, petitioner alleges that he filed the petition in the Tehama County Superior Court on  
19 December 2, 2010, pursuant to the mailbox rule. (ECF No. 23 at 5.)

20 Petitioner filed his petition in the Tehama County Superior Court on December 2, 2010,  
21 which was after the statute of limitations ran on August 7, 2010. For this reason, petitioner is not  
22 entitled to statutory tolling for the state habeas petition he filed on December 2, 2010, or any of  
23 the state habeas petitions he filed beginning in 2017. Ferguson v. Palmateer, 321 F.3d 820, 823  
24 (9th Cir. 2003) (no statutory tolling if AEDPA time period expired before starting the state court  
25 review process).

26 *Equitable Tolling*

27 A prisoner who files a federal habeas petition after the expiration of the one-year statute of  
28 limitations may be entitled to equitable tolling. See Holland v. Florida, 560 U.S. 631, 649 (2010).

1 To get the benefit of equitable tolling, the prisoner must show that he was diligently pursuing his  
2 rights, but some extraordinary circumstance stood in his way and prevented timely filing. Id.; see  
3 Bills v. Clark, 628 F.3d 1092, 1097 (9th Cir. 2010) (“Equitable tolling is available where the  
4 prisoner can show extraordinary circumstances were the cause of an untimely filing.”) “A  
5 petitioner must show that his untimeliness was caused by an external impediment and not by his  
6 own lack of diligence.” Bryant v. Arizona Atty. Gen., 499 F.3d 1056, 1061 (9th Cir. 2007).  
7 “Indeed, the threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the  
8 exceptions swallow the rule.” Miranda v. Castro, 292 F.3d 1063, 1066 (9th Cir. 2002) (internal  
9 quotation marks and citation omitted).

10 In the amended opposition, petitioner alleges that the following circumstances entitle him  
11 to equitable tolling. Petitioner alleges that on February 25, 2012, he witnessed a murder at  
12 Folsom State Prison. (ECF No. 23 at 6.) Petitioner alleges that as a result of witnessing this  
13 murder, he was transferred on several occasions. (Id.) Petitioner alleges that as a result of these  
14 transfers, he could not re-start his state habeas actions until 2017. (Id. at 6-7.)

15 Petitioner did not become a witness to the murder until February 25, 2012, which was  
16 over one year after the statute of limitations ran on August 7, 2010. These circumstances do not  
17 explain petitioner’s failure to file a timely federal habeas corpus petition. For this reason,  
18 petitioner is not entitled to equitable tolling based on these circumstances.

19 For the reasons discussed above, the undersigned finds that claim one raised in the instant  
20 action is barred by the statute of limitations. Respondent’s motion to dismiss on this ground  
21 should be granted.<sup>2</sup>

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22 <sup>2</sup> If the undersigned construed claim one to directly challenge the validity of the August 5, 2009  
23 decision finding petitioner unsuitable for parole, claim one would still be time barred for the  
24 following reasons. If petitioner challenged the validity of the August 5, 2009 decision finding  
25 him unsuitable for parole, the statute of limitations would begin to run when the August 5, 2009  
26 decision became final, i.e., on December 3, 2009. See Redd v. McGrath, 343 F.3d 1077, 1079-80  
27 (9th Cir. 2003) (the statute of limitations applies to administrative decisions like the denial of  
28 parole); Shelby v. Bartlett, 391 F.3d 1061, 1066 (9th Cir. 2004) (the statute of limitations for a  
petition challenging parole denial begins to run on the date after that administrative decision  
becomes final); see Stephen v. Fox, 2019 WL 6320378, at \*2 (E.D. Cal. Nov. 26, 2019) (parole  
decision final 120 days after decision issued). The statute of limitations would expire one year  
later, i.e., on December 3, 2010. Petitioner would be entitled to statutory tolling for the 57 days

1 Exhaustion

2 Respondent also argues that claim one should be dismissed because it is not exhausted.  
3 The exhaustion of available state remedies is a prerequisite to a federal court’s consideration of  
4 claims sought to be presented in habeas corpus proceedings. See Rose v. Lundy, 455 U.S. 509  
5 (1982); 28 U.S.C. § 2254(b). A petitioner can satisfy the exhaustion requirement by providing  
6 the highest state court with a full and fair opportunity to consider all claims before presenting  
7 them to the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971), Middleton v. Cupp, 768  
8 F.2d 1083, 1086 (9th Cir. 1985), cert. denied, 478 U.S. 1021 (1986).

9 Respondent argues that petitioner failed to exhaust state court remedies because on  
10 February 13, 2019, the California Supreme Court denied his petition by an order stating, “The  
11 petition for writ of habeas corpus is denied. (See People v. Duvall (1995) 9 Cal.4th 464, 474 [a  
12 petition for writ of habeas corpus must include copies of reasonably available documentary  
13 evidence].)” (ECF No. 18-4 at 2.)

14 Although petitioner’s failure to include copies of reasonably available documentary  
15 evidence could have been “cured in a renewed petition,” petitioner’s failure to file a renewed  
16 petition in the California Supreme Court does not per se establish a failure to exhaust state court  
17 remedies. See Kim v. Villalobos, 799 F.2d 1317, 1319 (9th Cir. 1986). Where the state court  
18 denial rests on the proposition that the claims were not alleged with enough particularity or did  
19 not include reasonably available documentary evidence in support thereof, the court must  
20 independently examine petitioner’s California Supreme Court habeas petition and make its own

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21 his first state habeas was pending in the Tehama County Superior Court, i.e., December 2, 2010  
22 to January 27, 2011, thus extending the limitations period to January 29, 2011. Petitioner would  
23 not be entitled to gap tolling for the approximate 6 ½ years he waited to file his next state habeas  
24 petition because he has not shown good cause for this delay. See Valdez v. Montgomery, 918  
25 F.3d 687, 692 (9th Cir. 2019) (in considering gap tolling, absent showing of good cause, court  
26 will not depart from “benchmark” 60-day limit between filings). While petitioner argues that he  
27 is entitled to 6 ½ years of gap tolling because he was unable to proceed with his state habeas  
28 petitions after he witnessed a murder in February 2012, this circumstance occurred after the  
statute of limitations expired on January 29, 2011. The state habeas petitions petitioner began  
filing in 2017 would not restart the statute of limitations. See Ferguson v. Palmateer, *supra*. For  
these reasons, even if the undersigned calculated the statute of limitations from the date the  
August 5, 2009 decision finding petitioner unsuitable for parole became final, the instant action is  
still not timely.

1 determination whether the claim was pled with as much particularity as was practicable. See  
2 Schwartz v. Uribe, 2013 WL 1146984, at \*2 (C.D. Cal. Jan. 29, 2013) (citing Kim v. Villalobos,  
3 799 F.2d at 1320 (9th Cir. 1986)); Barrera v. Attorney General of California, 473 F.App'x 748,  
4 749 (9th Cir. 2012) (citations to Swain and Duvall require that a federal habeas court  
5 “independently analyze the petition presented to the California Supreme Court to determine  
6 whether [the petitioner] satisfied federal exhaustion requirements”).

7 In support of the opposition, respondent submitted a copy of the habeas corpus petition  
8 petitioner filed in the California Supreme Court on August 27, 2018. (ECF No. 18-3.) In this  
9 petition, petitioner appears to allege an ongoing violation of his plea agreement based on the  
10 Tehama County District Attorney’s Office continued opposition to his request for parole. (Id. at  
11 9.) Petitioner also raises other claims, such as the improper use of unchanging factors by the  
12 Board of Parole Hearings (“BPH”) to find petitioner unsuitable for parole. (Id.) Petitioner  
13 alleges that he has been wrongly found unsuitable for parole 16 times. (Id.)

14 Attached to habeas petition filed in the California Supreme Court as exhibits are copies of  
15 other habeas petitions filed by petitioner in state court. These petitions do not include  
16 documentary evidence, such as transcripts from the at-issue parole hearings or the transcript from  
17 petitioner’s plea agreement.

18 Petitioner’s habeas corpus petition filed in the California Supreme Court does not appear  
19 to raise a claim specifically alleging that the Tehama County District Attorney violated  
20 petitioner’s plea agreement at his August 5, 2009 parole suitability hearing. However, even if this  
21 petition raised this claim, the undersigned finds that petitioner’s failure to attach any relevant  
22 documentary evidence to this petition renders the claims raised in this petition unexhausted. The  
23 California Supreme Court’s citation to People v. Duvall in the order denying petitioner’s corpus  
24 habeas petition indicates that petitioner could refile a habeas corpus petition in the California  
25 Supreme Court that includes relevant documentary evidence, such as a transcript from the at-issue  
26 parole suitability hearing and/or a copy of petitioner’s plea agreement.

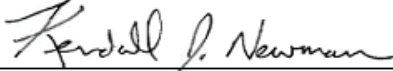
27 For the reasons discussed above, the undersigned finds that petitioner’s claim alleging that  
28 the Tehama County District Attorney violated petitioner’s plea agreement by opposing his request

1 for parole and alleging aggravating circumstances at petitioner's August 5, 2009 parole suitability  
2 hearing is not exhausted. Respondent's motion to dismiss on this ground should be granted.<sup>3</sup>

3 Accordingly, IT IS HEREBY RECOMMENDED that respondent's motion to dismiss  
4 (ECF No. 18) be granted.

5 These findings and recommendations are submitted to the United States District Judge  
6 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
7 after being served with these findings and recommendations, any party may file written  
8 objections with the court and serve a copy on all parties. Such a document should be captioned  
9 "Objections to Magistrate Judge's Findings and Recommendations." If petitioner files objections,  
10 he shall also address whether a certificate of appealability should issue and, if so, why and as to  
11 which issues. A certificate of appealability may issue under 28 U.S.C. § 2253 "only if the  
12 applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C.  
13 § 2253(c)(3). Any response to the objections shall be served and filed within fourteen days after  
14 service of the objections. The parties are advised that failure to file objections within the  
15 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951  
16 F.2d 1153 (9th Cir. 1991).

17 Dated: December 2, 2020

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19 \_\_\_\_\_  
20 KENDALL J. NEWMAN  
21 UNITED STATES MAGISTRATE JUDGE

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27 <sup>3</sup> Petitioner is not entitled to a stay of this action in order to exhaust claim one because this claim  
28 is not timely. See Johnson v. Federal Court Judges, 2020 WL 2114931, at \*6 (C.D. Cal. March  
20, 2020) (petitioner not entitled to a stay if claims are time barred).