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

GERALD PILMAN,  
Petitioner,  
v.  
R. FISHER,  
Respondent.

No. 2:20-CV-1771-WBS-DMC-P

**FINDINGS AND RECOMMENDATIONS**

Petitioner, a state prisoner proceeding pro se, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pending before the Court is Respondent’s unopposed motion to dismiss the petition as untimely. See ECF No. 12.

**I. BACKGROUND**

Petitioner was convicted of second-degree robbery, attempted second-degree robbery, and evading police. See ECF No. 13-1. A sentencing enhancement was found to be true and Petitioner was sentenced to a determinate state prison term of 14 years 8 months. See id. Petitioner did not appeal.

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1 Petitioner filed the following state court post-conviction actions:

2 First Action Filed in the Sacramento County Superior Court on  
3 September 7, 2018. See ECF No. 13-2  
4 Denied on November 30, 2018. See ECF No. 13-3.

5 Second Action Filed in the Sacramento County Superior Court on  
6 May 4, 2019. See ECF No. 13-4.  
7 Denied on June 11, 2019. See ECF No. 13-5.

8 Third Action Filed in the California Court of Appeal on July 18, 2019.  
9 See ECF No. 13-6.  
10 Denied on July 25, 2019. See ECF No. 13-6. See ECF  
11 No. 13-7.

12 Fourth Action Filed in the California Supreme Court on September 1,  
13 2019. See ECF No. 13-8.  
14 Denied on December 18, 2019. See ECF No. 13-9.

15 Fifth Action Filed in the Sacramento County Superior Court on  
16 March 8, 2020. See ECF No. 13-10.  
17 Denied on June 12, 2020. See ECF No. 13-11.

18 Petitioner's federal petition was filed on August 13, 2020. See ECF No. 1.

## 19 II. DISCUSSION

20 Federal habeas corpus petitions must be filed within one year from the later of: (1)  
21 the date the state court judgment became final; (2) the date on which an impediment to filing  
22 created by state action is removed; (3) the date on which a constitutional right is newly-  
23 recognized and made retroactive on collateral review; or (4) the date on which the factual  
24 predicate of the claim could have been discovered through the exercise of due diligence. See 28  
25 U.S.C. § 2244(d). Typically, the statute of limitations will begin to run when the state court  
26 judgment becomes final by the conclusion of direct review or expiration of the time to seek direct  
27 review. See 28 U.S.C. § 2244(d)(1).

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1           Where a petition for review by the California Supreme Court is filed and no  
2 petition for certiorari is filed in the United States Supreme Court, the one-year limitations period  
3 begins running the day after expiration of the 90-day time within which to seek review by the  
4 United States Supreme Court. See Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001).  
5 Where a petition for writ of certiorari is filed in the United States Supreme Court, the one-year  
6 limitations period begins to run the day after certiorari is denied or the Court issued a merits  
7 decision. See Wixom v. Washington, 264 F.3d 894, 897 (9th Cir. 2001). Where no petition for  
8 review by the California Supreme Court is filed, the conviction becomes final 40 days following  
9 the Court of Appeal’s decision, and the limitations period begins running the following day. See  
10 Smith v. Duncan, 297 F.3d 809 (9th Cir. 2002). If no appeal is filed in the Court of Appeal, the  
11 conviction becomes final 60 days after conclusion of proceedings in the state trial court, and the  
12 limitations period begins running the following day. See Cal. Rule of Court 8.308(a). If the  
13 conviction became final before April 24, 1996 – the effective date of the statute of limitations –  
14 the one-year period begins to run the day after the effective date, or April 25, 1996. See Miles v.  
15 Prunty, 187 F.3d 1104, 1105 (9th Cir. 1999).

16           The limitations period is tolled, however, for the time a properly filed application  
17 for post-conviction relief is pending in the state court. See 28 U.S.C. § 2244(d)(2). To be  
18 “properly filed,” the application must be authorized by, and in compliance with, state law. See  
19 Artuz v. Bennett, 531 U.S. 4 (2000); see also Allen v. Siebert, 128 S.Ct. 2 (2007); Pace v.  
20 DiGuglielmo, 544 U.S. 408 (2005) (holding that, regardless of whether there are exceptions to a  
21 state’s timeliness bar, time limits for filing a state post-conviction petition are filing conditions  
22 and the failure to comply with those time limits precludes a finding that the state petition is  
23 properly filed). A state court application for post-conviction relief is “pending” during all the  
24 time the petitioner is attempting, through proper use of state court procedures, to present his  
25 claims. See Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). It is not, however, considered  
26 “pending” after the state post-conviction process is concluded. See Lawrence v. Florida, 549  
27 U.S. 327 (2007) (holding that federal habeas petition not tolled for time during which certiorari  
28 petition to the Supreme Court was pending). Where the petitioner unreasonably delays between



1           **B. The Limitations Period is Tolled**

2           Respondent concedes Petitioner is entitled to statutory tolling for the time his first  
3 state court post-conviction action was pending – September 17, 2018, through November 30,  
4 2018, or 75 days). See ECF No. 12, pg. 5. Respondent argues Petitioner is not entitled to any  
5 tolling for the time his second state court action was pending because it was not properly filed in  
6 the next higher state court. See id. As to the third and fourth state court actions, Respondent  
7 contends Petitioner is not entitled to any statutory tolling because he unreasonably delayed 229  
8 days in filing following the trial court’s denial of his first post-conviction action. See id. at 5-6.  
9 Respondent presents no argument concerning the effect, if any, on the fifth state court post-  
10 conviction action filed in the trial court.

11                   1.       Second State Court Action

12           The Court agrees that the second state court post-conviction action was not  
13 properly filed. As with the first state court action, the second state court action was filed in the  
14 trial court and raised the same claims. Thus, the second action was duplicative under state law.  
15 See In re Clark, 5 Cal. 4th 750 (1993). Petitioner is not entitled to any tolling for the time the  
16 second state court action was pending, see Pace, 544 U.S. at 414-15, or for the time between the  
17 first and second actions because Petitioner was not moving to the next higher level of state court  
18 review, see Nino, 183 F.3d at 1006-07.

19                   2.       Third and Fourth State Court Actions

20           As Respondent observes, because the second state court action was not properly  
21 filed, it is as if it never existed. See Lakey v. Hickman, 633 F.3d 782, 785-86 (9th Cir. 2011).  
22 The Court, therefore, looks to the time between denial of the first state court action and the filing  
23 of the third state court action to determine whether there was an unreasonable delay. The first  
24 state court action was denied on November 30, 2018, and the third action was filed 229 days later  
25 on July 18, 2019. Respondent argues this delay falls outside the safe harbor of 120 days allowed  
26 under state law and, as a result, is unreasonable. Petitioner has not responded. The Court agrees  
27 with Respondent that the delay at issue is unreasonable. See Robinson v. Lewis, 9 Cal. 5th 883  
28 (2020).

1           Because the third action was filed after a 229-day delay, it was not properly filed  
2 and, therefore, for purposes of statutory tolling, it is as if the third petitioner does not exist. If the  
3 third petition does not exist, the fourth petition is defective for two reasons. First, it was filed  
4 after the third petition thus making the delay between the first and fourth petitions even longer  
5 than 229 days and, thus, also unreasonable. Second, the first petition was filed in the trial court  
6 and the fourth petition was filed in the California Supreme Court, which is not the next higher  
7 state court of appellate review. Petitioner is not entitled to tolling for any of the time between  
8 denial of the first action and filing of the third action, for any of the time the third action was  
9 pending, for the interval between the third and fourth actions, or for the time the fourth action was  
10 pending.

11           3.     Fifth State Court Action

12           The Court addresses the tolling effect, if any, of the fifth state court action even  
13 though Respondent makes no argument as to that action. The Court finds that the fifth action  
14 does not result in any additional tolling. First, the fifth action was filed in the trial court, as was  
15 the first action. Therefore, there is no tolling for the interval between the two actions because  
16 Petitioner was not proceeding to the next highest state court level of review. Second, the delay  
17 between denial of the first action in November 2018 and the filing of the fifth action in March  
18 2020 is unreasonable under state law. Thus, the fifth action was not properly filed for purposes of  
19 statutory tolling.

20           C.     The Limitations Period Ends

21           According to Respondent:

22                     As explained, the statute of limitation commenced on May 22,  
23 2018. There were 118 days that passed between finality of direct review  
24 and the filing of the first state petition, 229 days that elapsed between the  
25 denial of the first state petition and the filing of the third state petition, and  
26 the limitation period expired 18 days later, on August 4, 2019, during the  
27 pendency of the improperly filed third state petition. Since Petitioner did  
28 not file his federal petition until August 13, 2020, he exceeded the one  
year allowed under 28 U.S.C. § 2244(d), by a little over one year.

                   Petitioner's fifth state petition did not extend the limitation period  
because it was not filed until March 8, 2020, seven months after the  
August 4, 2019 expiration of the limitation period. (Lod. Doc. 10.) A  
petition filed after the limitation period cannot serve to extend the  
limitation period. *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir.

1 2003) (finding “section 2244(d) does not permit the reinitiation of the  
2 limitations period that has ended before the state petition was filed”);  
3 *Jiminez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001) (concluding state  
4 habeas petition filed “well after the AEDPA statute of limitations ended”  
5 did not save federal petition from being untimely).

6 ECF No. 12, pgs. 6-7.

7 As Respondent notes, 118 days passed between the date Petitioner’s conviction  
8 became final on May 21, 2018, and the filing of the first state court post-conviction action on  
9 September 7, 2018. Respondent concedes Petitioner is entitled to tolling for the time the first  
10 action was pending, and the Court finds the second action was not properly filed because it was  
11 duplicative under state law. Another 229 days passed following denial of the first action on  
12 November 30, 2018, and the filing of the third state court post-conviction action on July 18, 2019.

13 By the time the third action had been filed, 347 days of the one-year limitations  
14 period had elapsed. The Court finds Petitioner is not entitled to any further statutory tolling.  
15 Because the instant federal petition was filed in August 2020 – more than a year after 347 days  
16 had already elapsed – the petition is untimely.

### 17 III. CONCLUSION

18 Based on the foregoing, the undersigned recommends that Respondent’s  
19 unopposed motion to dismiss, ECF No. 12, be granted.

20 These findings and recommendations are submitted to the United States District  
21 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days  
22 after being served with these findings and recommendations, any party may file written objections  
23 with the Court. Responses to objections shall be filed within 14 days after service of objections.  
24 Failure to file objections within the specified time may waive the right to appeal. See *Martinez v.*  
*Ylst*, 951 F.2d 1153 (9th Cir. 1991).

25 Dated: March 11, 2021



26 DENNIS M. COTA  
27 UNITED STATES MAGISTRATE JUDGE  
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