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

JOHN STEVEN MORGAN,	)	
	)	
Petitioner,	)	No. C 07-6477 CRB (PR)
	)	
vs.	)	ORDER GRANTING
	)	MOTION TO DISMISS
RODNEY K. MITCHELL, Sheriff,	)	
	)	(Docket # 13)
Respondent(s).	)	
_____	)	

Petitioner, a state prisoner currently incarcerated at the Lake County Jail on a parole violation, seeks a writ of habeas corpus under 28 U.S.C. § 2254 challenging a 1998 conviction from Lake County Superior Court. Per order filed on April 18, 2008, the court found that, when liberally construed, the petition for a writ of habeas corpus stated cognizable claims for relief under § 2254 and ordered respondent to show cause why a writ of habeas corpus should not be granted. Respondent instead filed a motion to dismiss the petition as untimely under 28 U.S.C. § 2244(d). Petitioner filed an opposition and respondent filed a reply. (Petitioner also filed an unsolicited response to respondent's reply.)

I

Petitioner was convicted by a jury of one count of annoying or molesting a child under 18 with a similar prior conviction and two counts of contributing to the delinquency of a minor. Petitioner admitted that he had suffered a prior felony "strike" conviction and, on July 31, 1998, was sentenced to 12 years in state prison pursuant to California's Three Strikes Law.

On August 4, 1999, the California Court of Appeal affirmed the judgment of the superior court and, on October 20, 1999, the Supreme Court of California denied review.

On October 10, 2000, petitioner filed a petition for a writ of habeas corpus in Lake County Superior Court. It was denied on November 3, 2000.

On September 6, 2002, petitioner filed a motion for a new trial in Lake County Superior Court. It was denied "a short time later." Pet. at 8.<sup>1</sup>

On December 10, 2006, petitioner filed a petition for a writ of habeas corpus in Lake County Superior Court. It was denied on February 23, 2007.

On December 27, 2007, petitioner filed the instant federal petition for a writ of habeas corpus.

On June 16, 2008, petitioner filed a petition for a writ of habeas corpus in the California Court of Appeal. It was denied on June 25, 2008.

On July 15, 2008, petitioner filed a petition for a writ of habeas corpus in the Supreme Court of California. It was denied on August 13, 2008.

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<sup>1</sup>Although the superior court cannot locate a copy of the order denying the September 6, 2002 motion for a new trial, petitioner asserts that it was denied "a short time" after it was filed. Pet. at 8.

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II

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") became law on April 24, 1996 and imposed for the first time a statute of limitation on petitions for a writ of habeas corpus filed by state prisoners. Petitions filed by prisoners challenging non-capital state convictions or sentences must be filed within one year of the latest of the date on which: (A) the judgment became final after the conclusion of direct review or the time passed for seeking direct review; (B) an impediment to filing an application created by unconstitutional state action was removed, if such action prevented petitioner from filing; (C) the constitutional right asserted was recognized by the Supreme Court, if the right was newly recognized by the Supreme Court and made retroactive to cases on collateral review; or (D) the factual predicate of the claim could have been discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1). Time during which a properly filed application for state post-conviction or other collateral review is pending is excluded from the one-year time limit. Id. § 2244(d)(2).

A state prisoner with a conviction finalized after April 24, 1996, such as petitioner, ordinarily must file his federal habeas petition within one year of the date his process of direct review came to an end. See Calderon v. United States District Court (Beeler), 128 F.3d 1283, 1286 (9th Cir. 1997), overruled in part on other grounds by Calderon v. United States District Court (Kelly), 163 F.3d 530 (9th Cir. 1998) (en banc). Here, because petitioner did not seek a writ of certiorari from the Supreme Court of the United States after the Supreme Court of California denied review on October 20, 1999, his process of direct review came to an end on January 18, 2000, when the time allotted for filing a petition for a writ of certiorari expired. See Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir.

1 2002); Bowen v. Roe, 188 F.3d 1157, 1159 (9th Cir. 1999). Petitioner therefore  
2 had until January 18, 2001 to file a federal habeas petition within the one-year  
3 limitation period. See Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001)  
4 (calculating AEDPA's one-year limitation period according to Federal Rule of  
5 Civil Procedure 6(a)). The instant petition was not filed until December 27,  
6 2007. It is untimely unless the limitation period was tolled for a substantial  
7 period of time.

8 Section 2244(d)(2) tolls the one-year limitation period for the "time during  
9 which a properly filed application for State post-conviction or other collateral  
10 review with respect to the pertinent judgment or claim is pending." 28 U.S.C. §  
11 2244(d)(2). In Carey v. Saffold, 536 U.S. 214 (2002), the Supreme Court held  
12 that the limitation period is also tolled during the time between a lower state  
13 court's decision and the filing of a notice of appeal to a higher state court. 536  
14 U.S. at 219-21. In California, where prisoners generally use the state's "original  
15 writ system," this means that the limitation period remains tolled during the  
16 intervals between a state court's disposition of an original state habeas petition  
17 and the filing of a further original state habeas petition in a higher court, provided  
18 the prisoner did not delay unreasonably in seeking review in the higher court.  
19 See id. at 221-25.

20 The rationale of Carey does not entitle petitioner to interval tolling under §  
21 2244(d)(2) for the time period between November 3, 2000 (the date on which the  
22 state superior court denied petitioner's first state habeas) and September 6, 2002  
23 (the date on which petitioner filed his motion for a new trial in state superior  
24 court), or December 10, 2006 (the date on which petitioner filed his second state  
25 habeas in state superior court), because petitioner was not seeking review in a  
26 higher court. The Supreme Court noted that a California prisoner who, like  
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1 petitioner, files a "subsequent and similar petition in another lower court (say,  
2 another trial court) will likely find consideration of that petition barred as  
3 successive." Carey, 536 U.S. at 222 (citing In re Clark, 5 Cal. 4th 750, 767-71  
4 (1993)). By contrast, a prisoner who files the same petition in a higher,  
5 reviewing court will find that he can obtain appellate review. Id. (citing In re  
6 Resendiz, 25 Cal. 4th 230, 250 (2001)). Only the latter is entitled to tolling for the  
7 interval between the denial of the first petition and the filing of the next one. See  
8 id. at 221-25; see also Nino v. Galaza, 183 F.3d 1003, 1005 (9th Cir. 1999)  
9 (limitation period "remains tolled during the intervals between the state court's  
10 disposition of a state habeas petition and the filing of a petition at the next state  
11 appellate level").<sup>2</sup>

12 Here, the one-year limitation period began running against petitioner the  
13 day after his process of direct review came to an end on January 18, 2000, and  
14 ran unabated until October 10, 2000 (264 days), when petitioner filed his first  
15 habeas petition in state superior court. The limitation period was then tolled  
16 under § 2244(d)(2) while the petition was pending in state superior court. But  
17 once the petition was denied on November 3, 2000, petitioner only had 101 days  
18 remaining, or until February 11, 2001, to file a federal petition of time. He did  
19 not file until December 27, 2007.

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22 <sup>2</sup>Even before Carey, the Ninth Circuit declined to extend "interval tolling"  
23 to intervals other than the intervals between the state court's disposition of a state  
24 habeas petition and the filing of a petition at the next state appellate level. See,  
25 e.g., Dils v. Small, 260 F.3d 984, 986 (9th Cir. 2001) (finding that limitation  
26 period was not tolled during gap between successive state habeas petitions filed  
27 in the state's highest court); Smith v. Duncan, 297 F.3d 809, 814 (9th Cir. 2002)  
(finding that limitation period was not tolled during gap between first set of state  
28 habeas petitions (superior court, court of appeal and supreme court) and second  
set of state habeas petitions (superior court, court of appeal and supreme court)).



1 petitioner was suffering from paranoid schizophrenia." Id. He further contends  
2 that he suffers from an unnamed mental disorder that affects his "ability to  
3 interact socially," id. at 3-4, as well as from "depression [and] anxiety, affecting  
4 petitioner's ability to plot out a reasonable course of action regarding seeking  
5 relief in this matter," id. at 4.

6 Equitable tolling is applicable only "'if extraordinary circumstances  
7 beyond a prisoner's control make it impossible to file a petition on time.'" Roy v.  
8 Lampert, 465 F.3d 964, 969 (9th Cir. 2006) (quoting Beeler, 128 F.3d at 1288).  
9 The prisoner must show that he has been "pursuing his rights diligently" and that  
10 "some extraordinary circumstance stood in his way." Pace v. DiGuglielmo, 544  
11 U.S. 408, 418 (2005). He must also "show that the 'extraordinary circumstances'  
12 were the cause of his untimeliness." Spitsyn v. Moore, 345 F.3d 796, 799 (9th  
13 Cir. 2003) (citations omitted). Equitable tolling is justified in few cases. Indeed,  
14 the threshold necessary to trigger equitable tolling under AEDPA is very high,  
15 lest the exceptions swallow the rule. Miranda v. Castro, 292 F.3d 1063, 1066  
16 (9th Cir. 2002).

17 Petitioner's arguments and contentions in support of his claim for equitable  
18 tolling are without merit. A petitioner's pro se status and lack of legal  
19 sophistication are not extraordinary circumstances warranting equitable tolling.  
20 See Raspberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006); see also Hughes v.  
21 Idaho State Bd. of Corrections, 800 F.2d 905, 909 (9th Cir. 1986) (illiteracy of  
22 pro se petitioner not sufficient cause to avoid procedural bar); United States v.  
23 Flores, 981 F.2d 231, 236 (5th Cir. 1993) (pro se status, illiteracy, deafness and  
24 lack of legal training not external factors excusing abuse of the writ). Nor is  
25 limited access to the prison law library – it generally suffices to have access to  
26 one's legal materials, which most prisoners keep in their cells, and some degree  
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1 of access to a library or paging system. See Baker v. Norris, 321 F.3d 769, 771  
2 (8th Cir. 2003); see also Hardy v. Conway, 299 F. Supp. 2d 159, 161 (E.D.N.Y.  
3 2004) (restricted access to law library generally does not constitute extraordinary  
4 circumstance).

5 Mental incompetence may constitute an extraordinary circumstance  
6 warranting equitable tolling. Laws v. Lamarque, 351 F.3d 919, 923 (9th Cir.  
7 2003). But petitioner's unsupported references to schizophrenia and depression  
8 are not enough to establish mental incompetence. To establish a credible  
9 equitable tolling claim based on mental incompetence, a petitioner must do more  
10 than claim mental ailments. He must meet the "burden of showing that the  
11 mental health problems rendered him unable to file a habeas petition during the  
12 one year limitations period." Brown v. McKee, 232 F. Supp. 2d 761, 767-68  
13 (E.D. Mich. 2002). Petitioner does not (and cannot) make this requisite showing  
14 because the record makes clear that he was able to file a habeas petition in state  
15 court before the one-year limitation period expired, and was able to file several  
16 other petitions and motions in state court before finally filing the instant petition  
17 in federal court. See Gaston v. Palmer, 417 F.3d 1030, 1034-35 (9th Cir. 2005)  
18 (whether prisoner was able to file prior habeas petition in state court is important  
19 factor in determining whether he was unable to file a timely petition in federal  
20 court). In fact, the various habeas petitions and motions petitioner filed in state  
21 court before finally filing in federal court highlight the fact that petitioner has not  
22 shown that any of the alleged impediments were the cause of his untimeliness.  
23 See Spitsyn, 345 F.3d at 799.

24 That petitioner is not entitled to equitable tolling in this matter is further  
25 supported by his lack of diligence. See Pace, 544 U.S. at 418. Petitioner waited  
26 nine months after his process of direct review became final before filing his first  
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1 habeas petition in state superior court. Following that petition's denial, he did not  
2 proceed to the state court of appeal, but instead waited 22 months to file a motion  
3 for a new trial in the same superior court. And after that was denied, he did not  
4 proceed to the state court of appeal, but waited six years, until his parole was  
5 revoked, to file a federal petition. (Petitioner did not seek habeas relief from the  
6 state court of appeal and supreme court until after his filing in federal court.)

7 IV

8 For the foregoing reasons, respondent's motion to dismiss the petition as  
9 untimely (docket # 13) is GRANTED.

10 The clerk shall enter judgment in favor of respondent, terminate all  
11 pending motions as moot and close the file.

12 SO ORDERED.

13 DATED: Dec. 15, 2008



14 CHARLES R. BREYER  
15 United States District Judge