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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
)	
RODNEY K. MITCHELL, Sheriff,)	
)	
Respondent(s).)	
_____)	

The order granting respondent's motion to dismiss, filed on December 15, 2008, is AMENDED by replacing the full paragraph on page 8 of the order with the following full paragraph:

Mental incompetence may constitute an extraordinary circumstance warranting equitable tolling. Laws v. Lamarque, 351 F.3d 919, 923 (9th Cir. 2003). But petitioner's mere reference to schizophrenia and depression is not enough. To establish a credible equitable tolling claim based on mental incompetence, a petitioner must do more than claim mental ailments. He must meet the "burden of showing that the mental health problems rendered him unable to file a habeas petition during the one year limitations

1 period." Brown v. McKee, 232 F. Supp. 2d 761, 767-68 (E.D.
2 Mich. 2002). Petitioner does not (and cannot) make this requisite
3 showing because the record makes clear that he was able to file a
4 habeas petition in state court before the one-year limitation period
5 expired, and was able to file several other petitions and motions in
6 state court before finally filing the instant petition in federal court.
7 See Gaston v. Palmer, 417 F.3d 1030, 1034-35 (9th Cir. 2005)
8 (whether prisoner was able to file prior habeas petition in state
9 court is important factor in determining whether he was unable to
10 file a timely petition in federal court). In fact, the various habeas
11 petitions and motions petitioner filed in state court before finally
12 filing in federal court highlight the fact that petitioner has not
13 shown that any of the alleged impediments were the cause of his
14 untimeliness. See Spitsyn, 345 F.3d at 799.

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16 SO ORDERED.

17 DATED: Dec. 16, 2008

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20 CHARLES R. BREYER
21 United States District Judge
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