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

PEDRO FELICIANO,	)	No. C 07-4713 CW (PR)
	)	
Petitioner,	)	ORDER DENYING RESPONDENT'S MOTION
	)	TO DISMISS AND SETTING BRIEFING
v.	)	SCHEDULE
	)	
BEN CURRY, Warden,	)	(Docket no. 7)
	)	
Respondent.	)	
_____	)	

INTRODUCTION

Petitioner Pedro Feliciano, a state prisoner incarcerated at the Correctional Training Facility (CTF) at Soledad, filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent Ben Curry filed a motion to dismiss for untimeliness. Petitioner filed an opposition, arguing that he is entitled to statutory and equitable tolling. Respondent subsequently filed a reply. Having considered the papers submitted, the Court DENIES Respondent's motion to dismiss.

PROCEDURAL BACKGROUND

In 1983, Petitioner was convicted of one count of first degree murder and one count of attempted murder. He was sentenced to a term of twenty-seven years to life in state prison. On August 31, 2005, Petitioner appeared before the California Board of Parole Hearings (Board) for his fourth parole suitability hearing.<sup>1</sup> The Board found Petitioner unsuitable for parole. That decision became final on December 29, 2005.

On November 29, 2005, before the Board's denial of parole

<sup>1</sup> The Board of Prison Terms was abolished effective July 1, 2005, and replaced with the Board of Parole Hearings. Cal. Penal Code § 5075(a).

1 became final, Petitioner filed a state habeas petition in the San  
2 Bernardino County Superior Court challenging the Board's decision.  
3 On January 3, 2006, in response to a superior court order, the  
4 Attorney General's office filed an informal response to the  
5 petition. (Reply at 2.) Petitioner filed an informal reply on  
6 January 21, 2006. (Reply, Ex. A at 1.) On February 6, 2006, the  
7 superior court denied the petition.

8 According to the CTF mail log, the facility received mail  
9 addressed to Petitioner from the San Bernardino Superior Court on  
10 February 9, 2006 and from the San Francisco Superior Court on  
11 February 21, 2006. (Reply, Ex. B at 2.) However, Petitioner  
12 claims that no legal mail was forwarded to him on those dates.  
13 (Opp'n at 2.) In fact, he alleges that his housing unit officer  
14 informed him that he did not receive any legal mail between  
15 February 6, 2006 and November 16, 2006. (Id.) On November 6,  
16 2006, Petitioner, concerned that he had not received an order from  
17 the superior court, sought advice at the prison law library.  
18 (Id.) On November 16, 2006, Petitioner wrote to the superior  
19 court seeking a copy of the order. (Attach. to Opp'n, Pet'r Nov.  
20 16, 2006 Letter at 1.) The superior court responded by sending  
21 Petitioner a copy of the Board's decision instead of the order.  
22 (Attach. to Opp'n, Pet'r Dec. 17, 2006 Letter at 1.) On December  
23 17, 2006, Petitioner wrote to the superior court again to request  
24 a copy of the order. (Id.) According to the CTF mail logs, the  
25 facility received mail from the superior court on January 3, 2007.  
26 (Reply, Ex. B at 2.) Petitioner claims that he first received the  
27 superior court's denial on January 3, 2007. (Opp'n at 3.)  
28

1 On January 7, 2007,<sup>2</sup> 335 days after the superior court denied  
2 his petition, Petitioner filed a habeas petition in the California  
3 Court of Appeal. (Mot. to Dismiss, Ex. E.) The petition was file  
4 stamped by the clerk of the appellate court nine days later, on  
5 January 16, 2007. On January 26, 2007, the appellate court denied  
6 the petition. On February 26, 2007, Petitioner filed a habeas  
7 petition in the California Supreme Court, and it was denied on  
8 August 8, 2007.

9 On September 6, 2007,<sup>3</sup> twenty-nine days after the state  
10 supreme court denied his petition, Petitioner filed the present  
11 federal habeas petition. The petition was file stamped by the  
12 Clerk of the Court on September 13, 2007.

13 DISCUSSION

14 The Antiterrorism and Effective Death Penalty Act (AEDPA)  
15 became law on April 24, 1996 and imposed for the first time a  
16 statute of limitations on petitions for a writ of habeas corpus  
17 filed by state prisoners. Petitions filed by prisoners  
18 challenging non-capital state convictions or sentences must be  
19 filed within one year of the latest date on which: (A) the

20 \_\_\_\_\_  
21 <sup>2</sup> A pro se federal or state habeas petition is deemed filed on  
22 the date it is delivered to prison authorities for mailing. See  
23 Saffold v. Newland, 250 F.3d 1262, 1268 (9th Cir. 2001), vacated and  
24 remanded on other grounds, Carey v. Saffold, 536 U.S. 214 (2002)  
25 (holding that a federal or state habeas petition is deemed filed on  
26 the date the prisoner submits it to prison authorities for filing,  
rather than on the date it is received by the court). January 7, 2007  
is the date the state petition was signed and the earliest date that  
the petition could have been delivered to prison authorities for  
mailing. For the purposes of this discussion, the Court deems that  
the petition was filed on that date.

27 <sup>3</sup> September 6, 2007 is the date the federal petition was signed  
28 and the earliest date that the petition could have been delivered to  
prison authorities for mailing; therefore, it will be deemed filed on  
that date. See Saffold, 250 F.3d at 1268.

1 judgment became final after the conclusion of direct review or the  
2 time passed for seeking direct review; (B) an impediment to filing  
3 an application created by unconstitutional state action was  
4 removed, if such action prevented the petitioner from filing;  
5 (C) the constitutional right asserted was recognized by the  
6 Supreme Court, if the right was newly recognized by the Supreme  
7 Court and made retroactive to cases on collateral review; or  
8 (D) the factual predicate of the claim could have been discovered  
9 through the exercise of due diligence. 28 U.S.C. § 2244(d)(1)(A)-  
10 (D). However, "[t]he time during which a properly filed  
11 application for state post-conviction or other collateral review  
12 with respect to the pertinent judgment or claim is pending shall  
13 not be counted toward any period of limitation." Id.  
14 § 2244(d)(2).

15 The one-year statute of limitations also applies to habeas  
16 petitions that challenge administrative decisions. The Ninth  
17 Circuit Court of Appeals held in Shelby v. Bartlett, 391 F.3d 1061  
18 (9th Cir. 2004), that section 2244's one-year time limit applies  
19 to all habeas petitions filed by persons in custody pursuant to a  
20 state court judgment. In cases challenging administrative  
21 decisions, the limitations period is determined by section  
22 2244(d)(1)(D), which states that the limitations period begins to  
23 run on "the date on which the factual predicate of the claim or  
24 claims presented could have been discovered through the exercise  
25 of due diligence." Id. at 1066 (quoting 28 U.S.C.  
26 § 2244(d)(1)(D)). For an administrative decision, such as those  
27 by the Board, this typically means the day following notice to the  
28 petitioner of the decision. Id.; see also Redd v. McGrath, 343

1 F.3d 1077, 1084 (9th Cir. 2003).

2 In this case, the Board's denial became final on December 29,  
3 2005. The limitations period began to run the following day, on  
4 December 30, 2005. Accordingly, Petitioner was required to file  
5 his federal habeas petition no later than December 30, 2006. See  
6 28 U.S.C. § 2244(d). Therefore, his petition filed on September  
7 6, 2007, more than eight months after the limitations period had  
8 expired, is untimely absent either statutory or equitable tolling.

9 I. Statutory Tolling

10 The present petition may nonetheless be timely if the  
11 limitations period was tolled under 28 U.S.C. § 2244(d)(2) for a  
12 substantial period of time. As noted earlier, AEDPA's one-year  
13 limitations period is tolled under § 2244(d)(2) for "[t]he time  
14 during which a properly filed application for state post-  
15 conviction or other collateral review with respect to the  
16 pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2).  
17 The limitations period is also tolled during the time between a  
18 lower state court's decision and the filing of a notice of appeal  
19 to a higher state court. Carey v. Saffold, 536 U.S. 214, 223  
20 (2002). In California, where prisoners generally use the state's  
21 original writ system,<sup>4</sup> this means that the limitations period  
22 remains tolled during the intervals between a state court's  
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24 <sup>4</sup> In California, the supreme court, intermediate courts of  
25 appeal, and superior courts all have original habeas corpus  
26 jurisdiction. Nino v. Galaza, 183 F.3d 1003, 1006 n.2 (9th Cir.  
27 1999). Although a superior court order denying habeas corpus relief  
28 is non-appealable, a state prisoner may file a new habeas corpus  
petition in the appellate court. Id. If the appellate court denies  
relief, the petitioner may seek review in the California Supreme Court  
by way of a petition for review, or may instead file an original  
habeas petition in the supreme court. Id. at 1006 n.3.

1 disposition of an original state habeas petition and the filing of  
2 the next original state habeas petition in a higher court,  
3 provided the prisoner did not delay unreasonably in seeking review  
4 in the higher court. See id. at 220-25.

5 Where a petitioner waits months to file a habeas petition in  
6 a higher court, a federal court must later determine whether the  
7 petitioner "delayed 'unreasonably' in seeking [higher state court]  
8 review." Carey, 536 U.S. at 225. If a petitioner delayed  
9 unreasonably, the application would no longer have been "pending"  
10 during the period at issue. Id. If the state court does not  
11 clearly rule on a petitioner's delay, as in the present case, the  
12 federal court must evaluate all "relevant considerations" and  
13 independently determine whether the delay was "unreasonable." Id.  
14 at 226.

15 The Supreme Court held that a determination of unreasonable  
16 delay is particularly difficult to make in California: "The fact  
17 that California's timeliness standard is general rather than  
18 precise may make it more difficult for federal courts to determine  
19 just when a review application . . . comes too late." Id. at 223.  
20 The Supreme Court held, however, that California's appellate  
21 system could be treated similarly to those in other states, which  
22 measure delays "in terms of a determinate time period, such as 30  
23 or 60 days." Evans v. Chavis, 546 U.S. 189, 192 (2006). In other  
24 words, "California's 'reasonable time' standard [should] not lead  
25 to filing delays substantially longer than those in States with  
26 determinate timeliness rules." Id. at 200 (citing Carey, 536 U.S.  
27 at 222-23). Based on the Supreme Court's reference to the usual  
28 thirty or sixty day periods provided by states with determinate

1 deadlines, a delay of sixty days would likely be reasonable. On  
2 the other hand, a longer delay of six months would likely be  
3 unreasonable: "Six months is far longer than the 'short period[s]  
4 of time,' 30 to 60 days, that most States provide for filing an  
5 appeal to the state supreme court." Id. at 201.

6 Here, Petitioner is entitled to statutory tolling during the  
7 two-month period when his state habeas petition was pending in the  
8 San Bernardino County Superior Court. However, Petitioner is not  
9 entitled to statutory tolling during the 335-day period between  
10 the superior court's denial and the filing of his habeas petition  
11 in the appellate court. This 335-day period far exceeds the  
12 thirty-to-sixty days that the Supreme Court has suggested might  
13 constitute a reasonable delay which would justify statutory  
14 tolling. See Chavis, 546 U.S. at 197 ("only a timely appeal tolls  
15 AEDPA's 1-year limitations period for the time between the lower  
16 court's adverse decision and the filing of a notice of appeal in  
17 the higher court"). Therefore, the limitations period ran from  
18 the date of the superior court's denial on February 6, 2006 until  
19 Petitioner filed his state habeas petition in the appellate court  
20 on January 7, 2007. Petitioner is again entitled to statutory  
21 tolling for the seven-month period when he was pursuing his writ  
22 in the state appellate and supreme courts. The statute of  
23 limitations resumed running again on August 8, 2007, the date of  
24 the California Supreme Court's denial, and ran until September 6,  
25 2007, the date Petitioner's federal habeas petition was filed,  
26 which is twenty-nine additional days. Therefore, a total of 364  
27 days (335 days plus 29 days) can be counted towards the one-year  
28 limitations period. This calculation, which incorporates the

1 mailbox rule, indicates that the present federal petition is  
2 timely, having been filed with one day remaining.

3 Respondent argues that Petitioner filed his petition fifteen  
4 days late, or 380 days (344 days plus 36 days) after the  
5 limitations period began to run. However, Respondent did not  
6 apply the mailbox rule in calculating the timeliness of the  
7 petition.<sup>5</sup> Respondent also argues that Petitioner is not entitled  
8 to equitable tolling. However, the Court finds below that a  
9 portion of the limitations period should be equitably tolled.

10 II. Equitable Tolling

11 The one-year limitations period can be equitably tolled  
12 because § 2244(d) is a statute of limitations, not a  
13 jurisdictional bar. See Calderon v. United States District Court  
14 (Beeler), 128 F.3d 1283, 1288 (9th Cir. 1997). "When external  
15 forces, rather than a petitioner's lack of diligence, account for  
16 the failure to file a timely claim, equitable tolling of the  
17 statute of limitations may be appropriate." Miles v. Prunty, 187  
18 F.3d 1104, 1107 (9th Cir. 1999). Equitable tolling will not be  
19 available in most cases because extensions of time should be  
20 granted only if "'extraordinary circumstances' beyond a prisoner's  
21 control make it impossible to file a petition on time." Beeler,  
22 128 F.3d at 1288 (citation omitted). The prisoner must show that  
23 "the 'extraordinary circumstances' were the cause of his  
24 \_\_\_\_\_

25 <sup>5</sup> According to Respondent, the limitations period started to run  
26 on February 6, 2006, the date of the superior court's denial, and ran  
27 until January 16, 2007, the date the state habeas petition was file  
28 stamped in the appellate court (344 days). The limitations period  
then resumed running again on August 8, 2007, the date of the  
California Supreme Court's denial, and ran until September 13, 2007,  
the date the federal habeas petition was file stamped (36 days).



1 untimeliness." Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir.  
2 2003) (citations omitted). Another statement of the standard is  
3 that a litigant seeking equitable tolling bears the burden of  
4 establishing two elements: "(1) that he has been pursuing his  
5 rights diligently, and (2) that some extraordinary circumstance  
6 stood in his way," preventing timely filing. Pace v. DiGuglielmo,  
7 544 U.S. 408, 418 (2005).

8 The Ninth Circuit has said that the petitioner "bears the  
9 burden of showing that this extraordinary exclusion should apply  
10 to him." Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002).  
11 Indeed, "'the threshold necessary to trigger equitable tolling  
12 [under AEDPA] is very high, lest the exceptions swallow the  
13 rule.'" Id. at 1066 (quoting United States v. Marcello, 212 F.3d  
14 1005, 1010 (7th Cir.), cert. denied, 531 U.S. 878 (2000)).

15 The grounds for granting equitable tolling are "highly fact  
16 dependant." Lott v. Mueller, 304 F.3d 918, 923 (9th Cir. 2002).  
17 Where a prisoner fails to show "any causal connection" between the  
18 grounds upon which he asserts a right to equitable tolling and his  
19 inability to file a timely federal habeas application, the  
20 equitable tolling claim will be denied. Gaston v. Palmer, 417  
21 F.3d 1030, 1034-35 (9th Cir. 2005), amended, 447 F.3d 1165 (9th  
22 Cir. 2006).

23 However, "[r]ather than let procedural uncertainties  
24 unreasonably snuff out a constitutional claim, the issue of when  
25 grave difficulty merges literally into 'impossibility' should be  
26 resolved in [a petitioner's] favor." Lott, 304 F.3d at 920. When  
27 a prisoner is proceeding pro se, his allegations regarding  
28 diligence in filing a federal petition on time must be construed

1 liberally. Roy v. Lampert, 465 F.3d 964, 970 (9th Cir. 2006).  
2 Indeed, the purpose of the equitable tolling doctrine "is to  
3 soften the harsh impact of technical rules which might otherwise  
4 prevent a good faith litigant from having a day in court" and to  
5 "prevent the unjust technical forfeiture of causes of action."  
6 Jones v. Blanas, 393 F.3d 918, 928 (9th Cir. 2004).

7         Petitioner argues that, until he received a copy of the  
8 superior court's order, on January 3, 2007, he did not know  
9 whether his petition had been granted or denied. Moreover,  
10 Petitioner claims that the superior court took almost two months  
11 to send him the order after he requested it in November, 2006.  
12 (Opp'n at 2.) Without a copy of the order or knowledge of its  
13 contents, Petitioner could neither file a state habeas petition  
14 with the appellate court, nor initiate a federal habeas petition.  
15 Petitioner's inability to file a state habeas petition is a factor  
16 in determining whether he was unable timely to file a petition in  
17 federal court. See Gaston, 417 F.3d at 1034-35. His inability to  
18 pursue his state habeas petition constitutes "extraordinary  
19 circumstances," as contemplated by equitable tolling cases where  
20 delay was caused by such circumstances beyond the prisoner's  
21 control. See, e.g., Espinoza-Matthews v. California, 432 F.3d  
22 1021, 1027-28 (9th Cir. 2005) (equitable tolling warranted for  
23 inmate's eleven-month stay in ad-seg because he was denied access  
24 to legal papers despite his repeated requests for them); Corjasso  
25 v. Ayers, 278 F.3d 874, 878 (9th Cir. 2002) (equitable tolling  
26 warranted when district court erroneously refused to accept  
27 petition for filing because of technical deficiency in cover sheet  
28 and lost body of petition by the time petitioner sent in corrected

1 cover sheet); Beeler, 128 F.3d at 1289 (withdrawal of attorney who  
2 was aiding putative habeas petitioner to prepare petition and  
3 whose work product was not usable by replacement attorney  
4 qualified as extraordinary circumstances). Thus, the Court finds  
5 that "extraordinary circumstances" stood in Petitioner's way of  
6 timely filing his federal petition. See id. However, the  
7 "extraordinary circumstances" and the resulting delay warrant  
8 equitable tolling only if Petitioner acted with due diligence.  
9 See Pace, 544 U.S. at 418.

10 Petitioner did not pursue his claim diligently during the  
11 273-day period between February 6, 2006, when the superior court  
12 denied his petition unbeknownst to him, and November 6, 2006, when  
13 he first went to the prison law library for advice on contacting  
14 the superior court. Respondent argues that during this period  
15 Petitioner had constructive notice that he should have received a  
16 response from the superior court by February 16, 2006, forty-five  
17 days after the Attorney General filed an informal response to the  
18 petition. (Reply at 3 (citing Cal. R. Ct. 4.551(a)(5)).)  
19 California law requires a state court to "issue an order to show  
20 cause or deny the petition within 45 days after receipt of an  
21 informal response." Cal. R. Ct. 4.551(a)(5). Even if the statute  
22 of limitations ran during this 273-day period, it was equitably  
23 tolled as of November 6, 2006 because Petitioner acted with due  
24 diligence after that date.

25 As soon as Petitioner realized that he should have received  
26 the superior court's order, he diligently sought a copy of that  
27 order, writing to the court twice. Four days after he received a  
28 copy of the superior court's order, Petitioner promptly filed a

1 habeas petition in the state appellate court, on January 7, 2007.  
2 The statute began to run again, and was not equitably tolled, when  
3 the California Supreme Court denied the petition on August 8,  
4 2007, until Petitioner signed his federal petition on September 6,  
5 2007, twenty-nine additional days. Thus, a total of 302 days (273  
6 days plus 29 days) can be counted towards the limitations period.  
7 Because 302 days is well within the one year statute of  
8 limitations period, the present petition is timely.<sup>6</sup>

9 Accordingly, the Court DENIES Respondent's motion to dismiss  
10 the federal petition as untimely.

11 CONCLUSION

12 For the foregoing reasons,

13 1. Respondent's motion to dismiss the petition (docket no.  
14 7) is DENIED.

15 2. Within ninety (90) days of the date of this Order,  
16 Respondent shall file an Answer showing cause why a writ of habeas  
17 corpus should not be issued. Respondent shall file with the  
18 Answer a copy of all state records that have been transcribed  
19 previously and that are relevant to a determination of the issues  
20 presented by the petition.

21 3. If Petitioner wishes to respond to the Answer, he shall  
22 do so by filing a Traverse with the Court and serving it upon  
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24 <sup>6</sup> Petitioner also argues that he is entitled to equitable tolling  
25 because he is a Cuban immigrant with a limited ability to understand  
26 English and the American legal process. (Opp'n at 2.) Generally, "a  
27 pro se petitioner's lack of legal sophistication is not, by itself,  
28 an extraordinary circumstance" warranting equitable tolling. Rasberry  
v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006). However, because the  
Court finds other grounds for equitable tolling, it need not decide  
this issue.

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Respondent within thirty (30) days of his receipt of the Answer.  
Should Petitioner fail to do so, the petition will be deemed  
submitted and ready for decision thirty (30) days after the date  
Petitioner is served with Respondent's Answer.

4. Petitioner must keep the Court informed of any change of  
address.

5. This Order terminates Docket no. 7.

IT IS SO ORDERED.

DATED: 3/10/09

  
\_\_\_\_\_  
CLAUDIA WILKEN  
United States District Judge

1 UNITED STATES DISTRICT COURT  
2 FOR THE  
3 NORTHERN DISTRICT OF CALIFORNIA

4 PEDRO FELICIANO,  
5 Plaintiff,

Case Number: CV07-04713 CW

**CERTIFICATE OF SERVICE**

6 v.

7 BEN CURRY et al,  
8 Defendant.

9  
10 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

11 That on March 10, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said  
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing  
13 said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle  
14 located in the Clerk's office.

15 Pedro Feliciano C-59854  
16 P.O. Box 689, ZW-321L  
17 Soledad, CA 93960-0689

18 Dated: March 10, 2009

19 Richard W. Wieking, Clerk  
20 By: Sheilah Cahill, Deputy Clerk

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United States District Court  
For the Northern District of California