

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

3 ROMAN SUNDAY, SR.,

No. C 07-05308 SBA (PR)

4 Petitioner,

**ORDER DENYING WITHOUT
 PREJUDICE RESPONDENT'S MOTION
 TO DISMISS PETITION AS UNTIMELY
 AND SETTING BRIEFING SCHEDULE**

5 v.

6 D. K. SISTO, Warden,

(Docket no. 6)

7 Respondent.
 8 _____/

9 Petitioner Roman Sunday, Sr., a state prisoner, filed the instant pro se petition for a writ of
 10 habeas corpus pursuant to 28 U.S.C. § 2254.

11 Before the Court is Respondent's motion to dismiss on the ground that it is time-barred under
 12 28 U.S.C. § 2244(d), the statute of limitations set by the Antiterrorism and Effective Death Penalty
 13 Act of 1996 (AEDPA). Petitioner filed an opposition to the motion. Respondent filed a reply.
 14 Petitioner filed a response to the reply.

15 Having considered all of the papers filed by the parties, the Court DENIES Respondent's
 16 motion to dismiss without prejudice to refileing it and addressing the equitable tolling issues below.

17 **BACKGROUND**

18 On August 13, 2002, a Contra Costa County jury convicted Petitioner of first degree murder,
 19 kidnaping of a child under the age of fourteen, and unlawful possession of a firearm by a felon.
 20 Furthermore, the jury found the associated firearm use allegations to be true.

21 On September 12, 2003, the trial court found that Petitioner had two previous serious felony
 22 convictions and sentenced him to state prison for the total indeterminate term of eighty-six years to
 23 life. On June 22, 2005, the California Court of Appeal affirmed Petitioner's conviction. (Resp't Ex.
 24 A.) On October 12, 2005, the California Supreme Court denied his petition for review. (Resp't Ex.
 25 B.)

26 On November 13, 2006, Petitioner filed a habeas petition in the Santa Clara County Superior
 27 Court. (Resp't Ex. C.) The court denied the petition on December 21, 2006. (Id.) On April 16,
 28 2007, Petitioner filed a habeas petition California Court of Appeals. (Resp't Ex. D.) The court

1 denied the petition on April 16, 2007. (Id.) On April 26, 2007, Petitioner filed a habeas petition in
2 the California Supreme Court. (Resp't Ex. E.) The supreme court denied the petition for review on
3 September 12, 2007.

4 On October 11, 2008,¹ Petitioner filed the instant federal habeas petition. The federal court
5 file stamped the petition on June 16, 2008.

6 **DISCUSSION**

7 The AEDPA, which became law on April 24, 1996, imposes a statute of limitations on
8 petitions for a writ of habeas corpus filed by state prisoners. Petitions filed by prisoners challenging
9 non-capital state convictions or sentences must be filed within one year of the latest of the date on
10 which: (1) the judgment became final after the conclusion of direct review or the time passed for
11 seeking direct review; (2) an impediment to filing an application created by unconstitutional state
12 action was removed, if such action prevented petitioner from filing; (3) the constitutional right
13 asserted was recognized by the Supreme Court, if the right was newly recognized by the Supreme
14 Court and made retroactive to cases on collateral review; or (4) the factual predicate of the claim
15 could have been discovered through the exercise of due diligence. See 28 U.S.C. § 2244(d)(1).

16 A state prisoner with a conviction finalized after April 24, 1996, such as Petitioner, must
17 satisfy the AEDPA statute of limitations. See Calderon v. United States Dist. Court (Beeler), 128
18 F.3d 1283, 1286 (9th Cir. 1997), overruled in part on other grounds by Calderon v. United States
19 Dist. Court (Kelly), 163 F.3d 530 (9th Cir. 1998) (en banc).

20 The one-year period generally runs from "the date on which the judgment became final by
21 the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C.
22 § 2244(d)(1)(A). "Direct review" includes the period within which a petitioner can file a petition for
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24 ¹ A pro se federal or state habeas petition is deemed filed on the date it is delivered to prison
25 authorities for mailing. See Saffold v. Newland, 250 F.3d 1262, 1268 (9th Cir. 2000), vacated and
26 remanded on other grounds, Carey v. Saffold, 536 U.S. 214 (2002) (holding that a federal or state habeas
27 petition is deemed filed on the date the prisoner submits it to prison authorities for filing, rather than the
28 date it is received by the courts). October 11, 2008 is the date Petitioner's federal habeas petition was
signed 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.

1 a writ of certiorari from the United States Supreme Court, whether or not the petitioner actually files
2 such a petition. Bowen v. Roe, 188 F.3d 1157, 1159 (9th Cir. 1999). Accordingly, if a petitioner
3 fails to seek a writ of certiorari from the United States Supreme Court, the AEDPA's one-year
4 limitations period begins to run on the date the 90-day period defined by Supreme Court Rule 13
5 expires. See Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002). The one-year period is
6 calculated according to the general rule for counting time in federal courts, Rule 6(a) of the Federal
7 Rules of Civil Procedure. Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001). That is, "the
8 day of the act, event, or default from which the designated period of time begins to run shall not be
9 included" in the one-year limitations period. Fed. R. Civ. P. 6(a). This is referred to as the
10 "anniversary method" because, absent any tolling, the expiration date of the limitations period will
11 be the same date as the triggering event in the following year. Patterson, 251 F.3d at 1246.

12 In this case, Petitioner's conviction became final on January 10, 2006, when the time to file a
13 petition for a writ of certiorari in the Supreme Court expired. Accordingly, Petitioner was required
14 to file his federal habeas petition no later than January 10, 2007. See 28 U.S.C. § 2244(d).
15 Therefore, his petition filed on October 11, 2008 -- one year and nine months after the limitations
16 period had expired -- is untimely absent tolling.

17 **I. Statutory Tolling**

18 AEDPA's one-year limitation period is tolled under § 2244(d)(2) for the "time during which
19 a properly filed application for State post-conviction or other collateral review with respect to the
20 pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2)). This includes the time between a
21 lower state court's decision and the filing of a notice of appeal to a higher state court. Carey v.
22 Saffold, 536 U.S. 214, 219-221 (2002). In California, where prisoners generally use the state's
23 "original writ system," this means that the limitation period remains tolled during the intervals
24 between a state court's disposition of an original state habeas petition and the filing of a further
25 original state habeas petition in a higher court, provided the prisoner did not delay unreasonably in
26 seeking review in the higher court. See id. at 220-23; see also Nino v. Galaza, 183 F.3d 1003, 1005

1 (9th Cir. 1999) (limitation period "remains tolled during the intervals between the state court's
2 disposition of a state habeas petition and the filing of a petition at the next state appellate level").

3 After Carey, a state habeas petition is pending "in the absence of undue delay," while a
4 California petitioner "complete[s] a full round of [state] collateral review" all the way to the
5 California Supreme Court. Biggs v. Duncan, 339 F.3d 1045, 1048 (9th Cir. 2003) (citation and
6 internal quotations marks omitted). But if there is any gap between the completion of one round of
7 review and the commencement of another round of state habeas review, the petitioner is not entitled
8 to tolling during the gap. See id. at 1046-47, 1048; see also Dils v. Small, 260 F.3d 984, 986 (9th
9 Cir. 2001) (not tolling limitation period during gap between successive state habeas petitions filed in
10 the same court).

11 Respondent correctly notes that after Petitioner's process of direct review came to an end on
12 January 10, 2006, Petitioner allowed the one-year limitation period to run for 307 days until he filed
13 his first habeas petition in the Santa Clara County Superior Court on November 13, 2006. Under
14 Carey and its progeny, the one-year limitation period could be tolled under § 2244(d)(2) until the
15 California Supreme Court denied Petitioner's round of state habeas review on September 12, 2007.
16 After the California Supreme Court denied Petitioner's habeas petition on September 12, 2007,
17 Petitioner had fifty-eight days left (365 days - 307 days) to file a federal habeas petition on time. If
18 Petitioner were entitled to statutory tolling the entire time he completed a full round of state
19 collateral review, then he timely filed his federal habeas petition twenty-nine days later, on October
20 11, 2007.

21 Respondent claims that Petitioner is not entitled to any statutory tolling in connection with
22 Petitioner's habeas petitions to the state appellate and supreme courts. Respondent argues that
23 Petitioner's appellate court petition -- filed almost four months after the superior court denied his
24 petition -- was not "properly filed" within the meaning of § 2244(d)(2) because it was denied as
25 untimely by the state appellate court.

26 A petitioner is not entitled to statutory tolling for any petition denied by the state courts as
27 untimely because such a petition is considered "neither 'properly filed' nor 'pending'" in the state
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1 courts within the meaning of § 2244(d)(2). Thorson v. Palmer, 479 F.3d 643, 645 (9th Cir. 2007)
2 (citing Bonner v. Carey, 425 F.3d 1145, 1149 (9th Cir. 2005) (citing Pace v. DiGuglielmo, 544 U.S.
3 408, 417 (2005)). The Supreme Court has made clear that "[w]hen a postconviction petition is
4 untimely under state law, that is the end of the matter for purposes of § 2244(d)(2)." Pace, 544 U.S.
5 at 414.

6 Respondent suggests that because the state appellate court denied Petitioner's habeas petition
7 citing In re Clark, 5 Cal. 4th 750, 782-99 (1993), and In re Robbins, 18 Cal. 4th 770, 780 (1998), it
8 signaled that the petition was untimely. (Resp't Ex. D.) Accordingly, Respondent argues that under
9 Pace, the appellate court petition did not extend the period of statutory tolling through September
10 12, 2007, when the state supreme court denied the petition, and thus Petitioner's federal petition is
11 untimely.

12 The Court agrees that if Petitioner's state habeas petition was denied as untimely under state
13 law, his federal petition would be untimely under 28 U.S.C. § 2244(d). The issue here is whether
14 the state appellate court clearly rejected the petition as untimely when it cited In re Clark and In re
15 Robbins in its summary order of denial.

16 In Thorson, the California Supreme Court summarily denied Thorson's habeas petition with a
17 citation to In re Robbins, 18 Cal. 4th at 780. The Ninth Circuit held that the Supreme Court of
18 California had "clearly rejected Thorson's habeas petition as untimely" by citing In re Robbins,
19 because the court's summary order cited the very page of In re Robbins that sets forth 'the basic
20 analytical framework' governing California's timeliness determinations in habeas corpus
21 proceedings." Thorson, 479 F.3d at 645.

22 In Bonner, the California superior court explained that it was denying Bonner's petition
23 because, among other reasons, Bonner had either made the same claims in his earlier petition or
24 could have done so, and that there was no reason stated for any delay in this regard. The Ninth
25 Circuit held that "it is clear that the [state superior] court was denying Bonner's petition as
26 untimely." Bonner, 425 F.3d at 1148. It noted that the superior court's language tracked California's
27 requirement that, to avoid the state's timeliness bar, a petitioner must establish good cause for his
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1 delay, and that the record showed that Bonner had waited over four years to file his second petition.
2 Id. If California courts have deemed periods of three years substantial, Bonner had to establish good
3 cause for his four-year delay. Id. "When the court noted that Bonner had asserted no reason for his
4 delay, then, the court was explaining that he had not met his burden of establishing good cause." Id.

5 In In re Clark, the California Supreme Court held that "the general rule is still that, absent
6 justification for the failure to present all known claims in a single, timely petition for writ of habeas
7 corpus, successive and/or untimely petitions will be summarily denied." 5 Cal. 4th at 797. The
8 lengthy opinion primarily discusses the standards for applying, as well as the exceptions to, the
9 procedural bars against successive and/or untimely petitions. The opinion also discusses other
10 limitations on collateral attack in the California courts. See id. at 763-67.

11 Like in Thorson and Bonner, it is clear in the instant case that the state appellate court
12 rejected Petitioner's habeas petition as untimely when it issued its summary order with citations to In
13 re Clark and In re Robbins. The appellate court cited to the specific pages in the In re Clark and In
14 re Robbins opinions indicating that the denial was based on untimeliness grounds.

15 Under the circumstances, the state appellate court "clearly ruled" that Petitioner's habeas
16 petition was "untimely." Pace, 544 U.S. at 414 (quoting Carey v. Saffold, 536 U.S. 214, 226
17 (2002)). Thus, the rationale of Pace extends to this case. See Thorson, 479 F.3d at 645 (applying
18 rationale of Pace where denial of state petition was clear denial on timeliness grounds); Bonner, 425
19 F.3d at 1148-49 (same). Accordingly, Petitioner's habeas petition filed in the state appellate court
20 was not "properly filed," thus, he not entitled to statutory tolling for his entire round of state
21 collateral review.

22 There is no dispute that Petitioner is entitled to statutory tolling from the time he filed his
23 habeas petition in the superior court on November 13, 2006 until the court's denial of the petition on
24 December 21, 2006.

25 As mentioned above, no further statutory tolling occurred after the superior court denied his
26 habeas petition until the date his appellate court petition was denied because that petition was
27 "neither 'properly filed' nor 'pending'" in the state appellate court within the meaning of §
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1 2244(d)(2). See Pace, 544 U.S. at 417. Thus, the limitations period ran unabated from December
2 22, 2006, the day after his superior court petition was denied, and it expired fifty-eight days² later on
3 February 18, 2007.

4 Petitioner's supreme court habeas petition was filed about two months later -- on April 26,
5 2007. Because his supreme court habeas petition was filed after the one-year statute of limitations
6 had expired, the time it was pending in the state supreme court cannot serve to toll the statute. See
7 Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) ("[S]ection 2244(d) does not permit the
8 reinitiation of the limitations period that has ended before the state petition was filed," even if the
9 state petition was timely filed.); see also Rashid v. Kuhlmann, 991 F. Supp. 254, 259 (S.D.N.Y.
10 1998) ("Once the limitations period is expired, collateral petitions can no longer serve to avoid a
11 statute of limitations").

12 Therefore, the instant federal habeas petition filed on October 11, 2007 is untimely by almost
13 eight months unless equitable tolling applies.

14 **II. Equitable Tolling**

15 The one-year limitations period can be equitably tolled because § 2244(d) is a statute of
16 limitations and not a jurisdictional bar. Beeler, 128 F.3d at 1288. "When external forces, rather than
17 a petitioner's lack of diligence, account for the failure to file a timely claim, equitable tolling of the
18 statute of limitations may be appropriate." Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999).
19 Equitable tolling will not be available in most cases because extensions of time should be granted
20 only if "extraordinary circumstances beyond [a] prisoner's control make it impossible to file a
21 petition on time." Beeler, 128 F.3d at 1288 (citation and internal quotation marks omitted). The
22 prisoner must show that "the 'extraordinary circumstances' were the cause of his untimeliness."
23 Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003) (citations omitted). The Ninth Circuit has said
24 that the petitioner "bears the burden of showing that this extraordinary exclusion should apply to
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26 ² As mentioned above, Petitioner had allowed 307 days to run prior to filing his superior court
27 petition; therefore, he only had fifty-eight days (365 days - 307 days) of the limitations period
28 remaining.

1 him." Miranda, 292 F.3d at 1065. Whether equitable tolling is in order turns on an examination of
2 detailed facts. Lott v. Mueller, 304 F.3d 918, 923 (9th Cir. 2002).

3 In Laws v. Lamarque, the Ninth Circuit reversed the district court's order granting a motion
4 to dismiss because it failed to develop the record in response to Law's claim of mental
5 incompetency. 351 F.3d 919, 924 (9th Cir. 2003). The Ninth Circuit found that the allegations of
6 the verified state petition attached to Law's traverse, stating that he was "deprived [] of any kind of
7 cons[ci]ousness" during the period when his petitions should have been filed, may be treated as an
8 affidavit in opposition to the motion to dismiss. Id. (citing McElyea v. Babbitt, 833 F.2d 196,
9 197-98 (9th Cir. 1987)). The Ninth Circuit determined that a district court should not require the
10 petitioner to "carry a burden of persuasion" at the time he asserts equitable tolling to merit further
11 investigation into the merits of his arguments for tolling. Id. at 924. Instead, Ninth Circuit cases
12 require only that there be "circumstances consistent with [the] petitioner's petition . . . under which
13 he would be entitled to . . . equitable tolling" to trigger further factual development of the record. Id.
14 (citing Whalem/Hunt v. Early, 233 F.3d 1146, 1148 (9th Cir. 2000) (en banc) (remanding case to
15 district court for development of facts concerning whether AEDPA materials were unavailable in the
16 prison law library and the legal significance of such a finding)). The Ninth Circuit found that the
17 district court erred in granting judgment against Laws based upon the papers before it and that "[i]t
18 [was] enough that Laws 'alleged mental competency' in a verified pleading." Laws, 351 F.3d at 924
19 (citations omitted). Therefore, the Ninth Circuit held that Laws was entitled to further factual
20 development or an evidentiary hearing on the issue of whether he was precluded from filing his
21 petition by reason of mental impairment. Id.

22 In the present case, Petitioner has listed several reasons that he alleges contributed to his
23 delay in filing his federal petition.

24 First, Petitioner argues that he did not receive his legal files from his appellate counsel until
25 February 25, 2006. He claims that "equitable tolling should accrue from January 10, 2006 through
26 February 25, 2006 because a deprivation of his legal materials for 46 days . . . [was] an 'impediment
27 beyond the prisoner's control.'" (Opp'n at 3.)

1 A habeas petitioner cannot be expected to "prepare and file a meaningful petition on his own
2 within the limitations period' without access to his legal file." Espinoza-Matthews v. California, 432
3 F.3d 1021, 1027-28 (9th Cir. 2005) (quoting Spitsyn, 345 F.3d at 801). Therefore, Petitioner's lack
4 of access to his legal files could constitute an extraordinary circumstance sufficient to warrant
5 equitable tolling. See id. (equitable tolling warranted during inmate's eleven-month stay in
6 administrative segregation because he was denied access to legal papers despite his repeated
7 requests for them); see also Lott v. Mueller, 304 F.3d 918, 921-24 (9th Cir. 2002) (granting habeas
8 petitioner equitable tolling for eighty-two days he was deprived of his legal materials due to two
9 temporary transfers, despite the fact that petitioner received materials shortly before the limitation
10 period was to expire). Petitioner alleges that the forty-six days that he was without access to his
11 legal files (after the limitation period started to run against him on January 10, 2006) made it
12 impossible for him to file a federal petition on time. In the reply, Respondent states:

13 [P]etitioner fails to demonstrate any basis for equitable tolling, inasmuch as
14 appellate counsel provided [P]etitioner's legal file after only 46 days, with over ten
15 months remaining in the statute of limitations period. It is absurd for [P]etitioner to
now claim that appellate counsel's conduct amounted to an extraordinary
circumstance that made it impossible for him to file his petition.

16 (Reply at 2.) Respondent's statements are conclusory, and he does not take into consideration
17 Petitioner's arguments below that he is entitled to equitable tolling during nine of the remaining ten
18 months (from February 25, 2006 through November 13, 2006) based on limited access to the law
19 library. Thus, the Court finds that Respondent has not sufficiently addressed whether Petitioner is
20 entitled to equitable tolling based on a lack of access to his legal materials.

21 Petitioner next claims that he is entitled to equitable tolling "during the period of February
22 25, 2006 through November 13, 2006, the filing date of the state-habeas petition seeking collateral
23 relief, due to the myriad lockdowns and limited access to the law-library at CSP-Calipatria"
24 (Opp'n at 3.) Initially, Petitioner had filed a motion for the Court to issue an Order "Re: Production
25 of Documentary Evidence of Lockdowns at C.S.P. - Calipatria," claiming that he was unable to
26 make his equitable tolling argument without documents relating to lockdowns at California State
27 Prison - Calipatria between October 1, 2005 through December 12, 2006. (Pet'r Oct. 28, 2008 Mot.
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1 at 1.) He claimed that he had been unsuccessful in obtaining these documents from the prison's
2 "legal coordinator." (Id.) In an Order dated May 19, 2009, the Court granted Petitioner an extension
3 of time to file his opposition stating, "[b]ecause Petitioner is incarcerated and has alleged difficulty
4 in obtaining necessary documents, the Court finds that he must be given the opportunity to view the
5 aforementioned documents in order to respond to Respondent's motion to dismiss." (May 19, 2009
6 Order at 2.) The Court directed counsel for Respondent to "take steps to see that the appropriate
7 authorities provide Petitioner with copies of the documents relating to lockdowns at C.S.P. -
8 Calipatria between October 1, 2005 through December 12, 2006." (Id. at 3.) On August 7, 2009,
9 Respondent filed a "Response to Court Order to Provide Petitioner with Copies of Prison Records"
10 and provided the Court with competent evidence in the form of the Program Status Reports for this
11 time period. Contrary to Petitioner's claims, this evidence demonstrates that the prison was never on
12 "lockdown" or on a "state of emergency" status during the relevant time period. (Resp't Attach. 1-
13 4.) The Program Status Reports classify the prison as having been on a "modified program"
14 beginning on August 18, 2005 due to an attempted murder on a peace officer. (Id.) Pursuant to this
15 modified program, the inmates' access to the law library was classified as "NORMAL 12 inmates (2
16 C/Os)" in most of the Program Status Reports. (Id.) Some Program Status Reports classified the
17 inmates' access to the law library as "APPROVED COURT DEADLINES." (Id.) Toward the end
18 of the relevant time period from July 26, 2006 through October 27, 2006, the Program Status Reports
19 classified the inmates' access to the law library as "NORMAL 15 inmates and 3 clerks." (Id.)

20 In light of these Program Status Reports, Petitioner now concedes that twelve inmates at a
21 time were permitted to use the prison law library during the time period at issue; however, he "avers
22 he signed-up on the logsheet requesting access to the library each time it was available for his yard,
23 to no avail." (Opp'n at 3.) Even after viewing the Program Status Reports showing that no
24 lockdowns occurred, Petitioner, in his opposition, asserts equitable tolling should accrue "during the
25 period of February 25, 2006 through November 13, 2006, the filing date of the state-habeas petition
26 seeking collateral relief, due to the myriad lockdowns and limited access to the law-library at CSP-
27 Calipatria, i.e., the 12 inmates permitted access to the law-library are picked from a pool of over 500
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1 prisoners." (Id.) Petitioner's failure to provide a factual basis for his conclusory statement that there
2 were "lockdowns" during this time period leaves Respondent's evidence -- showing no lockdowns
3 occurred during this time period -- unrefuted. Therefore, the Court only focuses on Petitioner's
4 claim that his access to the law library was limited from February 25, 2006 through November 13,
5 2006.

6 The existence of an adequate law library does not provide for meaningful access to the courts
7 if the prisoners are not allowed a reasonable amount of time to use the library. See Lindquist v.
8 Idaho State Bd. of Corrections, 776 F.2d 851, 858 (9th Cir. 1985). However, the Constitution does
9 not guarantee a prisoner unlimited access to the law library. Prison officials of necessity must
10 regulate the time, manner and place in which library facilities are used. Id. The fact that a prisoner
11 must wait for a turn to use the library does not necessarily mean that he has been denied meaningful
12 access to the courts. Id. Moreover, prisoners on lockdown or in the Security Housing Unit may face
13 delays in accessing the law library, but so long as the delays are the product of prison regulations
14 reasonably related to legitimate penological interests, such delays are not of constitutional
15 significance, even where they result in actual injury. Lewis v. Casey, 518 U.S. 343, 361-62 (1996).

16 In the instant case, it is conceivable that equitable tolling might be warranted because
17 Petitioner was prevented from preparing a timely petition due to his limited access to the law library.
18 Again, Respondent did not fully address this issue in his reply to Petitioner's opposition.
19 Respondent merely states, "There is no documentary evidence of any kind that supports
20 [P]etitioner's claim that he regularly signed up to use the prison law library, but was somehow never
21 allowed to use it." (Reply at 3.) Such an argument is conclusory, and Respondent fails to address
22 Petitioner's claim that his limited access to the law library prevented him from filing a timely
23 petition. In support of his claim, Petitioner alleges that "[t]he library was rotated between yards
24 every other day, so by submitting a sign-up request for library access did not guarantee [him] a spot
25 in the library . . . [i]n fact it could take up to 6 weeks to gain access for 2 hours." (Pet'r Resp. to
26 Reply at 1.) As mentioned above, Respondent has submitted evidence countering Petitioner's claim
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1 of lockdowns during the relevant time period; however, Respondent has failed to refute Petitioner's
2 allegations that law library access was limited during that time.

3 In sum, the Court finds that Respondent has not addressed whether Petitioner is entitled to
4 equitable tolling based on his lack of access to his legal materials and his limited access to the law
5 library. Accordingly, the Court DENIES Respondent's motion to dismiss without prejudice to
6 renewing the motion and addressing the aforementioned equitable tolling issues raised in Petitioner's
7 opposition.

8 CONCLUSION

9 For the foregoing reasons,

10 1. Respondent's motion to dismiss the petition as untimely (docket no. 6) is DENIED
11 without prejudice to renewing the motion and addressing the equitable tolling issues set forth above
12 no later than **sixty (60) days** of the date of this Order. If Respondent chooses to file a renewed
13 motion, Petitioner shall file an opposition, no later than **thirty (30) days** of his receipt of the
14 renewed motion, and Respondent shall file with the Court and serve on Petitioner a reply no later
15 than **fifteen (15) days** of receipt of any opposition.

16 2. Should Respondent fail to file a renewed motion to dismiss within the sixty-day time
17 frame, Respondent is directed to SHOW CAUSE why the petition should not be granted.
18 Respondent shall file with this Court and serve upon Petitioner, no later than **sixty (60) days** of the
19 date of this Order, an Answer conforming in all respects to Rule 5 of the Rules Governing Section
20 2254 Cases, showing cause why a writ of habeas corpus should not be issued. Respondent shall file
21 with the Answer a copy of all portions of the state trial record that have been transcribed previously
22 and that are relevant to a determination of the issues presented by the petition.

23 3. If Petitioner wishes to respond to the Answer, he shall do so by filing a Traverse with
24 the Court and serving it on Respondent no later than **forty-five (45) days** of his receipt of the
25 Answer. Should Petitioner fail to do so, the petition will be deemed submitted and ready for
26 decision **forty-five (45) days** after the date Petitioner is served with Respondent's Answer.

1 4. It is Petitioner's responsibility to prosecute this case. Petitioner must keep the court
2 informed of any change of address by filing a separate paper with the Clerk of the Court headed
3 "NOTICE OF CHANGE OF ADDRESS," and comply with any orders of the Court within the time
4 allowed or ask for an extension of that time. Failure to do so may result in the dismissal of this
5 action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b). See Martinez v.
6 Johnson, 104 F.3d 769, 772 (5th Cir. 1997) (Rule 41(b) applicable in habeas cases).

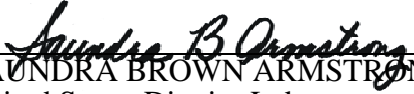
7 5. Petitioner is reminded that all communications with the Court, whether by way of
8 formal legal motions or informal letters, must be served on Respondent by mailing a true copy of the
9 document to Respondent's counsel.

10 6. Extensions of time are not favored, though reasonable extensions will be granted.
11 However, the party making a motion for an extension of time is not relieved from his or her duty to
12 comply with the deadlines set by the Court merely by having made a motion for an extension of
13 time. The party making the motion must still meet the deadlines set by the Court until an order
14 addressing the motion for an extension of time is issued. Any motion for an extension of time must
15 be filed no later than **fifteen (15) days** prior to the deadline sought to be extended.

16 7. This Order terminates Docket no. 6.

17 IT IS SO ORDERED.

18 DATED: September 30, 2009


SAUNDRA BROWN ARMSTRONG
United States District Judge

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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

ROMAN SUNDAY,

Plaintiff,

v.

D.K. SISTO et al,

Defendant.

Case Number: CV07-05308 SBA

CERTIFICATE OF SERVICE

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

That on October 15, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Roman Sunday
California State Prison - Solano
V-11338
P.O. Box 4000
Vacaville, CA 95696-4000

Dated: October 15, 2009

Richard W. Wieking, Clerk
By: LISA R CLARK, Deputy Clerk