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

ROBERT N. SANGER,

No. C 09-01474 SBA (PR)

Petitioner,

**ORDER GRANTING RESPONDENT'S  
MOTION TO DISMISS; AND DENYING  
CERTIFICATE OF APPEALABILITY**

v.

JAMES A. YATES, Warden,

(Docket no. 3)

Respondent.

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**INTRODUCTION**

Petitioner Robert N. Sanger, a state prisoner incarcerated at Pleasant Valley State Prison, filed the instant pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging the restitution fine imposed by the trial court. Respondent has filed a motion to dismiss the petition as untimely under 28 U.S.C. § 2244(d), the statute of limitations established by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Petitioner has filed an opposition to the motion. For the reasons discussed below, the Court GRANTS Respondent's motion to dismiss.

**PROCEDURAL BACKGROUND**

On May 23, 2001, Petitioner pled guilty to voluntary manslaughter. He was sentenced to twelve years in prison and ordered to pay \$10,000 in restitution. He did not file a direct appeal.

On dates not specified by the parties, Petitioner filed three habeas petitions in the San Francisco County Superior Court. The date on which his first petition was denied is unknown. His

1 second petition was denied June 19, 2007, and his third petition was denied December 17, 2008.

2 On January 20, 2009, Petitioner filed his first petition for habeas relief in the California  
3 Court of Appeal. The court of appeal denied the petition on January 22, 2009. He filed his second  
4 habeas petition in the appellate court on February 6, 2009, which was denied on February 13, 2009.

5 On February 26, 2009, Petitioner filed his petition for habeas relief in the California Supreme  
6 Court, which denied his petition on April 1, 2009.

7 On April 3, 2009, Petitioner filed the present federal habeas petition.

8 **DISCUSSION**

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

18 As a threshold matter, once a petitioner is notified that his petition is subject to dismissal  
19 based on the AEDPA's statute of limitations and the record indicates that the petition falls outside  
20 the one-year time period, the petitioner bears the burden of demonstrating that the limitation period  
21 was sufficiently tolled under statutory and/or equitable principles. See Smith v. Duncan, 297 F.3d  
22 809, 814 (9th Cir. 2002).

23 Where, as here, a petitioner does not seek direct review in the state court of appeals or the  
24 state supreme court, the limitation period will begin running the day after the date on which the time  
25 to seek such review expires. See id. at 812-13. In California, an appeal from criminal judgment  
26 must be filed within sixty days after rendition of judgment. See Cal. Rule of Court 8.308(a)  
27 (formerly Cal. Rule of Court 31). In the instant case, judgment was entered on May 23, 2001, and  
28 thus, the time for seeking direct review in the California Supreme Court expired on July 22, 2001.

1 As a result, the limitations period commenced on July 23, 2001. As such, Petitioner was required to  
2 file his federal habeas petition no later than July 23, 2002. See 28 U.S.C. § 2244(d). Therefore, his  
3 federal petition filed on April 3, 2009 -- almost seven years after the limitations period had expired -  
4 - is untimely absent either statutory or equitable tolling.

5 **I. Statutory Tolling**

6 The present petition may be timely if the limitations period was tolled under 28 U.S.C. §  
7 2244(d)(2) for a substantial period of time. AEDPA's one-year limitations period is tolled under §  
8 2244(d)(2) for "[t]he time during which a properly filed application for state post-conviction or other  
9 collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C.  
10 § 2244(d)(2). The limitations period is also tolled during the time between a lower state court's  
11 decision and the filing of a notice of appeal to a higher state court. Carey v. Saffold, 536 U.S. 214,  
12 223 (2002). In California, where prisoners generally use the state's original writ system,<sup>1</sup> this means  
13 that the limitations period remains tolled during the intervals between a state court's disposition of an  
14 original state habeas petition and the filing of the next original state habeas petition in a higher court,  
15 provided the prisoner did not delay unreasonably in seeking review in the higher court. See id. at  
16 220-25.

17 Additionally, a state habeas petition filed after the limitations period has expired will not  
18 restart the statute of limitations. See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003)  
19 ("[S]ection 2244(d) does not permit the reinitiation of the limitations period that has ended before  
20 the state petition was filed," even if the state petition was timely filed).

21 In the present case, the filing and denial dates of Petitioner's first superior court habeas  
22 petition are unknown. Petitioner filed his first state habeas petition in San Francisco County  
23 Superior Court sometime after July 22, 2001, when his conviction became final. However, even if

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25 <sup>1</sup> In California, the supreme court, intermediate courts of appeal, and superior courts all have  
26 original habeas corpus jurisdiction. Nino v. Galaza, 183 F.3d 1003, 1006 n.2 (9th Cir. 1999). Although  
27 a superior court order denying habeas corpus relief is non-appealable, a state prisoner may file a new  
28 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 the Court assumed Petitioner filed it on July 23, 2002, the day before the limitations period expired,  
2 the superior court would have ruled on his first petition by September 21, 2002 because under  
3 California law, a state court must "rule on a petition for writ of habeas corpus within 60 days after  
4 the petition is filed." Cal. Rule of Court 4.551(a)(3)(A). As mentioned above, the dates Petitioner  
5 filed his second and third superior court habeas petitions are also unknown. However, the record  
6 includes the dates these petitions were denied, thus, the Court presumes that the petitions were filed  
7 at least sixty days prior to the date of denial. See id. Petitioner must have filed his second superior  
8 court habeas petition on or after April 18, 2007, and it was denied on June 19, 2007. He filed a third  
9 superior court habeas petition on or after October 16, 2008, and it was denied on December 17,  
10 2008. Therefore, even if he is entitled to statutory tolling for the sixty-day period his first superior  
11 court habeas petition was pending between July 23, 2002 and September 21, 2002, Petitioner still  
12 waited almost five years before filing his second superior court habeas petition in 2007. In addition,  
13 Petitioner is not entitled to statutory tolling for the period between the superior court's disposition of  
14 his first habeas petition and the filing of his second habeas petition in that court, because there is no  
15 gap tolling between successive petitions. See Delhomme v. Ramirez, 340 F.3d 817, 820 (9th Cir.  
16 2003).

17 As the one-year statute of limitations already would have expired in either July, 2002 or  
18 September, 2002 (if Petitioner was eligible for statutory tolling during the period his first state  
19 superior court habeas could have been pending), his third superior court habeas petition could not  
20 revive the limitations period. See Ferguson, 321 F.3d at 823; Jimenez v. Rice, 276 F.3d 478, 482  
21 (9th Cir. 2001). The San Francisco County Superior Court clearly found Petitioner's delay  
22 unreasonable in its December 17, 2008 Order denying his third habeas petition, stating: "Here  
23 petitioner does not justify or explain the seven-year delay in bringing this claim to reduce  
24 restitution." (Mot. to Dismiss, Ex. 1 at 3.) Furthermore, Petitioner were not eligible for statutory  
25 tolling during the time his state habeas petitions were pending in the state appellate and supreme  
26 courts because "[o]nce the limitations period is expired, collateral petitions can no longer serve to  
27 avoid the statute of limitations." Rashid v. Kuhlmann, 991 F. Supp. 254, 259 (S.D.N.Y. 1998). This  
28 means that the petition is untimely unless Petitioner is entitled to equitable tolling.

1 **II. Equitable Tolling**

2 The Supreme Court has determined that the AEDPA's statute of limitations is subject to  
3 equitable tolling in appropriate cases. Holland v. Florida, 130 S. Ct. 2549, 2560 (2010). "When  
4 external forces, rather than a petitioner's lack of diligence, account for the failure to file a timely  
5 claim, equitable tolling of the statute of limitations may be appropriate." Miles v. Prunty, 187 F.3d  
6 1104, 1107 (9th Cir. 1999). Equitable tolling will not be available in most cases because extensions  
7 of time should be granted only if "extraordinary circumstances beyond [a] prisoner's control make it  
8 impossible to file a petition on time." Calderon v. United States District Court (Beeler), 128 F.3d  
9 1283, 1288 (9th Cir. 1997) (citation and internal quotation marks omitted)(brackets in original),  
10 overruled in part on other grounds by Calderon v. United States District Court (Kelly), 163 F.3d 530  
11 (9th Cir. 1998) (en banc). The prisoner must show that "the 'extraordinary circumstances' were the  
12 cause of his untimeliness." Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003) (citations omitted).  
13 Another statement of the standard is that a litigant seeking equitable tolling bears the burden of  
14 establishing two elements: "(1) that he has been pursuing his rights diligently, and (2) that some  
15 extraordinary circumstance stood in his way," preventing timely filing. Pace v. DiGuglielmo, 544  
16 U.S. 408, 418 (2005).

17 The Ninth Circuit has said that the petitioner "bears the burden of showing that this  
18 extraordinary exclusion should apply to him." Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir.  
19 2002). Indeed, "the threshold necessary to trigger equitable tolling [under AEDPA] is very high,  
20 lest the exceptions swallow the rule." Id. at 1066 (quoting United States v. Marcello, 212 F.3d  
21 1005, 1010 (7th Cir.), cert. denied, 531 U.S. 878 (2000)).

22 The grounds for granting equitable tolling are "highly fact dependant." Lott v. Mueller, 304  
23 F.3d 918, 923 (9th Cir. 2002). Where a prisoner fails to show "any causal connection" between the  
24 grounds upon which he asserts a right to equitable tolling and his inability to file a timely federal  
25 habeas application, the equitable tolling claim will be denied. Gaston v. Palmer, 417 F.3d 1030,  
26 1034-35 (9th Cir. 2005), amended, 447 F.3d 1165 (9th Cir. 2006).

27 Petitioner alleges in his opposition to the motion to dismiss that the AEDPA one-year  
28 limitations period does not apply to his case, stating: "the challenge of the restitution fine was the

1 only issue in this instant matter, and in which the AEDPA rules DO NOT APPLY." (Opp'n at 3  
2 (emphasis in original).) The Court finds his argument unavailing. The statute of limitations  
3 imposed by AEDPA applies to every challenge to non-capital state convictions or sentences brought  
4 by state prisoners in a habeas petition, including any challenges to restitution. The Court construes  
5 Petitioner's argument instead as one for equitable tolling based on a misunderstanding of his legal  
6 obligations under AEDPA. However, ignorance of the law does not justify equitable tolling of the  
7 limitations period. See Felder v. Johnson, 204 F.3d 168, 172-73 & n.10 (5th Cir. 2000); Hughes v.  
8 Idaho State Bd. of Corrections, 800 F.2d 905, 909 (9th Cir. 1986) (illiteracy of pro se petitioner not  
9 sufficient cause to avoid procedural bar). Therefore, Petitioner has not given any reasons to justify  
10 equitable tolling of the limitations period. He alleges no facts from which the Court could infer that  
11 his failure to raise his claim prior to the expiration of the limitations period was because of  
12 circumstances which were beyond his control and which made it impossible to file a timely federal  
13 petition. Thus, the limitations period will not be equitably tolled.

14 Accordingly, the present petition is untimely, and Respondent's motion to dismiss the  
15 petition as untimely (docket no. 3) is GRANTED. The petition is dismissed because it was not  
16 timely filed under 28 U.S.C. § 2244(d)(1).

17 **III. Certificate of Appealability**

18 The federal rules governing habeas cases brought by state prisoners have been amended to  
19 require a district court that dismisses or denies a habeas petition to grant or deny a certificate of  
20 appealability (COA) in its ruling. See Rule 11(a), Rules Governing § 2254 Cases, 28 U.S.C. foll.  
21 § 2254 (effective December 1, 2009).

22 For the reasons stated above, Petitioner has not shown "that jurists of reason would find it  
23 debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529  
24 U.S. 473, 484 (2000). Accordingly, a COA is DENIED.

25 **CONCLUSION**

26 For the foregoing reasons, Respondent's motion to dismiss the petition as untimely (docket  
27 no. 3) is GRANTED. The Clerk of the Court shall enter judgment in favor of Respondent,  
28 terminate as moot all pending motions, and close the file.

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This Order terminates Docket no. 3.

IT IS SO ORDERED.

DATED: 9/1/10

  
SAUNDRA BROWN ARMSTRONG  
United States District Judge

1 UNITED STATES DISTRICT COURT  
2 FOR THE  
3 NORTHERN DISTRICT OF CALIFORNIA  
4

5  
6 ROBERT N. SANGER,  
7 Plaintiff,

Case Number: CV09-01474 SBA  
**CERTIFICATE OF SERVICE**

8 v.  
9 JAMES A. YATES et al,  
10 Defendant.  
11 \_\_\_\_\_/

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

14 That on September 2, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said  
15 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing  
16 said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle  
17 located in the Clerk's office.

18 Robert Neal Sanger T-18274  
19 Pleasant Valley State Prison  
20 P.O. Box 8504  
21 Coalinga, CA 93210

22 Dated: September 2, 2010

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