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

STEPHEN B. TURNER,  
Petitioner,

No. C 12-5258 YGR (PR)

v.

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

JEFFREY BEARD, Secretary of California  
Department of Corrections and Rehabilitation,  
Respondent.

(Docket Nos. 5, 7, 9)

**INTRODUCTION**

Petitioner Stephen B. Turner, a former inmate who is currently serving a term of parole following his release from prison on January 5, 2010, filed a *pro se* action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Before the Court is Respondent's<sup>1</sup> motion to dismiss the instant petition as untimely under 28 U.S.C. § 2244(d), the statute of limitations set by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Petitioner has filed an unopposed motion to withdraw the second claim asserted in his petition, which the Court GRANTS. Petitioner has also filed an unopposed motion for a ruling on his petition, which the Court also GRANTS.

For the reasons discussed below, the Court GRANTS Respondent's motion to dismiss the petition as untimely.

**BACKGROUND**

On January 4, 2010, Petitioner was released from prison and placed on parole. One of the conditions of his parole prohibited him from possessing or viewing pornography. On May 13, 2011,

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<sup>1</sup>The individuals previously named as Respondents are no longer available and the position of Chairman of the Board of Parole Hearings is vacant. Therefore, the Court substitutes Petitioner's current custodian, Jeffrey Beard, Secretary of the California Department of Corrections and Rehabilitation, as Respondent. *See Stanley v. California Supreme Court*, 21 F.3d 359, 360 (9th Cir. 1994) (habeas petitioner must name state officer having custody of him as respondent or federal court will be deprived of personal jurisdiction); 28 foll. U.S.C. § 2254 Rule 2(a) (same).



1 discovered through the exercise of due diligence. *See* 28 U.S.C. § 2244(d)(1).

2       Although the statute of limitations period has four possible starting dates, § 2244(d)(1)(D)  
3 usually applies to prisoners challenging administrative decisions, such as the imposition of  
4 Petitioner's special parole condition. Under § 2244(d)(1)(D), the limitations period runs from the  
5 "date on which the factual predicate of the claim or claims presented could have been discovered  
6 through the exercise of due diligence." *Hasan v. Galaza*, 254 F.3d 1150, 1154 n.3 (9th Cir. 2001).  
7 Where there has been an administrative appeal, the one-year limitations period begins to run on the  
8 date the administrative decision becomes final. *See Shelby v. Bartlett*, 391 F.3d 1061, 1066 (9th Cir.  
9 2004) (limitations period began to run the day after prisoner received timely notice of the denial of  
10 his administrative appeal challenging disciplinary decision).

11       The special parole condition at issue was imposed on May 13, 2011. Petitioner did not  
12 administratively appeal this condition. Because Petitioner became aware of the factual predicate of  
13 his claim on the date the special condition was imposed, the one-year statute of limitations began to  
14 run on May 14, 2011, the day after its imposition. To meet the one-year statutory deadline, the  
15 federal habeas petition had to be filed by May 14, 2012. This petition was filed on October 11,  
16 2012. Therefore, unless tolling applies, this petition is untimely.

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18 **I. Statutory Tolling**

19       AEDPA's one-year limitations period is tolled under § 2244(d)(2) for the "time during which  
20 a properly filed application for State post-conviction or other collateral review [with respect to the  
21 pertinent judgment or claim] is pending." *Dictado v. Ducharme*, 244 F.3d 724, 726 (9th Cir. 2001)  
22 (quoting 28 U.S.C. § 2244 (d)(2)), *abrogated on other grounds by Pace v. DiGuglielmo*, 544 U.S.  
23 408 (2005).

24       Petitioner filed his initial state petition on September 22, 2011, which is 132 days after the  
25 statute of limitations began to run. The filing of this state petition began a period of statutory tolling  
26 under § 2244(d)(2), which continued until November 30, 2011, the date the California Supreme  
27 Court denied the petition he had filed on November 15, 2011.

28       Petitioner's first federal petition was filed on December 5, 2011 and was dismissed without

1 prejudice on September 14, 2012. The statute of limitations was not tolled under § 2244(d)(2)  
2 during the time the petition was pending in federal court. *See Duncan v. Walker*, 533 U.S. 167, 181  
3 (2001) (an application for federal habeas review is not an 'application for State post-conviction or  
4 other collateral review' within the meaning of 28 U.S.C. § 2244(d)(2)); *Jiminez v. Rice*, 276 F.3d  
5 478, 482-83 (9th Cir. 2001) (pending federal habeas petition does not toll AEDPA limitations  
6 period).

7 After this Court dismissed the federal habeas petition, Petitioner filed a second habeas  
8 petition in the California Supreme Court on September 24, 2012. This was 299 days after the  
9 California Supreme Court denied his first petition. Petitioner is not entitled to statutory tolling of the  
10 299 days between his state supreme court petitions because his second petition was not properly  
11 filed within the meaning of § 2244(d)(2). *See e.g. Evans v. Chavis*, 546 U.S. 189, 201 (2006)  
12 (unexplained delay of six months before filing petition in California Supreme Court does not qualify  
13 for statutory tolling under § 2244(d)(2) because it is much longer than the thirty to sixty day periods  
14 most states provide for filing appeals of petitions to state supreme court); *Chaffer v. Prosper*, 592  
15 F.3d 1046, 1048 (9th Cir. 2010) (per curiam) (101 and 115 days between state habeas petitions not  
16 entitled to statutory tolling).

17 The untolled time—132 days from the day the statute began to run to the filing of the first  
18 state petition, plus 299 days from the day the California Supreme Court denied the first petition to  
19 the filing of the second petition—equals 431 days, well over the 365-day statute of limitations.  
20 Therefore, unless equitable tolling applies, the petition is barred as untimely.

21 **II. Equitable Tolling**

22 AEDPA's statute of limitations is subject to equitable tolling in appropriate cases. *Holland v.*  
23 *Florida*, 560 U.S. 631, 646-49 (2010). "When external forces, rather than a petitioner's lack of  
24 diligence, account for the failure to file a timely claim, equitable tolling of the statute of limitations  
25 may be appropriate." *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999). Equitable tolling will  
26 not be available in most cases because extensions of time should be granted only if "extraordinary  
27 circumstances" beyond a prisoner's control make it impossible to file a petition on time. *Id.* The  
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1 prisoner must show that "the 'extraordinary circumstances' were the cause of his untimeliness."  
2 *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003) (citations omitted). Another statement of the  
3 standard is that a litigant seeking equitable tolling bears the burden of establishing two elements:  
4 "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance  
5 stood in his way," preventing timely filing. *Holland*, 560 U.S. at 649 (citation omitted); *accord*  
6 *Rasberry v. Garcia*, 448 F.3d 1150, 1153 (9th Cir. 2006).

7 The Ninth Circuit has said that the petitioner "bears the burden of showing that this  
8 extraordinary exclusion should apply to him." *Miranda v. Castro*, 292 F.3d 1063, 1065 (9th Cir.  
9 2002). Indeed, "the threshold necessary to trigger equitable tolling [under AEDPA] is very high,  
10 lest the exceptions swallow the rule." *Id.* at 1066.

11 Petitioner argues that the time during which his first federal petition was pending in this  
12 Court is equitably tolled because, "through no fault of his own, it took nearly a year for this Court to  
13 notify [him] that he was required to fairly present his federal claims to the California Supreme Court.  
14 Consequently, [Petitioner] should not be penalized for the delay simply because the U.S. District  
15 Courts are backlogged." Opp'n at 3. However, as discussed below, the time the first federal habeas  
16 petition was pending in this Court is not equitably tolled.

17 First, Petitioner's argument that this Court had a duty to notify him that he was required to  
18 fairly present his claims to the state courts is without merit. It is not a district court's responsibility  
19 to act as counsel and advise a petitioner on proper exhaustion procedures. *See Pliler v. Ford*, 542  
20 U.S. 225, 231 (2004) (district judges have no duty to act as counsel to *pro se* litigants). Proper  
21 exhaustion of state court remedies has been required since 1996, when AEDPA was enacted. *See* 28  
22 U.S.C.  
23 § 2254(b)(1)(A). Ignorance of the law, by itself, does not justify equitable tolling. *See Waldron-*  
24 *Ramsey v. Pacholke*, 556 F.3d 1008, 1013 n.4 (9th Cir. 2009).

25 Second, equitable tolling is not warranted where a prior, completely unexhausted petition  
26 was dismissed, as is the case here. *See Ex. 8 at 7; also see Rasberry v. Garcia*, 448 F.3d 1150, 1153  
27 (9th Cir. 2006); *Jiminez v. Rice*, 276 F.3d 476, 481 (9th Cir. 2001) (once district court determines  
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1 that habeas petition contains only unexhausted claims, it need not inquire further as to petitioner's  
2 intentions). Where the prior dismissed petition was completely unexhausted, the new petition does  
3 not relate back. *Rasberry*, 448 F.3d at 1154-55; *Dils v. Small*, 260 F.3d 984, 986-87 (9th Cir. 2001).  
4 Accordingly, under Ninth Circuit authority, the time during which Petitioner's first petition was  
5 pending in this Court is not equitably tolled.

6 Nonetheless, Petitioner argues that the nine months his petition was pending in this Court is  
7 equivalent to the extraordinary circumstances shown in *Roy v. Lampert*, 465 F.3d 964, 969 (9th Cir.  
8 2006), *Herbst v. Cook*, 260 F.3d 1039, 1043 (9th Cir. 2001), *Spitsyn v. Moore*, 345 F.3d 796, 800  
9 (9th Cir. 2003), and *Jefferson v. Budge*, 419 F.3d 1013 (9th Cir. 2005). These cases are  
10 distinguishable.

11 In *Roy*, the Ninth Circuit remanded the case for an evidentiary hearing regarding whether the  
12 allegations of a deficient prison law library met the extraordinary circumstances required for  
13 equitable tolling. 465 F.3d at 974-75. In *Spitsyn*, the court held that equitable tolling applied where  
14 an attorney, who was specifically retained to prepare and file a habeas petition, failed to do so, and  
15 disregarded requests to return the files pertaining to the petitioner's case until long after the date the  
16 petition was due. 345 F.3d at 798, 800. The circumstances pertaining to Petitioner's late-filing are  
17 not equivalent to a deficient law library or the attorney's egregious misconduct addressed in *Spitsyn*.

18 In *Jefferson*, the court held that, when a mixed petition, containing exhausted and  
19 unexhausted claims, is dismissed, the petitioner is entitled to equitable tolling from the date the first  
20 habeas petition was dismissed until the date the petitioner files his exhausted petition. 419 F.3d at  
21 1017. *Jefferson* does not apply to Petitioner's situation because his petition is not a mixed petition,  
22 rather all of the claims in his first petition were unexhausted. Finally, in *Herbst*, the Ninth Circuit  
23 held that a district habeas court could not *sua sponte* dismiss a petition on grounds of untimeliness  
24 without providing adequate notice of the grounds for equitable as well as statutory tolling. 260 F.3d  
25 at 1043-44. *Herbst* does not apply here because the Court did not *sua sponte* dismiss Petitioner's  
26 first petition.  
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28 Thus, the authority Petitioner presents fails to support his argument that a petition pending

1 nine months in federal court qualifies as the extraordinary circumstances required for equitable  
2 tolling. Indeed, the Supreme Court has noted that it is not unusual for a district court to take nine  
3 months to rule on a motion to dismiss a habeas petition on procedural grounds. *See Duncan v.*  
4 *Walker*, 533 U.S. 167, 184 (2001) (Stevens, J. concurring) (nine months is the average time district  
5 courts take to dismiss federal petitions on procedural grounds). Therefore, this time-frame does not  
6 constitute extraordinary circumstances.

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8 Petitioner fails to acknowledge that his initial 132-day delay in filing his first habeas petition  
9 in state Superior Court and his failure to exhaust the claims in his first federal petition caused him to  
10 miss the one-year deadline. Even if Petitioner was unaware of the requirement of properly  
11 exhausting his claims when he first filed his federal petition, he became aware of this requirement  
12 after Respondent moved to dismiss the first petition for lack of exhaustion on April 6, 2012. At that  
13 point, Petitioner had used only 260 days of AEDPA's 365-day statute of limitations and he could  
14 have returned immediately to state court to exhaust his claims and re-filed his federal petition within  
15 the one-year time limit. Instead, Petitioner chose to stay in federal court and pursue a procedurally  
16 improper summary judgment motion. *See Ex. 8 at 8.*

17 Based on the above, equitable tolling does not apply because Petitioner has failed to carry his  
18 burden of showing that extraordinary circumstances prevented the timely filing of his petition.  
19 Accordingly, Respondent's motion to dismiss based on untimeliness is GRANTED.

20 **III. Certificate of Appealability**

21 The federal rules governing habeas cases brought by state prisoners have been amended to  
22 require a district court that dismisses or denies a habeas petition to grant or deny a certificate of  
23 appealability ("COA") in its ruling. *See Rule 11(a), Rules Governing § 2254 Cases*, 28 U.S.C. foll.  
24 § 2254 (effective December 1, 2009). Section 2253(c)(1) applies to an appeal of a final order  
25 entered on a procedural question antecedent to the merits, for instance a dismissal on statute of  
26 limitations grounds. *Slack v. McDaniel*, 529 U.S. 473, 483 (2000).

27 "Determining whether a COA should issue where the petition was dismissed on procedural  
28 grounds has two components, one directed at the underlying constitutional claims and one directed

1 at the district court's procedural holding." *Id.* at 484-85. "When the district court denies a habeas  
2 petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a  
3 COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable  
4 whether the petition states a valid claim of the denial of a constitutional right and that jurists of  
5 reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* at  
6 484; *see also James v. Giles*, 221 F.3d 1074, 1077 (9th Cir. 2000). As each of these components is a  
7 "threshold inquiry," the federal court "may find that it can dispose of the application in a fair and  
8 prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the  
9 record and arguments." *Slack*, 529 U.S. at 485. Supreme Court jurisprudence "allows and  
10 encourages" federal courts to first resolve the procedural issue. *See id.*

11 The Court concludes that jurists of reason would not find it debatable whether Petitioner's  
12 petition was untimely. Accordingly, a COA is DENIED.


13 **CONCLUSION**

14 For the reasons outlined above, the Court orders as follows:

- 15 1. Respondent's motion to dismiss the petition for a writ of habeas corpus is  
16 GRANTED, and this action is DISMISSED with prejudice. Docket no. 5.
- 17 2. Petitioner's motions to withdraw the second claim in his petition and for a ruling on  
18 his petition are granted. Docket Nos. 7 and 9.
- 19 2. The Court DENIES a COA.
- 20 3. The Clerk of the Court shall substitute Jeffrey Beard, Secretary of the California  
21 Department Corrections and Rehabilitation, as Respondent pursuant to 28 U.S.C. § 2254, Rule 2(a).
- 22 4. The Clerk of the Court shall enter judgment, terminate all pending motions, and close  
23 the file.
- 24 5. This Order terminates Docket Nos. 5, 7 and 9.

25 IT IS SO ORDERED.

26 DATED: March 4, 2014

27   
28 YVONNE GONZALEZ ROGERS  
UNITED STATES DISTRICT COURT JUDGE