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

CLIFFORD EUGENE GIVENS,

Petitioner,

vs.

GARY SWARTHOUT, Warden,

Respondent.

No. C 08-05231 EJD (PR)

ORDER GRANTING MOTION TO  
DISMISS; DENYING CERTIFICATE  
OF APPEALABILITY

(Docket No. 20)

Petitioner, a California prisoner, filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his state conviction. Respondent has moved to dismiss the petition<sup>1</sup> as untimely. (Docket No. 20.) Petitioner filed opposition, and Respondent filed a reply. For the reasons discussed below, the Court grants Respondent's motion to dismiss.

**BACKGROUND**

According to the petition, Petitioner pleaded guilty in the Superior Court of the State of California in and for the County of San Mateo to assault with a deadly weapon

<sup>1</sup> The amended petition, (Docket No. 14), is the operative petition in this case.

1 and two prior convictions. (Am. Pet. at 2.) Petitioner was sentenced on August 17, 1998,  
2 to sixteen years in state prison. (Id.) Petitioner did not appeal his conviction. (Id. at 3.)

3 On April 19, 2000, Petitioner filed a petition for a writ of habeas corpus in the San  
4 Mateo County Superior Court, which denied the petition on April 28, 2000. (Resp't. Mot.  
5 to Dismiss, Exs. 1 & 2.)

6 On July 3, 2007, Petitioner filed a second petition for a writ of habeas corpus in the  
7 San Mateo County Superior Court, which denied the petition on July 24, 2007. (Id., Exs.  
8 3 & 4.)

9 On September 18, 2007, Petitioner filed a habeas petition in the California Court  
10 of Appeal, which denied the petition on September 20, 2007. (Id., Ex. 5.)

11 On January 11, 2008, Petitioner filed a habeas petition in the California Supreme  
12 Court, which denied the petition on June 18, 2008. (Id., Exs. 6 & 7.)

13 Petitioner initiated the instant federal habeas action on November 4, 2008, and  
14 filed an amended petition on May 24, 2010.

## 15 DISCUSSION

### 16 A. Statute of Limitations

17 The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which  
18 became law on April 24, 1996, imposed for the first time a statute of limitations on  
19 petitions for a writ of habeas corpus filed by state prisoners. Petitions filed by prisoners  
20 challenging non-capital state convictions or sentences must be filed within one year of the  
21 latest of the date on which: (A) the judgment became final after the conclusion of direct  
22 review or the time passed for seeking direct review; (B) an impediment to filing an  
23 application created by unconstitutional state action was removed, if such action prevented  
24 petitioner from filing; (C) the constitutional right asserted was recognized by the Supreme  
25 Court, if the right was newly recognized by the Supreme Court and made retroactive to  
26 cases on collateral review; or (D) the factual predicate of the claim could have been  
27 discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1). Time during  
28

1 which a properly filed application for state post-conviction or other collateral review is  
2 pending is excluded from the one-year time limit. Id. § 2244(d)(2). The one-year period  
3 generally will run from “the date on which the judgment became final by conclusion of  
4 direct review or the expiration of the time for seeking such review.” 28 U.S.C. §  
5 2244(d)(1)(A).

6 If a petitioner could have sought review by the state court of appeals or the state  
7 supreme court but did not, the limitation period will begin running against him the day  
8 after the date on which the time to seek such review expired. See Cal. Rule of Court  
9 8.308(a) (providing that appeal from criminal judgment must be filed within sixty days  
10 after rendition of judgment or making of order being appealed) (formerly Cal. Rule of  
11 Court 31); see also Smith v. Duncan, 297 F.3d 809, 812-13 (9th Cir. 2002) (limitation  
12 period began running day after time to seek discretionary review of California Court of  
13 Appeal’s decision in the Supreme Court of California expired, which was forty days after  
14 the Court of Appeal filed its opinion) (citing Cal. Rules of Court 24(a), 28(b), 45(a); Cal.  
15 Civ. Proc. Code § 12a).

16 In Petitioner’s case, judgment became final on October 16, 1998, which is sixty  
17 days after rendition of judgment on August 17, 1998. See Cal. Rule of Court 8.308(a).  
18 The limitation period expired one year later on October 16, 1999. The instant federal  
19 habeas action was not filed until November 4, 2008, over nine years later. Unless the  
20 limitations period was tolled for a significant amount of time, the petition is untimely.

#### 21 B. Statutory Tolling

22 The one-year statute of limitations is tolled under § 2244(d)(2) for the “time during  
23 which a properly filed application for State post-conviction or other collateral review with  
24 respect to the pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2).

25 Respondent contends that Petitioner is not entitled to statutory tolling because by  
26 the time he filed his first petition in the state superior court on April 19, 2000, the statute  
27 of limitations had expired six months prior on October 16, 1999. (Mot. at 3.) A state  
28 habeas petition filed after AEDPA’s statute of limitations ended cannot toll the limitation

1 period. See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003); Jiminez, 276 F.3d  
2 at 482 (same). In opposition, Petitioner asserts that his state petitions were “properly  
3 filed” under Artuz v. Bennett, 531 U.S. 4, 8-9 (2000) and Gaston v. Palmer, 417 F.3d  
4 1030 (9th Cir. 2005). (Oppo. at 3-4.) However, the issue here is not whether Petitioner’s  
5 state petitions were “properly filed application[s]” but whether he filed them in a timely  
6 manner to warrant statutory tolling under AEDPA. He did not. Petitioner also argues  
7 that under California law, this Court is not procedurally barred from reviewing his federal  
8 petition. (Id. at 5.) However, this argument is irrelevant as Respondent is not moving for  
9 dismissal on the basis of procedural default, *i.e.*, because his state petitions were  
10 dismissed as untimely, but strictly on the grounds that the instant federal petition is  
11 untimely under AEDPA.

12 By the time Petitioner filed petitions in the state courts, the limitations period had  
13 already expired on October 16, 1999. Section 2244(d)(2) cannot “revive” the limitation  
14 period once it has run (*i.e.*, restart the clock to zero); it can only serve to pause a clock  
15 that has not yet fully run. “Once the limitations period is expired, collateral petitions can  
16 no longer serve to avoid the statute of limitations.” Rashid v. Kuhlmann, 991 F. Supp.  
17 254, 259 (S.D.N.Y. 1998). Accordingly, Petitioner is not entitled to statutory tolling.  
18 The instant federal petition is untimely.

### 19 C. Equitable Tolling

20 Petitioner claims that extraordinary circumstances excuse his delay. (Oppo. at 9.)  
21 Petitioner claims that it was a fellow inmate who discovered Petitioner’s claim of  
22 ineffective assistance of counsel, and who researched and presented them on his behalf.  
23 (Id.) He asserts, therefore, that he his entitled to tolling from the date his trial counsel  
24 waived his claim until the date his fellow inmate discovered the claim. (Id.)

25 The Supreme Court has determined that § 2244(d), AEDPA’s statute of  
26 limitations, is subject to equitable tolling in appropriate cases. Holland v. Florida, 130 S.  
27 Ct. 2549, 2560 (2010). “[A] ‘petitioner’ is ‘entitled to equitable tolling’ only if he shows  
28 ‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary

1 circumstance stood in his way’ and prevented timely filing.” Holland, 130 S. Ct. at 2562  
2 (quoting Pace, 544 U.S. at 418); accord Rasberry v. Garcia, 448 F.3d 1150, 1153 (9th Cir.  
3 2006) (quoting Pace); Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999) (“When  
4 external forces, rather than a petitioner’s lack of diligence, account for the failure to file a  
5 timely claim, equitable tolling of the statute of limitations may be appropriate.”). The  
6 diligence required to establish entitlement to equitable tolling is “reasonable diligence.”  
7 Holland, 130 S. Ct. at 2565 (finding district court’s finding of lack of diligence incorrect  
8 and remanding for detailed examination of facts to “determine whether they indeed  
9 constitute extraordinary circumstances sufficient to warrant equitable relief”).

10 The Ninth Circuit has held that the petitioner bears the burden of showing that this  
11 “extraordinary exclusion” should apply to him. Miranda v. Castro, 292 F.3d 1063, 1065  
12 (9th Cir. 2002). The prisoner also must show that “the extraordinary circumstances were  
13 the cause of his untimeliness and that the extraordinary circumstances made it impossible  
14 to file a petition on time.” Ramirez v. Yates, 571 F.3d 993, 997 (9th Cir. 2009) (internal  
15 quotation marks and citations omitted). Where a prisoner fails to show “any causal  
16 connection” between the grounds upon which he asserts a right to equitable tolling and  
17 his inability to timely file a federal habeas application, the equitable tolling claim will be  
18 denied. Gaston, 417 F.3d at 1034-35 (holding that where prisoner fails to show causal  
19 connection between self-representation on direct appeal or physical and mental  
20 disabilities and inability to timely file petition, district court’s finding that he was not  
21 entitled to equitable tolling where he had earlier filed a state habeas petition was not clear  
22 error). He must, furthermore, show that his untimeliness was caused by an external  
23 impediment and not by his own lack of diligence. Bryant v. Arizona Attorney General,  
24 499 F.3d 1056, 1061 (9th Cir. 2007) (no equitable tolling where petitioner was not  
25 diligent in that he failed to seek any state court relief for six years, or to take advantage of  
26 available paralegal assistance).

27 Respondent asserts that Petitioner fails to demonstrate that he acted diligently to  
28 preserve his rights from the date he was sentenced on August 17, 1998, until he filed the

1 instant petition on November 4, 2008. (Reply at 3.) Respondent also argues that  
2 Petitioner is not entitled to tolling for any period of time before Petitioner’s claim was  
3 discovered by a fellow inmate. (Id. at 4.) Respondent contends that Petitioner knew of  
4 the factual basis of his claim at the time his conviction became final. Under §  
5 2244(d)(1)(D), the one-year limitation period starts on the date on which “the factual  
6 predicate of the claim or claims presented could have been discovered through the  
7 exercise of due diligence.” The time begins ““when the prisoner knows (or through  
8 diligence could discover) the important facts, not when the prisoner recognizes their legal  
9 significance.”” Hasan v. Galaza, 254 F.3d 1150, 1154 n.3 (9th Cir. 2000) (quoting Owens  
10 v. Boyd, 235 F.3d 356, 359 (7th Cir. 2000)).

11 Petitioner has failed to meet his burden of showing that equitable tolling should  
12 apply to him. Castro, 292 F.3d at 1065. Petitioner has presented insufficient facts to  
13 indicate that “extraordinary circumstances” were the either the cause of his untimeliness  
14 or made it impossible to file a petition on time. Ramirez, 571 F.3d at 997. The fact that a  
15 fellow inmate discovered Petitioner’s claims tends to show that it was discoverable  
16 through diligence at an earlier time had Petitioner been more diligent in seeking  
17 assistance. The Courts finds that Petitioner’s own lack of diligence caused him to file an  
18 untimely petition and no external impediment. Bryant, 499 F.3d at 1061. Accordingly,  
19 Petitioner is not entitled to equitable tolling. The federal petition filed on November 4,  
20 2008 is untimely.

## 21 22 CONCLUSION

23 For the foregoing reasons, Respondent’s motion to dismiss the petition as  
24 untimely, (Docket No. 20), is GRANTED. The instant petition for a writ of habeas  
25 corpus is DISMISSED.

26 No certificate of appealability is warranted in this case. See Rule 11(a) of the  
27 Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254 (requiring district court to rule on  
28 certificate of appealability in same order that denies petition). Petitioner has not shown

1 “that jurists of reason would find it debatable whether the petition states a valid claim of  
2 the denial of a constitutional right and that jurists of reason would find it debatable  
3 whether the district court was correct in its procedural ruling.” Slack v. McDaniel, 529  
4 U.S. 473, 484 (2000).

5 This order terminates Docket No. 20.

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7 DATED: June 13, 2011 \_\_\_\_\_

  
8 EDWARD J. DAVILA  
9 United States District Judge  
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UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

CLIFFORD EUGENE GIVENS,  
Petitioner,

Case Number: CV08-05231 EJD

**CERTIFICATE OF SERVICE**

v.

GARY SWARTHOUT, Warden,  
Respondent.

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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 6/14/2011, 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.

Clifford Eugene Givens P-09900  
P. O. Box 51900  
Palo Alto, Ca 94303

Dated: 6/14/2011

Richard W. Wieking, Clerk  
/s/ By: Elizabeth Garcia, Deputy Clerk