

1 petition sua sponte. *Day v. McDonough*, 547 U.S. 198, 209 (2006). The limitation period shall
2 run from the latest of:

3 (A) the date on which the judgment became final by the conclusion
4 of direct review or the expiration of the time for seeking such
review;

5 (B) the date on which the impediment to filing an application
6 created by State action in violation of the Constitution or laws of the
United States is removed, if the applicant was prevented from filing
7 by such State action;

8 (C) the date on which the constitutional right asserted was initially
9 recognized by the Supreme Court, if the right has been newly
recognized by the Supreme Court and made retroactively applicable
to cases on collateral review; or

10 (D) the date on which the factual predicate of the claim or claims
11 presented could have been discovered through the exercise of due
diligence.

12 28 U.S.C. §2244(d)(1)(A)-(D). Further, the “time during which a properly filed application for
13 State post-conviction or other collateral review with respect to the pertinent judgment or claim
14 is pending shall not be counted toward any period of limitation under this subsection.” 28
15 U.S.C. §2244(d)(2).

16 If the petitioner seeks direct review from the highest state court but does not file a petition
17 for writ of certiorari with the United States Supreme Court, the conviction becomes final when
18 the time for filing such a petition elapses. *See Bowen v. Roe*, 188 F.3d 1157, 1159-60 (9th Cir.
19 1999).

20 **II. Reviewing Magistrate Judge’s R&R**

21 The duties of a district court in connection with a magistrate judge’s R&R are set forth
22 in Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1). A district court
23 must “make a *de novo* determination of those portions of the report . . . to which objection is
24 made,” and “may accept, reject, or modify, in whole or in part, the findings or recommendations
25 made by the magistrate judge.” 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3) (2007); *see also*
26 *United States v. Raddatz*, 447 U.S. 667, 676 (1980) (“[I]n providing for a ‘*de novo*’
27 determination . . . Congress intended to permit whatever reliance a district judge, in exercise of
28 sound judicial discretion, chose to place on a magistrate’s proposed findings and

1 recommendations.”).

2 *Discussion*

3 **I. Statute of Limitations**

4 Under Section 2244(d), Petitioner had one year from the date his conviction became final
5 to file a petition for writ of habeas corpus in federal court pursuant to 28 U.S.C. § 2254. *See* 28
6 U.S.C. § 2244(d)(1). As stated above, if the petitioner seeks direct review from the highest state
7 court but does not file a petition for writ of certiorari with the United States Supreme Court, the
8 conviction becomes final when the time for filing such a petition elapses. *See Bowen*, 188 F.3d
9 at 1159-60. Thus, including the ninety days within which Petitioner could have filed an appeal
10 in the United States Supreme Court by filing a petition for writ of certiorari, his conviction
11 became final on September 27, 2005. Petitioner therefore had until September 27, 2006 to file
12 his federal habeas petition unless the statute of limitations had been extended by statutory or
13 equitable tolling. 28 U.S.C. § 2244(d); *Calderon v. United States Dist. Court (Beeler)*, 128 F.3d
14 1283, 1288 (9th Cir. 1997) (overruled on other grounds by *Calderon v. United States Dist. Court*
15 (*Kelly*), 163 F.3d 530, 540 (9th Cir. 1998)).

16 Petitioner filed his federal habeas petition on April 14, 2008. This is over 18 months after
17 Petitioner’s conviction became final. Thus, the one-year statute of limitations bars Petitioner’s
18 claim unless the limitations period was tolled on statutory or equitable grounds.

19 **II. Statutory Tolling**

20 The one-year statute of limitations is tolled under 28 U.S.C. § 2244(d)(2) for the “time
21 during which a properly filed application for State post-conviction or other collateral review with
22 respect to the pertinent judgment or claim is pending shall not be counted toward any period of
23 limitation.” *See* 28 U.S.C. § 2244(d)(2). In California, a post-conviction habeas corpus petition
24 is considered “pending” during the time between a lower court’s decision on the petition and the
25 filing of a new petition in a higher court, if there exists no undue delay. *See Carey v. Saffold*,
26 536 U.S. 214, 223-25 (2002). The statute of limitations is tolled during “all of the time which
27 a state prisoner is attempting, through proper use of state court procedure, to exhaust state court
28 remedies with regard to a particular post-conviction application.” *Harris v. Carter*, 515 F.3d
1051, 1053 n.3 (9th Cir. 2008) (overruling *Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999)).

1 Accordingly, if a properly filed application for state post-conviction or other collateral
2 review is pending, that time will not be counted toward the statute of limitations. *See* 28 U.S.C.
3 § 2244(d)(2). A state petition is “properly filed,” and qualifies for statutory tolling, only if “its
4 delivery and acceptance are in compliance with the applicable laws and rules governing filings.”
5 *Artuz v. Bennett*, 531 U.S. 4, 8 (2000). These rules include “the court and office in which it must
6 be lodged.” *Id.* San Diego Superior Court Rule 3.3.2.A.1 provides that a “petition for writ of
7 habeas corpus should be filed in the criminal records division of the court that serves the area
8 in which the underlying criminal case was or is pending.”

9 Petitioner claims he should be entitled to tolling during the period in which the state
10 habeas petition filed in June 2006 was pending. However, the petition was sent to and
11 improperly lodged in the wrong location. Thus, Hawkins’s petition did not have a tolling effect
12 on the federal statute of limitations. Hawkins’s properly-filed state habeas petition was filed on
13 April 5, 2007, after the federal statute of limitations expired on September 27, 2006. An
14 application for state post-conviction relief does not toll the statute of limitations if the petitioner
15 files it after the statute of limitations has expired. *See Jiminez v. Rice*, 276 F.3d 478, 482 (9th
16 Cir. 2001), *cert. denied*, 123 S. Ct. 1627 (2003).

17 Although Petitioner filed additional state habeas petitions, they also did not toll the statute
18 of limitations. “[S]ection 2244(d) does not permit the reinitiation of the limitations period that
19 has ended before the state petition was filed.” *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th
20 Cir. 2003). Thus, following the California Supreme Court’s denial of Petitioner’s petition for
21 review, the statute of limitations began to run because Petitioner’s post-conviction state habeas
22 petition was untimely. (Lodgment 10). As a result, Hawkins’s later state petitions did not toll the
23 statute of limitations because it had already expired.

24 **III. Equitable Tolling**

25 Although statutory tolling does not apply in the present case, Petitioner may be entitled
26 to equitable tolling. While 28 U.S.C. § 2244 does not specifically provide courts with discretion
27 to maintain jurisdiction over habeas claims after the one-year statute of limitations has expired,
28 nothing in this section specifically disallows a court from maintaining jurisdiction as a matter
of equity. *See Duncan v. Walker*, 533 U.S. 167, 183 (2001). The Ninth Circuit permits

1 equitable tolling only for extraordinary circumstances, stating, “[T]he threshold necessary to
2 trigger equitable tolling [under AEDPA] is very high, lest the exceptions swallow the rule.”
3 *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002).

4 The Ninth Circuit has placed on the petitioner the burden of establishing entitlement to
5 tolling. See *Smith v. Duncan*, 297 F.3d 809, 814-15 (9th Cir. 2002). Generally, a petitioner
6 seeking equitable tolling must establish two elements: “(1) that he has been pursuing his rights
7 diligently, and (2) that some extraordinary circumstance stood in his way.” *Pace v.*
8 *DiGuglielmo*, 544 U.S. 408, 418 (2005); see also *Raspberry v. Garcia*, 448 F.3d 1150, 1153 (9th
9 Cir. 2006).

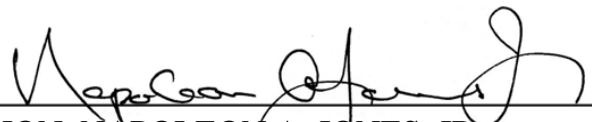
10 Although Petitioner did not request equitable tolling, this Court reads the submitted
11 papers as an implicit request for such relief. Here, Petitioner attempted to file the June 2006
12 petition almost nine months after the limitations period for appeal had elapsed. Even after
13 Petitioner became aware that his first post-conviction petition was improper, he took nearly two
14 and a half months to resubmit the petition to the proper court. Petitioner’s failure to act
15 demonstrates a lack of diligence as to preclude equitable tolling. Additionally, even if Petitioner
16 was given the benefit of the doubt as to his diligence, he has failed to demonstrate that
17 extraordinary circumstances existed to delay filing. Thus, Petitioner has failed to demonstrate
18 why equitable tolling should apply to extend the statute of limitations in this case.

19 ***Conclusion***

20 For the reasons above, this Court **ADOPTS** the R&R and, accordingly, **DENIES**
21 Hawkins’s Petition for Writ of Habeas Corpus in its entirety.

22
23 **IT IS SO ORDERED.**

24 DATED: July 13, 2009

25 
26 HON. NAPOLEON A. JONES, JR.
27 United States District Judge

28 cc: Magistrate Judge Lewis
All Counsel of Record