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CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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10 **UNITED STATES DISTRICT COURT**
11 **SOUTHERN DISTRICT OF CALIFORNIA**
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13 HUTTON F. MILLER,

14 Petitioner,

15 vs.

16 DERRAL G. ADAMS, Warden,

17 Respondent.
18

CASE NO. 08CV1093 BEN (POR)

**ORDER ADOPTING REPORT
AND RECOMMENDATION**

19
20 **INTRODUCTION**

21 Petitioner Hutton F. Miller filed a petition for writ of habeas corpus under 28 U.S.C. § 2254.
22 Respondent moved to dismiss the petition as time-barred by the applicable statute of limitations. Dkt.
23 No. 15. Magistrate Judge Louisa S. Porter issued a thoughtful and thorough Report and
24 Recommendation recommending Respondent's motion be granted and the Petition be dismissed. Dkt.
25 No. 27. Petitioner was granted an extension of time to file Objections, however, no Objections have
26 been filed. Dkt. No. 30. Having reviewed the matter de novo and for the reasons that follow, the
27 Report and Recommendation is **ADOPTED** and the Petition is **DISMISSED**.

28 //

1 **I. Statutory Tolling**

2 AEDPA's statute of limitations is tolled during the period that a petitioner is seeking post-
3 conviction relief in state court, but it "is not tolled from the time a final decision is issued on direct
4 state appeal and the time the first state collateral challenge is filed." *Nino v. Galaza*, 183 F.3d 1003,
5 1006 (9th Cir. 1999). Taking into account the time for Miller's conviction to become final and the
6 period for Miller to seek direct review, AEDPA's one year statute of limitations still expired more than
7 four years before Miller filed his first state habeas petition in 2005. The Report accurately finds that
8 statutory tolling does not apply.

9 **II. Equitable Tolling**

10 "Equitable tolling is justified in few cases, '[i]ndeed, the threshold necessary to trigger
11 equitable tolling under AEDPA is very high, lest the exceptions swallow the rule.'" *Spitsyn v. Moore*,
12 345 F.3d 796, 799 (9th Cir. 2003). Equitable tolling under AEDPA is only available if Miller
13 establishes "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary
14 circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); *Raspberry v. Garcia*,
15 448 F.3d 1150, 1153 (9th Cir. 2006).

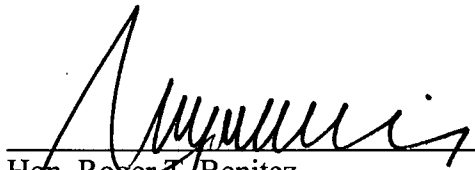
16 In Opposition, Miller's only claims for equitable tolling were lack of access to a transcript and
17 the inadequacy of the prison library at two different facilities in 2001-2002 and 2003-2004. The
18 Report accurately finds that Miller has failed to provide sufficient support for these general assertions.
19 Additionally, even if the Court were to apply equitable tolling for the time periods asserted by Miller,
20 from 2001 to 2004 and applicable statutory tolling was applied following the equitable tolling, Miller's
21 Petition was still filed more than two years late. Accordingly, even if statutory and equitable tolling
22 were applied, the Petition is still barred by the one-year statute of limitations.

23 **CONCLUSION**

24 After a de novo review, the Court fully **ADOPTS** Judge Porter's Report. The Petition is
25 **DISMISSED.**

26 **IT IS SO ORDERED.**

27 DATED: September 15, 2009

28 
Hon. Roger T. Benitez
United States District Judge