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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

ROBERTO CARLOS RUIZ,  
Petitioner,  
v.  
KEN CLARK, Warden,  
Respondent.

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Case No. 08-CV-1376-J (JMA)

**REPORT AND RECOMMENDATION  
GRANTING MOTION TO DISMISS  
PETITION FOR WRIT OF HABEAS  
CORPUS**

**[Doc. No. 8]**

**I. INTRODUCTION AND PROCEDURAL BACKGROUND**

A jury convicted Petitioner of forcible rape (Cal. Penal Code § 261(a)(2)), attempted forcible oral copulation (Cal. Penal Code §§ 664/288a(c)(2)), two counts of forcible sodomy (Cal. Penal Code §§ 286(c)(2)), two counts of first degree robbery (Cal. Penal Code §§ 211/212.5(a)), making a criminal threat (Cal. Penal Code § 422), dissuading a witness by force or threat (Cal. Penal Code § 136.1(c)(1)), two counts of oral copulation in concert (Cal. Penal Code § 288(a)(d)), two counts of forcible oral copulation (Cal. Penal Code § 288a(c)(2)) and sodomy while acting in concert (Cal. Penal Code § 286(d)). The jury found Petitioner used a knife in the commission of all counts (Cal. Penal Code § 12022(b)(1)). Additionally, in the convictions for forcible rape, attempted forcible oral copulation and sodomy of victim Betty R., the jury found Peti-

1 tioner used a deadly weapon (knife) in violation of Cal. Penal Code § 12022.3(a).  
2 Petitioner admitted having served a prior prison term within the meaning of California  
3 Penal Code § 667.5(b). On July 28, 2003, the trial court sentenced Petitioner to an  
4 aggregate term of 47 years and 4 months in prison. (Petn. at 4; Lodgment No. 1 at 2-3)

5 Petitioner appealed, and the Court of Appeal unanimously affirmed the judgment  
6 in an opinion filed on June 28, 2004 (Lodgement No. 1). Petitioner did not seek further  
7 review in the California Supreme Court (Petn at 4). The judgment in this case therefore  
8 became final 40 days later on August 7, 2004. While his appeal was pending, Petitioner  
9 filed a petition for writ of habeas corpus in San Diego County Superior Court in Case  
10 No. HSC 10713 on July 12, 2004 (See Attachment to Petn. at 2). The petition was  
11 denied on October 7, 2004. (Exhibit attached to Lodgment 2; see also Attachment to  
12 Petn. at 2).

13 On December 17, 2004, Petitioner filed a petition for writ of habeas corpus in the  
14 California Court of Appeal in Case No. D045552. (Lodgment No. 2). The state appellate  
15 court denied the petition on February 7, 2005. (Lodgment No. 3). On April 29, 2005,  
16 Petitioner filed a petition for writ of habeas corpus in the California Supreme Court in  
17 Case No. S133447. The Supreme Court denied the petition on March 29, 2006, without  
18 citation or comment (Lodgment No. 4). Petitioner took no further action for the next one  
19 year and two months.

20 On June 20, 2007, Petitioner filed a second petition for writ of habeas corpus in  
21 San Diego County Superior Court in Case No. HSC 10713. (See Attachment to Petn. at  
22 3). The petition was denied in an order filed on July 5, 2007. (Attachment to Petn. at 4)  
23 On July 26, 2007, Petitioner filed a second petition for writ of habeas corpus in the  
24 California Court of Appeal in Case No. D051327. (Lodgment No. 5). The state appel-  
25 late court denied the petition on October 9, 2007. (Lodgment No. 6).

26 On December 19, 2007, Petitioner filed a second petition for writ of habeas  
27 corpus in the California Supreme Court in Case No. S159245. The Supreme Court  
28 denied the petition on June 11, 2008, citing to *In re Clark*, 5 Cal. 4th 750 (1993) and *In*

1 *re Robbins*, 18 Cal. 4th 770, 780 (1998) (Lodgment No. 7; see Attachment to Petn.)

2         Petitioner constructively filed this federal Petition for Writ of Habeas on July 24,  
3 2008. [Doc. No. 1] On February 4, 2009, Respondent filed a Motion to Dismiss the  
4 Petition, contending that it was time-barred by the one-year statute of limitations set out  
5 in the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), 28 U.S.C.  
6 § 2244(d)<sup>1</sup>. [Doc. No. 8] Petitioner requested three extensions of time to file his  
7 Opposition [Doc. Nos. 9, 11, 13], each of which was granted [Doc. Nos. 10, 12, 14], and  
8 filed a one-page Opposition on July 9, 2009. [Doc. No. 16] As discussed below, the  
9 Petition should be dismissed with prejudice because it is time-barred.

10 **II. THE PETITION IS TIME-BARRED UNDER THE AEDPA STATUTE OF LIMITA-**  
11 **TIONS**

12         Ruiz’s Petition is governed by the Antiterrorism and Effective Death Penalty Act  
13 of 1996 (“AEDPA”) which places a one-year statute of limitations on the filing of  
14 petitions for writs of habeas corpus. 28 U.S.C. § 2244(d). Here, the statute of limita-  
15 tions period began to run from the date Ruiz’s judgment of conviction became final.  
16 See 28 U.S.C. § 2244(d)(1)(A). Ruiz’s conviction became final on August 7, 2004 -- 40  
17 days after the Court of Appeal filed its opinion. Cal.R.Ct. 8.264(b)(1), 8.500(e)(1);  
18 *Hemmerle v. Arizona*, 495 F.3d 1069, 1073-74 (9th Cir. 2007). Absent tolling, the one-  
19 year statute of limitations period would have expired on August 7, 2005. Petitioner did  
20 not constructively file his Petition until July 24, 2008, almost three years after the  
21 expiration of the statute of limitations.

22  
23 **A. Statutory Tolling**

24  
25 <sup>1</sup>28 U.S.C. § 2244(d)(1) states: “A 1-year period of limitation shall apply to an application  
26 for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.  
27 The limitation period shall run from the latest of — (A) the date on which the judgment became  
28 final by the conclusion of direct review or the expiration of the time for seeking such review; (B)  
the date on which the impediment to filing an application created by State action in violation of  
the Constitution or laws of the United States is removed, if the applicant was prevented from  
filing by such State action; (C) the date on which the constitutional right asserted was initially  
recognized by the Supreme Court and made retroactively applicable to cases on collateral  
review; or (D) the date on which the factual predicate of the claim or claims presented could  
have been discovered through the exercise of due diligence.”

1 Ruiz is entitled to statutory tolling for the period of time he diligently sought post-  
2 conviction relief in state court. 28 U.S.C. § 2244(d)(2); *Harris v. Carter*, 515 F.3d 1051  
3 (9th Cir. 2008) (“AEDPA tolls the one-year limitations period while a ‘properly filed  
4 application’ for postconviction review is pending in state court.”) State collateral review  
5 only tolls the one-year period; it does not delay its commencement. See *Laws v.*  
6 *Lamarque*, 351 F.3d 919 (9th Cir. 2003).

7 Here, Petitioner began to seek collateral relief in this case before his judgment  
8 was final in 2004 and continued with one full round of collateral petitions through 2006,  
9 when the California Supreme Court denied his first petition filed in that court on March  
10 29, 2006. (Lodgment Nos. 2-4). Even if Petitioner was entitled to statutory tolling for  
11 that entire period, Petitioner’s action is time-barred because he took no further action  
12 until June 20, 2007, over one year later. During this period, the statute of limitations  
13 expired.

14 Although Petitioner later pursued additional collateral actions in the state courts  
15 (Lodgment Nos. 5-7), statutory tolling cannot revive the limitations period; it can only  
16 serve to pause a clock that has not already run. *Patterson v. Stewart*, 251 F.3d 1243  
17 (9th Cir. 2001); *Green v. White*, 223 F.3d 1001 (9th Cir. 2000). Once the statute has  
18 run, the filing of a state habeas petition cannot revive it. See *Jiminez v. Rice*, 276 F.3d  
19 478, 482 (9<sup>th</sup> Cir. 2001). Accordingly, none of Petitioner’s collateral filings in 2007 and  
20 2008 had any effect on the AEDPA statute of limitations, because the limitations period  
21 had already expired by no later than March 29, 2007 -- before Petitioner began filing his  
22 second round of collateral actions in the state courts starting on June 20, 2007. *Id.*  
23 Furthermore, it is important to note that the state courts specifically denied all three of  
24 Petitioner’s second round of collateral filings on procedural grounds, including the  
25 ground that they were untimely under California state law. (Attachment to Petn.;  
26 Lodgments 6-7). Untimely or procedurally defective state petitions are improperly filed  
27 and do not toll the statute of limitations. *Pace v. DiGuglielmo*, 544 U.S. 408, 417  
28 (2005); *Harris*, 515 F.3d at 1053.

## **B. Equitable Tolling**

1 AEDPA's statute of limitations is subject to equitable tolling only when the  
2 petitioner shows "(1) that he has been pursuing his rights diligently, and (2) that some  
3 extraordinary circumstance has stood in his way." *Pace*, 544 at 418; *Harris*, 515 at  
4 1054-55. A petitioner bears the burden of showing that equitable tolling is appropriate  
5 and must establish that extraordinary circumstances caused the delay in filing the  
6 federal petition. *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). Here, Petitioner  
7 did not request equitable tolling and has failed to demonstrate that he pursued his rights  
8 diligently or that some extraordinary circumstance delayed him from timely filing his  
9 petition. Thus, Petitioner has failed to demonstrate that equitable tolling should apply to  
10 extend the statute of limitations in this case.

### 11 **III. CONCLUSION AND RECOMMENDATION**

12 After a thorough review of the record in this matter, the undersigned magistrate  
13 judge finds that Petitioner did not timely file his Petition under the AEDPA. Therefore,  
14 this Court hereby recommends that Respondent's Motion to Dismiss the Petition be  
15 **GRANTED**, the Petition be **DISMISSED WITH PREJUDICE**, and that judgment be  
16 entered accordingly.

17 This Report and Recommendation is submitted to the Honorable Napoleon A.  
18 Jones, Jr., United States District Judge assigned to this case, pursuant to the provisions  
19 of 28 U.S.C. § 636(b)(1).

20 **IT IS ORDERED** that not later than **September 2, 2009**, any party may file  
21 written objections with the Court and serve a copy on all parties. The document should  
22 be captioned "Objections to Report and Recommendation."

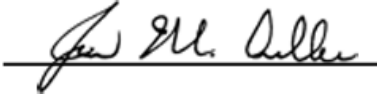
23 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with the  
24 Court and served on all parties within **10 days** of being served with the objections. The  
25 parties are advised that failure to file objections within the specified time may waive the  
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27  
28 right to raise those objections on appeal of the Court's order. *See Turner v. Duncan*,

1 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

2 **IT IS SO ORDERED.**

3 DATED: August 11, 2009

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6 Jan M. Adler  
7 U.S. Magistrate Judge  
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