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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 ESTER BURNETT,

12 Petitioner,

13 vs.

14 MATTHEW CATE, Secretary of the
15 California Department of Corrections,

16 Respondent.

CASE NO. 08cv1739 DMS (JMA)

**ORDER DENYING
PETITIONER'S MOTION TO
REOPEN CASE**

[Doc. 17.]

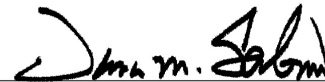
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18 Petitioner Ester Burnett, a prisoner in state custody proceeding *pro se*, filed a petition for writ
19 of habeas corpus pursuant to 28 U.S.C. § 2254. On September 25, 2009, this Court adopted the
20 Magistrate Judge's Report & Recommendation ("R&R") and dismissed the petition as time-barred
21 under the one-year statute of limitations provided in the Antiterrorism and Effective Death penalty Act
22 of 1996 ("AEDPA"), 28 U.S.C. § 2244(d). (September 25, 2009 Order, Doc. 16.) The petition was
23 dismissed without prejudice to allow Petitioner to more fully establish a claim for equitable tolling.
24 The basis for allowing Petitioner to amend his claim was evidence in the record that Petitioner had
25 been treated for mental illness. (*Id.* at 2.) However, it was unclear whether he was incompetent at the
26 time his claim expired under AEDPA, *i.e.* the time between when his conviction became final and
27 when he filed his first petition for habeas relief in state court. (*Id.*)

28 Petitioner has not filed a Second Amended Petition. Rather, on May 19, 2010, Petitioner filed
a motion to reopen the case, in which Petitioner states that he seeks to establish his equitable tolling

1 claim. The motion, however, makes no mention of any facts relating to his mental illness or equitable
2 tolling. Plaintiff contends his sentence is unconstitutional, but has not established that his claim is not
3 time-barred by the AEDPA. Accordingly, Petitioner's motion to reopen is denied. If Petitioner wishes
4 to file a full Second Amended Petition and attempt to establish equitable tolling, he may do so by
5 **August 20, 2010.**

6 **IT IS SO ORDERED.**

7 DATED: July 15, 2010



HON. DANA M. SABRAW
United States District Judge