

1 dismiss (Doc. 10), **DISMISSES** the Petition **WITH PREJUDICE**, and **DENIES** a
2 certificate of appealability.

3
4 **I. BACKGROUND**

5 Petitioner did not object to the following factual summary taken from the Report.

6 On May 23, 2002, a San Diego Superior Court jury found Petitioner guilty of two
7 counts of robbery and use of a handgun to commit a robbery. (*Report* at 2.) Petitioner
8 was later sentenced to seventy years to life. (*Id.*) Petitioner appealed his convictions.
9 (*Id.*) On February 4, 2004, the California Supreme Court denied the appeal. (*Id.*)

10 On August 13, 2004, Petitioner filed a petition for writ of habeas corpus in the
11 San Diego Superior Court. (*Report* at 2.) The court denied the petition on September
12 20, 2004. (*Id.*) Approximately one year later, on October 3, 2005, Petitioner filed a
13 second habeas petition with the same court. (*Id.*) The court found Petitioner
14 substantially delayed in filing the petition and denied it on November 28, 2005.¹ (*Id.*)

15 On February 16, 2007, Petitioner filed a federal habeas petition. After filing
16 several amended petitions, on December 12, 2007, Petitioner filed a motion to withdraw
17 the petition, which was granted. (*Report* at 3.) Then on April 23, 2008, Petitioner filed
18 a habeas petition with the California Supreme Court, which was denied on September
19 17, 2008. (*Id.*)

20 On May 14, 2009, Petitioner commenced the instant Petition. (*Report* at 3.) On
21 September 21, 2009, Respondent filed a motion to dismiss the Petition on the ground
22 that it is time barred. (*Id.* at 4.) Petitioner did not file an opposition. (*Id.*)

23 On April 9, 2010, Judge Porter issued the Report recommending that the Court
24 grant the motion. The Report found that the Petition is time barred by the one-year
25 statute of limitation provided by the Antiterrorism and Effective Death Penalty Act, 28

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27 ¹Petitioner continued to file state habeas petitions in the San Diego Superior Court.
28 Specifically, Petitioner filed petitions on January 25, 2006; February 13, 2007; and October 29,
2007. (*Report* at 2-3.) Each petition was denied. (*Id.*)

1 U.S.C. 2254 (“AEDPA”), and does not qualify for sufficient statutory-tolling to render
2 it timely. (*Id.* at 7-8.) On June 15, 2010, Petitioner filed an Objection to the Report.
3 (Doc. 15.)

4 5 **II. LEGAL STANDARD**

6 The duties of the district court in connection with a magistrate judge’s report and
7 recommendation are set forth in Rule 72(b) of the Federal Rules of Civil Procedure and
8 28 U.S.C. § 636(b)(1). The district court “must make a de novo determination of those
9 portions of the report ... to which objection is made,” and “may accept, reject, or modify,
10 in whole or in part, the findings or recommendations made by the magistrate.” 28
11 U.S.C. § 636(b)(1)(C); see also United States v. Remsing, 874 F.2d 614, 617 (9th Cir.
12 1989); United States v. Raddatz, 447 U.S. 667, 676 (1980).

13 14 **III. DISCUSSION**

15 In the motion to dismiss, Respondent argued that the Petition should be
16 dismissed because it is untimely. Respondent acknowledged that Petitioner qualifies for
17 some statutory tolling, but not enough to render the Petition timely. The Report agreed
18 with Respondent.

19 Petitioner filed an Objection, but failed to identify any deficiencies with the
20 Report’s analysis. Having read and considered the Petition, Report, and Objection, the
21 Court finds the Report presents a well-reasoned analysis of the issues. The Court,
22 therefore, concludes that the Petition is time barred.

23 24 **A. Petitioner’s Claim is Time Barred.**

25 The Petition is governed by the provisions of AEDPA. See Lindh v. Murphy, 521
26 U.S. 320, 336 (1997). AEDPA imposes a one-year statute of limitations for a state
27 prisoner filing a federal-habeas petition. 28 U.S.C. § 2244(d)(1). The one-year
28 limitations period begins to run on “the date on which judgment became final by the

1 conclusion of direct review or the expiration of the time for seeking such review.” *Id.* §
2 2244(d)(1)(A). The period of “direct review” under § 2244(d)(1)(A), includes the 90-
3 day period within which the petitioner could have filed a petition for a writ of certiorari
4 to the United States Supreme Court. *Bowen v. Roe*, 188 F.3d 1157, 1158-59 (9th Cir.
5 1999). Therefore, where the petitioner seeks direct review, but does not file a petition
6 for writ of certiorari, the one-year period begins to run 90 days after the California
7 Supreme Court’s decision. *Id.*

8 In the instant case, the California Supreme Court denied Petitioner’s direct
9 appeal on February 4, 2004. (*Report* at 2.) Because Petitioner did not file a petition for
10 writ of certiorari with the United States Supreme Court, the judgement became final 90
11 days later, on May 5, 2004. (*Id.*, at 5.) Therefore, Petitioner’s deadline for filing the
12 instant Petition was May 5, 2005. (*Id.*)

13 Petitioner did not file the Petition until May 14, 2010, more than four years after
14 AEDPA’s one-year statute of limitations expired. (*Report* at 5.) As such, the Report
15 correctly found the Petition is time barred, unless statutory tolling applies. (*Id.*)

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17 **B. Although Petitioner is Entitled to Some Statutory Tolling, the Petition**
18 **Remains Time Barred.**

19 The AEDPA statutory-tolling provision provides:

20 The time during which a properly filed application for State post-
21 conviction or other collateral review with respect to the pertinent
22 judgment or claim is pending shall not be counted toward any period of
limitation under this subsection.

23 22 U.S.C. § 2244(d)(2). Thus, AEDPA’s one-year limitations period is tolled while a
24 petitioner seeks post conviction relief in state court. *Nino v. Galaza*, 183 F.3d 1003,
25 1006 (9th Cir. 1999).

26 The statute of limitations is not tolled between the final decision on direct appeal
27 and the first habeas challenge, because no case is pending during that interval. *Nino*,

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1 183 F.3d at 1006. Instead, tolling begins after the first state habeas petition is filed with
2 the trial court and—as long as the subsequent petitions with the appellate court are
3 properly filed—continues until the California Supreme Court denies the petition. Evans
4 v.Chavis, 546 U.S. 189, 191 (2006).

5 An untimely petition is not “properly filed” and thus does not toll the statute of
6 limitations. Townsend v. Knowles, 562 F.3d 1200, 1205 (9th Cir. 2009). In California,
7 because there is no definitive time frame for filing a habeas petition, a filing is timely if
8 done within a “reasonable” time. Evans, 546 U.S. at 192. However, the United States
9 Supreme Court found a six-month, “unjustified” and “unexplained” delay to be
10 unreasonable. Id. at 201.

11 As explained above, Petitioner’s direct appeal became final on May 5, 2004,
12 ninety days after the California Supreme Court dismissed the appeal. At that point, the
13 limitations period began to run, and did not stop until August 13, 2004, when Petitioner
14 filed his first state habeas petition. Accordingly, the Report correctly found that after
15 the completion of his state collateral review, Petitioner had 266 days remaining to file
16 the instant Petition. (*Report* at 6.)

17 On September 20, 2004, the San Diego Superior Court denied Petitioner’s first
18 habeas petition. (*Report* at 6.) Petitioner, however, then waited for more than a
19 year—until October 3, 2005—to file a second habeas petition in the same court. (*Id.*)
20 Under Evans, because Petitioner failed to justify the substantial delay in filing the
21 second petition, the statute of limitations was not tolled during this period, rendering
22 the instant Petition time barred. Accordingly, the Report correctly found that, despite
23 statutory-tolling, the instant Petition remains untimely.

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25 **IV. CONCLUSION AND ORDER**

26 In light of the foregoing, the Court **ADOPTS** the Report (Doc. 13), **GRANTS**
27 Respondent’s motion (Doc. 10), and **DISMISSES** the Petition **WITH PREJUDICE**.

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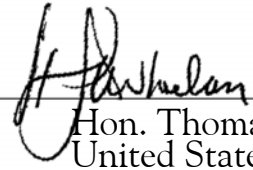
1 Moreover, because reasonable jurists would not find the Court's assessment of the
2 claims debatable or wrong, the Court **DENIES** a certificate of appealability. See Slack
3 v. McDaniel, 529 U.S. 473, 484 (2000).

4 Finally, the Court will **GRANT** Petitioner's motion (Doc. 17) for a copy of his
5 Objection. Accordingly, the clerk of the court is instructed to mail Petitioner a copy of
6 his Objection (Doc. 15).

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IT IS SO ORDERED.

DATED: July 19, 2010



Hon. Thomas J. Whelan
United States District Judge