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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

CHARLES WILLIAMS,

Petitioner,

vs.

UNKNOWN,

Respondent.

Civil No. 10-1439 DMS (NLS)

ORDER:

**(1) DENYING REQUEST TO FILE
LATE PETITION; AND**

**(2) DISMISSING CASE WITHOUT
PREJUDICE**

Petitioner, a state prisoner proceeding pro se, has submitted a document wherein he requests permission to file a late Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254.

FAILURE TO FILE PETITION

Petitioner has not filed a Petition for writ of habeas corpus in this action. Therefore, unless Petitioner is a capital prisoner, he has not initiated habeas proceedings in this Court. Calderon (Nicolaus) v. United States District Court, 98 F.3d 1102, 1107 n. 3 (9th Cir. 1996) (“Unlike non-capital prisoner who initiate habeas proceedings by filing a petition for a writ of habeas corpus, capital prisoners commence federal habeas proceedings by filing a request for appointment of counsel.”); McFarland v. Scott, 512 U.S. 849 (1994).

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1 Petitioner does not contend that he is a capital prisoner, that is, a prisoner under sentence of
2 death, and there is nothing in the documents he has submitted which indicates that he is a capital
3 prisoner. If Petitioner wishes to proceed with a habeas action in this Court he must (as is the case with
4 all non-capital prisoners) file a petition for writ of habeas corpus, which will be given a separate civil
5 case number. However, if Petitioner is in fact a capital prisoner, he may request the Court to re-open
6 this action in order to permit him to file a Petition under the civil case number assigned to this action.

7
8 Further, the Court cautions Petitioner that a one-year period of limitation applies to a petition
9 for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The
10 limitation period begins to run on the latest of:

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

13 (B) the date on which the impediment to filing an application
14 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;

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

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

20 28 U.S.C.A. § 2244(d)(1)(A)-(D) (West 2006). If the federal petition is filed after the statute of
21 limitations has run, the petition will be summarily dismissed.

22 The statute of limitations does not run while a properly filed state habeas corpus petition is
23 pending. 28 U.S.C. § 2244(d)(2); see Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). But see
24 Artuz v. Bennett, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’ when its delivery
25 and acceptance [by the appropriate court officer for placement into the record] are in compliance with
26 the applicable laws and rules governing filings.”). However, the filing of a federal habeas petition does
27 not toll the statute of limitations. Duncan v. Walker, 533 U.S. 167, 181-82 (2001).

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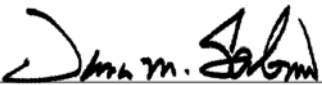
CONCLUSION AND ORDER

This action is **DISMISSED** without prejudice because Petitioner has not filed a Petition and has therefore failed to initiate federal habeas proceedings in this action. Accordingly, the request for extension of time is **DENIED** as moot. If Petitioner is a capital prisoner he may request to have this case reopened. *The Clerk of Court shall send Petitioner a blank Southern District of California habeas petition form and blank in forma pauperis application along with a copy of this Order.*

The Clerk shall close the file.

IT IS SO ORDERED.

DATED: July 16, 2010



HON. DANA M. SABRAW
United States District Judge