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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

EVERETTE BUFF,	)	Civil No. 11-CV-0372 RBB
	)	
Petitioner,	)	<b>ORDER GRANTING RESPONDENT'S</b>
	)	<b>MOTION TO DISMISS PETITION FOR</b>
v.	)	<b>WRIT OF HABEAS CORPUS [ECF No.</b>
	)	<b>8]</b>
L. MCEWAN, WARDEN,	)	
	)	
Respondent.	)	
_____	)	

Petitioner Everette Buff, a state prisoner proceeding pro se and in forma pauperis, filed a Petition for Writ of Habeas Corpus with exhibits on February 22, 2011, pursuant to 28 U.S.C. § 2254 [ECF Nos. 1, 5]. In his Petition, Buff consented to magistrate judge jurisdiction. (Pet. 16, ECF No. 1.)<sup>1</sup> In ground one, he argues that his state-appointed attorney introduced "false, forged, and altered evidence" at his parole suitability hearing. (Id. at 6.) Buff claims that this evidence denied him his right to be present at the hearing, which ultimately caused the parole board to accept a five-year parole stipulation that Buff did not authorize.

<sup>1</sup> Because the pages in the Petition are not consecutively paginated, the Court will cite to it using the page numbers assigned by the electronic case filing system.

1 (Id. at 9-10.) As a result, Petitioner contends his Fourteenth  
2 Amendment right to due process was violated. (Id. at 6.) In  
3 ground two, Buff argues that the California Court of Appeal  
4 decision did not acknowledge the "due process implications" of his  
5 appointed attorney's actions and the parole board's subsequent  
6 decision to keep Buff in custody. (Id. at 11.)

7 The Court dismissed the case without prejudice and with leave  
8 to amend for Petitioner's failure to pay the five-dollar filing fee  
9 or submit an application to proceed in forma pauperis [ECF No. 3].  
10 On February 28, 2011, Buff filed a motion to proceed in forma  
11 pauperis, and the case was reopened [ECF No. 4].

12 Respondent Leland McEwan filed a Motion to Dismiss Petition  
13 for Writ of Habeas Corpus, along with a Memorandum of Points and  
14 Authorities and a Notice of Lodgment on May 2, 2011 [ECF Nos. 8,  
15 9]. McEwan argues that Buff's Petition should be dismissed because  
16 it is barred by the one-year statute of limitations set forth in 28  
17 U.S.C. § 2244(d). (Mot. Dismiss Attach. #1 Mem. P. & A. 3, ECF No.  
18 8.) On May 6, 2011, Respondent filed a Notice, Consent, and  
19 Reference of a Civil Action to a Magistrate Judge [ECF No. 10].  
20 The Petitioner did not file an opposition to Respondent's Motion to  
21 Dismiss.

22 The Court has reviewed the Petition and Respondent's Motion to  
23 Dismiss and attachments. Although Civil Local Rule 7.1(f) provides  
24 that the failure to oppose a motion may constitute consent to  
25 granting the motion, this Court will evaluate the merits of  
26 Respondent's arguments. S.D. Cal. Civ. R. 7.1(f)(3)(c). For the  
27 reasons stated below, the Motion to Dismiss is **GRANTED**.

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**I. FACTUAL BACKGROUND**

On October 5, 1984, a jury found Buff guilty of first-degree murder, and he was sentenced to twenty-five years to life in prison. (Pet. 1-2, ECF. No. 1; See Lodgment No. 6, In re Buff, No. D057345, slip op. at 1 (Cal. Ct. App. June 9, 2010).) On January 29, 2009, the Board of Parole Hearings ("BPH") held a hearing on Buff's suitability for release on parole, at which Buff was represented by his state-appointed attorney. (Lodgment No. 4, In re Buff, No. EHC01327 (Cal. Super. Ct. Apr. 19, 2010) (order denying petition for writ of habeas corpus at 1); Lodgment No. 6, In re Buff, No. D057345, slip op. at 1.) Buff contends that he told his attorney that he wished to temporarily postpone the hearing because Petitioner was unprepared. (Lodgment No. 6, In re Buff, No. D057345, slip op. at 1.) Petitioner alleges that, instead, his attorney presented forged documents to the parole board that indicated that Buff was stipulating to another five years of incarceration. (Id.) At the hearing, the BPH accepted the stipulation, making Buff ineligible for parole for five additional years. (Pet. Attach. #1 Ex. E, at 18, ECF No. 1.)

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**II. PROCEDURAL BACKGROUND**

On February 1, 2010, Buff filed a petition for writ of habeas corpus in the Imperial County Superior Court, which was denied on March 2, 2010. (Lodgment No. 1, Buff v. Small, No. EHC01293 (Cal. Super. Ct. filed Feb. 1, 2010) (petition for writ of habeas corpus at 1); Lodgment No. 2, In re Buff, No. EHC01293 (Cal. Super. Ct. Mar. 2, 2010) (order denying petition for writ of habeas corpus at 1-2).) He refiled his petition on March 22, 2010, in the same court, and it was denied again on April 19, 2010. (Lodgment No. 3,

1 Buff v. Small, No. EHC01327 (Cal. Super. Ct. filed Mar. 22, 2010)  
2 (petition for writ of habeas corpus at 1); Lodgment No. 4, In re  
3 Buff, No. EHC01327 (order denying petition for writ of habeas  
4 corpus at 1-2).) Next, Buff filed a habeas petition in the  
5 California Court of Appeal for the Fourth District, Division One;  
6 it was denied on June 9, 2010. (Lodgment No. 5, Buff v. McEwan,  
7 No. D057345 (Cal. Ct. App. filed May 17, 2010) (petition for writ  
8 of habeas corpus at 1); Lodgment No. 6, In re Buff, No. D057345,  
9 slip op. at 1-2). On June 28, 2010, he filed a petition for habeas  
10 corpus relief in the California Supreme Court, which was denied on  
11 January 26, 2011. (See Lodgment No. 7, In re Buff, No. S183998  
12 (Cal. filed June 28, 2010) (petition for writ of habeas corpus at  
13 1); Lodgment No. 8, <http://appellatecases.courtinfo.ca.gov>(select  
14 "Supreme Court"; then enter supreme court case number). Buff filed  
15 his Petition for Writ of Habeas Corpus in this Court on February  
16 22, 2011 [ECF No. 1].

### 17 III. STANDARD OF REVIEW

18 Buff's Petition is subject to the Antiterrorism and Effective  
19 Death Penalty Act (AEDPA) of 1996 because it was filed after April  
20 24, 1996. 28 U.S.C.A. § 2244 (West 2006); Woodford v. Garceau, 538  
21 U.S. 202, 204 (2003) (citing Lindh v. Murphy, 521 U.S. 320, 326  
22 (1997)). AEDPA sets forth the scope of review for federal habeas  
23 corpus claims:

24 The Supreme Court, a justice thereof, a circuit  
25 judge, or a district court shall entertain an application  
26 for a writ of habeas corpus in behalf of a person in  
27 custody pursuant to the judgment of a State court only on  
28 the ground that he is in custody in violation of the  
Constitution or laws of the United States.

1 28 U.S.C.A. § 2254(a) (West 2006); see also Reed v. Farley, 512  
2 U.S. 339, 347 (1994); Hernandez v. Ylst, 930 F.2d 714, 719 (9th  
3 Cir. 1991).

4 To present a cognizable federal habeas corpus claim, a state  
5 prisoner must allege his conviction was obtained in violation of  
6 the Constitution or laws of the United States. 28 U.S.C.A §  
7 2254(a). In other words, a petitioner must allege the state court  
8 violated his federal constitutional rights. Hernandez, 930 F.2d at  
9 719; Jackson v. Ylst, 921 F.2d 882, 885 (9th Cir. 1990); Mannhald  
10 v. Reed, 847 F.2d 576, 579 (9th Cir. 1988). Petitions challenging  
11 a parole board's decision also fall under the umbrella of habeas  
12 review. Swarthout v. Cooke, 562 U.S. \_\_\_, 131 S.Ct. 859, 860 (2011)  
13 ("If the Board denies parole, the prisoner can seek judicial review  
14 in a state habeas petition.")

15 A federal district court does "not sit as a 'super' state  
16 supreme court" with general supervisory authority over the proper  
17 application of state law. Smith v. McCotter, 786 F.2d 697, 700  
18 (5th Cir. 1986); see also Lewis v. Jeffers, 497 U.S. 764, 780  
19 (1990) (holding that federal habeas courts must respect state  
20 court's application of state law); Jackson, 921 F.2d at 885  
21 (concluding federal courts have no authority to review a state's  
22 application of its law). Federal courts may grant habeas relief  
23 only to correct errors of federal constitutional magnitude.  
24 Oxborrow v. Eikenberry, 877 F.2d 1395, 1399 (9th Cir. 1989)  
25 (stating that federal courts are not concerned with errors of state  
26 law unless they rise to the level of a constitutional violation).

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1 In 1996, Congress "worked substantial changes to the law of  
2 habeas corpus." Moore v. Calderon, 108 F.3d 261, 263 (9th Cir.  
3 1997). Amended section 2254(d) now reads:

4 An application for a writ of habeas corpus on behalf  
5 of a person in custody pursuant to the judgement of a  
6 State court shall not be granted with respect to any  
claim that was adjudicated on the merits in State court  
proceedings unless the adjudication of the claim --

7 (1) resulted in a decision that was contrary to, or  
8 involved an unreasonable application of, clearly  
established Federal law, as determined by the  
Supreme Court of the United States; or

9 (2) resulted in a decision that was based on an  
10 unreasonable determination of the facts in light of  
11 the evidence presented in the state court  
proceeding.

12 28 U.S.C.A § 2254(d).

13 The Supreme Court, in Lockyer v. Andrade, 538 U.S. 63 (2003),  
14 stated that "AEDPA does not require a federal habeas court to adopt  
15 any one methodology in deciding the only question that matters  
16 under section 2254(d)(1) -- whether a state court decision is  
17 contrary to, or involved an unreasonable application of, clearly  
18 established Federal law." Id. at 71 (citation omitted). A federal  
19 court is therefore not required to review the state court decision  
20 de novo, but may proceed directly to the reasonableness analysis  
21 under § 2254(d)(1). Id.

22 The "novelty" in § 2254(d)(1) is "the reference to 'Federal  
23 law, as determined by the Supreme Court of the United States.'" Lindh v. Murphy, 96 F.3d 856, 869 (7th Cir. 1996) (en banc), rev'd  
24 on other grounds, 521 U.S. 320 (1997) (emphasis in original  
25 deleted). Section 2254(d)(1) "explicitly identifies only the  
26 Supreme Court as the font of 'clearly established' rules." (Id.)  
27 "[A] state court decision may not be overturned on habeas corpus  
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1 review, for example, because of a conflict with Ninth Circuit-based  
2 law." Moore, 108 F.3d at 264. "[A] writ may issue only when the  
3 state court decision is 'contrary to, or involved an unreasonable  
4 application of,' an authoritative decision of the Supreme Court."  
5 Id. (citing Childress v. Johnson, 103 F.3d 1221, 1224-26 (5th Cir.  
6 1997); Devin v. DeTella, 101 F.3d 1206, 1208 (7th Cir. 1996); see  
7 Baylor v. Estelle, 94 F.3d 1321, 1325 (9th Cir. 1996)).

8 Furthermore, with respect to the factual findings of the trial  
9 court, AEDPA provides:

10 In a proceeding instituted by an application for a  
11 writ of habeas corpus by a person in custody pursuant to  
12 the judgement of a State court, a determination of a  
13 factual issue made by a State court shall be presumed to  
be correct. The applicant shall have the burden of  
rebutting the presumption of correctness by clear and  
convincing evidence.

14 28 U.S.C.A. § 2254(e)(1).

#### 15 IV. DISCUSSION

16 Petitioner seeks habeas relief on two grounds. In ground one,  
17 he alleges that the introduction of "false, forged and altered  
18 evidence" at his parole hearing resulted in a five-year  
19 unsuitability finding. (Pet. 6, ECF. No 1.) This deprived him of  
20 his due process rights under the Fourteenth Amendment. (Id.) In  
21 particular, Buff claims he was scheduled to appear before the BPH  
22 to determine if he was suitable for parole on January 29, 2009.  
23 (Id.; see also Lodgment No. 4, In re Buff, No. EHC01327 (order  
24 denying petition for writ of habeas corpus at 1); Lodgment No. 6,  
25 In re Buff, No. D057345, slip op. at 1.)<sup>2</sup> Petitioner contends he  
26 wrote a letter to the BPH on January 4, 2009, inquiring whether he

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28 <sup>2</sup> At some places in Buff's Petition, he alleges the hearing  
took place on January 27, 2009; at others, January 29, 2009. (See  
id. at 6-10.)

1 would be appointed an attorney for the parole hearing. (Pet. 6  
2 (citing id. Attach. #1 Ex. A, at 2), ECF No. 1.) Buff asserts that  
3 one week before the hearing, his appointed attorney, Philip Osula,  
4 met with Petitioner and advised him to forego the hearing because  
5 Buff was "not prepared." (Id.)

6 Petitioner alleges that on January 27, 2009, he was escorted  
7 from his cell to meet with Osula prior to the scheduled parole  
8 hearing. (Id. at 7.) During the meeting, Buff claims Osula handed  
9 him a "BPH 1001(a) form" to complete. (Id.) Buff checked the  
10 section marked "Postpone Hearing" and wrote that the reasons were  
11 due to "No Access to Paperwork, Not Enough Time to Confer With  
12 Attorney." (Id.) He noticed that several boxes on the form had  
13 already been checked by someone else. (Id. (citing id. Attach. #1  
14 Ex. D, at 11).) Specifically, the section entitled, "Not Suitable  
15 for Parole," was checked off. (Id. (citing id. Attach. #1 Ex. D,  
16 at 11).) Buff maintains that he told Osula that Petitioner was not  
17 agreeing to the five-year unsuitability stipulation; he only wanted  
18 the hearing postponed. (Id. at 7-8.)

19 According to Petitioner, during the hearing, Osula stipulated  
20 to a five-year unsuitability for parole, against Buff's  
21 instructions. (Id. (citing id. Attach. #1 Ex. E, at 16-17).) The  
22 Petitioner asserts Osula agreed to the stipulation and stated that  
23 Buff "[r]ecognizes the fact he's not ready for parole and he's  
24 definitely not suitable. He needs more time to be disciplinary  
25 free, get-participate in self-help groups, get a v[ol]cation and  
26 [Buff] believes that five years would be sufficient for him to do  
27 so." (Id. (citing id. Attach. #1 Ex. E, at 18).)

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1           When Buff received the 1001(a) form back, he claims it had  
2 been altered even further. (Id.) "Prisoner elects to stipulate to  
3 5 years of unsuitability" had been added, followed by the initials  
4 "P.O." (Id. (citing id. Attach. #1 Ex. D, at 11).)

5           Petitioner alleges that his due process rights were violated  
6 when Osula altered the form and falsely represented to the panel  
7 that Buff was waiving his right to be present at the hearing. (Id.  
8 at 9 (citing id. Attach. #1 Exs. D at 11, E at 16).) Osula  
9 intentionally misled the BPH and deprived Petitioner of his right  
10 to participate at the parole hearing. (Id. at 10.) The Petitioner  
11 alleges that because he never waived his right to be present at the  
12 hearing, "[d]ue process demands a new hearing . . . ." (Id.)

13           In ground two, Petitioner challenges the California Court of  
14 Appeal's decision to deny his state habeas petition. (Id. at 11.)  
15 Buff asserts that the court of appeal failed to acknowledge the  
16 "due process implications" of Osula's actions and the Board's  
17 subsequent decision to deny Buff parole. (Id.) "Petitioner did  
18 not authorize the state appointed attorney to waive his presence at  
19 the hearing nor his right to speak and to present evidence [o]n his  
20 behalf." (Id. at 12.) Additionally, the Petitioner contends that  
21 Osula falsified the BPH 1001(a) form, which ultimately led to the  
22 Board's acceptance of the five-year stipulation. (Id.)  
23 Accordingly, Buff argues that his due process rights were violated.  
24 (Id.)

25           Respondent McEwan moves to dismiss the Petition as barred by  
26 the one-year statute of limitations set forth 28 U.S.C. § 2244(d).  
27 (Mot. Dismiss Attach. #1 Mem. P. & A. 3, ECF No. 8.) Respondent  
28 claims that the BPH informed Buff of the five-year stipulated

1 denial by letter, dated February 18, 2009. (Id. (citing Pet.  
2 Attach. #1 Ex. B, at 4, ECF No. 1).) McEwan acknowledges that Buff  
3 claims he did not become aware of the stipulation until April of  
4 2009. (Id.) Respondent alleges that "even based on this date,  
5 Buff's Petition was filed after the statute of limitations." (Id.)  
6 "Assuming Buff discovered the five-year denial on May 1, 2009, he  
7 was required to file his petition on May 1, 2010." (Id. at 3-4.)  
8 Yet, he filed his Petition on February 16, 2011, "656 days after he  
9 allegedly became aware of the five-year denial." (Id. at 4.)  
10 Finally, Respondent alleges that neither statutory nor equitable  
11 tolling is available. (Id. at 4-5.)

12 **A. The One-Year Statute of Limitations**

13 McEwan maintains that Buff's Petition is barred by AEDPA's  
14 one-year statute of limitations and should be dismissed. (Mot.  
15 Dismiss Attach. #1 Mem. P. & A. 3, ECF No. 8.) The statute of  
16 limitations for federal habeas corpus petitions is set forth in  
17 AEDPA. As amended, § 2244(d) provides:

18 (1) A 1-year period of limitation shall apply to an  
19 application for a writ of habeas corpus by a person in  
20 custody pursuant to the judgment of a State court. The  
21 limitation period shall run from the latest of --

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

25 (B) the date on which the impediment to filing an  
26 application created by State action in violation of  
27 the Constitution or laws of the United States is  
28 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, if the right has been newly recognized by the  
Supreme Court and made retroactively applicable to  
cases on collateral review; or

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

3 28 U.S.C.A. § 2244(d)(1).

4 The one-year statute of limitations in 28 U.S.C. § 2244(d)(1)  
5 applies to habeas petitions challenging denial of parole, and  
6 beings to run the day after an inmate receives notice of the parole  
7 board's decision. Redd v. McGrath, 343 F.3d 1077, 1082, 1084-85  
8 (9th Cir. 2003); Watson v. Woodford, 247 F. App'x 938, 939 (9th  
9 Cir. 2007) (same); see also Shelby v. Bartlett, 391 F.3d 1061, 1066  
10 (9th Cir. 2004) (holding that limitations period for challenging  
11 disciplinary order begins to run the day after receiving notice of  
12 the denial of inmate's appeal).

13 The parole hearing took place on January 29, 2009, and a  
14 letter was sent to Buff on February 18, 2009, alerting him of the  
15 five-year parole stipulation. (See Pet. Attach. #1 Ex. B, at 4,  
16 ECF No. 1.) Despite this letter, Buff alleges he "first became  
17 aware of the facts in support of [his] claim . . . on or about  
18 April 2009." (Id. Attach. #1 Ex. C, at 8.) Assuming Petitioner  
19 received notice on April 30, 2009, the statute of limitations would  
20 have begun to run on May 1, 2009. See Redd, 343 F.3d at 1084  
21 (explaining that the one-year statute of limitations under AEDPA  
22 begins to run the day after an inmate learned of the parole board's  
23 decision). The one-year statute of limitations would have expired  
24 on April 30, 2010. See Patterson v. Stewart, 251 F.3d 1243, 1245-  
25 46 (9th Cir. 2001) (quoting Fed. R. Civ. P. 6(a)) ("In computing  
26 any amount of time prescribed or allowed . . . by any applicable  
27 statute, the day of the act, event, or default from which the  
28 designated period of time runs shall not be included.") Buff filed

1 his federal Petition almost a year later, on February 22, 2011.  
2 (Pet. 1, ECF No. 1.) Therefore, unless he is entitled to  
3 sufficient statutory or equitable tolling, his claims are barred by  
4 AEDPA's statute of limitations.

5 **1. Statutory Tolling**

6 Respondent McEwan argues that Buff is not entitled to  
7 statutory tolling of the limitation period. (Mot. Dismiss Attach.  
8 #1 Mem. P. & A. 4, ECF No. 8.) McEwan maintains that the state  
9 superior court denied Buff's habeas petition because it was not  
10 filed within a reasonable time. (Id. (citing Lodgment No. 2, In re  
11 Buff, No. EHC01293 (order denying petition at 1-2)).) The  
12 Respondent notes that Buff filed "another improper, successive  
13 petition" with the superior court and then with the state court of  
14 appeal; both were deemed untimely. (Id. (citing Lodgment No. 4,  
15 In re Buff, No. EHC01327 (order denying petition for writ of habeas  
16 corpus at 1-2); Lodgment No. 6, In re Buff, No. D057345, slip op.  
17 at 1-2).) Respondent alleges, "A petitioner is not entitled to  
18 tolling if his petition is denied as untimely by the California  
19 courts." (Id. (citing Pace, 544 U.S. at 417).) McEwan concludes  
20 that because Buff is not entitled to statutory tolling, the statute  
21 of limitations expired on May 1, 2009. (Id.)

22 In his Petition, Buff does not include any facts that suggest  
23 statutory tolling applies, and he has not opposed Respondent's  
24 Motion to Dismiss. (See Pet. 6-12, ECF No. 1.)

25 The statute of limitations period under AEDPA is tolled during  
26 periods in which a petitioner is properly seeking collateral review  
27 of a pending state court judgment. Specifically, 28 U.S.C. §  
28 2244(d) states, "The time during which a properly filed application

1 for State post-conviction or other collateral review with respect  
2 to the pertinent judgment or claim is pending shall not be counted  
3 toward any period of limitation under this subsection." 28  
4 U.S.C.A. § 2244(d)(2); see also Pace v. DiGuglielmo, 544 U.S. 408,  
5 410 (2005). "[A]n application is 'properly filed' when its  
6 delivery and acceptance are in compliance with the applicable laws  
7 and rules governing filings." Artuz v. Bennett, 531 U.S. 4, 8  
8 (2000) (explaining that typical filing requirements include all  
9 relevant time limits). "When a postconviction petition is untimely  
10 under state law, 'that [is] the end of the matter' for purposes of  
11 § 2244(d)(2)." Pace, 544 U.S. at 414 (quoting Carey v. Saffold,  
12 536 U.S. 214, 226 (2002)); see also Zepeda v. Walker, 581 F.3d  
13 1013, 1018 (9th Cir. 2009).

14 The interval between the disposition of one state petition and  
15 the filing of another may be tolled under "interval tolling."  
16 Carey, 536 U.S. at 223. "[T]he AEDPA statute of limitations is  
17 tolled for 'all of the time during which a state prisoner is  
18 attempting, through proper use of state court procedures, to  
19 exhaust state court remedies with regard to a particular post-  
20 conviction application.'" Nino v. Galaza, 183 F.3d 1003, 1006 (9th  
21 Cir. 1999) (quoting Barnett v. Lamaster, 167 F.3d 1321, 1323 (10th  
22 Cir. 1999)); see also Carey, 536 U.S. at 219-22. The statute of  
23 limitations is tolled from the time a petitioner's first state  
24 habeas petition is filed until state collateral review is  
25 concluded, but it is not tolled before the first state collateral  
26 challenge is filed. Thorson v. Palmer, 479 F.3d 643, 646 (9th Cir.  
27 2007) (citing Nino, 183 F.3d at 1006).

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1 Even if Buff did not learn the result of his parole hearing  
2 before April 30, 2009, the statute of limitations in his case began  
3 to run on May 1, 2009. Yet, he did not file his first state habeas  
4 petition until February 1, 2010, and it was denied as untimely on  
5 March 2, 2010. (Lodgment No. 1, Buff v. Small, No. EHC01293  
6 (petition for writ of habeas corpus at 1); Lodgment No. 2, In re  
7 Buff, No. EHC01293 (order denying petition at 1-2) ("Petitioner has  
8 waited almost a year to file his petition after notice of his  
9 waiver. Petitioner failed to raise his claims in a timely  
10 fashion".) Buff filed another habeas petition in superior court,  
11 which was also denied on April 19, 2010. (Lodgment No. 3, Buff v.  
12 Small, No. EHC01327 (petition for writ of habeas corpus at 1);  
13 Lodgment No. 4, In re Buff, No. EHC01327 (order denying petition  
14 for writ of habeas corpus at 1-2) ("The petition is denied as a  
15 repetitive petition that does not allege a change in the applicable  
16 facts or law.".) A subsequent habeas petition filed with the  
17 appellate court was also denied as untimely. (See Lodgment No. 6,  
18 In re Buff, No. D057345, slip op. at 1-2 ("Buff's petition is  
19 clearly untimely.".) Because Buff's state habeas petitions were  
20 not "properly filed," he is not eligible for statutory tolling  
21 under § 2244(d)(2). See Pace, 544 U.S. at 417.

22 Interval tolling only applies to petitions that are "properly"  
23 filed in state court. 28 U.S.C. § 2244(d)(2); Nino, 183 F.3d at  
24 1006. Petitions that are untimely are not "properly" filed. Pace,  
25 544 U.S. at 417. Because Buff's state petitions were untimely,  
26 interval tolling is not available. (See Lodgment No. 2, In re  
27 Buff, No. EHC01293 (order denying petition at 1-2); Lodgment No. 4,  
28 In re Buff, No. EHC01327 (order denying petition for writ of habeas

1 corpus at 1-2); Lodgment No. 6, In re Buff, No. D057345, slip op.  
2 at 1; Pace, 544 U.S. at 417.

## 3           **2. Equitable Tolling**

4           Equitable tolling of the statute of limitations is appropriate  
5 when “‘extraordinary circumstances beyond a prisoner’s control make  
6 it impossible’” to file a timely petition. Spitsyn v. Moore, 345  
7 F.3d 796, 799 (9th Cir. 2003) (quoting Brambles v. Duncan, 330 F.3d  
8 1197, 1202 (9th Cir. 2003)); see also Stillman v. LaMarque, 319  
9 F.3d 1199, 1202 (9th Cir. 2003). “[A] litigant seeking equitable  
10 tolling bears the burden of establishing two elements: (1) that he  
11 has been pursuing his rights diligently, and (2) that some  
12 extraordinary circumstance stood in his way.” Pace, 544 U.S. at  
13 418 (citations omitted); see also Lawrence v. Florida, 549 U.S.  
14 327, 335 (2007); Rouse v. U.S. Dep’t of State, 548 F.3d 871, 878-79  
15 (9th Cir. 2008); Espinoza-Matthews v. California, 432 F.3d 1021,  
16 1026 (9th Cir. 2005).

17           “‘[T]he threshold necessary to trigger equitable tolling  
18 [under AEDPA] is very high, lest the exceptions swallow the rule.’”  
19 Miranda v. Castro, 292 F.3d 1063, 1066 (9th Cir. 2002) (quoting  
20 United States v. Marcello, 212 F.3d 1005, 1010 (7th Cir. 2000)).  
21 The failure to file a timely petition must be the result of  
22 external forces, not the result of the petitioner’s lack of  
23 diligence. Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999).  
24 “Determining whether equitable tolling is warranted is a ‘fact-  
25 specific inquiry.’” Spitsyn, 345 F.3d at 799 (quoting Frye v.  
26 Hickman, 273 F.3d 1144, 1146 (9th Cir. 2001)).

27           McEwan argues that Petitioner has not demonstrated that  
28 extraordinary circumstances beyond his control made it impossible

1 to file his Petition on time. (Mot. Dismiss Attach. #1 Mem. P. &  
2 A. 4, ECF No. 8.) Respondent dismisses Buff's contention that it  
3 took a year to find an inmate to draft his first state court  
4 petition as insufficient to entitle Buff to equitable tolling.  
5 (Id. at 5.) Petitioner is a layperson unlearned in the law. (Id.  
6 (citing Pet. Attach. #1 Ex. C, at 8, ECF No. 1).) Yet, McEwan  
7 argues, "Most inmates are 'laypersons unlearned in the law.'" Id.  
8 Accordingly, McEwan maintains, the federal habeas Petition  
9 should be dismissed. (Id.)

10 Buff alleges he initially "did not appreciate the legal  
11 significance" of the events that occurred at his parole hearing.  
12 (Pet. Attach. #1 Ex. C, at 8, ECF No. 1.) In April of 2009,  
13 another prisoner alerted Buff that he had a potential claim; he  
14 realized he should "seek assistance in challenging the parole  
15 board's finding." (Id. Attach. #1 Ex. C, at 8-9.) Petitioner  
16 claims he "exhausted every avenue available to [him] at Calipatria  
17 . . . to find an inmate who was qualified and willing to assist  
18 [him] with the appropriate legal challenge to the board's findings  
19 and [his] attorney's acts or omissions." (Id. Attach. #1 Ex. C, at  
20 9.) Buff asserts he was unable to obtain assistance until January  
21 of 2010, when another inmate agreed to prepare the Petition on  
22 Buff's behalf. (Id. Attach. #1 Ex. C, at 9.)

23 "[I]t is well settled that inexperience and ignorance of the  
24 law are insufficient to constitute extraordinary circumstances[]"  
25 to justify equitable tolling. Furr v. Small, No. CV 08-6870 ODW  
26 (FMO), 2009 WL 1598419, at \*5 (C.D. Cal. June 4, 2009) (citations  
27 omitted); see also Raspberry v. Garcia, 448 F.3d 1150, 1154 (9th  
28 Cir. 2006) ("[A] pro se petitioner's lack of legal sophistication



1 is not, by itself, an extraordinary circumstance warranting  
2 equitable tolling."); Marsh v. Soares, 223 F.3d 1217, 1220 (10th  
3 Cir. 2000); Fisher v. Johnson, 174 F.3d 710, 714 (5th Cir. 1999)  
4 ("Ignorance of the law, even for an incarcerated pro se petitioner,  
5 generally does not excuse prompt filing."); Hines v. Runnell, 2003  
6 U.S. Dist. LEXIS 7662 at \*6 (N.D. Cal. Apr. 30, 2003); Fisher v.  
7 Ramirez-Palmer, 219 F. Supp. 2d 1076, 1081 (E.D. Cal. 2002).

8 The Petitioner argues that because he lacks a legal education,  
9 he was initially unaware that he could state a habeas claim, and  
10 when he understood that he had a viable claim, Buff was unable to  
11 draft the Petition himself. (Pet. Attach. #1 Ex. C, at 8.) These  
12 statements do not establish extraordinary circumstances. Buff's  
13 "lack of legal sophistication" is not enough to entitle him to  
14 equitable tolling. Raspberry v. Garcia, 448 F.3d at 1154.

15 **V. CONCLUSION**

16 Because he is not entitled to statutory or equitable tolling,  
17 Respondent's Motion to Dismiss the Petition for Writ of Habeas  
18 Corpus as barred by AEDPA's one-year statute of limitations is  
19 **GRANTED.**

20  
21 Dated: August 11, 2011

  
RUBEN B. BROOKS  
United States Magistrate Judge

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23 cc: All parties of record  
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