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

CARL GRAY,

Petitioner,

vs.

JEFFREY BEARD, Secretary,

Respondent.

CASE NO. 12-CV-1911-H (RBB)

**ORDER GRANTING MOTION
TO DISMISS PETITION FOR
HABEAS CORPUS AND
ADOPTING REPORT AND
RECOMMENDATION**

Carl Gray (“Petitioner”), proceeding pro se and in forma pauperis, filed a petition seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. No. 1.)¹ On July 10, 2013, the magistrate judge issued report and recommendation to deny the petition and to deny the Respondent’s motion to dismiss. After the Court granted extensions for objections, on August 21, 2013, Respondent filed an objection arguing that the Court should dismiss the petition on alternative grounds. (Doc. No. 33.) On August 29, 2013, Petitioner filed his objection to the report and

¹The petition was originally submitted to the United States District Court for the Central District of California on July 20, 2012, and transferred to this Court on August 2, 2012. (Doc. No. 4.)

1 recommendation. For the reasons set forth below, the Court adopts the report and
2 recommendation and overrules both Petitioners' and Respondents' objections.

3 **Factual Background**

4 Petitioner is currently serving a twenty-seven years to life sentence in state
5 prison pursuant to a November 10, 1983, conviction of one count of first degree
6 murder with the use of a firearm, one count of second degree murder, and one count
7 of kidnapping. (Doc. No. 1.) In 1989 and 1990, while Petitioner was housed at
8 Folsom State Prison, two different confidential informants identified him as a
9 suspected "Blood disruptive group member with the alias of 'Killer.'" (Lodgment
10 No. 1, In re Gray, Case No. D061190, Att'y Gen. Informal Resp. Ex. 3, Confidential
11 Information Disclosure Form CDC 1030 (Aug. 10, 2010).) As early as 1990, CDCR
12 began documenting Petitioner as a suspected member of the Blood disruptive group.
13 (Id. Ex. 4, Notice of Critical Case Information – Safety of Persons Forms CDC 812;
14 id. Ex. 5, General Chrono (Nov. 27, 1990).) Petitioner contends that he is not a
15 member of the Bloods. (Lodgment No. 1, In re Gray, Case No. D061190, Att'y Gen.
16 Informal Resp. 2.)

17 **Procedural Background**

18 On May 10, 2009, Petitioner filed an administrative appeal requesting an
19 investigation into his current gang association status and that the results of the
20 investigation be provided to the ICC. (Doc. No. 13 "Resp't's Mot. Dismiss" at 8;
21 see Lodgment No. 1, In re Gray, Case No. D061190, Att'y Gen. Informal Resp. Ex.
22 24, Inmate/Parolee Appeal Form (submitted May 10, 2009).) Sergeant Williams
23 conducted an investigation into Petitioner's gang status and found no current
24 evidence of a gang association. (Lodgment No. 1, In re Gray, Case No. D061190,
25 Att'y Gen. Informal Resp. Ex. 25, Informational-Gang Chrono (June 8, 2009).)
26 Williams referred the matter to "ICC/UCC to make any appropriate changes
27 regarding Inmate Gray's gang status." (Id.) Williams' response indicated that an
28 investigation had been conducted, and a chrono was placed in Petitioner's file. (Id.

1 Ex. 24 at 1 (dated June 10, 2009).)

2 On April 24, 2010, Petitioner constructively filed a petition for writ of habeas
3 corpus in state court alleging that prison officials failed to purge his C-file of any
4 information relating to his association with the Bloods after determining, on June 8,
5 2009, that Petitioner was not associated with the Bloods. (Lodgment No. 2, Gray v.
6 Uribe, Case No. EHC01359 (Cal. Super. Ct. Imperial Cnty. filed Apr. 30, 2010)
7 (Petition at 3-5).) Petitioner challenged a December 3, 2009 ICC review that
8 referred to him as a “Bloods” associate. (Id. at 11.) The superior court denied
9 Petitioner’s petition on July 21, 2010, finding that Petitioner did not exhaust his
10 administrative remedies because he never appealed the December 3, 2009 ICC
11 decision. (Lodgment No. 3, In re Gray, Case No. EHC01359, at 2.)

12 On July 29, 2010, Gray submitted another administrative appeal contending
13 that the ICC at Centinela improperly noted on July 8, 2010, that he is a member of
14 the Bloods. (Lodgment No. 1, In re Gray, Case No. D061190, Att’y Gen. Informal
15 Resp. Ex. 26, Inmate/Parolee Appeal Form (July 29, 2010).) He relied on the
16 findings from the 2009 investigation and requested the ICC to make “the
17 appropriate changes” regarding his gang status. (Id.) Petitioner’s appeal was
18 screened out at the informal level as untimely. (Id.)

19 Petitioner attempted to submit his administrative appeal to the next level of
20 review on August 11, 2010. (Id.; Lodgment No. 4, Gray v. Uribe, Case No.
21 EHC01560 (Cal. Super. Ct. Imperial Cnty. filed Nov. 3, 2011) (Petition Ex. H).)
22 Petitioner explained that it was difficult for him to challenge CDCR’s
23 documentation of Petitioner as a Blood gang member because he lacked education
24 to address the complex matter. (Lodgment No. 4, Gray v. Uribe, Case No.
25 EHC01560 (Petition Ex. J).)

26 The appeals coordinator addressed the screening on August 16, 2010, and
27 stated, “[I]f you would like to pursue this matter further, you must submit an
28 explanation and supporting documentation explaining why you did not or could not

1 file your appeal timely.” (Lodgment No. 1, In re Gray, Case No. D061190, Att’y
2 Gen. Informal Resp. Ex. 27, Memorandum Re: Screening at the Informal Level
3 (Aug. 16, 2010).) Petitioner persisted and on August 29, 2010, he stated that “it has
4 been beyond the scope of my intellectual ability prior to 03/30/09 to address this
5 [timeliness] issue.” (Lodgment No. 4, Gray v. Uribe, Case No. EHC01560 (Petition
6 Ex. J).) Respondent states that after August 16, 2010, prison officials at Centinela
7 did not accept Petitioner’s appeal for further processing. (Doc. No. 13, Resp’t’s
8 Mot. Dismiss at 5.)

9 On October 24, 2011, Petitioner constructively filed a second petition for writ
10 of habeas corpus in state court challenging the reliability of confidential information
11 in his central file and contending that prison officials designated him as a member
12 of the Bloods based on unreliable and insufficient information. (Lodgment No. 4,
13 Gray v. Uribe, Case No. EHC01560 (Petition at 3-4).) Petitioner asserted that on
14 July 8, 2010, he appeared before the ICC at Centinela and discovered that he was
15 still being referred to as a Blood, even though on June 8, 2009, the investigator
16 found no evidence of his affiliation with the Bloods. (Id.) On December 7, 2011, the
17 court denied the petition. (Lodgment No. 5, In re Gray, Case No. EHC01560, order
18 at 1 (Cal. Super. Ct. Imperial Cnty. Dec. 7, 2011).)

19 On January 4, 2012, Petitioner filed a petition for writ of habeas corpus in the
20 California Court of Appeal; there, he alleged that prison officials violated prison
21 rules, the Due Process Clause, and the Eighth Amendment by designating him as a
22 Bloods gang member. (Lodgment No. 6, Gray v. Uribe, [Case No. D061190] (Cal.
23 Ct. App. filed Jan. 10, 2012) (Petition at 3-4).) Respondent filed an informal
24 response, and Petitioner filed an informal reply. (Lodgment No. 1, In re Gray, Case
25 No. D061190, Att’y Gen. Informal Resp. 1; Lodgment No. 7, In re Gray, Case No.
26 D061190.) On April 11, 2012, the court denied Petitioner’s petition finding that he
27 failed to explain why it took twenty years to challenge the gang designation.
28 (Lodgment No. 7, In re Gray, Case No. D061190.) The court concluded that

1 Petitioner’s designation was for “identification purposes only”; he was not
2 adversely affected by the designation; and he failed to show a constitutional
3 violation or that he was entitled to habeas relief. (Id.) Petitioner filed a petition for
4 review in the California Supreme Court complaining that prison officials did not
5 comply with the California Code of Regulations in designating him a Blood
6 disruptive group member. (Lodgment No. 8, Gray v. Uribe, Case No. S202008 (Cal.
7 filed Apr. 25, 2012) (Petition at 5).) Petitioner also argued that being referred to as a
8 Blood violated his liberty interest. (Id. at 6.) On June 27, 2012, the California
9 Supreme Court summarily denied the petition. (Lodgment No. 9, In re Gray, Case
10 No. S202008.)

11 Discussion

12 **I. Habeas Relief Pursuant to 28 U.S.C. § 2254**

13 Respondent contends that Gray's Petition should be dismissed because the
14 claims Petitioner asserts do not entitle him to federal habeas relief. (Doc. No. 13.
15 Resp't's Mot. Dismiss at 11) Specifically, Respondent argues that Petitioner's
16 designation as a disruptive group member within the CDCR does not adversely
17 impact the legality or duration of his confinement. (Id.)

18 In his opposition, Petitioner alleges that his designation as a Blood disruptive
19 group member affects the duration of his confinement because the Board of Parole
20 Hearings is required to consider members of a disruptive group as a risk to public
21 safety. (Doc. No. 19. Pet'r's Opp'n Mot. Dismiss at 8.) Petitioner claims that this
22 designation contributed to a four-year parole denial and will continue to adversely
23 affect him. (Id. at 8-9.)

24 Respondent replies that the likelihood of the Board denying Petitioner parole
25 in the future based on dated references to gang affiliation is too speculative to
26 confer habeas jurisdiction. (Doc. No. 20 Resp't's Reply at 3.)

27 Generally, prisoner petitions fall into two distinct categories: “(1) those
28 challenging the fact or duration of confinement itself; and (2) those challenging the

1 conditions of confinement.” McCarthy v. Bronson, 500 U.S. 136, 140 (1991).
2 Inmate challenges to validity of confinement fall within 28 U.S.C § 2254 , and 42
3 U.S.C. § 1983 governs inmate challenges to circumstances of confinement. Hill v.
4 McDonough, 547 U.S. 573, 579 (2006). A writ of habeas corpus is the appropriate
5 federal remedy when the duration of confinement is at issue. Preiser v. Rodriguez,
6 411 U.S. 475, 500 (1973). The Supreme Court explained that the specific provisions
7 in the federal habeas statute foreclose the more general remedy under section 1983.
8 Id. at 490.

9 The Ninth Circuit permitted habeas to be used to assert claims that are “likely
10 to accelerate” eligibility for parole, even though success in such cases would not
11 necessarily implicate the fact or duration of confinement. Docken v. Chase, 393
12 F.3d 1024, 1028 (9th Cir. 2004) (citing Bostic v. Carlson, 884 F.2d 1267 (9th Cir.
13 1989); Ramirez v. Galaza, 334 F.3d 850, 858 (9th Cir. 2003)). In Docken, the Ninth
14 Circuit concluded that there is a “sufficient nexus,” and therefore habeas
15 jurisdiction exists, when a prison inmate “challeng[es] aspects of [his] parole review
16 that . . . could potentially affect the duration of [his] confinement” Id. at 1031.

17 “Habeas corpus jurisdiction also exists when a [prisoner] seeks expungement
18 of a disciplinary finding from his record if expungement is likely to accelerate the
19 prisoner's eligibility for parole.” Bostic, 884 F.2d at 1269 (citing McCollum v.
20 Miller, 695 F.2d 1044, 1047 (7th Cir. 1982)). “[T]he likelihood of the effect on the
21 overall length of the prisoner's sentence . . . determines the availability of habeas
22 corpus.” Docken, 393 F.3d at 1028 (quoting Ramirez, 334 F.3d at 858).

23 “[C]hallenges to the procedures used in denying parole are *only* cognizable via
24 habeas.” Docken, 393 F.3d at 1029 (citing Butterfield v. Bail, 120 F.3d 1023, 1024
25 (9th Cir. 1997)). On the other hand, habeas jurisdiction is absent, and a section 1983
26 action proper, when a prisoner challenges only the conditions of his confinement.
27 Ramirez, 334 F.3d at 859.

28 Respondent cites to Sandin v. Conner, 515 U.S. 472 (1995), to argue that

1 because the decision to grant or deny parole is based on a myriad of considerations,
2 the possibility that CDCR's reference to Petitioner's suspected gang status will
3 impact his eligibility for parole is speculative. (Doc. No. 13 Resp't's Mot. Dismiss at
4 12.) In Sandin, the court of appeals concluded that plaintiff had a liberty interest in
5 remaining free of disciplinary segregation. Sandin, 515 U.S. at 475-76. The United
6 States Supreme Court reversed, holding that placement in segregated confinement
7 “did not present the type of atypical, significant deprivation in which a State might
8 conceivably create a liberty interest.” Id. at 486. The Court also noted that the
9 disciplinary action would not necessarily affect the length of plaintiff's sentence. Id.
10 at 487.

11 Sandin arose in the context of a section 1983 proceeding and does not address
12 the limits of habeas jurisdiction. See Zepeda v. Gipson, No. 1:12-cv-01431-JLT,
13 2012 WL 4363796, at *1 (E.D. Cal. Sept. 20, 2012). Therefore, the two statutory
14 remedies are not always mutually exclusive, particularly in parole-related cases.
15 Docken, 393 F.3d at 1030 n.6; see Arroyo v. Grounds, No. C 10-01007 SBA (PR),
16 2011 WL 4726465, at *6 (N.D. Cal. Sept. 30, 2011); Jefferies v. McEwen, No.
17 10cv2379-MMA (MDD), 2011 WL 6819114, at *2 (S.D. Cal. Aug. 9, 2011).

18 Some district courts have made distinctions from Docken and thus concluded
19 that certain expungement claims fail to raise a federal habeas question because the
20 allegedly false information in the prison file may not directly affect the duration of
21 the sentence. See Ricchio v. Eichenberger, No. 1:09-cv-01959 AWI MJS HC, 2011
22 WL 43536, at *3-4 (E.D. Cal. Jan. 6, 2011) (finding that petitioner seeking to
23 expunge an allegedly false chrono from her central file fails to state a federal habeas
24 claim because the parole board did not mention or rely on the chrono in denying her
25 parole); Zepeda, 2012 WL 4363796, at *3 (holding that petitioner challenging a
26 determination that he is a gang member and his subsequent security confinement
27 fails to state a federal habeas claim because petitioner did not allege that the
28 administrative decision extended the length of his incarceration).

1 Other courts in this circuit have found habeas jurisdiction available for
2 expungement claims. See Bostic, 884 F.2d at 1269 (holding that habeas jurisdiction
3 exists to expunge a disciplinary finding likely to accelerate eligibility for parole);
4 Flores v. Lewis, No. C 10-2773 RMW (PR), 2011 WL 2531240, at *3-4 (N.D. Cal.
5 June 24, 2011) (concluding that an action seeking expungement of petitioner's
6 revalidation as an active gang member stated a claim cognizable on habeas corpus);
7 Larriva v. Watson, No. 1:06-cv-01453 OWW WMW, 2008 WL 398847, at *2-3
8 (E.D. Cal. Feb. 12, 2008) (concluding that prisoner challenging his gang validation
9 and SHU placement may do so in a habeas petition); Murphy v. Dep't of Corr. &
10 Rehab., No. C 06-04956 MHP, 2008 WL 111226, at *7 (N.D. Cal. Jan. 9, 2008)
11 (finding that an action to expunge a serious disciplinary conviction is cognizable on
12 habeas review because expungement could affect the duration of the confinement by
13 making it more likely that petitioner would be granted parole); Drake v. Felker, No.
14 2:07-cv-00577 (JKS), 2007 WL 4404432, at *2 (E.D. Cal. Dec. 13, 2007) (same).

15 Furthermore, Respondent cites to Blair v. Martel, 645 F.3d 1151 (9th Cir.
16 2001), to argue that Blair has implicitly overruled Docken's holding that habeas
17 relief is available for claims that are "likely to accelerate eligibility for parole."
18 (Doc. No. 33. at 3.) In Blair, the Ninth Circuit Court of Appeals concluded that it
19 lacked habeas jurisdiction to consider an inmates request for expedited appeal of his
20 conviction because the request did not "necessarily spell speedier release." Blair,
21 645 F.3d at 1157-58. However, Blair is distinguishable from Docken. In Blair, the
22 petitioner challenged the procedural time line of his appeals process in order to
23 speed up the decision of whether to overturn his conviction. See Blair, 645 F.3d
24 1157-58. Whereas in Docken, the petitioner challenged aspects of his parole review
25 that he alleged could affect the duration of his confinement. Docken, 393 F.3d at
26 1028.

27 In this case, Petitioner has alleged that his designation as a disruptive group
28 member has had an adverse effect on the length of his sentence because it

1 contributed to a four year parole denial. (Doc. No. 19 Pet'r's Opp'n Mot. Dismiss at
2 8.) Expungement of Petitioner's designation as a gang member, if appropriate, could
3 affect the duration of his confinement by making it more likely that he would be
4 granted parole. See, e.g., Martin v. Tilton, No. 08-55392, 2011 WL 1624989, at *1
5 (9th Cir. April 29, 2011) (unpublished memorandum disposition)² (“Even though
6 Martin did not forfeit any work-time credits as a result of the disciplinary finding,
7 we have [habeas corpus] jurisdiction because the Board of Parole will consider the
8 charge when it evaluates Martin's eligibility for parole.”). Based on this, the Court
9 concludes that Petitioner's claim to expunge his gang member designation is
10 cognizable on habeas corpus. See Larriva v. Watson, 2008 WL 398847, at *3.
11 Therefore, the Court denies the motion to dismiss on this ground. The Court also
12 overrules the Respondent’s objections to the R&R.

13 **II. AEDPA's One-Year Statute of Limitations**

14 The statute of limitations for federal habeas corpus petitions is one year. 28
15 U.S.C.A. § 2244(d)(1). A federal petition for writ of habeas corpus may be
16 dismissed with prejudice when it was not filed within AEDPA's one-year statute of
17 limitations. Jiminez v. Rice, 276 F.3d 478, 483 (9th Cir. 2001). The statute of
18 limitations is a threshold issue that must be resolved before the merits of individual
19 claims. White v. Klitzkie, 281 F.3d 920, 921-22 (9th Cir. 2002).

20 In most cases challenging a conviction or sentence, the limitation period
21 begins running on the date that the petitioner's direct review became final. 28
22 U.S.C.A. § 2244(d)(1)(A). However, when a petitioner challenges an administrative
23 decision affecting the “‘fact or duration of his confinement,’ AEDPA’s one-year
24 statute of limitations runs from when the ‘factual predicate’ of the habeas claims
25 ‘could have been discovered through the exercise of due diligence.’” Mardesich v.

27 ² Pursuant to Ninth Circuit Local Rule 36-3, unpublished dispositions issued on or after
28 January 1, 2007, may be cited to the courts of the Ninth Circuit in accordance with Fed. R.
App. P. 32.1 but are not precedent.

1 Cate, 668 F.3d 1164, 1172 (9th Cir. 2012) (quoting 28 U.S.C. § 2244(d)(1)(D)).
2 Typically, the factual predicate is the denial of an administrative appeal. See Shelby
3 v. Bartlett, 391 F.3d 1061, 1066 (9th Cir. 2004) (holding that the statute of
4 limitations begins to run when the petitioner's administrative appeal was denied);
5 Redd v. McGrath, 343 F.3d 1077, 1079 (9th Cir. 2003) (holding that the Board of
6 Prison Term's denial of an inmate's administrative appeal was the "factual
7 predicate" of the inmate's claim that triggered the commencement of the limitations
8 period).

9 At issue here is when the one-year statute of limitations began to run on
10 Petitioner's claim that he was improperly designated as a member of the Bloods
11 disruptive group. Respondent argues that the limitations period began to run in
12 1990, when Petitioner was first documented as a suspected gang member. (Doc. No.
13 13 Resp't's Mot. Dismiss at 14.) Petitioner did not, however, file a grievance to
14 challenge his 1990 gang designation until May 10, 2009, almost twenty years later.
15 (See Lodgment No. 1, In re Gray, Case No. D061190, Att'y Gen. Informal Resp. Ex.
16 24, Inmate/Parolee Appeal Form.) His grievance was accepted, and he received a
17 response at the informal level. (Id. at 1.) Petitioner did not appeal that decision to
18 the next level. Instead, on July 29, 2010, Petitioner filed his second grievance
19 contending that the ICC at Centinela improperly noted on July 8, 2010, that he is a
20 member of the Bloods. (Lodgment No. 1, In re Gray, Case No. D061190, Att'y Gen.
21 Informal Resp. Ex. 26, Inmate/Parolee Appeal Form.) His appeal was screened out
22 at the informal level as untimely. (Id.)

23 The Ninth Circuit has not yet addressed the issue of when the statute of
24 limitations begins to run if the petitioner does not timely appeal the dismissal of an
25 administrative ruling. See Redd, 343 F.3d at 1084; Webb v. Walker, No.
26 2:05-cv-00291-JKS-GGH, 2008 WL 4224619, at *4 (E.D. Cal. Sept. 15, 2008)
27 ("[T]he true holding in Redd is that the time starts to run when the administrative
28 decision is final, which in Redd was the date the timely administrative appeal was

1 denied.”) The Fifth Circuit has held that the factual predicate is the date the
2 administrative decision was issued. Kimbrell v. Cockrell, 311 F.3d 361, 363 (5th
3 Cir. 2002) (finding that because the petitioner did not timely file a grievance after
4 the administrative decision, the limitations period began to run on the date of the
5 decision, not when the untimely appeal was decided).

6 Several district courts in this circuit have concluded that where the petitioner
7 does not timely file an appeal, the factual predicate is the administrative decision
8 itself. See Moreland v. Virga, No. 2:12-cv-0561 LKK KJN P, 2012 WL 5838970, at
9 *7-8 (E.D. Cal. Nov. 16, 2012) (finding that the statute of limitations runs from the
10 date of the administrative decision, not when the improperly filed administrative
11 appeal is denied); Edwards v. Small, No. 10CV918-JM(JMA), 2011 WL 976606, at
12 *2, *4 (S.D. Cal. Feb. 18, 2011) (stating that the limitations periods commenced on
13 the dates of each of three separate disciplinary hearings and noting that petitioner's
14 consolidated grievance was ultimately screened out as untimely); Webb v. Walker,
15 2008 WL 4224619, at *4-5 (finding that the factual predicate for the untimely
16 administrative appeal was known to the petitioner when the administrative decision
17 denying parole became final, ninety days after the decision).

18 Petitioner's initial classification as a Blood was done on the basis of a
19 confidential memorandum dated October 23, 1989. Pursuant to California Code of
20 Regulations title 15, section 3375(h), inmates do not have access to confidential
21 materials placed in their central file. See Cal. Code Regs. tit. 15, § 3375(h).
22 (Lodgment No. 1, In re Gray, Case No. D061190, Att'y Gen. Informal Resp. Ex. 3,
23 Confidential Information Disclosure Form CDC 1030.)

24 Respondent argues that Petitioner had been aware of his designation as early
25 as 1990 (Doc. No. 13 Resp't's Mot. Dismiss at 14.) Respondent fails to offer any
26 specific date that triggered the statute of limitations to begin to run in 1990. On this
27 record, the Court cannot conclude that the statute of limitations began to run in
28 1990 because there are no documents before the Court clearly establishing when

1 Petitioner was first notified of the classification at that time.

2 Nevertheless, Petitioner knew the factual predicate of his claim on December
3 3, 2009, the date he learned that "erroneous information identifying him as an
4 associate of the 'Bloods' . . . had not been purged from his C-File" (See
5 Lodgment No. 2, Gray v. Uribe, Case No. EHC01359 (Petition at 4).) Therefore, the
6 limitations period began running on December 4, 2009. See Shelby, 391 F.3d at
7 1066. Under 28 U.S.C. § 2244(d), Petitioner had one year from that date, or until
8 December 4, 2010, to file his federal petition for writ of habeas corpus. Petitioner
9 filed this action on July 16, 2012, approximately nineteen months after the
10 limitations period had expired. Absent any applicable tolling, the Petition is
11 untimely.

12 **A. Statutory Tolling**

13 The statute of limitations under AEDPA is tolled during periods in which a
14 properly filed habeas corpus petition is pending in the state courts. 28 U.S.C.A. §
15 2244(d)(2). The interval between the disposition of one state petition and the filing
16 of another may be tolled under "interval tolling." Carey v. Saffold, 536 U.S. 214,
17 223 (2002). "The period that an application for post-conviction review is pending is
18 not affected or 'untolled' merely because a petitioner files additional or overlapping
19 petitions before it is complete." Delhomme v. Ramirez, 340 F.3d 817, 820 (9th Cir.
20 2003). Statutory tolling applies to "intervals between a lower court decision and a
21 filing of a new petition in a higher court . . ." so long as those filings are timely.
22 Carey, 536 U.S. at 223-26. In California, a filing is timely if filed within a
23 reasonable amount of time; some states specify a time limit usually within thirty or
24 forty-five days. Carey, 536 U.S. at 222-23.

25 Respondent argues that Petitioner may not avail himself of statutory tolling
26 because the statute of limitations period began to run in 1990 and expired long
27 before Petitioner took any action. (Doc. No. 13 Resp't's Mot. Dismiss at 14.) Based
28 on the record, the limitations period began to run on December 4, 2009. Despite this

1 liberal construction, the petition is untimely.

2 Petitioner's first state court petition for a writ of habeas corpus was
3 constructively filed in Imperial County Superior Court on April 21, 2010.
4 (Lodgment No. 2, Gray v. Uribe, Case No. EHC01359 (Petition at 19).) Thus, he
5 filed his first state petition within the one-year period. On July 21, 2010 the state
6 court denied that petition. (Lodgment No. 3, Gray v. Uribe, Case No. EHC01359,
7 order at 2; see also Lodgment No. 4, Gray v. Uribe, Case No. EHC01359 (Petition
8 Ex. E).) On October 24, 2011, after waiting fifteen months, Petitioner constructively
9 filed his next state habeas petition, in Imperial County Superior Court. (Lodgment
10 No. 4, Gray v. Uribe, Case No. EHC01359 (Petition Ex. I).) Finally, on January 10,
11 2012, Gray filed a habeas petition with the California Court of Appeal. (Lodgment
12 No. 6, Gray v. Uribe, [Case No. D061190] (Petition).)

13 Here, Petitioner failed to satisfy the timeliness requirement when filing his
14 subsequent petition with the California Court of Appeal. Petitioner waited over a
15 year after the state superior court denied the first petition to bring another petition
16 for a writ of habeas corpus. By filing the second petition in the superior court,
17 Petitioner failed to present it to a higher state tribunal than the preceding petition as
18 required for interval tolling to apply. See Carey, 536 U.S. at 225-26.

19 Thus, by waiting to file with the California Court of Appeal until January 10,
20 2012, Petitioner unreasonably delayed review of the July 21, 2010, decision denying
21 his initial superior court petition. See Carey, 536 U.S. at 222-23. Because of the
22 unreasonable delay, Petitioner is not entitled to statutory tolling for this first round
23 of review. See id. at 223-26. The next round of review, triggered by the second
24 superior court petition, fares no better. The superior court denied Gray's second
25 habeas petition as "repetitive and an abuse of the writ" because it "again raises the
26 same issue that [petitioner] previously raised in a habeas petition filed in this court
27 on June 17, 2010 in case number EHC 01359." (Lodgment No. 5, In re Gray, Case
28 No. EHC01560, order at 1.) In any event, Petitioner's second superior court petition,

1 constructively filed on October 24, 2011, was after the December 4, 2010, deadline
2 and is therefore barred by AEDPA's one-year limitations period.³

3 State petitions filed after the expiration of the statute of limitations period
4 have no tolling effect. See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003)
5 (“[Section] 2244(d) does not permit the reinitiation of the limitations period that has
6 ended before the state petition was filed.”). Accordingly, Petitioner is not entitled to
7 statutory tolling for his second round of review.

8 **B. Equitable Tolling**

9 Equitable tolling of the statute of limitations is appropriate when the
10 petitioner can show "(1) that he has been pursuing his rights diligently, and (2) that
11 some extraordinary circumstance stood in his way." Holland v. Florida, 130 S. Ct.
12 2549, 2554 (2010); see also Lawrence v. Florida, 549 U.S. 327, 336 (2007). A
13 petitioner is entitled to equitable tolling of AEDPA's one-year statute of limitations
14 where “extraordinary circumstances beyond a prisoner's control made it impossible”
15 to file a timely petition. Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003)
16 (quoting Brambles v. Duncan, 330 F.3d 1197, 1202 (9th Cir. 2003)).

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

25 Respondent argues that Petitioner is not entitled to the 434 days that passed
26

27 ³ Petitioner is not entitled to interval tolling for the time period between his first and
28 second superior court petitions because he did not file his second petition in a higher level
court. Biggs v. Duncan, 339 F.3d 1045, 1048 (9th Cir. 2003).

1 between the August 16, 2010, rejection of his second administrative appeal as
2 untimely and the second state court petition filed on October 24, 2011. (Doc. No. 13
3 Resp't's Mot. Dismiss at 15-17.) Respondent also contends that Petitioner is not
4 entitled to the nineteen days between the California Supreme Court's denial of his
5 state petition on June 27, 2012, and the constructive filing of his federal Petition on
6 July 16, 2012. (Id.) Thus, Respondent argues the Petition is untimely by 453 days.

7 Petitioner acknowledges that he did not comply with the one-year statute of
8 limitations. (Doc. No. 19 Pet'r's Opp'n Mot. Dismiss at 9.) He claims, however, that
9 "[e]xtraordinary [c]ircumstances created by CSP at Centinela [p]rison [o]fficials"
10 precluded him from meeting the one-year statute of limitations. (Id.) Petitioner
11 alleges that prison officials at Centinela severely restricted his library access, so he
12 was unable to "perform bare minimal research required to adequately state a cause
13 of action to a court." (Id.) Respondent replies that Petitioner's allegations regarding
14 library access are general and conclusory because Petitioner fails to indicate the
15 dates and times he was denied access, or how many hours he was allowed to spend
16 at the library. (Doc. No. 20 Resp't's Reply at 9.) Respondent contends that mere
17 allegations of limited access to the law library are insufficient to toll the statute of
18 limitations. (Id.)

19 The Court concluded that the factual predicate for Petitioner's claims arose
20 on December 3, 2009. Petitioner nonetheless did not file his first state petition until
21 April 21, 2010. (See Lodgment No. 4, Gray v. Uribe, Case No. EHC01359
22 (Petition).) Petitioner does not explain what additional research he needed to timely
23 and adequately draft his federal petition to restate claims he alleged in detail in the
24 state courts. Moreover, he does not contend that access to the library at Centinela
25 was denied altogether.

26 Challenging Petitioner's assertions, Respondent argues in the Reply that
27 Petitioner visited the law library fifty-seven times between January 13, 2010, and
28 July 16, 2012. (Doc. No. 20 Resp't's Reply at 10) The prison records submitted by

1 Respondent show that between August 16, 2010, and August 17, 2011, Petitioner
2 went to the prison library at least eleven times. (Lodgment No. 11, Centinela state
3 prison law library visitation logs (Jan. 13, 2010-July 16, 2012).) On several
4 occasions, Petitioner was allowed but declined to go to the library. (Id.) On these
5 facts, Petitioner fails to establish that “‘some extraordinary circumstance stood in
6 his way’ and prevented timely filing.” Holland, 130 S. Ct. at 2562.

7 Petitioner does not explain how this alleged limited access to the library made
8 it impossible for him to file a timely habeas petition. Therefore, Petitioner is not
9 entitled to equitable tolling on this basis. See Ramirez v. Yates, 571 F.3d 993, 998
10 (9th Cir. 2009) (holding that petitioner was not entitled to equitable tolling where he
11 alleged the delay in filing was due to restricted library access in administrative
12 segregation). “[O]rdinary prison limitations on [one's] access to the law library and
13 copier (quite unlike the denial altogether of access to his personal legal papers)
14 were neither ‘extraordinary’ nor made it ‘impossible’ . . . to file [the] petition in a
15 timely manner.” Id.; see also Frye, 273 F.3d at 1146 (rejecting argument that lack of
16 access to library materials automatically qualifies as grounds for equitable tolling).

17 Based on the foregoing, the Court grants the motion to dismiss the petition as
18 untimely. Because the Court has concluded that the Petition must be dismissed as
19 untimely under AEDPA, it need not reach Respondent's contention that the claims
20 in the Petition are procedurally defaulted or have not been exhausted.

21 **III. Petitioner's Objection to Respondent's Reply**

22 Petitioner submitted a document entitled “Motion of Objection to
23 Respondent's Reply to Petitioner's Motion of Opposition to Respondent's Motion to
24 Dismiss Petition for Writ of Habeas Corpus,” which the Court filed nunc pro tunc to
25 January 31, 2013. (Doc. No. 23.)

26 On November 21, 2012, the Court issued an order granting petitioner's ex
27 parte application for an extension of time to file opposition to respondent's motion
28 to dismiss petition for writ of habeas corpus (Doc. No. 16) and directed Respondent

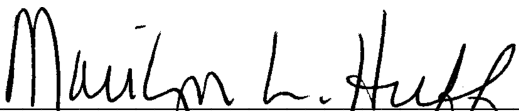
1 to file a reply by December 28, 2012. On December 20, 2012, the Court granted
2 Petitioner's second ex parte application for an extension of time to file opposition to
3 Respondent's motion to dismiss petition for writ of habeas corpus (Doc. No. 18) and
4 directed Respondent to file a Reply by January 17, 2013. Subsequently, Respondent
5 filed his reply. (Doc. No. 20 Resp't's Reply.) Petitioner's objection is without merit
6 because the reply was authorized and requested by the Court. To the extent
7 Petitioner's motion of objection to respondent's reply seeks an order striking the
8 reply, the Court denies the motion.

9 **Conclusion**

10 For the foregoing reasons the Court denies the petition, adopts the report and
11 recommendation, and overrules the objections.

12
13 IT IS SO ORDERED.

14 DATED: September 6, 2013

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17 MARILYN L. HUFF, District Judge
18 UNITED STATES DISTRICT COURT
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