

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

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3 UNITED STATES DISTRICT COURT **Dec 11, 2018**  
EASTERN DISTRICT OF WASHINGTON SEAN F. MCAVOY, CLERK

4 DAVID MANLOVE,

No. 2:18-CV-00089-SMJ

5 Petitioner,

**ORDER DENYING PETITION  
FOR A WRIT OF HABEAS  
CORPUS**

6 v.

7 RONALD HAYNES,

8 Respondent.  
9

10 Before the Court is *pro se* Petitioner David Manlove's First Amended  
11 Petition for a writ of habeas corpus under 28 U.S.C. § 2254, ECF No. 9. Petitioner,  
12 a prisoner at the Stafford Creek Corrections Center, challenges the Stevens County  
13 Superior Court judgment under which he is currently held in custody. *Id.* The Court  
14 directed that the petition be served on Respondent Ronald Haynes. ECF No. 10 at  
15 2. Respondent asks the Court to deny the petition as time barred. ECF No. 12 at 6–  
16 8. Having reviewed the pleadings and the file in this matter, the Court is fully  
17 informed<sup>1</sup> and denies the petition with prejudice.

18 On January 23, 2014, a jury found Petitioner guilty of residential burglary,  
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20 <sup>1</sup> After careful consideration, the Court concludes this matter may be decided solely  
on the state court record and neither discovery, nor an evidentiary hearing, nor any  
further delay is warranted.

1 second degree unlawful possession of a firearm, possession of more than forty  
2 grams of marijuana, third degree possession of stolen property, and first degree  
3 malicious mischief. ECF No. 13-1 at 2. The Stevens County Superior Court entered  
4 a judgment against Petitioner on January 28, 2014. *Id.* The state trial court sentenced  
5 Petitioner and committed him to the custody of the Washington State Department  
6 of Corrections. *Id.* at 2, 15.

7 On February 4, 2014, Petitioner appealed the judgment to the Washington  
8 State Court of Appeals, Division III. *Id.* at 17, 26, 83. The state appellate court  
9 affirmed the judgment on March 17, 2015. *Id.* at 83, 93. The Washington State  
10 Supreme Court denied Petitioner's petition for review on September 2, 2015. *Id.* at  
11 96. Petitioner did not seek a writ of certiorari from the U.S. Supreme Court. ECF  
12 No. 9 at 12. His deadline for doing so was ninety days after the state supreme court  
13 denied review. *See* Sup. Ct. R. 13.1.

14 On August 4, 2016, Petitioner filed a personal restraint petition with the  
15 Washington State Court of Appeals, Division III. ECF No. 13-1 at 98. The acting  
16 chief judge of the state appellate court dismissed the personal restraint petition as  
17 frivolous on March 13, 2017. *Id.* at 127, 131. The acting commissioner of the  
18 Washington State Supreme Court denied Petitioner's motion for discretionary  
19 review on August 11, 2017. *Id.* at 147, 150. Finally, a panel of five state supreme  
20 court justices unanimously denied Petitioner's motion to modify the

1 commissioner’s ruling on November 8, 2017. *Id.* at 2017.

2 On March 12, 2018, Petitioner submitted to this Court a Petition Under 28  
3 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody. ECF No. 1.  
4 This original habeas corpus petition was filed on March 28, 2018, when Petitioner  
5 paid the filing fee. *See* ECF No. 3. On May 22, 2018, the Court ordered Petitioner  
6 to amend the original petition to show, among other things, that it was timely. ECF  
7 No. 4 at 7–8. Petitioner filed his First Amended Petition on August 13, 2018. ECF  
8 No. 9.

9 A person in custody pursuant to a state court judgment may petition a federal  
10 court for a writ of habeas corpus “on the ground that he is in custody in violation of  
11 the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). But  
12 a federal habeas corpus petition is subject to a one-year limitation period. 28 U.S.C.  
13 § 2244(d)(1). Respondent argues the petition here was untimely. ECF No. 12 at 6–  
14 8. The Court agrees.

15 A person in custody pursuant to a state court judgment must file a petition  
16 for a writ of habeas corpus in a federal court within one year of “the date on which  
17 the judgment became final by the conclusion of direct review or the expiration of  
18 the time for seeking such review,” whichever is later. 28 U.S.C. § 2244(d)(1)(A). A  
19 state court judgment becomes “final” in one of two ways—“either by the conclusion  
20 of direct review by the highest court, including the United States Supreme Court, to

1 review the judgment, or by the expiration of the time to seek such review, again  
2 from the highest court from which such direct review could be sought.” *Wixom v.*  
3 *Washington*, 264 F.3d 894, 897 (9th Cir. 2001).

4       However, “[t]he time during which a properly filed application for State post-  
5 conviction or other collateral review with respect to the pertinent judgment or claim  
6 is pending shall not be counted toward any period of limitation under this  
7 subsection.” 28 U.S.C. § 2244(d)(2). A timely personal restraint petition is a form  
8 of “State post-conviction or other collateral review” that triggers statutory tolling.  
9 *See Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1010–11 (9th Cir. 2009); *Harris*  
10 *v. Carter*, 515 F.3d 1051, 1053 (9th Cir. 2008); *Malcom v. Payne*, 281 F.3d 951,  
11 956–57 (9th Cir. 2002). Statutory tolling continues for “all of the time during which  
12 a state prisoner is attempting, through proper use of state court procedures, to  
13 exhaust state court remedies with regard to a particular post-conviction  
14 application.” *Harris*, 515 F.3d at 1053 n.3 (quoting *Nino v. Galaza*, 183 F.3d 1003,  
15 1006 (9th Cir. 1999)). Where, as here, the Washington State Supreme Court  
16 commissioner denies review of an order dismissing a personal restraint petition,  
17 statutory tolling continues from the filing of the personal restraint petition until the  
18 Washington State Supreme Court justices deny a motion to modify the  
19 commissioner’s ruling. *Id.*

20       Here, Petitioner challenges the state trial court judgment under which he is

1 currently held in custody. That judgment became final after December 1, 2015,  
2 when the state appellate court had affirmed it, the state supreme court had denied  
3 review, and the deadline for seeking a writ of certiorari from the U.S. Supreme  
4 Court finally expired. Petitioner did not submit his original habeas corpus petition  
5 to this Court until March 12, 2018.<sup>2</sup> However, statutory tolling applied from August  
6 4, 2016 (the date Petitioner filed his personal restraint petition in the state appellate  
7 court) to November 8, 2017 (the date the state supreme court justices denied  
8 Petitioner's motion to modify the state supreme court commissioner's ruling).  
9 Outside this statutory tolling period, a total of 369 days elapsed between the date  
10 the state court judgment became final and the date Petitioner submitted his original  
11 habeas corpus petition to this Court: 246 days from December 2, 2015 to August 4,  
12 2016 and 123 days from November 9, 2017 to March 12, 2018. Because Petitioner  
13 filed this habeas corpus petition more than one year after the state trial court

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16 <sup>2</sup> The original petition was not in fact filed until Petitioner paid the filing fee on  
17 March 28, 2018. *See* ECF Nos. 1, 3. Additionally, the original petition was replaced  
18 in its entirety when Petitioner filed the First Amended Petition on August 13, 2018.  
19 *See* ECF No. 4 at 8; ECF No. 9. Nonetheless, for purposes of this Order only, the  
20 Court assumes, without deciding, that the First Amended Petition relates back to  
the date Petitioner submitted the original petition. This assumption allows the Court  
to use the deadline calculation most generous to Petitioner. *See* ECF No. 16 at 36  
(setting forth Petitioner's request to use the date he submitted the original petition  
rather than the date he filed the First Amended Petition). But even under that  
calculation, it appears beyond doubt that the original petition was time barred.

1 judgment became final, it is time barred.<sup>3</sup>

2 Relying on the Court’s May 22, 2018 Order to Amend Petition, ECF No. 4,  
3 Petitioner argues he had until April 29, 2018 to file his original petition here, ECF  
4 No. 16 at 37. But the Court’s prior order underestimated the amount of elapsed time  
5 when it declared that the original petition appeared untimely. *See* ECF No. 4 at 6.  
6 This miscalculation could not have prejudiced Petitioner because it postdated his  
7 original petition by over two months.

8 Petitioner states he “will accept the respondent’s conclusion that he is time  
9 barred on the condition that he can prove [sic]” each of Petitioner’s contentions  
10 are incorrect. ECF No. 16 at 37; *see also id.* at 37–41. But because this habeas  
11 corpus petition is time barred, the merits of the parties’ dispute will not be  
12 addressed.

13 Accordingly, **IT IS HEREBY ORDERED:**

14 **1.** Petitioner’s First Amended Petition for a writ of habeas corpus under  
15 28 U.S.C. § 2254, **ECF No. 9**, is **DENIED WITH PREJUDICE.**


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18 <sup>3</sup> Petitioner makes no attempt to establish equitable tolling, despite having the  
19 opportunity to do so. *See Waldron-Ramsey*, 556 F.3d at 1011 (“To receive equitable  
20 tolling, a petitioner bears the burden of showing ‘(1) that he has been pursuing his  
rights diligently, and (2) that some extraordinary circumstance stood in his way.’”  
(quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005))); ECF No. 4 at 7–8  
(explaining the equitable tolling standard and granting Petitioner an opportunity to  
amend the original petition to demonstrate its timeliness).

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- 2. The Clerk’s Office is directed to **ENTER JUDGMENT** in favor of Respondent.
- 3. All pending motions are **DENIED AS MOOT**.
- 4. All hearings and other deadlines are **STRICKEN**.
- 5. The Clerk’s Office is directed to **CLOSE** this file.

**IT IS SO ORDERED.** The Clerk’s Office is directed to enter this Order and provide copies to *pro se* Petitioner and Respondent’s counsel.

**DATED** this 11th day of December 2018.

  
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SALVADOR MENDEZ, JR.  
United States District Judge