

1 federal counsel was appointed.¹

2 The statute of limitations in this case began running on January 7, 2008, when
3 petitioner's writ of certiorari was denied by the United States Supreme Court. 28 U.S.C. §
4 2244(d). "The one-year clock is stopped, however, during the time the petitioner's 'properly
5 filed' application for state postconviction relief 'is pending.' § 2244(d)(2)." *Day v. McDonough*,
6 547 U.S. 198, 201 (2006). Petitioner's state habeas corpus petition, filed September 29, 2003,
7 was denied on August 26, 2009. Thus, from January 7, 2008 until August 26, 2009, the statute
8 of limitations was stopped.

9 "[T]he timeliness provision in the federal habeas corpus statute is subject to equitable
10 tolling." *Holland v. Florida*, 130 S. Ct. 2549, 2554 (2010). A federal habeas petitioner "is
11 entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently,
12 and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Id.*
13 at 2562 (internal quotation marks omitted). This determination is made "on a case-by-case
14 basis." *Id.* at 2653 (internal quotation marks omitted).

15 An indigent capital habeas petitioner has a statutory right to counsel. 18 U.S.C.
16 § 3599(a)(2). This right includes "a right to legal assistance in the preparation of a habeas
17 corpus application." *McFarland v. Scott*, 512 U.S. 849, 856 (1994). Considering the complex
18 nature of capital habeas proceedings and the seriousness of the death penalty, an attorney's
19 assistance in preparing a capital habeas petition is crucial. *Id.* at 855–856. In particular, "the
20 right to counsel necessarily includes a right for that counsel meaningfully to research and present
21 a defendant's habeas claims." *Id.* at 858. Accordingly,

22 when a condemned prisoner has requested counsel and counsel is
23 not appointed until after the deadline for filing a timely petition
24 has passed, the lack of counsel is an extraordinary circumstance
25 that stands in the prisoner's way and prevents the timely filing of a
petition that has been prepared with the assistance of counsel,
which is the petition that the prisoner has a right to file.

26 *Jablonski v. Martel*, No. 3-7-cv-3302-SI, slip op. at 2–3 (N.D. Cal. Sept. 9, 2011) (Order
27 Granting Motion for Equitable Tolling); see also, *Smith v. Ayers*, No. 3-4-cv-3436-CRB (N.D.

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¹ Because February 9, 2013 falls on a Saturday, petitioner requests tolling until Monday, February 11, 2013.

1 Cal. Jan. 8, 2009); *Stanley v. Martel*, No. 3-7-cv-4727-EMC (N.D. Cal. July 26, 2011); *Bolden v.*
2 *Martel*, No. 4-9-cv-2365-PJH (N.D. Cal. Dec. 5, 2011). Indeed, "were the Court to hold
3 otherwise, a capital habeas petitioner's right to counsel would be thoroughly eviscerated."
4 *Smith*, slip op. at 3.

5 Such is the case for petitioner. Although petitioner was entitled to counsel per the order
6 filed on January 13, 2009, the Court was unable to appoint counsel until more than three years
7 later on February 9, 2012. The absence of counsel constitutes extraordinary circumstances
8 justifying equitable tolling in this case. In addition, petitioner "has been pursuing his rights
9 diligently," *Holland*, 130 S. Ct. at 2562, as he promptly filed a request for counsel. Furthermore,
10 petitioner wrote letters to the Court, the Selection Board, and various law firms regarding his
11 need for counsel. *See* Petitioner's Exhibits 1-3. Accordingly, petitioner is entitled to equitable
12 tolling of the statute of limitations.

13 Respondent nonetheless opposes petitioner's motion, arguing that no extraordinary
14 circumstances existed to prevent the filing of the petition. As this Court has already held, lack of
15 counsel constitutes extraordinary circumstances justifying the equitable tolling of the statute of
16 limitations. Respondent argues that numerous non-capital petitioners without counsel file timely
17 petitions; unlike non-capital petitioners, however, capital petitioners have a right to counsel
18 during all stages of their habeas proceedings. 18 U.S.C. § 3599(a)(2). Petitioner is in no way
19 responsible for the delay in appointment of the counsel to which he is entitled by statute; as such,
20 he has demonstrated extraordinary circumstances justifying equitable tolling.

21 Respondent also maintains that petitioner has already filed a "finalized petition," since he
22 filed a protective petition on August 26, 2010. This petition, although filed by petitioner *in*
23 *propria persona*, was filed with the assistance of state appellate counsel Richard Targow, who
24 was not at that time (and is not currently) petitioner's appointed counsel for his federal habeas
25 proceedings.²

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28 ² Mr. Targow confirmed in his verification to the protective petition that while he was assisting petitioner, federal counsel had not been appointed and he (Mr. Targow) was not available to represent petitioner in his federal court proceedings. Petition for Writ of Habeas Corpus at 88, Verification.

1 Protective petitions are authorized under *Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005).
 2 Recognizing that there was often substantial delay between the conclusion of direct review and
 3 the conclusion of state habeas remedies, the United States Supreme Court in *Pace* instructed
 4 habeas petitioners to first file a “protective petition” in federal court within one year of the
 5 conclusion of direct review, and subsequently move the federal court “to stay and abey the
 6 federal habeas proceedings until state (habeas) remedies are exhausted.” *Pace*, 544 U.S. at 416.

7 Accordingly, the fact that petitioner filed a protective petition while he was
 8 unrepresented has no bearing on whether or not he is entitled to equitable tolling in order to file
 9 his finalized petition. Respondent cites to no caselaw holding otherwise. Petitioner was diligent
 10 in pursuing his rights, and has also demonstrated extraordinary circumstances that prevented the
 11 filing of his finalized petition.³ *Holland*, 130 S. Ct. at 2562.

12 Having determined that petitioner is entitled to equitable tolling, it remains for the Court
 13 to determine the length of the tolling period. The Supreme Court has confirmed that the length
 14 of the tolling period is to be made "on a case-by-case basis." *Holland*, 130 S. Ct. at 2563. It is
 15 undisputed both that petitioner has a statutory right to counsel to prepare his federal habeas
 16 petition and that federal habeas counsel was not appointed until February 9, 2012. Furthermore,
 17 a review of the voluminous record demonstrates that this matter is complex. Therefore, the
 18 Court finds that petitioner is entitled to one year from counsel’s appointment to prepare and to
 19 amend the finalized petition as necessary.

20 Accordingly, and good cause therefor appearing, the Court GRANTS petitioner’s motion
 21 for equitable tolling, and extends the tolling period for one year following the date counsel was
 22 appointed. Thus, petitioner must file his finalized petition on or before February 11, 2013.

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 24 **IT IS SO ORDERED.**

25 DATED: August 20, 2012

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 27 _____
 WILLIAM ALSUP
 UNITED STATES DISTRICT JUDGE

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³ Under our local rules applying to capital habeas proceedings, “[t]he term ‘finalized petition’ shall refer to the petition filed by retained or appointed counsel. . . .” Habeas L.R. 2254-28(a).