

SEP 27 2011

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JERRY PENA,

Petitioner - Appellant,

v.

MICHAEL MARTEL; CALIFORNIA
DEPARTMENT OF CORRECTIONS
AND REHABILITATION; A.
HEDGPETH; KERN VALLEY STATE
PRISON,

Respondents - Appellees.

No. 10-16133

D.C. No. 2:08-cv-01740-LKK-
CMK

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding

Argued and Submitted September 1, 2011
San Francisco, California

*This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Before: FISHER and RAWLINSON, Circuit Judges, and MILLS, District Judge.**

Jerry Pena appeals the judgment of the district court dismissing his 28 U.S.C. § 2254 habeas petition as untimely. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

We assume that Pena’s third state habeas petition was filed in the California Supreme Court on December 12, 2007, in accordance with the prison mailbox rule. That date is consistent with the proof of service, the legal mail log and the position taken by the state in the district court.

We nonetheless conclude that Pena is not entitled to statutory tolling for the interval between the California Court of Appeal’s denial of his second habeas petition and his filing of the third petition in the state supreme court. *See* 28 U.S.C. § 2244(d)(2). Pena’s filing delay was “substantially longer than the ‘30 to 60 days’ that ‘most States’ allow for filing petitions.” *Chaffer v. Prosper*, 592 F.3d 1046, 1048 (9th Cir. 2010) (per curiam) (quoting *Evans v. Chavis*, 546 U.S. 189, 201 (2006)); *see also Velasquez v. Kirkland*, 639 F.3d 964, 968 (9th Cir. 2011) (holding that an 81-day delay was “far longer than the Supreme Court’s thirty-to-sixty-day benchmark for California’s ‘reasonable time’ requirement”).

**The Honorable Richard Mills, Senior United States District Judge for the Central District of Illinois, sitting by designation.

Pena was therefore required to offer an adequate explanation for his delay, but he has not done so. *See Velasquez*, 639 F.3d at 968; *Chaffer*, 592 F.3d at 1048.

Although Pena added a table of contents and a table of authorities to his petition, he does not explain why he could not have accomplished those quite minor modifications within a reasonable time. His federal petition was therefore untimely filed. *See* 28 U.S.C. § 2244(d)(1).

AFFIRMED.