



1 an answer to the petition has been filed. Herbst v. Cook, 260 F.3d 1039 (9<sup>th</sup> Cir.2001).

2 The Ninth Circuit, in Herbst v. Cook, concluded that a district court may dismiss *sua sponte* a  
3 habeas petition on statute of limitations grounds so long as the court provides the petitioner adequate  
4 notice of its intent to dismiss and an opportunity to respond. 260 F.3d at 1041-42. By issuing the  
5 Order to Show Cause, the Court afforded Petitioner the notice required by the Ninth Circuit in Herbst.

6 B. Limitation Period For Filing Petition For Writ Of Habeas Corpus

7 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of  
8 1996 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas corpus  
9 filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997);  
10 Jeffries v. Wood, 114 F.3d 1484, 1499 (9<sup>th</sup> Cir. 1997) (en banc), *cert. denied*, 118 S.Ct. 586 (1997).  
11 The instant petition was filed on December 1, 2015<sup>1</sup>, and thus, it is subject to the provisions of the  
12 AEDPA.

13 The AEDPA imposes a one-year period of limitation on petitioners seeking to file a federal  
14 petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As amended, § 2244, subdivision (d)  
15 reads:

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

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

21 (B) the date on which the impediment to filing an application created by  
22 State action in violation of the Constitution or laws of the United States is

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23 <sup>1</sup> In Houston v. Lack, the United States Supreme Court held that a pro se habeas petitioner’s notice of appeal is deemed  
24 filed on the date of its submission to prison authorities for mailing, as opposed to the actual date of its receipt by the court  
25 clerk. Houston v. Lack, 487 U.S. 166, 276, 108 S.Ct. 2379, 2385 (1988). The rule is premised on the pro se prisoner’s  
26 mailing of legal documents through the conduit of “prison authorities whom he cannot control and whose interests might  
27 be adverse to his.” Miller v. Sumner, 921 F.2d 202, 203 (9<sup>th</sup> Cir. 1990); see Houston, 487 U.S. at 271. The Ninth Circuit  
28 has applied the “mailbox rule” to state and federal petitions in order to calculate the tolling provisions of the AEDPA.  
Saffold v. Neland, 250 F.3d 1262, 1268-1269 (9<sup>th</sup> Cir. 2000); Stillman v. LaMarque, 319 F.3d 1199, 1201 (9<sup>th</sup> Cir. 2003).  
The date the petition is signed may be considered the earliest possible date an inmate could submit his petition to prison  
authorities for filing under the mailbox rule. Jenkins v. Johnson, 330 F.3d 1146, 1149 n. 2 (9<sup>th</sup> Cir. 2003). Accordingly,  
for all of Petitioner’s state petitions and for the instant federal petition, the Court will consider the date of signing of the  
petition (or the date of signing of the proof of service if no signature appears on the petition) as the earliest possible filing  
date and the operative date of filing under the mailbox rule for calculating the running of the statute of limitation.  
Petitioner signed the instant petition on December 1, 2015. (Doc. 1, p. 15).

1 removed, if the applicant was prevented from filing by such State action;

2 (C) the date on which the constitutional right asserted was initially  
3 recognized by the Supreme Court, if the right has been newly recognized by  
4 the Supreme Court and made retroactively applicable to cases on collateral  
5 review; or

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

8 (2) The time during which a properly filed application for State post-conviction or  
9 other collateral review with respect to the pertinent judgment or claim is pending  
10 shall not be counted toward any period of limitation under this subsection.

11 28 U.S.C. § 2244(d).

12 In most cases, the limitation period begins running on the date that the petitioner's direct  
13 review became final. Here, the Petitioner was convicted on October 23, 2007 and sentenced on  
14 November 28, 2007. (Doc. 1, p. 1). Although Petitioner alleges in the petition that he did not file an  
15 appeal from his conviction, the Court's own research has indicated that he filed an appeal in the  
16 California Court of Appeal, Fifth Appellate District ("5<sup>th</sup> DCA") that was denied on January 13, 2009.

17 It does not appear that Petitioner filed a petition for review in the California Supreme Court.  
18 According to the California Rules of Court, a decision of the Court of Appeal becomes final thirty  
19 days after filing of the opinion, Cal. Rules of Court, Rule 8.264(b)(1), and an appeal must be taken to  
20 the California Supreme Court within ten days of finality. Cal. Rules of Court, Rule 8.500(e)(1). Thus,  
21 Petitioner's conviction would become final forty days after the Court of Appeal's decision was filed,  
22 or on February 22, 2009. Petitioner would then have one year from the following day, February 23,  
23 2009, or until February 22, 2010, absent applicable tolling, within which to file his federal petition for  
24 writ of habeas corpus.

25 As mentioned, the instant petition was filed on December 1, 2015, almost five years after the  
26 date the one-year period would have expired. Thus, unless Petitioner is entitled to either statutory or  
27 equitable tolling, the instant petition is untimely and should be dismissed.

28 C. Tolling of the Limitation Period Pursuant to 28 U.S.C. § 2244(d)(2)

Under the AEDPA, the statute of limitations is tolled during the time that a properly filed

1 application for state post-conviction or other collateral review is pending in state court. 28 U.S.C. §  
2 2244(d)(2). A properly filed application is one that complies with the applicable laws and rules  
3 governing filings, including the form of the application and time limitations. Artuz v. Bennett, 531  
4 U.S. 4, 8 (2000). An application is pending during the time that ‘a California petitioner completes a  
5 full round of [state] collateral review,” so long as there is no unreasonable delay in the intervals  
6 between a lower court decision and the filing of a petition in a higher court. Delhomme v. Ramirez,  
7 340 F. 3d 817, 819 (9th Cir. 2003), abrogated on other grounds as recognized by Waldrip v. Hall, 548  
8 F. 3d 729 (9th Cir. 2008)(per curium)(internal quotation marks and citations omitted); see Evans v.  
9 Chavis, 546 U.S. 189, 193-194 (2006); see Carey v. Saffold, 536 U.S. 214, 220, 222-226 (2002); see  
10 also, Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999).

11         Nevertheless, there are circumstances and periods of time when no statutory tolling is allowed.  
12 For example, no statutory tolling is allowed for the period of time between finality of an appeal and  
13 the filing of an application for post-conviction or other collateral review in state court, because no  
14 state court application is “pending” during that time. Nino, 183 F.3d at 1006-1007; Raspberry v.  
15 Garcia, 448 F.3d 1150, 1153 n. 1 (9<sup>th</sup> Cir. 2006). Similarly, no statutory tolling is allowed for the  
16 period between finality of an appeal and the filing of a federal petition. Id. at 1007. In addition, the  
17 limitation period is not tolled during the time that a federal habeas petition is pending. Duncan v.  
18 Walker, 563 U.S. 167, 181-182 (2001); see also, Fail v. Hubbard, 315 F. 3d 1059, 1060 (9th Cir.  
19 2001)(as amended on December 16, 2002). Further, a petitioner is not entitled to statutory tolling  
20 where the limitation period has already run prior to filing a state habeas petition. Ferguson v.  
21 Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (“section 2244(d) does not permit the reinitiation of the  
22 limitations period that has ended before the state petition was filed.”); Jiminez v. White, 276 F. 3d  
23 478, 482 (9th Cir. 2001). Finally, a petitioner is not entitled to continuous tolling when the  
24 petitioner’s later petition raises unrelated claims. See Gaston v. Palmer, 447 F.3d 1165, 1166 (9th Cir.  
25 2006).

26         Here, Petitioner alleges that he filed the following state habeas petitions: (1) petition filed in  
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1 the Superior Court of Tulare County on December 15, 2014, and denied on December 30, 2014;<sup>2</sup> (2)  
2 petition filed in the 5<sup>th</sup> DCA on January 26, 2015, and denied on February 27, 2015; and (3) filed in  
3 the California Supreme Court on May 22, 2015 and denied on September 9, 2015.<sup>3</sup> Additionally, the  
4 Court has determined that Petitioner filed a habeas petition in the 5<sup>th</sup> DCA on September 14, 2010 that  
5 was denied on September 21, 2010, challenging the restitution fine imposed by the trial court. As  
6 well, Petitioner filed a petition in the California Supreme Court on January 3, 2011 that was denied on  
7 June 15, 2011. No information was available on the latter petition.

8 None of the foregoing petitions, however, afford Petitioner any statutory tolling under the  
9 AEDPA. A petitioner is not entitled to tolling where the limitations period has already run prior to  
10 filing a state habeas petition. Green v. White, 223 F.3d 1001, 1003 (9<sup>th</sup> Cir. 2000); Jiminez v. Rice,  
11 276 F.3d 478 (9<sup>th</sup> Cir. 2001); see Webster v. Moore, 199 F.3d 1256, 1259 (11<sup>th</sup> Cir. 2000)(same);  
12 Ferguson v. Palmateer, 321 F.3d 820 (9<sup>th</sup> Cir. 2003)(“section 2244(d) does not permit the reinitiation  
13 of the limitations period that has ended before the state petition was filed.”); Jackson v. Dormire, 180  
14 F.3d 919, 920 (8<sup>th</sup> Cir. 1999) (petitioner fails to exhaust claims raised in state habeas corpus filed after  
15 expiration of the one-year limitations period). Here, as mentioned, the limitations period expired on  
16 February 22, 2010, approximately seven months *before* Petitioner filed his first state habeas petition  
17 on September 14, 2010. Accordingly, he cannot avail himself of the statutory tolling provisions of the  
18 AEDPA.

19 D. Equitable Tolling.

20 The running of the one-year limitation period under 28 U.S.C. § 2244(d) is subject to equitable  
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22 <sup>2</sup> In computing the running of the statute of limitations, the day an order or judgment becomes final is excluded and time  
23 begins to run on the day after the judgment becomes final. See Patterson v. Stewart, 251 F.3d 1243, 1247 (9<sup>th</sup> Cir. 2001)  
(Citing Rule 6 of the Federal Rules of Civil Procedure).

24 <sup>3</sup> Petitioner did not include the specific dates of some of his filings and denials, so the Court has accessed the California  
25 court system’s electronic database to complete the chronology. The court may take notice of facts that are capable of  
26 accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid.  
27 201(b); United States v. Bernal-Obeso, 989 F.2d 331, 333 (9<sup>th</sup> Cir. 1993). The record of state court proceeding is a source  
28 whose accuracy cannot reasonably be questioned, and judicial notice may be taken of court records. Mullis v. United States  
Bank. Ct., 828 F.2d 1385, 1388 n.9 (9<sup>th</sup> Cir. 1987); Valerio v. Boise Cascade Corp., 80 F.R.D. 626, 635 n. 1  
(N.D.Cal.1978), *aff’d*, 645 F.2d 699 (9<sup>th</sup> Cir.); see also Colonial Penn Ins. Co. v. Coil, 887 F.2d 1236, 1239 (4<sup>th</sup> Cir.  
1989); Rodic v. Thistledown Racing Club, Inc., 615 F.2d 736, 738 (6<sup>th</sup> Cir. 1980). As such, the internet website for the  
California Courts, containing the court system’s records for filings in the Court of Appeal and the California Supreme  
Court are subject to judicial notice.

1 tolling in appropriate cases. See Holland v. Florida, 560 U.S. 631, 651-652 (2010); Calderon v. United  
2 States Dist. Ct., 128 F.3d 1283, 1289 (9<sup>th</sup> Cir. 1997). The limitation period is subject to equitable  
3 tolling when “extraordinary circumstances beyond a prisoner’s control make it impossible to file the  
4 petition on time.” Shannon v. Newland, 410 F. 3d 1083, 1089-1090 (9th Cir. 2005)(internal quotation  
5 marks and citations omitted). “When external forces, rather than a petitioner’s lack of diligence,  
6 account for the failure to file a timely claim, equitable tolling of the statute of limitations may be  
7 appropriate.” Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999). “Generally, a litigant seeking  
8 equitable tolling bears the burden of establishing two elements: “(1) that he has been pursuing his  
9 rights diligently, and (2) that some extraordinary circumstance stood in his way.” Holland, 560 U.S.  
10 at 651-652; Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005). “[T]he threshold necessary to trigger  
11 equitable tolling under AEDPA is very high, lest the exceptions swallow the rule.” Miranda v. Castro,  
12 292 F. 3d 1062, 1066 (9th Cir. 2002)(citation omitted). As a consequence, “equitable tolling is  
13 unavailable in most cases.” Miles, 187 F. 3d at 1107.

14 Here, Petitioner has made no express claim of entitlement to equitable tolling and, based on the  
15 record now before the Court, the Court sees no basis for such a claim. Accordingly, the Court  
16 concludes that Petitioner is not entitled to equitable tolling and, thus, the petition is untimely and  
17 should be dismissed.

### 18 ORDER

19 For the foregoing reasons, the Court HEREBY DIRECTS the Clerk of the Court to assign a  
20 United States District Judge to this case.

### 21 RECOMMENDATION

22 Accordingly, the Court HEREBY RECOMMENDS that the habeas corpus petition be  
23 **DISMISSED** for Petitioner’s failure to comply with 28 U.S.C. § 2244(d)’s one-year limitation period.

24 This Findings and Recommendation is submitted to the United States District Court Judge  
25 assigned to this case, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304 of the  
26 Local Rules of Practice for the United States District Court, Eastern District of California.

27 **Within 21 days** after being served with a copy, any party may file written objections with the court  
28 and serve a copy on all parties. Such a document should be captioned “Objections to Magistrate

1 Judge's Findings and Recommendation." Replies to the objections shall be served and **filed within 10**  
2 **court days** (plus three days if served by mail) after service of the objections. The Court will then  
3 review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised  
4 that failure to file objections within the specified time may waive the right to appeal the District  
5 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9<sup>th</sup> Cir. 1991).

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7 IT IS SO ORDERED.

8 Dated: March 3, 2016

/s/ Jennifer L. Thurston  
UNITED STATES MAGISTRATE JUDGE