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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

<p>JEROME LEE CROSS,</p> <p style="padding-left: 40px;">Petitioner,</p> <p style="padding-left: 80px;">v.</p> <p>WARDEN,</p> <p style="padding-left: 40px;">Respondent.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Case No.: 1:16-cv-00112-JLT</p> <p>FINDINGS AND RECOMMENDATIONS TO DISMISS PETITION FOR VIOLATION OF THE ONE-YEAR STATUTE OF LIMITATIONS</p> <p>ORDER DIRECTING THAT OBJECTIONS BE FILED WITHIN TWENTY-ONE DAYS</p> <p>ORDER DIRECTING CLERK OF THE COURT TO ASSIGN DISTRICT JUDGE TO CASE</p>
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On January 29, 2016, issued an Order to Show Cause why the petition should not be dismissed as untimely. (Doc. 4). The order provided that a response should be filed within thirty days. To date, Petitioner has not responded to the Court’s Order to Show Cause. Because the Court finds the petition was not timely filed, it recommends it be **DISMISSED**.

I. DISCUSSION

A. Preliminary Review of Petition.

Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition if it “plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court” Rule 4 of the Rules Governing Section 2254 Cases. The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of habeas corpus, either on its own motion under Rule 4, pursuant to the respondent’s motion to dismiss, or after

1 an answer to the petition has been filed. Herbst v. Cook, 260 F.3d 1039 (9th 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, (1997); Jeffries v. Wood, 114
10 F.3d 1484, 1499 (9th Cir. 1997) (en banc), *cert. denied*, 118 S.Ct. 586 (1997). The instant petition was
11 filed on January 21, 2016¹, and thus, it is subject to the provisions of the AEDPA.

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

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

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

19 (B) the date on which the impediment to filing an application created by
20 State action in violation of the Constitution or laws of the United States is
removed, if the applicant was prevented from filing by such State action;

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23 ¹ 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 (9th 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 (9th Cir. 2000); Stillman v. LaMarque, 319 F.3d 1199, 1201 (9th 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 (9th 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 January 21, 2016. (Doc. 1, p. 9).

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

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

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

10 28 U.S.C. § 2244(d).

11 In most cases, the limitation period begins running on the date that the petitioner's direct
12 review became final. Here, the Petitioner was convicted in 2009 in Kings County Superior Court of
13 stalking, making criminal threats, and threatening a public official. (Doc. 1, p. 1). He was sentenced
14 in two separate cases to a total of six years, four months in prison. (*Id.*). It appears that Petitioner
15 filed his direct appeal in the California Court of Appeal, Fifth Appellate District ("5th DCA") on June
16 10, 2009 and the appellate court denied his appeal on March 2, 2010. The remittitur issued on May 3,
17 2010.

18 Petitioner did not file a petition for review. According to the California Rules of Court, a
19 decision of the Court of Appeal becomes final thirty days after filing of the opinion, Cal. Rules of
20 Court, Rule 8.264(b)(1), and an appeal must be taken to the California Supreme Court within ten days
21 of finality. Cal. Rules of Court, Rule 8.500(e)(1). Thus, Petitioner's conviction would become final
22 forty days after the Court of Appeal's decision was filed, or on April 11, 2010. Petitioner would then
23 have one year from the following day, April 12, 2010, or until April 11, 2011, absent applicable
24 tolling, within which to file his federal petition for writ of habeas corpus.

25 As mentioned, the instant petition was filed on January 21, 2016, 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, 121 S. Ct. 361 (2000). An application is pending during the time that ‘a California
5 petitioner completes a full round of [state] collateral review,’ so long as there is no unreasonable delay
6 in the intervals between a lower court decision and the filing of a petition in a higher court.
7 Delhomme v. Ramirez, 340 F. 3d 817, 819 (9th Cir. 2003), abrogated on other grounds as recognized
8 by Waldrip v. Hall, 548 F. 3d 729 (9th Cir. 2008)(per curium)(internal quotation marks and citations
9 omitted); see Evans v. Chavis, 546 U.S. 189, 193-194, 126 S. Ct. 846 (2006); see Carey v. Saffold,
10 536 U.S. 214, 220, 222-226, 122 S. Ct. 2134 (2002); see also, Nino v. Galaza, 183 F.3d 1003, 1006
11 (9th Cir. 1999).

12 Nevertheless, there are circumstances and periods of time when no statutory tolling is allowed.
13 For example, no statutory tolling is allowed for the period of time between finality of an appeal and
14 the filing of an application for post-conviction or other collateral review in state court, because no
15 state court application is “pending” during that time. Nino, 183 F.3d at 1006-1007; Raspberry v.
16 Garcia, 448 F.3d 1150, 1153 n. 1 (9th Cir. 2006). Similarly, no statutory tolling is allowed for the
17 period between finality of an appeal and the filing of a federal petition. Id. at 1007. In addition, the
18 limitation period is not tolled during the time that a federal habeas petition is pending. Duncan v.
19 Walker, 563 U.S. 167, 181-182, 121 S.Ct. 2120 (2001); see also, Fail v. Hubbard, 315 F. 3d 1059,
20 1060 (9th Cir. 2001)(as amended on December 16, 2002). Further, a petitioner is not entitled to
21 statutory tolling where the limitation period has already run prior to filing a state habeas petition.
22 Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (“section 2244(d) does not permit the
23 reinitiation of the limitations period that has ended before the state petition was filed.”); Jiminez v.
24 White, 276 F. 3d 478, 482 (9th Cir. 2001). Finally, a petitioner is not entitled to continuous tolling
25 when the petitioner’s later petition raises unrelated claims. See Gaston v. Palmer, 447 F.3d 1165,
26 1166 (9th Cir. 2006).

27 Here, Petitioner alleges that he filed the following state habeas petitions: (1) petition filed in
28 the California Supreme Court on November 30, 2015, and denied on January 13, 2016. The Court has

1 accessed the California state courts official website to complete the chronology. In so doing, the Court
2 has determined that Petitioner filed the following additional state habeas petitions: (1) petition filed in
3 the California Supreme Court on July 12, 2010 and denied on February 16, 2011; (2) petition filed in
4 the 5th DCA on April 16, 2015 and denied on May 19, 2015; (3) petition filed in the 5th DCA on July
5 21, 2015 and denied on August 12, 2015; and (4) two petitions filed in the 5th DCA on July 24, 2015,
6 and denied on August 14, 2015.²

7 As mentioned, the limitation period commenced on April 12, 2010, and would have continued
8 to run until tolled when Petitioner filed his first state habeas petition on July 12, 2010, a period of 91
9 days, leaving Petitioner with 274 days remaining on his one-year period. The limitation period would
10 have started to run again when the first state petition was denied on February 16, 2011, and would
11 have continued to run unabated until it expired 274 days later, i.e., on November 17, 2011. Petitioner
12 did not file his second state habeas petition until April 16, 2015; however, by that point, the limitation
13 period had been expired for over three years.

14 A petitioner is not entitled to tolling where the limitations period has already run prior to filing
15 a state habeas petition. Green v. White, 223 F.3d 1001, 1003 (9th Cir. 2000); Jiminez v. Rice, 276
16 F.3d 478 (9th Cir. 2001); see Webster v. Moore, 199 F.3d 1256, 1259 (11th Cir. 2000)(same);
17 Ferguson v. Palmateer, 321 F.3d 820 (9th Cir. 2003)(“section 2244(d) does not permit the reinitiation
18 of the limitations period that has ended before the state petition was filed.”); Jackson v. Dormire, 180
19 F.3d 919, 920 (8th Cir. 1999) (petitioner fails to exhaust claims raised in state habeas corpus filed after
20 expiration of the one-year limitations period). Here, as mentioned, the limitations period expired on
21 November 17, 2011, approximately 3 years and five months *before* Petitioner filed his next state
22 habeas petition. Accordingly, he cannot avail himself of the statutory tolling provisions of the AEDPA
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25 ² The court may take notice of facts that are capable of accurate and ready determination by resort to sources whose
26 accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b); United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th
27 Cir. 1993). The record of state court proceeding is a source whose accuracy cannot reasonably be questioned, and judicial
28 notice may be taken of court records. Mullis v. United States Bank. Ct., 828 F.2d 1385, 1388 n.9 (9th 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 (9th Cir.); see also Colonial Penn Ins.
Co. v. Coil, 887 F.2d 1236, 1239 (4th Cir. 1989); Rodic v. Thistledown Racing Club, Inc., 615 F.2d 736, 738 (6th. 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 for those petitions filed after November 17, 2011. Thus, unless Petitioner is entitled to some form of
2 equitable tolling, the petition is untimely and should be dismissed.

3 D. Equitable Tolling.

4 The running of the one-year limitation period under 28 U.S.C. § 2244(d) is subject to equitable
5 tolling in appropriate cases. See Holland v. Florida, 560 U.S. 631, 651-652, 130 S.Ct. 2549, 2561
6 (2010); Calderon v. United States Dist. Ct., 128 F.3d 1283, 1289 (9th Cir. 1997). The limitation period
7 is subject to equitable tolling when “extraordinary circumstances beyond a prisoner’s control make it
8 impossible to file the petition on time.” Shannon v. Newland, 410 F. 3d 1083, 1089-1090 (9th Cir.
9 2005)(internal quotation marks and citations omitted). “When external forces, rather than a
10 petitioner’s lack of diligence, account for the failure to file a timely claim, equitable tolling of the
11 statute of limitations may be appropriate.” Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999).
12 “Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: “(1) that
13 he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his
14 way.” Holland, 560 U.S. at 651-652; Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807
15 (2005). “[T]he threshold necessary to trigger equitable tolling under AEDPA is very high, lest the
16 exceptions swallow the rule.” Miranda v. Castro, 292 F. 3d 1062, 1066 (9th Cir. 2002)(citation
17 omitted). As a consequence, “equitable tolling is unavailable in most cases.” Miles, 187 F. 3d at
18 1107.

19 Here, Petitioner has made no express claim of entitlement to equitable tolling and, based on the
20 record now before the Court, the Court sees no basis for such a claim. Accordingly, the Court will
21 recommend that the petition be dismissed as untimely.

22 **ORDER**

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

25 **RECOMMENDATION**

26 Accordingly, the Court RECOMMENDS that the habeas corpus petition be **DISMISSED** for
27 violating the one-year statute of limitations.

28 This Findings and Recommendation is submitted to the United States District Court Judge

1 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the
2 Local Rules of Practice for the United States District Court, Eastern District of California. **Within 21**
3 **days** after being served with a copy, any party may file written objections with the court and serve a
4 copy on all parties. Such a document should be captioned “Objections to Magistrate Judge’s Findings
5 and Recommendation.” Replies to the objections shall be served and filed **within 10 days** (plus three
6 days if served by mail) after service of the objections. The Court will then review the Magistrate
7 Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to file
8 objections within the specified time may waive the right to appeal the District Court’s order. Martinez
9 v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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11 IT IS SO ORDERED.

12 Dated: March 3, 2016

/s/ Jennifer L. Thurston
13 UNITED STATES MAGISTRATE JUDGE
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