

1 denied both on the same day, November 18, 2010. (Id. at 3, 4.)
2 Petitioner did not file a petition for review in the California
3 Supreme Court. (Id. at 3.) Instead, on February 18, 2011,² he
4 filed a habeas petition in that court, which was denied on July
5 27, 2011. (Id. at 4.) The four claims Petitioner raises in his
6 federal Petition appear to correspond to the four claims he
7 apparently raised in his state supreme court habeas petition.
8 (Id. at 4, 5-6.)

9 Under the Antiterrorism and Effective Death Penalty Act of
10 1996 ("AEDPA"), Petitioner had one year from the date his
11 conviction became final in which to file a federal habeas
12 petition. See 28 U.S.C. § 2244(d). That statute provides:

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

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

20 (B) the date on which the impediment to
21 filing an application created by State action in
22 violation of the Constitution or laws of the United
23 States is removed, if the applicant was prevented
24

25 ²The California Appellate Courts' Case Information website
26 indicates that this petition was filed on February 18, 2011,
27 whereas Petitioner states that it was filed on February 3, 2011
28 (see Pet. at 4). As explained below, even using Petitioner's date,
his federal Petition would still be untimely by approximately a
month.

1 from filing by such State action;

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

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

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

16 Because Petitioner did not file a petition for review in the
17 California Supreme Court, his conviction became final 40 days
18 after the court of appeal's joint ruling on his direct appeal and
19 his habeas petition in that court, see Waldrip v. Hall, 548 F.3d
20 729, 735 (9th Cir. 2008) - in other words, on December 28, 2010.
21 Thus, absent some kind of tolling, Petitioner had until December
22 28, 2011, to file his federal Petition. He did not file it until
23 July 25, 2012, seemingly more than a half year late.

24 From the face of the Petition, Petitioner does not appear to
25 be entitled to a later trigger date under § 2244(d)(1)(B).

26 Petitioner is not contending that he was impeded from filing his
27 federal Petition by unconstitutional state action. Nor does it
28 appear that Petitioner is entitled to a later trigger date under

1 § 2244(d)(1)(C). Petitioner is not contending that any of his
2 claims are based on a federal constitutional right that was
3 initially recognized by the U.S. Supreme Court subsequent to the
4 date his conviction became final and that has been made
5 retroactively applicable to cases on collateral review. Finally,
6 Petitioner does not appear to be entitled to a later trigger date
7 under § 2244(d)(1)(D). Petitioner was aware of the underlying
8 factual and legal predicates of his claims since before his
9 conviction became final, given that he raised them on direct
10 appeal. (See Pet. at 2-3.)


11 Petitioner appears to be entitled to statutory tolling under
12 § 2244(d)(2) for the period during which his state supreme court
13 petition was pending, from February 18 to July 27, 2011. He does
14 not appear to be entitled to any gap tolling, however, for the
15 period between the denial of his California Court of Appeal
16 habeas petition, on November 18, 2010, and his filing of a habeas
17 petition in the California Supreme Court, on February 3 or 18,
18 2011, because that 76- or 91-day period substantially exceeds the
19 30 to 60 days the U.S. Supreme Court has identified as
20 "reasonable," see Velasquez v. Kirkland, 639 F.3d 964, 967 (9th
21 Cir. 2011) (citing Evans v. Chavis, 546 U.S. 189, 192-93, 126 S.
22 Ct. 846, 849-50, 163 L. Ed. 2d 684 (2006)), and Petitioner has
23 not offered any explanation for why he did not file his supreme
24 court petition within the "reasonable" period, see Evans, 546
25 U.S. at 201 ("unjustified or unexplained" unusual delays not
26 reasonable). So, even with statutory tolling for the pendency of
27 the supreme court petition, Petitioner's federal Petition was
28 still approximately a month late.

1 Under certain circumstances, a habeas petitioner may be
2 entitled to equitable tolling. See Holland v. Florida, 560 U.S.
3 ___, 130 S. Ct. 2549, 2560, 177 L. Ed. 2d 130 (2010). But he must
4 show that (1) he has been pursuing his rights diligently and (2)
5 "some extraordinary circumstance stood in his way." See Pace v.
6 DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807, 1814, 161 L. Ed.
7 2d 669 (2005). Here, Petitioner has not purported to make any
8 such showing.

9 A district court has the authority to raise the statute of
10 limitations issue sua sponte when untimeliness is obvious on the
11 face of a petition; it may summarily dismiss the petition on that
12 ground pursuant to Rule 4 of the Rules Governing § 2254 Cases in
13 the U.S. District Courts, as long as the court gives petitioner
14 adequate notice and an opportunity to respond. Herbst v. Cook,
15 260 F.3d 1039, 1042-43 (9th Cir. 2001).

16 IT THEREFORE IS ORDERED that on or before September 3, 2012,
17 Petitioner should show cause in writing, if he has any, why the
18 Court should not recommend that this action be dismissed with
19 prejudice on the ground of untimeliness. If Petitioner intends
20 to rely on the equitable tolling doctrine, he will need to
21 include with his response to the Order to Show Cause a
22 declaration under penalty of perjury stating facts showing that
23 (1) he has been pursuing his rights diligently and (2) "some
24 extraordinary circumstance stood in his way."

25
26
27 DATED: August 6, 2012



JEAN ROSENBLUTH
U.S. MAGISTRATE JUDGE