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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANGEL HERNANDEZ,
Petitioner,
v.
PAUL D. BRAZELTON, Warden,
Respondent.

NO. CV 12-8716-GW (AGR)

ORDER TO SHOW CAUSE

On October 11, 2012, Petitioner, who is represented, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. For the reasons discussed below, it appears the one-year statute of limitations has expired.

The court, therefore, orders Petitioner to show cause, on or before **November 13, 2012**, why the court should not recommend dismissal of the petition with prejudice based on expiration of the one-year statute of limitations.

1 I.

2 **PROCEDURAL BACKGROUND**

3 On June 20, 2008, a Los Angeles County jury convicted Petitioner of
4 various crimes. (Petition at 2.) On August 13, 2008, the court sentenced
5 Petitioner to 63 years in prison. (*Id.*) On November 17, 2009, the California
6 Court of Appeal affirmed the conviction. (*Id.* at 3.) On February 3, 2010, the
7 California Supreme Court denied review. (*Id.*, Attachment 4.)

8 On March 1, 2011, Petitioner filed a habeas petition in the Superior Court,
9 which was denied on March 24, 2011. (*Id.* at 3-4.) On August 4, 2011, Petitioner
10 filed a habeas petition in the California Court of Appeal, which was denied on
11 August 15, 2011. (*Id.*) On October 25, 2011, Petitioner filed an application to
12 recall the remittitur in his direct appeal; the application was denied on November
13 28, 2011. (*Id.* at 4-5.)

14 On October 11, 2012, Petitioner filed the instant petition in this court in
15 which he raises two grounds, both alleging his constitutional rights were violated
16 by the erroneous admission of evidence. (*Id.* at 5 & Attachment 8.)

17 II.

18 **STATUTE OF LIMITATIONS**

19 The petition was filed after enactment of the Antiterrorism and Effective
20 Death Penalty Act of 1996 (“AEDPA”). Therefore, the court applies the AEDPA in
21 reviewing the petition. *Lindh v. Murphy*, 521 U.S. 320, 336, 117 S. Ct. 2059, 138
22 L. Ed. 2d 481 (1997).

23 The AEDPA contains a one-year statute of limitations for a petition for writ
24 of habeas corpus filed in federal court by a person in custody pursuant to a
25 judgment of a state court. 28 U.S.C. § 2244(d)(1). The one-year period starts
26 running on the latest of either the date when a conviction becomes final under 28
27 U.S.C. § 2244(d)(1)(A) or on a date set in § 2244(d)(1)(B)-(D). Only subdivision
28 (d)(1)(A) is relevant in Petitioner’s case.

1 The California Supreme Court denied review on direct appeal on February
2 3, 2010. Petitioner's conviction became final 90 days later on May 4, 2010. See
3 *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999). Absent tolling, the statute of
4 limitations expired on May 4, 2011.

5 **A. Statutory Tolling**

6 The statute of limitations is tolled during the time "a properly filed
7 application for State post-conviction or other collateral review with respect to the
8 pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2).

9 The clock began to run on May 4, 2010, when Petitioner's conviction
10 became final. Petitioner filed his first state habeas petition on March 1, 2011, at
11 which point 301 days of the limitations period had elapsed. Assuming without
12 deciding that Petitioner is entitled to statutory tolling from March 1, 2011, when he
13 filed his first state habeas petition, to November 28, 2011, when the application to
14 recall the remittitur was denied,¹ Petitioner had 64 days remaining in the
15 limitations period to file here, meaning the limitations period expired on January
16 31, 2012. Absent equitable tolling, the petition is time-barred.

17 **B. Equitable Tolling**

18 "[T]he timeliness provision in the federal habeas corpus statute is subject to
19 equitable tolling." *Holland v. Florida*, 130 S. Ct. 2549, 2554, 177 L. Ed. 2d 130
20 (2010). "[A] 'petitioner' is 'entitled to equitable tolling' only if he shows '(1) that he
21 has been pursuing his rights diligently, and (2) that some extraordinary
22 circumstance stood in his way' and prevented timely filing." *Id.* at 2562 (quoting
23 *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669
24 (2005)). "The diligence required for equitable tolling purposes is "reasonable
25 diligence," not "maximum feasible diligence." *Id.* at 2565 (citations and quotation

26
27 ¹ At this stage of the proceedings, the court expresses no opinion on
28 whether the application to recall the remittitur statutorily tolled the statute of
limitations, or whether the gaps between Petitioner's collateral filings shortened
the statutory tolling period.

1 marks omitted). The extraordinary circumstances must have been the cause of
2 an untimely filing. *Pace*, 544 U.S. at 418. “[E]quitable tolling is available for this
3 reason only when “extraordinary circumstances beyond a prisoner’s control
4 make it *impossible* to file a petition on time” and “the extraordinary
5 circumstances” circumstances” were the *cause* of [the prisoner’s] untimeliness.”
6 *Bills v. Clark*, 628 F.3d 1092, 1097 (9th Cir. 2010) (citations omitted, emphases in
7 original).

8 There is no indication in the petition that Petitioner is entitled to equitable
9 tolling.


10 **III.**

11 **ORDER TO SHOW CAUSE**

12 IT IS THEREFORE ORDERED that, on or before **November 13, 2012**,
13 Petitioner shall show cause, if there be any, why the court should not recommend
14 dismissal with prejudice of the petition based on expiration of the one-year statute
15 of limitations.

16 **Petitioner is advised that if he fails to timely respond to this order to**
17 **show cause, the court will recommend that the petition be dismissed with**
18 **prejudice based on expiration of the one-year statute of limitations.**

19
20 DATED: October 17, 2012

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22 ALICIA G. ROSENBERG
23 United States Magistrate Judge
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