

1 court denied it on September 16, 2011. (Pet. at 4.) He filed a
2 petition in the California Court of Appeal on December 18, 2011,
3 which that court denied on February 21, 2012. On May 29, 2012,
4 Petitioner filed a habeas petition in the California Supreme
5 Court, which denied it on October 18, 2012. Petitioner appears
6 to raise the same claims in his federal habeas Petition as he
7 raised on direct appeal and in his state habeas petitions.

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

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

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

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

24 (C) the date on which the constitutional
25 right asserted was initially recognized by the
26 Supreme Court, if the right has been newly
27 recognized by the Supreme Court and made
28 retroactively applicable to cases on collateral

1 review; or

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

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

10 From the face of the Petition, Petitioner does not appear to
11 be entitled to a later trigger date under § 2244(d)(1)(B). He
12 does not contend that he was impeded from filing his federal
13 Petition by unconstitutional state action. Nor does it appear
14 that Petitioner is entitled to a later trigger date under
15 § 2244(d)(1)(C). He is not contending that any of his claims are
16 based on a federal constitutional right that was initially
17 recognized by the U.S. Supreme Court subsequent to the date his
18 conviction became final and that has been made retroactively
19 applicable to cases on collateral review. Finally, Petitioner
20 does not appear to be entitled to a later trigger date under
21 § 2244(d)(1)(D). He apparently was aware of the underlying
22 factual and legal predicates of his claims since before his
23 conviction became final: he raised two of them on direct appeal
24 and thus necessarily already knew of them, and the other claims
25 concern events that happened at trial or his appellate counsel's
26 failure to raise certain issues on appeal, and thus Petitioner
27 was necessarily aware of them before his conviction became final.

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2 Petitioner's conviction became final on November 16, 2010,
3 90 days after the California Supreme Court denied review of his
4 Petition for Review. See Merolillo v. Yates, 663 F.3d 444, 454
5 n.5 (9th Cir. 2011), cert. denied, 80 U.S.L.W. 3028 (U.S. Oct. 1,
6 2012) (No. 11-1094). Thus, absent some kind of tolling,
7 Petitioner had until November 16, 2011, to file his federal
8 Petition. He did not file it until October 18, 2012, seemingly
9 almost a year late.

10 Assuming that Petitioner's state habeas petitions were
11 properly filed, he is entitled to statutory tolling for the 27-
12 day period during which his superior court petition was pending.
13 See § 2244(d)(2). That 27 days would extend his AEDPA deadline
14 to December 13, 2011. Petitioner did not file his court of
15 appeal habeas petition until December 18, 2011. Thus, absent
16 "gap" tolling for the period between the denial of his superior
17 court petition and his filing in the court of appeal, his federal
18 Petition was filed after the AEDPA deadline. See Ferguson v.
19 Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (holding that
20 § 2244(d) "does not permit the reinitiation of the limitations
21 period that has ended before the state petition was filed," even
22 if state petition was timely under state law). Petitioner does
23 not appear to be entitled gap tolling, however, because the 92-
24 day period between the denial of his superior court petition and
25 his filing in the court of appeal (and the similar delay between
26 the court of appeal's denial and his filing in the state supreme
27 court) exceeds the 30 to 60 days the U.S. Supreme Court has
28 identified as "reasonable," see Velasquez v. Kirkland, 639 F.3d

1 964, 967 (9th Cir. 2011) (citing Evans v. Chavis, 546 U.S. 189,
2 192-93, 126 S. Ct. 846, 849-50, 163 L. Ed. 2d 684 (2006)), and
3 Petitioner has not offered any explanation for why he did not
4 file his court of appeal petition within the "reasonable" period,
5 see Evans, 546 U.S. at 201 ("unjustified or unexplained" unusual
6 delays not reasonable). So, even with statutory tolling for the
7 pendency of the superior court petition, Petitioner's federal
8 Petition was still apparently about 10 months late unless he can
9 show that his 92-day delay - as well as the similar 97-day delay
10 between the denial of the court of appeal petition and his filing
11 in the state supreme court - was reasonable.

12 In addition to statutory tolling, under certain
13 circumstances, a habeas petitioner may be entitled to equitable
14 tolling. See Holland v. Florida, 560 U.S. ___, 130 S. Ct. 2549,
15 2560, 177 L. Ed. 2d 130 (2010). But he must show that (1) he has
16 been pursuing his rights diligently and (2) "some extraordinary
17 circumstance stood in his way." See Pace v. DiGuglielmo, 544
18 U.S. 408, 418, 125 S. Ct. 1807, 1814, 161 L. Ed. 2d 669 (2005).
19 Here, Petitioner has not purported to make any such showing.

20 A district court has the authority to raise the statute-of-
21 limitations issue sua sponte when untimeliness is obvious on the
22 face of a petition; it may summarily dismiss the petition on that
23 ground pursuant to Rule 4 of the Rules Governing § 2254 Cases in
24 the U.S. District Courts, as long as the court gives petitioner
25 adequate notice and an opportunity to respond. Herbst v. Cook,
26 260 F.3d 1039, 1042-43 (9th Cir. 2001).

27 IT THEREFORE IS ORDERED that on or before December 10, 2012,
28 Petitioner show cause in writing, if he has any, why the Court

1 should not recommend that this action be dismissed with prejudice
2 because it is untimely. If Petitioner intends to rely on the
3 equitable tolling doctrine, he will need to include with his
4 response to the Order to Show Cause a declaration under penalty
5 of perjury stating facts demonstrating that (1) he has been
6 pursuing his rights diligently and (2) "some extraordinary
7 circumstance stood in his way."

8
9 DATED: November 8, 2012


JEAN ROSENBLUTH
J.S. MAGISTRATE JUDGE