

1 The Petition alleges five claims attacking the validity of
2 Petitioner's 2009 state court conviction. Petitioner alleges that he
3 raised Grounds One and Two in his state appeal, but that Grounds Three
4 through Five have not been presented to any state court.¹

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6 A review of the California Department of Corrections &
7 Rehabilitation ("CDCR") website, Inmate Locator function, confirms that
8 Petitioner -- although presently incarcerated at a facility in Arizona
9 -- remains within the custody of the CDCR. Such review also confirms
10 that Petitioner has named an appropriate Respondent, namely, the Chief
11 of the CDCR's Contract Beds Unit, the CDCR unit that oversees the
12 transfer of California inmates to other states to relieve overcrowding
13 in California prisons.

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15 The Petition bears a November 29, 2012 signature date and contains
16 a proof of service form, signed under penalty of perjury, stating that
17 the Petition was mailed on that date. The envelope in which the
18 Petition was sent to the Court is postmarked December 3, 2012, and the
19 Clerk's Office received and lodged the Petition on December 7, 2012.
20 Pursuant to the "mailbox rule," the Court will deem the Petition to have

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25 ¹ Pursuant to Rule 201 of the Federal Rules of Evidence, the
26 Court has taken judicial notice of the official dockets of the
27 California Court of Appeal and the California Supreme Court available
28 electronically at <http://appellatecases.courtinfo.ca.gov>. Those dockets
confirm the Petitioner's allegations regarding the dates on which the
state courts acted in connection with Petitioner's appeal and that
Petitioner has not sought state habeas relief in either the California
Court of Appeal or the California Supreme Court.

1 been "filed" on November 29, 2012.²

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3 **DISMISSAL APPEARS WARRANTED DUE TO UNTIMELINESS**
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5 Petitioner admits that the Petition contains three unexhausted
6 claims. (Petition at 6.) Thus, the Petition is "mixed." While a
7 "mixed" federal habeas petition generally must be dismissed, dismissal
8 can be avoided if a petitioner exercises one of the options available to
9 him, such as voluntarily dismissing the unexhausted claims and
10 proceeding on the exhausted claims, or seeking a stay of the federal
11 action while he pursues exhaustion. If this action were to proceed,
12 Petitioner would be entitled to exercise one of his available options in
13 the light of the "mixed" nature of the Petition. However, doing so
14 would be inappropriate and unwarranted if this action is untimely. For
15 the reasons set forth below, it is plain that the Petition is untimely.

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17 *The Accrual And Running Of Petitioner's Limitations Period:*
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19 The one-year limitations period that governs the Petition is set
20 forth in 28 U.S.C. § 2244(d)(1). The California Supreme Court denied
21 review on July 13, 2011, and there is no evidence that Petitioner sought
22 a writ of *certiorari* in the United States Supreme Court. Accordingly,
23 Petitioner's state conviction became "final" 90 days later, *i.e.*, on
24

25 ² "Under the 'mailbox rule,' a pro se prisoner's filing of a
26 state habeas petition is deemed filed at the moment the prisoner
27 delivers it to prison authorities for forwarding to the clerk of the
28 court." Stillman v. Lamarque, 319 F.3d 1199, 1201 (9th Cir. 2003);
Campbell v. Henry, 614 F.3d 1056, 1058-59 (9th Cir. 2010); see also Rule
3(d) of the Rules Governing Section 2254 Cases in the United States
District Courts.

1 October 11, 2011. See 28 U.S.C. § 2244(d)(1)(A); Zepeda v. Walker, 581
2 F.3d 1013, 1016 (9th Cir. 2009). Therefore, Petitioner had until
3 October 11, 2012, to file a timely federal habeas petition. As the
4 instant Petition was not "filed" until November 29, 2012, it was
5 untimely, absent an application of tolling sufficient to render it
6 timely.

7
8 *Statutory Tolling:*

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10 28 U.S.C. § 2244(d)(2) suspends the limitations period for the time
11 during which a "properly-filed" application for post-conviction or other
12 collateral review is "pending" in state court. Additionally, in
13 appropriate circumstances, applications for state post-conviction relief
14 filed in an upward progression may be deemed "pending" under Section
15 2244(d)(2) "even during the intervals between the denial of a petition
16 by one court and the filing of a new petition at the next level, if
17 there is not undue delay." Biggs v. Terhune, 339 F.3d 1045, 1046 (9th
18 Cir. 2003); see also Carey v. Saffold, 536 U.S. 214, 217-25, 122 S. Ct.
19 2134, 2137-41 (2002)(for purposes of California's "original" habeas
20 petition system, "pending" covers the time between the denial of a
21 petition in a lower court and the filing, "within a reasonable time," of
22 a "further original state habeas petition in a higher court").

23
24 Petitioner has not sought state post-conviction relief.
25 Accordingly, he may not receive Section 2244(d)(2) statutory tolling,
26 and his limitations period commenced following the finality of his
27 appeal and expired over a month and a half before he signed and mailed
28 the instant Petition.

1 *Equitable Tolling:*

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3 The Supreme Court has made clear that the one-year limitations
4 period established by Section 2244(d)(1) may be equitably tolled in
5 appropriate circumstances. Holland v. Florida, ___ U.S. ___, 130 S. Ct.
6 2549, 2560-62 (2010). However, application of the equitable tolling
7 doctrine is the exception rather than the norm. See, e.g., Waldron-
8 Ramsey v. Pacholke, 556 F.3d 1008, 1011 (9th Cir. 2009)(characterizing
9 the Ninth Circuit's "application of the doctrine" as "sparing" and a
10 "rarity"); Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir.
11 1999)("equitable tolling is unavailable in most cases"). "Indeed, the
12 threshold necessary to trigger equitable tolling is very high, lest the
13 exceptions swallow the rule." Miranda v. Castro, 292 F.3d 1063, 1066
14 (9th Cir. 2002)(internal quotation marks and citation omitted); see also
15 Lakey, 633 F.3d at 786 (noting the "necessity" of a "high threshold" for
16 application of the equitable tolling doctrine).

17
18 As the Supreme Court has explained, a habeas petitioner may receive
19 equitable tolling only if he "shows '(1) that he has been pursuing his
20 rights diligently, and (2) that some extraordinary circumstance stood in
21 his way' and prevented timely filing." Holland, 130 S. Ct. at 2562
22 (citation omitted); see also Pace v. DiGuglielmo, 544 U.S. 408, 418 and
23 n.8, 125 S. Ct. 1807, 1814 and n.8 (2005). Both elements must be met.
24 *Id.* at 418, 125 S. Ct. at 1814-15 (finding that the petitioner was not
25 entitled to equitable tolling, because he had not established the
26 requisite diligence). A petitioner seeking application of the doctrine
27 bears the burden of showing that it should apply to him. *Id.*; see also
28 Lawrence v. Florida, 549 U.S. 327, 336, 127 S. Ct. 1079, 1085

1 (2007)(observing that, to receive equitable tolling, the petitioner must
2 prove the above two requirements).

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4 Petitioner has not alleged any basis for applying the equitable
5 tolling doctrine, and none is apparent. The first two claims of the
6 Petition were fully briefed by appellate counsel as of early 2011, at
7 the latest, and could have been raised in a federal habeas petition as
8 of July 2011. The ineffective assistance claims alleged in Grounds
9 Three and Four are based on information that should and/or could have
10 been known to Petitioner some time ago. The "actual innocence" claim
11 alleged in Ground Five is based on facts known to plaintiff at the time
12 of his trial. Thus, it is unclear why Petitioner delayed in seeking
13 federal habeas relief. It is clear, however, that his delay has
14 rendered the Petition untimely.

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16 District courts are permitted to consider, *sua sponte*, whether a
17 petition is untimely and to dismiss a petition that is untimely on its
18 face after providing the petitioner with the opportunity to be heard.
19 Day v. McDonough, 547 U.S. 198, 209, 126 S. Ct. 1675, 1684 (2006);
20 Wentzell v. Neven, 674 F.3d 1124, 1126 (9th Cir. 2012). Accordingly,
21 Petitioner is ORDERED TO SHOW CAUSE why this action should not be
22 dismissed on the ground of untimeliness. **By no later than February 21,**
23 **2013**, Petitioner shall file a response to this Order To Show Cause. If
24 Petitioner concedes that this action is untimely, he shall state this
25 concession clearly. If Petitioner disputes that this action is
26 untimely, he must explain clearly and in detail why it is not untimely,
27 and provide any available competent evidence that establishes the
28 timeliness of this action.

