



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

JATEEN BHATT,

Petitioner,

v.

SUPERIOR COURT OF THE STATE  
OF CALIFORNIA, COUNTY OF LOS  
ANGELES,

Respondent.

Case No. CV 13-00881 SJO (AN)

**ORDER TO SHOW CAUSE RE  
DISMISSAL OF PETITION FOR  
WRIT OF HABEAS CORPUS BY A  
PERSON IN STATE CUSTODY AS  
TIME-BARRED**

**I. BACKGROUND**

Before the Court is a petition for writ of habeas corpus ("Petition") brought by Jateen Bhatt ("Petitioner"), a state prisoner proceeding *pro se*. The Petition is brought pursuant to 28 U.S.C. § 2254 and raises three claims directed at a November 19, 2009 conviction in the California Superior Court for Los Angeles County. Petitioner was convicted of grand theft by embezzlement and forgery, received a sentence enhancement based on the dollar amount lost, and was sentenced to four years in state prison (case no. BA350834).

For the reasons set forth below, Petitioner is ordered to show cause why his Petition should not be dismissed with prejudice because it is time-barred.

## II. DISCUSSION

### A. Standard of Review

Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts (“Habeas Rules”), 28 U.S.C. foll. § 2254, requires a judge to “promptly examine” a habeas petition and “[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner.” Local Rule 72-3.2 of this Court also provides “[t]he Magistrate Judge promptly shall examine a petition for writ of habeas corpus, and if it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief, the Magistrate Judge may prepare a proposed order for summary dismissal and submit it and a proposed judgment to the District Judge.” C.D. Cal. R. 72-3.2. Further, an untimely habeas petition may be dismissed *sua sponte*, however, the district court must give the petitioner adequate notice and an opportunity to respond before doing so. *Day v. McDonough*, 547 U.S. 198, 209-10, 126 S. Ct. 1675 (2006); *Herbst v. Cook*, 260 F.3d 1039, 1043 (9th Cir. 2001).

### B. Statute of Limitations

The Petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which establishes a one-year statute of limitations for state prisoners to file a habeas petition in federal court. 28 U.S.C. § 2244(d)(1); *see also Lindh v. Murphy*, 521 U.S. 320, 327-37, 117 S. Ct. 2059 (1997). In most cases, the limitations period is triggered by “the date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A).

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1       The face of the Petition and relevant state court records<sup>1/</sup> establish the following  
2 relevant facts. Petitioner was convicted of the above offenses on November 19, 2009,  
3 and sentenced on December 17, 2009. On July 19, 2010, the California Court of  
4 Appeal affirmed the judgment (case no. B221302). The California Supreme Court then  
5 denied review of the court of appeal's decision on October 13, 2010 (case no.  
6 S185858). Petitioner did not file a petition for certiorari with the United States  
7 Supreme Court. (Pet. at 2-4; state court records.)

8       Therefore, for purposes of AEDPA's limitations period, Petitioner's judgment  
9 became final on January 11, 2011, the ninetieth day after the state high court denied  
10 his petition for review and the last day for him to file a petition for certiorari with the  
11 Supreme Court. *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999). The statute of  
12 limitations then started to run the next day, on January 12, 2011, and ended a year later  
13 on January 12, 2012. 28 U.S.C. § 2244(d)(1)(A); *see also Patterson v. Stewart*, 251  
14 F.3d 1243, 1245-47 (9th Cir. 2001) (the limitations period begins to run on the day  
15 after the triggering event pursuant to Fed. R. Civ. P. 6(a)). Petitioner did not  
16 constructively file his pending Petition until January 31, 2013 -- 385 days after the  
17 expiration of the limitations period.<sup>2/</sup> Accordingly, absent some basis for tolling or an  
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19       <sup>1/</sup> The Court takes judicial notice of records in the state appellate courts that  
20 relate to this action, which are available on the Internet at  
21 <http://appellatecases.courtinfo.ca.gov> ("state court records"). *See Smith v. Duncan*, 297  
22 F.3d 809, 815 (9th Cir. 2002) (federal courts may take judicial notice of related state  
23 court documents), *overruled on other grounds as recognized in Cross v. Sisto*, 676  
F.3d 1172 (9th Cir. 2012).

24       <sup>2/</sup> Pursuant to the "mailbox rule," a *pro se* prisoner's federal habeas petition  
25 is deemed to be filed on the date the prisoner delivers the petition to prison authorities  
26 for mailing to the clerk. *Houston v. Lack*, 487 U.S. 266, 270-71, 108 S. Ct. 2379  
27 (1988); *Huizar v. Carey*, 273 F.3d 1220, 1222 (9th Cir. 2001); *see also* Habeas Rule  
28 3(d). Absent evidence to the contrary, the Court finds Petitioner constructively filed  
the Petition by delivering it to the prison mail system on January 31, 2013, the  
(continued...)

1 alternative start date to the limitations period under 28 U.S.C. § 2244(d)(1), the  
2 pending Petition is time-barred.

### 3 **C. Statutory Tolling**

4 AEDPA includes a statutory tolling provision that suspends the limitations  
5 period for the time during which a “properly-filed” application for post-conviction or  
6 other collateral review is “pending” in state court. 28 U.S.C. § 2244(d)(2); *Waldrip v.*  
7 *Hall*, 548 F.3d 729, 734 (9th Cir. 2008); *Bonner v. Carey*, 425 F.3d 1145, 1148 (9th  
8 Cir. 2005). An application is “pending” until it has achieved final resolution through  
9 the state’s post-conviction procedures. *Carey v. Saffold*, 536 U.S. 214, 220, 122 S. Ct.  
10 2134 (2002).

11 The Petition and relevant state court records establish Petitioner filed three state  
12 habeas petitions, one in the superior court (case no. BA350834), one in the court of  
13 appeal (case nos. B235108), and one in the California Supreme Court (case no.  
14 S206000). Petitioner states that he filed his first petition in the superior court on April  
15 4, 2011.<sup>3/</sup> (Pet. at 4.) That petition was denied on May 5, 2011. (Pet. at 4; attach. A.)  
16 He filed his next petition in the state court of appeal on August 12, 2011, and that  
17 petition was denied on January 10, 2012. (Pet. at 5; attach. B; state court records.)  
18 Given tolling for the period from April 4, 2011, until January 10, 2012 (281 days),  
19 AEDPA’s limitations deadline was extended from January 12 to October 19, 2012.

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21 <sup>2/</sup> (...continued)

22 postmark date reflected on the envelope containing the Petition.

23 <sup>3/</sup> The mailbox rule also applies to *pro se* state habeas petitions. *See Stillman*  
24 *v. Lamarque*, 319 F.3d 1199, 1201 (9th Cir. 2003). However, based on the Court’s  
25 statutory tolling analysis below, the Petition is untimely by 68 days. In light of the fact  
26 the mailbox rule normally affords prisoners no more than two or three extra days of  
27 tolling, it does not appear an earlier constructive filing date would affect the result.  
28 But, should Petitioner disagree, his response to this Order must include properly  
authenticated exhibits indicating the date he delivered his superior court habeas  
petition to prison authorities for mailing.

1       Petitioner's third state habeas petition was not filed in the California Supreme  
2 Court until October 15, 2012, 279 days after his second petition was denied. (State  
3 court records.) As a result, although "intervals between a lower court decision and a  
4 filing of a new petition in a higher court," when reasonable, fall "within the scope of  
5 the statutory word 'pending,'" thus tolling the limitations period, *Saffold*, 536 U.S. at  
6 221, 223; *Evans v. Chavis*, 546 U.S. 189, 192, 126 S. Ct. 846 (2006), in this case the  
7 279-day interval was "substantially longer than the '30 to 60 days' that 'most States'  
8 allow for filing petitions, and [Petitioner has] offered no justification for the delay[]  
9 as required under California law." *Chaffer v. Prosper*, 592 F.3d 1046, 1048 (9th Cir.  
10 2010) (holding that intervals of 115 and 101 days were unreasonable and did not  
11 qualify for statutory tolling) (citations omitted); *see also Banjo v. Ayers*, 614 F.3d 964,  
12 970 (9th Cir. 2010) (holding that a 146-day interval was unreasonable). As a result,  
13 Petitioner is not entitled to statutory tolling for the interval between the denial of his  
14 second state habeas petition in the court of appeal and the filing of his third state  
15 habeas petition in the California Supreme Court.

16       Petitioner's third petition was denied on November 20, 2012. (Pet. at 6; attach.  
17 C; state court records.) Petitioner is entitled to an additional 36 days of statutory  
18 tolling for the time that petition was pending. *See* CAL. CT. R. 8.532(b)(2)(C);  
19 *Corjasso v. Ayers*, 278 F.3d 874, 880 n.1 (9th Cir. 2002) (orders of the California  
20 Supreme Court denying habeas petitions are final upon filing). The limitations  
21 deadline was again extended from October 19, 2012, to November 24, 2012. The  
22 pending Petition, constructively filed on January 31, 2013, is still untimely by 68 days.

23       Petitioner purports to have filed at least one additional petition for review in the  
24 California Supreme Court (Pet. at 6, 15), but he provides no case number, has not  
25 attached a copy of a relevant petition or denial order, and his state court records do not  
26 indicate any such petition being filed. Consequently, absent evidence to the contrary,  
27 the Court finds Petitioner did not file any additional petitions for review.

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1 The foregoing establishes that despite receiving the 317 days of statutory tolling  
2 to which he is entitled, Petitioner's pending Petition is still untimely.

3 **D. Alternative Start of the Statute of Limitations**

4 **1. State-Created Impediment**

5 In rare instances, AEDPA's one-year limitations period can run from "the date  
6 on which the impediment to filing an application created by State action in violation  
7 of the Constitution or laws of the United States is removed, if the applicant was  
8 prevented from filing by such State action." 28 U.S.C. § 2244(d)(1)(B). Asserting that  
9 the statute of limitations was delayed by a state-created impediment requires  
10 establishing a due process violation. *Lott v. Mueller*, 304 F.3d 918, 925 (9th Cir.  
11 2002). The Petition does not set forth any facts for an alternate start date of the  
12 limitations period under this provision.

13 **2. Newly Recognized Constitutional Right**

14 AEDPA provides that, if a claim is based upon a constitutional right that is  
15 newly recognized and applied retroactively to habeas cases by the United States  
16 Supreme Court, the one-year limitations period begins to run on the date which the  
17 new right was initially recognized by the Supreme Court. 28 U.S.C. § 2244(d)(1)(C).  
18 The Petition does not set forth any facts for an alternate start date of the limitations  
19 period under this provision.

20 **3. Discovery of Factual Predicate**

21 AEDPA also provides that, in certain cases, its one-year limitations period shall  
22 run from "the date on which the factual predicate of the claim or claims presented  
23 could have been discovered through the exercise of due diligence." 28 U.S.C. §  
24 2244(d)(1)(D); *Ford v. Gonzalez*, 683 F.3d 1230, 1235 (9th Cir. 2012). The Petition  
25 does not set forth any facts for an alternate start date of the limitations period under  
26 this provision.

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1   **E.    Equitable Tolling**

2       AEDPA's limitations period "is subject to equitable tolling in appropriate  
3 cases." *Holland v. Florida*, --- U.S. ---, 130 S. Ct. 2549, 2560 (2010). Specifically, "a  
4 litigant seeking equitable tolling bears the burden of establishing two elements: (1)  
5 that he has been pursuing his rights diligently, and (2) that some extraordinary  
6 circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct.  
7 1807 (2005); *Lawrence v. Florida*, 549 U.S. 327, 336, 127 S. Ct. 1079 (2007).

8       However, "[e]quitable tolling is justified in few cases" and "the threshold  
9 necessary to trigger equitable tolling [under AEDPA] is very high, lest the exceptions  
10 swallow the rule." *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003) (*quoting*  
11 *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002)). Additionally, although "we  
12 do not require [the petitioner] to carry a burden of persuasion at this stage in order to  
13 merit further investigation into the merits of his argument for [equitable] tolling,"  
14 *Laws v. Lamarque*, 351 F.3d 919, 924 (9th Cir. 2003), "[w]here the record is amply  
15 developed, and where it indicates that the [alleged extraordinary circumstance did not]  
16 cause the untimely filing of his habeas petition, a district court is not obligated to hold  
17 evidentiary hearings to further develop the factual record, notwithstanding a  
18 petitioner's allegations . . . ." *Roberts v. Marshall*, 627 F.3d 768, 773 (9th Cir. 2010);  
19 *see also Elmore v. Brown*, 378 Fed. Appx. 664, 666 (9th Cir. 2010) ("[W]here the  
20 record is sufficient to permit the district court - and us on appeal - to evaluate the  
21 strength of the petitioner's [equitable tolling] claim, the district court does not  
22 necessarily abuse its discretion if it denies the petitioner a hearing.") (cited pursuant  
23 to Ninth Circuit Rule 36-3).

24       The Petition does not set forth any facts for equitable tolling.

25                   **ORDER**

26       Based on the foregoing, the Court finds this action is untimely. Accordingly,  
27 Petitioner shall have until **March 19, 2013**, to file a written response and show cause  
28 why his Petition should not be dismissed with prejudice because it is time-barred. In

1 responding to this Order, Petitioner must show by declaration and any properly  
2 authenticated exhibits what, if any, factual or legal basis he has for claiming that the  
3 Court's foregoing analysis is incorrect, or that AEDPA's one-year statute of  
4 limitations should be tolled, or the start date extended.

5 **Petitioner is warned that if a timely response to this Order is not made,**  
6 **Petitioner will waive his right to respond and the Court will, without further**  
7 **notice, issue an order dismissing the Petition, with prejudice, as time-barred.**

8 **Further, if Petitioner determines the Court's analysis is correct and the**  
9 **Petition is time-barred, he should consider filing a Request For Voluntary**  
10 **Dismissal of this action pursuant to Fed. R. Civ. P. 41(a)(1) in lieu of a response.**

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12 IT IS SO ORDERED.

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15 DATED: February 20, 2013

16   
17 ARTHUR NAKAZATO  
18 UNITED STATES MAGISTRATE JUDGE  
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