

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

JESUS BELTRAN OLIVAR,	)	Case No. CV 13-4112-MWF (JPR)
	)	
Petitioner,	)	
	)	ORDER TO SHOW CAUSE
vs.	)	
	)	
FRANK X. CHAVEZ, Warden,	)	
	)	
Respondent.	)	
	)	

---

On June 7, 2013, Petitioner, who is represented by counsel, filed a federal habeas Petition under 28 U.S.C. § 2254. Because counsel did not use the required Central District of California habeas form, see Local R. 83-16.1, the Court dismissed the Petition with leave to amend. On July 12, 2013, Petitioner filed an amended Petition. The Petition purports to challenge Petitioner’s 2008 convictions in Los Angeles County Superior Court for murder and related crimes. (Pet. at 2.) Although Petitioner did not provide a date for the denial of his appeal (Pet. at 3), the Court’s review of the California Appellate Court’s Case Information website shows that the California Court of Appeal denied it on October 29, 2009. Counsel states that she

1 "doesn't think" Petitioner filed a Petition for Review in the  
2 California Supreme Court (id.), but in fact he did, according to  
3 the appeals courts' case-information website, and the supreme  
4 court denied it on January 13, 2010.<sup>1</sup> Petitioner states that he  
5 has not filed any state habeas petitions (id.), and the Court's  
6 review of the case-information website confirms that.

7 Petitioner raises one claim in his Petition, "Inappropriate  
8 Joinder of Charges Violates Defendant's Right to Due Process  
9 Under Fifth Amendment." (Pet. at 5.) He also raised this claim  
10 in the California Court of Appeal, or at least a state-law  
11 version of it. People v. Olivar, No. B210504, 2009 WL 3467497,  
12 at \*3 (Cal. Ct. App. Oct. 29, 2009).

13 Under the Antiterrorism and Effective Death Penalty Act of  
14 1996 ("AEDPA"), Petitioner had one year from the date his  
15 conviction became final in which to file a federal habeas  
16 petition. See 28 U.S.C. § 2244(d). That statute provides:

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

21 (A) the date on which the judgment became  
22 final by the conclusion of direct review or the  
23 expiration of the time for seeking such review;

---

24  
25 <sup>1</sup>Because counsel mistakenly represents that Petitioner did not  
26 file a Petition for Review, she has not listed the issues he raised  
27 in that petition. Given that Petitioner has not filed any state  
28 habeas petitions, the Court therefore cannot know whether  
Petitioner's federal claim has in fact been exhausted in state  
court. For the purposes of this Order to Show Cause the Court  
assumes that it has.

1 (B) the date on which the impediment to  
2 filing an application created by State action in  
3 violation of the Constitution or laws of the United  
4 States is removed, if the applicant was prevented  
5 from filing by such State action;

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

12 (D) the date on which the factual predicate  
13 of the claim or claims presented could have been  
14 discovered through the exercise of due diligence.

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

20 Petitioner's conviction apparently became final 90 days  
21 after the state supreme court denied review - in other words, on  
22 April 13, 2010. Bowen v. Roe, 188 F.3d 1157, 1159 (9th Cir.  
23 1999).

24 From the face of the Petition, it does not appear that  
25 Petitioner has any basis for contending that he is entitled to a  
26 later trigger date under § 2244(d)(1)(B), (C), or (D).  
27 Petitioner does not contend that he was impeded from filing his  
28 federal petition by unconstitutional state action. Nor is his

1 claim based on a federal constitutional right that was initially  
2 recognized by the U.S. Supreme Court subsequent to the date his  
3 conviction became final and that has been made retroactively  
4 applicable to cases on collateral review. Finally, Petitioner  
5 has long been aware of the underlying factual and legal  
6 predicates of his claim, as he raised it on direct appeal.

7 Thus, Petitioner's last day to file his federal habeas  
8 Petition was April 13, 2011, unless a basis for tolling the  
9 statute exists. See Patterson v. Stewart, 251 F.3d 1243, 1246  
10 (9th Cir. 2001). Absent tolling, Petitioner's Petition was filed  
11 more than two years late.


12 No basis for statutory tolling under § 2244(d)(2) appears to  
13 exist here, as Petitioner apparently has not filed any state  
14 habeas petitions. Under certain circumstances, a habeas  
15 petitioner may be entitled to equitable tolling. See Holland v.  
16 Florida, 560 U.S. \_\_\_, 130 S. Ct. 2549, 2560, 177 L. Ed. 2d 130  
17 (2010). A habeas petitioner is entitled to equitable tolling  
18 only if he shows that (1) he has been pursuing his rights  
19 diligently and (2) "some extraordinary circumstance stood in his  
20 way." See Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct.  
21 1807, 1814, 161 L. Ed. 2d 669 (2005). Here, Petitioner has not  
22 purported to make any such showing.

23 A district court has the authority to raise the statute-of-  
24 limitations issue sua sponte when untimeliness is obvious on the  
25 face of a petition; it may summarily dismiss the petition on that  
26 ground pursuant to Rule 4 of the Rules Governing § 2254 Cases in  
27 the U.S. District Courts, as long as the court gives petitioner  
28 adequate notice and an opportunity to respond. Herbst v. Cook,

1 260 F.3d 1039, 1042-43 (9th Cir. 2001).

2 IT THEREFORE IS ORDERED that on or before August 16, 2013,  
3 Petitioner show cause in writing, if he has any, why the Court  
4 should not dismiss this action with prejudice because it is  
5 untimely. If Petitioner intends to rely on the equitable-tolling  
6 doctrine, he will need to include with his response to the Order  
7 to Show Cause a declaration under penalty of perjury stating  
8 facts showing that (1) he has been pursuing his rights diligently  
9 and (2) "some extraordinary circumstance stood in his way." He  
10 may submit any other evidence he deems appropriate to support his  
11 claim to tolling.

12  
13 DATED: July 19, 2013

  
\_\_\_\_\_  
14 JEAN ROSENBLUTH  
15 U.S. MAGISTRATE JUDGE  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28