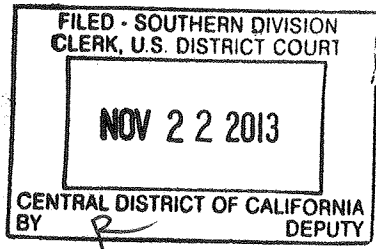


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I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY
FIRST CLASS MAIL POSTAGE PREPAID, TO ALL COUNSEL *Petitioner*
(OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF
RECORD IN THIS ACTION ON THIS DATE.

DATED: 11-22-13
[Signature]
DEPUTY CLERK



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ADALL ALLEN,¹) Case No. CV 13-4182-JPR
)
) Petitioner,)
)
) MEMORANDUM OPINION AND ORDER
 vs.) DENYING PETITION AND DISMISSING
) ACTION WITH PREJUDICE
 RICK M. HILL, Warden,)
)
) Respondent.)

On May 29, 2013, Petitioner constructively filed a Petition for Writ of Habeas Corpus by a Person in State Custody. At the same time, he submitted an "Election Regarding Consent to Proceed Before a United States Magistrate Judge" form, indicating that he voluntarily consented to "have a United States Magistrate Judge conduct all further proceedings in this case, decide all dispositive and non-dispositive matters, and order the entry of

¹ Petitioner's name appears variously in the record as Adall Allen and Allen Adall. In his November 18, 2013 response to the Court's Order to Show Cause, he clarifies that his name is Adall Allen, which is how it appears on most of the state-court records. Accordingly, the Clerk is directed to amend the docket to reflect Petitioner's true name.

1 final judgment." The Petition purports to challenge Petitioner's
2 October 2000 convictions in Los Angeles County Superior Court for
3 robbery, in violation of California Penal Code section 211.

4 (Pet. at 2.) Petitioner raises four claims: (1) the state
5 superior court erred in denying his habeas petition as untimely;
6 (2) his sentence was cruel and unusual under the Eighth
7 Amendment; (3) his trial counsel was ineffective for allowing him
8 to enter an unknowing and involuntary plea; and (4) his trial and
9 appellate counsel were ineffective for failing to request an
10 evidentiary hearing that would have proved that his sentence
11 "amounted to stacking." (See id. at 5-6 & Attach. Mem.)

12 Petitioner concedes that he did not appeal his convictions but
13 instead filed a habeas petition "on or about" September 23, 2003,
14 in the state superior court.² (See Pet. Attach. Mem. at 2 & App.
15 B.) On October 28, 2003, the superior court denied his petition,
16 apparently as untimely. (See Pet. at 3 & App. B.) On December
17 24, 2003, Petitioner filed a habeas petition in the California
18 Court of Appeal. (See Pet. App. B.) The Court's review of the
19 California Appellate Courts' Case Information website reveals
20 that on January 14, 2004, the court of appeal denied that
21 petition. On November 15, 2012, more than eight years later,
22 Petitioner filed a habeas petition in the state supreme court for
23 the first time. (See Pet. at 5-6.) It denied his petition on
24 January 30, 2013, with a citation to In re Robbins, 18 Cal. 4th

25
26 ² The Court's review of the California Appellate Courts'
27 Case Information website confirms that Petitioner did not directly
28 appeal his convictions or sentence. He was therefore likely
mistaken when he checked the box on the Petition indicating that he
did appeal. (See Pet. at 2.)

1 770, 780, 77 Cal. Rptr. 2d 153, 159-60 (1998), indicating that it
2 was untimely. See Thorson v. Palmer, 479 F.3d 643, 644-45 (9th
3 Cir. 2007).

4 Because the Petition on its face appeared to be untimely, on
5 July 11, 2013, the Court ordered Petitioner to show cause in
6 writing why it should not be dismissed with prejudice under the
7 Antiterrorism and Effective Death Penalty Act of 1996's one-year
8 statute of limitations. See 28 U.S.C. § 2244(d)(1). After three
9 extensions of time, Petitioner filed a Reply to the OSC on
10 November 18, 2013. He claims that he is entitled to equitable
11 tolling because his trial attorney promised him that if he
12 pleaded guilty the attorney would file a notice of appeal, and
13 yet he didn't do so. (Reply at 1-2.) Then, Petitioner ran out
14 of funds to continue to pay his habeas counsel, who raised the
15 claims in the Petition in state court in 2003, and therefore
16 never filed a habeas petition in the state supreme court. (Id.
17 at 3.) Finally, Petitioner claims entitlement to equitable
18 tolling because he has only a ninth-grade education and
19 "absolutely no knowledge as to the operation of laws." (Id. at
20 2.)

21 DISCUSSION

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

1 gave Petitioner notice that his Petition appeared to be untimely
2 and an opportunity to respond, which he has done.

3 Under AEDPA,

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

8 (A) the date on which the judgment became
9 final by the conclusion of direct review or the
10 expiration of the time for seeking such review;

11 (B) the date on which the impediment to
12 filing an application created by State action in
13 violation of the Constitution or laws of the United
14 States is removed, if the applicant was prevented
15 from filing by such State action;

16 (C) the date on which the constitutional
17 right asserted was initially recognized by the
18 Supreme Court, if the right has been newly
19 recognized by the Supreme Court and made
20 retroactively applicable to cases on collateral
21 review; or

22 (D) the date on which the factual predicate
23 of the claim or claims presented could have been
24 discovered through the exercise of due diligence.

25 (2) The time during which a properly filed
26 application for State post-conviction or other collateral
27 review with respect to the pertinent judgment or claim is
28 pending shall not be counted toward any period of

1 limitation under this subsection.

2 § 2244(d).

3 Under certain circumstances, a habeas petitioner may be
4 entitled to equitable tolling of the limitation period, see
5 Holland v. Florida, 560 U.S. 631, ___, 130 S. Ct. 2549, 2560, 177
6 L. Ed. 2d 130 (2010), but only if he shows that (1) he has been
7 pursuing his rights diligently and (2) "some extraordinary
8 circumstance stood in his way," Pace v. DiGuglielmo, 544 U.S.
9 408, 418, 125 S. Ct. 1807, 1814, 161 L. Ed. 2d 669 (2005).

10 In his Reply to the OSC, Petitioner does not contest that
11 because he did not appeal his state judgment, his convictions
12 became final in December 2000, 60 days after the period for
13 filing a notice of appeal had expired. See Griffin v. Grounds,
14 472 F. App'x 527, 528 (9th Cir. 2012) (California state
15 conviction becomes final after 60 days if defendant does not
16 appeal). Petitioner also does not contest the Court's analysis
17 in the OSC concerning a later trigger date and any available
18 statutory tolling; as explained in the OSC, even assessing any
19 such conceivable claims in the light most favorable to
20 Petitioner, his Petition was still years late. Most likely for
21 this reason, Petitioner argues only that he is entitled to
22 equitable tolling.

23 But the Petition and Petitioner's Reply to the OSC lack any
24 facts that could conceivably entitle Petitioner to equitable
25 tolling. Petitioner concedes that he knew at least as of 2003
26 the factual predicate for all of his claims, including that his
27 trial lawyer did not file a notice of appeal despite his alleged
28 promise to do so; Petitioner filed a habeas petition raising all

1 the claims in the Petition in state superior court in September
2 2003. (See Pet. Attach. Mem. at 2 & App. B.) Even if his habeas
3 counsel didn't raise the claims in the state supreme court
4 because Petitioner ran out of money to pay him, Petitioner has
5 not explained why he could not then have filed the state supreme
6 court petition himself. Petitioner is not constitutionally
7 entitled to counsel on habeas, see Pennsylvania v. Finley, 481
8 U.S. 551, 555, 107 S. Ct. 1990, 1993, 95 L. Ed. 2d 539 (1987)
9 (noting that "right to appointed counsel extends to the first
10 appeal of right, and no further"), and thus his lack of habeas
11 counsel in the state supreme court is not an "extraordinary
12 circumstance" warranting equitable tolling. Nor is Petitioner's
13 ignorance of the law. See Raspberry v. Garcia, 448 F.3d 1150,
14 1154 (9th Cir. 2006) ("[A] pro se petitioner's lack of legal
15 sophistication is not, by itself, an extraordinary circumstance
16 warranting equitable tolling."). The fact that Petitioner has
17 now found a way to raise the same claims pro se, first in his
18 2012 state supreme court petition and now in his federal
19 Petition, demonstrates that he is fully capable of representing
20 himself; he has offered no reason why he could not have done so
21 earlier, particularly given that his habeas lawyer had already
22 prepared a petition.


23 Because Petitioner has offered no valid justification for
24 the delay in filing his federal Petition, he is not entitled to
25 equitable tolling, and the Petition was filed late by more than a
26 decade.

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ORDER

IT THEREFORE IS ORDERED that Judgment be entered denying the
Petition and dismissing this action with prejudice.³

DATED: November 22, 2013


JEAN ROSENBLUTH
U.S. MAGISTRATE JUDGE

³ "Upon the consent of the parties," a magistrate judge
"may conduct any or all proceedings in a jury or nonjury civil
matter and order the entry of judgment in the case." 28 U.S.C.
§ 636(c)(1). Here, Petitioner is the only "party" to the
proceeding and has consented to the jurisdiction of the undersigned
U.S. Magistrate Judge; Respondent has not yet been served with the
Petition and therefore is not a party to this action. See, e.g.,
Travelers Cas. & Sur. Co. of Am. v. Brenneke, 551 F.3d 1132, 1135
(9th Cir. 2009) ("A federal court is without personal jurisdiction
over a defendant unless the defendant has been served in accordance
with Fed. R. Civ. P. 4." (internal quotation marks omitted)).
Thus, all parties have consented pursuant to § 636(c)(1). See
Wilhelm v. Rotman, 680 F.3d 1113, 1118-21 & n.3 (9th Cir. 2012)
(holding that magistrate judge had jurisdiction to sua sponte
dismiss prisoner's lawsuit under 42 U.S.C. § 1983 for failure to
state claim because prisoner consented and was only party to
action); Carter v. Valenzuela, No. CV 12-05184 SS, 2012 WL 2710876,
at *1 n.3 (C.D. Cal. July 9, 2012) (after Wilhelm, finding that
magistrate judge had authority to deny successive habeas petition
when petitioner had consented and respondent had not yet been
served with petition).