

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

SHAWN CAVETTE,
Petitioner,
v.
RICK HILL, Warden,
Respondent.

NO. CV 14-812-R (AGR)

ORDER TO SHOW CAUSE

On February 3, 2014, Petitioner filed a Petition for Habeas Corpus pursuant to 28 U.S.C. § 2254. For the reasons discussed below, it appears that the one-year statute of limitations has expired.

The court, therefore, orders Petitioner to show cause, on or before **March 19, 2014**, why this court should not recommend dismissal of the petition with prejudice based on expiration of the one-year statute of limitations.

1 I.

2 **PROCEDURAL BACKGROUND**

3 On December 6, 2010, Petitioner pled guilty to first degree burglary and
4 admitted a prior conviction for assault with a deadly weapon and three prior
5 prison terms. (Petition at 2); *People v. Cavette*, 2011 WL 5579192, *1 (2011).
6 Petitioner was sentenced to 13 years in prison. (*Id.*) On November 17, 2011, the
7 California Court of Appeal affirmed the conviction. (*Id.* at 3.)¹ Petitioner did not
8 file a petition for review in the California Supreme Court. (Petition at 3.)

9 On August 13, 2012, Petitioner filed a habeas petition in the California
10 Supreme Court, which was summarily denied on November 14, 2012. (*Id.* at 4);
11 see California Appellate Courts online docket in Case No. S204676.

12 On February 3, 2014, Petitioner filed the instant petition in this court in
13 which he raises two grounds. (Petition at 5-6.)

14 II.

15 **STATUTE OF LIMITATIONS**

16 The petition was filed after enactment of the Antiterrorism and Effective
17 Death Penalty Act of 1996 (“AEDPA”). Therefore, the court applies the AEDPA in
18 reviewing the petition. *Lindh v. Murphy*, 521 U.S. 320, 336, 117 S. Ct. 2059, 138
19 L. Ed. 2d 481 (1997).

20 The AEDPA contains a one-year statute of limitations for a petition for writ
21 of habeas corpus filed in federal court by a person in custody pursuant to a
22 judgment of a state court. 28 U.S.C. § 2244(d)(1). The one-year period starts
23 running on the latest of either the date when a conviction becomes final under 28
24 U.S.C. § 2244(d)(1)(A) or on a date set in § 2244(d)(1)(B)-(D).

25
26
27
28 _____
¹ Petitioner incorrectly alleges the date to be November 27, 2011 (Petition at 3). See *Cavette*, 2011 WL 5579192.

1 **A. The Date on Which Conviction Became Final – § 2244(d)(1)(A)**

2 The Court of Appeal affirmed Petitioner’s conviction on November 17,
3 2011. Because Petitioner did not file a petition for review with the California
4 Supreme Court, his conviction became final 40 days later on December 27, 2011.
5 *See Gaston v. Palmer*, 417 F.3d 1030, 1033 (9th Cir. 2005). Absent tolling, the
6 statute of limitations expired on December 27, 2012.

7 **1. Statutory Tolling**

8 The statute of limitations is tolled during the time “a properly filed
9 application for State post-conviction or other collateral review with respect to the
10 pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2). Petitioner’s first
11 habeas petition was filed on August 13, 2012, at which point he had used up 230
12 days of the limitations period and had 135 days remaining. Petitioner
13 constructively filed the federal petition in this court on January 27, 2014, 439 days
14 after the November 14, 2012 denial by the California Supreme Court. (Petition at
15 7 (signature) & back of envelope.) Thus, he was 304 days late (439 - 135).

16 **2. Equitable Tolling**

17 “[T]he timeliness provision in the federal habeas corpus statute is subject to
18 equitable tolling.” *Holland v. Florida*, 130 S. Ct. 2549, 2554, 177 L. Ed. 2d 130
19 (2010). “[A] ‘petitioner’ is ‘entitled to equitable tolling’ only if he shows ‘(1) that he
20 has been pursuing his rights diligently, and (2) that some extraordinary
21 circumstance stood in his way’ and prevented timely filing.” *Id.* at 2562 (quoting
22 *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669
23 (2005)). “The diligence required for equitable tolling purposes is “reasonable
24 diligence,” not “maximum feasible diligence.” *Id.* at 2565 (citations and quotation
25 marks omitted). The extraordinary circumstances must have been the cause of
26 an untimely filing. *Pace*, 544 U.S. at 418. “[E]quitable tolling is available for this
27 reason only when ““extraordinary circumstances beyond a prisoner’s control
28 make it *impossible* to file a petition on time”” and ““the extraordinary

1 circumstances” were the *cause* of [the prisoner’s] untimeliness.” *Bills v. Clark*,
2 628 F.3d 1092, 1097 (9th Cir. 2010) (citations omitted, emphasis in original).

3 There is no indication in the petition that Petitioner is entitled to equitable
4 tolling.

5 **B. Date of Discovery – 28 U.S.C. § 2244(d)(1)(D)**

6 In the context of an ineffective assistance claim, the statute of limitations
7 may start to run on the date a petitioner discovered (or could have discovered)
8 the factual predicate for a claim that his counsel’s performance was deficient, or
9 on the date a petitioner discovered (or could have discovered) the factual
10 predicate for prejudice, whichever is later. *See Hasan v. Galaza*, 254 F.3d 1150,
11 1155 (9th Cir. 2001). Therefore, the statute of limitations begins to run on “the
12 date on which the factual predicate of the claim or claims presented could have
13 been discovered through the exercise of due diligence.” 28 U.S.C. §
14 2244(d)(1)(D). The statute starts to run when the petitioner knows or through
15 diligence could discover the important facts, not when the petitioner recognizes
16 their legal significance. *Hasan*, 254 F.3d at 1154 n.3.

17 In Ground Two, Petitioner argues that his counsel failed to inform him of
18 the consequences of an “open plea.”² Petitioner told counsel he would plead
19 guilty only to the burglary charge, “nothing else.” According to Petitioner, counsel
20 told Petitioner that the judge “indicate[d] he would sentence Petitioner to 9 years
21 with half-time (no strike) if an open plea was given.” Thus, Petitioner believed
22 that the “worst case scenario” was a 9-year sentence at half time. (Petition at 5-
23 6.)

24
25
26
27 ² “An open plea is one where . . . the defendant is not offered any
28 promises and pleads unconditionally to the maximum possible sentence, subject
to the trial court’s discretion to impose a lesser sentence.” *People v. Murray*, 203
Cal. App. 4th 277, 281 n.1 (2012).

