

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

McLORDAN BAUTISTA,  <div style="text-align: right;">Petitioner,</div> <div style="text-align: center;">v.</div> WARDEN,  <div style="text-align: right;">Respondent.</div>	}	No. CV 14-6608 R (FFM)  <b>ORDER TO SHOW CAUSE WHY          PETITION SHOULD NOT BE          DISMISSED AS TIME-BARRED</b>
--	---	--

Petitioner, a prisoner in state custody proceeding *pro se*, constructively filed<sup>1</sup> a Petition for Writ of Habeas Corpus (“Petition”) on or about August 14, 2014. Petitioner challenges a 2004 conviction and sentence. Petitioner filed a petition for review on direct appeal with the California Supreme Court, which petition was denied without prejudice on August 24, 2005. (Petition at ¶ 9(g).)

<sup>1</sup>

A *pro se* prisoner’s relevant filings may be construed as filed on the date they were submitted to prison authorities for mailing, under the prison “mailbox rule” of *Houston v. Lack*, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245 (1988). A proof of service attached to the Petition states that the Petition was placed in the prison mailing system on August 14, 2014.

1     **1.     LIMITATIONS PERIOD FOR FEDERAL HABEAS PETITIONS**

2             The present proceedings were initiated after the April 24, 1996 effective  
3     date of the Antiterrorism and Effective Death Penalty Act (“AEDPA”).

4     Accordingly, the AEDPA’s timeliness provisions apply, including a one-year  
5     limitations period which is subject to both statutory and equitable tolling. *See* 28  
6     U.S.C. § 2244(d)(1). For those prisoners whose convictions became final post-  
7     AEDPA, the one-year period starts running from the latest of four alternative  
8     dates set forth in 28 U.S.C. § 2244(d)(1)(A)-(D). *See, e.g., Patterson v. Stewart,*  
9     251 F.3d 1243, 1245-47 (9th Cir. 2001). Where, as here, the challenged  
10    judgment was affirmed by the state’s highest court, the period of direct review  
11    ends either when the petitioner failed to file a *certiorari* petition in the United  
12    States Supreme Court and the 90-day period for doing so has expired, or when  
13    the Supreme Court has ruled on a filed petition. *See Clay v. United States,* 537  
14    U.S. 522, 527-32 and nn.3-4, 123 S. Ct. 1072, 155 L. Ed. 2d 88 (2003); *Wixom v.*  
15    *Washington,* 264 F.3d 894, 897 (9th Cir. 2001).

16            In this case, petitioner does not appear to have filed a *certiorari* petition in  
17    the United States Supreme Court. (*See* Petition (apparently inadvertently stating  
18    that United States Supreme Court petition was filed, but stating that case number,  
19    result, and date of result are not applicable, presumably because no petition was  
20    filed).) Thus, under section 2244(d)(1)(A), petitioner’s conviction became final  
21    90 days after the denial of the petition for review by the California Supreme  
22    Court. *See Clay,* 537 U.S. at 527-32 and nn.3, 4; 28 U.S.C. § 2101(d); Sup. Ct.  
23    R. 13.1. Therefore, petitioner’s conviction became final on November 22, 2005.  
24    Accordingly, the one-year limitations period expired on November 22, 2006.  
25    *Patterson,* 251 F.3d at 1245-47. Because petitioner did not initiate the current  
26    proceedings until August 14, 2014, the present action is untimely, absent  
27    statutory or equitable tolling. *See* 28 U.S.C. § 2244(d)(1); Fed. R. Civ. Proc.  
28    6(a).

1       **2.     STATUTORY TOLLING**

2             Title 28 U.S.C. § 2244(d)(2) provides that “[t]he time during which a  
3 properly filed application for state post-conviction or other collateral review with  
4 respect to the pertinent judgment or claim is pending shall not be counted toward  
5 any period of limitation under this subsection.”

6             The statute of limitations is not tolled between the date on which a  
7 judgment becomes final and the date on which the petitioner filed his first state  
8 collateral challenge because there is no case “pending.” *Nino v. Galaza*, 183 F.3d  
9 1003, 1006 (9th Cir. 1999). Once an application for post-conviction review  
10 commences, it is “pending” until a petitioner “complete[s] a full round of [state]  
11 collateral review.” *Delhomme v. Ramirez*, 340 F.3d 817, 819 (9th Cir. 2003)  
12 (citing *Biggs v. Duncan*, 339 F.3d 1045, 1048 (9th Cir. 2003)). “One full round”  
13 generally means that the statute of limitations is tolled while a petitioner is  
14 properly pursuing post-conviction relief, from the time a California prisoner files  
15 his first state habeas petition until the California Supreme Court rejects his final  
16 collateral challenge. *Carey v. Saffold*, 536 U.S. 214, 219-20, 122 S. Ct. 2134,  
17 153 L. Ed. 2d 260 (2002); *see also Nino*, 183 F.3d at 1006; *Delhomme*, 340 F.3d  
18 at 819. The period tolled includes the time between a lower court decision and  
19 the filing of a new petition in a higher court, as long as the intervals between the  
20 filing of those petitions are “reasonable.” *Delhomme*, 340 F.3d at 819 (citing  
21 *Biggs*, 339 F.3d at 1048 n.1).

22             Here, petitioner does not appear to be entitled to any statutory tolling.  
23 Petitioner does not allege that he filed any habeas petitions prior to the November  
24 22, 2006 expiration of his limitations period.

25       **3.     EQUITABLE TOLLING**

26             The AEDPA limitations period also may be subject to equitable tolling, if  
27 the petitioner shows that extraordinary circumstances beyond the petitioner’s  
28 control made timely filing of a federal habeas petition impossible *and* the

1 petitioner has acted diligently in pursuing his rights. *Holland v. Florida*, 560  
2 U.S. 631, 649, 130 S. Ct. 2549, 2562, 177 L. Ed. 2d 130 (2010). The petitioner  
3 bears the burden of showing that equitable tolling is appropriate. *Miranda v.*  
4 *Castro*, 292 F.3d 1063, 1065 (9th Cir. 2002).

5 Petitioner has not made any allegation that suggests that equitable tolling  
6 may be appropriate. Petitioner has made no showing of extraordinary  
7 circumstances or of diligence, therefore, petitioner has not demonstrated that he is  
8 entitled to equitable tolling.

9 **4. ORDER TO SHOW CAUSE**

10 Petitioner vaguely states that he could not have discovered the factual  
11 predicate for his claims prior to the filing of the Petition. Petitioner does not  
12 explain what factual predicate he is referring to, when and how he discovered it,  
13 and why he did not discover it earlier. Under these allegations, petitioner has not  
14 demonstrated that he is entitled to a later start date. Therefore, and because the  
15 Petition does not demonstrate any basis for tolling the statute, the Court orders  
16 petitioner to show cause in writing within 15 days of the date of this order why  
17 the Petition should not be dismissed as time-barred. If petitioner fails to provide  
18 a timely response to this order, the Court will recommend that the Petition be  
19 dismissed as time-barred.

20 IT IS SO ORDERED.

21  
22 DATED: September 16, 2014

23  
24 /S/ FREDERICK F. MUMM  
25 FREDERICK F. MUMM  
26 United States Magistrate Judge  
27  
28