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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EARL A. LEE,
Petitioner,
v.
J. SOTO, Warden,
Respondent.

NO. CV 16-5470-ODW (AGR)

ORDER TO SHOW CAUSE

Petitioner has 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 **August 22, 2016** why the 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 A Los Angeles County Superior Court jury convicted Petitioner of two
4 counts of special-circumstance murder and other crimes and enhancements. He
5 was sentenced to two consecutive prison terms, each consisting of life without
6 possibility of parole plus 25 years. See *People v. Lee*, No. B213692, 2010 WL
7 2636483 (Cal. App. 2d Dist.).

8 On July 2, 2010, the California Court of Appeal affirmed. *Id.* On October
9 20, 2010, the California Supreme Court denied review. California Appellate
10 Courts Online Docket in Case No. S184433.

11 Five and a half years passed. On April 1, 2016, Petitioner filed a habeas
12 petition in the California Supreme Court, which denied relief on May 18, 2016.
13 California Appellate Courts Online Docket in Case No. S233435.

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 (1997).

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

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

25 Petitioner's conviction became final on January 18, 2011, 90 days after the
26 California Supreme Court denied review on October 20, 2010. See *Bowen v.*
27 *Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999). The statute of limitations expired on
28 January 19, 2012. Absent tolling, the petition is late by over four years.

1 **1. Statutory Tolling**

2 The statute of limitations is tolled during the time “a properly filed
3 application for State post-conviction or other collateral review with respect to the
4 pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2). Petitioner does
5 not appear to have had any state habeas challenges pending during the
6 limitations period. He cannot benefit from tolling for his 2016 California Supreme
7 Court petition, for he did not file that action until long after the limitations period
8 had expired. *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003).

9 **2. Equitable Tolling**

10 “[T]he timeliness provision in the federal habeas corpus statute is subject to
11 equitable tolling.” *Holland v. Florida*, 560 U.S. 631, 634(2010). “[A] ‘petitioner’ is
12 ‘entitled to equitable tolling’ only if he shows ‘(1) that he has been pursuing his
13 rights diligently, and (2) that some extraordinary circumstance stood in his way’
14 and prevented timely filing.” *Id.* at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S.
15 408, 418 (2005)). “The diligence required for equitable tolling purposes is
16 ‘reasonable diligence,’ not ‘maximum feasible diligence.’” *Id.* at 653 (citations
17 and quotation marks omitted). The extraordinary circumstances must have been
18 the cause of an untimely filing. *Pace*, 544 U.S. at 418. “[E]quitable tolling is
19 available for this reason only when “‘extraordinary circumstances beyond a
20 prisoner’s control make it impossible to file a petition on time’” and “‘the
21 extraordinary circumstances’” were the cause of [the prisoner’s] untimeliness.”
22 *Bills v. Clark*, 628 F.3d 1092, 1097 (9th Cir. 2010) (citations omitted, emphasis in
23 original).

24 There is no indication in the petition or the extensive supporting
25 memorandum that Petitioner is entitled to equitable tolling.

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

27 In the context of an ineffective assistance claim, the statute of limitations
28 may start to run on the date a petitioner discovered (or could have discovered)

1 the factual predicate for a claim that his counsel's performance was deficient, or
2 on the date a petitioner discovered (or could have discovered) the factual
3 predicate for prejudice, whichever is later. See *Hasan v. Galaza*, 254 F.3d 1150,
4 1155 (9th Cir. 2001). Therefore, the statute of limitations begins to run on "the
5 date on which the factual predicate of the claim or claims presented could have
6 been discovered through the exercise of due diligence." 28 U.S.C.
7 § 2244(d)(1)(D). The statute starts to run when the petitioner knows or through
8 diligence could discover the important facts, not when the petitioner recognizes
9 their legal significance. *Hasan*, 254 F.3d at 1154 n.3.

10 Petitioner alleges his trial counsel was ineffective, but the factual bases for
11 Petitioner's claim were known by him at the latest before he was sentenced.
12 (See Petition at scanned pp. 10-14.) Therefore, the date of discovery with
13 respect to trial counsel does not assist Petitioner.

14 **III.**

15 **ORDER TO SHOW CAUSE**

16 IT IS THEREFORE ORDERED that on or before **August 22, 2016**,
17 Petitioner shall show cause why the court should not recommend dismissal of the
18 petition based on expiration of the one-year statute of limitations.

19 **If Petitioner fails to respond to this order to show cause by August 22,**
20 **2016, the court will recommend that the petition be dismissed with**
21 **prejudice based on expiration of the one-year statute of limitations.**

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23
24 DATED: August 2, 2016



ALICIA G. ROSENBERG
United States Magistrate Judge