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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

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11 JESUS A. LEYVA,) No. CV 17-2008 ODW (FFM)
12)
13) Petitioner,) ORDER TO SHOW CAUSE WHY THE
14) v.) PETITION SHOULD NOT BE
15) WILLIAM L. MUNIZ,) DISMISSED AS UNTIMELY
16) Respondent.)

17 On March 7, 2017, petitioner Jesus A. Leyva (“petitioner”) constructively¹
18 filed a Petition for Writ of Habeas Corpus by a Person in State Custody (the
19 “petition”) pursuant to 28 U.S.C. § 2254. (Dkt. 1.) The petition challenges
20 petitioner’s 2014 conviction in the Superior Court of Los Angeles County for
21 various crimes.

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

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

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26 ¹ A pro se petitioner’s relevant filings may be construed as filed on the date
27 they were submitted to prison authorities for mailing, under the prison “mailbox
28 rule” of *Houston v. Lack*, 487 U.S. 266 (1988). While no proof of service is
attached to the petition, the outside of the envelope in which the petition was
filed bears a notation seemingly indicating that the petition was received by
prison authorities on March 7, 2017. (See Dkt. 1 at 73.)

1 No. 104–132, 110 Stat. 1214 (1996). Accordingly, AEDPA’s timeliness
2 provisions apply, including a one-year limitations period which is subject to both
3 statutory and equitable tolling. *See* 28 U.S.C. § 2244(d)(1). For those prisoners
4 whose convictions became final post-AEDPA, the one-year period starts running
5 from the latest of four alternative dates set forth in 28 U.S.C. § 2244(d)(1)(A)-
6 (D). *See, e.g., Patterson v. Stewart*, 251 F.3d 1243, 1245–47 (9th Cir. 2001).

7 Section 2244(d)(1)(A) provides that the one-year limitations period “shall
8 run from the latest of . . . the date on which the [petitioner’s conviction] became
9 final by the conclusion of direct review or the expiration of the time for seeking
10 such review.” If a petitioner’s conviction is affirmed by an intermediate
11 appellate court and he does not appeal that decision to the state’s highest court,
12 his conviction becomes final for the purposes of section 2244(d)(1)(A) when the
13 period for seeking review from the state’s highest court expires. *Wixom v.*
14 *Washington*, 264 F.3d 894, 897 (9th Cir. 2001). In California, a petitioner’s
15 period for seeking review from the California Supreme Court expires forty days
16 after the Court of Appeal decision is filed. *See* Cal. R. Ct. 8.264(b)(1) (“[A]
17 Court of Appeal decision . . . is final in that court 30 days after filing.”); Cal. R.
18 Ct. 8.500(e)(1) (“A petition for review must be . . . filed within 10 days after the
19 Court of Appeal decision is final in that court.”).

20 The California Court of Appeal decision affirming petitioner’s conviction
21 was filed on May 27, 2015.² While petitioner did have a habeas petition pending
22 in the California Supreme Court at that time, as discussed below, petitioner never
23 filed a petition for *direct review* of his conviction in the California Supreme
24 Court. Thus, for the purposes of section 2244(d)(1)(A), petitioner’s conviction

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26 ² The Court takes judicial notice of Petitioner’s state court proceedings as
27 indicated on the California Courts of Appeal official case information website,
28 found at <http://appellatecases.courtinfo.ca.gov/index.html>. *See Porter v. Ollison*,
620 F.3d 952, 954–55 (9th Cir. 2010) (federal courts may take judicial notice of
state court dockets found on the internet).

1 became final on July 6, 2015, forty days after petitioner's conviction was
2 affirmed by the California Court of Appeal. *See Wixom*, 264 F.3d at 897; Cal. R.
3 Ct. 8.264(b)(1), 8.500(e)(1). Accordingly, the one-year limitations period was
4 set to expire on July 6, 2016. *See Patterson*, 251 F.3d at 1245-47. Because
5 petitioner did not initiate the current proceedings until March 7, 2017, the
6 present action is untimely, absent statutory or equitable tolling. *See* 28 U.S.C. §
7 2244(d)(1); Fed. R. Civ. Proc. 6(a).

8 **2. STATUTORY TOLLING**

9 Title 28 U.S.C. § 2244(d)(2) provides that “[t]he time during which a
10 properly filed application for state post-conviction or other collateral review with
11 respect to the pertinent judgment or claim is pending shall not be counted toward
12 any period of limitation under this subsection.” The statute of limitations is not
13 tolled between the date on which a judgment becomes final and the date on
14 which the petitioner files his first state collateral challenge because there is no
15 case “pending.” *Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999). However,
16 a state habeas petition filed before a petitioner's conviction is final may toll
17 limitations period, effectively delaying the initiation of the limitations period
18 during the time the petition is pending. *Jimenez v. Rice*, 276 F.3d 478, 482 (9th
19 Cir. 2001) (citation omitted).

20 As noted above, on April 28, 2015, petitioner filed a habeas petition in the
21 California Supreme Court while his direct appeal was still pending before the
22 California Court of Appeal. The California Supreme Court denied the petition
23 on July 8, 2015, two days after petitioner's conviction became final for the
24 purposes of section 2244(d)(1)(A). Petitioner admits that he has not filed any
25 other habeas petitions in state court since his habeas petition was denied by the
26 California Supreme Court. California court records confirm his admission.
27 Accordingly, the one-year limitations period within which petitioner was

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1 permitted to file a federal habeas petition effectively began on July 8, 2015, and
2 ended on July 8, 2016, unless it is subject to equitable tolling.

3 **3. EQUITABLE TOLLING**

4 The AEDPA limitations period also may be subject to equitable tolling, if
5 the petitioner shows that extraordinary circumstances beyond the petitioner's
6 control made timely filing of a federal habeas petition impossible and the
7 petitioner has acted diligently in pursuing his rights. *Holland v. Florida*, 560
8 U.S. 631, 649 (2010). The petitioner bears the burden of showing that equitable
9 tolling is appropriate. *Miranda v. Castro*, 292 F.3d 1063, 1065 (9th Cir. 2002).


10 Petitioner has made no showing of extraordinary circumstances or of
11 diligence and, therefore, has not demonstrated that equitable tolling is
12 appropriate in this case.

13 **4. ORDER TO SHOW CAUSE**

14 Under the allegations and facts of the petition, petitioner has not
15 demonstrated that he is entitled to a later start date of the limitations period.
16 Therefore, and because the petition does not demonstrate any basis for tolling the
17 statute, or for setting aside the one-year limitation, the Court orders petitioner to
18 show cause in writing within thirty (30) days of the date of this order why the
19 petition should not be dismissed as time-barred. If petitioner fails to provide a
20 timely response to this order, the Court will recommend that the petition be
21 dismissed, with prejudice, as time-barred.

22 IT IS SO ORDERED.

23 MAR 27 2017

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