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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

RANDY ROGERS,  
Petitioner,  
v.  
ERIC ARNOLD, Warden,  
Respondent.

Case No. CV 17-05572-CJC (KES)

ORDER TO SHOW CAUSE WHY  
HABEAS PETITION SHOULD NOT  
BE DISMISSED AS UNTIMELY

On July 24, 2017, Randy Rogers (“Petitioner”) constructively filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 (“Petition”). (Dkt. 1.) As discussed more fully below, the Court orders Petitioner to show cause why the Petition should not be dismissed as untimely.

**I.**

**PROCEDURAL HISTORY**

The following facts are taken from the Petition and its exhibits, from the Court’s own records, or from public records; where necessary, the Court takes judicial notice of the latter. See Fed. R. Evid. 201(b)(2) (“The court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.”); United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980) (“[A] court

1 may take judicial notice of its own records in other cases, as well as the records of an  
2 inferior court in other cases.”)

3 **A. Petitioner’s Underlying Conviction.**

4 In 2011, Petitioner was convicted by a Los Angeles County Superior Court  
5 jury of twelve counts of robbery. See People v. Rogers, 2012 WL 3765145, at \*1  
6 (Cal. App. 2d Aug. 31, 2012). In a bifurcated proceeding, the superior court found  
7 true allegations that Petitioner had suffered four prior strike convictions, served two  
8 prior prison terms, and suffered two prior serious felony convictions. Id. Petitioner  
9 was sentenced to 160 years to life in state prison. Id.

10 On August 31, 2012, the Court of Appeal affirmed Petitioner’s conviction in  
11 an unpublished opinion. (Id.) Petitioner’s Petition for Review to the California  
12 Supreme Court was denied on November 14, 2012. (Dkt. 1 at 2.)

13 **B. Petitioner’s State Court Habeas Proceedings.**

14 The state habeas petitions filed by Petitioner are as follows<sup>1</sup>:

<b>Filing Date</b>	<b>Court</b>	<b>Case No.</b>	<b>Disposition</b>
August 23, 2012	California Court of Appeal	B243430	Denied, October 12, 2012
October 24, 2012	California Supreme Court	S206175	Denied, November 28, 2012
November 2, 2012	California Court of Appeal	B244904	Denied, January 4, 2013
January 7, 2013	California Supreme Court	S208055	Denied, February 20, 2013
October 29, 2016	Los Angeles County Superior Court	YA074167	Denied, December 15, 2016

26  
27 <sup>1</sup> The Court compiled this list from a review of the Petition and its attachments, as  
28 well as records from the California Court of Appeal website. It may be incomplete  
with respect to petitions filed in the Los Angeles County Superior Court.

1 2 3	January 17, 2017	California Court of Appeal	B280118	Denied, January 20, 2017
4 5	February 27, 2017	California Supreme Court	S240276	Denied, April 12, 2017

6 Petitioner’s 2016 round of state petitions raise the claims brought in the instant  
7 Petition.

8 **C. The Instant Federal Habeas Petition.**

9 Petitioner raises the following three claims:

10 Ground One: Petitioner’s sentence violates Miller v. Alabama, 567 U.S. 460  
11 (2012) because it “was imposed under an unconstitutional mandatory minimum  
12 sentencing law.” (Dkt. 1 at 5.)

13 Ground Two: “The Three Strikes Law is an arbitrarily applied sentencing  
14 scheme that unconstitutionally limits individualized decision-making.” (Id.)

15 Ground Three: California’s Three Strikes Law “is implicitly biased and has  
16 been implemented in ways that violate Petitioner’s Fourteenth Amendment rights to  
17 equal protection of the laws.” (Id. at 6.)

18 **II.**

19 **LEGAL STANDARD**

20 The Ninth Circuit has held that the district court has the authority to raise the  
21 statute of limitations issue sua sponte when untimeliness is obvious on the face of the  
22 Petition and to summarily dismiss a habeas petition on that ground pursuant to Rule  
23 4 of the Rules Governing Section 2254 Cases in the United States District Courts, so  
24 long as the Court “provides the petitioner with adequate notice and an opportunity to  
25 respond.” See Nardi v. Stewart, 354 F.3d 1134, 1141 (9th Cir. 2004); Herbst v. Cook,  
26 260 F.3d 1039, 1042-43 (9th Cir. 2001).

27 **A. One-Year Statute of Limitations.**

28 This action is subject to the Antiterrorism and Effective Death Penalty Act of

1 1996 (“AEDPA”). Calderon v. U.S. Dist. Court for the Cent. Dist. of Cal. (Beeler),  
2 128 F.3d 1283, 1287 n.3 (9th Cir. 1997), cert. denied, 522 U.S. 1099 (1998).<sup>2</sup> AEDPA  
3 provides as follows:

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

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

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

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

18 (D) the date on which the factual predicate of the claim or claims  
19 presented could have been discovered through the exercise of due  
20 diligence.

21 (2) The time during which a properly filed application for State post-  
22 conviction or other collateral review with respect to the pertinent  
23 judgment or claim is pending shall not be counted toward any period of  
24 limitation under this subsection.

25 28 U.S.C. § 2244(d).

26 \_\_\_\_\_  
27 <sup>2</sup> Beeler was overruled on other grounds in Calderon v. U.S. Dist. Court  
28 (Kelly), 163 F.3d 530, 540 (9th Cir. 1998) (en banc), cert. denied, 526 U.S. 1060  
(1999).



1 conviction or other collateral review with respect to the pertinent  
2 judgment or claim is pending shall not be counted toward any period of  
3 limitation under this subsection.

4 28 U.S.C. § 2244(d)(2). The United States Supreme Court has interpreted this  
5 language to mean that the AEDPA's statute of limitations is tolled from the time the  
6 first state habeas petition is filed until the California Supreme Court rejects a  
7 petitioner's final collateral challenge, so long as the petitioner has not unreasonably  
8 delayed during the gaps between sequential filings. Carey v. Saffold, 536 U.S. 214,  
9 219-21 (2002) (holding that, for purposes of statutory tolling, a California petitioner's  
10 application for collateral review remains pending during the intervals between the  
11 time a lower state court denies the application and the time the petitioner files a  
12 further petition in a higher state court); Nino v. Galaza, 183 F.3d 1003, 1006 (9th  
13 Cir.), cert. denied, 529 U.S. 1104 (2000) (The statute is tolled from "the time the first  
14 state habeas was filed until the California Supreme Court rejects the petitioner's final  
15 collateral challenge."). Statutory tolling "does not permit the reinitiation of a  
16 limitations period that has ended before the state petition was filed," even if the state  
17 petition was timely filed. Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir.), cert.  
18 denied, 540 U.S. 924 (2003); Jimenez v. Rice, 276 F.3d 478, 482 (9th Cir. 2001);  
19 Wixom v. Washington, 264 F.3d 894, 898-99 (9th Cir. 2001), cert. denied, 534 U.S.  
20 1143 (2002).

21 Petitioner filed two rounds of state habeas petitions before his AEDPA statute  
22 of limitations expired. Even assuming that those petitions were properly filed and  
23 therefore qualified for statutory tolling, the latest AEDPA deadline he could receive  
24 would expire on February 20, 2014, one year after his second California Supreme  
25 Court petition (Case No. S208055) was denied. Petitioner is not entitled to statutory  
26 tolling for the pendency of the state petitions filed in 2016 and 2017, because they  
27 were not initiated during the AEDPA limitations period.

1 **C. Petitioner has not Shown that He is Entitled to Equitable Tolling.**

2 In Holland v. Florida, 560 U.S. 631, 649 (2010), the Supreme Court held that  
3 the AEDPA’s one-year limitation period also is subject to equitable tolling in  
4 appropriate cases. However, in order to be entitled to equitable tolling, the petitioner  
5 must show both that (1) he has been pursuing his rights diligently, and (2) some  
6 extraordinary circumstance stood in his way and prevented his timely filing. See  
7 Holland, 130 S. Ct. at 2562 (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)).  
8 The Ninth Circuit has held that the Pace standard is consistent with the Ninth  
9 Circuit’s “sparing application of the doctrine of equitable tolling.” Waldron-Ramsey  
10 v. Pacholke, 556 F.3d 1008, 1011 (9th Cir.), cert. denied, 130 S. Ct. 244 (2009).  
11 Thus, “[t]he petitioner must show that ‘the extraordinary circumstances were the  
12 cause of his untimeliness and that the extraordinary circumstances made it impossible  
13 to file a petition on time.’” Porter, 620 F.3d at 959 (quoting Ramirez v. Yates, 571  
14 F.3d 993, 997 (9th Cir. 2009)). “[T]he threshold necessary to trigger equitable tolling  
15 [under AEDPA] is very high, lest the exceptions swallow the rule.” Miranda v.  
16 Castro, 292 F.3d 1063, 1066 (9th Cir.), cert. denied, 537 U.S. 1003 (2002).  
17 Consequently, as the Ninth Circuit has recognized, equitable tolling will be justified  
18 in few cases. Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003); Waldron-Ramsey,  
19 556 F.3d at 1011 (“To apply the doctrine in ‘extraordinary circumstances’ necessarily  
20 suggests the doctrine’s rarity, and the requirement that extraordinary circumstances  
21 ‘stood in his way’ suggests that an external force must cause the untimeliness, rather  
22 than, as we have said, merely ‘oversight, miscalculation or negligence on [the  
23 petitioner’s] part, all of which would preclude the application of equitable tolling.’”).

24 The burden of demonstrating that the AEDPA’s one-year limitation period was  
25 sufficiently tolled, whether statutorily or equitably, rests with the petitioner. See,  
26 e.g., Pace, 544 U.S. at 418; Banjo v. Ayers, 614 F.3d 964, 967 (9th Cir. 2010); Gaston  
27 v. Palmer, 417 F.3d 1030, 1034 (9th Cir. 2005) (as amended); Miranda v. Castro, 292  
28 F.3d 1063, 1065 (9th Cir. 2002). Petitioner has not described any circumstances in

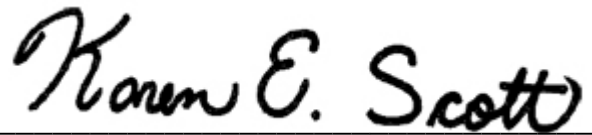
1 his Petition that might create equitable tolling.

2 **IV.**

3 **CONCLUSION**

4 IT IS THEREFORE ORDERED that, on or before **September 1, 2017**,  
5 Petitioner show cause in writing, if any he has, why the Court should not recommend  
6 that this action be dismissed with prejudice on the ground of untimeliness.

7  
8 DATED: August 03, 2017

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10 KAREN E. SCOTT  
11 UNITED STATES MAGISTRATE JUDGE

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