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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

MICHAEL JAY ROBINSON,	}	No. CV 17-06970-VBF (DFM)
Petitioner,		ORDER TO SHOW CAUSE
v.		
UNITED STATES DISTRICT COURT OF CALIFORNIA,		
Respondent.		

On September 21, 2017, Michael Jay Robinson (“Petitioner”) initiated this action by filing a Petition for Writ of Habeas Corpus by a Person in State Custody challenging his conviction. Dkt. 1 (“Petition”) at 1.¹ According to the California Court of Appeal website,² Petitioner’s challenged conviction

¹ All citations to the Petition use the CM/ECF pagination.

² The Court takes judicial notice of the state appellate court’s records related to Petitioner’s case, which are available at <http://appellatecases.courtinfo.ca.gov>. See Smith v. Duncan, 297 F.3d 809, 815 (9th Cir. 2002) (federal habeas courts may take judicial notice of relevant state court records), overruled on other grounds as recognized in Cross v. Sisto, 676 F.3d 1172, 1178-79 (9th Cir. 2012).

1 occurred in September 2000 in Los Angeles County Superior Court (Case No.
2 GA041966). See California Courts, Appellate Courts Case Information,
3 <http://appellatecases.courtinfo.ca.gov>. The state appellate court affirmed his
4 conviction in September 2002 (Case No. B144770). Id. The California
5 Supreme Court denied review in August 2002 (Case No. S107909). Id.
6 Petitioner does not appear to have filed a petition for writ of certiorari with the
7 United States Supreme Court. On June 21, 2006, Petitioner filed a habeas
8 petition in the Los Angeles County Superior Court. Id. It was summarily
9 denied by order on June 27, 2006. Id. Petitioner is presently serving the 70
10 years to life sentence imposed in 2000. Petition at 1.

11 For the reasons discussed below, the Petition appears to be untimely by
12 several years. Petitioner is therefore ordered to show cause in writing within
13 twenty-eight (28) days of the service of this Order why his Petition should not
14 be dismissed with prejudice as time barred.

15 **A. The Petition Is Facially Untimely**

16 Under the Antiterrorism and Effective Death Penalty Act of 1996
17 (“AEDPA”), a one-year limitation period applies to a federal petition for writ
18 of habeas corpus filed by a person in state custody. See 28 U.S.C. § 2244(d)(1).
19 In most cases, the limitation period begins running from “the date on which
20 the judgment became final by the conclusion of direct review or the expiration
21 of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A).

22 The California Supreme Court denied Petitioner’s petition for review on
23 August 21, 2002. Petitioner does not appear to have filed a petition for writ of
24 certiorari in the United States Supreme Court. Therefore, his conviction
25 became final 90 days later, on November 19, 2002. See Bowen v. Roe, 188
26 F.3d 1157, 1158-59 (9th Cir. 1999). If the Court assumes that date is the date
27 Petitioner’s limitation period began to run, Petitioner then had one year from
28 the date his judgment became final, or until November 20, 2003, to timely file

1 a habeas corpus petition in this Court. See Patterson v. Stewart, 251 F.3d 1243,
2 1247 (9th Cir. 2001). However, Petitioner did not file the instant action until
3 September 21, 2017, almost 14 years too late.

4 **B. Later Trigger Dates**

5 From the face of the Petition, it does not appear that Petitioner has any
6 basis for contending that he is entitled to a later trigger date under
7 § 2244(d)(1)(B), (C), or (D). He does not assert that he was impeded from filing
8 his federal petition by unconstitutional state action. See § 2244(d)(1)(B). Nor
9 are his claims based on a federal constitutional right that was newly recognized
10 by the United States Supreme Court and made retroactively applicable to cases
11 on collateral review. See § 2244(d)(1)(C). Finally, Petitioner has been long
12 aware of the underlying factual predicates of his claims, which challenge the
13 evidence presented at trial. See Petition at 7-9; § 2244(d)(1)(D); Hasan v.
14 Galaza, 254 F.3d 1150, 1154 n.3 (9th Cir. 2001) (holding that limitation period
15 under § 2244(d)(1)(D) begins running when petitioner knew of facts underlying
16 claims, not when he realized their “legal significance”). To the extent that
17 Petitioner argues that bystander testimony was newly discovered, the witness
18 testimony “could have been discovered through the exercise of due diligence.”
19 See Petition at 7, § 2244(d)(1)(D).

20 **C. Statutory Tolling**

21 Under AEDPA, “[t]he time during which a properly filed application for
22 State post-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.” § 2244(d)(2). According to information
25 available on the California Court of Appeal website, Petitioner did not file a
26 state habeas petition until June 21, 2006, long after the limitation period
27 expired. See California Courts, Appellate Courts Case Information,
28 <http://appellatecases.courtinfo.ca.gov> (search for case no. B191781). He

1 therefore is not entitled to statutory tolling. See Ferguson v. Palmateer, 321
2 F.3d 820, 823 (9th Cir. 2003) (“[S]ection 2244(d) does not permit the
3 reinitiation of a limitation period that ended before the state petition was
4 filed[.]”).

5 **D. Equitable Tolling**

6 Federal habeas petitions are subject to equitable tolling of the one-year
7 limitation period in appropriate cases. Holland v. Florida, 560 U.S. 631, 645
8 (2010). To be entitled to equitable tolling, the petitioner must show both “(1)
9 that he has been pursuing his rights diligently, and (2) that some extraordinary
10 circumstance stood in his way” and prevented his timely filing. Id. at 649
11 (citing Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)). The Ninth Circuit has
12 noted that its “sparing application of the doctrine of equitable tolling” is
13 consistent with the Pace standard. Waldron-Ramsey v. Pacholke, 556 F.3d
14 1008, 1011 (9th Cir. 2009). Thus, “[t]he petitioner must show that ‘the
15 extraordinary circumstances were the cause of his untimeliness and that the
16 extraordinary circumstances made it impossible to file a petition on time.’”
17 Porter v. Ollison, 620 F.3d 952, 959 (9th Cir. 2010) (quoting Ramirez v. Yates,
18 571 F.3d 993, 997 (9th Cir. 2009)).

19 “Indeed, ‘the threshold necessary to trigger equitable tolling [under
20 AEDPA] is very high, lest the exceptions swallow the rule.’” Miranda v.
21 Castro, 292 F.3d 1063, 1066 (9th Cir. 2002) (citation omitted, alteration in
22 original). Consequently, equitable tolling is justified in few cases. Spitsyn v.
23 Moore, 345 F.3d 796, 799 (9th Cir. 2003). The petitioner bears the burden of
24 demonstrating by a preponderance of the evidence that AEDPA’s limitation
25 period should be equitably tolled. See Pace, 544 U.S. at 418; Holt v. Frink, No.
26 15-01302, 2016 WL 125509, at *4 (N.D. Cal. Jan. 12, 2016) (collecting cases).

27 Here, Petitioner has not addressed his failure to file in a timely manner
28 or contend that he took any action before the AEDPA limitation expired.

1 Thus, Petitioner has failed to demonstrate that he pursued his rights diligently.

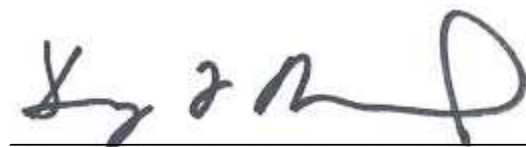
2 **E. Conclusion**

3 A district court has the authority to raise the statute of limitations issue
4 sua sponte when untimeliness is obvious on the face of a petition, and it may
5 summarily dismiss the petition on that ground under Rule 4 of the Rules
6 Governing Section 2254 Cases in the United States District Courts, as long as
7 the court gives the petitioner adequate notice and an opportunity to respond.
8 Herbst v. Cook, 260 F.3d 1039, 1042-43 (9th Cir. 2001).

9 IT THEREFORE IS ORDERED that within twenty-eight (28) days of
10 the service of this Order, Petitioner show cause in writing why the Court
11 should not dismiss this action with prejudice because it is untimely. If
12 Petitioner intends to rely on the equitable-tolling doctrine, he will need to
13 include with his response to this Order to Show Cause a declaration under
14 penalty of perjury stating facts showing that (1) he has been pursuing his rights
15 diligently and (2) "some extraordinary circumstance stood in his way." He
16 may submit any other evidence he deems appropriate to support his claim for
17 tolling.

18 Petitioner is expressly warned that his failure to timely respond to this
19 Order may result in his Petition being dismissed for the reasons stated above
20 and for failure to prosecute.

21
22 Dated: October 26, 2017



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24 DOUGLAS F. McCORMICK
25 United States Magistrate Judge
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