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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

MICHAEL URIAS,	)	No. CV 17-07688-R (DFM)
	)	
Petitioner,	)	ORDER TO SHOW CAUSE
	)	
v.	)	
	)	
SECRETARY OF THE	)	
CALIFORNIA DEPARTMENT OF	)	
CORRECTIONS,	)	
	)	
Respondent.	)	

On October 16, 2017, Michael Urias (“Petitioner”) initiated this action by filing a Petition for Writ of Habeas Corpus by a Person in State Custody in the United States District Court for the Eastern District of California. See Dkt. 1 (“Petition”) at 1. Pursuant to 28 U.S.C. § 2241(d), the Petition was transferred to this Court. See Dkt. 3.

For the reasons discussed below, Petitioner is ORDERED TO SHOW CAUSE in writing within 28 days of the service of this Order why the instant petition should not be dismissed with prejudice because it is time barred and/or because the Court lacks jurisdiction over it.

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1 **A. State Court Proceedings**

2 According to the California Court of Appeal website, Petitioner’s  
3 challenged conviction occurred in August 1999 in Los Angeles County  
4 Superior Court (No. BA173513). See California Courts, Appellate Cts. Case  
5 Information, <http://appellatecases.courtinfo.ca.gov> (“Appellate Cts. Case  
6 Information”). The state appellate court affirmed his conviction in February  
7 2001 (No. B134600). Id. The California Supreme Court denied review on April  
8 25, 2001 (No. S096224). Id. Petitioner does not appear to have filed a petition  
9 for writ of certiorari with the United States Supreme Court. Petition at 2.<sup>1</sup>

10 On October 3, 2001, Petitioner filed a state petition for writ of habeas  
11 corpus in the California Court of Appeal (No. B153407). See Appellate Cts.  
12 Case Information. That court denied the petition on October 24, 2001. Id.  
13 Petitioner filed two more state petitions for writs of habeas corpus in the  
14 California Court of Appeal on December 1, 2008 (No. B212379) and on  
15 November 8, 2012 (No. B2450001). See id. None of these three prior state  
16 habeas petitions filed in the California Court of Appeal raised the issue of the  
17 trial court’s imposition of the \$3,000 fine at issue in the instant case. See  
18 Petition at 12-13.

19 On July 6, 2016, the California trial court heard and denied Petitioner’s  
20 Request for Consideration Re: Modification of Sentence, which claimed that  
21 “the imposition of a \$3000.00 restitution fine [was] erroneous and improper  
22 based upon an inability to pay.” Id. at 9. On August 2, 2016, Petitioner filed a  
23 petition for writ of habeas corpus on this issue in the California Court of  
24 Appeal, and, in a two-page opinion, the state appellate court denied that  
25 petition on October 17, 2016. See id. at 12-13. On September 13, 2017, the  
26 California Supreme Court summarily denied Petitioner’s further appeal and

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27 <sup>1</sup> All citations to the Petition use the CM/ECF pagination.  
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1 noted that “courts will not entertain habeas corpus claims that are untimely”  
2 and those “that could have been, but were not, raised on appeal.” Id. at 15.

3 **B. Timeliness of the Petition**

4 **1. The Petition Is Facially Untimely**

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

11 The California Supreme Court denied Petitioner’s petition for review on  
12 April 25, 2001. See Appellate Cts. Case Information (No. S096224). Petitioner  
13 does not appear to have filed a petition for writ of certiorari in the United  
14 States Supreme Court. See Petition at 2. Therefore, his conviction became final  
15 90 days later, on July 24, 2001. See Bowen v. Roe, 188 F.3d 1157, 1158-59  
16 (9th Cir. 1999). If the Court assumes July 24, 2001, is the date Petitioner’s  
17 limitation period began to run, Petitioner had one year from the date his  
18 judgment became final, or until July 24, 2002, to timely file a habeas corpus  
19 petition in this Court. See Patterson v. Stewart, 251 F.3d 1243, 1247 (9th Cir.  
20 2001). Petitioner did not file the instant action until October 16, 2017, over 15  
21 years too late. The Petition is thus facially untimely.

22 **2. The Petition Does Not Entitle Petitioner to Any Later Trigger**  
23 **Date**

24 From the face of the Petition, it does not appear that Petitioner has any  
25 basis for contending that he is entitled to a later trigger date under 28 U.S.C.  
26 §§ 2244(d)(1)(B), (C), or (D). He does not assert that he was impeded from  
27 filing his federal petition by unconstitutional state action. See 28 U.S.C.  
28 § 2244(d)(1)(B). Nor are his claims based on a federal constitutional right that

1 was newly recognized by the United States Supreme Court and made  
2 retroactively applicable to cases on collateral review. See id. § 2244(d)(1)(C).  
3 Finally, Petitioner has been long aware of the underlying factual predicate of  
4 his claim—that is, his alleged inability to pay the \$3,000 restitution fine  
5 imposed on him by the state trial court in 1999. See Petition at 7, 9, 12-13; 28  
6 U.S.C. § 2244(d)(1)(D); Hasan v. Galaza, 254 F.3d 1150, 1154 n.3 (9th Cir.  
7 2001) (holding that limitation period under § 2244(d)(1)(D) begins running  
8 when petitioner knew of facts underlying claims, not when he realized their  
9 “legal significance”). Petitioner is thus not entitled any later trigger date under  
10 28 U.S.C. § 2244(d)(1).

11 **3. The Petition Does Not Suggest Any Entitlement to Statutory**  
12 **Tolling**

13 Under AEDPA, “[t]he time during which a properly filed application for  
14 State post-conviction or other collateral review with respect to the pertinent  
15 judgment or claim is pending shall not be counted toward any period of  
16 limitation under this subsection.” 28 U.S.C. § 2244(d)(2). The entire period of  
17 time for a full round of collateral review, from the filing of a first state habeas  
18 petition to the time the last state habeas petition is denied, may be deemed  
19 “pending” and tolled, so long as the state petitioner proceeds from a lower  
20 state court to a higher one. See Carey v. Saffold, 536 U.S. 214, 222-23 (2002).  
21 This includes so-called “gap tolling” for the periods of time between such state  
22 habeas petitions, as long as that period is “reasonable.” Id. Periods of up to 60  
23 days are generally presumptively reasonable. See Evans v. Chavis, 546 U.S.  
24 189, 201 (2006) (holding unexplained six-month delay unreasonable compared  
25 to “short periods of time,” such as 30 to 60 days, “that most States provide for  
26 filing an appeal to the state supreme court” (alteration omitted)).

27 As previously discussed, Petitioner’s limitation period began running on  
28 July 24, 2001, when Petitioner’s conviction became final under 28 U.S.C. §

1 2244(d)(1)(A). While the exact date Petitioner filed his first state habeas corpus  
2 petition in Los Angeles County Superior Court is unclear, the California Court  
3 of Appeal issued its denial of that petition on October 24, 2001. See Appellate  
4 Cts. Case Information (No. B153407). Assuming Petitioner immediately filed  
5 his initial state habeas corpus petition once his conviction became final on July  
6 24, 2001, and assuming that Petitioner is entitled to statutory tolling for the  
7 entire 93-day period from July 24 to October 24, 2001, the AEDPA limitation  
8 period was extended to October 24, 2002.

9       It does not appear Petitioner had his second state habeas corpus petition  
10 heard until 2008. See Petition at 3; Appellate Cts. Case Information (No.  
11 B212379); The Superior Court of California, County of Los Angeles, Criminal  
12 Case Summary, <http://lacourt.org/criminalcasesummary/ui> (“LASC  
13 Criminal Case Summary”) (No. BA173513). While Petitioner does not  
14 disclose when he initiated his second habeas corpus petition in the state trial  
15 court, even assuming Petitioner filed his petition one full year in advance of his  
16 scheduled hearing on the same—a generous timeline by any measure—the  
17 over five-year gap between the California Court of Appeal’s denial of his first  
18 habeas corpus petition and Petitioner’s filing of his second habeas corpus  
19 petition still substantially exceeds the 30 to 60 days the Supreme Court has  
20 identified as a “reasonable” gap for tolling. See Evans 546 U.S. at 201 (refusing  
21 to apply tolling to an unexplained 6-month gap). Absent any explanation for  
22 the long delay, Petitioner is not entitled to gap tolling for that period or to any  
23 additional statutory tolling. See Stewart v. Cate, 757 F.3d 929, 935-37 (9th Cir.  
24 2014) (as amended) (unexplained 100-day gap unreasonable); Ferguson v.  
25 Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (“[S]ection 2244(d) does not  
26 permit the reinitiation of the limitations period that has ended before the state  
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1 petition was filed.”).<sup>2</sup>

#### 2           **4.     Equitable Tolling**

3           Federal habeas petitions are subject to equitable tolling of the one-year  
4 limitation period in appropriate cases. Holland v. Florida, 560 U.S. 631, 645  
5 (2010). To be entitled to equitable tolling, the petitioner must show both “(1)  
6 that he has been pursuing his rights diligently, and (2) that some extraordinary  
7 circumstance stood in his way” and prevented his timely filing. Id. at 649  
8 (citing Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)). The Ninth Circuit has  
9 noted that its “sparing application of the doctrine of equitable tolling” is  
10 consistent with the Pace standard. Waldron-Ramsey v. Pacholke, 556 F.3d  
11 1008, 1011 (9th Cir. 2009). Thus, “[t]he petitioner must show that ‘the  
12 extraordinary circumstances were the cause of his untimeliness and that the  
13 extraordinary circumstances made it impossible to file a petition on time.’”  
14 Porter v. Ollison, 620 F.3d 952, 959 (9th Cir. 2010) (quoting Ramirez v. Yates,  
15 571 F.3d 993, 997 (9th Cir. 2009)).

16           “Indeed, ‘the threshold necessary to trigger equitable tolling [under  
17 AEDPA] is very high, lest the exceptions swallow the rule.’” Miranda v.  
18 Castro, 292 F.3d 1063, 1066 (9th Cir. 2002) (citation omitted, alteration in  
19 original). Consequently, equitable tolling is justified in few cases. Spitsyn v.  
20 Moore, 345 F.3d 796, 799 (9th Cir. 2003). The petitioner bears the burden of

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21           <sup>2</sup> The Court acknowledges that The Superior Court of California,  
22 County of Los Angeles, Criminal Case Summary website for case No.  
23 BA173513 also notes a “Motion” hearing that occurred on May 3, 2002. See  
24 LASC Criminal Case Summary (No. BA173513). This Court understands the  
25 May 3, 2002, hearing to be distinct from a “Habeas Corpus Petition” hearing,  
26 which is explicitly so labeled on the case summary. See id. The Court further  
27 notes that even if the May 3, 2002, hearing were for a habeas corpus petition,  
28 the instant Petition still would not be subject to statutory tolling since over 4.5  
years will likely have passed from the May 3 hearing and Petitioner’s filing of a  
further habeas corpus petition several years later.

1 demonstrating by a preponderance of the evidence that AEDPA’s limitation  
2 period should be equitably tolled. See Pace, 544 U.S. at 418; Holt v. Frink, No.  
3 15-01302, 2016 WL 125509, at \*4 (N.D. Cal. Jan. 12, 2016) (collecting cases).

4 Here, Petitioner has not addressed his failure to file in a timely manner  
5 or contended that he took any action before the AEDPA limitation period  
6 expired. Thus, Petitioner fails to demonstrate that he pursued his rights  
7 diligently.

### 8 **C. Jurisdiction**

9 “The federal habeas statute gives United States district courts jurisdiction  
10 to entertain petitions for habeas relief only from persons who are ‘in custody in  
11 violation of the Constitution or laws or treaties of the United States.’” Maleng  
12 v. Cook, 490 U.S. 488, 490 (1989) (per curiam) (citation omitted); see also 28  
13 U.S.C. § 2254(a) (“[A] district court shall entertain an application for a writ of  
14 habeas corpus in behalf of a person in custody pursuant to the judgment of a  
15 State court only on the ground that he is in custody in violation of the  
16 Constitution or laws or treaties of the United States.”). The “in custody”  
17 requirement is jurisdictional and is thus “the first question” courts must  
18 consider when evaluating a federal habeas corpus petition. Bailey v. Hill, 599  
19 F.3d 976, 978-79 (9th Cir. 2010).

20 Construing § 2254(a)’s “in custody” requirement, the Supreme Court  
21 “has recognized that its purpose is to permit petitions only when the remedy  
22 sought is capable of alleviating severe restraints on individual liberty.” Id. at  
23 980.

24 The custody requirement of the habeas corpus statute is designed  
25 to preserve the writ of habeas corpus as a remedy for severe  
26 restraints on individual liberty. Since habeas corpus is an  
27 extraordinary remedy whose operation is to a large extent  
28 uninhibited by traditional rules of finality and federalism, its use

1 has been limited to cases of special urgency, leaving more  
2 conventional remedies for cases in which the restraints on liberty  
3 are neither severe nor immediate.

4 Hensley v. Mun. Court, 411 U.S. 345, 351 (1973). “[T]he imposition of a fine,  
5 by itself, is not sufficient to meet § 2254’s jurisdictional requirements.” Bailey,  
6 599 F.3d at 979 (noting that liability under a restitution order is “like a fine-  
7 only conviction” and “is not a serious restraint . . . on liberty as to warrant  
8 habeas relief” (quoting Tinder v. Paula, 725 F.2d 801,805 (1st Cir. 1984))).

9 In Bailey v. Hill, the Ninth Circuit held that a challenge to a restitution  
10 order by a custodial state prisoner who does not challenge the lawfulness of his  
11 custody under federal law is insufficient for jurisdiction under the federal  
12 habeas statute 28 U.S.C. § 2254. See id. at 979-80. There, the petitioner did not  
13 dispute that his custody in itself, or its conditions, offended federal law; rather,  
14 he challenged only the restitution order by seeking “the elimination or  
15 alteration of a money judgment” through his petition for habeas corpus. See id.  
16 at 978, 981. Noting that § 2254(a) commands that courts entertain habeas  
17 petitions “only” on the ground that a prisoner is “in custody in violation of the  
18 Constitution or laws or treaties of the United States,” the Ninth Circuit held  
19 that the district court lacked jurisdiction over the petitioner’s challenge to the  
20 restitution order because the petition “lack[ed] any nexus, as required by the  
21 plain text of §2254(a), to his custody.” Id. at 981. The Ninth Circuit thus  
22 concluded that “§ 2254(a) does not confer jurisdiction over a state prisoner’s  
23 in-custody challenge to a restitution order imposed as part of a criminal  
24 sentence.” Id. at 982.

25 Bailey appears to be dispositive here. The Petition alleges two grounds  
26 for federal habeas corpus relief under § 2254(a). See Petition at 4. Both of these  
27 grounds pertain only to the trial court’s imposition of a restitution fine. See id.  
28 (“[1] The trial court when sentencing me imposed an illegal and improper



1 restitution fine . . . [2] The trial court imposed an illegal sentence . . . the trial  
2 court imposed improper restitution on me.”). Like in Bailey, Petitioner does  
3 not contend that his custody in itself, or its conditions, violate federal law; he  
4 merely asks this Court to “reduce” the amount of his restitution. Id. at 4, 7.  
5 Because federal “courts do not have jurisdiction over a habeas corpus petition  
6 brought pursuant to § 2254 challenging only a restitution order,” this Court  
7 lacks the requisite jurisdiction to hear Petitioner’s claims.

8 **D. Conclusion**

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

15 IT THEREFORE IS ORDERED that within 28 days of the service of  
16 this Order, Petitioner show cause in writing why the Court should not dismiss  
17 this action with prejudice because it is time barred and/or because the Court  
18 lacks jurisdiction over it. If Petitioner intends to rely on the equitable-tolling  
19 doctrine, he will need to include with his response to this Order to Show Cause  
20 a declaration under penalty of perjury stating facts showing that (1) he has  
21 been pursuing his rights diligently and (2) “some extraordinary circumstance  
22 stood in his way.” He may submit any other evidence he deems appropriate to  
23 support his claim for tolling.

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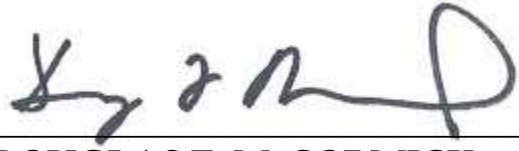
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1           **Petitioner is expressly warned that his failure to timely respond to this**  
2 **Order may result in his Petition being dismissed for the reasons stated above**  
3 **and for failure to prosecute.**

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5 Dated: November 15, 2017

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8 DOUGLAS F. McCORMICK  
9 United States Magistrate Judge

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