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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

KENNETH SAVASTANO,	)	Case No. EDCV 13-00710-PA (OP)
Petitioner,	)	ORDER TO SHOW CAUSE RE:
v.	)	DISMISSAL OF PETITION FOR WRIT
PEOPLE OF CALIFORNIA, B.	)	OF HABEAS CORPUS BY A PERSON
CASH, WARDEN,	)	IN STATE CUSTODY
Respondents.	)	(28 U.S.C. § 2254) AS UNTIMELY

**I.**  
**INTRODUCTION**

On April 11, 2013, Kenneth Savastano (“Petitioner”) constructively filed a Petition for Writ of Habeas Corpus by a Person in State custody pursuant to 28 U.S.C. § 2254 (“Petition”).<sup>1</sup> (ECF No. 1.)

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<sup>1</sup> The prison mailbox rule holds that a habeas petitioner’s state and federal filings are constructively filed when turned over to prison officials for forwarding to the Clerk of the Court. See, e.g., Smith v. Duncan, 297 F.3d 809, 814 (9th Cir. 2002); Huizar v. Carey, 273 F.3d 1220, 1223 (9th Cir. 2001). The Court has used the signature date on the Petition as the constructive filing date since the signature date is the earliest date on which Petitioner could have turned

1 Pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the  
2 United States District Courts, the Court has examined the current Petition and  
3 finds that it plainly appears from its face that Petitioner is not entitled to relief in  
4 the district court. Specifically, the Court finds that the Petition is subject to  
5 dismissal as untimely.

6 **II.**

7 **PROCEDURAL HISTORY**

8 On June 4, 2008, after entering guilty pleas in the San Bernardino County  
9 Superior Court, case number FSB055846, Petitioner was convicted of three  
10 counts of attempted murder with a weapon. On the same date, Petitioner was  
11 sentenced to a state prison term of at least twenty-five years (twenty-five years on  
12 count one, two years and four months on count two, and two years and four  
13 months on count three). (Pet. at 3.)

14 Petitioner claims he filed an appeal. However, an examination of the  
15 California Courts' website did not reveal the filing of a direct appeal in the  
16 California Court of Appeal or a petition for review in the California Supreme  
17 Court. (Id.; Official Records of California Courts.<sup>2</sup>)

18 On May 18, 2009, Petitioner filed a habeas corpus petition in the  
19 California Supreme Court, case number S172985. On September 30, 2009, the  
20 supreme court denied the petition without comment or citation. (Official Records  
21 of California Courts.)

22 On June 6, 2011, Petitioner filed a second habeas corpus petition in the  
23 California Supreme Court, case number S193721. On October 19, 2011, the

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25 the Petition over to the prison authorities for mailing.

26 <sup>2</sup> The Court takes judicial notice of the state court records which are  
27 available on the Internet at <http://appellatecases.courtinfo.ca.gov>. See Smith,  
28 297 F.3d at 815 (federal courts may take judicial notice of relevant state court  
records in federal habeas proceedings).

1 supreme court denied the petition with citation to People v. Duvall, 9 Cal. 4<sup>th</sup>  
2 464, 474 (1995); In re Swain, 34 Cal. 2d 300, 304). (Pet. at 4; Official Records  
3 of California Courts.)

4 For the reasons discussed below, Petitioner is ordered to show cause why  
5 the current Petition should not be dismissed with prejudice as untimely.

### 6 III.

### 7 DISCUSSION

#### 8 A. Standard of Review.

9 This Court may entertain a habeas application on behalf of a person who is  
10 in custody pursuant to a state court judgment and in violation of the Constitution,  
11 laws, or treaties of the United States. See 28 U.S.C. § 2254(a). The Court need  
12 neither grant the writ nor order a return if it appears from the application that the  
13 applicant is not entitled to relief. See 28 U.S.C. § 2243. “If it plainly appears  
14 from the face of the petition and any exhibits annexed to it that the petitioner is  
15 not entitled to relief in the district court, the judge must dismiss the petition and  
16 direct the clerk to notify the petitioner.” Rule 4 of the Rules Governing Section  
17 2254 Cases in United States District Courts, 28 U.S.C. foll. § 2254; see also  
18 Hendricks v. Vasquez, 908 F.2d 490, 491 (9th Cir. 1990) (summary dismissal is  
19 appropriate where the allegations in the petition are vague or conclusory,  
20 palpably incredible, or patently frivolous or false). Further, the Court has the  
21 authority to raise the statute of limitations issue *sua sponte* and to dismiss the  
22 petition on those grounds. Herbst v. Cook, 260 F.3d 1039, 1043 (9th Cir. 2001).  
23 However, that authority should only be exercised after a petitioner is provided  
24 with adequate notice and an opportunity to respond. Id.

#### 25 B. The Petition Was Not Filed Within the Limitation Period.

26 The current Petition is subject to the Antiterrorism and Effective Death  
27 Penalty Act of 1996 (“AEDPA”) one-year statute of limitations period, as set  
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1 forth under 28 U.S.C. § 2244(d). See Calderon v. U. S. Dist. Court (Beeler), 128  
2 F.3d 1283, 1286 (9th Cir. 1997).<sup>3</sup> In most cases, the limitation period begins to  
3 run from “the date on which the judgment became final by conclusion of direct  
4 review or the expiration of the time for seeking such review.” 28 U.S.C. §  
5 2244(d)(1)(A).

6 As stated above, on June 4, 2008, after entering guilty pleas to three counts  
7 of attempted murder with a weapon, Petitioner was sentenced to a state prison  
8 term of at least twenty-five years. (Pet. at 3.) Although Petitioner claims he filed  
9 an appeal, an examination of the California Courts’ website did not reveal the  
10 filing of a direct appeal in the California Court of Appeal or a petition for review  
11 in the California Supreme Court. (Id.; Official Records of California Courts.) As  
12 a result, Petitioner’s conviction thereafter became final on August 3, 2008, sixty  
13 days after his sentencing. See Cal. R. Ct. 8.308(a) (formerly Cal. R. Ct. 30.1).  
14 Petitioner had until August 3, 2009, to file the current Petition. 28 U.S.C. §  
15 2244(d)(1)(A); see also Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir.  
16 2001). Petitioner did not constructively file the current Petition until April 11,  
17 2013, over three and one half years after the limitation period expired. Thus,  
18 absent applicable statutory tolling, equitable tolling, or an alternate start date to  
19 the AEDPA’s limitations period under 28 U.S.C. § 2244(d)(1), the current  
20 Petition appears to be untimely.

21 **C. Statutory Tolling of the Limitation Period Pursuant to 28 U.S.C. §**  
22 **2244(d)(2).**

23 Title 28 U.S.C. § 2244(d)(2) provides that “[t]he time during which a  
24 properly filed application for State post-conviction or other collateral review with  
25 respect to the pertinent judgment or claim is pending shall not be counted toward  
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27 <sup>3</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).

1 any period of limitation under this subsection.” Patterson, 251 F.3d at 1247.

2 The United States Supreme Court has held the statute of limitations is  
3 tolled where a petitioner is properly pursuing post-conviction relief. Carey v.  
4 Saffold, 536 U.S. 214, 219-21, 122 S. Ct. 2134, 2137-39, 153 L. Ed. 2d 260  
5 (2002). The period tolled includes the intervals between one state court’s  
6 disposition of a habeas petition and the filing of a habeas petition at the next  
7 level of the state court system. Id. In Nino v. Galaza, 183 F.3d 1003, 1006 (9th  
8 Cir. 1999), the Ninth Circuit held that “the statute of limitations is tolled from the  
9 time the first state habeas petition is filed until the California Supreme Court  
10 rejects the petitioner’s final collateral challenge.” Claims denied as untimely or  
11 determined by the federal courts to have been untimely in state court will not  
12 satisfy the requirements for statutory tolling. Evans v. Chavis, 546 U.S. 189,  
13 192-93, 126 S. Ct. 846, 163 L. Ed. 2d 684 (2006) (citing Saffold, 536 U.S. at  
14 222-23).<sup>4</sup>

15 As set forth above, Petitioner’s limitation period ended on August 3, 2009.  
16 Petitioner filed his first state habeas petition in the California Supreme Court on  
17 May 18, 2009, which was denied on September 30, 2009. (Official Records of  
18 California Courts.) At the time the petition was filed, 288 days of the limitation  
19 period had lapsed. Petitioner is entitled to statutory tolling for the time period  
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21 <sup>4</sup> The Court in Chavis held that a California Supreme Court order silent on  
22 the grounds for the court’s decision is not equivalent to a holding that the filing  
23 was timely. Chavis, 546 U.S. at 197-98. Thus, in the absence of clear direction  
24 or explanation from the California Supreme Court about the meaning of the term  
25 “reasonable time” (in which to file a habeas petition), or clear indication that a  
26 particular request for appellate review was timely or untimely, the federal court  
27 must itself examine the delay in each case and determine what the state courts  
28 would have held with respect to timeliness. Id. at 198. That is, “the federal court  
must decide whether the filing of the request for state-court appellate review (in  
state collateral review proceedings) was made within what California would  
consider a ‘reasonable time.’” Id.

1 this petition was pending pursuant to 28 U.S.C. § 2244(d)(2). Thus, at the  
2 supreme court denied the petition, seventy-seven days of the limitation period  
3 remained.

4 Petitioner filed his second state habeas petition in the California Supreme  
5 Court 614 days later, on June 6, 2011, well beyond the expiration of the  
6 limitation period. (Official Records of California Courts.) Petitioner is not  
7 entitled to statutory tolling for the time period this petition was pending pursuant  
8 to 28 U.S.C. § 2244(d)(2). Section 2244(d) does not permit the reinitiation of the  
9 AEDPA limitations period that has ended before a state habeas petition is filed.  
10 Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (holding that § 2244(d)  
11 “does not permit the reinitiation of the limitations period that has ended before  
12 the state petition was filed,” even if the state petition was timely filed); see also  
13 Jiminez v. Rice, 276 F.3d 478, 482 (9th Cir. 2001); Wixom v. Washington, 264  
14 F.3d 894, 898-99 (9th Cir. 2001). Thus, absent equitable tolling or an alternate  
15 start date to the AEDPA’s limitations period under 28 U.S.C. § 2244(d)(1), the  
16 current Petition appears to be untimely.

17 **D. Equitable Tolling.**

18 The one-year limitation period is subject to equitable tolling if a petitioner  
19 demonstrates: “(1) that he has been pursuing his rights diligently, and (2) that  
20 some extraordinary circumstance stood in his way’ and prevented timely filing.”  
21 Holland v. Florida, 130 S. Ct. 2549, 2562, 177 L. Ed. 2d 130 (2010) (quoting  
22 Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669  
23 (2005)). A petitioner bears the burden of alleging facts that would give rise to  
24 tolling. Id. “[T]he threshold necessary to trigger equitable tolling under [the]  
25 AEDPA is very high, lest the exceptions swallow the rule.” Miranda v. Castro,  
26 292 F.3d 1063, 1066 (9th Cir. 2002) (internal quotation marks and citation  
27 omitted). This high bar is necessary to effectuate the “AEDPA’s statutory  
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1 purpose of encouraging prompt filings in federal court in order to protect the  
2 federal system from being forced to hear stale claims.” Guillory v. Roe, 329 F.3d  
3 1015, 1018 (9th Cir. 2003) (internal quotation marks and citation omitted).  
4 Equitable tolling determinations are “highly fact-dependent.” Whalem/Hunt v.  
5 Early, 233 F.3d 1146, 1148 (9th Cir. 2000) (en banc) (per curiam); accord Lott v.  
6 Mueller, 304 F.3d 918, 923 (9th Cir. 2002) (observing that equitable tolling  
7 determinations “turn[ ] on an examination of detailed facts”). Petitioner has not  
8 set forth any facts showing that he is entitled to equitable tolling.

9 **E. Alternate Start of the Statute of Limitations.**

10 **1. State-Created Impediment.**

11 In rare instances, AEDPA provides that its one-year limitations period  
12 shall run from “the date on which the impediment of filing an application created  
13 by State action in violation of the Constitution or laws of the United States is  
14 removed, if the applicant was prevented from filing by such State action.” 28  
15 U.S.C. § 2244(d)(1)(B). Asserting that the statute of limitations was delayed by a  
16 state-created impediment requires a showing of a due process violation. Lott,  
17 304 F.3d at 925. Petitioner has not set forth any facts showing that he is entitled  
18 to relief under this provision.

19 **2. Newly Recognized Constitutional Right.**

20 The AEDPA also provides that, if a claim is based upon a constitutional  
21 right that is newly recognized and applied retroactively to habeas cases by the  
22 United States Supreme Court, the one-year limitations period begins to run on the  
23 date which the new right was initially recognized by the United States Supreme  
24 Court. 28 U.S.C. § 2244(d)(1)(C). Petitioner has not set forth any facts showing  
25 that he is entitled to relief under this provision.

26 **3. Discovery of Factual Predicate.**

27 The AEDPA further provides that, in certain cases, its one-year limitations  
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1 period shall run from “the date on which the factual predicate of the claim or  
2 claims presented could have been discovered through the exercise of due  
3 diligence.” 28 U.S.C. § 2244(d)(1)(D). Petitioner has not set forth any facts  
4 showing that he is entitled to relief under this provision.

5 **V.**

6 **ORDER**

7 Based upon the foregoing, the Court finds that the face of the Petition  
8 indicates that it is untimely. Accordingly, Petitioner is ordered to show cause  
9 why the Petition should not be dismissed as untimely by filing a response within  
10 thirty days of the date of this Order. In the response to this Order to Show Cause  
11 (“OSC”), Petitioner shall make clear the dates on which any state habeas petition  
12 was filed and shall, if possible, attach copies of any state petition (showing that it  
13 was filed) and copies of the state court’s decision addressing each petition. All  
14 facts relied upon by Petitioner must be proved by testimony contained in a  
15 declaration signed under penalty of perjury pursuant to 28 U.S.C. § 1746, or in  
16 properly authenticated documents. Petitioner must describe specifically the  
17 nature and duration of any extraordinary circumstances and their consequences in  
18 a declaration signed by him under penalty of perjury. Petitioner shall also  
19 include with his response properly authenticated prison records or documents  
20 which demonstrate any circumstance which Petitioner believes impeded his  
21 ability to timely file the current Petition.

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1 Failure to comply with these requirements may result in the dismissal of  
2 this action for failure to prosecute and/or failure to comply with a court order.  
3 Failure to remedy the deficiencies discussed may also result in a recommendation  
4 that the action be dismissed.

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6 **IT IS SO ORDERED.**

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8 DATED: April 19, 2013

  
HONORABLE OSWALD PARADA  
United States Magistrate Judge

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