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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

PETER PAUL NORIEGA, ) Case No. EDCV 13-1474-MWF (JPR)  
 )  
 Petitioner, )  
 ) ORDER TO SHOW CAUSE  
 vs. )  
 )  
 DAVID LONG, Warden, )  
 )  
 Respondent. )  
 )

On August 13, 2013, Petitioner constructively filed a  
Petition for Writ of Habeas Corpus by a Person in State Custody.  
The Petition challenges Petitioner’s 2007 conviction and 62-  
years-to-life sentence in Riverside County Superior Court for  
murder and related offenses. Petitioner raises four claims,  
three of which he appears to have raised on direct appeal, and  
one - ineffective assistance of counsel - that he acknowledges he  
has not previously raised. (Pet. at 5-6.) The California  
Supreme Court denied his Petition for Review on January 14, 2009,  
according to the California Appellate Courts’ Case Information  
website, and Petitioner did not file a petition for writ of  
certiorari in the U.S. Supreme Court (Pet. at 3). Petitioner

1 states that he did not file any state habeas petitions (Pet. at  
2 3), and the Court's review of the Case Information website seems  
3 to confirm that.

4 Under the Antiterrorism and Effective Death Penalty Act of  
5 1996 ("AEDPA"), a petitioner generally has one year from the date  
6 his conviction became final to file a federal habeas petition.  
7 See 28 U.S.C. § 2244(d). That statute provides:

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

12 (A) the date on which the judgment became  
13 final by the conclusion of direct review or the  
14 expiration of the time for seeking such review;

15 (B) the date on which the impediment to  
16 filing an application created by State action in  
17 violation of the Constitution or laws of the United  
18 States is removed, if the applicant was prevented  
19 from filing by such State action;

20 (C) the date on which the constitutional  
21 right asserted was initially recognized by the  
22 Supreme Court, if the right has been newly  
23 recognized by the Supreme Court and made  
24 retroactively applicable to cases on collateral  
25 review; or

26 (D) the date on which the factual predicate  
27 of the claim or claims presented could have been  
28 discovered through the exercise of due diligence.

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

6 Petitioner's conviction apparently became final on April 14,  
7 2009, 90 days after the California Supreme Court denied his  
8 Petition for Review. See Bowen v. Roe, 188 F.3d 1157, 1159 (9th  
9 Cir. 1999). Thus, absent some kind of tolling or a later trigger  
10 date, Petitioner had until April 13, 2010, to file his federal  
11 Petition. See Patterson v. Stewart, 251 F.3d 1243, 1246  
12 (9th Cir. 2001) (limitation period begins to run day after  
13 triggering event). He did not file it until August 13, 2013,  
14 seemingly more than three years late.

15 From the face of the Petition it does not appear that  
16 Petitioner is entitled to a later trigger date on any of his  
17 claims. As to three of the claims, Petitioner simply attaches  
18 his opening brief on appeal, and therefore he necessarily knew of  
19 them before his conviction became final. As to his ineffective-  
20 assistance-of-counsel claim, Petitioner has provided no facts or  
21 argument in support; he states merely that the other three  
22 "grounds raised herein are the result of (IAC)."<sup>1</sup> (Pet. at 6.)  
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24 <sup>1</sup> He also attached to the Petition a one-page declaration  
25 making certain conclusory claims about his trial lawyer, including  
26 that he asked his attorney to call a particular witness but the  
27 attorney "never subpoenaed her," his attorney never filed a new-  
28 trial motion, and his attorney didn't hire a gang expert. These  
bare allegations are not sufficient to raise a claim for relief.  
Greenway v. Schriro, 653 F.3d 790, 804 (9th Cir. 2011) (conclusory  
allegations not supported by specific facts do not warrant habeas

1 Even if that claim could conceivably be timely, it nonetheless  
2 appears to be unexhausted, and therefore the Court could not  
3 consider it even were it sufficiently developed. See Rose v.  
4 Lundy, 455 U.S. 509, 518, 102 S. Ct. 1198, 1203, 71 L. Ed. 2d 379  
5 (1982) (holding that "mixed" petitions - those containing both  
6 exhausted and unexhausted claims - must generally be dismissed);  
7 cf. Rhines v. Weber, 544 U.S. 269, 277-78, 125 S. Ct. 1528, 1535,  
8 161 L. Ed. 2d 440 (2005) (allowing for stays of mixed petitions  
9 in certain circumstances). Thus, Petitioner has not shown that  
10 he is entitled to a later trigger date on any of his claims.  
11 Moreover, because Petitioner has apparently not filed any state  
12 habeas petitions (see Pet. at 3), he does not appear to be  
13 entitled to any statutory tolling.

14 In certain circumstances, a habeas petitioner may be  
15 entitled to equitable tolling. See Holland v. Florida, 560 U.S.  
16 \_\_\_, 130 S. Ct. 2549, 2560, 177 L. Ed. 2d 130 (2010). But he must  
17 show that (1) he has been pursuing his rights diligently and (2)  
18 "some extraordinary circumstance stood in his way." See Pace v.  
19 DiGuiglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807, 1814, 161 L. Ed.  
20 2d 669 (2005). Petitioner states in a one-page declaration he  
21 attached to the Petition that "I was in SHU at Pelican Bay State  
22 Prison from 3-2007 thru 1-2011 and HDSP from 1-2011 thru 10-2011  
23 on lockdown"; he further asserts that

24 my trial attorney finally sent my client file after  
25 numerous requests. I finally received it around March  
26 15, 2013.

27 \_\_\_\_\_  
28 relief).

1 He attaches a copy of his March 5, 2013 letter to his trial  
2 attorney requesting his file but does not attach any earlier  
3 letters or otherwise demonstrate earlier efforts to get the file.  
4 Petitioner has also attached to his Petition letters his  
5 appellate attorney wrote to him and others in 2007 and 2009. The  
6 appellate attorney warned Petitioner in her July 14, 2009 letter  
7 that

8       if you wish to pursue your case on your own in federal  
9       court, . . . [t]he deadline . . . is calculated from the  
10      date of the denial of the petition as 90 days, plus one  
11      year. This is an absolute deadline.

12 She also informed him that his Petition for Review was denied in  
13 January 2009; a subsequent letter seems to show that she sent  
14 Petitioner his trial transcripts in October 2009, well before the  
15 limitation period expired, and again warned him of the deadline.  
16 Thus, Petitioner was aware that any federal habeas Petition had  
17 to be filed no later than April 2010, and he apparently had the  
18 materials he needed to pursue federal habeas relief in a timely  
19 manner. Cf. Gassler v. Bruton, 255 F.3d 492, 495 (8th Cir. 2001)  
20 (denying tolling because habeas petition can be filed without  
21 access to trial record, which may be ordered subsequently if  
22 necessary for reviewing court's decision). Even accepting all of  
23 Petitioner's assertions as true and crediting his argument that  
24 he could not have filed his Petition until he received his case  
25 file, in March 2013, he has not explained why he waited five more  
26 months to file it. Indeed, his federal Petition mostly simply  
27 relies on his opening brief on appeal and therefore could not  
28 have taken much time to prepare.

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

8 IT THEREFORE IS ORDERED that on or before September 26,  
9 2013, Petitioner show cause in writing, if he has any, why the  
10 Court should not recommend that this action be dismissed because  
11 it is untimely for the reasons stated above. Petitioner is  
12 advised that his failure to timely comply with this Order may  
13 result in his Petition being dismissed for the reasons stated  
14 herein and for failure to prosecute.

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17 DATED: August 27, 2013

  
JEAN ROSENBLUTH  
U.S. MAGISTRATE JUDGE