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I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY
FIRST CLASS MAIL, POSTAGE PREPAID, TO PETITIONER*
AT HIS RESPECTIVE MOST RECENT ADDRESS OF
RECORD IN THIS ACTION ON THIS DATE.

DATED: July 22, 2014
S. Gomez DEPUTY CLERK

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

ROBERT FOSTER,
Petitioner,
v.
DEPARTMENT OF CORRECTIONS,
Respondent.

Case No. EDCV 14-01445 CAS (AN)
**ORDER TO SHOW CAUSE RE
DISMISSAL OF PETITION FOR
WRIT OF HABEAS CORPUS BY A
PERSON IN STATE CUSTODY AS
TIME-BARRED**

I. BACKGROUND

Before the Court is a petition for writ of habeas corpus by a person in state custody pursuant to 28 U.S.C. § 2254 (“Petition”) brought by Robert Foster (“Petitioner”), a state prisoner proceeding *pro se*. The Petition raises one claim challenging Petitioner’s Three Strikes sentence of forty-five years to life following a jury trial in the California Superior Court for Riverside County (case no. RIF085673). Petitioner was convicted of two counts of robbery, with firearm and prior conviction enhancements.

For the reasons set forth below, Petitioner is ordered to show cause why his Petition should not be dismissed with prejudice because it is time-barred.

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2 **II. DISCUSSION**

3 **A. Standard of Review**

4 Rule 4 of the Rules Governing Section 2254 Cases in the United States District
5 Courts (“Habeas Rules”), 28 U.S.C. foll. § 2254, requires a judge to “promptly
6 examine” a habeas petition and “[i]f it plainly appears from the petition and any
7 attached exhibits that the petitioner is not entitled to relief in the district court, the
8 judge must dismiss the petition and direct the clerk to notify the petitioner.” Local Rule
9 72-3.2 of this Court also provides “[t]he Magistrate Judge promptly shall examine a
10 petition for writ of habeas corpus, and if it plainly appears from the face of the petition
11 and any exhibits annexed to it that the petitioner is not entitled to relief, the Magistrate
12 Judge may prepare a proposed order for summary dismissal and submit it and a
13 proposed judgment to the District Judge.” C.D. Cal. R. 72-3.2. Further, an untimely
14 habeas petition may be dismissed *sua sponte* if the court gives the petitioner adequate
15 notice and an opportunity to respond. *Day v. McDonough*, 547 U.S. 198, 209-10, 126
16 S. Ct. 1675 (2006); *Herbst v. Cook*, 260 F.3d 1039, 1043 (9th Cir. 2001).

17 **B. Statute of Limitations**

18 The Petition is governed by the Antiterrorism and Effective Death Penalty Act
19 of 1996 (“AEDPA”), which establishes a one-year statute of limitations for state
20 prisoners to file a federal habeas petition. 28 U.S.C. § 2244(d)(1). In most cases, the
21 limitations period is triggered by “the date on which the judgment became final by
22 conclusion of direct review or the expiration of the time for seeking such review.” 28
23 U.S.C. § 2244(d)(1)(A).

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1 The Petition and Petitioner’s relevant state court records^{1/} establish the following
2 facts. Petitioner was sentenced for the above offenses on April 21, 2000. On April 25,
3 2001, the California Court of Appeal affirmed the judgment (case no. E027127). The
4 California Supreme Court then denied review of the court of appeal’s decision on
5 August 8, 2001 (case no. S098033). Petitioner does not allege, and it does not appear,
6 that he filed a petition for certiorari in the United States Supreme Court. (Pet. at 2;
7 attachments [2]; state court records; *see also* Supreme Court Docket, available on the
8 Internet at <http://www.supremecourt.gov/docket>.)

9 Therefore, for purposes of AEDPA’s limitations period, Petitioner’s judgment
10 became final on November 6, 2001, the ninetieth day after the state high court denied
11 his petition for review and the last day for him to file a petition for certiorari with the
12 Supreme Court. *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999). The statute of
13 limitations then started to run the next day, on November 7, 2001, and ended on
14 November 7, 2002. 28 U.S.C. § 2244(d)(1)(A); *see also Patterson v. Stewart*, 251 F.3d
15 1243, 1245-47 (9th Cir. 2001) (the limitations period begins to run on the day after the
16 triggering event under Fed. R. Civ. P. 6(a)). Petitioner did not constructively file his
17 pending Petition until July 10, 2014 -- 4,263 days after the expiration of the limitations
18 period.^{2/} Accordingly, absent some basis for a considerable amount of tolling or an

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20 ^{1/} The Court takes judicial notice of Internet records relating to this action in
21 the Riverside Superior Court (available at <http://public-access.riverside.courts.ca.gov>),
22 and in the state appellate courts (available at <http://appellatecases.courtinfo.ca.gov>)
23 (“state court records”). *See Smith v. Duncan*, 297 F.3d 809, 815 (9th Cir. 2002) (federal
24 courts may take judicial notice of related state court documents), *overruled on other*
grounds as recognized in Cross v. Sisto, 676 F.3d 1172 (9th Cir. 2012).

25 ^{2/} Pursuant to the “mailbox rule,” a *pro se* prisoner’s federal habeas petition
26 is deemed to be filed on the date the prisoner delivers the petition to prison authorities
27 for mailing to the clerk. *Houston v. Lack*, 487 U.S. 266, 270-71, 108 S. Ct. 2379
28 (1988); *Huizar v. Carey*, 273 F.3d 1220, 1222 (9th Cir. 2001); *see also* Habeas Rule
3(d). For purposes of the timeliness analysis, and absent any evidence to the contrary,

(continued...)

1 alternative start date to the limitations period under 28 U.S.C. §§ 2244(d)(1)(B)-(D),
2 the pending Petition is time-barred.

3 **C. Statutory Tolling**

4 AEDPA includes a statutory tolling provision that suspends the limitations
5 period for the time during which a “properly-filed” application for post-conviction or
6 other collateral review is “pending” in state court. 28 U.S.C. § 2244(d)(2); *Waldrip v.*
7 *Hall*, 548 F.3d 729, 734 (9th Cir. 2008); *Bonner v. Carey*, 425 F.3d 1145, 1148 (9th
8 Cir. 2005). An application is “pending” until it has achieved final resolution through
9 the state’s post-conviction procedures. *Carey v. Saffold*, 536 U.S. 214, 220, 122 S. Ct.
10 2134 (2002). However, to qualify for statutory tolling, a state habeas petition must be
11 filed before the expiration of AEDPA’s limitations period. *See Ferguson v. Palmateer*,
12 321 F.3d 820, 823 (9th Cir. 2003) (“[S]ection 2244(d) does not permit the reinitiation
13 of the limitations period that has ended before the state petition was filed.”); *see also*
14 *Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000) (“A state-court petition [] that
15 is filed following the expiration of the limitations period cannot toll that period because
16 there is no period remaining to be tolled.”).

17 Petitioner’s attachments and state court records establish that he has filed six
18 state habeas petitions which appear to be related to the conviction and sentence in case
19 no. RIF085673, two in the trial court (case nos. RIC1216842, RIC1303166), two in the
20 California Court of Appeal (case nos. E058653, E060862), and two in the California
21 Supreme Court (case nos. S116164, S211528). All six petitions were denied. However,
22 the first of those petitions (case no. S116164) was not filed until May 27, 2003, 201
23 days after AEDPA’s limitations period expired on November 7, 2002. Further, none
24 of the other five petitions were filed prior to 2012. Thus, Petitioner is not entitled to

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26 ^{2/} (...continued)

27 the Court finds Petitioner constructively filed the Petition by delivering it to the prison
28 mail system on July 10, 2014, which is the date that was handwritten by a prison
official on the back of the envelope containing the Petition.

1 any statutory tolling. *Ferguson*, 321 F.3d at 823; *Webster*, 199 F.3d at 1259.

2 In his attached pages [2], Petitioner makes a perfunctory request for this Court
3 to find “that the time spent in state court was equitably tolled within the meaning of the
4 AEDPA.” In light of the fact Petitioner has not alleged any facts that would qualify
5 him for equitable tolling (*see* section E, below) the Court construes his request as an
6 argument for *statutory* tolling and rejects it for the reasons set forth above.

7 **D. Alternative Start of the Statute of Limitations**

8 **1. State-Created Impediment**

9 In rare instances, AEDPA’s one-year limitations period can run from “the date
10 on which the impediment to filing an application created by State action in violation
11 of the Constitution or laws of the United States is removed, if the applicant was
12 prevented from filing by such State action.” 28 U.S.C. § 2244(d)(1)(B). Asserting that
13 the statute of limitations was delayed by a state-created impediment requires
14 establishing a due process violation. *Lott v. Mueller*, 304 F.3d 918, 925 (9th Cir. 2002).
15 The Petition does not set forth any facts for an alternate start date of the limitations
16 period under this provision.

17 **2. Newly Recognized Constitutional Right**

18 AEDPA provides that, if a claim is based upon a constitutional right that is
19 newly recognized and applied retroactively to habeas cases by the United States
20 Supreme Court, the one-year limitations period begins to run on the date which the
21 new right was initially recognized by the Supreme Court. 28 U.S.C. § 2244(d)(1)(C).
22 The Petition does not set forth any facts for an alternate start date of the limitations
23 period under this provision.

24 **3. Discovery of Factual Predicate**

25 AEDPA also provides that, in certain cases, its one-year limitations period shall
26 run from “the date on which the factual predicate of the claim or claims presented
27 could have been discovered through the exercise of due diligence.” 28 U.S.C. §
28 2244(d)(1)(D); *Ford v. Gonzalez*, 683 F.3d 1230, 1235 (9th Cir. 2012). The Petition

1 does not set forth any facts for an alternate start date of the limitations period under this
2 provision.

3 **E. Equitable Tolling**

4 AEDPA’s limitations period “is subject to equitable tolling in appropriate
5 cases.” *Holland v. Florida*, 560 U.S. 631, 645, 130 S. Ct. 2549 (2010). Specifically,
6 “a litigant seeking equitable tolling bears the burden of establishing two elements: (1)
7 that he has been pursuing his rights diligently, and (2) that some extraordinary
8 circumstance stood in his way.” *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct.
9 1807 (2005); *Lawrence v. Florida*, 549 U.S. 327, 336, 127 S. Ct. 1079 (2007).

10 However, “[e]quitable tolling is justified in few cases” and “the threshold
11 necessary to trigger equitable tolling [under AEDPA] is very high, lest the exceptions
12 swallow the rule.” *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003) (*quoting*
13 *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002)). Additionally, although “we
14 do not require [the petitioner] to carry a burden of persuasion at this stage in order to
15 merit further investigation into the merits of his argument for [equitable] tolling,” *Laws*
16 *v. Lamarque*, 351 F.3d 919, 924 (9th Cir. 2003), “[w]here the record is amply
17 developed, and where it indicates that the [alleged extraordinary circumstance did not]
18 cause the untimely filing of his habeas petition, a district court is not obligated to hold
19 evidentiary hearings to further develop the factual record, notwithstanding a
20 petitioner’s allegations” *Roberts v. Marshall*, 627 F.3d 768, 773 (9th Cir. 2010);
21 *see also Elmore v. Brown*, 378 Fed. Appx. 664, 666 (9th Cir. 2010) (“[W]here the
22 record is sufficient to permit the district court - and us on appeal - to evaluate the
23 strength of the petitioner’s [equitable tolling] claim, the district court does not
24 necessarily abuse its discretion if it denies the petitioner a hearing.”) (cited pursuant
25 to 9th Cir. R. 36-3).

26 The Petition does not set forth any facts for equitable tolling.

27 **ORDER**

28 Based on the foregoing, the Court finds this action is untimely. Accordingly,

1 Petitioner shall have until **August 12, 2014**, to file a written response and show cause
2 why his Petition should not be dismissed with prejudice because it is time-barred. In
3 responding to this Order, Petitioner must show by declaration and any properly
4 authenticated exhibits what, if any, factual or legal basis he has for claiming that the
5 Court's foregoing analysis is incorrect.

6 **Petitioner is warned that if a timely response to this Order is not made,**
7 **Petitioner will waive his right to respond and the Court will, without further**
8 **notice, issue an order dismissing the Petition, with prejudice, as time-barred.**

9 **Further, if Petitioner determines the Court's analysis is correct and the**
10 **Petition is time-barred, he should consider filing a Request For Voluntary**
11 **Dismissal of this action pursuant to Fed. R. Civ. P. 41(a)(1) in lieu of a response.**

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13 IT IS SO ORDERED.

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16 DATED: July 22, 2014

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19 ARTHUR NAKAZATO
20 UNITED STATES MAGISTRATE JUDGE
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