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TO: _____ DATE: _____ DEPUTY CLERK: _____

Petitioner on 03-10-15 by TS

FILED
CLERK, U.S. DISTRICT COURT

March 10, 2015

CENTRAL DISTRICT OF CALIFORNIA
BY: TS DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

<p>11 KENNETH LEE WILLMAN,</p> <p>12 Petitioner,</p> <p>13 v.</p> <p>14</p> <p>15 STU SHERMAN, Warden,</p> <p>16 Respondent.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>No. ED CV 15-00374-JGB (DFM)</p> <p>ORDER TO SHOW CAUSE</p>
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19 On March 2, 2015, Petitioner Kenneth Willman filed a Petition for Writ
20 of Habeas Corpus by a Person in State Custody (“Petition”) in this Court.
21 From the face of the Petition, it appears that Petitioner pleaded guilty in the
22 San Bernardino County Superior Court to five counts of committing a forcible
23 lewd act upon a child and one count of sodomy by use of force. Petition at 21.¹
24 On August 3, 2011, Petitioner was sentenced to 42 years in state prison. Id. at
25 2.

27 ¹ All citations to the Petition are to the CM/ECF pagination.

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

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

10 Petitioner did not file an appeal. See Petition at 3. Because Petitioner did
11 not appeal the judgment, his conviction became final 60 days after sentencing
12 on October 2, 2011. See Cal. R. Ct. 8.308(a); Mendoza v. Carey, 449 F.3d
13 1065, 1067 (9th Cir. 2006). Petitioner then had one year from the date his
14 judgment became final on October 2, 2011, or until October 2, 2012, to timely
15 file a habeas corpus petition in this Court. See Patterson v. Stewart, 251 F.3d
16 1243, 1247 (9th Cir. 2001). However, Petitioner did not file the instant action
17 until March 2, 2015, more than two years too late.

18 From the face of the Petition, it does not appear that Petitioner has any
19 basis for contending that he is entitled to a later trigger date under §
20 2244(d)(1)(B). Nor does it appear that Petitioner has any basis for contending
21 that he is entitled to a later trigger date under § 2244(d)(1)(C) because none of
22 the claims alleged in the Petition appear to be based on a federal constitutional
23 right that was initially recognized by the United States Supreme Court
24 subsequent to the date his conviction became final and that has been made
25 retroactively applicable to cases on collateral review. Finally, it does not
26 appear that Petitioner has any basis for contending that he is entitled to a later
27 trigger date under § 2244(d)(1)(D) because it appears from the face of the
28 Petition that Petitioner was aware of the factual predicate of all his claims at

1 the time of his guilty plea in 2010 and sentencing in 2011. See Hasan v.
2 Galaza, 254 F.3d 1150, 1154 n.3 (9th Cir. 2001) (statute of limitations begins
3 to run when a prisoner “knows (or through diligence could discover) the
4 important facts, not when the prisoner recognizes their legal significance”).

5 **B. It Does Not Appear that Petitioner Is Entitled to Any Statutory or**
6 **Equitable Tolling Which Would Make the Petition Timely**

7 Under AEDPA, “[t]he time during which a properly filed application for
8 State post-conviction or other collateral review with respect to the pertinent
9 judgment or claim is pending shall not be counted toward any period of
10 limitation under this subsection.” 28 U.S.C. § 2244(d)(2). The entire period of
11 time for a full round of collateral review, from the filing of a first state habeas
12 petition to the time the last state habeas petition is denied, may be deemed
13 “pending” and tolled, so long as the state petitioner proceeds in a hierarchical
14 order from one lower state court to a higher state court. See Carey v. Saffold,
15 536 U.S. 214, 223 (2002). This includes so-called “gap tolling” for the periods
16 of time between such state habeas petitions. Id.

17 As noted above, Petitioner’s conviction became final on October 2, 2011,
18 giving him until October 2, 2012 to file a timely petition in this Court.
19 Petitioner did not file his first state habeas petition in the San Bernardino
20 County Superior Court until July 31, 2014. See Petition at 4. Petitioner is
21 therefore not entitled to statutory tolling for any of his state habeas petitions
22 because they were all filed after the one-year limitations period had already
23 expired. See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (holding
24 that section 2244(d) “does not permit the reinitiation of the limitations period
25 that has ended before the state petition was filed,” even if the state petition was
26 timely filed).

27 The Supreme Court has held that AEDPA’s one-year limitation period is
28 also subject to equitable tolling in appropriate cases. See Holland v. Florida,

1 560 U.S. 605, 645 (2010). However, a habeas petitioner is entitled to equitable
2 tolling only if he shows (1) that he has been pursuing his rights diligently; and
3 (2) that “some extraordinary circumstance stood in his way.” See Pace v.
4 DiGuglielmo, 544 U.S. 408, 418 (2005); see also Holland, 560 U.S. at 649.
5 Here, Petitioner does not allege that any circumstances exist which would
6 establish a right to equitable tolling.

7 **C. Conclusion**

8 A district court has the authority to raise the statute of limitations issue
9 sua sponte when untimeliness is obvious on the face of the petition and to
10 summarily dismiss a petition on that ground pursuant to Rule 4 of the Rules
11 Governing Section 2254 Cases in the United States District Courts, so long as
12 the court “provides the petitioner with adequate notice and an opportunity to
13 respond.” See Nardi v. Stewart, 354 F.3d 1134, 1141 (9th Cir. 2004); Herbst v.
14 Cook, 260 F.3d 1039, 1042-43 (9th Cir. 2001).

15 IT THEREFORE IS ORDERED that, on or before April 10, 2015,
16 Petitioner show cause in writing as to why the Court should not recommend
17 that this action be summarily dismissed with prejudice on the ground of
18 untimeliness.

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20 Dated: March 10, 2015



21 DOUGLAS F. McCORMICK
22 United States Magistrate Judge
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