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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 EASTERN DIVISION

11 ALASDAIR MURRAY McAULAY, } No. ED CV 17-01351-PSG (DFM)
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12 Petitioner,
13 v.
14 STATE OF CALIFORNIA et al.
15 Respondents.

ORDER TO SHOW CAUSE

18 On June 19, 2017,¹ Alasdair Murray McAulay (“Petitioner”)
19 constructively filed pro se a Petition for Writ of Habeas Corpus by a Person in
20 State Custody, challenging his June 24, 2014 conviction by guilty plea for elder
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23 ¹ Under the “mailbox rule,” a pro se prisoner’s habeas petition is
24 constructively filed when she gives it to prison authorities for mailing to the
25 court clerk. Hernandez v. Spearman, 764 F.3d 1071, 1074 (9th Cir. 2014); see
26 also Houston v. Lack, 487 U.S. 266, 276 (1988). Under this rule, a court
27 generally deems a habeas petition filed on the day it is signed, Roberts v.
28 Marshall, 627 F.3d 768, 770 n.1 (9th Cir. 2010), because it assumes that the
 petitioner turned the petition over to prison authorities for mailing that day,
 see Butler v. Long, 752 F.3d 1177, 1178 n.1 (9th Cir. 2014) (per curiam) (as
 amended).

1 abuse under circumstances likely to produce great bodily harm. Dkt. 1
2 (“Petition”) at 2.² The Petition raises five claims of ineffective assistance of
3 trial counsel. *Id.* at 5-7. On July 17, 2017, Petitioner filed a “memorandum
4 brief” in support of the Petition. Dkt. 4 (“Memorandum”).

5 For the reasons discussed below, it appears that Petitioner may no longer
6 be in custody under his conviction and that the Petition is untimely. Petitioner
7 is therefore ordered to show cause in writing by August 15, 2017, why the
8 Petition should not be dismissed with prejudice.

9 **A. State-Court Proceedings**

10 On June 24, 2014, Petitioner pleaded guilty to charges of elder abuse
11 under circumstances likely to produce great bodily harm, and he was
12 sentenced to three years in prison. Petition at 2. According to California’s
13 Appellate Courts Case Information website, the trial court entered judgment
14 on January 6, 2015. *See* Appellate Cts. Case Information, [http://](http://appellatecases.courtinfo.ca.gov/search.cfm?dist=42)
15 appellatecases.courtinfo.ca.gov/search.cfm?dist=42 (search for case no.
16 E062851). Petitioner states that he did not appeal, Petition at 2, but the
17 Appellate Courts Case Information website shows that on February 9, 2015, he
18 lodged pro se a notice of appeal in the California Court of Appeal. *See*
19 Appellate Cts. Case Information, [http://](http://appellatecases.courtinfo.ca.gov/search.cfm?dist=42)
20 [appellatecases.courtinfo.ca.gov/](http://appellatecases.courtinfo.ca.gov/search.cfm?dist=42)
21 [search.cfm?dist=42](http://appellatecases.courtinfo.ca.gov/search.cfm?dist=42) (search for case no. E062851). The court of appeal
22 dismissed the appeal on its own motion on March 24, 2015, and a remittitur
23 issued on May 27. *Id.* It does not appear that Petitioner filed a petition for
24 review with the California Supreme Court.

25 Meanwhile, on January 28, 2015, Petitioner filed a habeas petition in the
26 California Court of Appeal. *See* Appellate Cts. Case Information, <http://>

27 ² Citations to Petitioner’s filings use the pagination provided by
28 CM/ECF.

1 appellatecases.courtinfo.ca.gov/search.cfm?dist=42 (search for case no.
2 E062758). The court denied the petition on February 4, 2015. Id. On February
3 17, 2015, Petitioner filed a habeas petition in the California Supreme Court,
4 which denied it on March 25. See Appellate Cts. Case Information,
5 <http://appellatecases.courtinfo.ca.gov/search.cfm?dist=0> (search for case no.
6 S224473).

7 On April 4, 2016, Petitioner filed a habeas petition in the Riverside
8 County Superior Court, which denied it on April 5. Petition at 3-4;
9 Memorandum at 1. On June 10, 2016, Petitioner filed a petition for writ of
10 mandate in the California Court of Appeal, which denied it on July 1.³ See
11 Appellate Cts. Case Information, [http://appellatecases.courtinfo.ca.gov/](http://appellatecases.courtinfo.ca.gov/search.cfm?dist=42)
12 [search.cfm?dist=42](http://appellatecases.courtinfo.ca.gov/search.cfm?dist=42) (search for case no. E066163); Petition at 4. Petitioner
13 states that he filed a habeas petition in the California Supreme Court on June
14 10, 2017, and on an unspecified date he “received a no decision response to his
15 petition.” Memorandum at 2.

16 **B. Jurisdiction**

17 “The federal habeas statute gives United States district courts jurisdiction
18 to entertain petitions for habeas relief only from persons who are ‘in custody in
19 violation of the Constitution or laws or treaties of the United States.’” Maleng
20 v. Cook, 490 U.S. 488, 490 (1989) (per curiam) (citation omitted, emphasis in
21 original); see also 28 U.S.C. § 2254(a) (“[A] district court shall entertain an
22 application for a writ of habeas corpus in behalf of a person in custody
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24 ³ In his Memorandum, Petitioner states that the appellate court denied
25 this petition on July 1, 2017, see Memorandum at 2, but in his federal Petition,
26 Petitioner states that it was denied on July 1, 2016, see Petition at 4, which
27 comports with the information available on the California Appellate Courts’
28 website, see Appellate Cts. Case Information, <http://appellatecases.courtinfo.ca.gov/search.cfm?dist=42> (search for case no. E066163).

1 pursuant to the judgment of a State court only on the ground that he is in
2 custody in violation of the Constitution or laws or treaties of the United
3 States.”). The “in custody” requirement is jurisdictional, and it requires that
4 the petitioner be in custody at the time the petition is filed. Bailey v. Hill, 599
5 F.3d 976, 978-79 (9th Cir. 2010); see also Cook, 490 U.S. at 490-91 (“We have
6 interpreted the statutory language as requiring that the habeas petitioner be ‘in
7 custody’ under the conviction or sentence under attack at the time his petition
8 is filed.”).

9 Here, it appears Petitioner was no longer in jail or prison on June 19,
10 2017, when he constructively filed his Petition, but that he was instead in the
11 custody of U.S. Immigration and Customs Enforcement at the Hudson County
12 Correctional Facility in New Jersey. See Petition at 10 (listing “Hudson
13 County Correctional Center, (ICE detainee)” as place of detention on
14 declaration in support of application to proceed in forma pauperis), 12 (listing
15 “Hudson County Correctional Center” as return address on mailing envelope);
16 see also Memorandum at 10 (listing “Hudson County Correctional Center” in
17 signature line), 12 (listing “Hudson County Correctional Center” as return
18 address on mailing envelope).⁴ The immigration consequences of a state-court
19 conviction constitute collateral consequences and do not satisfy the in-custody
20 requirement for purposes of determining whether subject-matter jurisdiction is
21 lacking. Resendiz v. Kovensky, 416 F.3d 952, 956-58 (9th Cir. 2005),
22 abrogated on other grounds by Chaidez v. United States, 568 U.S. 342 (2013);
23 Gomez v. Adelanto Det. Facility, No. 12-9417, 2013 WL 4500454, at *1-2
24 (C.D. Cal. Aug. 21, 2013) (finding that petitioner whose state sentence had
25 expired but who was in federal custody for being in country illegally did not

26 ⁴ Petitioner is apparently a native of Cameroon and was at some point
27 seeking lawful-permanent-resident status. See In re: Alasdair Murray
28 McAulay, No. A096 597 428, 2009 WL 952470 (B.I.A. Mar. 18, 2009).

1 satisfy “in custody” requirement for purposes of federal habeas petition); Ali v.
2 Clark, No. 10-846, 2010 WL 5559393, at *1, *3 (W.D. Wash. Dec. 16, 2010)
3 (finding that petitioner who had completed state-court sentence and who was
4 being held in immigration detention was not “in custody” for purposes of
5 federal habeas petition), accepted by 2011 WL 66024 (W.D. Wash. Jan. 10,
6 2011).

7 A parole or probation term is sufficient to satisfy the “in custody”
8 jurisdictional requirement. Jones v. Cunningham, 371 U.S. 236, 243 (1963);
9 Fowler v. Sacramento Cty. Sheriff’s Dep’t, 421 F.3d 1027, 1033 n.5 (9th Cir.
10 2005). If Petitioner believes that he satisfies the “in custody” requirement by
11 virtue of any parole or probation term, he should explain in his response to this
12 Order whether he received such a term and when it expired or is set to expire.

13 **C. Timeliness**

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

20 **1. Accrual Date**

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

27 Assuming for the purposes of this Order that Petitioner’s pro se appeal
28 was timely and properly filed, his conviction became final 40 days after the

1 court of appeal's dismissal, when his time for seeking review in the California
2 Supreme Court expired. See Waldrip v. Hall, 548 F.3d 729, 735 (9th Cir. 2008)
3 (finding that when petitioner did not petition California Supreme Court for
4 review, his conviction became final 40 days after California Court of Appeal
5 affirmed conviction); Cal. R. Ct. 8.366(b)(1) (court of appeal's order dismissing
6 appeal is final in 30 days); Cal. R. Ct. 8.500(e)(1) (petition for review due
7 within 10 days of court of appeal's decision becoming final). Because the court
8 of appeal dismissed Petitioner's appeal on March 24, 2015, his conviction
9 became final on May 4, 2015.⁵ Under § 2244(d)(1)(A), the limitation period
10 began running the following day, and it expired one year later, on May 4,
11 2016. See Patterson v. Stewart, 251 F.3d 1243, 1246-47 (9th Cir. 2001).

12 Petitioner does not appear to be entitled to a later trigger date under
13 § 2244(d)(1)(B), (C), or (D). He does not assert that he was impeded from filing
14 his federal petition by unconstitutional state action. See § 2244(d)(1)(B). Nor
15 are his claims based on a federal constitutional right that was newly recognized
16 by the United States Supreme Court and made retroactively applicable to cases
17 on collateral review. See § 2244(d)(1)(C). And it appears that Petitioner has
18 been long aware of the underlying factual predicate of his claims, all of which
19 relate to his attorney's conduct during Petitioner's criminal proceedings in the
20 trial court and his alleged failure to appeal. See § 2244(d)(1)(D) (providing that
21 limitation period may begin to run on "the date on which the factual predicate
22 of the claim or claims presented could have been discovered through the
23 exercise of due diligence"). And although Petitioner claims that he did not
24 realize for "several months" that his counsel had "failed to file [an] appeal after
25 [being] requested to do so," Petition at 3, he certainly knew of his attorney's

26 ⁵ The fortieth day was May 3, 2015, but because that day was a Sunday,
27 the deadline to file a petition for review was extended to Monday, May 4. See
28 Waldrip, 548 F.3d at 735 n.2.

1 alleged failure by, at the latest, February 9, 2015, when Petitioner lodged an
2 appeal pro se. As such, he is not entitled to a later trigger date under
3 § 2244(d)(1)(D). See Hasan v. Galaza, 254 F.3d 1150, 1154 n.3 (9th Cir. 2001)
4 (holding that limitation period under § 2244(d)(1)(D) begins running when
5 petitioner knew of facts underlying claims, not when he realized their “legal
6 significance”).

7 Thus, under § 2244(d)(1)(A), Petitioner had until May 4, 2016, to file his
8 federal Petition. Because he did not constructively file the Petition until June
9 19, 2017, it is untimely absent sufficient tolling.

10 **2. Statutory Tolling**

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

25 As previously discussed, Petitioner’s limitation period began running on
26 May 5, 2015. On April 4, 2016, Petitioner filed a habeas petition in Riverside
27 County Superior Court, which denied it on April 5. Petition at 3-4;
28 Memorandum at 1. Petitioner filed his next petition on June 10, 2016, and the

1 California Court of Appeal denied it on July 1, 2016. See Appellate Cts. Case
2 Information, <http://appellatecases.courtinfo.ca.gov/search.cfm?dist=42>
3 (search for case no. E066163); Petition at 4. Assuming that Petitioner is
4 entitled to statutory tolling for the entire 89-day period from April 4 to July 1,
5 2016, the AEDPA limitation period was extended to August 1, 2016.

6 Plaintiff states that he did not file his next state habeas petition until June
7 10, 2017, nearly a year after the California Court of Appeal’s July 1, 2016
8 denial. Memorandum at 2. That one-year period substantially exceeds the 30
9 to 60 days the Supreme Court has identified as “reasonable” for gap tolling,
10 and Petitioner has offered no explanation for the delay. He therefore is not
11 entitled to gap tolling for that period. See Evans, 546 U.S. at 201 (refusing to
12 apply tolling to unexplained six-month gap); see also Stewart v. Cate, 757 F.3d
13 929, 935-37 (9th Cir. 2014) (as amended) (unexplained 100-day gap
14 unreasonable). And because Petitioner filed that petition in June 2017, long
15 after the limitation period expired on August 1, 2016, he is not entitled to any
16 additional statutory tolling. See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th
17 Cir. 2003) (“[S]ection 2244(d) does not permit the reinitiation of the limitations
18 period that has ended before the state petition was filed.”).

19 **3. Equitable Tolling**

20 Federal habeas petitions are subject to equitable tolling of the one-year
21 limitation period in appropriate cases. Holland v. Florida, 560 U.S. 631, 645
22 (2010). To be entitled to equitable tolling, the petitioner must show both “(1)
23 that he has been pursuing his rights diligently, and (2) that some extraordinary
24 circumstance stood in his way” and prevented his timely filing. Id. at 649
25 (citing Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)). “The petitioner must
26 show that ‘the extraordinary circumstances were the cause of his untimeliness
27 and that the extraordinary circumstances made it impossible to file a petition
28 on time.’” Porter v. Ollison, 620 F.3d 952, 959 (9th Cir. 2010) (quoting

1 Ramirez v. Yates, 571 F.3d 993, 997 (9th Cir. 2009)). “[T]he threshold
2 necessary to trigger equitable tolling [under AEDPA] is very high, lest the
3 exceptions swallow the rule.” Miranda v. Castro, 292 F.3d 1063, 1066 (9th
4 Cir. 2002) (citation omitted, alteration in original). Equitable tolling will
5 therefore be justified in few cases. Spitsyn v. Moore, 345 F.3d 796, 799 (9th
6 Cir. 2003); see also Waldron-Ramsey v. Pacholke, 556 F.3d 1008, 1011 (2009)
7 (“To apply the doctrine in ‘extraordinary circumstances’ necessarily suggests
8 the doctrine’s rarity, and the requirement that extraordinary circumstances
9 ‘stood in his way’ suggests that an external force must cause the untimeliness,
10 rather than, as we have said, merely ‘oversight, miscalculation or negligence
11 on [the petitioner’s] part, all of which would preclude the application of
12 equitable tolling.’” (citation omitted, alteration in original)). The petitioner
13 bears the burden of demonstrating that AEDPA’s limitation period should be
14 equitably tolled. See Pace, 544 U.S. at 418.

15 Petitioner does not contend that any extraordinary circumstance
16 prevented him from filing a timely federal petition, nor does he allege any facts
17 showing that he was reasonably diligent in pursuing his rights. As such, it does
18 not appear that he is entitled to any equitable tolling.

19 Thus, the AEDPA limitation period expired on August 1, 2016. Because
20 Petitioner did not constructively file his federal Petition until June 19, 2017, it
21 is untimely by more than 10 months.

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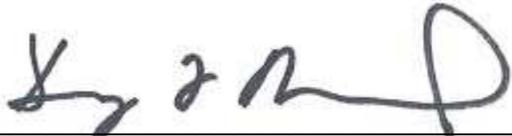
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1 **D. Conclusion**

2 IT THEREFORE IS ORDERED that on or before August 22, 2017,
3 Petitioner show cause in writing why the Court should not dismiss this action
4 with prejudice for lack of jurisdiction and because it is untimely. Petitioner is
5 expressly warned that his failure to timely respond to this Order may result in
6 his Petition being dismissed for the reasons stated above and for failure to
7 prosecute.

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9 Dated: July 25, 2017

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12 DOUGLAS F. McCORMICK
13 United States Magistrate Judge
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