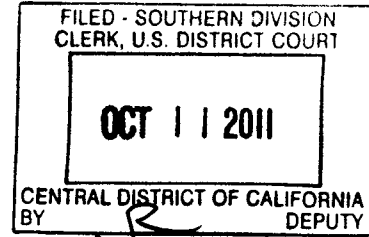


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3 I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY
FIRST CLASS MAIL POSTAGE PREPAID, TO ALL COUNSEL *Petitioner*
(OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF
RECORD IN THIS ACTION ON THIS DATE.

4 DATED: 10-11-11
5 _____
6 DEPUTY CLERK



12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA

14 BAO QUOC NGUYEN,) Case No. SACV 11-1526-JST (JPR)
15 Petitioner,)
16 vs.) ORDER TO SHOW CAUSE
17 KAMALA D. HARRIS, Attorney)
18 General of California, et al.)
19 Respondents.)

20 On October 3, 2011, Petitioner filed a Petition for Writ of Habeas Corpus by
21 a Person in State Custody.¹ The Petition purports to challenge a judgment of
22 conviction sustained by Petitioner in Orange County Superior Court on January
23 16, 2004, following Petitioner's guilty plea to burglary-related charges. Petitioner
24 raises 16 claims in his Petition. As best the Court can glean, he challenges the
25 advisement of his constitutional rights he received when he pleaded guilty, the
26 effectiveness of his counsel, the superior court's rulings concerning probation, the

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28 ¹Petitioner names the California Attorney General as the Respondent. Petitioner appears to be in custody; thus, under the advisory committee notes to Rule 2(a) of the Rules Governing § 2254 Cases, the proper Respondent is the warden at the institution in which Petitioner is housed.

1 use of prior strikes against him at sentencing, and alleged violations of the Double
2 Jeopardy Clause.

3 Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),
4 Petitioner had one year from the date his conviction became final in which to file a
5 federal habeas petition. See 28 U.S.C. § 2244(d). That statute provides:

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

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

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

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

21 (D) the date on which the factual predicate of the
22 claim or claims presented could have been discovered through
23 the exercise of due diligence.

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

28 Under California law in effect at the time of Petitioner's conviction, an

1 appeal had to be filed within 60 days of rendition of judgment. See Cal. R. Ct.
2 8.308(a) (formerly Rule 30.1(a)). When the judgment of conviction was entered
3 pursuant to a guilty plea, the defendant was required to file a notice of intended
4 appeal within the 60-day period, accompanied by a statement “showing reasonable
5 constitutional, jurisdictional, or other grounds going to the legality of the
6 proceedings”; the appeal did not become operative unless and until the trial court
7 executed and filed a certificate of probable cause for appeal. See Cal. R. Ct.
8 8.304(b) (formerly Rule 30(b)); see also Cal. Penal Code § 1237.5.

9 Here, it appears from the face of the Petition that Petitioner did not appeal
10 the judgment of conviction. Consequently, “the date on which the judgment
11 became final by conclusion of direct review or the expiration of the time for
12 seeking such review” was March 17, 2004, when Petitioner’s time to file a notice
13 of intended appeal expired.

14 From the face of the Petition, it does not appear that Petitioner has any basis
15 for contending that he is entitled to a later trigger date under § 2244(d)(1)(B).
16 Petitioner is not contending that he was impeded from filing his federal petition by
17 unconstitutional state action. Nor does it appear that Petitioner has any basis for
18 contending that he is entitled to a later trigger date under § 2244(d)(1)(C).
19 Petitioner is not contending that any of his claims are based on a federal
20 constitutional right that was initially recognized by the U.S. Supreme Court
21 subsequent to the date his conviction became final and that has been made
22 retroactively applicable to cases on collateral review. Finally, it appears to the
23 Court that Petitioner has no basis for contending that he is entitled to a later trigger
24 date under § 2244(d)(1)(D). Petitioner was aware of the factual predicate of his
25 claims as of the date he pleaded guilty and was sentenced. See Hasan v. Galaza,
26 254 F.3d 1150, 1154 n.3 (9th Cir. 2001) (statute of limitations begins to run when
27 a prisoner first knows (or through diligence could discover) the facts underlying
28 his claims, not when he recognizes their legal significance).

1 Thus, Petitioner’s last day to file his federal habeas petition was March 17,
2 2005, unless a basis for tolling the statute exists. See Patterson v. Stewart, 251
3 F.3d 1243, 1246 (9th Cir. 2001).

4 No basis for statutory tolling under § 2244(d)(2) appears to exist here.
5 Petitioner has filed numerous state habeas petitions,² but the first was not filed
6 until August 8, 2005, according to the Petition, almost five months after the end of
7 the AEDPA limitation period. Thus, Petitioner appears not to be entitled to
8 statutory tolling for any of those state habeas petitions. See, e.g., Ferguson v.
9 Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (holding that § 2244(d) “does not
10 permit the reinitiation of the limitations period that has ended before the state
11 petition was filed,” even if the state petition was timely filed).

12 The Supreme Court has held that AEDPA’s one-year limitation period is
13 subject to equitable tolling in appropriate cases. See Holland v. Florida, ___ U.S.
14 ___, 130 S. Ct. 2549, 2560, 177 L. Ed. 2d 130 (2010). A habeas petitioner is
15 entitled to equitable tolling only if he shows that (1) he has been pursuing his
16 rights diligently and (2) “some extraordinary circumstance stood in his way.” See
17 Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807, 1814, 161 L. Ed. 2d 669
18 (2005). Here, Petitioner has not purported to make any such showing in the
19 Petition.

20 A district court has the authority to raise the statute of limitations issue *sua*
21 *sponte* when untimeliness is obvious on the face of a petition; it may summarily
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23 ²Notations on the docket reports for some of these habeas petitions seem to
24 indicate that they may have been rejected as untimely. Thus, even if Petitioner can
25 show cause why the limitation period should be tolled until he filed his first state
26 habeas petition, in August 2005, he would then have to demonstrate that his state
27 habeas petitions were “properly filed” under § 2244(d) (2) in order to further toll the
28 limitation period up to the time he filed the instant Petition, in October 2011. See
Allen v. Siebert, 552 U.S. 3, 4, 128 S. Ct. 2, 7, 169 L. Ed. 2d 329 (2007) (untimely
state habeas petitions are not “properly filed” and thus do not toll limitation period).

1 dismiss the petition on that ground pursuant to Rule 4 of the Rules Governing
2 § 2254 Cases in the U.S. District Courts, as long as the court gives petitioner
3 adequate notice and an opportunity to respond. Herbst v. Cook, 260 F.3d 1039,
4 1042-43 (9th Cir. 2001).

5 IT THEREFORE IS ORDERED that on or before **November 11, 2011**,
6 Petitioner should show cause in writing, if he has any, why the Court should not
7 recommend that this action be dismissed with prejudice on the ground of
8 untimeliness. If Petitioner intends to rely on the equitable tolling doctrine, he will
9 need to include with his response to the Order to Show Cause a declaration under
10 penalty of perjury stating facts showing that (1) he has been pursuing his rights
11 diligently and (2) “some extraordinary circumstance stood in his way.”
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13 DATED: October 11, 2011

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16 JEAN P. ROSENBLUTH
17 U.S. MAGISTRATE JUDGE
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