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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

BRUCE L. AMICO,  
Petitioner,  
v.  
ROBERT H. TRIMBLE, Warden,  
Respondent.

NO. SACV 12-484-DDP (AGR)  
  
ORDER TO SHOW CAUSE

On March 29, 2012, Petitioner filed a Petition for Habeas Corpus (“Petition”) pursuant to 28 U.S.C. § 2254. For the reasons discussed below, it appears the court lacks jurisdiction of the Petition and the one-year statute of limitations has expired.

The court, therefore, orders Petitioner to show cause, on or before **May 7, 2012**, why the court should not recommend dismissal of the petition with prejudice based on lack of jurisdiction and/or expiration of the one-year statute of limitations.

1 I.

2 **PROCEDURAL BACKGROUND**

3 On April 8, 1970, Petitioner was sentenced to five years to life for robbery  
4 and assault with a deadly weapon. (Petition at 2.) Petitioner did not appeal. (*Id.*;  
5 Petition, Memorandum (“Memo”) at 1.) Petitioner states the sentence has been  
6 discharged and he is currently in custody based on a different conviction.  
7 (Petition at 2.)

8 On July 20, 2011, the Orange County Superior Court denied Petitioner’s  
9 state habeas petition. (*Id.* at 3-4 & Exh. 3.) On September 29, 2011, the  
10 California Court of Appeal denied Petitioner’s state habeas petition without  
11 explanation. (*Id.* at 4 & Exh. 4.) On February 15, 2012, the California Supreme  
12 Court denied Petitioner’s state habeas petition with citations to *In re Robbins*, 18  
13 Cal. 4th 770, 780 (1998), and *In re Clark*, 5 Cal. 4th 750 (1993).

14 On March 20, 2012, Petitioner constructively filed the instant Petition in this  
15 court. (Petition, back of envelope.) Petitioner raises two grounds: (1) Judge  
16 McMillan did not have jurisdiction over his 1970 criminal case because his oath of  
17 office was not on file with the California Secretary of State; and (2) the prosecutor  
18 did not have jurisdiction to prosecute Petitioner because he did not have his oath  
19 of office on file with the County Clerk. (Memo at 3.)

20 II.

21 **JURISDICTION**

22 “Section 2254(a)’s in custody requirement has been interpreted to mean  
23 that federal courts lack jurisdiction over habeas corpus petitions unless the  
24 petitioner is under the conviction or sentence under attack at the time his petition  
25 is filed.” *Bailey v. Hill*, 599 F.3d 976, 978-79 (9th Cir. 2010) (citation and  
26 quotation marks omitted).

27 “[O]nce the sentence imposed for a conviction has completely expired, the  
28 collateral consequences of that conviction are not themselves sufficient to render

1 an individual 'in custody' for the purposes of a habeas attack upon it." *Maleng v.*  
2 *Cook*, 490 U.S. 488, 492, 109 S. Ct. 1923, 104 L. Ed. 2d 540 (1989) (per curiam).  
3 "[W]hat matters is that [the conditions and restrictions of the petitioner's release]  
4 restrain petitioner's liberty to do those things which in this country free men are  
5 entitled to do." *Jones v. Cunningham*, 371 U.S. 236, 243, 83 S. Ct. 373, 9 L. Ed.  
6 2d 285 (1963).

7 Petitioner concedes that his 1970 sentence has been "discharged."  
8 (Petition at 2.) However, he states that his 1970 conviction has been "used as  
9 the basis for current Three-Strike conviction." (*Id.*; Memo at 2 ("two felonies from  
10 April of 1970 are the basis of his current Three-Strike conviction in San Diego  
11 County, No. 117308, dated March 11, 1997").

12 In *Lackawanna County District Attorney v. Coss*, 532 U.S. 394, 121 S. Ct.  
13 1567, 149 L. Ed. 2d 608 (2001), Coss was convicted of various crimes in 1986.  
14 *Id.* at 397. In 1990, after he was released from custody, Coss was again  
15 convicted of a crime. *Id.* at 398. Coss was sentenced to 6-12 years in state  
16 prison. *Id.* at 399. In 1994, Coss filed a federal habeas petition based on his  
17 1986 conviction because of the effect it had on his 1990 conviction. *Id.*

18 The Supreme Court held that Coss could not bring a habeas petition  
19 "directed solely at [the 1986] convictions." *Id.* at 401. "[O]nce a state conviction  
20 is no longer open to direct or collateral attack in its own right because the  
21 defendant failed to pursue those remedies while they were available (or because  
22 the defendant did so unsuccessfully), the conviction may be regarded as  
23 conclusively valid. If that conviction is later used to enhance a criminal sentence,  
24 the defendant generally may not challenge the enhanced sentence through a  
25 petition under § 2254 on the ground that the prior conviction was  
26 unconstitutionally obtained." *Id.* at 403-04; see also *Nunez v. Ramirez-Palmer*,  
27 485 F.3d 432 (9th Cir. 2007).

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1           The Orange County Superior Court’s decision indicates the Petitioner filed  
2 a previous state habeas petition in 2005. (Petition, Exh. 3 at 1.) Because  
3 Petitioner did not file his first state habeas petition until 2005, he is not entitled to  
4 statutory tolling. See *Welch v. Carey*, 350 F.3d 1079, 1081-84 (9th Cir. 2003)  
5 (state habeas petition filed after the limitations has expired does not revive the  
6 expired limitations period). Absent equitable tolling, the petition is time-barred.

## 7                           **2.     Equitable Tolling**

8           “[T]he timeliness provision in the federal habeas corpus statute is subject to  
9 equitable tolling.” *Holland v. Florida*, 130 S. Ct. 2549, 2554, 177 L. Ed. 2d 130  
10 (2010). “[A] ‘petitioner’ is ‘entitled equitable tolling’ only if he shows ‘(1) that he  
11 has been pursuing his rights diligently, and (2) that some extraordinary  
12 circumstance stood in his way’ and prevented timely filing.” *Id.* at 2562 (quoting  
13 *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669  
14 (2005)). “The diligence required for equitable tolling purposes is “reasonable  
15 diligence,” not “maximum feasible diligence.” *Id.* at 2565 (citations and quotation  
16 marks omitted). The extraordinary circumstances must have been the cause of  
17 an untimely filing. *Pace*, 544 U.S. at 418. “[E]quitable tolling is available for this  
18 reason only when “extraordinary circumstances beyond a prisoner’s control  
19 make it *impossible* to file a petition on time” and “the extraordinary  
20 circumstances” circumstances” were the *cause* of [the prisoner’s] untimeliness.”  
21 *Bills v. Clark*, 628 F.3d 1092, 1097 (9th Cir. 2010) (citations omitted, emphases in  
22 original).

23           There is no indication in the Petition that Petitioner is entitled to equitable  
24 tolling.

### 25                           **B.     Date of Discovery – 28 U.S.C. § 2244(d)(1)(D)**

26           The statute of limitations may start to run on “the date on which the factual  
27 predicate of the claim or claims presented could have been discovered through  
28 the exercise of due diligence.” 28 U.S.C. § 2244(d)(1)(D). The statute starts to

1 run when the petitioner knows or through diligence could discover the important  
2 facts, not when the petitioner recognizes their legal significance. *See Hasan v.*  
3 *Galaza*, 254 F.3d 1150, 1154 n.3 (9th Cir. 2001).

4 Petitioner states he recently discovered that in his 1970 Orange County  
5 Case No. C-22766 neither Judge Byron K. McMillan nor the prosecutor had filed  
6 oaths of office with the California Secretary of State and County Clerk-Recorder.  
7 (Petition, Declaration ¶¶ 2-6.) Petitioner attaches a letter from the California  
8 Secretary of State dated May 2, 2011, which states it has “no document  
9 responsive to this request” for an oath of office for Judge “Byron K. McMillan,  
10 1970.” (Petition, Exh. 1.) Petitioner also attaches a letter from the Clerk-  
11 Recorder dated May 19, 2011, in response to a Public Records Act request that  
12 states it “does not possess any records that are responsive to this item” and  
13 referencing Pat Brian. (Petition, Exh. 2.) Petitioner argues that Judge McMillan  
14 had no jurisdiction to preside over his 1970 case, and the prosecutor had no  
15 jurisdiction to prosecute him.<sup>2</sup> (Memo at 2.)

16 Petitioner argues that neither he nor his counsel could have discovered  
17 these facts earlier. (*Id.* at 2.) Petitioner’s assertion is unsupported and makes no  
18 sense. There is no reason to believe it would have been more difficult to obtain  
19 information about oaths on file at the time in 1970 than in 2011 or 2012.

20 It appears that the Petition is barred by the one-year statute of limitations.  
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23 <sup>2</sup> The Attorney General’s Opinions cited by Petitioner indicate Petitioner’s  
24 argument has no merit in any event. One opinion makes clear that “the fact that  
25 Relators have not located any of Defendant’s oaths of office in the county clerk’s  
26 office does not establish that Defendant’s oath of office was not filed in the  
27 appropriate office at the appropriate time.” No. 99-1211, 83 Ops. Cal. Atty. Gen.  
28 63, 67, 2000 Cal. AG LEXIS 12 (Mar. 8, 2000). Another opinion states: “It is  
sufficient the Defendant’s oath of office was taken before he began serving in  
office and is currently on file in the office of a deputy clerk for the Superior Court  
of California . . . .” (No. 99-1212, 83 Ops. Cal. Atty. Gen. 70, 74, 2000 Cal. AG  
LEXIS 14 (Mar. 14, 2000). The applicant’s argument that the oath was not on file  
with the county clerk raised no substantial question of law or fact. (*Id.*)

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IV.

**ORDER TO SHOW CAUSE**

IT IS THEREFORE ORDERED that, on or before **May 7, 2012**, Petitioner shall show cause, if there be any, why the court should not recommend dismissal with prejudice of the petition based on lack of jurisdiction and/or expiration of the one-year statute of limitations.

**Petitioner is also advised that if he fails to timely respond to this order to show cause, the court will recommend that the petition be dismissed with prejudice based on expiration of the one-year statute of limitations.**

DATED: April 10, 2012

  
ALICIA G. ROSENBERG  
United States Magistrate Judge