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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

MICHAEL FRIES,)	No. SA CV 16-01687-R (DFM)
Petitioner,)	
v.)	ORDER TO SHOW CAUSE
K.D. HARRIS et al.,)	
Respondents.)	

A. Background

On September 12, 2016, Petitioner initiated this action by filing a Petition for Writ of Habeas Corpus by a Person in State Custody in this Court. Dkt. 1 (“Petition”). The Petition seeks to challenge Petitioner’s 1996 conviction in Orange County Superior Court. Id. at 2.¹ Petitioner is presently serving the 96 years to life sentence imposed in that case. Id.

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

1 **B. 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, the limitation period begins
7 running from “the date on which the judgment became final by the conclusion
8 of direct review or the expiration of the time for seeking such review.” 28
9 U.S.C. § 2244(d)(1)(A).

10 The California Supreme Court denied Petitioner’s petition for review on
11 July 22, 1998. See Petition, App’x D at 9. Petitioner does not appear to have
12 filed a petition for writ of certiorari in the Supreme Court. Therefore, his
13 conviction became final 90 days later, on October 20, 1998. See Bowen v. Roe,
14 188 F.3d 1157, 1158-59 (9th Cir. 1999). If the Court assumes that date is the
15 date Petitioner’s limitation period began to run, Petitioner then had one year
16 from the date his judgment became final, or until October 21, 1999, to timely
17 file a habeas corpus petition in this Court. See Patterson v. Stewart, 251 F.3d
18 1243, 1247 (9th Cir. 2001). However, Petitioner did not file the instant action
19 until September 12, 2016, almost 17 years too late.

20 **C. Possible Later Trigger Dates**

21 **1. State Impediment**

22 AEDPA provides that its one-year limitations period shall run from “the
23 date on which the impediment of filing an application created by state action
24 in violation of the Constitution or laws of the United States is removed, if the
25 applicant was prevented from filing by such state action.” 28 U.S.C. §
26 2244(d)(1)(B).

27 **2. Newly Recognized Constitutional Right**

28 AEDPA provides that, if a claim is based upon a constitutional right that

1 is newly recognized and applied retroactively to habeas cases by the United
2 States Supreme Court, the one-year limitations period begins to run on the date
3 which the new right was initially recognized by the United States Supreme
4 Court. 28 U.S.C. § 2244(d)(1)(C). It does not appear that any of the claims
5 alleged in the Petition is based on a federal constitutional right that was
6 initially recognized by the United States Supreme Court after the date his
7 conviction became final and that has been made retroactively applicable to
8 cases on collateral review.

9 **3. Discovery of Factual Predicate**

10 Under 28 U.S.C. § 2244(d)(1)(D), the statute of limitations begins to run
11 when the “factual predicate” of Petitioner’s claims “could have been
12 discovered through the exercise of due diligence.” Id. The term “factual
13 predicate” refers to the facts underlying the claim, not the legal significance of
14 those facts. Hasan v. Galaza, 254 F.3d 1150, 1154 n. 3 (9th Cir. 2001) (“This is
15 not to say that [Petitioner] needed to understand the legal significance of those
16 facts--rather than simply the facts themselves--before the due diligence (and
17 hence the limitations) clock started ticking.”); accord Summers v. Patrick, 535
18 F. Supp. 2d 995, 998 (C.D. Cal. 2008) (“Under § 2244(d)(1)(D), AEDPA’s
19 statute of limitations commences when a petitioner knows, or through the
20 exercise of due diligence could discover, the factual predicate of her claims, not
21 when a petitioner learns the legal significance of those facts.”).

22 **D. Statutory Tolling**

23 Under AEDPA, “[t]he time during which a properly filed application for
24 State post-conviction or other collateral review with respect to the pertinent
25 judgment or claim is pending shall not be counted toward any period of
26 limitation under this subsection.” 28 U.S.C. § 2244(d)(2). The entire period of
27 time for a full round of collateral review, from the filing of a first state habeas
28 petition to the time the last state habeas petition is denied, may be deemed

1 “pending” and tolled, so long as the state petitioner proceeds in a hierarchical
2 order from one lower state court to a higher state court. See Carey v. Saffold,
3 536 U.S. 214, 223 (2002). This includes so-called “gap tolling” for the periods
4 of time between such state habeas petitions. See *id.*

5 **E. Equitable Tolling**

6 In Holland v. Florida, 560 U.S. 631, 649 (2010), the Supreme Court held
7 that AEDPA’s one-year limitation period is subject to equitable tolling in
8 appropriate cases. However, in order to be entitled to equitable tolling, the
9 petitioner must show both “(1) that he has been pursuing his rights diligently,
10 and (2) that some extraordinary circumstance stood in his way” and prevented
11 his timely filing. *Id.* at 649 (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418
12 (2005)). The Ninth Circuit has held that the Pace standard is consistent with
13 the Ninth Circuit’s “sparing application of the doctrine of equitable tolling.”
14 Waldron-Ramsey v. Pacholke, 556 F.3d 1008, 1011 (9th Cir. 2009). Thus,
15 “[t]he petitioner must show that ‘the extraordinary circumstances were the
16 cause of his untimeliness and that the extraordinary circumstances made it
17 impossible to file a petition on time.’” Porter v. Ollison, 620 F.3d 952, 959 (9th
18 Cir. 2010) (quoting Ramirez v. Yates, 571 F.3d 993, 997 (2009)). “Indeed, the
19 threshold necessary to trigger equitable tolling [under AEDPA] is very high,
20 lest the exceptions swallow the rule.” Miranda v. Castro, 292 F.3d 1063, 1066
21 (9th Cir. 2002) (internal quotation marks and citation omitted).

22 Consequently, as the Ninth Circuit has recognized, equitable tolling will
23 be justified in few cases. Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003);
24 see also Waldron-Ramsey, 556 F.3d at 1011 (“To apply the doctrine in
25 ‘extraordinary circumstances’ necessarily suggests the doctrine’s rarity, and the
26 requirement that extraordinary circumstances ‘stood in his way’ suggests that
27 an external force must cause the untimeliness, rather than, as we have said,
28 merely ‘oversight, miscalculation or negligence on [the petitioner’s] part, all of

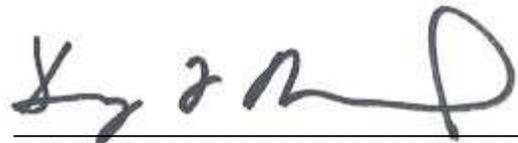
1 which would preclude the application of equitable tolling.” (quoting Harris v.
2 Carter, 515 F.3d 1051, 1054-55 (9th Cir. 2008))).

3 **F. Conclusion**

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

11 Because it appears from the face of the Petition that Petitioner’s claims
12 may be time-barred, IT THEREFORE IS ORDERED that, on or before
13 October 21, 2016, Petitioner show cause in writing as to why the Court should
14 not recommend that this action be summarily dismissed with prejudice on the
15 ground of untimeliness. Petitioner is specifically ordered to identify whether he
16 is arguing that a later trigger date should apply under 28 U.S.C. §
17 2244(d)(1)(B), (C), or (D), and all facts that support such an argument.
18 Petitioner is also ordered to identify any period for which statutory or equitable
19 tolling is claimed, and all facts to support any such claim.

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21 Dated: September 19, 2016

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24 DOUGLAS F. McCORMICK
25 United States Magistrate Judge
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