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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JONATHAN CHAMPEAU,

Petitioner

v.

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Respondent.

Case No. SACV 17-1685-JAK (GJS)

ORDER TO SHOW CAUSE RE:
POSSIBLE DISMISSAL FOR
UNTIMELINESS AND/OR LACK
OF EXHAUSTION

On September 27, 2017, Petitioner filed a 28 U.S.C. § 2254 habeas petition in this district (Dkt. 1, “Petition”). Pursuant to 28 U.S.C. § 636(c), Petitioner has consented to have the undersigned conduct all further proceedings in this case. (*See* Dkt. 2, 4.)

The Petition stems from Petitioner’s January 6, 2016 misdemeanor conviction and sentencing in Orange County Superior Court Case No. 14WF1642 (the “State Conviction”). (Petition at 2.)¹ Petitioner sustained the State Conviction pursuant to a guilty plea to counts of battery and resisting a public or peace officer, and he received a sentence of three years of probation and six days in jail. (*See* docket for OCSC Case No. 14WF1642.) Although Petitioner alleges that he submitted an

¹ Pursuant to Rule 201 of the Federal Rules of Evidence, the Court has reviewed the dockets available electronically for the Orange County Superior Court, the California Court of Appeal, the California Supreme Court, and federal courts.

1 untimely appeal to the California Court of Appeal that was not accepted (Petition at
2 2-3),² the electronic dockets available for the California Court of Appeal and the
3 California Supreme Court do not show any direct appeal from the State Conviction,
4 nor do they show any state post-conviction proceedings challenging the State
5 Conviction.

6 Over a year and a half passed following the State Conviction. In July 2017,
7 Petitioner mailed a 28 U.S.C. § 2241 habeas petition to the United States District
8 Court for the Southern District of California, which challenged the State Conviction.
9 The petition was assigned Case No. 3:17-cv-01525-BEN-BGS (the “Prior Federal
10 Petition”). The Prior Federal Petition was dismissed without prejudice on August
11 27, 2017, on the grounds that Petitioner did not appear to be in custody and had not
12 paid his filing fee or sought leave to proceed in forma pauperis, and with advice that
13 Petitioner should proceed under Section 2254 in this District if he wished to
14 challenge the State Conviction.

15 The Petition is dated September 27, 2017, and was filed on that date.
16

17 **THE PETITION IS FACIALLY DEFECTIVE AND UNEXHAUSTED**

18 The Petition suffers from two readily apparent defects that must be addressed.

19 First, the Petition names as Respondent “The People of the State of California.”

20 This is improper. Under Rule 2(a) of the Rules Governing Section 2254 Cases in
21 the United States District Courts, the proper Respondent is “the state officer who has
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23 ² Notwithstanding the Petition’s allegation, a defendant who has sustained a
24 misdemeanor conviction may not appeal directly to the California Court of Appeal
25 initially. Rather, he must appeal to the Appellate Division of the Superior Court,
26 and if his appeal is denied, he then must file an application asking the Appellate
27 Division to certify the case for transfer to the California Court of Appeal. If such
28 certification is denied, the defendant may petition the California Court of Appeal
directly to accept the transfer of the case. *See* Cal. Penal Code § 1466; Cal. R. Ct.
8.1002, 8.1005, and 8.1006; *McMonagle v. Meyer*, 802 F.3d 1093, 1096 (9th Cir.
2015). If the California Court of Appeal denies transfer, that denial is final and may
not be appealed to the California Supreme Court. *Id.* In addition, a defendant may
raise certain claims in the state courts through a habeas petition. *Id.* at 1099 n.1.

1 custody.” The Notes to Rule 2(a) make clear that, if a petitioner is on probation – as
2 appears to be the case here – the proper Respondents are the particular probation
3 officer responsible for supervising the petitioner and the official in charge of the
4 probation agency. If this action proceeds, Petitioner must amend the Petition to
5 designate the correct Respondents.

6 Second, the Petition admittedly is unexhausted. Federal courts may not grant
7 habeas relief to a person held in state custody unless the petitioner has exhausted his
8 available state court remedies as to the issue(s) presented. 28 U.S.C. §
9 2254(b)(1)(A); *Rose v. Lundy*, 455 U.S. 509, 518 (1982); *Fields v. Waddington*, 401
10 F.3d 1018, 1020 (9th Cir. 2005) (“We may review the merits of Petitioner’s habeas
11 petition only if he exhausted state court remedies.”). “[T]he exhaustion doctrine is
12 designed to give the state courts a full and fair opportunity to resolve federal
13 constitutional claims before those claims are presented to the federal courts.”
14 *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (emphasis added); *see also*
15 *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (to give the State the chance to pass upon
16 and resolve violations of his federal rights, a state prisoner must exhaust his
17 available state remedies before seeking federal habeas relief). To satisfy the
18 exhaustion requirement, a petitioner must “fairly present” his federal claim to the
19 state courts, *i.e.*, give them a fair opportunity to consider and correct violations of
20 the prisoner’s federal rights. *See Duncan v. Henry*, 513 U.S. 364, 365 (1995);
21 *Peterson v. Lampert*, 319 F.3d 1153, 1155-56 (9th Cir. 2003) (en banc).

22 Petitioner admits that he has not raised any of the five Grounds set forth in the
23 Petition in the California Court of Appeal or California Supreme Court on direct
24 appeal or through a habeas petition filed in the California Supreme Court. (Petition
25 at 5-7.) As noted above, Petitioner alleges he submitted an untimely appeal that was
26 rejected and not filed. Thus, having failed to properly pursue the direct appeal
27 process described in Note 2 above (*i.e.*, appealing to the Appellate Division and then
28 seeking transfer to the California Court of Appeal), and having failed to pursue the

1 alternative route of seeking habeas relief in the state high court (*see McMonagle*,
2 802 F.3d at 1098-99), Petitioner has not fairly presented his five claims to the state
3 courts and they are unexhausted as a result.

4 When a habeas petition is fully unexhausted, as is the case here, the petitioner
5 has two options. He can voluntarily dismiss his petition without prejudice, so that
6 he may pursue exhaustion in the state courts and then return to federal court once his
7 claims are exhausted. Alternatively, he may ask the Court to stay his case while he
8 pursues exhaustion in the state courts, pursuant to the *Rhines* stay procedure. *See*
9 *Rhines v. Weber*, 544 U.S. 269 (2005) (authorizing stays of “mixed” petitions); and
10 *Mena v. Long*, 813 F.3d 907 (9th Cir. 2016) (finding the *Rhines* stay procedure
11 applicable to fully unexhausted petitions). To obtain a *Rhines* stay, a petitioner must
12 show: (1) “good cause” for the failure to exhaust the claims at issue; (2) that the
13 unexhausted claims are “potentially meritorious”; and (3) and that the petitioner has
14 not engaged in “intentionally dilatory litigation tactics.” *Rhines*, 544 U.S. at 277-78.
15 The Supreme Court has cautioned that a *Rhines* stay should be afforded “only in
16 limited circumstances.” *Id.* at 277.

17 As set forth below, the Court has directed Petitioner to file a Response to this
18 Order to Show Cause. In his Response, Petitioner shall state: whether he believes
19 the Petition is exhausted and, if so, explain why; or whether he concedes that the
20 Petition is unexhausted and, if so, indicate clearly which of the above two options he
21 wishes to exercise. Petitioner is cautioned that, at present, the Court is disinclined to
22 grant a *Rhines* stay given the apparent untimeliness of the Petition, which would
23 render element (2) above unsatisfied. In addition, there is no apparent basis in the
24 record for finding that there was good cause for Petitioner’s failure to exhaust his
25 claims, thus rendering element (1) unsatisfied as well. Nonetheless, if Petitioner
26 wishes to seek a stay of this action and believes that he can satisfy the *Rhines*
27 standard, he may attempt to do so in his Response and the Court will consider his
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1 arguments carefully.³

2
3 **THE PETITION IS UNTIMELY ON ITS FACE**

4 The one-year limitations period that governs the Petition is set forth in 28 U.S.C.
5 § 2244(d)(1). Petitioner was convicted on January 6, 2016, and he did not pursue a
6 timely appeal, nor did he seek state habeas relief. Generally, a misdemeanor
7 conviction is “final” for purposes of the Section 2244(d)(1) limitations period 90
8 days after the California Court of Appeal denies a transfer application. *McMonagle*,
9 802 F.3d at 1097-98 (when petitioner “appealed his conviction through the proper
10 channels” by appealing to the Appellate Division and then requesting transfer, his
11 conviction was final 90 days after the California Court of Appeal denied transfer).
12 Here, as discussed earlier, Petitioner did not follow the “proper channels” for
13 appealing the State Conviction. Under California law, he had 30 days from his
14 January 6, 2016 State Conviction in which to file a notice of appeal in the trial court,
15 and he admittedly did not do so on a timely basis. *See* Cal. R. Ct. 8.852(a), 8.853;
16 *see also* Cal. R. Ct. 8.852(d) (the court clerk must reject and not file an untimely
17 notice of appeal from a misdemeanor conviction). Accordingly, for federal statute
18 of limitations purposes, Petitioner’s state conviction became “final” on the
19 expiration of that 30-day period, *i.e.*, on February 5, 2016. *See Randle v. Crawford*,
20 604 F.3d 1047, 1054-57 (9th Cir. 2010) (when petitioner filed untimely notice of
21 appeal outside 30-day window under state law, his conviction was “final” for
22 limitations period upon expiration of that 30-day time frame). Therefore, Petitioner
23 had until February 5, 2017, to file a timely federal habeas petition. The instant
24 Petition was not filed until September 27, 2017, and therefore, it was untimely by
25 over seven and a half months, absent tolling.⁴

26
27 ³ Of course, if there is an ultimate finding that the Petition is untimely,
dismissal will follow and no *Rhines* stay will issue.

28 ⁴ The Prior Federal Petition was filed on July 26, 2017, and also was untimely.

1 Section 2244(d)(2) suspends the limitations period for the time during which a
2 “properly-filed” application for post-conviction relief is “pending” in state court.
3 Petitioner did not file any state habeas proceeding, and the untimely Prior Federal
4 Petition could not serve as a basis for statutory tolling even if it had been timely.
5 *See Duncan v. Walker*, 533 U.S. 167, 181-81 (2001). Accordingly, no Section
6 2244(d)(2) statutory tolling is available in this case.

7 The limitations period for Section 2254 petitions is subject to equitable tolling in
8 appropriate circumstances. *Holland v. Florida*, 560 U.S. 631, 645-49 (2010).
9 However, application of the equitable tolling doctrine is the exception rather than
10 the norm. *See, e.g., Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1011 (9th Cir.
11 2009) (characterizing the Ninth Circuit’s “application of the doctrine” as “sparing”
12 and a “rarity”); *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999) (“equitable
13 tolling is unavailable in most cases”). A habeas petitioner may receive equitable
14 tolling only if he “shows ‘(1) that he has been pursuing his rights diligently, and (2)
15 that some extraordinary circumstance stood in his way’ and prevented timely filing.”
16 *Holland*, 560 U.S. at 649 (citation omitted); *see also Pace v. DiGuglielmo*, 544 U.S.
17 408, 418 & n.8 (2005). Both elements must be met. *Id.* at 418 (finding that the
18 petitioner was not entitled to equitable tolling, because he had not established the
19 requisite diligence). A petitioner seeking application of the doctrine bears the
20 burden of showing that it should apply to him. *Id.*; *see also Lawrence v. Florida*,
21 549 U.S. 327, 336 (2007) (observing that, to receive equitable tolling, the petitioner
22 must prove the above two requirements).

23 Nothing in the Petition or the available record supports finding equitable tolling
24 to be available in this case. Unlike many Section 2254 habeas petitioners, Petitioner
25 has not been incarcerated since his conviction but, rather, received probation. At
26 most, Petitioner asserts that he “learned more about the law through legal library.”
27 (Petition at 7.) Petitioner’s status as a pro se litigant and any related legal ignorance
28 is an insufficient basis for equitable tolling. Allegations of this nature are

1 commonly made and are routinely rejected as bases for equitable tolling. *See*
2 *Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006) (collecting cases from
3 other circuits and holding that “a pro se petitioner’s lack of legal sophistication is
4 not, by itself, an extraordinary circumstance”); *see also Johnson v. United States*,
5 544 U.S. 295, 311 (2005) (in the parallel 28 U.S.C. § 2255 context, rejecting a
6 movant/prisoner’s attempt to justify his lack of diligence based on his pro se status
7 and lack of legal sophistication, and stating: “we have never accepted pro se
8 representation alone or procedural ignorance as an excuse for prolonged inattention
9 when a statute’s clear policy calls for promptness”); *Ford v. Pliler*, 590 F.3d 782,
10 789 (9th Cir. 2009) (observing that the equitable tolling “standard has never been
11 satisfied by a petitioner’s confusion or ignorance of the law alone”); *Waldron-*
12 *Ramsey*, 556 F.3d at 1013 n.4 (“a pro se petitioner’s confusion or ignorance of the
13 law is not, itself, a circumstance warranting equitable tolling”). On the present
14 record, there is no basis for applying the equitable tolling doctrine.

15 In sum, it is plain that the Petition, on its face, is untimely by over seven months.

16 * * * * *

17 District courts are permitted to consider, *sua sponte*, whether a petition is
18 untimely and to dismiss a petition that is untimely on its face after providing the
19 petitioner with the opportunity to be heard. *Day v. McDonough*, 547 U.S. 198, 209
20 (2006); *Wentzell v. Neven*, 674 F.3d 1124, 1126 (9th Cir. 2012). In addition, the
21 Court may raise exhaustion problems *sua sponte*. *Boyd v. Thompson*, 147 F.3d
22 1124, 1127-28 (9th Cir. 1998); *Stone v. City and County of San Francisco*, 968 F.2d
23 850, 856 (9th Cir. 1992).

24 Accordingly, Petitioner is ORDERED TO SHOW CAUSE why this action
25 should not be dismissed on the ground of untimeliness and/or the ground of
26 unexhaustion. By no later than **December 8, 2017**, Petitioner shall file a Response
27 to this Order To Show Cause addressing both issues as follows:

28 1. If Petitioner concedes that this action is untimely, he shall so state clearly. If

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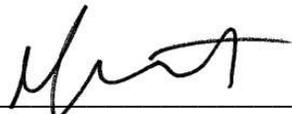
Petitioner disputes that this action is untimely, he must explain clearly and in detail why it is not untimely and provide any available competent evidence that establishes the timeliness of this action.

2. In addition, Petitioner shall state clearly whether he concedes that the Petition is unexhausted. If Petitioner contends that the Petition is exhausted, he must explain why. If Petition concedes that the Petition is unexhausted, he shall specify which of the foregoing two options he elects. If Petitioner seeks a *Rhines* stay, he must explain how and why the above-described *Rhines* standard is satisfied.

Petitioner is explicitly cautioned that his failure to comply with this Order will be deemed to constitute a concession that this action may be dismissed on the ground of untimeliness and/or the ground of exhaustion.

IT IS SO ORDERED.

DATED: November 8, 2017.



GAIL J. STANDISH
UNITED STATES MAGISTRATE JUDGE