



1 untimely and should therefore be dismissed.

2 DISCUSSION

3 A. Preliminary Review of Petition

4 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition  
5 if it “plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is  
6 not entitled to relief in the district court . . . .” Rule 4 of the Rules Governing Section 2254 Cases.  
7 The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of  
8 habeas corpus, either on its own motion under Rule 4, pursuant to the respondent’s motion to  
9 dismiss, or after an answer to the petition has been filed. Herbst v. Cook, 260 F.3d 1039 (9<sup>th</sup>  
10 Cir.2001).

11 The Ninth Circuit, in Herbst v. Cook, concluded that a district court may dismiss *sua sponte* a  
12 habeas petition on statute of limitations grounds so long as the court provides the petitioner adequate  
13 notice of its intent to dismiss and an opportunity to respond. 260 F.3d at 1041-42. By issuing this  
14 Order to Show Cause and providing Petitioner an opportunity to file a response, the Court is  
15 affording Petitioner the notice required by the Ninth Circuit.

16 B. Limitation Period for Filing a Petition for Writ of Habeas Corpus

17 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of  
18 1996 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas  
19 corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063  
20 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9<sup>th</sup> Cir. 1997) (en banc), *cert. denied*, 118 S.Ct. 586  
21 (1997). The instant petition was filed on November 18, 2008, and thus, it is subject to the  
22 provisions of the AEDPA.

23 The AEDPA imposes a one year period of limitation on petitioners seeking to file a federal  
24 petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As amended, § 2244, subdivision (d)  
25 reads:

26 (1) A 1-year period of limitation shall apply to an application for a writ of habeas  
27 corpus by a person in custody pursuant to the judgment of a State court. The

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limitation.

1 limitation period shall run from the latest of—

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

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

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

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

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

15 28 U.S.C. § 2244(d).

16 In most cases, the one-year period commences on the day after a petitioner’s direct review  
17 becomes final. Here, the Court has accessed the California state court system’s electronic database  
18 to determine that Petitioner filed a petition for review that was denied by the California Supreme  
19 Court on June 9, 2004.<sup>2</sup> Thus, direct review would have concluded on September 7, 2004, when the  
20 ninety day period for seeking review in the United States Supreme Court expired. Barefoot v.  
21 Estelle, 463 U.S. 880, 887 (1983); Bowen v. Roe, 188 F.3d 1157, 1159 (9<sup>th</sup> Cir.1999); Smith v.  
22 Bowersox, 159 F.3d 345, 347 (8<sup>th</sup> Cir.1998). Petitioner would then have one year from the following  
23 day, September 8, 2004, or until September 7, 2005, absent applicable tolling, within which to file  
24 his federal petition for writ of habeas corpus. As mentioned, the instant petition was not filed until  
25 November 18, 2008, over three years *after* the one-year period would have expired. Thus, unless  
26 Petitioner is entitled to either statutory or equitable tolling, the petition is untimely and must be  
27 dismissed.

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28 <sup>2</sup>The court may take notice of facts that are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b); United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th Cir. 1993). The record of state court proceeding is a source whose accuracy cannot reasonably be questioned, and judicial notice may be taken of court records. Mullis v. United States Bank. Ct., 828 F.2d 1385, 1388 n.9 (9th Cir. 1987); Valerio v. Boise Cascade Corp., 80 F.R.D. 626, 635 n. 1 (N.D.Cal.1978), *aff’d*, 645 F.2d 699 (9th Cir.); *see also* Colonial Penn Ins. Co. v. Coil, 887 F.2d 1236, 1239 (4th Cir. 1989); Rodic v. Thistledown Racing Club, Inc., 615 F.2d 736, 738 (6th. Cir. 1980). As such, the internet website for the California Courts, containing the court system’s records for filings in the Court of Appeal and the California Supreme Court are subject to judicial notice.

1 C. Tolling of the Limitation Period Pursuant to 28 U.S.C. § 2244(d)(2)

2 Under the AEDPA, the statute of limitations is tolled during the time that a properly filed  
3 application for state post-conviction or other collateral review is pending in state court. 28 U.S.C.  
4 § 2244(d)(2). A properly filed application is one that complies with the applicable laws and rules  
5 governing filings, including the form of the application and time limitations. Artuz v. Bennett, 531  
6 U.S. 4, 8, 121 S. Ct. 361 (2000). An application is pending during the time that ‘a California  
7 petitioner completes a full round of [state] collateral review,’ so long as there is no unreasonable  
8 delay in the intervals between a lower court decision and the filing of a petition in a higher court.  
9 Delhomme v. Ramirez, 340 F. 3d 817, 819 (9th Cir. 2003), abrogated on other grounds as recognized  
10 by Waldrip v. Hall, 548 F. 3d 729 (9th Cir. 2008)(per curium)(internal quotation marks and citations  
11 omitted); see Evans v. Chavis, 546 U.S. 189, 193-194, 126 S. Ct. 846 (2006); see Carey v. Saffold,  
12 536 U.S. 214, 220, 222-226, 122 S. Ct. 2134 (2002); see also, Nino v. Galaza, 183 F.3d 1003, 1006  
13 (9th Cir. 1999).

14 Nevertheless, there are circumstances and periods of time when no statutory tolling is  
15 allowed. For example, no statutory tolling is allowed for the period of time between finality of an  
16 appeal and the filing of an application for post-conviction or other collateral review in state court,  
17 because no state court application is “pending” during that time. Nino, 183 F.3d at 1006-1007.  
18 Similarly, no statutory tolling is allowed for the period between finality of an appeal and the filing of  
19 a federal petition. Id. at 1007. In addition, the limitation period is not tolled during the time that a  
20 federal habeas petition is pending. Duncan v. Walker, 563 U.S. 167, 181-182, 121 S.Ct. 2120  
21 (2001); see also, Fail v. Hubbard, 315 F. 3d 1059, 1060 (9th Cir. 2001)(as amended on December 16,  
22 2002). Further, a petitioner is not entitled to statutory tolling where the limitation period has already  
23 run prior to filing a state habeas petition. Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003)  
24 (“section 2244(d) does not permit the reinitiation of the limitations period that has ended before the  
25 state petition was filed.”); Jiminez v. White, 276 F. 3d 478, 482 (9th Cir. 2001). Finally, a petitioner  
26 is not entitled to continuous tolling when the petitioner’s later petition raises unrelated claims. See  
27 Gaston v. Palmer, 447 F.3d 1165, 1166 (9th Cir. 2006).

1 Here, Petitioner alleges, and the Court has confirmed through the California courts'  
2 electronic database, that Petitioner filed the following state habeas petitions: (1) filed in the Kern  
3 County Superior Court on May 22, 2007 and denied on July 20, 2007; (2) filed in the California  
4 Court of Appeal, Fifth Appellate District (“5<sup>th</sup> DCA”) on February 1, 2008 and denied on February  
5 14, 2008; and (3) filed in the California Supreme Court on April 21, 2008 and denied on October 1,  
6 2008. Assuming, without deciding, that all three petitions were “properly filed” pursuant to the  
7 AEDPA, they do not afford Petitioner any statutory tolling because all of them were filed after the  
8 one-year period had elapsed.

9 A petitioner is not entitled to tolling where the limitations period has already run prior to  
10 filing a state habeas petition. Green v. White, 223 F.3d 1001, 1003 (9<sup>th</sup> Cir. 2000); Jiminez v. Rice,  
11 276 F.3d 478 (9<sup>th</sup> Cir. 2001); see Webster v. Moore, 199 F.3d 1256, 1259 (11<sup>th</sup> Cir. 2000)(same);  
12 Ferguson v. Palmateer, 321 F.3d 820 (9<sup>th</sup> Cir. 2003)(“section 2244(d) does not permit the reinitiation  
13 of the limitations period that has ended before the state petition was filed.”); Jackson v. Dormire, 180  
14 F.3d 919, 920 (8<sup>th</sup> Cir. 1999) (petitioner fails to exhaust claims raised in state habeas corpus filed  
15 after expiration of the one-year limitations period). Here, as mentioned, the limitations period  
16 expired on September 7, 2005, approximately twenty months *before* Petitioner filed his first state  
17 habeas petition. Accordingly, he cannot avail himself of the statutory tolling provisions of the  
18 AEDPA. That being the case, the petition can only be saved by equitable tolling.

19 D. Equitable Tolling

20 The limitation period is subject to equitable tolling when “extraordinary circumstances  
21 beyond a prisoner’s control make it impossible to file the petition on time.” Shannon v. Newland,  
22 410 F. 3d 1083, 1089-1090 (9<sup>th</sup> Cir. 2005)(internal quotation marks and citations omitted). “When  
23 external forces, rather than a petitioner’s lack of diligence, account for the failure to file a timely  
24 claim, equitable tolling of the statute of limitations may be appropriate.” Miles v. Prunty, 187 F.3d  
25 1104, 1107 (9<sup>th</sup> Cir. 1999). “Generally, a litigant seeking equitable tolling bears the burden of  
26 establishing two elements: “(1) that he has been pursuing his rights diligently, and (2) that some  
27 extraordinary circumstance stood in his way.” Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct.  
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1 1807 (2005). “[T]he threshold necessary to trigger equitable tolling under AEDPA is very high, lest  
2 the exceptions swallow the rule.” Miranda v. Castro, 292 F. 3d 1062, 1066 (9th Cir. 2002)(citation  
3 omitted). As a consequence, “equitable tolling is unavailable in most cases.” Miles, 187 F. 3d at  
4 1107.

5 Here, Petitioner makes no express claim of entitlement to equitable tolling. However,  
6 Petitioner has appended to the instant petition a letter to the Clerk of the Court apologizing for not  
7 filing additional copies and indicating that this was because of his “lack of skills,” the lack of  
8 adequate law library facilities at his prison, and lockdowns that have limited Petitioner’s access to  
9 the prison law library. (Doc. 1, p. 36). Although Petitioner does not allege that any of these factors  
10 entitle him to equitable tolling, construing his pleadings liberally, and assuming, arguendo, that he  
11 had raised those factors as grounds for equitable tolling, he would nevertheless be mistaken.

12 Library closures and unpredictable lockdowns do not constitute extraordinary circumstances  
13 warranting equitable tolling in this case. See, United States v. Van Poyck, 980 F.Supp. 1108, 1111  
14 (C.D.Cal.1997) (inability to secure copies of transcripts from court reporters and lockdowns at prison  
15 lasting several days and allegedly eliminating access to law library were not extraordinary  
16 circumstances and did not equitably toll one-year statute of limitations); Atkins v. Harris, 1999 WL  
17 13719, \*2 (N.D.Cal. Jan.7, 1999) (“lockdowns, restricted library access and transfers do not  
18 constitute extraordinary circumstances sufficient to equitably toll the [AEDPA] statute of limitations.  
19 Prisoners familiar with the routine restrictions of prison life must take such matters into account  
20 when calculating when to file a federal [habeas] petition.... Petitioner’s alleged lack of legal  
21 sophistication also does not excuse the delay.”); Giraldes v. Ramirez-Palmer, 1998 WL 775085, \*2  
22 (N. D.Cal.1998) (holding that prison lockdowns do not constitute extraordinary circumstances  
23 warranting equitable tolling).

24 Petitioner’s indigent status, his limited legal knowledge, recurring lockdowns, and the limited  
25 availability of law library resources are circumstances that do not differ from the majority of  
26 incarcerated prisoners attempting to file petitions for writ of habeas corpus in this Court. Thus, by  
27 definition, such circumstances are not “extraordinary” and do not justify equitable tolling. If limited  
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