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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LOUIS JOSEPH BROUSSARD,)	1:09-cv-01521-JLT HC
)	
Petitioner,)	ORDER TO SHOW CAUSE WHY THE
)	PETITION SHOULD NOT BE DISMISSED
v.)	FOR VIOLATION OF THE ONE-YEAR
)	STATUTE OF LIMITATIONS
)	
JAMES WALKER,)	ORDER TO FILE RESPONSE WITHIN
)	THIRTY DAYS
Respondent.)	

PROCEDURAL HISTORY

____ Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The instant federal petition for writ of habeas corpus was filed on August 18, 2009.¹ The Court has conducted a preliminary review of the petition and has determined

¹In Houston v. Lack, the United States Supreme Court held that a pro se habeas petitioner's notice of appeal is deemed filed on the date of its submission to prison authorities for mailing, as opposed to the date of its receipt by the court clerk. Houston v. Lack, 487 U.S. 166, 276, 108 S.Ct. 2379, 2385 (1988). The rule is premised on the pro se prisoner's mailing of legal documents through the conduit of "prison authorities whom he cannot control and whose interests might be adverse to his." Miller v. Sumner, 921 F.2d 202, 203 (9th Cir. 1990); *see*, Houston, 487 U.S. at 271, 108 S.Ct. at 2382. The Ninth Circuit has applied the "mailbox rule" to state and federal petitions in order to calculate the tolling provisions of the AEDPA. Saffold v. Neland, 250 F.3d 1262, 1268-1269 (9th Cir. 2000), *amended* May 23, 2001, *vacated and remanded on other grounds sub nom.* Carey v. Saffold, 536 U.S. 214, 226 (2002). The date the petition is signed may be considered the earliest possible date an inmate could submit his petition to prison authorities for filing under the mailbox rule. Jenkins v. Johnson, 330 F.3d 1146, 1149 n. 2 (9th cir. 2003). Accordingly, for all of Petitioner's state petitions, if any, and for the instant federal petition, the Court will consider the date of signing of the petition (or the date of signing of the proof of service if no signature appears on the petition) as the earliest possible filing date and the operative date of filing under the mailbox rule

1 that it may be untimely and therefore should be dismissed.

2 **A. Preliminary Review of Petition**

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

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

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

16 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of
17 1996 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas
18 corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063
19 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc), *cert. denied*, 118 S.Ct. 586
20 (1997). The instant petition was filed on August 18, 2009, and thus, it is subject to the provisions of
21 the AEDPA.

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

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

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for calculating the running of the statute of limitation. For the instant petition, the Court will consider the date of August 18,
2009, the date Petitioner signed his petition, as the operative filing date. (Doc. 1, p. 6).

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

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

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

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

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

14 28 U.S.C. § 2244(d).

15 In most cases, the limitation period begins running on the date that the petitioner's direct
16 review became final. The AEDPA, however, is silent on how the one year limitation period affects
17 cases where direct review concluded *before* the enactment of the AEDPA. The Ninth Circuit has
18 held that if a petitioner whose review ended before the enactment of the AEDPA filed a habeas
19 corpus petition within one year of the AEDPA's enactment, the Court should not dismiss the petition
20 pursuant to § 2244(d)(1). Calderon v. United States Dist. Court (Beeler), 128 F.3d 1283,1286 (9th
21 Cir.), *cert. denied*, 118 S.Ct. 899 (1998); Calderon v. United States Dist. Court (Kelly), 127 F.3d
22 782, 784 (9th Cir.), *cert. denied*, 118 S.Ct. 1395 (1998). In such circumstances, the limitations
23 period would begin to run on April 25, 1996. Patterson v. Stewart, 2001 WL 575465 (9th Cir. Ariz.).
24 Petitioner would then have one year, or until April 24, 1997, within which to file his federal petition.

25 Here, the Petitioner alleges that he was convicted on April 14, 1989, and sentenced on June
26 13, 1989. Petitioner alleges that he did not file an appeal. Therefore, Petitioner had sixty days in
27 which to file a notice of appeal. People v. Mendez, 81 Cal.Rptr.2d 301, 302, 19 Cal.4th 1084, 1086,
28 969 P.2d 146, 147 (1999). Because Petitioner did not file a notice of appeal, his direct review
concluded on August 12, 1989, when the sixty-day period for filing a notice of appeal expired. Thus,
because Petitioner's direct review concluded before the enactment of the AEDPA, the operative one-
year window for filing his federal habeas corpus petition commenced on April 25, 1996 and closed
on April 24, 1997.

1 As mentioned, the instant petition was not filed until August 18, 2009, over twelve years after
2 the one-year period had concluded. Accordingly, unless Petitioner is entitled to either statutory or
3 equitable tolling sufficient to account for that twelve-year delay, the petition is untimely and should
4 be dismissed.

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

6 Under the AEDPA, the statute of limitations is tolled during the time that a properly filed
7 application for state post-conviction or other collateral review is pending in state court. 28 U.S.C.
8 § 2244(d)(2). A properly filed application is one that complies with the applicable laws and rules
9 governing filings, including the form of the application and time limitations. Artuz v. Bennett, 531
10 U.S. 4, 8, 121 S. Ct. 361 (2000). An application is pending during the time that ‘a California
11 petitioner completes a full round of [state] collateral review,’ so long as there is no unreasonable
12 delay in the intervals between a lower court decision and the filing of a petition in a higher court.
13 Delhomme v. Ramirez, 340 F. 3d 817, 819 (9th Cir. 2003), abrogated on other grounds as recognized
14 by Waldrip v. Hall, 548 F. 3d 729 (9th Cir. 2008)(per curium)(internal quotation marks and citations
15 omitted); see Evans v. Chavis, 546 U.S. 189, 193-194, 126 S. Ct. 846 (2006); see Carey v. Saffold,
16 536 U.S. 214, 220, 222-226, 122 S. Ct. 2134 (2002); see also, Nino v. Galaza, 183 F.3d 1003, 1006
17 (9th Cir. 1999).

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

1 state petition was filed.”); Jiminez v. White, 276 F.3d 478, 482 (9th Cir. 2001). Finally, a petitioner
2 is not entitled to continuous tolling when the petitioner’s later petition raises unrelated claims. See
3 Gaston v. Palmer, 447 F.3d 1165, 1166 (9th Cir. 2006).

4 Here, Petitioner alleges that he filed the following state court habeas petitions: (1) filed in the
5 Superior Court of Kern County on an unknown date and denied December 8, 2008; (2) filed in the
6 California Court of Appeal, Fifth Appellate District (“5th DCA”) on December 26, 2008 and denied
7 on January 8, 2009; and (3) filed in the California Supreme Court on March 12, 2009, and denied on
8 July 29, 2009. (Doc. 1, pp. 2-3).² The California courts’ electronic database also indicates that
9 Petitioner filed two additional state habeas petitions in the 5th DCA: (1) filed on October 3, 2006 and
10 denied on October 5, 2006; and (2) filed on January 17, 2007 and denied on February 1, 2007.

11 Even assuming, without deciding, that these state habeas petitions were “properly filed”
12 within the meaning of the AEDPA, thus normally entitling a petitioner to statutory tolling of the one-
13 year period, a petitioner is not entitled to tolling where, as here, the limitations period has already run
14 prior to filing the state habeas petition. Green v. White, 223 F.3d 1001, 1003 (9th Cir. 2000); Jiminez
15 v. Rice, 276 F.3d 478 (9th Cir. 2001); see Webster v. Moore, 199 F.3d 1256, 1259 (11th Cir.
16 2000)(same); Ferguson v. Palmateer, 321 F.3d 820 (9th Cir. 2003)(“section 2244(d) does not permit
17 the reinitiation of the limitations period that has ended before the state petition was filed.”); Jackson
18 v. Dormire, 180 F.3d 919, 920 (8th Cir. 1999) (petitioner fails to exhaust claims raised in state habeas
19 corpus filed after expiration of the one-year limitations period). As mentioned, the limitations
20 period expired on April 24, 1997, over nine years *before* Petitioner filed his first state habeas petition
21 on October 3, 2006. Accordingly, he cannot avail himself of the statutory tolling provisions of the
22 AEDPA. Thus, unless Petitioner is entitled to equitable tolling, the petition must be dismissed as
23 untimely.

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25 ²The Court determined the date of filing of Petitioner’s state court petitions by accessing the California court
26 system’s electronic database. A federal court may take notice of facts that are capable of accurate and ready determination
27 by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b); United States v. Bernal-Obeso,
28 989 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 **D. Equitable Tolling**

2 The limitation period is subject to equitable tolling when “extraordinary circumstances
3 beyond a prisoner’s control make it impossible to file the petition on time.” Shannon v. Newland,
4 410 F. 3d 1083, 1089-1090 (9th Cir. 2005)(internal quotation marks and citations omitted). “When
5 external forces, rather than a petitioner’s lack of diligence, account for the failure to file a timely
6 claim, equitable tolling of the statute of limitations may be appropriate.” Miles v. Prunty, 187 F.3d
7 1104, 1107 (9th Cir. 1999). “Generally, a litigant seeking equitable tolling bears the burden of
8 establishing two elements: “(1) that he has been pursuing his rights diligently, and (2) that some
9 extraordinary circumstance stood in his way.” Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct.
10 1807 (2005). “[T]he threshold necessary to trigger equitable tolling under AEDPA is very high, lest
11 the exceptions swallow the rule.” Miranda v. Castro, 292 F. 3d 1062, 1066 (9th Cir. 2002)(citation
12 omitted). As a consequence, “equitable tolling is unavailable in most cases.” Miles, 187 F. 3d at
13 1107.

14 Here, Petitioner has not alleged any entitlement to equitable tolling and, based on the record
15 now before the Court, the Court perceives no basis for equitable tolling. Thus, it appears that the
16 petition is untimely. However, Petitioner will be permitted to respond to the Order to Show Cause
17 and address the Court’s concern regarding the timeliness of the petition. If Petitioner fails to
18 provide satisfactory reasons for the apparent untimeliness of the petition, the petition may be
19 dismissed.

20 **ORDER**

21 Accordingly, the Court HEREBY ORDERS:

- 22 1. Petitioner is ORDERED TO SHOW CAUSE within thirty (30) days of the date of service
23 of this Order why the Petition should not be dismissed for violation of the one-year
24 statute of limitations in 28 U.S.C. § 2244(d).

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1 Petitioner is forewarned that his failure to comply with this order may result in a
2 Recommendation that the Petition be dismissed pursuant to Local Rule 110.

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4 IT IS SO ORDERED.

5 Dated: January 8, 2010

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/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE

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