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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DONAL VANCE WARSINGER,)	1:11-cv-00008-JLT HC
)	
Petitioner,)	ORDER TO SHOW CAUSE WHY THE
)	PETITION SHOULD NOT BE DISMISSED
v.)	FOR VIOLATION OF THE ONE-YEAR
)	STATUTE OF LIMITATIONS (Doc. 1)
)	
SWARTHOUT,)	ORDER DIRECTING THAT A RESPONSE
)	BE FILED 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 December 30, 2010.¹ A preliminary review of the Petition, however, reveals that the petition may be

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); Stillman v. LaMarque, 319 F.3d 1199, 1201 (9th cir. 2003); Smith v. Ratelle, 323 F.3d 813, 816 n. 2 (9th Cir. 2003). 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 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 for calculating the

1 untimely and should therefore be dismissed.

2 On January 24, 2011, Petitioner filed his written consent to the jurisdiction of the United
3 States Magistrate Judge for all purposes. (Doc. 4).

4 DISCUSSION

5 A. Preliminary Review of Petition

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

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

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

19 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of
20 1996 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas
21 corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063
22 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc), *cert. denied*, 118 S.Ct. 586
23 (1997). The instant petition was filed on December 30, 2010, and thus, it is subject to the provisions
24 of the AEDPA.

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

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28 running of the statute of limitation. Here, the petition indicates a signing date of December 30, 2010 and Petitioner indicates
that he handed the petition to a correctional officer for mailing on that date as well. (Doc. 1, p. 11).

1 reads:

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

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

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

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

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

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

18 28 U.S.C. § 2244(d).

19 In most cases, the limitation period begins running on the date that the petitioner’s direct
20 review became final. Here, the Petitioner was convicted in the Fresno County Superior Court on
21 May 5, 2004 of one count of assault with a deadly weapon and sentenced to an indeterminate term of
22 thirty-eight years to life. (Doc. 1, p. 1). Petitioner initiated his direct appeal in the California Court
23 of Appeal, Fifth Appellate District (“5th DCA”), which affirmed his conviction on April 21, 2006.²
24 Thereafter, Petitioner filed a petition for review that was denied by the California Supreme Court on
25 June 28, 2006. Thus, direct review would have concluded on September 24, 2006, when the ninety
26 day period for seeking review in the United States Supreme Court expired. Barefoot v. Estelle, 463
27 U.S. 880, 887 (1983); Bowen v. Roe, 188 F.3d 1157, 1159 (9th Cir.1999); Smith v. Bowersox, 159

28 ²The 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 F.3d 345, 347 (8th Cir.1998). Petitioner would then have had one year from the following day,
2 September 25, 2006, or until September 5, 2007, absent applicable tolling, within which to file his
3 federal petition for writ of habeas corpus. As mentioned, the instant petition was filed on December
4 30, 2010, over three years after the date the one-year period would have expired. Thus, unless
5 Petitioner is entitled to either statutory or equitable tolling, the instant petition is untimely and should
6 be dismissed.

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

8 Under the AEDPA, the statute of limitations is tolled during the time that a properly filed
9 application for state post-conviction or other collateral review is pending in state court. 28 U.S.C.
10 § 2244(d)(2). A properly filed application is one that complies with the applicable laws and rules
11 governing filings, including the form of the application and time limitations. Artuz v. Bennett, 531
12 U.S. 4, 8, 121 S. Ct. 361 (2000). An application is pending during the time that ‘a California
13 petitioner completes a full round of [state] collateral review,’ so long as there is no unreasonable
14 delay in the intervals between a lower court decision and the filing of a petition in a higher court.
15 Delhomme v. Ramirez, 340 F. 3d 817, 819 (9th Cir. 2003), abrogated on other grounds as recognized
16 by Waldrip v. Hall, 548 F. 3d 729 (9th Cir. 2008)(per curium)(internal quotation marks and citations
17 omitted); see Evans v. Chavis, 546 U.S. 189, 193-194, 126 S. Ct. 846 (2006); see Carey v. Saffold,
18 536 U.S. 214, 220, 222-226, 122 S. Ct. 2134 (2002); see also, Nino v. Galaza, 183 F.3d 1003, 1006
19 (9th Cir. 1999).

20 Nevertheless, there are circumstances and periods of time when no statutory tolling is
21 allowed. For example, no statutory tolling is allowed for the period of time between finality of an
22 appeal and the filing of an application for post-conviction or other collateral review in state court,
23 because no state court application is “pending” during that time. Nino, 183 F.3d at 1006-1007;
24 Raspberry v. Garcia, 448 F.3d 1150, 1153 n. 1 (9th Cir. 2006). Similarly, no statutory tolling is
25 allowed for the period between finality of an appeal and the filing of a federal petition. Id. at 1007.
26 In addition, the limitation period is not tolled during the time that a federal habeas petition is
27 pending. Duncan v. Walker, 563 U.S. 167, 181-182, 121 S.Ct. 2120 (2001); see also, Fail v.
28 Hubbard, 315 F. 3d 1059, 1060 (9th Cir. 2001)(as amended on December 16, 2002). Further, a

1 petitioner is not entitled to statutory tolling where the limitation period has already run prior to filing
2 a state habeas petition. Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (“section 2244(d)
3 does not permit the reinitiation of the limitations period that has ended before the state petition was
4 filed.”); Jiminez v. White, 276 F. 3d 478, 482 (9th Cir. 2001). Finally, a petitioner is not entitled to
5 continuous tolling when the petitioner’s later petition raises unrelated claims. See Gaston v. Palmer,
6 447 F.3d 1165, 1166 (9th Cir. 2006).

7 Here, Petitioner alleges that he filed the following state habeas petitions: (1) petition filed in
8 the Superior Court of Fresno County on December 14, 2007, and denied on January 3, 2008; (2)
9 petition filed in the 5th DCA on February 26, 2008, and denied on March 6, 2008; and (3) filed in the
10 California Supreme Court on April 7, 2008 and denied on October 22, 2008. (Doc. 1, pp. 12; 16-
11 18).³

12 Normally, a petitioner would be entitled to statutory tolling for the pendency of a “properly
13 filed” state habeas petition. However, that is not the case in this instance. A petitioner is not entitled
14 to tolling where the limitations period has *already run* prior to filing a state habeas petition. Green v.
15 White, 223 F.3d 1001, 1003 (9th Cir. 2000); Jiminez v. Rice, 276 F.3d 478 (9th Cir. 2001); see
16 Webster v. Moore, 199 F.3d 1256, 1259 (11th Cir. 2000)(same); Ferguson v. Palmateer, 321 F.3d 820
17 (9th Cir. 2003)(“section 2244(d) does not permit the reinitiation of the limitations period that has
18 ended before the state petition was filed.”); Jackson v. Dormire, 180 F.3d 919, 920 (8th Cir. 1999)
19 (petitioner fails to exhaust claims raised in state habeas corpus filed after expiration of the one-year
20 limitations period). Here, as mentioned, the limitations period expired on September 24, 2007, over
21 two months *before* Petitioner filed his first state habeas petition on December 17, 2007.
22 Accordingly, he cannot avail himself of the statutory tolling provisions of the AEDPA for these three
23 state habeas petitions.

24 D. Equitable Tolling

25 The running of the one-year limitation period under 28 U.S.C. § 2244(d) is subject to
26 equitable tolling in appropriate cases. See Holland v. Florida, __ U.S. __, 130 S.Ct. 2549, 2561

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³Again, the Court has determined the exact filing and denial dates by accessing the California state courts’ electronic data base.

1 (2010); Calderon v. United States Dist. Ct., 128 F.3d 1283, 1289 (9th Cir. 1997). The limitation
2 period is subject to equitable tolling when “extraordinary circumstances beyond a prisoner’s control
3 make it impossible to file the petition on time.” Shannon v. Newland, 410 F. 3d 1083, 1089-1090
4 (9th Cir. 2005)(internal quotation marks and citations omitted). “When external forces, rather than a
5 petitioner’s lack of diligence, account for the failure to file a timely claim, equitable tolling of the
6 statute of limitations may be appropriate.” Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999).
7 “Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: “(1)
8 that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in
9 his way.” Holland, 2010 WL 2346549 at *12; 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 made no express claim of entitlement to equitable tolling and, based on
15 the record now before the Court, the Court sees no basis for such a claim. Accordingly, the Court
16 makes a preliminary determination that Petitioner is not entitled to equitable tolling at this time.
17 Thus, it appears that the petition is untimely and should be dismissed.

18 The burden of demonstrating that the AEDPA’s one-year limitation period was sufficiently
19 tolled, whether statutorily or equitable, rests with the petitioner. See, e.g., Pace v. DiGuglielmo, 544
20 U.S. 408, 418 (2005); Gaston v. Palmer, 417 F.3d 1030, 1034 (9th Cir. 2005); Smith v. Duncan, 297
21 F.3d 809, 814 (9th Cir. 2002); Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002). As discussed
22 above, it does not appear that Petitioner has established the timeliness of the instant petition.

23 However, prior to dismissing the instant petition, the Court, pursuant to the Ninth Circuit’s mandate
24 in Herbst, will permit Petitioner to file a response to this Order to Show Cause, in which he must
25 present reasons sufficient to establish the timeliness of the petition. If Petitioner fails to do so, the
26 Court will dismiss the petition pursuant to 28 U.S.C. § 2244(d)(1).

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ORDER

For the foregoing reasons, the Court HEREBY ORDERS:

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

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

IT IS SO ORDERED.

Dated: February 3, 2011

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE