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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ROWAN BROOKS,)	1:11-cv-01315-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)
)	
JAMES YATES,)	ORDER DIRECTING THAT A RESPONSE
)	BE FILED WITHIN THIRTY DAYS
Respondent.)	

PROCEDURAL HISTORY

Petitioner is a state prisoner proceeding through counsel 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 electronically by counsel on August 9, 2011. A preliminary review of the Petition, however, reveals that the petition may be untimely and should therefore be dismissed.

DISCUSSION

A. Preliminary Review of Petition

Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition if it “plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court” Rule 4 of the Rules Governing Section 2254 Cases. The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of

1 habeas corpus, either on its own motion under Rule 4, pursuant to the respondent's motion to
2 dismiss, or after an answer to the petition has been filed. Herbst v. Cook, 260 F.3d 1039 (9th
3 Cir.2001).

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

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

10 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of
11 1996 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas
12 corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063
13 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc), *cert. denied*, 118 S.Ct. 586
14 (1997). The instant petition was filed on August 9, 2011, and thus, it is subject to the provisions of
15 the AEDPA.

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

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

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

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

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

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

28 (2) The time during which a properly filed application for State post-conviction or
other collateral review with respect to the pertinent judgment or claim is pending shall

1 not be counted toward any period of limitation under this subsection.

2 28 U.S.C. § 2244(d).

3 In most cases, the limitation period begins running on the date that the petitioner’s direct
4 review became final. Petitioner was convicted in the Kern County Superior Court of first degree
5 murder on April 4, 2006, and was sentenced to an indeterminate term of twenty-five-years-to-life.
6 Petitioner filed his direct appeal in the California Court of Appeal, Fifth Appellate District (“5th
7 DCA”), which affirmed his conviction; thereafter, Petitioner filed a petition for review that was
8 denied by the California Supreme Court on November 19, 2008. Thus, direct review would have
9 concluded on February 17, 2009, when the ninety-day period for seeking review in the United States
10 Supreme Court expired. Barefoot v. Estelle, 463 U.S. 880, 887 (1983); Bowen v. Roe, 188 F.3d
11 1157, 1159 (9th Cir.1999); Smith v. Bowersox, 159 F.3d 345, 347 (8th Cir.1998). Petitioner would
12 then have had one year from the following day, February 18, 2009, or until February 17, 2010, absent
13 applicable tolling, within which to file his federal petition for writ of habeas corpus.

14 As mentioned, the instant petition was filed on August 9, 2011, approximately eighteen
15 months after the date the one-year period would have expired. Thus, unless Petitioner is entitled to
16 either statutory or equitable tolling, the instant petition is untimely and should be dismissed.

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

18 Under the AEDPA, the statute of limitations is tolled during the time that a properly filed
19 application for state post-conviction or other collateral review is pending in state court. 28 U.S.C.
20 § 2244(d)(2). A properly filed application is one that complies with the applicable laws and rules
21 governing filings, including the form of the application and time limitations. Artuz v. Bennett, 531
22 U.S. 4, 8, 121 S. Ct. 361 (2000). An application is pending during the time that ‘a California
23 petitioner completes a full round of [state] collateral review,’ so long as there is no unreasonable
24 delay in the intervals between a lower court decision and the filing of a petition in a higher court.
25 Delhomme v. Ramirez, 340 F. 3d 817, 819 (9th Cir. 2003), abrogated on other grounds as recognized
26 by Waldrip v. Hall, 548 F. 3d 729 (9th Cir. 2008)(per curium)(internal quotation marks and citations
27 omitted); see Evans v. Chavis, 546 U.S. 189, 193-194, 126 S. Ct. 846 (2006); see Carey v. Saffold,
28 536 U.S. 214, 220, 222-226, 122 S. Ct. 2134 (2002); see also, Nino v. Galaza, 183 F.3d 1003, 1006

1 (9th Cir. 1999).

2 Nevertheless, there are circumstances and periods of time when no statutory tolling is
3 allowed. For example, no statutory tolling is allowed for the period of time between finality of an
4 appeal and the filing of an application for post-conviction or other collateral review in state court,
5 because no state court application is “pending” during that time. Nino, 183 F.3d at 1006-1007;
6 Raspberry v. Garcia, 448 F.3d 1150, 1153 n. 1 (9th Cir. 2006). Similarly, no statutory tolling is
7 allowed for the period between finality of an appeal and the filing of a federal petition. Id. at 1007.
8 In addition, the limitation period is not tolled during the time that a federal habeas petition is
9 pending. Duncan v. Walker, 563 U.S. 167, 181-182, 121 S.Ct. 2120 (2001); see also, Fail v.
10 Hubbard, 315 F. 3d 1059, 1060 (9th Cir. 2001)(as amended on December 16, 2002). Further, a
11 petitioner is not entitled to statutory tolling where the limitation period has already run prior to filing
12 a state habeas petition. Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (“section 2244(d)
13 does not permit the reinitiation of the limitations period that has ended before the state petition was
14 filed.”); Jiminez v. White, 276 F. 3d 478, 482 (9th Cir. 2001). Finally, a petitioner is not entitled to
15 continuous tolling when the petitioner’s later petition raises unrelated claims. See Gaston v. Palmer,
16 447 F.3d 1165, 1166 (9th Cir. 2006).

17 Here, Petitioner alleges that he filed the following state habeas petitions: (1) petition filed in
18 the 5th DCA on December 18, 2009, and denied on June 27, 2010;¹ and (2) petition filed in the
19 California Supreme Court on June 28, 2010, and denied on August 11, 2010. ²

21 ¹In computing the running of the statute of limitations, the day an order or judgment becomes final is excluded and
22 time begins to run on the day after the judgment becomes final. See Patterson v. Stewart, 251 F.3d 1243, 1247 (9th Cir. 2001)
(Citing Rule 6 of the Federal Rules of Civil Procedure).

23 ²The court may take notice of facts that are capable of accurate and ready determination by resort to sources whose
24 accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b); United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th Cir.
25 1993). The record of state court proceeding is a source whose accuracy cannot reasonably be questioned, and judicial notice
26 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
27 such, the internet website for the California Courts, containing the court system’s records for filings in the Court of Appeal
28 and the California Supreme Court are subject to judicial notice. Petitioner did not indicate the exact date of filing of his state
supreme court petition; however, the Court has determined that date by accessing the State’s electronic court database.

1 As mentioned, the one-year period commenced on February 18, 2009, and appears to have
2 continued to run until the first state habeas petition was filed in the 5th DCA on December 18, 2009,
3 a period of 303 days. Petitioner would thus have had only 62 days remaining on his one-year period
4 at that point.

5 Assuming, without deciding, that the two state habeas petitions filed by Petitioner were
6 “properly filed,” thus entitling Petitioner to statutory tolling under the AEDPA, the one-year period
7 would have resumed running when the second of his state habeas petitions was denied by the
8 California Supreme Court on August 11, 2010. The one-year period would have expired 62 days
9 later, i.e., on October 12, 2010. Because the instant petition was not filed until August 9, 2011,
10 approximately ten months after the one-year period would have expired, it appears that the petition is
11 untimely. Unless Petitioner is entitled to equitable tolling sufficient to account for that ten-month
12 gap, the petition should be dismissed as untimely under the AEDPA.

13 D. Equitable Tolling

14 The running of the one-year limitation period under 28 U.S.C. § 2244(d) is subject to
15 equitable tolling in appropriate cases. See Holland v. Florida, __U.S.__, 130 S.Ct. 2549, 2561
16 (2010); Calderon v. United States Dist. Ct., 128 F.3d 1283, 1289 (9th Cir. 1997). The limitation
17 period is subject to equitable tolling when “extraordinary circumstances beyond a prisoner’s control
18 make it impossible to file the petition on time.” Shannon v. Newland, 410 F. 3d 1083, 1089-1090
19 (9th Cir. 2005)(internal quotation marks and citations omitted). “When external forces, rather than a
20 petitioner’s lack of diligence, account for the failure to file a timely claim, equitable tolling of the
21 statute of limitations may be appropriate.” Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999).
22 “Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: “(1)
23 that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in
24 his way.” Holland, 2010 WL 2346549 at *12; Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct.
25 1807 (2005). “[T]he threshold necessary to trigger equitable tolling under AEDPA is very high, lest
26 the exceptions swallow the rule.” Miranda v. Castro, 292 F. 3d 1062, 1066 (9th Cir. 2002)(citation
27 omitted). As a consequence, “equitable tolling is unavailable in most cases.” Miles, 187 F. 3d at
28 1107.

1 Here, Petitioner has made no express claim of entitlement to equitable tolling and, based on
2 the record now before the Court, the Court sees no basis for such a claim.

3 The burden of demonstrating that the AEDPA's one-year limitation period was sufficiently
4 tolled, whether statutorily or equitably, rests with the petitioner. See, e.g., Pace v. DiGuglielmo, 544
5 U.S. 408, 418 (2005); Gaston v. Palmer, 417 F.3d 1030, 1034 (9th Cir. 2005); Smith v. Duncan, 297
6 F.3d 809, 814 (9th Cir. 2002); Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002). For the
7 reasons discussed above, the Court makes a preliminary finding that Petitioner has not met his
8 burden with respect to the tolling issue and has failed to show that the petition is timely.

9 However, before dismissing the petition, the Court will, pursuant to the Ninth Circuit's
10 mandate in Herbst, afford Petitioner an opportunity to respond to this Order to Show Cause with any
11 further information, allegations, or evidence to account for the untolled time discussed above. If
12 Petitioner's response does not adequately account for all of the time necessary to make the petition
13 timely, the Court will recommend dismissal.

14 **ORDER**

15 For the foregoing reasons, the Court HEREBY ORDERS:

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

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

21 IT IS SO ORDERED.

22 Dated: August 12, 2011

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE