



1 indicated that the petition was untimely and should therefore be dismissed, the Court, on October 18,  
2 2012, issued an Order to Show Cause why the petition should not be dismissed as untimely. (Doc. 3).  
3 That Order to Show Cause gave Petitioner thirty days within which to file a response. To date,  
4 Petitioner has not filed any response.

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. The  
9 Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of habeas  
10 corpus, either on its own motion under Rule 4, pursuant to the respondent’s motion to dismiss, or after  
11 an answer to the petition has been filed. Herbst v. Cook, 260 F.3d 1039 (9<sup>th</sup> Cir.2001).

12 The Ninth Circuit, in Herbst v. Cook, concluded that a district court may dismiss *sua sponte* a  
13 habeas petition on statute of limitations grounds so long as the court provides the petitioner adequate  
14 notice of its intent to dismiss and an opportunity to respond. 260 F.3d at 1041-42. By issuing the  
15 October 18, 2012 Order to Show Cause, the Court afforded Petitioner the notice required by the Ninth  
16 Circuit in Herbst.

17 B. Limitation Period For Filing Petition For Writ Of Habeas Corpus

18 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of  
19 1996 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas corpus  
20 filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997);  
21 Jeffries v. Wood, 114 F.3d 1484, 1499 (9<sup>th</sup> Cir. 1997) (en banc), *cert. denied*, 118 S.Ct. 586 (1997).  
22 The instant petition was filed on October 9, 2012, and thus, it is subject to the provisions of the  
23 AEDPA.

24 The AEDPA imposes a one-year period of limitation on petitioners seeking to file a federal  
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26 the Court would normally consider the date of signing of the petition (or the date of signing of the proof of service if no  
27 signature appears on the petition) as the earliest possible filing date and the operative date of filing under the mailbox rule  
28 for calculating the running of the statute of limitation. However, Petitioner did not date the petition when signing it nor did  
he attach a Proof of Service that contains a date. Therefore, the Court will use the date the petition was actually filed with  
the Court, i.e., October 9, 2012.

1 petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As amended, § 2244, subdivision (d)  
2 reads:

3 (1) A 1-year period of limitation shall apply to an application for a writ of habeas  
4 corpus by a person in custody pursuant to the judgment of a State court. The  
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 the applicant was prevented from filing by such State action;

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

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

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

15 28 U.S.C. § 2244(d).

16 In most cases, the limitation period begins running on the date that the petitioner's direct  
17 review became final. Here, the Petitioner was convicted on July 31, 2007 in the Kern County Superior  
18 Court. (Doc. 1, p. 2). Petitioner appealed his conviction and, subsequently, filed a petition for review  
19 which was denied by the California Supreme Court on September 23, 2009.<sup>2</sup> Thus, direct review  
20 concluded on December 22, 2009, when the ninety day period for seeking review in the United States  
21 Supreme Court expired. Barefoot v. Estelle, 463 U.S. 880, 887 (1983); Bowen v. Roe, 188 F.3d 1157,

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22  
23 <sup>2</sup> The Court has accessed the electronic website for the courts of the State of California in order to determine that Petitioner  
24 filed his petition for review in case no. S174753 on July 21, 2009 and that it petition was denied on September 23, 2009.  
25 The court may take judicial notice of facts that are capable of accurate and ready determination by resort to sources whose  
26 accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b); United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th  
27 Cir. 1993). The record of state court proceeding is a source whose accuracy cannot reasonably be questioned, and judicial  
28 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 1159 (9<sup>th</sup> Cir.1999); Smith v. Bowersox, 159 F.3d 345, 347 (8<sup>th</sup> Cir.1998). Petitioner would then had  
2 one year from the following day, December 23, 2009, or until December 22, 2010, absent applicable  
3 tolling, within which to file his federal petition for writ of habeas corpus.

4 As mentioned, the instant petition was filed on October 9, 2012, approximately 22 months after  
5 the date the one-year period would have expired. Thus, unless Petitioner is entitled to either statutory  
6 or equitable tolling, the instant petition is untimely and should 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 delay  
14 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 allowed.  
21 For example, no statutory tolling is allowed for the period of time between finality of an appeal and  
22 the filing of an application for post-conviction or other collateral review in state court, because no  
23 state court application is “pending” during that time. Nino, 183 F.3d at 1006-1007; Raspberry v.  
24 Garcia, 448 F.3d 1150, 1153 n. 1 (9<sup>th</sup> Cir. 2006). Similarly, no statutory tolling is allowed for the  
25 period between finality of an appeal and the filing of a federal petition. Id. at 1007. In addition, the  
26 limitation period is not tolled during the time that a federal habeas petition is pending. Duncan v.  
27 Walker, 563 U.S. 167, 181-182, 121 S.Ct. 2120 (2001); see also, Fail v. Hubbard, 315 F. 3d 1059,  
28

1 1060 (9th Cir. 2001)(as amended on December 16, 2002). Further, a petitioner is not entitled to  
2 statutory tolling where the limitation period has already run prior to filing a state habeas petition.  
3 Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (“section 2244(d) does not permit the  
4 reinitiation of the limitations period that has ended before the state petition was filed.”); Jiminez v.  
5 White, 276 F. 3d 478, 482 (9th Cir. 2001). Finally, a petitioner is not entitled to continuous tolling  
6 when the petitioner’s later petition raises unrelated claims. See Gaston v. Palmer, 447 F.3d 1165,  
7 1166 (9th Cir. 2006).

8 Here, Petitioner has not alleged that he has filed any state habeas corpus petitions. Therefore,  
9 he cannot claim any statutory tolling under the AEDPA in order to extend the one-year limitation  
10 period.<sup>2</sup>

11 D. Equitable Tolling.

12 The running of the one-year limitation period under 28 U.S.C. § 2244(d) is subject to equitable  
13 tolling in appropriate cases. See Holland v. Florida, \_\_U.S.\_\_, 130 S.Ct. 2549, 2561 (2010); Calderon  
14 v. United States Dist. Ct., 128 F.3d 1283, 1289 (9<sup>th</sup> Cir. 1997). The limitation period is subject to  
15 equitable tolling when “extraordinary circumstances beyond a prisoner’s control make it impossible to  
16 file the petition on time.” Shannon v. Newland, 410 F. 3d 1083, 1089-1090 (9th Cir. 2005)(internal  
17 quotation marks and citations omitted). “When external forces, rather than a petitioner’s lack of  
18 diligence, account for the failure to file a timely claim, equitable tolling of the statute of limitations  
19 may be appropriate.” Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999). “Generally, a litigant  
20 seeking equitable tolling bears the burden of establishing two elements: “(1) that he has been pursuing  
21 his rights diligently, and (2) that some extraordinary circumstance stood in his way.” Holland, 130  
22 S.Ct. at 2652; Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807 (2005). “[T]he threshold  
23 necessary to trigger equitable tolling under AEDPA is very high, lest the exceptions swallow the rule.”  
24 Miranda v. Castro, 292 F. 3d 1062, 1066 (9th Cir. 2002)(citation omitted). As a consequence,  
25 “equitable tolling is unavailable in most cases.” Miles, 187 F. 3d at 1107.

26 \_\_\_\_\_  
27 <sup>2</sup> The Order to Show Cause expressly cautioned Petitioner to notify the Court in his response if he had, in fact, filed any  
28 state habeas petitions that would entitle him to statutory tolling under the AEDPA. As mentioned, Petitioner did not file a  
response.

1 Here, Petitioner has made no claim, either express or implied, of entitlement to equitable  
2 tolling and, based on the record now before the Court, the Court sees no basis for such a claim.  
3 Accordingly, Petitioner is not entitled to equitable tolling.

4 The burden of demonstrating that the AEDPA's one-year limitation period was sufficiently  
5 tolled, whether statutorily or equitable, rests with the petitioner. See, e.g., Pace v. DiGuglielmo, 544  
6 U.S. 408, 418 (2005); Gaston v. Palmer, 417 F.3d 1030, 1034 (9<sup>th</sup> Cir. 2005); Smith v. Duncan, 297  
7 F.3d 809, 814 (9<sup>th</sup> Cir. 2002); Miranda v. Castro, 292 F.3d 1063, 1065 (9<sup>th</sup> Cir. 2002). For the reasons  
8 discussed above, the Court can only conclude that Petitioner has not met his burden with respect to the  
9 tolling issue. Accordingly, the Court must dismiss the petition.

10 Moreover, the Court declines to issue a certificate of appealability. A state prisoner seeking a  
11 writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition, and  
12 an appeal is only allowed in certain circumstances. Miller-El v. Cockrell, 537 U.S. 322, 335-336  
13 (2003). The controlling statute in determining whether to issue a certificate of appealability is 28  
14 U.S.C. § 2253, which provides as follows:

- 15 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge,  
16 the final order shall be subject to review, on appeal, by the court of appeals for the circuit  
17 in which the proceeding is held.
- 18 (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a  
19 warrant to remove to another district or place for commitment or trial a person charged  
20 with a criminal offense against the United States, or to test the validity of such person's  
21 detention pending removal proceedings.
- 22 (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not  
23 be taken to the court of appeals from—
- 24 (A) the final order in a habeas corpus proceeding in which the detention  
25 complained of arises out of process issued by a State court; or
- 26 (B) the final order in a proceeding under section 2255.
- 27 (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made  
28 a substantial showing of the denial of a constitutional right.
- (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or  
issues satisfy the showing required by paragraph (2).

The Court may issue a certificate of appealability only when a petitioner makes a substantial

1 showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To make a substantial  
2 showing, the petitioner must establish that “reasonable jurists could debate whether (or, for that  
3 matter, agree that) the petition should have been resolved in a different manner or that the issues  
4 presented were ‘adequate to deserve encouragement to proceed further.’” Slack v. McDaniel, 529  
5 U.S. 473, 484 (2000) (*quoting* Barefoot v. Estelle, 463 U.S. 880, 893 (1983)).

6 In the present case, the Court finds that Petitioner has not made the required substantial  
7 showing of the denial of a constitutional right to justify the issuance of a certificate of appealability.  
8 Reasonable jurists would not find the Court’s determination that Petitioner is not entitled to federal  
9 habeas corpus relief debatable, wrong, or deserving of encouragement to proceed further. Thus, the  
10 Court **DECLINES** to issue a certificate of appealability.

11 **ORDER**

12 For the foregoing reasons, the Court **HEREBY ORDERS**:

- 13 1. The petition for writ of habeas corpus (Doc. 1), is **DISMISSED** with prejudice for  
14 violation of the one-year statute of limitations in 28 U.S.C. § 2244(d)(1);
- 15 2. The Clerk of the Court is **DIRECTED** to enter judgment and close the file; and,
- 16 3. The Court **DECLINES** to issue a certificate of appealability.

17  
18  
19 **IT IS SO ORDERED.**

20 Dated: **December 4, 2012**

**/s/ Jennifer L. Thurston**  
UNITED STATES MAGISTRATE JUDGE