



1 **DISCUSSION**

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

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

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

15 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of  
16 1996 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas corpus  
17 filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997);  
18 Jeffries v. Wood, 114 F.3d 1484, 1499 (9<sup>th</sup> Cir. 1997) (en banc), *cert. denied*, 118 S.Ct. 586 (1997).  
19 The instant petition was filed on May 22, 2013, and thus, it is subject to the provisions of the AEDPA.

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

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

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

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28 date and the operative date of filing under the mailbox rule for calculating the running of the statute of limitation.  
Petitioner signed the instant petition on May 22, 2013. (Doc. 1, p. 9).

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

5 (C) the date on which the constitutional right asserted was initially  
6 recognized by the Supreme Court, if the right has been newly recognized by  
7 the Supreme Court and made retroactively applicable to cases on collateral  
8 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  
13 shall 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 the petitioner's direct review  
16 became final. Here, the Petitioner was convicted on May 3, 2010. (Doc. 1, p. 1). Petitioner filed a  
17 petition for review that was denied by the California Supreme Court on February 15, 2012. (Doc. 1, p.  
18 11). Thus, direct review would have concluded on May 15, 2012, when the ninety day period for  
19 seeking review in the United States Supreme Court expired. Barefoot v. Estelle, 463 U.S. 880, 887  
20 (1983); Bowen v. Roe, 188 F.3d 1157, 1159 (9<sup>th</sup> Cir.1999); Smith v. Bowersox, 159 F.3d 345, 347 (8<sup>th</sup>  
21 Cir.1998). Petitioner would then have one year from the following day, i.e., May 16, 2012, or until  
22 May 15, 2013, absent applicable tolling, within which to file his federal petition for writ of habeas  
23 corpus.

24 As mentioned, the instant petition was filed on May 22, 2013, eight days after the one-year  
25 period expired. Thus, unless Petitioner is entitled to either statutory or equitable tolling, the instant  
26 petition is untimely and should be dismissed.

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

28 Under the AEDPA, the statute of limitations is tolled during the time that a properly filed  
application for state post-conviction or other collateral review is pending in state court. 28 U.S.C. §  
2244(d)(2). A properly filed application is one that complies with the applicable laws and rules  
governing filings, including the form of the application and time limitations. Artuz v. Bennett, 531

1 U.S. 4, 8, 121 S. Ct. 361 (2000). An application is pending during the time that ‘a California  
2 petitioner completes a full round of [state] collateral review,’ so long as there is no unreasonable delay  
3 in the intervals between a lower court decision and the filing of a petition in a higher court.  
4 Delhomme v. Ramirez, 340 F. 3d 817, 819 (9th Cir. 2003), abrogated on other grounds as recognized  
5 by Waldrip v. Hall, 548 F. 3d 729 (9th Cir. 2008)(per curium)(internal quotation marks and citations  
6 omitted); see Evans v. Chavis, 546 U.S. 189, 193-194, 126 S. Ct. 846 (2006); see Carey v. Saffold,  
7 536 U.S. 214, 220, 222-226, 122 S. Ct. 2134 (2002); see also, Nino v. Galaza, 183 F.3d 1003, 1006  
8 (9th Cir. 1999).

9         Nevertheless, there are circumstances and periods of time when no statutory tolling is allowed.  
10 For example, no statutory tolling is allowed for the period of time between finality of an appeal and  
11 the filing of an application for post-conviction or other collateral review in state court, because no state  
12 court application is “pending” during that time. Nino, 183 F.3d at 1006-1007; Raspberry v. Garcia,  
13 448 F.3d 1150, 1153 n. 1 (9<sup>th</sup> Cir. 2006). Similarly, no statutory tolling is allowed for the period  
14 between finality of an appeal and the filing of a federal petition. Id. at 1007. In addition, the  
15 limitation period is not tolled during the time that a federal habeas petition is pending. Duncan v.  
16 Walker, 563 U.S. 167, 181-182, 121 S.Ct. 2120 (2001); see also, Fail v. Hubbard, 315 F. 3d 1059,  
17 1060 (9th Cir. 2001)(as amended on December 16, 2002). Further, a petitioner is not entitled to  
18 statutory tolling where the limitation period has already run prior to filing a state habeas petition.  
19 Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (“section 2244(d) does not permit the  
20 reinitiation of the limitations period that has ended before the state petition was filed.”); Jiminez v.  
21 White, 276 F. 3d 478, 482 (9th Cir. 2001). Finally, a petitioner is not entitled to continuous tolling  
22 when the petitioner’s later petition raises unrelated claims. See Gaston v. Palmer, 447 F.3d 1165,  
23 1166 (9th Cir. 2006).

24         Here, Petitioner alleges, under penalty of perjury, that, other than his direct appeal, he has not  
25 filed any other actions in state court to challenge this conviction. (Doc. 1, p. 2). Accordingly, no basis  
26 exists to award statutory tolling under the AEDPA. Unless Petitioner is entitled to equitable tolling,  
27 the petition is untimely.

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D. Equitable Tolling.

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

Here, Petitioner has made no express claim of entitlement to equitable tolling and, based on the record now before the Court, the Court sees no basis for such a claim. Accordingly, Petitioner is not entitled to equitable tolling. Thus, the petition is untimely and should be dismissed.

The burden of demonstrating that the AEDPA’s one-year limitation period was sufficiently tolled, whether statutorily or equitable, rests with the petitioner. See, e.g., Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005); Gaston v. Palmer, 417 F.3d 1030, 1034 (9<sup>th</sup> Cir. 2005); Smith v. Duncan, 297 F.3d 809, 814 (9<sup>th</sup> Cir. 2002); Miranda v. Castro, 292 F.3d 1063, 1065 (9<sup>th</sup> Cir. 2002). Unless Petitioner’s response to the Order to Show Cause provides adequate grounds for either statutory or equitable tolling, the Court will recommend that the petition be dismissed as untimely.

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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: May 21, 2013

/s/ Jennifer L. Thurston  
UNITED STATES MAGISTRATE JUDGE