

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

ERIC RICHARD ELESON,  
Petitioner,  
v.  
JOE A. LIZARRAGA, et. al.,  
Respondents.

Case No. 1:15-cv-00008-LJO-SAB HC  
ORDER TO SHOW CAUSE

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

On December 29, 2014, Petitioner filed the instant Petition.<sup>1</sup> (Pet., ECF No. 1). On April 28, 1995, Petitioner was convicted of Lewd or Lascivious Acts, in violation of Cal. Penal Code § 288(a), in the Tuolumne County Superior Court. (Pet. at 2).<sup>2</sup> Petitioner was sentenced to 85 years to life. (Pet. at 2).

Petitioner alleges the following grounds for relief in his federal petition: (1) Cal. Penal Code § 288 was not validly enacted, so the trial court lacked jurisdiction to convict and sentence him; (2) Cal. Penal Code § 667 is illegal because California did not seek authorization from the

---

<sup>1</sup> Pursuant to the mailbox rule, the Court deems the petitions filed on the date they were signed and presumably handed to prison authorities for mailing. See Houston v. Lack, 487 U.S. 266, 276 (1988); Huizar v. Carey, 273 F.3d 1220, 1222 (9th Cir. 2001).

<sup>2</sup> Page numbers refer to the ECF pagination.

1 Appropriations Committee of the California Legislature for the greater amount of taxes  
2 necessary to pay for increased periods of incarceration, and it was not validly enacted; (3)  
3 Government officials' failure to respond to Petitioner's documents means that his allegations are  
4 true and he should be released; (4) The prosecutors and judges did not have the authority to act in  
5 his case, because the California Bar is not valid; (5) California has no jurisdiction over him; (6)  
6 The two sentence enhancements should be served after the indeterminate sentences are complete;  
7 and (7) His out-of-state conviction should not have been used to enhance the punishment of his  
8 California conviction involved in this petition.

9 **I.**

10 **DISCUSSION**

11 **A. Preliminary Review of Petition**

12 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a  
13 petition if it “plainly appears from the petition and any attached exhibits that the petitioner is not  
14 entitled to relief in the district court . . . .” Rule 4 of the Rules Governing Section 2254 Cases.  
15 The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ  
16 of habeas corpus, either on its own motion under Rule 4, pursuant to the respondent's motion to  
17 dismiss, or after an answer to the petition has been filed. Herbst v. Cook, 260 F.3d 1039 (9th  
18 Cir. 2001). In Herbst v. Cook, the Ninth Circuit concluded that a district court may dismiss *sua*  
19 *sponte* a habeas petition on statute of limitations grounds so long as the court provides the  
20 petitioner adequate notice of its intent to dismiss and an opportunity to respond. 260 F.3d at  
21 1041-42.

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

23 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act  
24 of 1996 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas  
25 corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059,  
26 2063 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc), cert. denied, 118  
27 S.Ct. 586 (1997). As the instant petition was filed on October 13, 2014, it is subject to the  
28 provisions of the AEDPA.

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

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

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

9 (B) the date on which the impediment to filing an application  
10 created by 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;

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

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

16 (2) The time during which a properly filed application for State  
17 post-conviction or 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.

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. In this case, the petition for review was denied by the California Supreme  
21 Court on January 15, 1997. Thus, direct review concluded on April 15, 1997, when the ninety  
22 (90) day period for seeking review in the United States Supreme Court expired. See Barefoot v.  
23 Estelle, 463 U.S. 880, 887 (1983); Brown v. Roe, 188 F.3d 1157, 1159 (9th Cir. 1999).  
24 Petitioner had one year from the conclusion of direct review, absent applicable tolling, in which  
25 to file his federal petition for writ of habeas corpus. Therefore, the statute of limitations expired  
26 on April 15, 1998, absent applicable tolling. However, Petitioner delayed filing the instant  
27 petition until December 29, 2014, over sixteen years beyond the expiration of the statute of  
28 limitations. Therefore, Petitioner's federal petition is untimely absent any applicable tolling.

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

2           Title 28 U.S.C. § 2244(d)(2) states that the “time during which a properly filed  
3 application for State post-conviction or other collateral review with respect to the pertinent  
4 judgment or claim is pending shall not be counted toward” the one year limitation period.

5           The statute of limitations began to run on April 15, 1997, and expired on April 15, 1998.  
6 Petitioner claims that he has filed two habeas petitions in the California state courts. (Pet. at 3-  
7 4). Although Petitioner filed two post-conviction collateral challenges with respect to the  
8 pertinent judgment or claim in state court, the petitions did not operate to toll the statute of  
9 limitations. Petitioner’s first state habeas petition was filed in the Tuolumne County Superior  
10 Court on September 11, 2013, over fifteen years after the limitations period expired. (Pet. at 3).  
11 Subsequently, on February 3, 2014, Petitioner filed a petition for writ of habeas corpus in the  
12 California Supreme Court. (Pet. at 4). When the limitations period had already expired at the  
13 time the collateral challenge was filed, the collateral challenges had no tolling consequences.  
14 See Green v. White, 223 F.3d 1001, 1003 (9th Cir.2000). Therefore, Petitioner is not entitled to  
15 statutory tolling for his two state habeas petitions, because his first state habeas petition was filed  
16 after the expiration of the limitations period. Thus, it appears that Petitioner’s federal petition is  
17 untimely, absent equitable tolling.

18           **D. Equitable Tolling**

19           The limitations period is subject to equitable tolling if the petitioner demonstrates: “(1)  
20 that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance  
21 stood in his way.” Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005); see also Irwin v. Department  
22 of Veteran Affairs, 498 U.S. 89, 96 (1990); Calderon v. U.S. Dist. Ct. (Kelly), 163 F.3d 530, 541  
23 (9th Cir. 1998) (citing Alvarez-Machain v. United States, 107 F.3d 696, 701 (9th Cir. 1996),  
24 *cert. denied*, 522 U.S. 814 (1997)). Petitioner bears the burden of alleging facts that would give  
25 rise to tolling. Pace, 544 U.S. at 418; Smith v. Duncan, 297 F.3d 809 (9th Cir.2002); Hinton v.  
26 Pac. Enters., 5 F.3d 391, 395 (9th Cir.1993).

27           Petitioner claims that there is no statute of limitations when fraud is present. However,  
28 Petitioner’s fraud argument regarding the statute of limitations goes to the merits of his claims,

1 and does not address why he should be entitled to equitable tolling. Petitioner also claims that  
2 there is an ongoing impediment to filing his petition. However, Petitioner does not provide any  
3 specific reasons why he was unable to file his state habeas petition for over fifteen years after the  
4 expiration of the statute of limitations. Petitioner also doesn't explain what impediments  
5 prevented him from filing his federal habeas petition for over sixteen years after the expiration of  
6 the statute of limitations. In addition, Petitioner does not explain how he was able to file the  
7 instant federal petition if there are still ongoing impediments that affect his ability to file  
8 documents with the Court.

9 **II.**  
10 **ORDER**

11  
12 Accordingly, IT IS HEREBY ORDERED that Petitioner is ORDERED to SHOW  
13 CAUSE within **thirty (30)** days of the date of service of this Order why the petition should not  
14 be dismissed for violating the limitations period of 28 U.S.C. § 2244(d).

15 Petitioner is forewarned that failure to follow this order will result in dismissal of the  
16 petition pursuant to Fed. R. Civil Proc. § 41(b) (A petitioner's failure to prosecute or to comply  
17 with a court order may result in a dismissal of the action, and the dismissal operates as an  
18 adjudication on the merits.).

19  
20  
21 IT IS SO ORDERED.

22 Dated: February 25, 2015

  
UNITED STATES MAGISTRATE JUDGE