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8 **UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**
10

11 JESSE COLLINS,) Case No.: 1:15-cv-00559-JLT
12)
13 Petitioner,) ORDER TO SHOW CAUSE WHY THE PETITION
14) SHOULD NOT BE DISMISSED FOR VIOLATION
15 v.) OF THE ONE-YEAR STATUTE OF
16 J. SOTO,) LIMITATIONS AND LACK OF EXHAUSTION
17)
18 Respondent.) ORDER DIRECTING THAT RESPONSE BE
19) FILED WITHIN THIRTY DAYS
20)
21 _____)

22
23 Petitioner is a state prisoner proceeding in propria persona with a petition for writ of habeas
24 corpus pursuant to 28 U.S.C. § 2254.
25

26 **PROCEDURAL HISTORY**

27 The instant petition was filed on March 26, 2015, in the Central District of California (Doc. 1),
28 and transferred to this Court on April 10, 2015. (Doc. 3).¹ A preliminary review of the petition,
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¹ In 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 actual 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. 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); Stillman v. LaMarque, 319 F.3d 1199, 1201 (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 running of the statute of limitation. Petitioner signed the instant petition on March 26, 2015. (Doc. 1, p. 8).

1 however, reveals that the petition may be untimely and should therefore be dismissed. Also, it appears
2 that Petitioner has never raised his claim to the California Supreme Court, thus rendering his petition
3 unexhausted.

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 if
7 it “plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not
8 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 (9th 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 if the court provides the petitioner adequate notice of
14 its intent to dismiss and an opportunity to respond. 260 F.3d at 1041-42. By issuing this Order to
15 Show Cause, the Court is affording Petitioner the notice required by the Ninth Circuit in Herbst.

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

17 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996
18 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas corpus filed
19 after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997); Jeffries
20 v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc), *cert. denied*, 118 S.Ct. 586 (1997). The instant
21 petition was filed on March 25, 2015, and thus, it is subject to the provisions of the AEDPA.

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

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

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

27 (B) the date on which the impediment to filing an application created by
28 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;

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

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

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

10 28 U.S.C. § 2244(d).

11 In most cases, the limitation period begins running on the date that the petitioner's direct review
12 became final. Here, the Petitioner was convicted in 1997 and his direct appeal concluded with the
13 denial of his petition for review in the California Supreme Court on March 9, 1999. However, it
14 appears that Petitioner is appealing the purported denial of his request for "recall" of his sentence,
15 pursuant to California Penal Code sec. 1170.126, which went into effect on November 7, 2012 and
16 provides for relief from an indeterminate life sentence under California's Three Strikes Law in certain
17 circumstances. Thus, here, under subsection (d), of section 2244, the limitation period would have
18 begun to run on "the date on which the factual predicate of the claim or claims presented could have
19 been discovered through the exercise of due diligence." It appears that date would have been the
20 effective date of sec. 1170.126.

21 By that calculation, the one-year period would have begun on November 8, 2012, and would
22 have continued until it expired 365 days later on November 7, 2013. Since the instant petition was filed
23 on March 25, 2015, approximately 18 months after the one-year period would have expired, the petition
24 would appear to be untimely, unless Petitioner is entitled to statutory or equitable tolling.

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

26 Under the AEDPA, the statute of limitations is tolled during the time that a properly filed
27 application for state post-conviction or other collateral review is pending in state court. 28 U.S.C. §
28 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
U.S. 4, 8, 121 S. Ct. 361 (2000). An application is pending during the time that 'a California petitioner
completes a full round of [state] collateral review,' so long as there is no unreasonable delay in the

1 intervals between a lower court decision and the filing of a petition in a higher court. Delhomme v.
2 Ramirez, 340 F. 3d 817, 819 (9th Cir. 2003), abrogated on other grounds as recognized by Waldrip v.
3 Hall, 548 F. 3d 729 (9th Cir. 2008)(per curium)(internal quotation marks and citations omitted); see
4 Evans v. Chavis, 546 U.S. 189, 193-194, 126 S. Ct. 846 (2006); see Carey v. Saffold, 536 U.S. 214,
5 220, 222-226, 122 S. Ct. 2134 (2002); see also, Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999).

6 Nevertheless, there are circumstances and periods of time when no statutory tolling is allowed.
7 For example, no statutory tolling is allowed for the period of time between finality of an appeal and the
8 filing of an application for post-conviction or other collateral review in state court, because no state
9 court application is “pending” during that time. Nino, 183 F.3d at 1006-07; Raspberry v. Garcia, 448
10 F.3d 1150, 1153 n. 1 (9th Cir. 2006). Similarly, no statutory tolling is allowed for the period between
11 finality of an appeal and the filing of a federal petition. Id. at 1007. In addition, the limitation period
12 is not tolled during the time that a federal habeas petition is pending. Duncan v. Walker, 563 U.S. 167,
13 181-182, 121 S.Ct. 2120 (2001); see also, Fail v. Hubbard, 315 F. 3d 1059, 1060 (9th Cir. 2001)(as
14 amended on December 16, 2002). Further, a petitioner is not entitled to statutory tolling where the
15 limitation period has already run prior to filing a state habeas petition. Ferguson v. Palmateer, 321 F.3d
16 820, 823 (9th Cir. 2003) (“section 2244(d) does not permit the reinitiation of the limitations period that
17 has ended before the state petition was filed”); Jiminez v. White, 276 F. 3d 478, 482 (9th Cir. 2001).
18 Finally, a petitioner is not entitled to continuous tolling when the petitioner’s later petition raises
19 unrelated claims. See Gaston v. Palmer, 447 F.3d 1165, 1166 (9th Cir. 2006).

20 Here, Petitioner attached documents to his petition that suggest he filed state habeas petitions in
21 2001, 2003, 2004, 2007, 2008, and 2009. Obviously, any petition filed prior to the effective date of
22 sec. 1170.126 on November 7, 2012 could not have been raising that new statutory provisions as a
23 grounds for habeas relief and, thus, would be irrelevant to the timeliness analysis since they were filed
24 prior to the running of the one-year period. A tolling provision has no applicability where the period to
25 be tolled has not commenced. See Hill v. Keane, 984 F.Supp. 157, 159 (E.D.N.Y. 1997), abrogated on
26 other grounds, Bennett v. Artuz, 199 F.3d 116, 122 (2d Cir. 1999) (state collateral action filed before
27 commencement of limitations period does not toll limitation period), affirmed, 531 U.S. 4, 121 S.Ct.
28 361, 148 L.Ed.2d 213. Petitioner does not allege any state habeas filings after November 7, 2012, and

1 thus would not be entitled to any statutory tolling during the running of the one-year limitation period.
2 Therefore, unless Petitioner is entitled to equitable tolling, the petition is untimely and must be
3 dismissed.

4 D. Equitable Tolling.

5 The running of the one-year limitation period under 28 U.S.C. § 2244(d) is subject to equitable
6 tolling in appropriate cases. See Holland v. Florida, 560 U.S. 631, 651-52, 130 S.Ct. 2549, 2561
7 (2010); Calderon v. United States Dist. Ct., 128 F.3d 1283, 1289 (9th Cir. 1997). The limitation period
8 is subject to equitable tolling when “extraordinary circumstances beyond a prisoner’s control make it
9 impossible to file the petition on time.” Shannon v. Newland, 410 F. 3d 1083, 1089-1090 (9th Cir.
10 2005)(internal quotation marks and citations omitted). “When external forces, rather than a petitioner’s
11 lack of diligence, account for the failure to file a timely claim, equitable tolling of the statute of
12 limitations may be appropriate.” Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999). “Generally, a
13 litigant seeking equitable tolling bears the burden of establishing two elements: “(1) that he has been
14 pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.”
15 Holland, 560 U.S. at 651-652; Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807 (2005). “[T]he
16 threshold necessary to trigger equitable tolling under AEDPA is very high, lest the exceptions swallow
17 the rule.” Miranda v. Castro, 292 F. 3d 1062, 1066 (9th Cir. 2002)(citation omitted). As a
18 consequence, “equitable tolling is unavailable in most cases.” Miles, 187 F. 3d at 1107.

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

22 **CONCLUSION**

23 The burden of demonstrating that the AEDPA’s one-year limitation period was sufficiently
24 tolled, whether statutorily or equitable, rests with the petitioner. See, e.g., Pace v. DiGuglielmo, 544
25 U.S. 408, 418 (2005); Gaston v. Palmer, 417 F.3d 1030, 1034 (9th Cir. 2005); Smith v. Duncan, 297
26 F.3d 809, 814 (9th Cir. 2002); Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002). For the reasons
27 discussed above, the Court finds and concludes that Petitioner has not met his burden with respect to
28 the tolling issue. Accordingly, the petition is late and should therefore be dismissed.

1 E. Exhaustion.

2 A petitioner who is in state custody and wishes to collaterally challenge his conviction by a
3 petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The
4 exhaustion doctrine is based on comity to the state and gives the state court the initial opportunity to
5 correct the alleged constitutional deprivations. Coleman v. Thompson, 501 U.S. 722, 731 (1991); Rose
6 v. Lundy, 455 U.S. 509, 518 (1982); Buffalo v. Sunn, 854 F.2d 1158, 1163 (9th Cir. 1988).

7 A petitioner can satisfy the exhaustion requirement by providing the highest state court with a
8 full and fair opportunity to consider each claim before presenting it to the federal court. Duncan v.
9 Henry, 513 U.S. 364, 365 (1995); Picard v. Connor, 404 U.S. 270, 276 (1971); Johnson v. Zenon, 88
10 F.3d 828, 829 (9th Cir. 1996). A federal court will find that the highest state court was given a full and
11 fair opportunity to hear a claim if the petitioner has presented the highest state court with the claim's
12 factual and legal basis. Duncan, 513 U.S. at 365 (legal basis); Kenney v. Tamayo-Reyes, 504 U.S. 1,
13 112 S.Ct. 1715, 1719 (1992) (factual basis).

14 Additionally, the petitioner must have specifically told the state court that he was raising a
15 federal constitutional claim. Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666, 669 (9th
16 Cir. 2000), *amended*, 247 F.3d 904 (2001); Hiiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999);
17 Keating v. Hood, 133 F.3d 1240, 1241 (9th Cir. 1998). In Duncan, the United States Supreme Court
18 reiterated the rule as follows:

19 In Picard v. Connor, 404 U.S. 270, 275 . . . (1971), we said that exhaustion of state remedies
20 requires that petitioners “fairly presen[t]” federal claims to the state courts in order to give the
21 State the “opportunity to pass upon and correct alleged violations of the prisoners' federal
22 rights” (some internal quotation marks omitted). If state courts are to be given the opportunity
23 to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact
24 that the prisoners are asserting claims under the United States Constitution. If a habeas
25 petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due
26 process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal
27 court, but in state court.

28 Duncan, 513 U.S. at 365-366. The Ninth Circuit examined the rule further, stating:

Our rule is that a state prisoner has not “fairly presented” (and thus exhausted) his federal
claims in state court *unless he specifically indicated to that court that those claims were based*
on federal law. See Shumway v. Payne, 223 F.3d 982, 987-88 (9th Cir. 2000). Since the
Supreme Court's decision in Duncan, this court has held that the *petitioner must make the*
federal basis of the claim explicit either by citing federal law or the decisions of federal courts,
even if the federal basis is “self-evident,” Gatlin v. Madding, 189 F.3d 882, 889 (9th Cir. 1999)
(citing Anderson v. Harless, 459 U.S. 4, 7 . . . (1982), or the underlying claim would be
decided under state law on the same considerations that would control resolution of the claim

1 on federal grounds. Hiiivala v. Wood, 195 F.3d 1098, 1106-07 (9th Cir. 1999); Johnson v.
2 Zenon, 88 F.3d 828, 830-31 (9th Cir. 1996);

3 In Johnson, we explained that the petitioner must alert the state court to the fact that the
4 relevant claim is a federal one without regard to how similar the state and federal standards for
5 reviewing the claim may be or how obvious the violation of federal law is.

6 Lyons v. Crawford, 232 F.3d 666, 668-669 (9th Cir. 2000) (italics added), as amended by Lyons v.
7 Crawford, 247 F.3d 904, 904-5 (9th Cir. 2001).

8 Where none of a petitioner's claims has been presented to the highest state court as required by
9 the exhaustion doctrine, the Court must dismiss the petition. Raspberry v. Garcia, 448 F.3d 1150, 1154
10 (9th Cir. 2006); Jiminez v. Rice, 276 F.3d 478, 481 (9th Cir. 2001). The authority of a court to hold a
11 mixed petition in abeyance pending exhaustion of the unexhausted claims has not been extended to
12 petitions that contain no exhausted claims. Raspberry, 448 F.3d at 1154.

13 Here, as the Central District noted in its transfer order, there is no evidence currently in the
14 record that Petitioner has ever presented his "recall" claim to any state court, much less to the
15 California Supreme Court. (Doc. 3, p. 2, fn. 2). Indeed, Petitioner has presented no evidence that he
16 has ever asked for recall of his sentence pursuant to sec. 1170.126. As such, the petition appears to be
17 completely unexhausted. The Court cannot consider a petition that is entirely unexhausted. Rose v.
18 Lundy, 455 U.S. at 521-22; Calderon, 107 F.3d at 760.

19 However, pursuant to the Ninth Circuit's mandate, the Court will permit Petitioner thirty days
20 within which to submit a response to this Order to Show Cause. In his response, Petitioner should
21 provide evidence to show (1) that his petition is timely; and (2) that he has presented his "recall" claim
22 to the California Supreme Court. If Petitioner fails to submit a response within the time permitted, or
23 if the response so submitted fails to persuade the Court that the petition is both timely and exhausted,
24 the Court will recommend that the petition be dismissed.

25 ORDER

26 For the foregoing reasons, the Court HEREBY ORDERS:

27 1. Petitioner is ORDERED TO SHOW CAUSE **within 30 days** of the date of service of
28 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) and for lack of exhaustion.

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: **April 29, 2015**

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE