

1 habeas petition on statute of limitations grounds so long as the court provides the petitioner adequate
2 notice of its intent to dismiss and an opportunity to respond. 260 F.3d at 1041-42. By issuing this
3 Order to Show Cause, the Court is affording Petitioner the notice required by the Ninth Circuit in
4 Herbst.

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

6 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of
7 1996 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas corpus
8 filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997);
9 Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc), *cert. denied*, 118 S.Ct. 586 (1997).
10 The instant petition was filed on September 3, 2015¹, and thus, it is subject to the provisions of the
11 AEDPA.

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

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

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

19 (B) the date on which the impediment to filing an application created by
20 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;

21 (C) the date on which the constitutional right asserted was initially
22 recognized by the Supreme Court, if the right has been newly recognized by

23 ¹ In Houston v. Lack, the United States Supreme Court held that a pro se habeas petitioner’s notice of appeal is deemed
24 filed on the date of its submission to prison authorities for mailing, as opposed to the actual date of its receipt by the court
25 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
26 mailing of legal documents through the conduit of “prison authorities whom he cannot control and whose interests might
27 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
28 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 September 3, 2015. (Doc. 1, p. 27).

1 the Supreme Court and made retroactively applicable to cases on collateral
2 review; or

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

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

8 28 U.S.C. § 2244(d).

9 In most cases, the limitation period begins running on the date that the petitioner's direct
10 review became final. The AEDPA, however, is silent on how the one year limitation period affects
11 cases where direct review concluded *before* the enactment of the AEDPA. The Ninth Circuit has held
12 that if a petitioner whose review ended before the enactment of the AEDPA filed a habeas corpus
13 petition within one year of the AEDPA's enactment, the Court should not dismiss the petition pursuant
14 to § 2244(d)(1). Calderon v. United States Dist. Court (Beeler), 128 F.3d 1283,1286 (9th Cir.), *cert.*
15 *denied*, 118 S.Ct. 899 (1998); Calderon v. United States Dist. Court (Kelly), 127 F.3d 782, 784 (9th
16 Cir.), *cert. denied*, 118 S.Ct. 1395 (1998). In such circumstances, the limitations period would begin
17 to run on April 25, 1996 and would expire one year later, i.e., on April 24, 1997. Patterson v. Stewart,
18 2001 WL 575465 (9th Cir. Ariz.).

19 Here, Petitioner alleges he was convicted on January 11, 1994, and that he appealed his
20 conviction to the California Court of Appeal, Fifth Appellate District ("5th DCA"), which affirmed his
21 conviction on June 15, 1995 in case number F021144. (Doc. 1, pp. 1-2). According to the California
22 Rules of Court, a decision of the Court of Appeal becomes final thirty days after filing of the opinion,
23 Cal. Rules of Court, Rule 8.264(b)(1), and an appeal must be taken to the California Supreme Court
24 within ten days of finality. Cal. Rules of Court, Rule 8.500(e)(1). Thus, Petitioner's conviction would
25 become final forty days after the Court of Appeal's decision was filed, or on July 25, 1995. However,
26 the record indicates that remittitur issued on August 8, 1995; thus, the Court will accept that later date
27 as the date when direct review became final. (Doc. 1, p. 164).

28 Because Petitioner's direct appeal became final prior to the enactment of the AEDPA, the one-
year limitation period applicable to Petitioner's 1994 conviction began on April 25, 1996 and expired
on April 24, 1997. As mentioned, Petitioner did not file the instant petition until September 3, 2015,

1 over nineteen years after his one-year limitation period expired. Thus, unless Petitioner is entitled to
2 some form of tolling, his petition is untimely and should be dismissed.

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

4 Under the AEDPA, the statute of limitations is tolled during the time that a properly filed
5 application for state post-conviction or other collateral review is pending in state court. 28 U.S.C. §
6 2244(d)(2). A properly filed application is one that complies with the applicable laws and rules
7 governing filings, including the form of the application and time limitations. Artuz v. Bennett, 531
8 U.S. 4, 8, 121 S. Ct. 361 (2000). An application is pending during the time that ‘a California
9 petitioner completes a full round of [state] collateral review,’ so long as there is no unreasonable delay
10 in the intervals between a lower court decision and the filing of a petition in a higher court.

11 Delhomme v. Ramirez, 340 F. 3d 817, 819 (9th Cir. 2003), abrogated on other grounds as recognized
12 by Waldrip v. Hall, 548 F. 3d 729 (9th Cir. 2008)(per curium)(internal quotation marks and citations
13 omitted); see Evans v. Chavis, 546 U.S. 189, 193-194, 126 S. Ct. 846 (2006); see Carey v. Saffold,
14 536 U.S. 214, 220, 222-226, 122 S. Ct. 2134 (2002); see also, Nino v. Galaza, 183 F.3d 1003, 1006
15 (9th Cir. 1999).

16 Nevertheless, there are circumstances and periods of time when no statutory tolling is allowed.
17 For example, no statutory tolling is allowed for the period of time between finality of an appeal and
18 the filing of an application for post-conviction or other collateral review in state court, because no
19 state court application is “pending” during that time. Nino, 183 F.3d at 1006-1007; Raspberry v.
20 Garcia, 448 F.3d 1150, 1153 n. 1 (9th Cir. 2006). Similarly, no statutory tolling is allowed for the
21 period between finality of an appeal and the filing of a federal petition. Id. at 1007. In addition, the
22 limitation period is not tolled during the time that a federal habeas petition is pending. Duncan v.
23 Walker, 563 U.S. 167, 181-182, 121 S.Ct. 2120 (2001); see also, Fail v. Hubbard, 315 F. 3d 1059,
24 1060 (9th Cir. 2001)(as amended on December 16, 2002). Further, a petitioner is not entitled to
25 statutory tolling where the limitation period has already run prior to filing a state habeas petition.
26 Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (“section 2244(d) does not permit the
27 reinitiation of the limitations period that has ended before the state petition was filed.”); Jiminez v.
28 White, 276 F. 3d 478, 482 (9th Cir. 2001). Finally, a petitioner is not entitled to continuous tolling

1 when the petitioner’s later petition raises unrelated claims. See Gaston v. Palmer, 447 F.3d 1165,
2 1166 (9th Cir. 2006).

3 Here, Petitioner alleges that he filed the following state habeas petitions: (1) consolidated
4 petitions filed in the Superior Court of Merced County on September 5 and September 12, 2014, and
5 denied on September 29, 2014 (Doc. 1, p. 165);² (2) petition filed in the 5th DCA on November 12,
6 2014, and denied on December 2, 2014 (Doc. 1, p. 168); and (3) petition filed in the California
7 Supreme Court on February 2, 2015 and denied on April 15, 2015. Although Petitioner does not
8 specify the precise dates on which he filed all of these petition(s), the Court has accessed the
9 California court system’s electronic database to ascertain the exact dates of filing and denial.³

10 However, none of these petitions entitles Petitioner to statutory tolling under the AEDPA
11 because they were all filed after the one-year period expired. A petitioner is not entitled to tolling
12 where the limitations period has already run prior to filing a state habeas petition. Green v. White, 223
13 F.3d 1001, 1003 (9th Cir. 2000); Jiminez v. Rice, 276 F.3d 478 (9th Cir. 2001); see Webster v. Moore,
14 199 F.3d 1256, 1259 (11th Cir. 2000)(same); Ferguson v. Palmateer, 321 F.3d 820 (9th Cir.
15 2003)(“section 2244(d) does not permit the reinitiation of the limitations period that has ended before
16 the state petition was filed.”); Jackson v. Dormire, 180 F.3d 919, 920 (8th Cir. 1999) (petitioner fails to
17 exhaust claims raised in state habeas corpus filed after expiration of the one-year limitations period).
18 Here, as mentioned, the limitations period expired on April 24, 1997, approximately seventeen years
19 *before* Petitioner filed his first state habeas petition. Accordingly, he cannot avail himself of the
20 statutory tolling provisions of the AEDPA.

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23 ² In computing the running of the statute of limitations, the day an order or judgment becomes final is excluded and time
24 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).

25 ³ The court may take 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.

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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, 560 U.S. 631, 651-652, 130 S.Ct. 2549, 2561 (2010); Calderon v. United States Dist. Ct., 128 F.3d 1283, 1289 (9th 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, 560 U.S. at 651-652; 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.

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. Thus, the petition appears to be untimely and should be dismissed.

E. Actual Innocence.

Petitioner makes several references in his petition to actual innocence, so the Court will presume he is raising that contention as a way to avoid dismissal for untimeliness. In McQuiggin v. Perkins, 569 U.S. ___, 2013 WL 2300806 (2013), the United States Supreme Court held that “actual innocence” could be an exception to the one-year limitation bar in the AEDPA:

We hold that actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in Schlup and House,⁴ or, as in this case, expiration of the statute of limitations. We caution, however, that tenable actual-innocence gateway pleas are rare: “[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting

⁴ Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851 (1995); House v. Bell, 547 U.S. 518, 126 S.Ct. 2064 (2006).

1 reasonably, would have voted to find him guilty beyond a reasonable doubt.” Schlup, 513 U.S.,
2 at 329; see House, 547 U.S., at 538 (emphasizing that the Schlup standard is “demanding” and
3 seldom met). And in making an assessment of the kind Schlup envisioned, “the timing of the
[petition]” is a factor bearing on the “reliability of th[e] evidence” purporting to show actual
innocence. Schlup, 513 U.S., at 332.

4 McQuiggin, at *3. The Supreme Court went on to explain that an “unexplained delay in presenting
5 new evidence bears on the determination whether the petitioner has made the requisite showing, and,
6 thus, “a court may consider how the timing of the submission and the likely credibility of [a
7 petitioner’s] affiants bear on the probable reliability of evidence [of actual innocence].” Id. at *11,
8 quoting Schlup, 513 U.S. at 332. See also Lee v. Lampert, 653 F.3d 929, 932-933 (9th Cir. 2011)(*en*
9 *banc*)(“a credible claim of actual innocence constitutes an equitable exception to AEDPA’s limitations
10 period, and a petitioner who makes such a showing may pass through the Schlup gateway and have his
11 otherwise time-barred claims heard on the merits.”) The “Schlup gateway,” however, may only be
12 employed when a petitioner “falls within the narrow class of cases... implicating a fundamental
13 miscarriage of justice. Schlup, 513 U.S. at 314-315; McQuiggin, at *9. However, “[t]o ensure that the
14 fundamental miscarriage of justice exception would remain ‘rare’ and would only be applied in the
15 ‘extraordinary case,’ while at the same time ensuring that the exception would extend relief to those
16 who were truly deserving,” the Supreme Court explicitly limited the equitable exception to cases
17 where a petitioner has made a showing of innocence. Schlup, 513 U.S. at 321. “The Supreme Court
18 did not hold that a petitioner may invoke Schlup whenever he wants a trial do-over.” Lee, 653 F.3d at
19 946 (Kozinski, J., concurring.)

20 The rule announced in McQuiggin is not a type of equitable tolling, which provides for an
21 extension of the time statutorily prescribed, but an equitable exception to § 2244(d)(1). McQuiggin at
22 *7. Moreover, the Court noted that actual innocence, if proven, merely allows a federal court to
23 address the merits of a petitioner’s constitutional claims; the Court has yet to address whether “a
24 freestanding claim of actual innocence” provides a separate basis for granting habeas relief.
25 McQuiggin at *7.

26 Here, the petition, *as presently alleged*, has failed to meet Schlup’s exacting standard.
27 Petitioner makes the claim of actual innocence and includes this allegation along with claims of
28 ineffective assistance of trial counsel and violations of due process at trial. (E.g., Doc. 1, p. 22).

1 However, as discussed above, actual innocence means just that: factual and actual innocence of the
2 charge, not merely legal innocence. In other words, “actual innocence” is not met merely by
3 presenting constitutional claims the might require reversal of his conviction and a new trial. Unless
4 Petitioner can produce evidence establishing his factual innocence of the charges for which he was
5 convicted in 1994 under Schlup, he cannot use the actual innocence doctrine to avoid the one-year
6 limitation period.

7 However, under the Ninth Circuit’s ruling in Herbst, this Court is required to afford Petitioner
8 an opportunity to present any facts or evidence he has to avoid dismissal for untimeliness.
9 Accordingly, Petitioner will be permitted thirty days within which to respond to this Order to Show
10 Cause and provide additional information that would preclude dismissal. If Petitioner fails to provide
11 such information in his response, the Court will recommend that the petition be dismissed for
12 untimeliness.

13 **ORDER**

14 For the foregoing reasons, the Court HEREBY ORDERS:

- 15 1. **Within 30 days**, Petitioner is ORDERED TO SHOW CAUSE in writing why the
16 Petition should not be dismissed for violation of the one-year statute of limitations in 28
17 U.S.C. § 2244(d).

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

20
21 IT IS SO ORDERED.

22 Dated: October 29, 2015

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