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

|                        |   |                                       |
|------------------------|---|---------------------------------------|
| JAMES SION SPRAGUE,    | ) | Case No.: 1:16-cv-00243-JLT           |
| Petitioner,            | ) |                                       |
| v.                     | ) | ORDER TO SHOW CAUSE WHY THE PETITION  |
| JEFFREY BEARD, Warden, | ) | SHOULD NOT BE DISMISSED FOR VIOLATION |
| Respondent.            | ) | OF THE ONE-YEAR STATUTE OF            |
|                        | ) | LIMITATIONS                           |
|                        | ) | ORDER DIRECTING THAT RESPONSE BE      |
|                        | ) | FILED WITHIN THIRTY DAYS              |
|                        | ) |                                       |

After reviewing this petition for writ of habeas corpus, it appears to the Court that it is untimely and should be dismissed.

**I. DISCUSSION**

A. Preliminary Review of Petition.

Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition if it “plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court . . . .” Rule 4 of the Rules Governing Section 2254 Cases. The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of habeas corpus, either on its own motion under Rule 4, pursuant to the respondent’s motion to dismiss, or after an answer to the petition has been filed. Herbst v. Cook, 260 F.3d 1039 (9<sup>th</sup> Cir.2001).

The Ninth Circuit, in Herbst v. Cook, concluded that a district court may dismiss *sua sponte* a habeas petition on statute of limitations grounds so long as the court provides the petitioner adequate

1 notice of its intent to dismiss and an opportunity to respond. Id. at 1041-42. By issuing this Order to  
2 Show Cause, the Court is affording Petitioner the notice required by the Ninth Circuit in Herbst.

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

4 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of  
5 1996 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas corpus  
6 filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997);  
7 Jeffries v. Wood, 114 F.3d 1484, 1499 (9<sup>th</sup> Cir. 1997) (en banc), *cert. denied*, 118 S.Ct. 586 (1997).  
8 Petitioner filed this action on February 16, 2016<sup>1</sup> so it is subject to the provisions of the AEDPA.

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

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

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

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

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

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

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26 <sup>1</sup> In Houston v. Lack, the United States Supreme Court held that a pro se habeas petitioner’s notice of appeal is deemed  
27 filed on the date of its submission to prison authorities for mailing, as opposed to the actual date of its receipt by the court  
28 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 (9<sup>th</sup> 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 (9<sup>th</sup> Cir. 2000); Stillman v. LaMarque, 319 F.3d 1199, 1201 (9<sup>th</sup> 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 (9<sup>th</sup> 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 February 16, 2016. (Doc. 1, p. 18).

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

3 28 U.S.C. § 2244(d).

4 In most cases, the limitation period begins running on the date that the petitioner's direct  
5 review became final. Here, Petitioner was convicted on August 30, 2006 and sentenced on October  
6 10, 2006. (Doc. 1, p. 1). Petitioner indicates that he pled guilty to various charges and did not appeal.  
7 (Id., p. 2). California state law governs the period within which prisoners have to file an appeal and, in  
8 turn, that law governs the date of finality of convictions. See, e.g., Mendoza v. Carey, 449 F.3d 1065,  
9 1067 (9<sup>th</sup> Cir. 2006); Lewis v. Mitchell, 173 F.Supp.2d 1057, 1060 (C.D. Cal. 2001)(California  
10 conviction becomes final 60 days after the superior court proceedings have concluded, citing prior  
11 Rule of Court, Rule 31(d)). Pursuant to California Rules of Court, Rule 8.308(a), a criminal defendant  
12 convicted of a felony must file his notice of appeal within sixty days of the rendition of judgment. See  
13 People v. Mendez, 19 Cal.4th 1084, 1086, 969 P.2d 146, 147 (1999)(citing prior Rule of Court, Rule  
14 31(d)). Because Petitioner did not file a notice of appeal, his direct review concluded on December  
15 10, 2006, when the sixty-day period for filing a notice of appeal expired. The one-year period under  
16 the AEDPA would have commenced the following day, on December 11, 2006, and Petitioner would  
17 have had one year from that date, or until December 10, 2007, within which to file his federal petition  
18 for writ of habeas corpus. See Patterson v. Stewart, 251 F.3d 1243, 1245 (9<sup>th</sup> Cir.2001).

19 Petitioner filed this action more than eight years after the date the one-year period expired.  
20 Thus, unless he is entitled to either statutory or equitable tolling, the instant petition is untimely and  
21 should be dismissed.

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

23 Under the AEDPA, the statute of limitations is tolled during the time that a properly filed  
24 application for state post-conviction or other collateral review is pending in state court. 28 U.S.C. §  
25 2244(d)(2). A properly filed application is one that complies with the applicable laws and rules  
26 governing filings, including the form of the application and time limitations. Artuz v. Bennett, 531  
27 U.S. 4, 8 (2000). An application is pending during the time that 'a California petitioner completes a  
28 full round of [state] collateral review,' so long as there is no unreasonable delay in the intervals

1 between a lower court decision and the filing of a petition in a higher court. Delhomme v. Ramirez,  
2 340 F. 3d 817, 819 (9th Cir. 2003), abrogated on other grounds as recognized by Waldrip v. Hall, 548  
3 F. 3d 729 (9th Cir. 2008)(per curium)(internal quotation marks and citations omitted); see Evans v.  
4 Chavis, 546 U.S. 189, 193-194 (2006); see Carey v. Saffold, 536 U.S. 214, 220, 222-226 (2002); see  
5 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  
8 the filing of an application for post-conviction or other collateral review in state court, because no  
9 state court application is “pending” during that time. Nino, 183 F.3d at 1006-1007; Raspberry v.  
10 Garcia, 448 F.3d 1150, 1153 n. 1 (9<sup>th</sup> Cir. 2006). Similarly, no statutory tolling is allowed for the  
11 period between finality of an appeal and the filing of a federal petition. Id. at 1007. In addition, the  
12 limitation period is not tolled during the time that a federal habeas petition is pending. Duncan v.  
13 Walker, 563 U.S. 167, 181-182 (2001); see also, Fail v. Hubbard, 315 F. 3d 1059, 1060 (9th Cir.  
14 2001)(as amended on December 16, 2002). Further, a petitioner is not entitled to statutory tolling  
15 where the limitation period has already run prior to filing a state habeas petition. Ferguson v.  
16 Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (“section 2244(d) does not permit the reinitiation of the  
17 limitations period that has ended before the state petition was filed.”); Jiminez v. White, 276 F. 3d  
18 478, 482 (9th Cir. 2001). Finally, a petitioner is not entitled to continuous tolling when the  
19 petitioner’s later petition raises unrelated claims. See Gaston v. Palmer, 447 F.3d 1165, 1166 (9th Cir.  
20 2006).

21         Petitioner alleges that he filed the following state habeas petitions: (1) petition filed in the  
22 Superior Court of Kings County and denied on May 16, 2014<sup>2</sup>; (2) petition filed in the 5<sup>th</sup> DCA on  
23 September 8, 2014, and denied on October 23, 2014; and (3) petition filed in the California Supreme  
24 Court on February 9, 2015, and denied on April 29, 2015. Although Petitioner does not specify the  
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26  
27 <sup>2</sup> In computing the running of the statute of limitations, the day an order or judgment becomes final is excluded and time  
28 begins to run on the day after the judgment becomes final. See Patterson v. Stewart, 251 F.3d 1243, 1247 (9<sup>th</sup> Cir. 2001)  
(Citing Rule 6 of the Federal Rules of Civil Procedure).

1 precise dates on which he filed several of these petitions, the Court has accessed the California court  
2 system’s electronic database and has determined the chronology explained above.<sup>3</sup>

3 However, none of these state petitions are entitled to statutory tolling under the AEDPA  
4 because they were all filed long after the one-year period had expired. A petitioner is not entitled to  
5 tolling where the limitations period has already run prior to filing a state habeas petition. Green v.  
6 White, 223 F.3d 1001, 1003 (9<sup>th</sup> Cir. 2000); Jiminez v. Rice, 276 F.3d 478 (9<sup>th</sup> Cir. 2001); see  
7 Webster v. Moore, 199 F.3d 1256, 1259 (11<sup>th</sup> Cir. 2000)(same); Ferguson v. Palmateer, 321 F.3d 820  
8 (9<sup>th</sup> Cir. 2003)(“section 2244(d) does not permit the reinitiation of the limitations period that has ended  
9 before the state petition was filed.”); Jackson v. Dormire, 180 F.3d 919, 920 (8<sup>th</sup> Cir. 1999) (petitioner  
10 fails to exhaust claims raised in state habeas corpus filed after expiration of the one-year limitations  
11 period).

12 D. Equitable Tolling.

13 The running of the one-year limitation period under 28 U.S.C. § 2244(d) is subject to equitable  
14 tolling in appropriate cases. See Holland v. Florida, 560 U.S. 631, 651-652 (2010); Calderon v. United  
15 States Dist. Ct., 128 F.3d 1283, 1289 (9<sup>th</sup> Cir. 1997). The limitation period is subject to equitable  
16 tolling when “extraordinary circumstances beyond a prisoner’s control make it impossible to file the  
17 petition on time.” Shannon v. Newland, 410 F. 3d 1083, 1089-1090 (9th Cir. 2005)(internal quotation  
18 marks and citations omitted). “When external forces, rather than a petitioner’s lack of diligence,  
19 account for the failure to file a timely claim, equitable tolling of the statute of limitations may be  
20 appropriate.” Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999). “Generally, a litigant seeking  
21 equitable tolling bears the burden of establishing two elements: “(1) that he has been pursuing his  
22 rights diligently, and (2) that some extraordinary circumstance stood in his way.” Holland, 560 U.S.  
23 at 651-652; Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005). “[T]he threshold necessary to trigger

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25 <sup>3</sup> 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.

1 equitable tolling under AEDPA is very high, lest the exceptions swallow the rule.” Miranda v. Castro,  
2 292 F. 3d 1062, 1066 (9th Cir. 2002)(citation omitted). As a consequence, “equitable tolling is  
3 unavailable in most cases.” Miles, 187 F. 3d at 1107.

4 Petitioner has made no express claim of entitlement to equitable tolling and, based on the  
5 record now before the Court, the Court sees no basis for such a claim. Indeed, Petitioner’s actions  
6 strongly suggest a complete lack of due diligence, as evidenced by the 5<sup>th</sup> DCA’s denial of his petition,  
7 which included a comment that Petitioner had provided no explanation for failing to raise the claim on  
8 direct appeal in 2006. Thus, Petitioner is not entitled to equitable tolling. Accordingly, it appears that  
9 the petition is untimely and should be dismissed. However, mindful of the Ninth Circuit’s mandate,  
10 this Court will afford Petitioner an opportunity to respond on the issue of timeliness by submitting a  
11 response to this Order to Show Cause. Petitioner is reminded that, unless he can account for sufficient  
12 time to make the petition timely under the AEDPA, the Court will issue a Recommendation that the  
13 petition be dismissed.

14 **ORDER**

15 For the foregoing reasons, the Court HEREBY ORDERS:

- 16 1. Petitioner is ORDERED TO SHOW CAUSE **within 30 days** of the date of service of  
17 this Order why the Petition should not be dismissed for violation of the one-year statute of  
18 limitations in 28 U.S.C. § 2244(d).

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

21  
22 IT IS SO ORDERED.

23 Dated: February 24, 2016

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