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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

RUDY BOTELLO,  
Petitioner,  
v.  
M. BITER, Warden,  
Respondent.

No. 1:16-cv-01376-AWI-JLT (HC)  
ORDER TO SHOW CAUSE WHY THE  
PETITION SHOULD NOT BE DISMISSED  
FOR VIOLATION OF THE ONE-YEAR  
STATUTE OF LIMITATIONS  
[THIRTY-DAY DEADLINE]

On September 16, 2016, Petitioner filed the instant habeas petition. A preliminary review of the petition reveals that the petition may be untimely and should be dismissed. Therefore, the Court will order Petitioner to show cause why the petition should not be dismissed for violation of the statute of limitations.

**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 petition and any attached exhibits 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 a 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 (9th Cir.

1 2001).

2 The Ninth Circuit, in Herbst v. Cook, concluded that a district court may dismiss *sua*  
3 *sponte* a habeas petition on statute of limitations grounds so long as the court provides the  
4 petitioner adequate notice of its intent to dismiss and an opportunity to respond. 260 F.3d at  
5 1041-42. By issuing this Order to Show Cause, the Court is affording Petitioner the notice  
6 required by the Ninth Circuit in Herbst.

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

8 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of  
9 1996 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas  
10 corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320 (1997). The instant  
11 petition was filed on September 16, 2016, and thus, it is subject to the provisions of the AEDPA.

12 The AEDPA imposes a one-year period of limitation on petitioners seeking to file a  
13 federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). In most cases, the limitation  
14 period begins running on the date that the petitioner's direct review became final. Here,  
15 Petitioner was convicted on May 6, 2002, of robbery with the use of a deadly weapon based on  
16 his plea of nolo contendere. (Doc. 1, p. 1). Petitioner was sentenced to a determinate term of 28  
17 years.

18 California state law governs the period within which prisoners have to file an appeal and,  
19 in turn, that law governs the date of finality of convictions. See, e.g., Mendoza v. Carey, 449  
20 F.3d 1065, 1067 (9th Cir. 2006); Lewis v. Mitchell, 173 F.Supp.2d 1057, 1060 (C.D. Cal. 2001)  
21 (California conviction becomes final 60 days after the superior court proceedings have concluded,  
22 citing prior Rule of Court, Rule 31(d)). Pursuant to California Rules of Court, Rule 8.308(a), a  
23 criminal defendant convicted of a felony must file his notice of appeal within sixty days of the  
24 rendition of judgment. See People v. Mendez, 19 Cal.4th 1084, 1086, 969 P.2d 146, 147 (1999)  
25 (citing prior Rule of Court, Rule 31(d)). Because it appears that Petitioner did not file a notice of  
26 appeal, his direct review would have concluded on July 5, 2002, when the sixty-day period for  
27 filing a notice of appeal expired. The one-year period under the AEDPA would have commenced  
28 the following day, on July 6, 2002, and Petitioner would have had one year from that date, or

1 until July 5, 2003, within which to file his federal petition for writ of habeas corpus. See  
2 Patterson v. Stewart, 251 F.3d 1243, 1245 (9th Cir.2001).

3 As mentioned, the instant petition was filed on September 16, 2016, which was over  
4 thirteen years after the date the one-year period had expired. Thus, unless Petitioner is entitled to  
5 tolling, the instant petition is untimely and should be dismissed.

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

7 Under the AEDPA, the statute of limitations is tolled during the time that a properly filed  
8 application for state post-conviction or other collateral review is pending in state court. 28 U.S.C.  
9 § 2244(d)(2). A properly filed application is one that complies with the applicable laws and rules  
10 governing filings, including the form of the application and time limitations. Artuz v. Bennett,  
11 531 U.S. 4, 8 (2000). An application is pending during the time that ‘a California petitioner  
12 completes a full round of [state] collateral review,’ so long as there is no unreasonable delay in  
13 the intervals between a lower court decision and the filing of a petition in a higher court.  
14 Delhomme v. Ramirez, 340 F. 3d 817, 819 (9th Cir. 2003), *abrogated on other grounds as*  
15 *recognized by* Waldrip v. Hall, 548 F. 3d 729 (9th Cir. 2008) (per curium) (internal quotation  
16 marks and citations omitted); see Evans v. Chavis, 546 U.S. 189, 193-194 (2006); Carey v.  
17 Saffold, 536 U.S. 214, 220, 222-226 (2002).

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

1 (9th Cir. 2001). Finally, a petitioner is not entitled to continuous tolling when the petitioner's  
2 later petition raises unrelated claims. See Gaston v. Palmer, 447 F.3d 1165, 1166 (9th Cir. 2006).

3 Petitioner alleges that he filed state habeas petitions in 2015 in the Superior Court of  
4 Fresno and the California Court of Appeal, Fifth Appellate District ("5th DCA"). However,  
5 neither of these petitions affords Petitioner any statutory tolling under the AEDPA because the  
6 one-year period had expired long before the first state petition was filed. Ferguson, 321 F.3d at  
7 823.

8 D. Later Start Date Pursuant to 28 U.S.C. § 2244(d)(1)(D)

9 As set forth above, the statute of limitations will commence on the date on which the  
10 factual predicate of the claim or claims presented could have been discovered through the  
11 exercise of due diligence if that date is later than the date on which judgment became final. 28  
12 U.S.C. § 2244(d)(1). In this case, Petitioner claims the sentencing court imposed an unlawful  
13 upper term in violation of Apprendi v. New Jersey, 530 U.S. 466 (2000), and Cunningham v.  
14 California, 549 U.S. 270 (2007). Since Apprendi was decided in 2000, and Petitioner knew he  
15 was being sentenced to the upper term at the time of sentencing, the factual predicate of  
16 Petitioner's claim would have been known to him at the time of sentencing, or could have been  
17 discovered through the exercise of due diligence. Therefore, § 2244(d)(1)(D) is inapplicable and  
18 the petition remains untimely.

19 E. Equitable Tolling

20 The running of the one-year limitation period under 28 U.S.C. § 2244(d) is subject to  
21 equitable tolling in appropriate cases. See Holland v. Florida, 560 U.S. 631, 651-652 (2010);  
22 Calderon v. United States Dist. Ct., 128 F.3d 1283, 1289 (9th Cir. 1997). The limitation period is  
23 subject to equitable tolling when "extraordinary circumstances beyond a prisoner's control make  
24 it impossible to file the petition on time." Shannon v. Newland, 410 F. 3d 1083, 1089-1090 (9th  
25 Cir. 2005) (internal quotation marks and citations omitted). "Generally, a litigant seeking  
26 equitable tolling bears the burden of establishing two elements: "(1) that he has been pursuing his  
27 rights diligently, and (2) that some extraordinary circumstance stood in his way." Holland, 560  
28 U.S. at 651-652; Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005). "[T]he threshold necessary to

1 trigger equitable tolling under AEDPA is very high, lest the exceptions swallow the rule.”  
2 Miranda v. Castro, 292 F. 3d 1062, 1066 (9th Cir. 2002) (citation omitted). As a consequence,  
3 “equitable tolling is unavailable in most cases.” Miles, 187 F. 3d at 1107. Here, the Court sees  
4 no basis for a claim of equitable tolling. Accordingly, the petition is untimely and should be  
5 dismissed.

6 F. Conclusion

7 The instant petition is untimely by over thirteen years. However, pursuant to Herbst,  
8 Petitioner will be given an opportunity to respond and provide any additional evidence or  
9 information he has pertinent to the issue of timeliness. If Petitioner’s response is not persuasive  
10 and determinative on the issue, the Court will recommend that the petition be dismissed as  
11 untimely.

12 **II. ORDER**

13 For the foregoing reasons, the Court ORDERS:

14 1. **Within thirty days**, Petitioner **SHALL** show cause in writing why the Petition  
15 should not be dismissed for violation of the one-year statute of limitations in 28 U.S.C. § 2244(d).

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

18 IT IS SO ORDERED.

19 Dated: October 4, 2016

20 /s/ Jennifer L. Thurston  
21 UNITED STATES MAGISTRATE JUDGE