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8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
10

11 ALBERT ZACCARDI,

12 Petitioner,

13 v.

14 E. ARNOLD,

15 Respondent.
16

No. 2:17-cv-1405 KJN P

ORDER TO SHOW CAUSE

17 I. Introduction

18 Petitioner, a state prisoner proceeding pro se, has filed a petition for a writ of habeas
19 corpus pursuant to 28 U.S.C. § 2254, together with an application to proceed in forma pauperis.

20 II. Request to Proceed In Forma Pauperis

21 Examination of the in forma pauperis application reveals that petitioner is unable to afford
22 the costs of suit. Accordingly, the application to proceed in forma pauperis is granted. See 28
23 U.S.C. § 1915(a).

24 III. Legal Standards

25 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a
26 petition if it “plainly appears from the face of the petition and any exhibits annexed to it that the
27 petitioner is not entitled to relief in the district court. . . .” Id. Courts have authority to address
28 statute of limitations *sua sponte*, but the court is required to give the petitioner notice and an

1 opportunity to respond before dismissing the case. See Herbst v. Cook, 260 F.3d 1039, 1043-44,
2 & n.3 (9th Cir. 2001).

3 On April 24, 1996, the Antiterrorism and Effective Death Penalty Act (“AEDPA”) was
4 enacted. Section 2244(d)(1) of Title 8 of the United States Code provides:

5 A 1-year period of limitation shall apply to an application for a writ
6 of habeas corpus by a person in custody pursuant to the 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
8 conclusion of direct review or the expiration of the time for seeking
such review;

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

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

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

16 28 U.S.C. § 2244(d)(1).

17 Section 2244(d)(2) provides that “the time during which a properly filed application for
18 State post-conviction or other collateral review with respect to the pertinent judgment or claim is
19 pending shall not be counted toward” the limitations period. 28 U.S.C. § 2244(d)(2). Generally,
20 this means that the statute of limitations is tolled during the time after a state habeas petition has
21 been filed, but before a decision has been rendered. Nedds v. Calderon, 678 F.3d 777, 780 (9th
22 Cir. 2012). However, “a California habeas petitioner who unreasonably delays in filing a state
23 habeas petition is not entitled to the benefit of statutory tolling during the gap or interval
24 preceding the filing.” Id. at 781 (citing Carey v. Saffold, 536 U.S. 214, 225-27 (2002)).
25 Furthermore, the AEDPA “statute of limitations is not tolled from the time a final decision is
26 issued on direct state appeal and the time the first state collateral challenge is filed because there
27 is no case ‘pending’ during that interval.” Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999),
28 overruled on other grounds by Carey, 536 U.S. at 214. In Carey, the United States Supreme

1 Court held that the limitation period is statutorily tolled during one complete round of state post-
2 conviction review, as long as such review is sought within the state's time frame for seeking such
3 review. Id., 536 U.S. at 220, 222-23.

4 State habeas petitions filed after the one-year statute of limitations has expired do not
5 revive the statute of limitations and have no tolling effect. Ferguson v. Palmateer, 321 F.3d 820,
6 823 (9th Cir. 2003) ("section 2244(d) does not permit the reinitiation of the limitations period that
7 has ended before the state petition was filed"); Jiminez v. Rice, 276 F.3d 478, 482 (9th Cir. 2001).

8 III. Chronology

9 Petitioner was convicted of second degree murder with use of a firearm on August 23,
10 1983, and sentenced to 17 years to life. (ECF No. 1 at 1.) Petitioner filed an appeal, which was
11 denied by the appellate court, and his petition for review was also denied by the California
12 Supreme Court. Petitioner states he cannot recall the dates due to the passage of time.

13 Petitioner did not file a petition for certiorari in the United States Supreme Court, and
14 states he filed no other collateral challenges in any other court, state or federal. (ECF No. 1 at 2.)

15 Petitioner constructively filed the instant action on July 5, 2017. (ECF No. 1 at 9.)
16 Petitioner raises two grounds in his petition:

17 1. Petitioner's second degree murder sentence violates due process because he was
18 convicted pursuant to a penal code statute which defines and dictates second degree murder by
19 ten words.

20 2. Petitioner's continued imprisonment violates the Eighth Amendment because his
21 sentence is not proportional.

22 IV. Appellate Courts Case Information¹

23 The California Courts official website reflects petitioner filed the following cases:
24

25 ¹ The court may take judicial notice of facts that are "not subject to reasonable dispute
26 because it . . . can be accurately and readily determined from sources whose accuracy cannot
27 reasonably be questioned," Fed. R. Evid. 201(b), including undisputed information posted on
28 official websites. Daniels-Hall v. National Education Association, 629 F.3d 992, 999 (9th Cir.
2010). It is appropriate to take judicial notice of the docket sheet of a California court. White v.
Martel, 601 F.3d 882, 885 (9th Cir. 2010). The address of the official website of the California
state courts is www.courts.ca.gov.

1 1. On July 8, 2010, petitioner filed a petition for writ of habeas corpus in the California
2 Court of Appeal for the Third Appellate District. In re Albert Zaccardi on Habeas Corpus, Case
3 No. C065474 (Cal. App. 3). The appellate court denied the petition on July 22, 2010. Id.

4 2. On February 21, 2014, petitioner filed a petition for writ of habeas corpus in the
5 California Court of Appeal for the Third Appellate District. In re Albert Zaccardi on Habeas
6 Corpus, Case No. C075817 (Cal. App. 3). The appellate court denied the petition on March 6,
7 2014. Id.

8 3. On January 26, 2017, petitioner filed a petition for writ of habeas corpus in the
9 California Court of Appeal for the Third Appellate District. In re Albert Zaccardi on Habeas
10 Corpus, Case No. C065474 (Cal. App. 3). The appellate court denied the petition on February 3,
11 2017. Id.

12 4. On August 27, 2010, petitioner filed a petition for writ of habeas corpus in the
13 California Supreme Court. Zaccardi (Albert) on Habeas Corpus, Case No. S185849 (Cal. S. Ct.).
14 The California Supreme Court denied the petition on March 16, 2011. Id.

15 5. On April 19, 2017, petitioner filed a petition for writ of habeas corpus in the California
16 Supreme Court. Zaccardi (Albert) on Habeas Corpus, Case No. S241367 (Cal. S. Ct.). On June
17 14, 2017, the California Supreme Court denied the petition without prejudice to any relief
18 petitioner might be entitled after the California Supreme Court decides Butler on Habeas Corpus,
19 S237014.²

20 ////

22 ² In Butler, the California Supreme Court Case Summary notes that the case is fully briefed, and
23 identifies the pending issues as:

Petition for review after the Court of Appeal denied a motion to
modify an order implementing a settlement agreement. This case
presents the following issue: Should the Board of Parole Hearings
be relieved of its obligations arising from a 2013 settlement to
continue calculating base terms for life prisoners and to promulgate
regulations for doing so in light of the 2016 statutory reforms to the
parole suitability and release date scheme for life prisoners, which
now mandate release on parole upon a finding of parole suitability?

28 Id.

1 V. Discussion

2 Here, petitioner's conviction became final prior to the enactment of AEDPA. State
3 prisoners whose convictions became final prior to AEDPA's enactment, had a one-year grace
4 period in which to file their petitions. Calderon v. United States Dist. Ct. (Beeler), 128 F.3d
5 1283, 1286 (9th Cir. 1997), overruled in part on other grounds by Calderon v. United States Dist.
6 Ct. (Kelly), 163 F.3d 530, 540 (9th Cir. 1998) (*en banc*). Thus, petitioner was required to
7 challenge his conviction on or before April 24, 1997. Patterson v. Stewart, 251 F.3d 1243, 1245
8 (9th Cir. 2001). Petitioner filed the instant petition on July 5, 2017.

9 Petitioner does not appear to contend that he is entitled to a later trigger date under 28
10 U.S.C. § 2244(d)(1)(B) or (C), and the petition provides no such basis. Petitioner does not
11 contend that he was impeded from filing his federal petition by unconstitutional state action and
12 thereby entitled to a later trigger date under § 2244(d)(1)(B). Moreover, petitioner asserts no
13 basis to contend that he is entitled to a later trigger date under § 2244(d)(1)(C) because his claim
14 is based on a federal constitutional right that was initially recognized by the United States
15 Supreme Court subsequent to the date his conviction became final and was made retroactively
16 applicable to cases on collateral review.

17 Moreover, for purposes of § 2244(d)(1)(D), the statute of limitations begins to run when a
18 petitioner "knows (or through diligence could discover) the important facts, not when the
19 [petitioner] recognizes their legal significance." See Hasan v. Galaza, 254 F.3d 1150, 1154 n.3
20 (9th Cir. 2001) (citation omitted). Here, petitioner identifies no such newly-discovered facts.

21 The burden of demonstrating that the AEDPA's one-year limitations period was
22 sufficiently tolled, whether statutorily or equitably,³ rests with the petitioner. See, e.g., Pace v.

23 ³ In Holland v. Florida, 560 U.S. 631, 649 (2010), the Supreme Court held that the AEDPA's
24 one-year limitations period is subject to equitable tolling in appropriate cases. However, in order
25 to be entitled to equitable tolling, the petitioner must show both that (1) he has been pursuing his
26 rights diligently and (2) some extraordinary circumstance stood in his way and prevented his
27 timely filing. Id. (quoting Pace, 544 U.S. at 418). The Ninth Circuit has held that the Pace
28 standard is consistent with the Ninth Circuit's "sparing application of the doctrine of equitable
tolling." Waldron-Ramsey v. Pacholke, 556 F.3d 1008, 1011 (9th Cir. 2009). Thus, "[t]he
petitioner must show that 'the extraordinary circumstances were the cause of his untimeliness and
that the extraordinary circumstances made it impossible to file a petition on time.'" Porter v.

1 DiGuglielmo, 544 U.S. 408, 418 (2005); Zepeda v. Walker, 581 F.3d 1013, 1019 (9th Cir. 2009);
2 Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002). The state court petitions filed after the
3 limitation period expired in 1997 cannot revive the statute of limitations, and provide no statutory
4 tolling. Ferguson, 321 F.3d at 823. In addition, given petitioner filed his federal petition over 20
5 years after the limitations period expired, it is unlikely he would be entitled to sufficient equitable
6 tolling to render the instant petition timely.

7 Finally, to the extent petitioner is attempting to seek relief under Butler, such effort is
8 unavailing. First, any such claim would be unexhausted. The exhaustion of state court remedies
9 is a prerequisite to the granting of a petition for writ of habeas corpus. 28 U.S.C. § 2254(b)(1). A
10 petitioner satisfies the exhaustion requirement by providing the highest state court with a full and
11 fair opportunity to consider all claims before presenting them to the federal court. Picard v.
12 Connor, 404 U.S. 270, 276 (1971); Middleton v. Cupp, 768 F.2d 1083, 1086 (9th Cir. 1985), cert.
13 denied, 478 U.S. 1021 (1986).

14 The official records of the California Supreme Court reflect that petitioner's petition was
15 denied without prejudice to renewal following a decision Butler, which is pending decision at this
16 time. Thus, if petitioner wishes to pursue relief reserved pursuant to the order of the California
17 Supreme Court, he must await the decision in Butler and then re-file his petition in the California
18 Supreme Court. Second, in any event, it is does not appear that any decision rendered in Butler
19 would offer petitioner a later trigger date under § 2244(d)(1)(C). Section 2244(d)(1)(C) requires
20 that a prisoner's federal claim be based on a federal constitutional right that was initially
21 recognized by the United States Supreme Court subsequent to the date his conviction became
22

23 Ollison, 620 F.3d 952, 959 (9th Cir. 2010) (as amended) (quoting Ramirez v. Yates, 571 F.3d
24 993, 997 (9th Cir. 2009)). "Indeed, 'the threshold necessary to trigger equitable tolling [under the
25 AEDPA] is very high, lest the exceptions swallow the rule.'" Miranda, 292 F.3d at 1066 (citation
26 omitted). Consequently, as the Ninth Circuit has recognized, equitable tolling will be justified in
27 few cases. Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003) (as amended); see also Waldron-
28 Ramsey, 556 F.3d at 1011 ("To apply the doctrine in 'extraordinary circumstances' necessarily
suggests the doctrine's rarity, and the requirement that extraordinary circumstances 'stood in his
way' suggests that an external force must cause the untimeliness, rather than, as we have said,
merely 'oversight, miscalculation or negligence on [the petitioner's] part, all of which would
preclude the application of equitable tolling.'" (alteration in original) (citation omitted)).

1 final and was made retroactively applicable to cases on collateral review by the United States
2 Supreme Court. Therefore, any holding by the California Supreme Court would not offer
3 petitioner a later trigger date for the limitations period.


4 In conclusion, because petitioner's conviction became final before the enactment of
5 AEDPA, and the limitations period expired on April 24, 1997, petitioner's July 15, 2017 federal
6 petition is barred by the statute of limitations. In an abundance of caution, petitioner is ordered to
7 show cause why this action should not be dismissed as time-barred.

8 In accordance with the above, IT IS HEREBY ORDERED that:

- 9 1. Petitioner's motion to proceed in forma pauperis is granted; and
10 2. Within thirty days from the date of this order, petitioner shall show cause why this
11 action should not be dismissed as barred by the statute of limitations.

12 Dated: July 13, 2017

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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE