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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

JOE QUSTA NINO,
Petitioner,
v.
JEFFREY BEARD,
Respondent.

Case No. CV 14-09928 SVW (RAO)
**ORDER ACCEPTING FINDINGS,
CONCLUSIONS, AND
RECOMMENDATIONS OF UNITED
STATES MAGISTRATE JUDGE**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, all of the records and files herein, and the Magistrate Judge’s Revised Report and Recommendation. Further, the Court has engaged in a *de novo* review of those portions of the Report to which Petitioner’s Objections were directed. The Court hereby accepts and adopts the findings, conclusions, and recommendations of the Magistrate Judge.

Petitioner opposes Respondent’s Motion to Dismiss the Petition as time barred, asserting that he is entitled to statutory tolling under 28 U.S.C. § 2244(d)(2) or, in the alternative, that he qualifies for an exception to AEDPA’s statute of limitations because he is actually innocent. The Magistrate Judge recommended that the Petition be denied as time barred and dismissed with prejudice.

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1 The Court has carefully considered Petitioner’s Objections to the Revised
2 Report and Recommendation and Petitioner’s argument, citing to *Rudin v. Myles*,
3 781 F.3d 1043 (9th Cir. 2015), that this Court can review for reasonableness a state
4 court’s determination of untimeliness of a post-conviction petition. Petitioner’s
5 citation to *Rudin* is unavailing. In *Rudin*, the Court of Appeals for the Ninth Circuit
6 found that the petitioner was not entitled to statutory tolling under § 2244(d)(2) and
7 rejected the argument that the Nevada Supreme Court erred in finding her post-
8 conviction petition untimely filed. 781 F.3d at 1053-54. “While we may not have
9 made the same decision as the Nevada Supreme Court, we are not at liberty to
10 second guess that court’s decision when it was acting on direct appeal of the state
11 post-conviction court’s judgment. The state supreme court concluded that Rudin’s
12 petition was untimely under state law, and ‘[w]hen a postconviction petition is
13 untimely under state law, that [is] the end of the matter for purposes of
14 § 2244(d)(2).’” *Id.* at 1054 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 414, 125
15 S. Ct. 1807, 161 L. Ed. 2d 669 (2005)).

16 Petitioner argues that the Superior Court of California acted unreasonably in
17 determining that Petitioner’s first state habeas petition was untimely, and this Court
18 should find his petition “properly filed,” entitling him to statutory tolling under
19 AEDPA. Pet’r’s Objs. at 7. The United States Supreme Court has made clear,
20 however, that in a federal habeas matter, the district court does not review for
21 reasonableness a state court’s determination of untimeliness of a post-conviction
22 petition. *See Allen v. Siebert*, 552 U.S. 3, 5-6, 128 S. Ct. 2, 169 L. Ed. 2d 329
23 (2007) (per curiam) (concluding that petitioner’s state postconviction petition was
24 not ‘properly filed’ because the state courts deemed it time barred, even though the
25 state courts had discretion in enforcing the time bar); *accord Zepeda v. Walker*, 581
26 F.3d 1013, 1018 (9th Cir. 2009) (“[T]he Supreme Court has now twice found state
27 habeas petitions improperly filed under AEDPA even though the relevant condition
28 to filing was either new or unevenly applied.”) (citing *Pace*, 544 U.S. 408; *Siebert*,

1 552 U.S. at 6-7).

2 “[W]here a state court rejects a petition for failure to comply with conditions
3 of filing, that is ‘the end of the matter.’” *Zepeda*, 581 F.3d at 1018 (citing *Carey v.*
4 *Saffold*, 536 U.S. 214, 226, 122 S. Ct. 2134, 153 L. Ed. 2d 260 (2002) (observing
5 that “[i]f the California Supreme Court had clearly ruled that Saffold’s 4 1/2-month
6 delay was ‘unreasonable,’ that would be the end of the matter” for tolling
7 purposes); *Pace*, 544 U.S. at 417); *see also Lakey v. Hickman*, 633 F.3d 782, 786
8 (9th Cir. 2011) (finding no statutory tolling when state habeas petition was rejected
9 as untimely by California Supreme Court even though California’s timeliness rule
10 required consideration of diligence). Accordingly, Petitioner’s Objections are
11 overruled, and this Court adopts the Revised Report and Recommendation of the
12 Magistrate Judge.

13 IT IS THEREFORE ORDERED that the Petition is denied and Judgment
14 shall be entered dismissing this action with prejudice.

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16 DATED: July 19, 2017



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18 STEPHEN V. WILSON
19 UNITED STATES DISTRICT JUDGE
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