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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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|---------------------------------|---|-----------------------------|
| Keith Zon Doolin, |) | Case No. CIV. F-06-0825 AWI |
| |) | |
| Petitioner, |) | <u>DEATH PENALTY CASE</u> |
| |) | |
| vs. |) | ORDER DISMISSING PETITION |
| |) | |
| Robert L. Ayers, Jr., As Acting |) | |
| Warden of San Quentin State |) | |
| Prison, |) | |
| |) | |
| Respondent. |) | |

(DP)(HC) Doolin v. People of The State of California Doc. 3

16 This matter is before the Court on the pro se Petition filed by
17 Keith Zon Doolin ("Doolin") requesting an order directing the
18 California Supreme Court to decide his pending direct appeal. The
19 Petition originally was submitted to the Ninth Circuit Court of
20 Appeals on June 12, 2006 and thereafter returned to Doolin for filing
21 in this Court. In his Petition, Doolin complains that the briefing
22 on his direct appeal has been complete since April 11, 2005, and that
23 despite five letters and/or motions submitted to the state high court,
24 the matter still remains pending.

25 By consulting the Supreme Court docket for *People v. Doolin*, Case
26 Number S054489, this Court has confirmed that a judgment of death was
27 entered by the Fresno Superior Court on June 18, 1996, appellate
28 counsel, Robert Derham, was appointed to represent Doolin on December

1 on December 12, 2000, Doolin's opening brief was filed November 14,
2 2003, the state record was filed with the Supreme Court on February
3 20, 2004, the Respondent's brief was filed on October 6, 2004,
4 Doolin's reply brief was filed on April 12, 2005, and Doolin's state
5 habeas petition was filed in related Case Number S137884 on October
6 11, 2005.

7 The relief sought in Doolin's present Petition cannot be granted
8 because this Court is without authority to direct the California
9 Supreme Court to rule on his direct appeal. Although Doolin's
10 Petition is fashioned as a request for this Court to intervene in the
11 direct appeal proceedings and prod the California Supreme Court into
12 action, the underlying issue of his case is the constitutionality of
13 his conviction for capital murder and the sentence that he should
14 suffer the death penalty.¹ "[W]hen a state prisoner is challenging the
15 very fact or duration of his physical imprisonment, and the relief he
16 seeks is a determination that he is entitled to immediate release or
17 a speedier release from that imprisonment, his sole federal remedy is
18 a writ of habeas corpus." *Preiser v. Rodriguez*, 411 U.S. 475, 500
19 (1973). Neither the constitutionality of his conviction nor the
20 constitutionality of his sentence, however, have been exhausted as
21 required under Title 28 of the United States Code ("U.S.C.") §
22 2254(b)(1)(A). The applicable language of 28 U.S.C. § 2254(b)(1)(A)
23 is as follows: "An application for a writ of habeas corpus on behalf
24 of a person in custody pursuant to the judgment of a State Court shall
25 not be granted unless it appears that - the applicant has exhausted

26

27 ¹ Doolin strenuously argues that he is innocent of the charges
28 for which he was convicted and claims that misconduct on the part of
the prosecution, the trial court, and even his own appointed counsel
are to blame for his being on death row.

1 the remedies available in the courts of the State." In addition,
2 subdivision (c) of 28 U.S.C. § 2254 provides: "An applicant shall not
3 be deemed to have exhausted the remedies available in the courts of
4 the State, within the meaning of this section, if he has the right
5 under the law of the State to raise by any available procedure the
6 question presented." There is nothing before this Court suggesting
7 that the California Supreme Court cannot provide an effective process
8 to address the merits of Doolin's conviction and death sentence,
9 notwithstanding the complained of delay.

10 When, as in the present case, the appeal of a state
11 criminal conviction is pending, a would-be habeas corpus
12 petitioner must await the outcome of his appeal before his
13 state remedies are exhausted, even where the issue to be
14 challenged in the writ of habeas corpus has been finally
15 settled in the state courts.

16 *Sherwood v. Tomkins*, 716 F.2d 632, 634 (9th Cir. 1983). The prayer
17 for relief advanced by Doolin together with the current pending status
18 of his direct appeal in the California Supreme Court make his case
19 indistinguishable from *Sherwood*.

20 The Court has examined the exception to the holding in *Sherwood*,
21 as announced in *Coe v. Thurman*, 922 F.2d 528 (9th Cir. 1990) and finds
22 Doolin does not fall within the exception. In that case, the
23 petitioner, Coe, filed a petition for habeas corpus in federal
24 district court alleging two claims: a due process violation for
25 inordinate delay in the processing of his direct appeal in state
26 court; and ineffective assistance of appellate counsel. *Id.* at 529-
27 30. The state argued the holding in *Sherwood* was binding and that
28 Coe's federal petition was subject to dismissal. *Id.* at 530. The
Ninth Circuit rejected this approach and held "That since excessive
delay in obtaining an appeal may constitute a due process violation,

1 a prisoner need not fully exhaust his state remedies if the root of
2 his complaint is his inability to do so." *Id.* at 530-31. The
3 appellate court then undertook to address the merits and determine
4 whether the delay presented was so inordinate that it violated Coe's
5 due process rights. After considering controlling authority and the
6 four relevant factors,² the court found a due process violation. *Id.*
7 at 531-32. For the sake of comparison with Doolin's case, it must be
8 noted that in *Coe*, the delay in processing the appeal was less than
9 four years, the reason for the delay resulted from the state's failure
10 to monitor the "dilatory court reporter" so the transcript could be
11 certified, Coe consistently asserted his right to expedite his appeal,
12 and the delay resulted in prejudice because were his conviction
13 overturned, the passage of time would make retrial difficult. *Id.* at
14 531-32. *Coe*, however, involved once count of conspiracy and nine
15 counts of burglary with a ten-year prison sentence. In contrast,
16 Doolin was convicted of first degree capital murder and sentenced to
17 death. Capital trials are by nature lengthy and quite involved, if
18 not complex, particularly where the defendant's mental state is at
19 issue and/or where there are multiple victims. There also are
20 numerous administrative issues attendant upon direct appeals of
21 California death penalty cases, including that fact that 652 inmates
22 are on death row. Of those 652 inmates, 51 inmates were tried and
23 convicted in counties within the Fresno Division of the Eastern
24 District of California.³ Information available from the California

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26 ² The four factors are: (1) length of the delay; (2) reason for
27 the delay; (3) defendant's assertion of his right; and (4) prejudice.
Coe, 922 F.2d at 531-32.

28 ³ Those counties include Calaveras, Fresno, Inyo, Kern, King,
Madera, Mariposa, Merced, Stanislaus, Tulare, and Tuolumne.

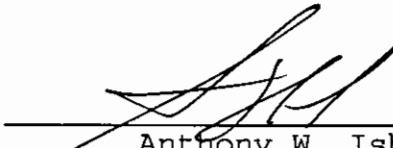
1 Supreme Court public records for these 51 inmates shows that the
2 amount of time it takes to schedule an oral argument following full
3 briefing ranges from 10 months to 80 months.⁴ Doolin's case is well
4 within this range. Thus, he has failed to establish that his case has
5 been inordinately delayed.

6 In light of the foregoing, Doolin's Petition IS DISMISSED. Once
7 Doolin completes his direct appeal before the California Supreme Court
8 and pursues state post-conviction relief, any subsequent federal
9 petition for habeas corpus relief may be filed in this Court according
10 to applicable federal law. Such petition will not, however, be
11 subject to the provisions of 28 U.S.C. § 2244(b), as it will not be
12 considered a "second or successive" petition within the meaning of the
13 statute. See *Slack v. v. McDaniel*, 529 U.S. 473, 487 (2000); *Anthony*
14 *v. Cambra*, 236 F.3d 568, 572 (9th Cir. 2000).

15
16 IT IS SO ORDERED.

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18 Dated: _____

7-5-06



Anthony W. Ishii
United States District Judge

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⁴ The 80 month lapse of time was unusual. The average length of time between completion of briefing and oral argument is approximately 14 to 15 months