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8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA  
10

11 MICHAEL N. JACOBSEN,

1: 06 CV 01254 LJO WMW HC

12 Petitioner,

MEMORANDUM OPINION AND ORDER RE  
RESPONDENT'S MOTION TO DISMISS  
PETITION FOR WRIT OF HABEAS CORPUS

13  
14 v.

[Doc. 11]

15 PEOPLE OF THE STATE OF CALIFORNIA, ORDER DENYING CERTIFICATE OF  
16 APPEALABILITY

17 Respondent.  
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21 Petitioner is a prisoner proceeding with a petition for writ of habeas corpus pursuant to 28  
22 U.S.C. Section 2254. Pending before the court is Respondent's motion to dismiss the petition.

23 **PROCEDURAL HISTORY**

24 On January 7, 2003, in Fresno County Superior Court, Petitioner entered a plea of no contest  
25 to one count of felony domestic violence pursuant to Penal Code Section 273.5, admitted that he  
26 personally used a knife in the commission of the offense within the meaning of Penal Code Section  
27 12022(b)(1), and admitted that he personally inflicted great bodily injury on his victim within the  
28 meaning of Penal Code Section 12022l7(3).

1 On February 5, 2003, Petitioner came before the trial court for judgment and sentencing.  
2 Pursuant to a stipulated plea agreement, the trial court sentenced Petitioner to a stayed, aggregate  
3 state prison term of six years. The trial court granted Petitioner probation for three years and  
4 imposed various terms and conditions. Petitioner did not appeal from the trial court's judgment and  
5 no collateral post-conviction challenges were filed until September 22, 2004.

6 From June 6, 2003, until September 13, 2004, Petitioner appeared before the trial court on  
7 numerous allegations that he had violated the terms and conditions of his probation. Each time,  
8 Petitioner's probation was reinstated. However, on September 13, 2004, after a contested probation  
9 violation hearing, the trial court revoked Petitioner's probation, lifted the stay and imposed the six-  
10 year prison sentence.

11 Petitioner appeal from this judgment. On September 8, 2005, in an unpublished opinion, the  
12 Court of Appeal, Fifth Appellate District affirmed the trial court's judgment. In doing so, the Court  
13 of Appeal noted in part that there was no conflict of interest at the time Petitioner entered his plea,  
14 but, also found that any issues concerning the validity of his plea were barred by the fact that  
15 Petitioner had failed to appeal from the order granting probation.

16 Following the revocation, Petitioner filed ten petitions for writ of habeas corpus in the  
17 California courts. The first of these was filed in Fresno County Superior Court on September 17,  
18 2004.

## 19 LEGAL STANDARD

### 20 JURISDICTION

21 Relief by way of a petition for writ of habeas corpus extends to a person in custody pursuant  
22 to the judgment of a state court if the custody is in violation of the Constitution or laws or treaties of  
23 the United States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); Williams v. Taylor, 120 S.Ct.  
24 1495, 1504 fn.7 (2000). Petitioner asserts that he suffered violations of his rights as guaranteed by  
25 the United States Constitution. In addition, the conviction challenged arises out of the Fresno  
26 County Superior Court, which is located within the jurisdiction of this court. 28 U.S.C. § 2254(a);  
27 2241(d). Accordingly, the court has jurisdiction over the action.

28 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of

1 1996 (“AEDPA”), which applies to all petitions for writ of habeas corpus filed after its enactment.  
2 Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997), *cert. denied*, 522 U.S. 1008, 118 S.Ct.  
3 586 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9<sup>th</sup> Cir. 1997) (quoting Drinkard v. Johnson, 97  
4 F.3d 751, 769 (5<sup>th</sup> Cir.1996), *cert. denied*, 520 U.S. 1107, 117 S.Ct. 1114 (1997), *overruled on other*  
5 *grounds by Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059 (1997) (holding AEDPA only applicable  
6 to cases filed after statute's enactment). The instant petition was filed after the enactment of the  
7 AEDPA, thus it is governed by its provisions.

#### 8 STANDARD OF REVIEW

9 This court may entertain a petition for writ of habeas corpus “in behalf of a person in custody  
10 pursuant to the judgment of a State court only on the ground that he is in custody in violation of the  
11 Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a).

12 The AEDPA altered the standard of review that a federal habeas court must apply with  
13 respect to a state prisoner's claim that was adjudicated on the merits in state court. Williams v.  
14 Taylor, 120 S.Ct. 1495, 1518-23 (2000). Under the AEDPA, an application for habeas corpus will  
15 not be granted unless the adjudication of the claim “resulted in a decision that was contrary to, or  
16 involved an unreasonable application of, clearly established Federal law, as determined by the  
17 Supreme Court of the United States;” or “resulted in a decision that was based on an unreasonable  
18 determination of the facts in light of the evidence presented in the State Court proceeding.” 28  
19 U.S.C. § 2254(d); Lockyer v. Andrade, 123 S.Ct. 1166, 1173 (2003) (disapproving of the Ninth  
20 Circuit’s approach in Van Tran v. Lindsey, 212 F.3d 1143 (9<sup>th</sup> Cir. 2000)); Williams v. Taylor, 120  
21 S.Ct. 1495, 1523 (2000). “A federal habeas court may not issue the writ simply because that court  
22 concludes in its independent judgment that the relevant state-court decision applied clearly  
23 established federal law erroneously or incorrectly.” Lockyer, at 1174 (citations omitted). “Rather,  
24 that application must be objectively unreasonable.” Id. (citations omitted).

25 While habeas corpus relief is an important instrument to assure that individuals are  
26 constitutionally protected, Barefoot v. Estelle, 463 U.S. 880, 887, 103 S.Ct. 3383, 3391-3392 (1983);  
27 Harris v. Nelson, 394 U.S. 286, 290, 89 S.Ct. 1082, 1086 (1969), direct review of a criminal  
28 conviction is the primary method for a petitioner to challenge that conviction. Brecht v.

1 Abrahamson, 507 U.S. 619, 633, 113 S.Ct. 1710, 1719 (1993). In addition, the state court’s factual  
2 determinations must be presumed correct, and the federal court must accept all factual findings made  
3 by the state court unless the petitioner can rebut “the presumption of correctness by clear and  
4 convincing evidence.” 28 U.S.C. § 2254(e)(1); Purkett v. Elem, 514 U.S. 765, 115 S.Ct. 1769  
5 (1995); Thompson v. Keohane, 516 U.S. 99, 116 S.Ct. 457 (1995); Langford v. Day, 110 F.3d 1380,  
6 1388 (9<sup>th</sup> Cir. 1997).

## 7 **DISCUSSION**

8 Respondent moves to dismiss this petition on the ground that it is barred by the statute of  
9 limitations. Petitioner opposes the motion.

10 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a  
11 petition if it “plainly appears from the face of the petition and any exhibits annexed to it that the  
12 Petitioner is not entitled to relief in the district court . . . .” The Advisory Committee Notes to Rule 5  
13 of the Rules Governing § 2254 Cases state that “an alleged failure to exhaust state remedies may be  
14 raised by the Attorney General, thus avoiding the necessity of a formal answer as to that ground.”  
15 The Ninth Circuit has referred to a respondent’s motion to dismiss as a request for the court to  
16 dismiss under Rule 4 of the Rules Governing § 2254 Cases. See, e.g., O’Bremski v. Maass, 915  
17 F.2d 418, 420 (1991); White v. Lewis, 874 F.2d 599, 602-03 (9<sup>th</sup> Cir. 1989); Hillery v. Pulley, 533  
18 F.Supp. 1189, 1194 & n.12 (E.D. Cal. 1982). Based on the Rules Governing Section 2254 Cases and  
19 case law, the court will review Respondent’s Motion to Dismiss pursuant to its authority under Rule  
20 4.

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

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

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

28 (B) the date on which the impediment to filing an application created by  
State action in violation of the Constitution or laws of the United States is removed, if

1 the applicant was prevented from filing by such State action;

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

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

6 (2) The time during which a properly filed application for State post-conviction or  
7 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.

8 In this case, Petitioner raises a single claim of ineffective assistance of counsel as related to  
9 the time of the his plea entered January 7, 2003. Judgment and sentencing were pronounced on this  
10 plea on February 5, 2003. This judgment and probation grant were final judgments under California  
11 law and therefore appealable. People v. Mazurette, 24 Cal.4th 789, 792 (2001) (an order granting  
12 probation is a final, appealable judgment).

13 If a petitioner does not appeal a state court judgment, the conviction becomes final on the  
14 date on which the time for filing such an appeal expired. See 28 U.S.C. § 2244(d)(1)(A). In  
15 California, a conviction becomes final 60 days after the superior court enters judgment. California  
16 Rules of Court, Rule 8.308. Lewis v. Mitchell, 173 F.Supp.2d 1057, 1060(C.D.Cal. 2001)(where  
17 petitioner did not appeal her conviction to the California Court of Appeal, the conviction became  
18 final 60 days after petitioner was sentenced). Petitioner's conviction thus became final on April 6,  
19 2003, and the one-year statute of limitations began running the following day. Therefore, the court  
20 finds that absent any tolling, Petitioner's last day to file a federal petition challenging the February 5,  
21 2003 judgment was April 6, 2004.

22 Title 28 U.S.C. § 2244(d)(2) states that the "time during which a properly filed application  
23 for State post-conviction or other collateral review with respect to the pertinent judgment or claim is  
24 pending shall not be counted toward" the one year limitation period. 28 U.S.C. § 2244(d)(2). In  
25 Nino v. Galaza, the Ninth Circuit held that the "statute of limitations is tolled from the time the first  
26 state habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral  
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1 challenge.”<sup>1</sup> Nino v. Galaza, 183 F.3d 1003, 1006 (9<sup>th</sup> Cir. 1999), *cert. denied*, 120 S.Ct. 1846  
2 (2000); see, also, Taylor v. Lee, 186 F.3d 557 (4<sup>th</sup> Cir. 1999); Barnett v. Lemaster, 167 F.3d 1321,  
3 1323 (10<sup>th</sup> Cir. 1999). The court finds that Petitioner is not entitled to tolling pursuant to Section  
4 2244(d)(2), because his state petitions were all filed after April 6, 2004, when the statute expired..  
5 Because the limitations period had already expired, the collateral challenge had no tolling  
6 consequence. Green v. White, 223 F.3d 1001, 1003 (9<sup>th</sup> Cir.2000) (Petitioner is not entitled to  
7 tolling where the limitations period has already run); see also Webster v. Moore, 199 F.3d 1256  
8 (11<sup>th</sup> Cir.2000).

9 The limitations period is subject to equitable tolling if “extraordinary circumstances beyond a  
10 prisoner’s control” have made it impossible for the petition to be filed on time. Calderon v. U.S.  
11 Dist. Ct. (Kelly), 163 F.3d 530, 541 (9<sup>th</sup> Cir. 1998), *citing Alvarez-Machain v. United States*, 107  
12 F.3d 696, 701 (9<sup>th</sup> Cir. 1996), *cert denied*, 522 U.S. 814, 118 S.Ct. 60, 139 (1997); Calderon v.  
13 United States Dist. Court (Beeler), 128 F.3d 1283,1288 (9<sup>th</sup> Cir.), *overruled in part on other grounds*  
14 *by, Calderon v. United States Dist. Court (Kelly)*, 163 F.3d 530 (9<sup>th</sup> Cir. 1998) (*en banc*) (noting that  
15 “[e]quitable tolling will not be available in most cases, as extensions of time will only be granted if  
16 ‘extraordinary circumstances’ beyond a prisoner’s control make it impossible to file a petition on  
17 time”). “When external forces, rather than a petitioner’s lack of diligence, account for the failure to  
18 file a timely claim, equitable tolling of the statute of limitations may be appropriate.” Miles v.  
19 Prunty, 187 F.3d 1104, 1107 (9<sup>th</sup> Cir.1999), *citing Kelly*, 163 F.3d at 541; Beeler, 128 F.3d at  
20 1288-1289.

21 In opposition to Respondent’s motion to dismiss, Petitioner argues that he is a non-lawyer,  
22 doing the best to prosecute his case despite his lack of knowledge of the law. The Ninth Circuit has  
23 held that claims of ignorance of the law and illiteracy are insufficient to justify equitable tolling.

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25 <sup>1</sup>In California, the Supreme Court, intermediate Courts of Appeal, and Superior Courts all have original habeas  
26 corpus jurisdiction. See, Nino 183 F.3d at 1006, n. 2 (9<sup>th</sup> Cir. 1999). Although a Superior Court order denying habeas corpus  
27 relief is non-appealable, a state prisoner may file a new habeas corpus petition in the Court of Appeal. Id. If the Court of  
28 Appeal denies relief, the petitioner may seek review in the California Supreme Court by way of a petition for review, or may  
instead file an original habeas petition in the Supreme Court. See, id.

1 See, e.g., Hughes v. Idaho State Bd. of Corrections, 800 F.2d 905, 909 (9<sup>th</sup> Cir.1986) (pro se  
2 prisoner's illiteracy and lack of knowledge of law unfortunate but insufficient to establish cause);  
3 Kibler v. Walters, 220 F.3d 1151, 1153 (9<sup>th</sup> Cir. 2000) (lack of knowledge of state law not cause);  
4 See, also, Marsh v. Soares, 223 F.2d 1217, 1220 (10<sup>th</sup> Cir. 2000); Fisher v. Johnson, 174 F.3d 710  
5 (5<sup>th</sup> Cir. 1999); Rose v. Dole, 945 F.2d 1331, 1335 (6th Cir.1991). Accordingly, Petitioner's  
6 argument provides no basis for equitable tolling.

7 Petitioner also claims that he was unable to get his transcripts from his appellate attorney in a  
8 timely manner. However, neither appellate counsel's failure to return trial transcripts more quickly  
9 nor trial counsel's alleged negligence constitute "extraordinary circumstances" necessitating  
10 equitable tolling. See Frye v. Hickman, 273 F.3d 1144, 1146 (9<sup>th</sup> Cir.2001) (stating that neither  
11 miscalculation of the limitations period by defense counsel nor negligence in general constitute  
12 extraordinary circumstances sufficient to warrant equitable tolling), *cert. denied*, --- U.S. ---, 122  
13 S.Ct. 1913 (2000).

14 Having concluded that Petitioner is entitled to neither statutory nor equitable tolling, the  
15 court must find that the statute of limitations ran on April 6, 2004. The present petition, filed  
16 September 13, 2006, is therefore untimely and barred by the statute of limitations.

17 Petitioner may seek to appeal from the judgment of the court in this case. Petitioner cannot  
18 proceed on such an appeal absent a certificate of appealability. The controlling statute, 28 U.S.C. §  
19 2253, provides as follows:

- 20 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge,  
21 the final order shall be subject to review, on appeal, by the court of appeals for the circuit in  
22 which the proceeding is held.  
23 (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a  
24 warrant to remove to another district or place for commitment or trial a person charged with a  
25 criminal offense against the United States, or to test the validity of such person's detention  
26 pending removal proceedings.  
27 (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not  
28 be taken to the court of appeals from--  
(A) the final order in a habeas corpus proceeding in which the detention complained of arises  
out of process issued by a State court; or  
(B) the final order in a proceeding under section 2255.  
(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made  
a substantial showing of the denial of a constitutional right.  
(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or  
issues satisfy the showing required by paragraph (2).

1 In the present case, the court finds no denial of a constitutional right. Accordingly, a  
2 certificate of appealability will be denied.

3  
4 Based on the above, the court HEREBY ORDERS as follows:

- 5 1) Respondent's motion to dismiss is GRANTED;  
6 2) This petition for writ of habeas corpus is DISMISSED as barred by the statute of limitations;  
7 3) A certificate of appealability is DENIED;  
8 4) The Clerk of the Court is directed to enter judgment for Respondent and to close this case.

9  
10 IT IS SO ORDERED.

11 **Dated: February 6, 2008**

**/s/ Lawrence J. O'Neill**  
UNITED STATES DISTRICT JUDGE