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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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11 PHANAT DETHPHILAPHANH,

1: 08 CV 0289 WMW HC

12 Petitioner,

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

13
14 v.

[Doc. 9]

15 HOREL,

16 Respondent.
17 _____/

18
19
20 Petitioner is a prisoner proceeding with a petition for writ of habeas corpus pursuant to 28
21 U.S.C. Section 2254. Pursuant to Title 28 U.S.C. § 636(c)(1), the parties have consented to the
22 jurisdiction of the United States Magistrate Judge.
23

24 **PROCEDURAL HISTORY**

25 On February 2, 1998, in Fresno County Superior Court, Petitioner pled guilty to first degree
26 murder and admitted a personal arming enhancement. On April 7, 1998, the court sentenced
27 Petitioner to serve an indeterminate prison term of 28 years to life. Petitioner filed a direct appeal
28 and on March 30, 1999, the California Court of Appeal, Fifth Appellate District ("Court of Appeal"),

1 affirmed the judgment.

2 Petitioner subsequently filed three pro se state post-conviction collateral challenges:

3 First Petition

4 August 7, 2006: Petition for writ of habeas corpus filed in Fresno County Superior Court

5 August 11, 2006 : Petition denied

6 Second Petition

7 August 30, 2006: Petition for writ of habeas corpus filed in Court of Appeal

8 September 21, 2006: Petition denied.

9 Third Petition

10 November 9, 2006: Petition for writ of habeas corpus filed in California Supreme Court

11 May 9, 2007: Petition denied.

12 Petitioner filed the present action on February 28, 2008.

13 **LEGAL STANDARD**

14 JURISDICTION

15 Relief by way of a petition for writ of habeas corpus extends to a person in custody pursuant
16 to the judgment of a state court if the custody is in violation of the Constitution or laws or treaties of
17 the United States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); Williams v. Taylor, 120 S.Ct.
18 1495, 1504 fn.7 (2000). Petitioner asserts that he suffered violations of his rights as guaranteed by
19 the United States Constitution. In addition, the conviction challenged arises out of the Fresno
20 County Superior Court, which is located within the jurisdiction of this court. 28 U.S.C. § 2254(a);
21 2241(d). Accordingly, the court has jurisdiction over the action.

22 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of
23 1996 (“AEDPA”), which applies to all petitions for writ of habeas corpus filed after its enactment.
24 Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997), *cert. denied*, 522 U.S. 1008, 118 S.Ct.
25 586 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (quoting Drinkard v. Johnson, 97
26 F.3d 751, 769 (5th Cir.1996), *cert. denied*, 520 U.S. 1107, 117 S.Ct. 1114 (1997), *overruled on other*
27 *grounds by Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059 (1997) (holding AEDPA only applicable
28 to cases filed after statute's enactment). The instant petition was filed after the enactment of the

1 AEDPA, thus it is governed by its provisions.

2 STANDARD OF REVIEW

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

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

19 While habeas corpus relief is an important instrument to assure that individuals are
20 constitutionally protected, Barefoot v. Estelle, 463 U.S. 880, 887, 103 S.Ct. 3383, 3391-3392 (1983);
21 Harris v. Nelson, 394 U.S. 286, 290, 89 S.Ct. 1082, 1086 (1969), direct review of a criminal
22 conviction is the primary method for a petitioner to challenge that conviction. Brecht v.
23 Abrahamson, 507 U.S. 619, 633, 113 S.Ct. 1710, 1719 (1993). In addition, the state court’s factual
24 determinations must be presumed correct, and the federal court must accept all factual findings made
25 by the state court unless the petitioner can rebut “the presumption of correctness by clear and
26 convincing evidence.” 28 U.S.C. § 2254(e)(1); Purkett v. Elem, 514 U.S. 765, 115 S.Ct. 1769
27 (1995); Thompson v. Keohane, 516 U.S. 99, 116 S.Ct. 457 (1995); Langford v. Day, 110 F.3d 1380,
28 1388 (9th Cir. 1997).

DISCUSSION

Respondent moves to dismiss this petition on the ground that it is untimely and barred by the statute of limitations. Petitioner has not opposed or otherwise responded to the motion.

Procedural Basis for Motion to Dismiss

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

Statute of Limitations Bar

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

(1) A 1-year period of limitation shall apply to an application for a writ 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 –

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

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

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

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

1 (2) The time during which a properly filed application for State post-conviction or
2 other collateral review with respect to the pertinent judgment or claim is pending shall
3 not be counted toward any period of limitation under this subsection.

4 In this case, the Court of Appeal affirmed Petitioner's judgment on March 30, 1999.
5 Petitioner did not seek review with the California Supreme Court, thus the time to seek direct review
6 ended upon the expiration of the 40-day period following the issuance of the opinion, on May 9,
7 1999. Cal. Rules of Court, rule 28(b)(renumbered to 8.500(e)(1)); Smith v. Duncan, 297 F.3d 809,
8 813 (9th Cir. 2002). The one-year statute of limitations began running the following day - - May 10,
9 1999. Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001)(citing Fed.R.Civ.P. 6(a)). Thus,
10 absent tolling, the last day to file a federal petition was May 9,2000.

11 Title 28 U.S.C. § 2244(d)(2) states that the "time during which a properly filed application
12 for State post-conviction or other collateral review with respect to the pertinent judgment or claim is
13 pending shall not be counted toward" the one year limitation period. 28 U.S.C. § 2244(d)(2). In
14 Nino v. Galaza, the Ninth Circuit held that the "statute of limitations is tolled from the time the first
15 state habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral
16 challenge."¹ Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 1846
17 (2000); see, also, Taylor v. Lee, 186 F.3d 557 (4th Cir. 1999); Barnett v. Lemaster, 167 F.3d 1321,
18 1323 (10th Cir. 1999). The Court reasoned that tolling the limitations period during the time a
19 petitioner is preparing his petition to file at the next appellate level reinforces the need to present all
20 claims to the state courts first and will prevent the premature filing of federal petitions out of concern
21 that the limitation period will end before all claims can be presented to the state supreme court. Id. at
22 1005. In Carey v. Saffold, 536 U.S. 214, 122 S.Ct. 2134 (2002), the Court determined that under
23 California's collateral review process, the intervals between a lower court decision and the filing of a
24 new petition in a higher court are within the scope of the statutory word "pending." Id. at 2140.

25 ¹In 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 (9th 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 Thus, as in Nino v. Galaza, tolling occurs during the intervals between petitions in the state courts.

2 In this case, Petitioner did not file his first post-conviction petition for relief until August 7,
3 2006, long after the statute of limitations expired in 2000. Thus, the court finds that Petitioner is not
4 entitled to statutory tolling of the statute of limitations. See Green v. White, 223 F.3d 1001, 1003
5 (9th Cir.2000) (Petitioner is not entitled to tolling where the limitations period has already run);
6 The limitations period is subject to equitable tolling if “extraordinary circumstances beyond a
7 prisoner’s control” have made it impossible for the petition to be filed on time. Calderon v. U.S.
8 Dist. Ct. (Kelly), 163 F.3d 530, 541 (9th Cir. 1998), *citing* Alvarez-Machain v. United States, 107
9 F.3d 696, 701 (9th Cir. 1996), *cert denied*, 522 U.S. 814, 118 S.Ct. 60, 139 (1997); Calderon v.
10 United States Dist. Court (Beeler), 128 F.3d 1283,1288 (9th Cir.), *overruled in part on other grounds*
11 *by*, Calderon v. United States Dist. Court (Kelly), 163 F.3d 530 (9th Cir. 1998) (*en banc*) (noting that
12 “[e]quitable tolling will not be available in most cases, as extensions of time will only be granted if
13 ‘extraordinary circumstances’ beyond a prisoner’s control make it impossible to file a petition on
14 time”). “When external forces, rather than a petitioner’s lack of diligence, account for the failure to
15 file a timely claim, equitable tolling of the statute of limitations may be appropriate.” Miles v.
16 Prunty, 187 F.3d 1104, 1107 (9th Cir.1999), *citing* Kelly, 163 F.3d at 541; Beeler, 128 F.3d at
17 1288-1289. In this case, Petitioner has not opposed the motion to dismiss and the court’s
18 examination of the petition reveals no basis for equitable tolling.

19 Based on all of the above, the court must conclude that this petition for writ of habeas corpus
20 is untimely and is barred by the statute of limitations.

21 Petitioner may seek to appeal from the judgment of the court in this case. Petitioner cannot
22 proceed on such an appeal absent a certificate of appealability. The controlling statute, 28 U.S.C. §
23 2253, provides as follows:

- 24 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge,
25 the final order shall be subject to review, on appeal, by the court of appeals for the circuit in
26 which the proceeding is held.
27 (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a
28 warrant to remove to another district or place for commitment or trial a person charged with a
criminal offense against the United States, or to test the validity of such person’s detention
pending removal proceedings.
(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not
be taken to the court of appeals from--

- 1 (A) the final order in a habeas corpus proceeding in which the detention complained of arises
2 out of process issued by a State court; or
3 (B) the final order in a proceeding under section 2255.
4 (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made
5 a substantial showing of the denial of a constitutional right.
6 (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or
7 issues satisfy the showing required by paragraph (2).

8
9 In the present case, the court finds no denial of a constitutional right. Accordingly, a
10 certificate of appealability will be denied.
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12 Based on the foregoing, IT IS HEREBY ORDERED as follows:

- 13 1) Respondent's motion to dismiss is GRANTED;
14 2) this petition for writ of habeas corpus is DISMISSED as barred by the statute of limitations;
15 3) a certificate of appealability is DENIED;
16 3) the Clerk of the Court is directed to enter judgment for Respondent and to close this case.
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19 IT IS SO ORDERED.

20 Dated: January 12, 2009

21 /s/ William M. Wunderlich
22 UNITED STATES MAGISTRATE JUDGE
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