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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JOEL WILLIAMS,

1: 08 CV 0325 AWI WMW HC

Petitioner,

FINDINGS AND RECOMMENDATIONS RE
MOTION TO DISMISS PETITION FOR WRIT
OF HABEAS CORPUS

v.

[Doc. 16]

ROSANNE CAMPBELL, WARDEN,

Respondent.

_____/

Petitioner is a prisoner proceeding with a petition for writ of habeas corpus pursuant to 28 U.S.C. Section 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72-302. Pending before the court is Respondent’s motion to dismiss.

PROCEDURAL HISTORY

On April 17, 1987, in Kern County Superior Court, Petitioner was convicted of first degree murder with a firearm enhancement. The court sentenced Petitioner to serve an indeterminate prison term of two years for the firearm enhancement allegation, and a consecutive term of 25 years to life

1 for murder.

2 Petitioner filed a direct appeal. On June 30, 1988, , the California Court of Appeal, Fifth
3 Appellate District (“Court of Appeal”), affirmed the judgment. Petitioner filed a petition for review
4 with the California Supreme Court, which denied the petition on September 21, 1998.

5 Petitioner subsequently filed four pro se state post-conviction collateral challenges: Petitioner
6 filed the present action on January 25, 2008.

7 **LEGAL STANDARD**

8 JURISDICTION

9 Relief by way of a petition for writ of habeas corpus extends to a person in custody pursuant
10 to the judgment of a state court if the custody is in violation of the Constitution or laws or treaties of
11 the United States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); Williams v. Taylor, 120 S.Ct.
12 1495, 1504 fn.7 (2000). Petitioner asserts that he suffered violations of his rights as guaranteed by
13 the United States Constitution. In addition, the conviction challenged arises out of the Kern County
14 Superior Court, which is located within the jurisdiction of this court. 28 U.S.C. § 2254(a); 2241(d).
15 Accordingly, the court has jurisdiction over the action.

16 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of
17 1996 (“AEDPA”), which applies to all petitions for writ of habeas corpus filed after its enactment.
18 Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997), *cert. denied*, 522 U.S. 1008, 118 S.Ct.
19 586 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (quoting Drinkard v. Johnson, 97
20 F.3d 751, 769 (5th Cir.1996), *cert. denied*, 520 U.S. 1107, 117 S.Ct. 1114 (1997), *overruled on other*
21 *grounds by Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059 (1997) (holding AEDPA only applicable
22 to cases filed after statute's enactment). The instant petition was filed after the enactment of the
23 AEDPA, thus it is governed by its provisions.

24 STANDARD OF REVIEW

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

28 The AEDPA altered the standard of review that a federal habeas court must apply with

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

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

23 DISCUSSION

24 Respondent moves to dismiss this petition on the ground that it is untimely and barred by the
25 statute of limitations. Petitioner opposes the motion.

26 Procedural Basis for Motion to Dismiss

27 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition
28 if it “plainly appears from the face of the petition and any exhibits annexed to it that the Petitioner is

1 not entitled to relief in the district court” The Advisory Committee Notes to Rule 5 of the Rules
2 Governing § 2254 Cases state that “an alleged failure to exhaust state remedies may be raised by the
3 Attorney General, thus avoiding the necessity of a formal answer as to that ground.” The Ninth
4 Circuit has referred to a respondent’s motion to dismiss as a request for the court to dismiss under
5 Rule 4 of the Rules Governing § 2254 Cases. See, e.g., O’Bremski v. Maass, 915 F.2d 418, 420
6 (1991); White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989); Hillery v. Pulley, 533 F.Supp. 1189,
7 1194 & n.12 (E.D. Cal. 1982). Based on the Rules Governing Section 2254 Cases and case law, the
8 court will review Respondent’s Motion to Dismiss pursuant to its authority under Rule 4.

9 Statute of Limitations Bar

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

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

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

17 (B) the date on which the impediment to filing an application created by
18 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;

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

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

22 (2) The time during which a properly filed application for State post-conviction or
23 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.

24 In this case, the California Supreme Court denied review on September 21, 1998. The state
25 appeal process became “final” on September 21, 1998, before the April 25, 1996 effective date of the
26 AEDPA statute of limitations. Petitioner’s petition was therefore due, in the normal course, one year
27 from the effective date of the statute of limitations. Thus, absent tolling, the last day to file a federal
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1 petition was April 24, 1997. See Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001)(citing
2 Fed.R.Civ.P. 6(a)).

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

18 In this case, it is undisputed that Petitioner’s first post-conviction petition was filed on
19 November 21, 2006, long after the expiration of the statute of limitations on April 24, 1997. Thus,
20 the court finds that Petitioner is not entitled to statutory tolling of the statute of limitations.

21 In his opposition to Respondent’s motion to dismiss, Petitioner contends that his case is not
22 governed by the statute of limitations set forth in 28 U.S.C. § 2244(d)(1). Specifically, Petitioner
23 argues that his petition is based on a change in California law which became effective on January 1,

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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 2005. This law allows the admission of evidence regarding battered person's syndrome. Petitioner
2 does not explain what section of 28 U.S.C. § 2244(d)(1) he believes is applicable to his case, but
3 merely states that he relies on a change in the law.

4 The two sections of 28 U.S.C. § 2244(d)(1) which could apply to changes in the law are
5 sections (B) and (C), which provide that the statute of limitations runs from the following:

- 6 (B) the date on which the impediment to filing an application created by State action in
7 violation of the Constitution or laws of the United States is removed, if the applicant was
8 prevented from filing by such State action;
9 (C) the date on which the constitutional right asserted was initially recognized by the
10 Supreme Court, if the right has been newly recognized by the Supreme Court and made
11 retroactively applicable to cases on collateral review.

12 Petitioner makes no claim in either his petition or his opposition to the motion to dismiss that any
13 State action taken in violation of the Constitution or laws of the United States prevented him from
14 filing his petition at an earlier date. Further, Petitioner does not claim that he is relying upon a
15 constitutional right newly recognized by the Supreme Court. Accordingly, the court can find no
16 basis on which to hold that the statute of limitations in this case is governed by either subsection (B)
17 or subsection (C). It must conclude, therefore, that it is governed by subsection (A).

18 In light of all of the above, the court concludes that this petition for writ of habeas corpus is
19 untimely and is barred by the statute of limitations.

20 Based on the foregoing, IT IS HEREBY RECOMMENDED as follows:

- 21 1) that Respondent's motion to dismiss be GRANTED;
22 2) that this petition for writ of habeas corpus be DISMISSED as barred by the statute of
23 limitations;
24 3) that the Clerk of the Court be directed to enter judgment for Respondent and to close this
25 case.

26 These findings and recommendations are submitted to the United States District Judge
27 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636 (b) (1). Within thirty days
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1 after being served with these findings and recommendations, any party may file written objections
2 with the court and serve a copy on all parties. Such a document should be captioned “Objections to
3 Magistrate Judge’s Findings and Recommendations.” Any reply to the objections shall be served
4 and filed within ten days after service of the objections. The parties are advised that failure to file
5 objections within the specified time may waive the right to appeal the District Court’s order.

6 Martinez v. Y1st, 951 F.2d 1153 (9th Cir. 1991).

7 IT IS SO ORDERED.

8 **Dated: January 12, 2009**

/s/ William M. Wunderlich
UNITED STATES MAGISTRATE JUDGE

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