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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

JOSEPH DONALD ADDISON,  
Petitioner,  
v.  
CYNTHIA TAMPKINS, Warden,  
Respondent.

No. 1:18-cv-00725-SKO HC

**FINDINGS AND RECOMMENDATION  
THAT THE COURT DISMISS  
THE PETITION AS UNTIMELY**

**COURT CLERK TO ASSIGN DISTRICT  
JUDGE**

**(Doc. 1)**

**Screening Order**

Petitioner, Joseph Donald Addison, is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner presents two grounds for habeas relief: (1) violation of his *Miranda*<sup>1</sup> and *Massiah*<sup>2</sup> rights; and (2) judicial bias.

**I. Preliminary Screening**

Rule 4 of the Rules Governing § 2254 Cases requires the Court to conduct a preliminary review of each petition for writ of habeas corpus. The Court must dismiss a petition "[i]f it

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).  
<sup>2</sup> *Massiah v. United States*, 377 U.S. 201 (1964).

1 plainly appears from the petition . . . that the petitioner is not entitled to relief." Rule 4 of the  
2 Rules Governing 2254 Cases; *see also Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990).  
3 A petition for writ of habeas corpus should not be dismissed without leave to amend unless it  
4 appears that no tenable claim for relief can be pleaded were such leave to be granted. *Jarvis v.*  
5 *Nelson*, 440 F.2d 13, 14 (9th Cir. 1971).  
6

7 The Ninth Circuit has held that the a district court may *sua sponte* dismiss a petition for  
8 writ of habeas corpus on the ground that it is untimely, so long as the court provides the petitioner  
9 with adequate notice of its intent to dismiss and an opportunity to respond. *Herbst v. Cook*, 260  
10 F.3d 1039, 1042-43 (9th Cir. 2001).  
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## 12 **II. Procedural Background**

13 On April 16, 1996, Petitioner was convicted of three counts of second degree robbery.  
14 The judgment was affirmed by the California Court of Appeal for the Fifth Appellate District on  
15 October 7, 1997. The California Supreme Court denied the petition for review without prejudice  
16 on December 23, 1997.

17 On May 15, 2017, Petitioner filed a petition for writ of habeas corpus with the Madera  
18 Superior Court, which was denied as untimely on May 22, 2017. On June 21, 2017, Petitioner  
19 filed a petition for writ of habeas corpus with the California Court of Appeal, Fifth Appellate  
20 District, which was denied on June 29, 2017. On July 12, 2017, Petitioner filed a petition for writ  
21 of habeas corpus with the California Supreme Court, which was denied on September 13, 2017.  
22

## 23 **III. Standard of Review**

24 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of  
25 1996 ("AEDPA"), which applies to all petitions for writ of habeas corpus filed after its  
26 enactment. *Lindh v. Murphy*, 521 U.S. 320, 327 (1997). AEDPA provides a one-year period of  
27 limitation in which a petitioner may file a petition for writ of habeas corpus. 28 U.S.C. §  
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1 2244(d)(1). The limitations period is measured from the latest of:

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

5 (B) the date on which the impediment to filing a State action in  
6 violation of the Constitution or laws of the United States is  
7 removed, if the applicant was prevented from filing by such state  
8 action;

9 (C) the date on which the constitutional right asserted was  
10 initially recognized by the Supreme Court and made retroactively  
11 applicable to cases on collateral review; or

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

15 28 U.S.C. § 2244(d)(1).

16 The limitations period is tolled during the time that a “properly filed” application for  
17 review is in state court. § 2244(d)(2) (“The time during which a properly filed application for  
18 State post-conviction or other collateral review with respect to the pertinent judgment or claim is  
19 pending shall not be counted toward any period of limitation under this subsection.”)

#### 20 **IV. Petitioner’s Petition Is Untimely**

21 Here, direct review in the State of California ended on December 23, 1997, when the  
22 California Supreme Court denied review. The federal statutory limitations period began on  
23 March 23, 1998, following the expiration of the 90-day period to file a petition for writ of  
24 certiorari in the United States Supreme Court. Accordingly, the one-year statutory limitations  
25 period expired on March 23, 1999. Petitioner filed his petition for writ of habeas corpus with this  
26 court on May 25, 2018; consequently unless Petitioner is entitled to statutory or equitable tolling,  
27 the petition is untimely.

28 The limitations period is not tolled from the time the state court issues a final decision on  
direct appeal to the time the first state collateral challenge is filed, because there is no case  
“pending” in state court during this interval. *Porter v. Ollison*, 620 F.3d 952, 958 (9th Cir. 2010)

1 (citing *Rasberry v. Garcia*, 448 F.3d 1150, 1153 n.1 (9th Cir. 2006)).

2 Based on the pending petition, as well as the California courts' information, Petitioner did  
3 not file his first state post-conviction collateral action until May 15, 2017—long after the  
4 limitations period expired on March 23, 1999. Because Petitioner's limitations period expired  
5 before he filed his petition with the Supreme Court, his filing in the Supreme Court does not  
6 extend his limitations period. *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003)  
7 (“[S]ection 2244(d) does permit the reinitiation of the limitations period that has ended before the  
8 state petition was filed.”); *Green v. White*, 223 F.3d 1001, 1003 (9th Cir. 2000); *Jiminez v. Rice*,  
9 276 F.3d 478, 482 (9th Cir. 2001). Consequently, Petitioner's petition is untimely and the Court  
10 recommends the petition be dismissed.  
11

12 **V. Certificate of Appealability**

13 A petitioner seeking a writ of habeas corpus has no absolute entitlement to appeal a  
14 district court's denial of his petition, but may only appeal in certain circumstances. *Miller-El v.*  
15 *Cockrell*, 537 U.S. 322, 335-36 (2003). The controlling statute in determining whether to issue a  
16 certificate of appealability is 28 U.S.C. § 2253, which provides:  
17

18 (a) In a habeas corpus proceeding or a proceeding under section 2255  
19 before a district judge, the final order shall be subject to review, on appeal, by  
20 the court of appeals for the circuit in which the proceeding is held.

21 (b) There shall be no right of appeal from a final order in a proceeding  
22 to test the validity of a warrant to remove to another district or place for  
23 commitment or trial a person charged with a criminal offense against the  
24 United States, or to test the validity of such person's detention pending  
25 removal proceedings.

26 (c) (1) Unless a circuit justice or judge issues a certificate of  
27 appealability, an appeal may not be taken to the court of appeals from—

28 (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.

1 (2) A certificate of appealability may issue under paragraph (1)  
2 only if the applicant has made a substantial showing of the denial of a  
3 constitutional right.

4 (3) The certificate of appealability under paragraph (1) shall  
5 indicate which specific issues or issues satisfy the showing required by  
6 paragraph (2).

7 If a court denies a habeas petition, the court may only issue a certificate of appealability  
8 "if jurists of reason could disagree with the district court's resolution of his constitutional claims  
9 or that jurists could conclude the issues presented are adequate to deserve encouragement to  
10 proceed further." *Miller-El*, 537 U.S. at 327; *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).  
11 Although the petitioner is not required to prove the merits of his case, he must demonstrate  
12 "something more than the absence of frivolity or the existence of mere good faith on his . . .  
13 part." *Miller-El*, 537 U.S. at 338.

14 Reasonable jurists would not find the Court's determination that the petition is barred by  
15 the statute of limitations to be debatable, wrong, or deserving of encouragement to proceed  
16 further. Accordingly, the undersigned recommends that the Court decline to issue a certificate of  
17 appealability.

## 18 **VI. Conclusion and Recommendation**

19 The undersigned recommends that the Court dismiss the Petition for writ of habeas corpus  
20 with prejudice and decline to issue a certificate of appealability.

21 These Findings and Recommendations will be submitted to the United States District  
22 Judge assigned to the case, pursuant to the provisions of 28 U.S.C § 636(b)(1). Within **thirty**  
23 **(30) days** after being served with these Findings and Recommendations, either party may file  
24 written objections with the Court. The document should be captioned "Objections to Magistrate  
25 Judge's Findings and Recommendations." Replies to the objections, if any, shall be served and  
26 filed within **fourteen (14) days** after service of the objections. The parties are advised that failure  
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to file objections within the specified time may constitute waiver of the right to appeal the District Court's order. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 ((9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991))).

The Court Clerk is hereby directed to assign a district judge to this action.

IT IS SO ORDERED.

Dated: June 1, 2018

/s/ Sheila K. Olerto  
UNITED STATES MAGISTRATE JUDGE