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**United States District Court**  
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KUN SHAN PENG,	)	No. C 07-4797 MMC (PR)
	)	
Petitioner,	)	
	)	<b>ORDER DENYING MOTION TO</b>
v.	)	<b>DISMISS</b>
	)	
JAMES TILTON, Director of the	)	
California Department of	)	
Corrections; BEN CURRY, Warden,	)	<b>(Docket No. 13)</b>
	)	
Respondents.	)	

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On September 18, 2007, petitioner, a California prisoner incarcerated at San Quentin State Prison and proceeding pro se, filed the above-titled petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. After reviewing the petition, the Court ordered respondent to file an answer showing cause why the petition should not be granted, or in the alternative, a motion to dismiss on procedural grounds. Respondent chose the latter course, and has filed a motion to dismiss the petition on the ground that the petition is barred by the applicable one-year statute of limitations. See 28 U.S.C. § 2244(d). Petitioner has filed opposition to the motion, and respondent has filed a reply.

**BACKGROUND**

On August 5, 1992, in the Superior Court of Santa Clara County (“Superior Court”),

1 petitioner pleaded guilty to second degree murder. (Resp.'s Ex. 1 at 9.)<sup>1</sup> On October 9,  
2 1992, he was sentenced to a term of fifteen years to life in state prison. (Ex. 2.) Petitioner  
3 did not appeal his conviction or sentence. (Pet. at 3.)

4 On April 23, 1997, petitioner filed a petition for a writ of habeas corpus in the  
5 Superior Court. (Ex. 4.) On May 23, 1997, the court denied the petition. (Ex. 5.)

6 Also on April 23, 1997, petitioner filed a petition for a writ of habeas corpus in the  
7 California Supreme Court. (Ex. 3.) On July 30, 1997, the court denied the petition. (Id.)

8 More than nine years later, on November 16, 2006, petitioner filed a petition for a writ  
9 of habeas corpus in the Superior Court. (Trav. at 9.) On January 22, 2007, the court denied  
10 the petition as untimely. (Ex. 6.)

11 Thereafter, also in 2007, petitioner filed several more state habeas petitions. (Exs. 7-  
12 10.) Petitioner's final state habeas petition, filed in the California Supreme Court on May 4,  
13 2007, was denied on August 29, 2007. (Ex. 11.)

14 On September 28, 2007, petitioner filed the instant petition, claiming his conviction is  
15 invalid because he acted in self-defense, the trial court erroneously ruled that his confession  
16 could be admitted against him, he was incompetent to plead guilty, and his attorney provided  
17 ineffective assistance. By order filed April 10, 2008, the Court dismissed the first two claims  
18 because they allege the deprivation of constitutional rights that occurred before petitioner  
19 pleaded guilty. See Haring v. Prosise, 462 U.S. 306, 319-20 (1983) (holding defendant who  
20 pleads guilty cannot later raise in habeas corpus proceedings independent claims relating to  
21 deprivation of constitutional rights that occurred before plea of guilty). Thus, the only claims  
22 at issue herein are petitioner's claims that he was incompetent to plead guilty and that he was  
23 provided with ineffective assistance of counsel.

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27 <sup>1</sup>Unless otherwise noted, all exhibits referenced hereinafter are those filed by  
28 respondent in support of the motion to dismiss.



1 clock at zero); it can only serve to pause a clock that has not yet fully run. Once  
2 the limitations period is expired, collateral petitions can no longer serve to  
3 avoid a statute of limitations.”). Petitioner did not begin filing his state habeas  
4 corpus petitions [sic] April 23, 1997, over three years and four months after the  
5 limitations period had expired. Accordingly, the state collateral proceedings  
6 did not toll the statute. Petitioner did not file this petition until September 18,  
7 2007, over 13 years and 9 months after the limitations period ended.  
8 Therefore, the petition is untimely and must be dismissed with prejudice.

9 (Mot. Dismiss at 3:9-28.)

10 In opposition, petitioner argues (1) statutory tolling renders the petition timely, and (2)  
11 even if the petition is untimely, he is entitled to consideration thereof because he is actually  
12 innocent of the charges in the underlying conviction and, consequently, a miscarriage of  
13 justice would occur if the instant petition is dismissed without reaching the merits.

14 Respondent does not address either of petitioner’s arguments and asserts reliance on the  
15 arguments made in the motion to dismiss. (Reply at 1:22-23.)

16 The motion to dismiss will be denied as respondent’s argument is without legal  
17 support. Specifically, contrary to respondent’s assertion that petitioner was required to file  
18 his petition in federal court by no later than December 8, 1993, the Ninth Circuit clearly  
19 holds that where, as here, a petitioner’s conviction became final *prior* to AEDPA’s  
20 enactment on April 24, 1996, the one-year statute of limitations began to run on April 25,  
21 1996, and expired one year later, on April 24, 1997. Malcom v. Payne, 281 F.3d 951, 955  
22 (9th Cir. 2002).<sup>2</sup> Consequently, under applicable Ninth Circuit case law petitioner had until  
23 April 24, 1997 to file a timely federal habeas petition.

24 Further, contrary to respondent’s assertion that petitioner’s state collateral proceedings  
25 could not have served to toll the statute of limitations because “[p]etitioner did not begin

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26 <sup>2</sup>When, as in the instant case, a defendant does not seek direct review of his  
27 conviction, the conviction becomes final on the date the time for seeking direct review  
28 expires. Smith v. Duncan, 297 F.3d 809, 812-13 (9th Cir. 2002). In California, a defendant  
has sixty days after the date of the superior court judgment in which to file an appeal to the  
California Court of Appeal. See Cal. Rule of Court 30(a)(1), 30.1. Here, judgment was  
entered in the superior court on October 9, 1992 (Ex. 2); thus, the conviction became final  
sixty days later, on December 8, 1992.

1 filing his state habeas corpus petitions [until] April 23, 1997, over three years and four  
2 months after the limitations period had expired,” the record before the Court at this time  
3 shows that the noted filings were made one day *before* the date on which the statute of  
4 limitations expired, thereby arguably serving to toll the statute.

5 Accordingly, as respondent’s arguments do not support a finding that the petition is  
6 untimely, and respondent has not addressed whether petitioner is entitled either to statutory  
7 tolling or to a determination of his claims because he is actually innocent of the underlying  
8 crime, the motion to dismiss will be denied.

9 **CONCLUSION**

10 For the foregoing reasons, the Court hereby orders as follows:

11 1. Respondent’s motion to dismiss the petition as untimely is hereby DENIED.

12 (Docket No. 13.)

13 2. Respondent shall file with the Court and serve on petitioner, within **ninety (90)**  
14 days of the date this order is filed, an answer conforming in all respects to Rule 5 of the  
15 Rules Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not  
16 be granted based on petitioner’s cognizable claims. Respondent shall file with the answer  
17 and serve on petitioner a copy of all portions of the state trial record that have been  
18 transcribed previously and that are relevant to a determination of the issues presented by the  
19 petition.

20 If petitioner wishes to respond to the answer, he shall do so by filing a traverse with  
21 the Court and serving it on respondent within **thirty (30)** days of the date the answer is filed.

22 3. In lieu of an answer, respondent may file, within **ninety (90)** days of the date this  
23 order is filed, a renewed motion to dismiss on procedural grounds, as set forth in the  
24 Advisory Committee Notes to Rule 4 of the Rules Governing Section 2254 Cases. If  
25 respondent file such a motion, petitioner shall file with the Court and serve on respondent an  
26 opposition or statement of non-opposition within **thirty (30)** days of the date the motion is  
27 filed, and respondent shall file with the Court and serve on petitioner a reply within **fifteen**  
28 **(15)** days of the date any opposition is filed.

1           4. Petitioner is reminded that all communications with the Court must be served on  
2 respondent by mailing a true copy of the document to respondent's counsel.

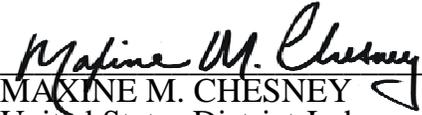
3           5. It is petitioner's responsibility to prosecute this case. Petitioner must keep the  
4 Court and respondent informed of any change of address and must comply with the Court's  
5 orders in a timely fashion. Failure to do so may result in the dismissal of this action for  
6 failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

7           6. Upon a showing of good cause, requests for a reasonable extension of time will be  
8 granted as long as they are filed on or before the deadline they seek to extend.

9           This order terminates Docket No. 13.

10          IT IS SO ORDERED.

11          DATED: April 30, 2009

  
MAXINE M. CHESNEY  
United States District Judge

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