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

MICHAEL ISREAL,)	No. C 09-04233 CW (PR)
)	
Petitioner,)	ORDER DENYING PETITION FOR WRIT OF
)	HABEAS CORPUS; DENYING CERTIFICATE
v.)	OF APPEALABILITY
)	
A. HEDGPETH, Warden,)	
)	
Respondent.)	
_____)	

INTRODUCTION

Petitioner Michael Isreal, a state prisoner incarcerated at High Desert State Prison, filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent Hedgpeth filed an answer in which he requests that the Court either dismiss the petition as untimely, or, in the alternative, deny the petition on the merits. Petitioner then filed a traverse. Having considered the papers submitted, the Court denies the petition on the merits, and thus finds it unnecessary to rule on timeliness.

BACKGROUND

In 1979, an Alameda County Superior Court jury convicted Petitioner of first degree murder. He was sentenced to twenty-five years to life in state prison.

Petitioner had a parole suitability hearing originally scheduled for August 12, 2005; however, it was cancelled on July 26, 2005 and postponed to a later date. (Resp't Ex. 3 at 10; Pet, Ex. A.) One year later, on June 28, 2006, Petitioner's parole suitability hearing scheduled for August 1, 2006 was similarly cancelled and postponed to a later date. (Resp't Ex. 3 at 13; Pet,

1 Ex. B.) On August 1, 2007, the Board of Parole Hearings (Board)
2 found Petitioner unsuitable for parole on the grounds that the
3 circumstances of his commitment offense indicated that, if released
4 from prison, he would pose an unreasonable risk of danger to
5 society, or a threat to public safety, or both. Petitioner was
6 denied parole for five years, and he will next be eligible for
7 parole in 2012.

8 On November 29, 2007, the Board's decision became final.

9 On July 17, 2008,¹ Petitioner filed a state habeas petition in
10 the Monterey County Superior Court. (Resp't Ex. 1 at 1, 4.) That
11 petition was transferred to the Alameda County Superior Court and
12 was stamped as "FILED" in that court on September 9, 2008. (Id. at
13 1.) In that petition, Petitioner alleged that the Board violated
14 his due process rights by failing to give him two years of credit
15 when it denied him parole for five years on August 1, 2007. (Id.
16 at 3.) Petitioner claimed that the five-year denial was "illegal"
17 and that his next scheduled parole suitability hearing should be in
18 "August of 2010 instead of 2012" because the Board postponed it
19 twice. (Id.)
20

21 On October 23, 2008, the Alameda County Superior Court denied
22 the petition for failure to state a prima facie case for relief,
23

24 ¹ A pro se federal or state habeas petition is deemed filed on
25 the date it is delivered to prison authorities for mailing. See
26 Saffold v. Newland, 250 F.3d 1262, 1268 (9th Cir. 2001), vacated
27 and remanded on other grounds, Carey v. Saffold, 536 U.S. 214
28 (2002) (holding that a federal or state habeas petition is deemed
filed on the date the prisoner submits it to prison authorities for
mailing, rather than on the date it is received by the court).
July 17, 2008 is the date the state petition was signed and the
earliest date that the petition could have been delivered to prison
authorities for mailing. For the purposes of this discussion, the
Court deems that the petition was filed on that date.

1 stating:

2 The petition for writ of habeas corpus ("the Petition")
3 filed on September 9, 2008 is **DENIED** for failure to
4 state a prima facie case for relief. Although
5 Petitioner has not provided the court with a complete
6 record (the transcript of the parole suitability hearing
was not attached to the Petition), Petitioner provides
sufficient documentation to allow the court's review of
the merits of the claim.

7 (Resp't Ex. 2 at 1 (emphasis in original).)

8 On December 1, 2008, Petitioner filed a habeas petition in the
9 California Court of Appeal, Sixth Appellate District. The petition
10 was stamped as "FILED" by the Clerk of the Court in the Sixth
11 District three days later, on December 4, 2008.² (Resp't Ex. 3 at
12 1.) That petition was denied without prejudice and recommended for
13 refiling with the California Court of Appeal, First Appellate
14 District, on December 9, 2008. (Id. at 26.) Petitioner then
15 refiled the petition in the First District on January 20, 2009.
16 (Id. at 1.) That petition was summarily denied on February 4,
17 2009. (Resp't Ex. 4 at 1.)

18 On March 24, 2009, Petitioner filed a habeas petition in the
19 California Supreme Court, and that petition was summarily denied on
20 August 12, 2009. (Resp't Exs. 5, 6.)

21 On September 8, 2009,³ Petitioner filed the present federal
22 habeas petition, alleging the same due process violation raised in
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24 _____
25 ² The stamped filing date on the appellate court petition
26 filed in the Sixth District is faded; therefore, this Court
27 obtained the filing date from the state court's official online
28 database.

³ September 8, 2009 is the date the federal petition was
signed and the earliest date that it could have been delivered to
prison authorities for mailing; therefore, it will be deemed filed
on that date. See Saffold, 250 F.3d at 1268.

1 his state habeas petitions.⁴

2 DISCUSSION

3 I. Timeliness

4 The Antiterrorism and Effective Death Penalty Act (AEDPA)
5 became law on April 24, 1996 and imposed for the first time a
6 statute of limitations on petitions for a writ of habeas corpus
7 filed by state prisoners. Petitions filed by prisoners challenging
8 non-capital state convictions or sentences must be filed within one
9 year of the latest date on which: (A) the judgment became final
10 after the conclusion of direct review or the time passed for
11 seeking direct review; (B) an impediment to filing an application
12 created by unconstitutional state action was removed, if such
13 action prevented the petitioner from filing; (C) the constitutional
14 right asserted was recognized by the Supreme Court, if the right
15 was newly recognized by the Supreme Court and made retroactive to
16 cases on collateral review; or (D) the factual predicate of the
17 claim could have been discovered through the exercise of due
18 diligence. 28 U.S.C. § 2244(d)(1)(A)-(D). However, "[t]he time
19 during which a properly filed application for State post-conviction
20 or other collateral review with respect to the pertinent judgment
21 or claim is pending shall not be counted toward any period of
22 limitation." Id. § 2244(d)(2).

25 ⁴ Aside from stating his due process claim, the "Grounds for
26 Relief" section of his federal petition is blank. Instead,
27 Petitioner incorporates the supporting facts and authorities
28 relevant to his due process claim from his attached state supreme
court petition; therefore, in this Order the Court will cite to the
page numbers and exhibits from his attached state supreme court
petition.

1 The one-year statute of limitations also applies to habeas
2 petitions that challenge administrative decisions. The Ninth
3 Circuit held in Shelby v. Bartlett, 391 F.3d 1061 (9th Cir. 2004),
4 that section 2244's one-year time limit applies to all habeas
5 petitions filed by persons in custody pursuant to a state court
6 judgment. In cases challenging administrative decisions, the
7 limitations period is determined by section 2244(d)(1)(D), which
8 states that the limitations period begins to run on "the date on
9 which the factual predicate of the claim or claims presented could
10 have been discovered through the exercise of due diligence." Id.
11 at 1066 (quoting 28 U.S.C. § 2244(d)(1)(D)). For an administrative
12 decision, such as those by the Board, this typically means the day
13 following notice to the petitioner of the decision. Id.; see also
14 Redd v. McGrath, 343 F.3d 1077, 1084 (9th Cir. 2003).

15 In this case, the Board's denial became final on November 29,
16 2007. The limitations period began to run the following day, on
17 November 30, 2007. Accordingly, Petitioner was required to file
18 his federal habeas petition no later than November 30, 2008. See
19 28 U.S.C. § 2244(d). Therefore, his petition filed on September 8,
20 2009 -- nearly one year after the limitations period had expired --
21 is untimely absent statutory tolling.

22 The present petition may nonetheless be timely if the
23 limitations period was tolled under 28 U.S.C. § 2244(d)(2) for a
24 substantial period of time. As noted earlier, AEDPA's one-year
25 limitations period is tolled under § 2244(d)(2) for "[t]he time
26 during which a properly filed application for state post-conviction
27 or other collateral review with respect to the pertinent judgment
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1 or claim is pending." 28 U.S.C. § 2244(d)(2). The limitations
2 period is also tolled during the time between a lower state court's
3 decision and the filing of a notice of appeal to a higher state
4 court. Carey v. Saffold, 536 U.S. 214, 223 (2002). In California,
5 where prisoners generally use the state's original writ system,
6 this means that the limitations period remains tolled during the
7 intervals between a state court's disposition of an original state
8 habeas petition and the filing of the next original state habeas
9 petition in a higher court, provided the prisoner did not delay
10 unreasonably in seeking review in the higher court. See id. at
11 220-25.

12 Where a petitioner waits months to file a habeas petition in a
13 higher court, a federal court must later determine whether the
14 petitioner "delayed 'unreasonably'" in seeking higher state court
15 review. Carey, 536 U.S. at 225. If a petitioner delayed
16 unreasonably, the application would no longer have been "pending"
17 during the period at issue. Id. If the state court does not
18 clearly rule on a petitioner's delay, as in the present case, the
19 federal court must evaluate all "relevant considerations" and
20 independently determine whether the delay was "unreasonable." Id.
21 at 226.

22 The Supreme Court held that a determination of unreasonable
23 delay is particularly difficult to make in California: "The fact
24 that California's timeliness standard is general rather than
25 precise may make it more difficult for federal courts to determine
26 just when a review application . . . comes too late." Id. at 223.
27 The Supreme Court held, however, that California's appellate system
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1 could be treated similarly to those in other states, which measure
2 delays "in terms of a determinate time period, such as 30 or 60
3 days." Evans v. Chavis, 546 U.S. 189, 192 (2006). In other words,
4 "California's 'reasonable time' standard [should] not lead to
5 filing delays substantially longer than those in States with
6 determinate timeliness rules." Id. at 200 (citing Carey, 536 U.S.
7 at 222-23). Based on the Supreme Court's reference to the usual
8 thirty or sixty day periods provided by states with determinate
9 deadlines, a delay of sixty days would likely be reasonable. On
10 the other hand, a longer delay of six months would likely be
11 unreasonable: "Six months is far longer than the 'short period[s]
12 of time,' 30 to 60 days, that most States provide for filing an
13 appeal to the state supreme court." Id. at 201.

14 The language in Evans referred to above -- that most states
15 find thirty to sixty days to be reasonable -- seems to imply that
16 delays are reasonable only if they are roughly between thirty to
17 sixty days. More conclusive is the Supreme Court's statement that
18 in determining whether a delay is reasonable "the [Ninth] Circuit
19 must keep in mind that, in Saffold, we held that timely filings in
20 California fell within the federal tolling provision on the
21 assumption that California law in this respect did not differ
22 significantly from the laws of other states, i.e., that
23 California's 'reasonable time' standard would not lead to filing
24 delays substantially longer than those in States with determinate
25 timeliness rules." Evans, 546 U.S. at 199-200 (citing Carey, 536
26 U.S. at 222-23). "California, of course, remains free to tell us
27 if, in this respect, we were wrong." Evans, 546 U.S. at 200.

1 Respondent argues that Petitioner filed his state superior
2 court petition 284 days after the Board's decision became final.
3 Respondent's calculation considers the filing date as September 9,
4 2008, the date the superior court petition was received in the
5 Alameda County Superior Court, instead of the date that the
6 petition was filed in the Monterey County Superior Court.

7 Respondent also argues that the eighty-nine day gap between
8 the superior court's denial and Petitioner filing his appellate
9 court petition in the First District was a period of "unreasonable
10 delay" and that the limitations period should not be tolled for
11 that period. Respondent's calculation of an eighty-nine day gap
12 does not credit the date that Petitioner's appellate petition was
13 filed in the wrong appellate district. However, as noted above,
14 the Court finds it unnecessary to rule on Respondent's request to
15 dismiss the federal petition as untimely because the petition fails
16 on the merits.

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18 II. The Merits of the Petition

19 Petitioner's due process claim arises out of the 2005 and 2006
20 postponements of his parole hearings. Specifically, Petitioner
21 claims that he "does not contest the five-year denial, which the
22 Board was entitled to do, so long as it gave Petitioner credit for
23 it's [sic] two years of postponements . . . which would schedule
24 Petitioner['s] next parole hearing for 2010 instead of 2012."
25 (Pet. at 3.)

26 A. Legal Standard

27 A federal court may entertain a habeas petition from a state
28 prisoner "only on the ground that he is in custody in violation of

1 the Constitution or laws or treaties of the United States." 28
2 U.S.C. § 2254(a). Under AEDPA, a district court may not grant
3 habeas relief unless the state court's adjudication of the claim:
4 "(1) resulted in a decision that was contrary to, or involved an
5 unreasonable application of, clearly established Federal law, as
6 determined by the Supreme Court of the United States; or
7 (2) resulted in a decision that was based on an unreasonable
8 determination of the facts in light of the evidence presented in
9 the State court proceeding." 28 U.S.C. § 2254(d); Williams v.
10 Taylor, 529 U.S. 362, 412 (2000). The first prong applies both to
11 questions of law and to mixed questions of law and fact, id. at
12 407-09, and the second prong applies to decisions based on factual
13 determinations, Miller-El v. Cockrell, 537 U.S. 322, 340 (2003).

14 A state court decision is "contrary to" Supreme Court
15 authority, that is, falls under the first clause of § 2254(d)(1),
16 only if the "state court arrives at a conclusion opposite to that
17 reached by [the Supreme] Court on a question of law or if the state
18 court decides a case differently than [the Supreme] Court has on a
19 set of materially indistinguishable facts." Williams, 529 U.S. at
20 412-13. A state court decision is an "unreasonable application of"
21 Supreme Court authority, under the second clause of § 2254(d)(1),
22 if it correctly identifies the governing legal principle from the
23 Supreme Court's decisions but "unreasonably applies that principle
24 to the facts of the prisoner's case." Id. at 413. The federal
25 court on habeas review may not issue the writ "simply because that
26 court concludes in its independent judgment that the relevant
27 state-court decision applied clearly established federal law
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1 erroneously or incorrectly." Id. at 411. Rather, the application
2 must be "objectively unreasonable" to support granting the writ.
3 Id. at 409.

4 When there is no reasoned opinion from the highest state court
5 to consider the petitioner's claims, the court looks to the last
6 reasoned opinion of the highest court to analyze whether the state
7 judgment was erroneous under the standard of § 2254(d). Ylst v.
8 Nunnemaker, 501 U.S. 797, 801-06 (1991). In the present case, the
9 Alameda County Superior Court is the highest court that addressed
10 Petitioner's due process claim.

11 B. Analysis

12 The state superior court found, after reviewing the merits of
13 his due process claim, that Petitioner "fail[ed] to state a prima
14 facie case for relief." (Resp't Ex. 2 at 1.) That court's
15 decision denying Petitioner's claim was based on a legal
16 determination concerning the sufficiency of his legal claim, not on
17 any factual determinations.

18 In his federal petition, Petitioner states, "All postponements
19 were due to deficiency caused by Respondent actions and/or lack of
20 process[es] due." (Pet. at 3 (alteration in original).) Section
21 2253 of Title 15 of the California Code of Regulations, which
22 authorizes the Board to postpone subsequent parole suitability
23 hearings, provides, in pertinent part:

24 (a) General. The rights and interests of all persons
25 properly appearing before a board life parole
26 consideration hearing are best served when hearings are
27 conducted as scheduled. Occasional circumstances may
28 require the delay of a scheduled hearing. It is the
intention of the board to recognize the need and

1 desirability to occasionally delay a scheduled hearing
2 and to authorize said delays through a process of
3 voluntary waiver or stipulation of unsuitability or to
postpone or continue a scheduled life parole
consideration hearing.

4 Cal. Code Regs. tit. 15, § 2253(a). To the extent Petitioner
5 contends the Board improperly delayed his parole suitability
6 hearings in violation of state law, he asserts no cognizable claim
7 for federal habeas relief. See Estelle v. McGuire, 502 U.S. 62,
8 67-68 (1991).

9 To show a constitutional violation, Petitioner must prove that
10 any alleged delay was both unreasonable and prejudicial. See
11 United States v. Santana, 526 F.3d 1257, 1260 (9th Cir. 2008);
12 Meador v. Knowles, 990 F.2d 503, 506 (9th Cir. 1993); Camacho v.
13 White, 918 F.2d 74, 79 (9th Cir. 1990); Hopper v. United States
14 Parole Comm'n, 702 F.2d 842, 845 (9th Cir. 1983). The Court need
15 not determine whether the delay was unreasonable, because
16 Petitioner has failed to demonstrate any non-speculative
17 possibility of prejudice.

18 First, the Board did not abrogate Petitioner's future right to
19 parole hearings, or even deny them indefinitely but rather
20 postponed his scheduled parole hearing on two occasions. The
21 record shows that Petitioner was informed in writing about the 2005
22 and 2006 postponements, and he was advised that a new hearing would
23 be scheduled. (Pet., Exs. A, B.) Petitioner's parole suitability
24 hearing eventually took place on August 1, 2007, and he was
25 afforded an opportunity to be heard in accordance with due process
26 before he was denied parole. Petitioner alleges no facts remotely
27 suggesting that the delays in 2005 and 2006 affected the merits of
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1 the Board's August 1, 2007 decision deeming him unsuitable for
2 parole. Nothing indicates the delays had any effect on the
3 standards for determining suitability.

4 Second, Petitioner claims that the Board should have given him
5 "credit for it's [sic] two years of postponements." (Pet. at 3.)
6 As mentioned above, Petitioner argues that he should have received
7 a three-year denial instead of a five-year denial. Petitioner may
8 be arguing that the repeated delays in scheduling his parole
9 hearing have resulted in additional time for which no credit will
10 ever be applied, thereby violating due process. However, his
11 argument is unavailing. Even if, at some future hearing, the Board
12 were to find Petitioner suitable for parole, his ultimate release
13 date would not be fixed by reference to the hearing date, but
14 rather would be a product of the Board's discretion, taking into
15 account the "matrix" of suggested base terms set forth in state
16 prison regulations, circumstances in aggravation and mitigation,
17 and adjustments for enhancements or other offenses, and reduced by
18 any post-conviction credit awarded by the Board. See Cal. Code
19 Regs. tit. 15, §§ 2403-2411. Petitioner's suggestion that the
20 alleged delays might cause some future suitability determination to
21 occur later than it otherwise would have occurred is far too
22 speculative to show the requisite prejudice. See California Dep't
23 of Corrections v. Morales, 514 U.S. 499, 509 (2000) (rejecting Ex
24 Post Facto challenge to amendment decreasing frequency of
25 California parole suitability hearings; amendment "create[d] only
26 the most speculative and attenuated possibility of producing the
27 prohibited effect of increasing the measure of punishment for
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1 covered crimes"). Moreover, any suggestion that the delay might
2 cause the actual release date (following some future suitability
3 finding or future grant of habeas relief) to occur later than it
4 otherwise would have occurred is even more speculative. Thus, no
5 due process violation occurred because Petitioner has failed to
6 show any prejudice from the alleged delays in 2005 and 2006. It
7 follows that the state courts' rejection of Petitioner's due
8 process claim was not contrary to, or an objectively unreasonable
9 application of, any clearly established Federal law as determined
10 by the United States Supreme Court. See 28 U.S.C. § 2254(d).
11 Therefore, Petitioner is not entitled to habeas relief.

12 Accordingly, the Court GRANTS Respondent's request to deny the
13 petition on the merits; the petition is DENIED.

14 CONCLUSION

15 For the foregoing reasons, the Court orders as follows:

16 1. The Court does not rule on Respondent's request to
17 dismiss the petition as untimely.

18 2. Respondent's alternative request to deny the petition on
19 the merits is GRANTED, and the petition for a writ of habeas corpus
20 is DENIED.

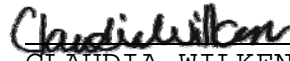
21 3. A certificate of appealability is DENIED. Reasonable
22 jurists would not "find the district court's assessment of the
23 constitutional claims debatable or wrong." Slack v. McDaniel, 529
24 U.S. 473, 484 (2000). Petitioner may seek a certificate of
25 appealability from the Ninth Circuit Court of Appeals.
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27 4. The Clerk of the Court shall enter judgment in favor of
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1 Respondent and close the file.

2 IT IS SO ORDERED.

3 Dated: 3/14/2012



CLAUDIA WILKEN

United States District Judge

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