

United States District Court
For the Northern District of California

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FILED

NOV 19 2012

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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

MARQUELL D. SAUCER,
Petitioner,

v.

GARY SWARTHART, Warden,
Respondent.

No. C 12-04569 EJD (PR)

ORDER REQUESTING MOTION TO
DISMISS OR NOTICE THAT MOTION
IS UNWARRANTED; GRANTING
MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

(Docket No. 2)

Petitioner, a state prisoner incarcerated at the California State Prison - Solano, has filed a pro se petition for a writ of habeas corpus under 28 U.S.C. § 2254, challenging his state conviction. Petitioner has filed a motion for leave to proceed in forma pauperis. (Docket No. 2.)

BACKGROUND

According to the petition, Petitioner pleaded guilty in Contra Costa County Superior Court to Penal Code § 187 (murder). (Pet. at 2.) Petitioner was sentenced on August 31, 1999, to twenty-five years to life. (Id.)

Petitioner appealed his conviction, and the state appellate court affirmed. (Id. at 3.) It appears the state high court denied review. (Id.)

Order Requesting MTD; Granting IFP
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1 recognized by the Supreme Court and made retroactive to cases on collateral review; or (4)
2 the factual predicate of the claim could have been discovered through the exercise of due
3 diligence. See 28 U.S.C. § 2244(d)(1). Time during which a properly filed application for
4 state post-conviction or other collateral review is pending is excluded from the one-year time
5 limit. See id. § 2244(d)(2).

6 The one-year period generally will run from “the date on which the judgment became
7 final by conclusion of direct review or the expiration of the time for seeking such review.”
8 28 U.S.C. § 2244(d)(1)(A). The instant petition was filed on August 30, 2012, thirteen years
9 after Petitioner’s sentencing in August 1999. Although the one-year statute of limitations is
10 tolled under § 2244(d)(2) for the “time during which a properly filed application for State
11 post-conviction or other collateral review with respect to the pertinent judgment or claim is
12 pending,” there is doubt whether Petitioner is entitled to tolling during the time his state
13 habeas petitions were pending.¹ Accordingly, the instant petition appears to be untimely.

14 This apparent procedural problem should be addressed before the Court reaches the
15 merits of the claims raised in the petition. If the petition is time-barred, the litigants and
16 court need not expend resources addressing the substantive claims in the petition.
17 Accordingly, pursuant to Rule 4 of the Rules Governing Habeas Corpus Cases Under Section
18 2254, Respondent shall either (1) move to dismiss the petition on the ground that it is
19 untimely, or (2) inform the Court that Respondent is of the opinion that a motion to dismiss is
20 unwarranted in this case.

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Petitioner’s last petition to the state supreme court was denied with a citation to In re Robbins, 18 Cal. 4th 770, 780 (1998), which is a clear ruling that the petition was untimely. See supra at 2. “When a postconviction petition is untimely under state law, ‘that [is] the end of the matter’ for the purposes of § 2244(d)(2).” Pace v. DiGuiglielmo, 544 U.S. 408, 414 (2005) (citing Carey v. Saffold, 536 U.S. 214, 226 (2002)). In Pace, the Supreme Court held that “[b]ecause the state court rejected petitioner’s [postconviction] petition as untimely, it was not ‘properly filed,’ and he is not entitled to statutory tolling under §2244(d)(2).” Id. at 413.

CONCLUSION

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2 In light of the foregoing, the Court orders as follows:

3 1. The Clerk of the Court shall serve by certified mail a copy of this order, the
4 petition and all attachments thereto, upon Respondent and Respondent's attorney, the
5 Attorney General for the State of California. The Clerk shall also serve a copy of this order
6 on Petitioner.

7 2. Respondent shall file with the Court and serve upon Petitioner, within **thirty**
8 **(30) days** of the date this order is filed, a motion to dismiss the petition as untimely, or a
9 notice that Respondent is of the opinion that a motion to dismiss is unwarranted.

10 3. If Petitioner wishes to oppose the motion to dismiss, he shall do so by filing an
11 opposition with the Court and serving it upon Respondent within **thirty (30) days** of his
12 receipt of the motion to dismiss.

13 4. Respondent shall file and serve a reply within **fifteen (15) days** of receipt of
14 Petitioner's opposition.

15 5. The motion shall be deemed submitted as of the date the reply brief is due. No
16 hearing will be held on the motion. If Respondent notifies the Court that a motion to dismiss
17 is unwarranted or the motion is denied, the Court will then determine whether to require an
18 answer to the petition.

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


23 7. Extensions of time are not favored, though reasonable extensions will be
24 granted. However, the party making a motion for an extension of time is not relieved of his
25 or her duty to comply with the deadlines set by the Court merely by having made a motion for
26 an extension of time. The party making the motion must still meet the deadlines set by the
27 court until an order addressing the motion for an extension of time is issued. Any motion for
28 an extension of time must be filed no later than 5 days prior to the deadline sought to be

1 extended.

2 8. Petitioner's motion for leave to proceed in forma pauperis (Docket
3 No. 2) is GRANTED.

4 This order terminates Docket No. 2.

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6 DATED: 11/10/12


EDWARD J. DAVILA
United States District Judge

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MARQUELL D. SAUCER,

Petitioner,

vs.

GARY SWARTHART, Warden,

Respondent.

No. C 12-04569 EJD (PR)

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 11/19/12, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) inter-office delivery receptacle located in the Clerk's office.

Marquell D. Saucer
P-52956
2100 Peabody Rd.,
Vacaville, CA 95696

DATED: 11/19/12

Richard W. Wieking, Clerk
By: Elizabeth Garcia, Deputy Clerk