UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:17-CV-02269-SVW (SK)	Date	April 5, 2017
Title	Hal Lee Moore v. Shawn Hatton et al		

Present: The Honorable	Steve Kim, U.S. Magistrate Judge

Marc Krause	n/a
Deputy Clerk	Court Smart / Recorder
Attorneys Present for Petitioner:	Attorneys Present for Respondent:
None present	None present

Proceedings: (IN CHAMBERS) **ORDER TO SHOW CAUSE**

On March 23, 2017, Petitioner filed a petition for writ of habeas corpus under 28 U.S.C. § 2254, challenging his 2009 state sentence of 15 years to life in prison for second-degree murder. (ECF No. 1). On its face, the Petition appears subject to immediate dismissal because it is untimely. The California Court of Appeal affirmed Petitioner's conviction on August 23, 2010. (Cal Ct. App. B215307). Because Petitioner failed to file a petition for review in the California Supreme Court, his conviction became final when his time to seek such review expired. *See Gonzalez v. Thaler*, 132 S. Ct. 641, 646 (2012) (When a state prisoner "does not seek review in a State's highest court, the judgment becomes 'final' on the date that the time for seeking such review expires."). In California, a Court of Appeal decision becomes final 30 days after issuance, *see* Cal. R. Ct. 8.366(b)(1), and a petition for review of a Court of Appeal decision must be filed in the California Supreme Court "within 10 days after the Court of Appeal decision is final." Cal. R. Ct. 8.500(e)(1)(A). Thus, Petitioner's conviction became final for AEDPA purposes 40 days after August 23, 2010. From that date, Petitioner had one year in which to file a federal habeas petition in 2011. *See* 28 U.S.C. § 2244(d)(1)(A) (a federal habeas petitioner must file a petition within one year of "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review."). Hence, the Petition is untimely on its face by more than five years pursuant to § 2244(d)(1)(A).

Nor is the Petition made timely, as Petitioner argues, by the new rule announced by the U.S. Supreme Court in *Johnson v. United States*, 135 S. Ct. 2551 (2015). Petitioner claims that the California Penal Code section under which he was convicted, section 187(a), is unconstitutionally vague in light of *Johnson*, which was decided in June 2015, well after his state conviction became final in 2010. (Pet., Memo at 3-4). A federal petition based on a newly-established federal right may be timely under AEDPA if filed within one year from "the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2244(d)(1)(C). But *Johnson*, which held that the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), was unconstitutionally vague, applies only to those federal prisoners who received increased federal sentences under the ACCA, a federal statute. *Johnson*, 135 S. Ct. at 2557, 2263. It is not

applicable to Petitioner's state conviction under the California Penal Code. *Johnson* did not announce a new rule that could have directly invalidated Petitioner's state conviction or sentence. Indeed, Petitioner could have made his void-for-vagueness argument sooner, within the limitations period, irrespective of *Johnson*. The mere fact that *Johnson*, if decided earlier, could have arguably provided persuasive support for a vagueness challenge does not mean that once announced later it created a new constitutional rule resetting the one-year limitations period.

In any case, even if *Johnson* had somehow announced a new rule retroactively applicable to Petitioner's state conviction and sentence, the Petition would still be untimely under § 2244(d)(1)(C). Although *Johnson* was made retroactively applicable on April 18, 2016, *see Welch v. United States*, 136 S. Ct. 1257 (2016), the one-year limitations period under § 2244(d)(1)(C) runs from the date that the Supreme Court decided *Johnson* – not from the date of the decision in *Welch* that made *Johnson* retroactive applicable. *See Dodd v. United States*, 545 U.S. 353, 357–59 (2005) (limitations period under § 2244(d)(1)(C) begins to run when Supreme Court recognizes right, not when right becomes retroactively applicable). Therefore, any claim predicated on *Johnson* expired on June 26, 2016 – one year from the date that the Supreme Court decided *Johnson* in June 2015. Because the present Petition was filed on March 23, 2017, it remains untimely by almost nine months notwithstanding the limitations period under § 2244(d)(1)(C).

THEREFORE, Petitioner is hereby ORDERED TO SHOW CAUSE **on or before May 5, 2017**, why the Court should not dismiss the Petition as untimely under AEDPA. **If Petitioner does not file a timely response to this Order to Show Cause, Petitioner is advised that the Court may recommend dismissal of the Petition for failure to prosecute.** *See* Fed. R. Civ. P 41(b); L.R. 41-1. **If Petitioner no longer wishes to pursue this action because he agrees it is untimely or otherwise lacking in merit, he may voluntarily dismiss the action pursuant to Federal Rule of Civil Procedure 41(a) by filing a "Notice of Dismissal."** The Clerk is directed to provide Petitioner with a Notice of Dismissal Form (CV-009).