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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

RAUL JOE ALDRETE,)	Case No. CV 18-10800-JPR
)	
Petitioner,)	MEMORANDUM DECISION AND ORDER
)	DENYING PETITION AND DISMISSING
v.)	ACTION WITH PREJUDICE
)	
CHRISTIAN PFEIFFER, Warden,)	
)	
Respondent.)	
)	
)	

PROCEEDINGS

On December 12, 2018, Petitioner, proceeding pro se, constructively filed a Petition for Writ of Habeas Corpus by a Person in State Custody, raising a single claim: his 2000 conviction for discharging a firearm was "not a strikable offen[s]e." (Pet. at 3; see also id. at 1-2.)¹ Respondent moved to dismiss on June 20, 2019, and Petitioner opposed on March 20, 2020. Respondent did not file a reply. The parties consented to

¹The Ninth Circuit transferred the Petition to this Court after denying as unnecessary Petitioner's application to file a second or successive petition in that he had not filed a prior petition pertaining to the 2000 conviction.

1 the jurisdiction of the undersigned under 28 U.S.C. § 636(c)(1).
2 For the reasons discussed below, the Petition is denied as
3 untimely and because the Court lacks subject-matter jurisdiction,
4 and this action is dismissed with prejudice.

5 **BACKGROUND**

6 On August 17, 2000, Petitioner pleaded guilty in Los Angeles
7 County Superior Court to discharging a firearm with gross
8 negligence under former California Penal Code section 246.3 and
9 was sentenced to five years probation with one year in county
10 jail. (See Lodged Doc. 1 at 10; Pet. at 1-2; Opp'n at 3.)
11 Petitioner did not appeal. See Cal. App. Cts. Case Info.,
12 <http://appellatecases.courtinfo.ca.gov/> (search for "Aldrete"
13 with "Raul" in Second App. Dist. revealing no appeals filed after
14 1994) (last visited July 23, 2020); see also Opp'n at 3
15 ("[P]etitioner has never filed any appeal on this matter.").

16 Subsequently, in 2013, a San Bernardino County jury
17 convicted him of assault with a firearm, willful infliction of
18 corporal injury on a cohabitant, and felon in possession of a
19 firearm. (Lodged Doc. 1 at 2.) The trial court found true that
20 Petitioner had been convicted of two prior strikes, including the
21 2000 discharging-a-firearm conviction. (Id. at 2, 10.) He was
22 sentenced to 37 years to life in state prison. (Id. at 2.) The
23 California Court of Appeal affirmed the judgment on June 19,
24 2015. (Id. at 1-2.) Petitioner did not file a petition for
25 review. See Cal. App. Cts. Case Info., <http://appellatecases.courtinfo.ca.gov/> (search for "Aldrete" with "Raul" in supreme
26 court revealing no petition for review filed after 1995) (last
27 visited July 23, 2020).
28

1 **PETITIONER'S CLAIM**

2 Petitioner's 2000 conviction for discharging a firearm in a
3 grossly negligent manner should not count as a strike. (Pet. at
4 1, 3.)

5 **DISCUSSION**

6 **I. The Court Lacks Subject-Matter Jurisdiction**

7 Under § 2254(a), a federal court "shall entertain an
8 application for a writ of habeas corpus in behalf of a person in
9 custody pursuant to the judgment of a State court only on the
10 ground that he is in custody in violation of the Constitution or
11 laws or treaties of the United States." Section 2254(a)'s
12 custody requirement "has been interpreted to mean that federal
13 courts lack jurisdiction over habeas corpus petitions unless the
14 petitioner is 'under the conviction or sentence under attack at
15 the time his petition is filed.'" Bailey v. Hill, 599 F.3d 976,
16 978-79 (9th Cir. 2010) (citation omitted); see also Maleng v.
17 Cook, 490 U.S. 488, 490-91 (1989) (per curiam) (interpreting
18 § 2254(a) as "requiring that the habeas petitioner be 'in
19 custody' under the conviction or sentence under attack at the
20 time his petition is filed"). Because the custody requirement is
21 jurisdictional, "it is the first question [a court] must
22 consider." Bailey, 599 F.3d at 978 (citation omitted).

23 In August 2000, Petitioner was apparently sentenced on the
24 discharging-a-firearm conviction to five years probation with one
25 year in county jail. (Lodged Doc. 1 at 10-11; Pet. at 1-2.) His
26 probation, and therefore his custody, see Chaker v. Crogan, 428
27 F.3d 1215, 1219 (9th Cir. 2005), likely terminated five or six
28 years later, in August 2005 or 2006. But even if Petitioner

1 violated his probation shortly before its anticipated completion
2 and was sentenced to the upper term of three years, see Cal.
3 Penal Code §§ 18 & 246.3 (2000), his custody would have ended in
4 August 2008 or 2009. On December 12, 2018, then, the
5 constructive filing date of the Petition, he wouldn't have been
6 in custody on the conviction he challenges for about a decade or
7 more. Because he was not "'in custody' under the conviction or
8 sentence under attack at the time his petition [wa]s filed," this
9 Court lacks subject-matter jurisdiction, and the Petition must be
10 dismissed with prejudice. Maleng, 490 U.S. at 490; see Hays v.
11 Tews, No. CV 15-4279-DMG (KES), 2015 WL 13123193, at *2, *6-7
12 (C.D. Cal. Nov. 2, 2015) (dismissing habeas petition with
13 prejudice for lack of subject-matter jurisdiction because
14 petitioner was no longer in custody on conviction he challenged),
15 accepted by 2017 WL 962754 (C.D. Cal. Mar. 13, 2017).²

16 **II. The Petition Is Untimely**

17 Even had Petitioner been in custody when he filed the
18 Petition, it would still have to be dismissed because it is
19 untimely by nearly two decades.

21 ²To the extent Petitioner challenges his 2013 sentence,
22 thereby collaterally attacking the 2000 conviction, he may not do
23 so. "[O]nce a state conviction is no longer open to direct or
24 collateral attack in its own right" because the petitioner
25 "failed to pursue" relief when it was available or was
26 unsuccessful in doing so, "the conviction may be regarded as
27 conclusively valid" and federal courts are without jurisdiction
28 to review it on habeas. Lackawanna Cnty. Dist. Att'y v. Coss,
532 U.S. 394, 403 (2001). If an expired conviction is "later
used to enhance a criminal sentence," a petitioner "generally may
not challenge the enhanced sentence" through a § 2254 petition
"on the ground that the prior conviction was unconstitutionally
obtained." Id. at 403-04.

1 A. Applicable Law

2 The Antiterrorism and Effective Death Penalty Act sets forth
3 a one-year limitation period for filing a federal habeas petition
4 and specifies that the period runs from the latest of the
5 following dates:

6 (A) the date on which the judgment became final by the
7 conclusion of direct review or the expiration of the time
8 for seeking such review;

9 (B) the date on which the impediment to filing an
10 application created by State action in violation of the
11 Constitution or laws of the United States is removed, if
12 the applicant was prevented from filing by such State
13 action;

14 (C) the date on which the constitutional right asserted
15 was initially recognized by the Supreme Court, if the
16 right has been newly recognized by the Supreme Court and
17 made retroactively applicable to cases on collateral
18 review; or

19 (D) the date on which the factual predicate of the claim
20 or claims presented could have been discovered through
21 the exercise of due diligence.

22 § 2244(d)(1). AEDPA includes a statutory tolling provision that
23 suspends the limitation period for the time during which a
24 properly filed application for postconviction or other collateral
25 review is pending in state court. See § 2244(d)(2); Waldrip v.
26 Hall, 548 F.3d 729, 734 (9th Cir. 2008). In addition to
27 statutory tolling, federal habeas petitions are subject to
28 equitable tolling of the one-year limitation period in

1 appropriate cases. Holland v. Florida, 560 U.S. 631, 645 (2010).
2 Determining whether equitable tolling is warranted is a fact-
3 specific inquiry. Frye v. Hickman, 273 F.3d 1144, 1146 (9th Cir.
4 2001) (as amended). The petitioner must show that he has been
5 pursuing his rights diligently and that some extraordinary
6 circumstance stood in his way and prevented timely filing.
7 Holland, 560 U.S. at 649.

8 As to both statutory and equitable tolling, a petitioner
9 bears the burden of demonstrating that AEDPA's limitation period
10 was sufficiently tolled. Pace v. DiGuglielmo, 544 U.S. 408, 418
11 (2005) (equitable tolling); Smith v. Duncan, 297 F.3d 809, 814
12 (9th Cir. 2002) (as amended) (statutory tolling), abrogated on
13 other grounds by Pace, 544 U.S. at 418.

14 B. Analysis

15 Petitioner apparently pleaded guilty and was convicted on
16 August 17, 2000. (See Pet. at 1-2; see also Opp'n at 2-3.) He
17 did not file any direct appeal. See Cal. App. Cts. Case Info.,
18 <http://appellatecases.courtinfo.ca.gov/> (search for "Aldrete"
19 with "Raul" in Second App. Dist. yielding no direct appeal in
20 2000) (last visited July 23, 2020); (see also Opp'n at 3). He
21 does not contend that he is entitled to a later trigger date
22 under § 2244(d)(1)(B), (C), or (D), and the record discloses no
23 basis for applying any of those provisions.³ Because Petitioner
24

25 ³At one point, Petitioner cites People v. Gallardo, 4 Cal.
26 5th 120 (2017) (Pet. at 3), possibly suggesting that he could not
27 have sought relief until it came out, in December 2017. But
28 § 2244(d)(1)(C) applies to U.S. Supreme Court decisions, not
state ones. See Banks v. Sherman, No. CV 18-9468-SP, 2019 WL
4749903, at *3 (C.D. Cal. Sept. 30, 2019) (finding that Gallardo

1 did not appeal, his state conviction became final for AEDPA
2 purposes on approximately October 16, 2000, 60 days after
3 judgment. See Cal. R. Ct. 8.308(a) (formerly Rule 30.1(a)); cf.
4 Caspari v. Bohlen, 510 U.S. 383, 390 (1994) (state conviction and
5 sentence become final when availability of direct appeal has been
6 exhausted and time for filing petition for writ of certiorari has
7 elapsed or timely filed petition has been denied).⁴ Thus,
8 AEDPA's one-year statute of limitations began to run on October
9 17, 2000, and ostensibly expired on October 16, 2001. See
10 Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001)
11 (holding that AEDPA limitation period begins day after triggering
12 event). Petitioner did not constructively file his petition
13 until December 12, 2018, more than 17 years late.

14 Petitioner does not claim to have filed any state habeas
15 petition while the limitation period was running, nor is there
16 any evidence he did so. Accordingly, because he is not entitled
17 to any statutory tolling, he must show equitable tolling
18 sufficient to account for the significant delay in filing the
19 Petition. Even if his opposition to the motion to dismiss is
20 liberally construed to argue for equitable tolling, he fails to
21 demonstrate that it should apply.

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23 didn't qualify petitioner for later start date under
24 § 2244(d)(1)(C)); see also Dodd v. United States, 545 U.S. 353,
25 357-58 (2005) (construing identical language in § 2255 as
26 expressing "clear" congressional intent that delayed accrual is
inapplicable unless U.S. Supreme Court itself has made new rule
retroactive). Thus, Gallardo cannot provide a later trigger date.

27 ⁴Petitioner could not have filed a petition for writ of
28 certiorari because he did not appeal to the highest state court.
See 28 U.S.C. § 1257; Sup. Ct. R. 13.

1 Petitioner alleges that his attorney failed to advise him
2 that his entry of a guilty plea would result in a conviction that
3 might be used to enhance a future sentence. (See Opp'n at 3-4.)
4 Equitable tolling may be available when misconduct by a
5 petitioner's attorney was "sufficiently egregious" that it
6 constitutes an "extraordinary circumstance." Porter v. Ollison,
7 620 F.3d 952, 959 (9th Cir. 2010) (as amended); see also Spitsyn
8 v. Moore, 345 F.3d 796, 801 (9th Cir. 2003) (as amended) (holding
9 that attorney's failure to prepare and file habeas petition
10 despite petitioner's repeatedly contacting him about it amounted
11 to sufficiently egregious misconduct for equitable tolling).
12 Even if Petitioner's claim were true – and there is no evidence
13 of that other than his own conclusory allegation – any such
14 failing on the part of his attorney could not have caused a 17-
15 year delay. See Ramirez v. Yates, 571 F.3d 993, 997 (9th Cir.
16 2009) ("The petitioner must additionally show that the
17 'extraordinary circumstances were the cause of his
18 untimeliness.'" (citation omitted)). Indeed, he proffers no
19 facts explaining the delay, including the five years he waited
20 after his 2013 sentence was enhanced by the 2000 conviction to
21 seek relief. See Doe v. Busby, 661 F.3d 1001, 1015 (9th Cir.
22 2011) ("[W]e do not doubt that tolling a case for twenty years
23 would be difficult to justify.").


24 Accordingly, Petitioner is not entitled to a later trigger
25 date or tolling of any kind, and the Petition is untimely by more
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1 than 17 years.⁵

2 **ORDER**

3 IT THEREFORE IS ORDERED that Judgment be entered denying the
4 Petition and dismissing this action with prejudice.⁶

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6 DATED: July 23, 2020



7 JEAN ROSENBLUTH
8 U.S. MAGISTRATE JUDGE
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21 ⁵Because the Petition is untimely, the Court need not
22 address Respondent's exhaustion argument. (See Mot. to Dismiss
23 at 3-5); Seals v. Jaquez, No. C 10-3707-PJH (PR), 2013 WL
24 4555227, at *3 n.4 (N.D. Cal. Aug. 27, 2013), aff'd, 623 F. App'x
25 363 (9th Cir. 2015).

26 ⁶To the extent Petitioner seeks resentencing on his 2000 or
27 2013 convictions under new state law (see Opp'n at 3, 6), he must
28 seek such relief in state court. See Jones v. Super. Ct., No. CV
15-752-JFW (PJW), 2016 WL 7638205, at *2 (C.D. Cal. Nov. 17,
2016) (claim for resentencing under Proposition 36 not cognizable
in federal court), accepted by 2017 WL 43915 (C.D. Cal. Jan. 4,
2017); Nelson v. Biter, 33 F. Supp. 3d 1173, 1176-78 (C.D. Cal.
2014) (request for resentencing under Cal. Penal Code § 1170.126
not federal constitutional claim).