UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**EDCV 16-2680-SJO (KK)**	Date:	July 25, 2017
Title:	***Joseph Wayne Williams v. Shawn Hatton***		

Present: The Honorable KENLY KIYA KATO, UNITED STATES MAGISTRATE JUDGE

DEB TAYLOR	Not Reported
Deputy Clerk	Court Reporter

Attorney(s) Present for Petitioner:	Attorney(s) Present for Respondent:
None Present	None Present

Proceedings: (In Chambers) Order to Show Cause Why This Action Should Not Be Dismissed As Untimely [Dkt. 1]

I.
INTRODUCTION

Petitioner Joseph Wayne Williams ("Petitioner") has filed a pro se Petition for Writ of Habeas Corpus ("Petition") by a Person in State Custody pursuant to 28 U.S.C. § 2254. Petitioner challenges his conviction and sentence based on the following claims: (1) California's Natural and Probable Consequences Doctrine is a residual clause that increases negligent homicide to murder; (2) the Natural and Probable Consequences Doctrine is based on a surrogate foreseeability rather than a defendant's actual foreseeability and conduct; (3) Natural and Probable Consequences culpability is measured by surrogacy; and (4) the Natural and Probable Consequences Doctrine applies in both Conspiracy and Aiding and Abetting laws. See ECF Docket ("Dkt.") No. 1, Pet. at 4. However, the Petition appears to be untimely on its face. The Court thus orders Petitioner to show cause why this action should not be dismissed as untimely.

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II.
BACKGROUND

In 2008, Petitioner was convicted of second degree murder in violation of sections 187(a) and 188 of the California Penal Code in Riverside County Superior Court. See Pet. at 1. Petitioner was sentenced to a term of fifteen years to life. Id.

On June 26, 2009, Petitioner filed a direct appeal at the California Court of Appeal. See California Courts, Appellate Courts Case Information, Docket (July 19, 2017, 1:51 PM) http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=41&doc_id=1940913&doc_no=D057205. On February 23, 2011, the California Court of Appeal affirmed Petitioner's conviction. Id.

On January 3, 2011, Petitioner filed a petition for review at the California Supreme Court. See California Courts, Appellate Courts Case Information, Docket (July 19, 2017, 1:51 PM) http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=1966376&doc_no=S189433. On February 16, 2011, the California Supreme Court denied the petition. Id.

On August 4, 2016, Petitioner filed a petition for habeas corpus in the California Supreme Court, which was denied on October 12, 2016. Pet. at 3, 36; see also California Courts, Appellate Courts Case Information, Docket (July 19, 2017, 3:52 PM) http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2150997&doc_no=S236368.

On November 7, 2016, Petitioner constructively[1] filed the instant Petition.[2] Pet. at 4.

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[1] Under the "mailbox rule," when a pro se prisoner gives prison authorities a pleading to mail to court, the court deems the pleading constructively "filed" on the date it is signed. Roberts v. Marshall, 627 F.3d 768, 770 n.1 (9th Cir. 2010).

[2] Petitioner filed an application for leave to file a second or successive petition ("Application") with the Ninth Circuit Court of Appeals believing he had previously filed a federal habeas petition. See Pet. at 2-3. Petitioner alleges he filed a federal habeas petition in the Southern District of California. Id. at 2. However, on July 14, 2017, the Ninth Circuit Court of Appeals denied the Application as unnecessary "[b]ecause the record reflects that [Petitioner] has not had a prior section 2254 habeas corpus petition challenging his 2008 conviction adjudicated on the merits." Dkt. 2.

III.
DISCUSSION

A. THE PETITION WAS FILED AFTER AEDPA'S ONE-YEAR LIMITATIONS PERIOD

Petitioner filed the Petition after April 24, 1996, the effective date of AEDPA. Pet. at 4. Therefore, the requirements for habeas relief set forth in AEDPA apply. Soto v. Ryan, 760 F.3d 947, 956-57 (9th Cir. 2014). AEDPA "sets a one-year limitations period in which a state prisoner must file a federal habeas corpus petition." Thompson v. Lea, 681 F.3d 1093, 1093 (9th Cir. 2012) (citation omitted). Ordinarily, the limitations period runs from the date on which the prisoner's judgment of conviction "became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1) ("Section 2244(d)(1)"). "When, on direct appeal, review is sought in the state's highest court but no petition for certiorari to the United States Supreme Court is filed, direct review is considered to be final when the certiorari petition would have been due, which is 90 days after the decision of the state's highest court." Porter v. Ollison, 620 F.3d 952, 958-59 (9th Cir. 2010) (citations omitted).

Here, Petitioner's conviction became final on May 17, 2011, i.e., ninety days after the date of Petitioner's conviction. Id. AEDPA's one-year limitations period commenced the next day, May 18, 2011, and expired on May 18, 2012. See 28 U.S.C. § 2244(d)(1). However, Petitioner constructively filed the instant Petition on November 7, 2016. Pet. at 4. Therefore, in the absence of a later trigger date under 28 U.S.C. § 2241 (d)(1)(B), (C), or (D), or any applicable tolling, it appears the Petition may be untimely by over four years under Section 2244(d)(1). Thompson, 681 F.3d at 1093.

B. PETITIONER IS NOT ENTITLED TO A LATER TRIGGER DATE

Pursuant to 28 U.S.C. § 2244(d)(1), there are three situations where a petitioner may be entitled to a later trigger date of the one-year limitation period beyond the date of his conviction becoming final. First, under Subsection (B), if a state action prevented a petitioner from filing a federal habeas claim in violation of the Constitution or laws of the United States, the limitations period begins to run on "the date on which the impediment to filing an application created by State action in . . . is removed." 28 U.S.C. § 2244(d)(1)(B). Second, under Subsection (C), if a right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review, the limitations period begins to run on the "date on which the constitutional right asserted was initially recognized by the Supreme Court." 28 U.S.C. § 2244(d)(1)(C). Third, under Subsection (D), if a petitioner brings newly-discovered claims, the limitations period begins to run on "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D).

Here, it does not appear Petitioner is entitled to a trigger date beyond the date on which his conviction became final. See 28 U.S.C. 2244(d)(1). First, Petitioner does not appear to be

entitled to a later trigger date under Subsection (B) because he does not identify any State action that prevented him from filing a federal habeas claim in violation of the Constitution or laws of the United States. 28 U.S.C. § 2244(d)(1)(B). Second, Petitioner does not appear to be entitled to a later trigger date under Subsection (D) because Petitioner does not identify a newly-discovered claim based on a *factual* discovery. Instead, Petitioner's argument appears to rest on a legal predicate arising from the U.S. Supreme Court decision Johnson v. U.S., ___ U.S. ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015) (finding the residual clause of the Armed Career Criminal Act ("ACCA") unconstitutionally vague).

To the extent Petitioner argues he is entitled to a later trigger date under Subsection (C) because Johnson creates a "newly announced substantive rule" that applies retroactively on collateral review, Johnson does not apply to Petitioner's claims. Petitioner argues that "[d]ue to the extreme vagueness in their applications, the governing laws and statutes of second degree murder, Penal Code sections 189 and 188, and their corresponding jury instructions, are in violation of" Johnson. Pet. at 23. However, as a preliminary matter, the rule in Johnson does not appear to apply because "Petitioner's sentence was not enhanced under ACCA's 'residual clause' or any other similar statute." Renteria v. Lizarraga, No. CV 16-1568-RGK (SS), 2016 WL 4650059, at *2 (C.D. Cal. Aug. 1, 2016), report and recommendation adopted, 2016 WL 4595209 (C.D. Cal. Sept. 2, 2016). In fact, unlike the claims in Johnson, Petitioner's challenges to California Penal Code sections 188 and 189 and CALCRIM 520 are premised (1) on state law; (2) do not discuss any sentencing enhancements; and (3) do not require a "wide-ranging inquiry" into whether Petitioner's crimes posed any "serious potential risk of physical injury to another." Johnson, No. LACV 16-9245-GW (JCG), 2016 WL 8738264, at *3 (C.D. Cal. Dec. 20, 2016), report and recommendation adopted as modified sub nom. Johnson v. Fox, 2017 WL 1395512 (C.D. Cal. Apr. 14, 2017) (citing Johnson, 135 S. Ct. 2551). Specifically, Petitioner has not identified any residual clause found in California Penal Code section 188[3] and CALCRIM 520[4], but instead merely argues that the language employed in both is vague. See Pet. at 11-13. Furthermore, while some courts have found "California Penal Code § 189 [] may contain a residual clause, Johnson does not render all such clauses unconstitutionally vague." Johnson v. Fox, 2017 WL 1395512, at *1. Accordingly, Johnson's new rule of constitutional law does not appear applicable to Petitioner's claims, and thus Petitioner is not entitled to a later trigger date under Subsection (C).

C. STATUTORY TOLLING DOES NOT RENDER THE PETITION TIMELY

"A habeas petitioner is entitled to statutory tolling of AEDPA's one-year statute of limitations while a 'properly filed application for State post-conviction or other collateral review

[3] Implied malice exists "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." Cal. Penal Code § 188.

[4] "An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes." CALCRIM 520.

with respect to the pertinent judgment or claim is pending.'" Nedds v. Calderon, 678 F.3d 777, 780 (9th Cir. 2012) (quoting 28 U.S.C. § 2244(d)(2) ("Section 2244(d)(2)")). Statutory tolling does not extend to the time between the date on which a judgment becomes final and the date on which the petitioner files his first state collateral challenge because, during that time, there is no case "pending." Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). In addition, Section 2244(d)(2) "does not permit reinitiation of the limitations period that has ended before the state petition was filed." Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003).

Here, AEDPA's one-year statute of limitations commenced on May 18, 2011. See 28 U.S.C. § 2244(d)(1). Following the commencement of the limitations period, on August 4, 2016, Petitioner filed his state habeas petition in the California Supreme Court. See Pet. at 3, 16. The limitations period, however, expired on May 18, 2012, well before Petitioner filed his first state habeas petition. See id. Section 2244(d)(2) does not permit reinitiation of the limitations period. See Ferguson, 321 F.3d at 823. Therefore, statutory tolling does not render the Petition timely. See id.

C. EQUITABLE TOLLING DOES NOT RENDER THE PETITION TIMELY

In addition to the statutory tolling provided for by Section 2244(d)(2), the "AEDPA limitations period may be tolled" when it is "equitably required." Doe v. Busby, 661 F.3d 1001, 1011 (9th Cir. 2011) (citations omitted). The "threshold necessary to trigger equitable tolling [under AEDPA] is very high." Bills v. Clark, 628 F.3d 1092, 1097 (9th Cir. 2010) (citation and internal quotation marks omitted). A court may grant equitable tolling only where "'extraordinary circumstances' prevented an otherwise diligent petitioner from filing on time." Forbess v. Franke, 749 F.3d 837, 839 (9th Cir. 2014). The petitioner "bears a heavy burden to show that [he] is entitled to equitable tolling, lest the exceptions swallow the rule." Rudin v. Myles, 781 F.3d 1043, 1055 (9th Cir. 2015) (internal citation and quotation marks omitted).

Here, Petitioner does not appear to specifically identify any reasons entitling him to equitable tolling and the Court has not found any basis to support such a claim. Thus, equitable tolling does not render the Petition timely. Bills, 628 F.3d at 1097.

IV.
ORDER

Accordingly, based upon the Petition as currently submitted, Section 2244(d)(1) appears to bar this action. Petitioner is therefore ORDERED TO SHOW CAUSE why this action should not be dismissed as untimely by filing a written response **no later than August 16, 2017**. Petitioner is advised to inform the Court of any reason demonstrating entitlement to statutory or equitable tolling.

Instead of filing a response to the instant Order, Petitioner may request a voluntary dismissal of this action pursuant to Federal Rule of Civil Procedure 41(a). **The Clerk of the Court has attached a Notice of Dismissal form.** However, the Court warns Petitioner any

dismissed claims may be later subject to the statute of limitations under Section 2244(d)(1), as amended by AEDPA, "[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2244(d)(1).

The Court warns Petitioner failure to timely file a response to this Order will result in the Court dismissing this action with prejudice as untimely, and for failure to prosecute and comply with court orders. See Fed. R. Civ. P. 41(b).

The Clerk of Court is directed to serve a copy of this Order on Petitioner at his current address of record.

IT IS SO ORDERED.