

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

ANDREW OTTON, JR.,

Petitioner,

No. 2:05-cv-2021 MCE KJN P

vs.

CLAUDE E. FINN,

Respondent.

FINDINGS AND RECOMMENDATIONS

_____ /

I. Introduction

Petitioner is a state prisoner proceeding without counsel with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. This action proceeds on the first amended petition filed on March 28, 2007. (Dkt. No. 17.) In 1984, petitioner was convicted of first degree murder pursuant to a guilty plea. Petitioner was sentenced on February 9, 1984, to twenty-five years to life in state prison.

Petitioner raises four claims in his amended petition, all of which he contends violate the terms of his 1984 plea agreement.¹ Generally, petitioner contends that his plea agreement provided that he would earn good time credits such that he would parole 12-1/2 years

¹ Petitioner does not challenge the 1997 or 2003 denials of parole by the Board of Prison Terms. (See Dkt. 23-6 at 36; 77.)

1 after his initial incarceration. He argues that his plea has been rendered involuntary by the failure
2 of the Board of Prison Terms and San Mateo County officials to abide by the terms of the plea
3 bargain. Petitioner also argues that San Mateo County officials are violating the plea agreement
4 by appearing at his parole hearings and opposing petitioner's release on parole. Finally,
5 petitioner contends his plea bargain has been violated by former Governor Gray Davis' "no
6 parole" policy.

7 Respondent argues petitioner's claims are untimely.

8 II. The Statute Of Limitations And The Plea Bargain

9 The Antiterrorism and Effective Death Penalty Act ("AEDPA") contains a statute
10 of limitations for filing a habeas petition:

11 (d)(1) A 1-year period of limitation shall apply to an application for
12 a writ of habeas corpus by a person in custody pursuant to the
13 judgment of a State court. The limitation period shall run from the
14 latest of-

15 (A) the date on which the judgment became final by the conclusion
16 of direct review or the expiration of the time for seeking such
17 review;

18 (B) the date on which the impediment to filing an application
19 created by State action in violation of the Constitution or laws of
20 the United States is removed, if the applicant was prevented from
21 filing by such State action;

22 (C) the date on which the constitutional right asserted was initially
23 recognized by the Supreme Court, if the right has been newly
24 recognized by the Supreme Court and made retroactively
25 applicable to cases on collateral review; or

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

(2) The time during which a properly filed application for State
post-conviction or other collateral review with respect to the
pertinent judgment or claim is pending shall not be counted toward
any period of limitation under this subsection.

28 U.S.C. § 2244.

////

1 Petitioner was sentenced on February 9, 1984. A twelve-and-a-half year term
2 would have expired no later than August 9, 1996, which arguably would have been the date upon
3 which the factual predicate of the claim could have been discovered. However, petitioner's
4 initial parole consideration hearing was held on December 30, 1997. (Dkt. No. 23-6 at 36.) It
5 appears unlikely petitioner would have believed he would be paroled prior to his initial parole
6 hearing. Thus, even with December 30, 1997 as a starting date, the statute of limitations expired
7 on December 31, 1998, and would not have been revived by petitioner's 2003 habeas petition
8 filed in the San Mateo Superior Court. State habeas petitions filed after the one-year statute of
9 limitations has expired do not revive the statute of limitations and have no tolling effect. See
10 Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003); Jimenez v. Rice, 276 F.3d 478, 482
11 (9th Cir. 2001). The discovery of "the factual predicate" of a claim may give rise to a new
12 limitations period. Hasan v Galaza, 254 F.3d 1150, 1154 (9th Cir. 2001). However, it is not
13 necessary for a petitioner to understand the legal significance of the facts; rather, the clock starts
14 when a petitioner understands the facts themselves. Id. at 1154 n.3.

15 Petitioner has failed to address the issue of timeliness and did not file a reply to
16 respondent's answer. Petitioner does not say he was unaware of the factual basis of his claim in
17 1996, 1997 or 1998. Indeed, he argues his understanding of the plea agreement was that he
18 would only serve one-half of the 25 year term and then be released on parole. Petitioner makes
19 no effort to explain why it took him until 2003 to file a habeas petition in state court. Petitioner
20 has not borne his burden of demonstrating the petition is timely as to his claims concerning the
21 plea bargain. See Herbst v. Cook, 260 F.3d 1039, 1042-43 (9th Cir. 2001) (indicating that once a
22 petitioner is given adequate notice and opportunity to respond to allegations that his petition is
23 subject to dismissal pursuant to the applicable statute of limitations, petitioner has the burden of
24 providing an adequate response).

25 But even if the petition were timely brought, his claims would fail. The last
26 reasoned rejection of the plea bargain claims is the decision of the San Mateo County Superior

1 Court which found:

2 a review of the transcript of Petitioner’s sentencing proceedings
3 indicates that he was not promised, either by the Deputy District
4 Attorney or the court, any particular release date. Nor did any San
5 Mateo County official promise not to oppose Petitioner’s parole.
6 The District Attorney’s statement that Petitioner was eligible for
7 good time/work-time credit did not amount to a promise that
8 Petitioner would be released from prison as soon as his earliest
9 possible release date arrived or at any other particular time.

7 (Dkt. No. 23-2 at 56.)

8 When a criminal defendant pleads guilty in exchange for certain promised actions,
9 his right to due process of law entitles him to fulfillment of those promises. Santobello v. New
10 York, 404 U.S. 257, 262 (1971).

11 As noted by the state court, the terms of the plea agreement do not include a
12 promise from the prosecution that they would refrain from opposing petitioner’s release on
13 parole. (Dkt. No. 23-1 at 52-76.) Although petitioner is correct that the sentencing court noted
14 petitioner is eligible for good-time credits (Dkt. No. 23-1 at 75-76), there is no express promise
15 of a date certain petitioner would be placed on parole, nor a promise that he would be released on
16 parole after the passage of twelve and a half years. (Dkt. No. 23-1 at 52-76.)² Thus, the state
17 court’s rejection of petitioner’s plea bargain claims was neither contrary to, nor an unreasonable
18 application of, controlling principles of United States Supreme Court precedent. The petition
19 should be denied.

20 ///

21 ² Petitioner also argues that his plea bargain was violated by Governor Gray Davis’ “no
22 parole” policy. In partial support of this argument, petitioner quotes Gray Davis as claiming
23 “murderers will be paroled in a pine box,” and provides numerous articles supporting petitioner’s
24 claim that Gray Davis followed a “no parole” policy. Although petitioner’s opinion that the
25 Governor has such a policy is shared by others, as demonstrated by the exhibits and attachments
26 filed in support of petitioner’s application, petitioner has failed to cite any relevant federal legal
authority supporting this claim nor has he demonstrated that such a policy was applied to him. In
addition, the court notes that Gray Davis does not currently serve as the Governor of California
and he did not reverse a decision of the Board granting petitioner a parole date. Accordingly,
former Governor Gray Davis’ alleged actions are irrelevant to this petition.

1 III. Conclusion

2 For all of the above reasons, the undersigned recommends that petitioner's
3 application for a writ of habeas corpus be denied.

4 Accordingly, IT IS HEREBY RECOMMENDED that petitioner's application for a
5 writ of habeas corpus be denied.

6 These findings and recommendations are submitted to the United States District
7 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
8 one days after being served with these findings and recommendations, any party may file written
9 objections with the court and serve a copy on all parties. Such a document should be captioned
10 "Objections to Magistrate Judge's Findings and Recommendations." Additionally, if petitioner
11 files objections, he shall also address whether a certificate of appealability should issue and, if so,
12 why and as to which issues. A certificate of appealability may issue under 28 U.S.C. § 2253
13 "only if the applicant has made a substantial showing of the denial of a constitutional right." 28
14 U.S.C. § 2253(c)(3). Any response to the objections shall be filed and served within fourteen
15 days after service of the objections. The parties are advised that failure to file objections within
16 the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
17 F.2d 1153 (9th Cir. 1991).

18 DATED: August 24, 2010

19
20
21 
22 KENDALL J. NEWMAN
23 UNITED STATES MAGISTRATE JUDGE

24 otto2021.157