UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

KEVIN ARTHER CLEVELAND,

Petitioner,

v.

RONALD SCOTT OWENS,

Respondents.

No. 2:14-cv-1528 JAM AC P

FINDINGS & RECOMMENDATIONS

Petitioner, a former state prisoner proceeding pro se, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. ECF No. 1. Pending before the court is respondent's motion to dismiss on the grounds that petitioner is no longer in custody, the petition was filed outside the one-year statute of limitations, and Ground Two of the petition should be dismissed because it fails to state a cognizable federal claim. ECF No. 9. Petitioner has responded to the motion (ECF No. 13) and respondent has replied (ECF No. 14).

I. Factual and Procedural Background

Petitioner pled no contest to two counts of possession of child pornography with a prior offense. ECF No. 1 at 1; Lodged Doc. No. 1. On November 6, 2007, imposition of petitioner's state prison sentence was suspended and he was granted five years formal probation. Lodged Doc. No. 1. On March 25, 2011, probation was terminated and petitioner was sentenced to two years in state prison. Lodged Doc. No. 2. The paperwork indicates that petitioner's sentence was

a paper commitment only and that he was to report to the parole office. Id. at 1. On May 25, 2011, the abstract of judgment was amended to correct a clerical error. Lodged Doc. No. 3. Petitioner was discharged from the custody of the California Department of Corrections and Rehabilitation on June 28, 2014. Lodged Doc. No. 10.

A. Direct Review

Petitioner did not appeal the judgment. ECF No. 1 at 6; ECF No. 9 at 2.

B. State Collateral Review

1. Sacramento County Superior Court Case No. 14HC00075

On February 4, 2014,[1] petitioner filed a petition for writ of habeas corpus in the Sacramento County Superior Court and it was assigned case number 14HC00075. Lodged Doc. No. 12 at 1. Though respondent has not provided a copy of the petition, the order denying the petition indicates that the petition related to the circumstances surrounding petitioner's parole violation and the conditions of his parole, rather than the underlying conviction. Id. at 2. The petition was denied on March 14, 2014. Id.

The docket for case 14HC00075 indicates that petitioner filed three other cases in the Sacramento County Superior Court that were related to his habeas petition. Id. at 1. Respondent has not provided any information on these cases, but the docket reflects that the earliest filed of the three cases was initiated on May 24, 2013. Id.

2. California Court of Appeal Case No. C075961

On March 12, 2014,[2] petitioner filed a petition for writ of habeas corpus in the California

[1] Based on the information provided in another of petitioner's state court petitions, he was in physical custody for a parole violation from January 15, 2014, until March 1, 2014. Lodged Doc. No. 13 at 5-6. This means petitioner would be entitled to the benefit of the prison mailbox rule. See Houston v. Lack, 487 U.S. 266, 276 (1988). However, since the petition has not been provided, the filing date reflects the date the petition was filed by the court, but the court notes that petitioner's first state appellate court petition states he filed a habeas petition in the Sacramento County Superior Court on January 22, 2014. Lodged Doc. No. 4 at 18.

[2] Plaintiff's state court petitions indicate that he was returned to physical custody immediately after filing the petition on March 12, 2014. Lodged Doc. No. 13 at 7. Since it is not clear how long petitioner remained in custody after that, the court will assume that petitioner was in physical custody until June 28, 2014, when he was discharged (Lodged Doc. No. 10), and is entitled to application of the prison mailbox rule through that date.

Court of Appeal, Third Appellate District and it was assigned case number C075961. Lodged Doc. No. 4. The petition challenged his underlying conviction, the circumstances surrounding his parole violation, and his parole conditions (id.) and was denied March 14, 2014 (Lodged Doc. No. 5).

3. California Court of Appeal Case No. C075964

The website of the California Court of Appeals, Third Appellate District, indicates that petitioner filed a second petition on March 12, 2014, and that it was assigned case number C075964.[3] This petition has not been provided by respondent. The docket indicates that it was filed as a petition for writ of mandate, but the notes for the order denying the petition on March 14, 2014, identify it as a petition for writ of habeas corpus.[4]

4. California Supreme Court Case No. S217599

On March 22, 2014, petitioner filed a petition for writ of habeas corpus in the California Supreme Court and it was assigned case number S217599. Lodged Doc. No. 6. The petition challenged his underlying conviction, the circumstances surrounding petitioner's parole violation, and conditions of parole (id.) and was denied June 11, 2014 (Lodged Doc. No. 7).

5. California Court of Appeal Case No. C076399

On April 3, 2014,[5] petitioner filed a petition for writ of habeas corpus in the California Court of Appeal, Third Appellate District and it was assigned case number C076399. Lodged Doc. No. 15. The petition appears to be appealing the denial of the petition filed in the Sacramento County Superior Court, case number 14HC00075, and seeking discovery to enable petitioner to challenge his conviction. Id. It was denied May 8, 2014. Lodged Doc. No. 16.

---

[3] This court may take judicial notice of the records of other courts. See United States v. Howard, 381 F.3d 873, 876 n.1 (9th Cir. 2004) (citing United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980)); see also Fed. R. Evid. 201(b)(2) (court may take judicial notice of facts that are capable of accurate determination by sources whose accuracy cannot reasonably be questioned).

[4] Docket for case number C075964 available at: http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=3&doc_id=2071273&doc_no=C075964

[5] The front page of the petition indicates it was originally received April 25, 2014, and returned because it did not have a verification. Lodged Doc. 15 at 1. It was ultimately filed by the court on May 6, 2014. Id.

6. California Court of Appeal Case No. C076398

On April 7, 2014,[6] petitioner filed a petition for writ of habeas corpus in the California Court of Appeal, Third Appellate District, and it was assigned case number C076398. Lodged Doc. No. 13. The petition challenged the circumstances surrounding petitioner's parole violation and his parole conditions (id.), and was denied May 8, 2014 (Lodged Doc. No. 14).

7. California Supreme Court Case No. S218079

On April 22, 2014, petitioner filed another petition for writ of habeas corpus in the California Supreme Court and it was assigned case number S218079. Lodged Doc. No. 8. The petition challenged the circumstances surrounding petitioner's parole violation, his conditions of parole, and length of parole (id.) and was denied June 11, 2014 (Lodged Doc. No. 9).

C. The Federal Petition

On June 27, 2014, petitioner, proceeding pro se, filed the instant federal petition. ECF No. 1.

II. Motion to Dismiss

Respondent moves to dismiss the instant petition on the grounds that it is moot, this court lacks jurisdiction, and the petition is untimely. ECF No. 9 at 3-9. He argues that the petition is moot and this court lacks jurisdiction because petitioner has been released from custody. Id. at 3-7. He further argues that the petition is untimely because petitioner's judgment became final on January 5, 2008, the last day to file his federal habeas petition was January 5, 2009, and petitioner is not entitled to any statutory tolling. Id. at 8-9. Respondent also argues that Ground Two should be dismissed because it fails to state a cognizable claim. Id. at 9-10.

III. Opposition

Petitioner argues that his petition is not moot because he is still being punished even though he is no longer in custody. He also argues that he does not believe that there is a statute of limitations for bringing a habeas petition as long as he is in some form of custody because the law

[6] The front page of the petition indicates it was originally received April 25, 2014, and returned because it did not have a verification. Lodged Doc. 13 at 1. It was ultimately filed by the court on May 6, 2014. Id.

says a petition must be brought in "a reasonable amount of time." ECF No. 13 at 2. He also argues that he was making vigorous efforts to appeal his case but that county officials prevented him from filing habeas petitions while he was in jail. Id. Finally, he argues that his petition should not be dismissed because it states reasonable claims. Id.

IV. Reply

Respondent replies that the limitations petitioner is currently experiencing are insufficient to satisfy the in custody requirement for a habeas case and the court is therefore without jurisdiction. ECF No. 14 at 3-4. He also argues that petitioner's argument that there is no statute of limitations is meritless, and that to the extent petitioner is attempting to make a claim for equitable tolling, he fails. Id. at 4. Finally, he asserts that petitioner has not disputed his claim that Ground Two fails to state a claim because petitioner's arguments dealt with his ineffective assistance of counsel claims, which did not constitute Ground Two of the petition. Id. at 5.

V. Case in Controversy

The petition in this case was filed on June 27, 2014 (ECF No. 1), and petitioner was discharged from custody the next day (Lodged Doc. No. 10). Respondent argues that because custody has ended, there is no longer a case in controversy rendering the case moot and depriving the court of jurisdiction. ECF No. 9 at 3-7.

28 U.S.C. § 2254(a) provides that "a district court shall entertain an application for a writ of habeas corpus in behalf of a person *in custody* pursuant to the judgment of a State court only on the ground that he is *in custody* in violation of the Constitution. . ." (emphasis added). The statute's first reference to custody establishes a jurisdictional requirement. Bailey v. Hill, 599 F.3d 976, 979 (9th Cir. 2010). However, the jurisdictional requirement is met where the petitioner is in custody at the time the petition is filed; custody need not continue for the court to retain jurisdiction.

> The petitioner must be in custody at the time that the petition is filed, see Carafas v. LaVallee, 391 U.S. 234, 238, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968), but the petitioner's "subsequent release from custody does not itself deprive the federal habeas court of its statutory jurisdiction." Tyars v. Finner, 709 F.2d 1274, 1279 (9th

> Cir. 1983). Physical custody is not indispensable to confer jurisdiction.

Id. "[O]nce the federal jurisdiction has attached in the District Court, it is not defeated by the release of the petitioner prior to completion of proceedings on such application.'" Carafas, 391 U.S. at 238. A prisoner who is on parole is still considered to be "in custody." Maleng v. Cook, 490 U.S. 488, 491 (1989). Petitioner filed his case the day before he was discharged from custody, and respondent concedes that petitioner was in custody at the time he filed the petition. ECF No. 9 at 6. This court therefore retains jurisdiction.

Respondent's arguments related to the statute's second use of "in custody" are off point. Section 2254(a) states in relevant part that a petition for habeas corpus can be brought "only on the ground that [petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." While the first "in custody" relates to petitioner's status at the time of filing the petitioner, this second "in custody" describes the nature of the claim petitioner can bring. Petitioner meets that standard as the petition challenges the underlying conviction on several constitutional grounds.[7] If petitioner's claims are found to be true, the state's custody of him would have been in violation of his constitutional rights. In this case, the fact that petitioner is no longer in that custody is irrelevant to jurisdiction, as the courts have very clearly held that a petitioner only has to be "in custody" at the time he brings his petition.

The fact that petitioner is no longer in custody also does not render the case moot. A habeas petition "is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." Sibron v. New York, 392 U.S. 40, 57 (1968). "A habeas petition challenging the *underlying conviction* is never moot simply because, subsequent to its filing, the petitioner has been released from custody." Chacon v. Wood, 36 F.3d 1459, 1463 (9th Cir. 1994) (emphasis added), overruled on other grounds, 28 U.S.C. § 2253(c). The Ninth Circuit has held that it is an "irrebuttable" presumption that

[7] Petitioner's claims in his response to the motion to dismiss regarding the collateral consequences of his conviction (ECF No. 13) do not impact the jurisdictional analysis because they are not the basis of his petition.

"'collateral consequences flow from *any* criminal conviction.'" Id. (quoting Hirabayashi v. U.S., 828 F.2d 591, 605-06 (9th Cir. 1987) (adding emphasis)). Petitioner is clearly challenging the underlying conviction, and the collateral consequences doctrine prevents the petition from being moot. Id.; Chaker v. Crogan, 428 F.3d 1215, 1219 (9th Cir. 2005).

Respondent, citing to Douglas v. Jacquez, 626 F.3d 501 (9th Cir. 2010), argues that the relief the court can provide is limited to release from custody. ECF No. 9 at 5. But this argument overlooks how the court effects that relief. Petitioner does not seek to have the court relieve him of the collateral consequences of his conviction, as respondent indicates in his reply (ECF No. 14 at 4), though such relief would flow from the relief petitioner is seeking. Petitioner seeks to have his conviction overturned (ECF No. 1 at 15), which is within the power of the court. In Douglas, on which respondent relies, the Ninth Circuit found the district court had exceeded its authority because it ordered the state court to modify the judgment to reflect conviction of a lesser offense. 626 F.3d at 505. The Ninth Circuit held that the proper remedy was to issue a conditional writ of habeas corpus that ordered the conviction vacated only if the state did not re-sentence petitioner within a reasonable amount of time. Id. The authority presented by respondent demonstrates that, if petitioner's claims are found to be true, this court has authority to order his conviction vacated.

Because (1) petitioner was in custody when he filed his petition and (2) he is challenging his underlying conviction, not just the collateral consequences of the conviction, respondent's motion to dismiss on the grounds that the case is moot and the court lacks jurisdiction must be denied.

VI. Statute of Limitations

In his opposition to the motion to dismiss, petitioner argues that he believed that as long as he was in some form of custody, he only had to bring his petition within "a reasonable amount of time." ECF No. 13 at 2. It appears that petitioner may have been referring to the California rules regarding the time to seek review by a higher court within the state court system. See Waldrip v. Hall, 548 F.3d 729, 734 (2008). This is not the standard for federal petitions.

Section 2244(d)(1) of Title 28 of the United States Code contains a one-year statute of

limitations for filing a habeas petition in federal court. This statute of limitations applies to habeas petitions filed after April 24, 1996, when the Antiterrorism and Effective Death Penalty Act (AEDPA) went into effect. Cassett v. Stewart, 406 F.3d 614, 625 (9th Cir. 2005). The one-year clock commences from one of several alternative triggering dates. See 28 U.S.C. § 2244(d)(1). In this case the applicable date is that "on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." § 2244(d)(1)(A).

In this case, petitioner was granted five years of probation and imposition of his sentence was suspended on November 6, 2007. Lodged Doc. No. 1. On March 25, 2011, probation was terminated and petitioner was sentenced to two years in state prison. Lodged Doc. No. 2. Respondent argues that judgment became final on January 5, 2008, sixty days after petitioner was granted five years of probation. ECF No. 9 at 8; see also Cal. R. Ct. 8.308(a) (defendant has sixty days to file an appeal after judgment is entered).

In California, when a court grants probation, it can (1) suspend the imposition of a sentence or (2) impose a sentence while suspending execution of it during the pendency of probation. See People v. Howard, 16 Cal. 4th 1081, 1084 (Cal. 1997) (citing Cal. Pen. Code § 1203.1(a)). Therefore, when the court suspended imposition of petitioner's sentence, no judgment of conviction was rendered. Id. at 1087; People v. Arguello, 59 Cal. 2d 475, 476 (Cal. 1963). However, "[t]he order granting probation was, itself, an appealable order (Pen. Code, s 1237), and on such an appeal all matters going to the validity of the conviction could have been raised. Since they were not raised then, they cannot be raised on a later appeal from the final judgment." People v. Wright, 275 Cal. App. 2d 738, 739 (Cal. App. 1969) (citations omitted); People v. Chavez, 243 Cal. App. 2d 761, 763 (Cal. App. 1966); Cal. Pen. Code § 1237.

Generally, a defendant may appeal a subsequent order revoking probation and implementing sentencing, but "the matters arising prior to pronouncement of judgment cannot thereby be reviewed." People v. Glasser, 238 Cal. App. 2d 819, 821 (Cal. App. 1965), disapproved on other grounds by People v. Barnum, 29 Cal. 4th 1210, 1218-19, 1226 (Cal. 2003). But even when a defendant fails to appeal after the initial grant of probation, the court still has an

"obligation to consider those alleged errors which may be raised at any time because they involve violations of fundamental constitutional rights." Id. at 824.

Under the general rule, petitioner's judgment became final on January 7, 2008,[8] sixty days after the order granting probation, and the statute of limitations expired one year later on January 7, 2009. Assuming, without deciding, that petitioner could have alleged facts involving fundamental constitutional rights, such that they would have been reviewable on an appeal from the order revoking probation, judgment became final on May 24, 2011, and the statute of limitations expired on May 24, 2012. The instant petition was filed on June 27, 2014, ECF No. 1, more than two years later. Accordingly, whether the limitations period is calculated from the grant of probation or from its revocation, the petition is untimely absent statutory or equitable tolling.

A. Statutory Tolling

Under the AEDPA, the statute of limitations is tolled during the time that a properly filed application for state post-conviction or other collateral review is pending in state court. 28 U.S.C. § 2244(d)(2). Since petitioner did not file any applications for state post-conviction or other collateral review until more than a year after his judgment became final (see supra Section I), he is not entitled to statutory tolling. State habeas petitions filed after the one-year statute of limitations has expired do not revive the statute of limitations and have no tolling effect. See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003); Jimenez v. Rice, 276 F.3d 478, 482 (9th Cir. 2001); Green v. White, 223 F.3d 1001, 1003 (9th Cir. 2000) (petitioner is not entitled to tolling where the limitations period has already run).

B. Equitable Tolling

A habeas petitioner is entitled to equitable tolling of AEDPA's one-year statute of limitations only if the petitioner shows: "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." Holland v. Florida, 560 U.S. 631, 649 (2010) (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005);

[8] January 5, 2008, fell on a Saturday. Cal. R. Ct. 8.60(a); Cal. Code Civ. P. § 12a.

Ramirez v. Yates, 571 F.3d 993, 997 (9th Cir. 2009). "[T]he statute-of-limitations clock stops running when extraordinary circumstances first arise, but the clock resumes running once the extraordinary circumstances have ended or when the petitioner ceases to exercise reasonable diligence, whichever occurs earlier." Luna v. Kernan, 784 F.3d 640, 651 (9th Cir. 2015) (citing Gibbs v. Legrand, 767 F.3d 879, 891-92 (9th Cir. 2014). An "extraordinary circumstance" has been defined as an external force that is beyond the inmate's control. Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999). "The diligence required for equitable tolling purposes is 'reasonable diligence,' not 'maximum feasible diligence.'" Holland, 560 U.S. at 653 (internal citations and additional quotation marks omitted); see also Bills v. Clark, 628 F.3d 1092, 1096 (9th Cir. 2010).

A showing of actual innocence can also satisfy the requirements for equitable tolling. Lee v. Lampert, 653 F.3d 929, 937 (9th Cir. 2011) (en banc); McQuiggin v. Perkins, 133 S. Ct. 1924, 1928 (2013). "[W]here an otherwise time-barred habeas petitioner demonstrates that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt, the petitioner may pass through the Schlup [v. Delo, 513 U.S. 298 (1995),][9] gateway and have his constitutional claims heard on the merits." Lee, 653 F.3d at 937; accord, McQuiggin, 133 S.Ct. at 1928.

Petitioner alleges that he made "a vigorous effort to appeal to a higher court" but that while he was in jail, county officials prevented him from filing a petition. ECF No. 13 at 2. He also mentions that he believes that there is evidence of his attempts to file a petition shortly after his conviction in 2007. Id. at 3. To the extent petitioner is attempting to make an argument for equitable tolling, it is insufficient. Although interference by jail officials could potentially constitute an extraordinary circumstance, petitioner has failed to establish either the scope of the interference, or that he was diligent in his efforts to pursue litigation. Petitioner's own sworn, state habeas petition establishes that he was on parole from March 25, 2011, to January 10, 2014, and therefore not in physical custody during that time (Lodged Doc. No. 13 at 3), and petitioner

[9] In Schlup, the Supreme Court announced that a showing of actual innocence could excuse a procedural default and permit a federal habeas court to reach the merits of otherwise barred claims for post-conviction relief.

offers no explanation for his failure to file a habeas petition during that time. Nearly three years of inactivity cannot be said to constitute diligent pursuit. Sanchez v. Yates, 503 F. App'x 520, 523 (9th Cir. 2013) (petitioner did not demonstrate diligence when he waited until ten months after impediment was removed to file federal habeas petition); Pace, 544 U.S. at 419 (petitioner not diligent when he waited years to file state petition for post-conviction relief and another five months to pursue federal relief after state petition was decided); McQuiggin, 133 S. Ct. at 1931 (petitioner did not qualify for equitable tolling after waiting nearly six years to seek federal post-conviction relief). Nor does petitioner's ignorance of the statute of limitations entitle him to equitable tolling. Rasberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006) ("a pro se petitioner's lack of legal sophistication is not, by itself, an extraordinary circumstance warranting equitable tolling").

To the extent the petition makes a claim of actual innocence that could potentially entitle petitioner to equitable tolling, a petitioner claiming actual innocence must satisfy the Schlup standard by demonstrating "'that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.'" Lee, 653 at 938 (quoting Schlup, 513 U.S. at 327). Actual innocence in the miscarriage of justice context "means factual innocence, not mere legal insufficiency." Bousley v. United States, 523 U.S. 614, 623-24 (1998); Sawyer v. Whitley, 505 U.S. 333, 339 (1992) (citing Smith v. Murray, 477 U.S. 527 (1986)); Jaramillo v. Stewart, 340 F.3d 877, 882-83 (9th Cir. 2003) (accord).

While the standard is exacting, permitting review only in an "extraordinary" case, "absolute certainty" as to a petitioner's guilt or innocence is not required. House v. Bell, 547 U.S. 518, 538 (2006). To make a credible claim of actual innocence, petitioner must produce "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." Schlup, 513 U.S. at 324. The habeas court then considers all the evidence: old and new, incriminating and exculpatory, admissible at trial or not. House, 547 U.S. at 538. On this complete record, the court makes a "'probabilistic determination about what reasonable, properly instructed jurors would do.'" Id. (quoting Schlup, 513 U.S. at 329).

Petitioner has not provided any new evidence in support of his actual innocence claims and without new evidence, the actual innocence exception does not apply. Schlup, 513 U.S. at 327.

VII. Conclusion

Since the petition is untimely, the court declines to address whether Ground Two of the petition states a claim for relief. The petition should be dismissed because it was filed beyond the one-year statute of limitations.

VIII. Certificate of Appealability

Pursuant to Rule 11 of the Federal Rules Governing Section 2254 Cases, this court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. A certificate of appealability may issue only "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). For the reasons set forth in these findings and recommendations, a substantial showing of the denial of a constitutional right has not been made in this case. Therefore, no certificate of appealability should issue.

Accordingly, IT IS HEREBY RECOMMENDED that:

1. Respondent's motion to dismiss (ECF No. 9) be granted and petitioner's application for a writ of habeas corpus be denied as untimely.

2. This court decline to issue the certificate of appealability referenced in 28 U.S.C. § 2253.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any response to the objections shall be filed and served within fourteen days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to

////

////

appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: September 21, 2015

ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE