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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 MICHAEL E. MAAS,

12 Petitioner,

13 v.

14 RONALD RACKLEY, Warden,

15 Respondents.

Case No.: 17cv1547 BAS (JMA)

**REPORT AND
RECOMMENDATION RE:
GRANTING MOTION TO
DISMISS**

16
17 **I. INTRODUCTION**

18 Petitioner Michael E. Maas, a state prisoner proceeding pro se with a First
19 Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (“Petition” or
20 “Pet.”), challenges his 1998 convictions in San Diego Superior Court case nos.
21 SCE185960 and SCE188460 for grand theft, unlawful taking of a vehicle, burglary and
22 forgery. (Am. Pet., ECF No. 4 at 2.) The Court has read and considered the Petition,
23 [ECF No. 4], the Motion to Dismiss and Memorandum of Points and Authorities in
24 Support of the Motion to Dismiss [ECF No. 8], the lodgments and other documents filed
25 in this case, and the legal arguments presented by both parties. For the reasons discussed
26 below, the Court recommends Respondent’s motion to dismiss be **GRANTED** and the
27 case be **DISMISSED** with prejudice.

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1 **II. FACTUAL AND PROCEDURAL BACKGROUND**

2 Maas was convicted of grand theft automobile, a violation of California Penal
3 Code § 487(d) and unlawful taking of a vehicle, a violation of California Penal Code
4 §10851(a) in case no. SCE 185960 on April 6, 1998. (Lodgment No. 2, ECF No. 9-2 at
5 1.) At sentencing, the defense argued one of Maas’s priors, his conviction in CR-78830,
6 was not a qualifying strike. (*Id.*) The trial court disagreed, and found Maas had suffered
7 two prior “strike” convictions; he was sentenced to twenty-five years to life in prison.
8 (*Id.*) Maas appealed his conviction and sentence. (*Id.* at 2.)

9 While that appeal was pending, Maas was convicted in case no. SCE 188460 of
10 burglary, a violation of California Penal Code § 459, and forgery, a violation of
11 California Penal Code § 470(a). (*Id.* at 2.) Maas again claimed his prior conviction in
12 CR-78830 was not a qualifying strike prior conviction. (*Id.*) The trial court disagreed,
13 and Maas was again sentenced to a term of twenty-five years-to-life in prison,
14 consecutive to his sentence in case no. SCE 185960. (*Id.*) Maas appealed his conviction
15 and sentence. (*Id.*)

16 On August 17, 2000, the state appellate court affirmed Maas’s conviction and
17 sentence in case no. SCE 188460. (*Id.*) On April 16, 2001, the state appellate court
18 affirmed Maas’s conviction and sentence in case no. SCE 185960. (*Id.*)

19 On November 6, 2012, California voters passed Proposition 36 which provided a
20 mechanism for resentencing certain three strikes offenders. Cal. Penal Code § 1170.126
21 (West 2012). Maas filed a petition for recall of his sentence pursuant to California Penal
22 § 1170.126 in both SCE 185960 and SCE 188460. (*Id.*) The court denied the petition,
23 concluding Maas was ineligible for resentencing due to the nature of one of his prior
24 strike convictions. (*Id.*)

25 On July 17, 2013, Maas filed a petition for writ of habeas corpus in the San Diego
26 Superior Court in case no. EHC 942 which challenged his convictions and sentences in
27 case nos. SCE 185960 and SCE 188460. (Lodgment No. 1, ECF No. 9-1.) Maas claimed
28 his trial counsel was ineffective when he failed to properly challenge Maas’s strike priors

1 and contended the prior convictions on which his sentences in SCE 185960 and SCE
2 188460 were based, CR-78830 and CR-81685, were invalid. The superior court denied
3 the petition as untimely. (Lodgment No. 2, ECF No. 9-2.)

4 Maas filed a petition for writ of habeas corpus in the California Court of Appeal
5 which raised the same issues as the petition for writ of habeas corpus he had filed in the
6 superior court. (Lodgment No. 3, ECF No. 9-3 at 3.) He also contended he should have
7 been able to challenge the judge assigned to his habeas corpus petition under California
8 Civil Code § 170.6(a)(1). (*Id.*) The state appellate court issued a writ of mandate
9 directing the superior court to vacate its order denying Maas's habeas corpus petition and
10 reassign the case to a new judge on December 10, 2014. (*Id.* at 6.) The California
11 Supreme Court affirmed the Court of Appeal's decision on November 7, 2016.
12 (Lodgment No. 4, ECF No. 9-4.)

13 On December 30, 2016, Maas filed a new habeas corpus petition in the San Diego
14 Superior Court in case no. EHC. (Lodgment No. 5, ECF No. 9-5.) The court
15 consolidated case nos. EHC 942 and EHC 1114, vacated the superior court's prior denial
16 of EHC 942 pursuant to the California Supreme Court's November 7, 2016 Order, and
17 denied the petitions on January 16, 2017. (Lodgment No. 6, ECF No. 9-6.)

18 Maas then filed a Motion to Vacate Improper Sentence in the California Court of
19 Appeal on January 30, 2017. (Lodgment No. 7, ECF No. 9-7.) He again attacked the
20 validity of the prior convictions upon which his three-strikes sentence was based. He
21 claimed the prior convictions were not strikes and the state had breached its plea
22 agreements in those cases by using them as strikes to enhance his sentence in case nos.
23 SCE 185960 and SCE 188460. (Lodgment No. 8, ECF No. 9-8 at 2.) The appellate court
24 denied the petition on February 3, 2017 on procedural grounds. (*Id.*)

25 On March 21, 2017, Maas filed a petition for writ of habeas corpus in the
26 California Supreme Court raising the same claims regarding his prior convictions and
27 three-strikes sentences. (Lodgment No. 9, ECF No. 9-9.) The California Supreme Court
28 denied the petition on May 24, 2017, citing *In re Robbins*, 18 Cal. 4th 770, 780 (1998,

1 *People v. Duvall*, 9 Cal. 4th 464, 474 (1995), and *In re Swain*, 34 Cal. 2d 300, 304
2 (1949). (Lodgment No. 10, ECF No, 9-10.)

3 On July 31, 2017, Maas filed a Petition for Writ of Habeas Corpus pursuant to 28
4 U.S.C. § 2254 in this Court, and a First Amended Petition on October 5, 2017. (ECF
5 Nos. 1, 4.) Respondent filed a Motion to Dismiss on November 28, 2017. (ECF No. 8.)
6 Maas did not file an Opposition.

7 **III. DISCUSSION**

8 Maas's amended petition contains four claims attacking his convictions and
9 sentences in case nos. SCE 185960 and SCE 188460. (Pet., ECF No. 4.) Respondent
10 contends the petition is successive and untimely. (Mot. to Dismiss, ECF No. 8-1.)

11 **A. The Petition is Successive**

12 In claim one, Maas contends his trial and appellate counsel in case nos. SCE
13 185960 and SCE 188460 were ineffective when they failed to properly investigate and
14 challenge the validity of the prior convictions used to enhance his sentences in those
15 cases. (Pet., ECF No. 4 at 8.) In claims three and four, he contends trial and appellate
16 counsel in case nos. SCE 185960 and SCE 188460 did not investigate whether the plea
17 agreement in CR-78830 was violated and how any violation would affect his sentence in
18 case nos. SCE 185960 and SCE 188460. (*Id.* at 15.)

19 A district court is required to dismiss any claim that does not satisfy the provisions
20 of 28 U.S.C. § 2244(b). 28 U.S.C. § 2244(b)(4) (West 2006). Section 2244(b) states as
21 follows:

22 (1) A claim presented in a second or successive habeas corpus
23 application under section 2254 that was presented in a prior application shall
24 be dismissed.

25 (2) A claim presented in a second or successive habeas corpus
26 application under section 2254 that was not presented in a prior application
27 shall be dismissed unless:

28 (A) the applicant shows that the claim relies on a new rule of
constitutional law, made retroactive to cases on collateral

1 review by the Supreme Court, that was previously unavailable;
2 or

3 (B) (i) the factual predicate for the claim could not have been
4 discovered previously through the exercise of due diligence;
5 and

6 (ii) the facts underlying the claim, if proven and viewed in light
7 of the evidence as a whole, would be sufficient to establish by
8 clear and convincing evidence that, but for constitutional error,
9 no reasonable factfinder would have found the applicant guilty
10 of the underlying offense.

11 28 U.S.C. § 2244(b).

12 On March 1, 2002, Maas filed a petition for writ of habeas corpus in this Court in
13 case no. 02cv0406 JM (BEN) challenging his conviction in SCE 185960. (*See Maas v.*
14 *Giurbino*, 02cv0406 JM (BEN) (So. Dist. Cal. 2002).) On November 12, 2002, this
15 Court denied the petition on the merits. (*See Order* filed Nov. 12, 2002 in case No.
16 02cv0460 JM (BEN), ECF No. 20.) Petitioner did not appeal that determination. On
17 April 5, 2002, Maas filed a petition for writ of habeas corpus in this Court in case no.
18 02cv0682 W (JFS) challenging his conviction in SCE 188460. (*See Maas v. Giurbino*,
19 02cv0682 W (JFS) (So. Dist. Cal. 2002).) On April 16, 2003, the Court denied the
20 petition on the merits. (*See Order* filed April 16, 2003 in case No. 02cv0682 W (JFS),
21 ECF No. 22.) Petitioner did not appeal that determination.

22 To the extent Petitioner is now seeking to challenge the same convictions he
23 challenged in his prior federal habeas corpus petitions, this Court cannot consider the
24 petition. Unless a petitioner shows he or she has obtained an Order from the appropriate
25 court of appeals authorizing the district court to consider a successive petition, the
26 petition may not be filed in the district court. *See* 28 U.S.C. § 2244(b)(3)(A). Here, there
27 is no indication the Ninth Circuit Court of Appeals has granted Petitioner leave to file a
28 successive petition.

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1 **B. Claims Regarding CR-78830 and CR-81685 Are Barred By *Lackawanna***
2 ***County District Attorney v. Coss***

3 In claim one, Maas argues the plea agreement he entered into in case no. CR-
4 78830 was violated by the state when it used that conviction to enhance his sentences in
5 case nos. SCE 185960 and SCE 188460. (Pet., ECF No. 4 at 7-9.) In claim two, he
6 contends trial counsel in case no. CR-81685 was ineffective because he did not
7 investigate whether Maas’s rights under the Interstate Agreement on Detainers were
8 violated. (*Id.* at 11-12.) In claim three, Maas alleges the state breached its plea
9 agreement in case no. CR-78830 when it used that conviction to enhance his sentence in
10 case nos. SCE 185960 and SCE 188460. (*Id.* at 14-17.) And, in claim four, Maas alleges
11 the state violated his plea agreement in CR-81685 when it returned him to state custody
12 instead of permitting him to serve his time in federal custody. (*Id.* at 18-22.)

13 To the extent Maas seeks to challenge his convictions in case nos. CR-78830 and
14 CR-81685, the challenges are precluded by *Lackawanna County District Attorney v.*
15 *Coss*, 532 U.S. 394 (2001). In *Lackawanna*, the Supreme Court stated:

16 [W]e hold that once a state conviction is no longer open to direct or
17 collateral attack in its own right because the defendant failed to pursue those
18 remedies while they were available (or because the defendant did so
19 unsuccessfully), the conviction may be regarded as conclusively valid. *See*
20 *Daniels, post*, at 382, 121 S.Ct. 1578. If that conviction is later used to
21 enhance a criminal sentence, the defendant generally may not challenge the
enhanced sentence through a petition under § 2254 on the ground that the
prior conviction was unconstitutionally obtained.

22 *Id.* at 403-04.

23 The convictions in case nos. CR-78830 and CR-81685 are no longer open to
24 collateral attack because Maas is no longer in custody pursuant to those convictions. The
25 *Lackawanna* Court identified two exceptions to the rule: (1) if the petitioner challenges
26 the enhanced sentence by claiming that a state conviction used to enhance the sentence is
27 invalid because counsel was not appointed, in violation of the Sixth Amendment, and (2)
28 if federal habeas review is “effectively the first and only forum available for review of

1 the prior conviction. *Id.* at 404-06. Neither exception applies in Maas’s case. Maas was
2 represented by counsel in both CR-78830 and CR-81685. (*See* Lodgment No. 5, ECF
3 No. 9-1 at 34, 45-46, 48, 58-64.) And, Maas could have challenged the validity of his
4 guilty pleas in CR-78830 and CR81685 in state court. Thus, under *Lackawanna*, Maas is
5 not entitled to relief as to his claims regarding CR-78830 and CR-81685.

6 **C. The Petition is Untimely**

7 Under 28 U.S.C. § 2244(d), a petitioner has one year from the date his or her
8 convictions is final to file a petition for writ of habeas corpus in federal court pursuant to
9 28 U.S.C. § 2254. *See* 28 U.S.C. § 2244(d). The statute of limitations, however, is
10 subject to both statutory and equitable tolling. *See* 28 U.S.C. § 2244(d)(1); *Calderon v.*
11 *United States Dist. Court (Beeler)*, 128 F.3d 1283, 1288 (9th Cir. 1997), overruled on
12 other grounds by *Calderon v. United States Dist. Court (Kelly)*, 163 F.3d 530, 540 (9th
13 Cir. 1998).

14 1. *Commencement of the One-Year Statute of Limitations*

15 The United States Supreme Court denied Mass’s petition for writ of certiorari in
16 San Diego Superior Court case no. SCE 185960 on October 1, 2001. *See Maas v.*
17 *California*, 534 U.S. 876 (2001). His conviction in SCE 185960 became final on that
18 date and the statute of limitations began running the next day. Absent tolling, his federal
19 habeas corpus petition was due October 1, 2002.

20 The California Supreme Court denied a petition for review on direct appeal in case
21 no. SCE 188460 on March 21, 2001. His conviction in SCE 188460 thus became final
22 ninety days later on June 19, 2001. *Bowen v. Roe*, 188 F.3d 1157, 1158-59 (9th Cir.
23 1999). Absent tolling, his federal habeas corpus petition was due on June 19, 2002.

24 2. *Statutory Tolling*

25 28 U.S.C. § 2244(d)(2) provides that “[t]he time during which a properly filed
26 application for State post-convictions or other collateral review . . . is pending shall not
27 be counted toward any period of limitation under this subsection.” 28 U.S.C.
28 § 2244(d)(2). Maas did not constructively file his first state habeas corpus petition

1 challenging his convictions in the San Diego Superior Court until July 7, 2013 in case no.
2 ECH 942, well after the statute of limitations had expired for both cases. (Lodgment No.
3 2, ECF No. 9-2.)

4 3. *Equitable tolling*

5 The statute of limitations under AEDPA “is subject to equitable tolling in
6 appropriate cases.” *Holland v. Florida*, 560 U.S. 631, 645 (2010). “To be entitled to
7 equitable tolling, [Petitioner] must show ‘(1) that he has been pursuing his rights
8 diligently, and (2) that some extraordinary circumstance stood in his way’ and prevented
9 timely filing.” *Lawrence v. Florida*, 549 U.S. 327, 336-37 (2007), quoting *Pace v.*
10 *DiGuglielmo*, 544 U.S. 408, 418 (2005). Equitable tolling is unavailable in most cases,
11 and “the threshold necessary to trigger equitable tolling is very high, lest the exceptions
12 swallow the rule.” *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002).

13 Maas has not presented any evidence he is entitled to equitable tolling and the
14 Court has not located any evidence in the record which would support an assertion of
15 equitable tolling. Accordingly, Maas is not entitled to any equitable tolling.

16 4. *The Petition is Untimely*

17 Arellano’s federal habeas corpus petition challenging his conviction in SCE
18 185960 was due October 1, 2002. His federal habeas corpus petition in SCE 188460 was
19 due on June 19, 2002. He did not file the petition in this case until July 11, 2017. The
20 petition is therefore untimely.

21 **V. CONCLUSION**

22 The Court submits this Report and Recommendation to United States District
23 Judge Cynthia A. Bashant under 28 U.S.C. § 636(b)(1) and Local Civil Rule HC.2 of the
24 United States District Court for the Southern District of California.

25 **IT IS HEREBY RECOMMENDED** that the Court issue an order: (1) approving
26 and adopting this Report and Recommendation, and (2) directing that Judgment be
27 entered **GRANTING** Respondent’s Motion to Dismiss the Petition for Writ of Habeas
28 Corpus.

1 **IT IS ORDERED** that no later than July 6, 2018 any party to this action may file
2 written objections with the Court and serve a copy on all parties. The document should be
3 captioned “Objections to Report and Recommendation.”

4 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with
5 the Court and served on all parties no later than July 20, 2018. The parties are advised
6 that failure to file objections within the specified time may waive the right to raise those
7 objections on appeal of the Court’s order. *See Turner v. Duncan*, 158 F.3d 449, 455 (9th
8 Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153, 1156 (9th Cir. 1991).

9
10 DATED: June 19, 2018



Jan M. Adler
UNITED STATES MAGISTRATE JUDGE