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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

VICTOR EUGENE AUSTIN JR,
Petitioner,
v.
C. PFEIFFER, Warden,
Respondent.

Case No.: 17-CV-01950-MMA-WVG

**REPORT AND
RECOMMENDATION FOR ORDER
GRANTING MOTION TO DISMISS
PETITION FOR WRIT OF HABEAS
CORPUS**

[ECF NO. 15]

I. INTRODUCTION

Currently before the Court is Respondent C. Pfeiffer’s (“Respondent”) Motion to Dismiss (“Motion”) Petitioner Victor Eugene Austin Jr.’s (“Petitioner”) First Amended Petition for Writ of Habeas Corpus (“FAP”) as untimely because it is barred by the statute of limitations, and because the sole claim for relief challenges only state law and does not present a federal claim. (Mot., ECF No. 15 at 3, 8.)

The Court, having reviewed the FAP, the Motion to Dismiss, and all supporting documents submitted by both parties, **RECOMMENDS** the Motion be **GRANTED** in part and **DENIED** in part and the Petition be **DISMISSED WITH PREJUDICE**.

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1 **II. FACTUAL AND PROCEDURAL BACKGROUND**

2 **A. State Court Trial and Appeal**

3 On February 22, 2012, Petitioner pled guilty of possessing cocaine base for sale (Cal.
4 Health & Saf. Code §11351.5) and pandering (Cal. Penal Code §266i (a)(2)). (FAP, ECF
5 No. 12 at 3.) Petitioner also admitted he used a firearm during the drug offense, had a prior
6 drug offense conviction, and a prior strike conviction. (*Id.*) Pursuant to a plea agreement,
7 Petitioner was sentenced to a total of eleven years and eight months in state prison on April
8 19, 2013. (*Id.*) California Health and Safety Code Section 11351.5 was amended in 2015
9 to reduce the minimum sentence for cocaine base related crimes, whereafter Petitioner
10 sought to have his sentence reflect the reduced minimum sentence. (*Id.* at 5.)

11 Respondent concedes that on January 1, 2015, pursuant to the enactment of Senate
12 Bill 1010 (California Fair Sentencing Act), the California Health and Safety Code Section
13 11351.5 was amended to provide that every person who possesses cocaine base for sale, or
14 purchases cocaine base for purposes of sale, is subject to imprisonment for two, three, or
15 four years as opposed to the three, four, or five year sentence scheme that existed prior to
16 the amendment. (Mot. at 2; 15.)

17 On May 21, 2015, Petitioner constructively¹ filed a request in California superior
18 court to have his sentence reduced to the lower term of two years as provided in the newly
19 amended statute. On July 17, 2015, the request was denied because the superior court found
20 the amendment of the statute was not retroactive, and thus Petitioner was not entitled to
21 relief. (FAP 35; Mot. at 2.)

22 On April 4, 2016, Petitioner constructively filed a habeas petition in the California
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25 ¹ Petitioner's documents are deemed constructively filed because under the mailbox rule
26 of *Houston v. Lack*, 487 U.S. 266 (1988), an incarcerated *pro se* prisoner's pleading is
27 deemed filed at the moment of delivery to prison officials. This mailbox rule has been
28 extended to both state and federal habeas corpus petitions for purposes of applying the
AEDPA statute of limitations. *See Miles v. Prunty*, 187 F.3d 1104, 1106 n. 2 (9th Cir.
1999).

1 Court of Appeal, renewing his request to have his sentence reduced pursuant to the same
2 statute. (Lod. 6, ECF No. 8-6.) On April 21, 2016, the petition was denied because
3 Petitioner’s judgment was final prior to the effective date of the amended statute, the statute
4 was not retroactive, and Petitioner had failed to state a *prima facie* claim that the plea
5 agreement he signed entitled him to benefit from a change in law. (FAP at 31; Mot. at 2.)

6 On June 17, 2016, Petitioner filed a habeas petition in the Supreme Court of
7 California, raising the same claim. (Lod. 8, ECF No. 8-8.) On August 31, 2016, the petition
8 was denied without comment. (FAP at 57; Mot. at 3.)

9 **B. Habeas Petition in Federal Court**

10 On September 21, 2017, Petitioner constructively filed his original federal habeas
11 petition *pro se*, claiming his sentence should be reduced to reflect the amendment of
12 California Health and Safety Code Section 11351.5. (ECF No. 1.) On January 2, 2018,
13 Respondent filed a motion to dismiss the petition as time barred by the statute of
14 limitations. (ECF No. 7 at 3-6.) On February 1, 2018, Petitioner filed an Opposition to
15 Respondent’s motion to dismiss. (ECF No. 10.) On February 28, 2018, Petitioner filed his
16 FAP raising the same claims presented in his original federal petition.

17 In an order issued on March 3, 2018, the Court denied Respondent’s motion to
18 dismiss as moot because it had accepted Petitioner’s FAP. (ECF No. 13 at 1-2.) Respondent
19 filed the present Motion on April 20, 2018, claiming the FAP was barred by the statute of
20 limitations and Petitioner failed to raise a federal question. (Mot. 5 at 3, 8.) Petitioner
21 constructively filed his Opposition to the Motion on June 5, 2018. (Pet’s Opp’n, ECF No.
22 17 at 1.)

23 **III. DISCUSSION**

24 **A. TIMELINESS OF THE PETITION**

25 The FAP is governed by the Antiterrorism and Effective Death Penalty Act of 1996
26 (“AEDPA”), which imposes a one-year statute of limitations period to file a federal petition
27 for writ of habeas corpus after a statutorily specified trigger date. 28 U.S.C. § 2244(d); *see*
28 *also Smith v. Mahoney*, 611 F.3d 978, 993 (9th Cir. 2010) (holding the one-year statute of

1 limitations on habeas petitions begins the date the state judgment became final, not
2 including time for post-conviction review). AEDPA states in relevant part:

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

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

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

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

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

14 (2) The time during which a properly filed application for State post-
15 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.

16 28 U.S.C. § 2244(d)(1)-(d)(2).

17 **1. Limitations Period Commencement Date**

18 Respondent contends that because Petitioner did not file a direct appeal, the one-
19 year limitations period commenced on June 18, 2013, sixty days after Petitioner was
20 sentenced.² (Mot. at 4.)

21 Petitioner appears to argue the FAP is governed by 28 U.S.C. § 2254, which does
22 not provide a statute of limitations, and cites *Williams v. Taylor*, 529 U.S. 362 (2000).³
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25 ² In California, an appeal of a conviction must be filed within 60 days after a sentence is
26 rendered and a “sentence” constitutes a “final judgment” for purposes of a defendant’s right
to appeal. *See* Cal. R. Ct. 8.308(a); Cal. Pen. Code § 1237(a).

27 ³ In *Williams*, the Supreme Court found, *inter alia*, that *Lockhart v. Fretwell*, 506 U.S. 364
28 (1993) did not modify or supplant the standard for analyzing the effectiveness of counsel
announced in *Strickland v. Washington*, 466 U.S. 668 (1984). *Williams*, 529 U.S. at 391.

1 While this limited reading of § 2254 is correct in that it does not outline a statute of
2 limitations, both §§ 2244 and 2254 are subsections of AEDPA to be read in conjunction,
3 not in isolation. Similarly, Petitioner’s citation to *Williams* is not helpful because it does
4 not address timeliness or the statute of limitations. Petitioner’s argument that AEDPA has
5 no statute of limitations is simply incorrect.

6 The Court finds the latest start date to be June 18, 2013, when Petitioner’s judgment
7 became final upon expiration of the time for him to seek review under 28 U.S.C. §
8 2244(d)(1) subsection A, and that no later date applies. *See United States v. Garcia*, 210
9 F.3d 1058, 1059 (9th Cir. 2000) (quoting *Kapral v. United States*, 166 F.3d 565, 577 (3rd
10 Cir. 1999) (holding if a defendant does not pursue a timely appeal, the conviction and
11 sentence becomes final, and the statute of limitation begins to run, on the date for filing
12 such an appeal expired.)

13 As Respondent contends and the Court concurs, the one-year statute of limitations
14 commenced on June 18, 2013, making June 18, 2014 the final date for Petitioner to timely
15 file a habeas petition. Petitioner does not argue there was an impediment that prevented
16 him from filing a timely petition nor does there appear to be any suggestion of this in the
17 record. Thus, no later start date is permitted under subsection B of 28 U.S.C. § 2254(d)(1).
18 This leaves subsections C and D as Petitioner’s only basis upon which the commencement
19 date of the limitations period might extend beyond June 18, 2013.

20 Petitioner claims the Supreme Court discussed the disproportionality of sentencing
21 between cocaine base and powder cocaine offenses in *Kimbrough v. United States*, 552
22 U.S. 85 (2007).⁴ (Pet’s Opp’n at 1-2.) The Court construes this as an argument that
23 subsections C and D provide statutory tolling. Setting aside that *Kimbrough* has nothing to
24 do with the statute at issue in this matter, *Kimbrough* was decided in 2007, eight years
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27 ⁴ In *Kimbrough*, the Supreme Court found that federal sentencing guidelines, particularly
28 those dealing with crack cocaine and powder cocaine, are advisory only. *Kimbrough*, 552
U.S. at 91.

1 before the statute was amended and six years before Petitioner’s conviction became final.
2 Therefore, even if *Kimbrough* did recognize the statute was a new right that was
3 retroactively applicable, which it could not have possibly done, such an argument would
4 not be beneficial to Petitioner because it was announced before his conviction. Therefore,
5 he is unable to take advantage of Subsection C. Petitioner also cannot take advantage of a
6 later start date under Subsection D because a change in law is not a new factual predicate.
7 *See Shannon v. Newland*, 410 F.3d 1083, 1088 (9th Cir. 2005) (holding a new court
8 decision was not a new factual predicate).

9 Accordingly, the Court concludes the date Petitioner’s conviction became final, June
10 18, 2013, is the appropriate date for analyzing the one year limitations, making the last date
11 to file a timely federal habeas petition June 18, 2014. Accordingly, the FAP constructively
12 filed on September 21, 2017 is clearly time-barred, absent grounds for statutory or
13 equitable tolling. *See* 28 U.S.C. § 2244(d)(1)-(2).

14 **2. Statutory Tolling**

15 Having determined that Petitioner’s judgment became final on June 18, 2013,
16 Petitioner had until June 18, 2014 to file his federal habeas petition, unless he qualifies for
17 statutory tolling, which the Court finds he does not.

18 Statutory tolling applies when a petitioner has a properly filed application for review
19 pending in state court. 28 U.S.C. § 2244(d)(2). “‘Properly filed’ means the petition’s
20 ‘delivery and acceptance are in compliance with the applicable laws and rules governing
21 filings’ in that state.” *Bonner v. Carey*, 425 F.3d 1145, 1148 (9th Cir. 2005) (quoting *Artuz*
22 *v. Bennett*, 531 U.S. 4, 8 (2000)).

23 Petitioner’s request to modify his sentence commenced in state court on May 21,
24 2015. After the request was denied, Petitioner brought a petition in state appellate and
25 thereafter in state supreme court. The final decision from the state supreme court petition
26 was on August 31, 2016. All of these state filings occurred after the expiration of the federal
27 limitations period. Once the federal limitations period has expired, the filing of a state
28 petition cannot revive the limitations period. *Jiminez v. Rice*, 276 F.3d 478 (9th Cir. 2001).

1 Accordingly, the Court finds no statutory tolling applies.

2 **3. Equitable Tolling**

3 AEDPA's limitations period is subject to equitable tolling in appropriate cases.
4 *Holland v. Florida*, 560 U.S. 631, 645 (2010). To determine if a petitioner is entitled to
5 equitable tolling the court must look to whether (1) he has been pursuing his rights
6 diligently, and (2) some extraordinary circumstance stood in the way and prevented timely
7 filing. *Id.*, at 649 (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). However,
8 "equitable tolling is unavailable in most cases and is appropriate only if extraordinary
9 circumstances beyond a prisoners control make it impossible to file a petition on time."
10 *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002) (internal quotation and citation
11 omitted). "[T]he threshold necessary to trigger equitable tolling under AEDPA is very high,
12 lest the exceptions swallow the rule." (*Id.*)

13 The burden of demonstrating grounds warranting equitable tolling rests with
14 Petitioner. *Pace*, 544 U.S. at 418; *Miranda*, 292 F.3d at 1066. Petitioner has made no
15 argument that equitable tolling applies and nothing in the record suggests equitable tolling
16 is available. Therefore, equitable tolling is unavailable.

17 **4. Conclusion**

18 Since the FAP was not timely filed and no statutory or equitable tolling applies, the
19 Court **RECOMMENDS** Respondent's motion be **GRANTED** and the Petition
20 **DISMISSED WITH PREJUDICE**.

21 **B. COGNIZABLE FEDERAL CLAIM**

22 Alternatively, Respondent asks the Court to dismiss the Petition, because the FAP
23 does not raise a cognizable federal claim. (Mot. at 8.) Since the Court is recommending the
24 Petition be dismissed as untimely, the Court **RECOMMENDS** this portion of the petition
25 be **DENIED** as moot. However, assuming *arguendo*, the Petition was timely filed, the
26 Court **RECOMMENDS** the petition be **DISMISSED WITH PREJUDICE** because it
27 does not invoke federal habeas corpus jurisdiction.

28 Respondent argues that Petitioner's sole claim in the Amended Petition challenges

1 only the state court's application of state law regarding sentencing and that the Amended
2 Petition should be dismissed because the claim does not present a federal question. (Mot.
3 at 8.) Petitioner claims the California Fair Sentencing Act should be applied to him
4 retroactively and the language of the California Fair Sentencing Act indicates that there
5 was an unconstitutional unfairness in the prior sentencing practices. (FAP at 9, 17-25.)

6 Federal courts are limited to deciding whether a conviction violated the Constitution,
7 laws, or treaties of the United States. *Estelle v. McQuire*, 502 U.S. 62, 68 (1991). It is not
8 the province of a federal habeas court to reexamine state-court determinations on state-law
9 questions. *Estelle*, 502 U.S. at 68. Furthermore, absent a showing of fundamental
10 unfairness, a state court's misapplication of its own sentencing laws does not justify federal
11 habeas relief. *Christian v. Rhode*, 41 F.3d 461, 469 (9th Cir. 1994).

12 Here, Petitioner has asked this Court to reexamine the state court's decision
13 regarding California's sentencing laws. Such review is not a cognizable federal claim.
14 Moreover, Petitioner simply states the old statute versus the new statute is constitutionally
15 unfair. Such a conclusory statement is insufficient to establish a fundamental unfairness in
16 the application of the statute.

17 Therefore, because Petitioner has not stated a cognizable federal habeas corpus
18 claim, the Court hereby **RECOMMENDS** the petition be **DISMISSED**.

19 **IV. CONCLUSION**

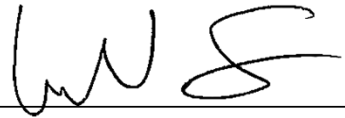
20 Petitioner is not entitled to statutory or equitable tolling to deem his Petition
21 timely. For the aforementioned reasons, the Court **RECOMMENDS** Respondent's Motion
22 to Dismiss be **GRANTED** in part and **DENIED** in part. In the alternative, the Court
23 **RECOMMENDS** the Petition be **DISMISSED** with prejudice for failing to state a
24 cognizable federal claim. This Report and Recommendation is submitted to U.S. District
25 Judge Michael M. Anello, pursuant to the provision of 28 U.S.C. Section 636(b)(1).

26 **IT IS ORDERED** that no later than **December 21, 2018** any party to this action
27 may file written objections with the Court and serve a copy on all parties. The document
28 should be captioned "Objections to Report and Recommendation."

1 **IT IS FURTHER ORDERED** that any reply to objections shall be filed with the
2 Court and served on all parties no later than **December 28, 2018**. The parties are advised
3 that failure to file objections within the specified time may waive the right to raise those
4 objections on appeal. *Martinez v. Ylst*, 951 F2d 1153 (9th Cir. 1991).

5 **IT IS SO ORDERED.**

6 Dated: November 15, 2018

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9 Hon. William V. Gallo
10 United States Magistrate Judge

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