

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ORLANDO JOHNSON,
Petitioner,

Civil No. 08-867-ST

v.

ORDER

BRIAN BELLEQUE,
Superintendent, Oregon State
Penitentiary,
Respondent.

HAGGERTY, District Judge:

Magistrate Judge Stewart issued a Findings and Recommendation [20] recommending that the Petition for Writ of Habeas Corpus [1] should be denied, and a judgment should be entered dismissing this case with prejudice. Objections to the Findings and Recommendation were filed by petitioner. The matter was then referred to this court for review.

When a party objects to any portion of the Magistrate's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the Magistrate's report. 28 U.S.C. § 636(b)(1)(B); *McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981). Petitioner filed objections in a timely manner. The court has given the file of this case a *de novo* review, and has also carefully evaluated the Magistrate's Findings and Recommendations and the Record of the case.

BACKGROUND

Petitioner was convicted of Robbery in the First Degree on September 26, 1990. He was sentenced as a dangerous offender to an indeterminate term of thirty years imprisonment (five-year minimum sentence). Petitioner declined to take a direct appeal and filed no petition for post-conviction relief (PCR).

After being paroled in 2003, petitioner was convicted for Robbery in the Second Degree. While pursuing a challenge to his 2003 conviction, petitioner developed a theory with which he wished to attack his 1990 conviction and sentence.

On December 23, 2004, petitioner filed a PCR challenge to his 1990 conviction and dangerous offender sentence. The PCR trial court denied relief. The Oregon Court of Appeals affirmed, and the Oregon Supreme Court denied review. Petitioner then filed this Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Respondent opposed the petition, arguing that it was filed outside of the one-year statute of limitations set forth in 28 U.S.C. § 2244.

While petitioner did not dispute that many of his claims were untimely, he contended that his Sixth Amendment claims pertaining to his 1990 dangerous offender sentence arose from the decision in *Blakely v. Washington*, 542 U.S. 296 (2004). Accordingly, petitioner argued, the statute of limitations for these claims should be calculated from June 24, 2004, the date *Blakely* was decided. Pet'r Reply at 3, citing 28 U.S.C. § 2244(d)(1)(C). Petitioner also argued that applying a statute of limitations bar to his case constituted an unlawful suspension of the writ.

OBJECTIONS

Petitioner asserts a summary objection to the reasonableness of the Findings and Recommendation by referencing his prior briefing before the Magistrate Judge. Respondent relies upon prior briefing in refutation of the summary objection.

ANALYSIS

The Magistrate Judge thoroughly reviewed petitioner's arguments regarding the proper calculation of the applicable statute of limitations. The statute relied upon established specifically that a statute of limitations may begin to run on the date on which a constitutional right was initially recognized, but only "where the newly recognized right is 'made retroactively applicable to cases on collateral review.'" Findings and Recommendation at 4, quoting 28 U.S.C. 2244(d)(1)(C). The Findings and Recommendation concluded correctly that the Supreme Court's decision in *Blakely* does not apply retroactively to cases on collateral review. Findings and Recommendation at 5, citing *United States v. Cruz*, 423 F.3d 1119 (9th Cir. 2005). Accordingly, petitioner's claims were deemed properly to be untimely.

The Findings and Recommendation also rejected petitioner's argument that applying a statute of limitations bar to his case constituted an unlawful suspension of the writ. This rejection was proper. Findings and Recommendation at 5, citing *Green v. White*, 223 F.3d 1001 (9th Cir. 2000); *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003).

CONCLUSION

Petitioner's objections have been considered and are overruled. The Findings and Recommendation [20] has been subjected to a *de novo* review and is ADOPTED. The Petition for Writ of Habeas Corpus [2] is denied, and a judgment will be entered separately dismissing this case with prejudice.

IT IS SO ORDERED.

Dated this 4 day of November, 2009.

 /s/ Ancer L. Haggerty
Ancer L. Haggerty
United States District Judge