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6 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 MICHAEL SHANE CATES,

Petitioner,

9 v.

10 JEFFREY UTTECHT,

11 Respondent.

Case No. C18-157 RAJ-BAT

**ORDER DECLINING SERVICE OF
HABEAS PETITION**

12
13 On January 22, 2018, Michael Shane Cates, signed a *pro se* 28 U.S.C. § 2241 habeas
14 corpus petition. Dkt. 1. The petition was received by the United States District Court for the
15 Eastern District of Washington on January 31, 2018. *See* Dkt. 6. On February 1, 2018, the
16 petition was transferred to this district because Mr. Cates challenges a conviction and sentence
17 imposed on April 24, 2012, in the Snohomish County Superior Court which is located in the
18 Western District of Washington. Dkt. 5.

19 In his habeas petition, Mr. Cates challenges his convictions for two counts of first degree
20 child rape and two counts of child molestation. Dkts. 1, 11. After Mr. Cates was sentenced, he
21 filed a direct appeal. The Washington Court of Appeals affirmed the convictions and sentence on
22 January 21, 2014. *See Cates v. State of Washington*, 179 Wash. App. 1002 (2014). The
23 Washington Supreme Court granted review on June 4, 2014, 180 Wn. 2d 1013, and affirmed the

1 Court of Appeals on July 2, 2015. *Cates v. State of Washington*, 183 Wn. 2d 531 (2015). While
2 review in the Washington Supreme Court was pending, Mr. Cates filed a personal restraint
3 petition (PRP) in the Washington Court of Appeals. The PRP was denied on April 4, 2016, and
4 review was terminated that day. A certificate of finality was issued on May 31, 2016.¹

5 Final judgment in the conviction Mr. Cates challenges was imposed more than one year
6 before the date he filed his federal habeas petition. It therefore appears Mr. Cates' habeas
7 petition is untimely and subject to dismissal. However, because Mr. Cates proceeds *pro se*, rather
8 than dismissing the case at this point, the Court grants him leave to explain, no later than **March**
9 **12, 2018**, why his habeas petition should not be dismissed. The Court will recommend the case
10 be dismissed if no response is filed or if the response does not adequately address the timeliness
11 of the petition.

12 DISCUSSION

13 As an initial matter, state prisoners such as Mr. Cates who challenge their conviction and
14 sentence must make all federal habeas challenges under § 2254, and may not seek relief under §
15 2241. *See Moore v. Reno*, 185 F.3d 1054, 1055 (9th Cir. 1999). Section 2241 is appropriate only
16 in limited situations not applicable here. *See e.g. McNeely v. Blanas*, 336 F.3d 882, 824 n. 1 (9th
17 Cir. 2003) (§ 2241 applicable is applicable pretrial detention); *Tyler v. United States*, 929 F.2d
18 451, 453 n. 5 (9th Cir. 1991) (§ 2241 applicable to certain parole board decisions).

19 However, rather than dismissing Mr. Cates' habeas petition as improperly brought under
20 § 2241, the Court construes the habeas petition as brought under § 2254. *See White v. Lambert*,

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22 ¹ The Court takes judicial notice of Washington State Court records. *See*
23 [https://dw.courts.wa.gov/index.cfm?fa=home.casesummary&casenumber=728822&searchtype=aName&crt_itl_nu=form.CRT_ITL_NU&filingDate=2014-10-17](https://dw.courts.wa.gov/index.cfm?fa=home.casesummary&casenumber=728822&searchtype=aName&crt_itl_nu=form.CRT_ITL_NU&filingDate=2014-10-1700:00:00.0&courtClassCode=A&casekey=169083664&courtname=COA, Division I)
00:00:00.0&courtClassCode=A&casekey=169083664&courtname=COA, Division I (last
accessed February 9, 2018)

1 370 F.3d 1002, 1005–07 (9th Cir. 2004) (§ 2254 is the exclusive avenue for challenging
2 constitutionality of continued detention by prisoner in state custody pursuant to a state court
3 judgment), overruled on other grounds, *Hayward v. Marshall*, 603 F.3d 546, 555 (9th Cir.2010)
4 (en banc).

5 Section 2254 habeas corpus petitions filed by persons imprisoned under a state court
6 judgment are subject to a one-year statute of limitations. *See* 28 U.S.C. § 2244(d)(1). Under 28
7 U.S.C. § 2244(d)(1)(A), “[t]he limitation period shall run from . . . the date on which the
8 judgment became final by the conclusion of direct review or the expiration of the time for
9 seeking such review” The limitation period may run from a later date under the following
10 circumstances. First it may run from the date the United State Supreme Court recognizes a new
11 constitutional right that the Supreme Court makes retroactive to cases on collateral review, and
12 second it may run from the date the factual predicate of the claim presented could have been
13 discoverered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1)(C) and (D).

14 Mr. Cates’ conviction became final on April 4, 2016, when review of his PRP was
15 terminated. Mr. Cates signed his federal habeas petition on January 22, 2018, though it was
16 received by the Eastern District of Washington on Janaury 31, 2018. Even assuming the petition
17 was filed on January 22, 2018, it nonetheless is untimely—more than one year passed from the
18 time judgment became final on April 4, 2016, and the date he filed his habeas petition. *See*
19 *Goncalves v. Stewart*, 18 Fed. Appx. 580 (9th Cir. 2001)(decision affirming conviction
20 terminates review, not subsequent issuance of certificate of finality). Therefore, Mr. Smith’s
21 federal habeas petition is barred under the federal statute of limitations, 28 U.S.C. § 2244(d).

22 The Court notes Mr. Cates contends “I am citing and using *State v. W.R.* as a ground for
23 newly discovered evidence.” Dkts. 1, 11 at 15. The contention fails as a basis to expand the

1 statute of limitations in this case. First *State v. W.R.*, 181 Wn.2d 757 (2014), is not a United
2 States Supreme Court decision and therefore does not provide relief from the one year statute of
3 limitations under 28 U.S.C. § 2244(d)(1)(C).

4 Second, *W.R.*'s constitutional holding does not rest on a new rule of federal constitutional
5 law, but relied on federal precedent that is almost thirty years old – long before Mr. Cates'
6 conviction became final. *State v. W.R.*, at 761-63. The Washington Supreme Court also decided
7 *W.R.* in 2014, years **before** judgment for federal habeas purposes was final in Mr. Cates' case.
8 The decision therefore does not constitute a new rule of law under any circumstances.

9 And lastly, Mr. Cates' claims rely on facts from his arrest in Missouri, his extradition
10 from that state to Washington to face trial, how his trial lawyer was overburdened and
11 ineffective, how the state's expert witness was allowed to provide improper testimony without a
12 Frye hearing, how his trial lawyer would not let him testify, how damaging photos were
13 presented to the jury, and how there was insufficient evidence to convict him. These are not new
14 facts.

15 The Court also notes the statute of limitations governing federal habeas petitions is
16 subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631 (2010). But equitable tolling is
17 available "only when extraordinary circumstances beyond a prisoner's control make it
18 impossible to file a petition on time and the extraordinary circumstances were the cause of his
19 untimeliness." *Laws v. Lamarque*, 351 F.3d 919, 922 (9th Cir. 2003) (internal quotation and
20 citation omitted). Thus, Mr. Cates must demonstrate extraordinary circumstances prevented him
21 from filing a timely federal habeas corpus petition.

22 Because it appears Mr. Cates' habeas petition is barred by the statute of limitations the
23 Court declines to serve it. However, the Court grants Mr. Cates leave to explain no later than **March**

1 **12, 2018**, why the petition should not be dismissed. The Court will recommend the case be
2 dismissed if no explanation is filed by that date or if the explanation does not adequately address
3 the timeliness of the petition.

4 The Clerk shall provide a copy of this order to Mr. Cates and to the assigned United
5 States District Judge.

6 DATED this 9th day of February, 2018.

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BRIAN A. TSUCHIDA
United States Magistrate Judge