UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 30 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BENJAMIN PATRICK LEE, Petitioner-Appellant, v. SUSAN PERRY, Warden, Respondent-Appellee.	No. 17-56530 D.C. No. 5:17-cv-00233-VBF-SK Central District of California, Riverside ORDER

Before: CLIFTON and CHRISTEN, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012).

Any pending motions are denied as moot.

DENIED.

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U.S. COURT OF APPEALS

BENJAMIN PATRICK LEE,

Petitioner-Appellant,

v.

SUSAN PERRY, Warden,

Respondent-Appellee.

No. 17-56530

D.C. No.
5:17-cv-00233-VBF-SK
Central District of California,
Riverside

ORDER

Before: W. FLETCHER and WATFORD, Circuit Judges.

The motion for reconsideration (Docket Entry No. 5) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

BENJAMIN PATRICK LEE, Petitioner, v. SUSAN PERRY (Warden), Respondent.	**Case No. ED CV 17-00233-VBF-SK** **ORDER** Overruling Petitioner's Objections; Adopting the Report & Recommendation; Dismiss Petition With Prejudice as Untimely; Directing Separate COA Ruling; Directing Entry of Separate Final Judgment; Terminating and Closing the Action (JS-6)

Pursuant to 28 U.S.C. § 636(b)(1), the Court has reviewed the Petition for Writ of Habeas Corpus by a Person in State Custody Pursuant to 28 U.S.C. section 2254 ("petition") (CM/ECF Document ("Doc") 1), the respondent warden's answer and accompanying memorandum (Docs 13 and 31-1), the relevant decision(s) of the California state courts, the "lodged documents" submitted by the respondent in paper form (listed in the index at Doc 14), petitioner's motion for leave to amend the habeas petition (Doc 15), the Report and Recommendation ("R&R") issued by the United States Magistrate Judge pursuant to Fed. R. Civ. P. 72(b)(1) and 28 U.S.C. § 636(b)(1)(B) (Doc 17), petitioner's timely objection to the R&R denominated as "Motion Opposing Report and Recommendation" (Doc 19), and the applicable law.

"Federal Rule of Civil Procedure 72(b)(2) gave respondent a right to respond to the objections, but the time to do so has elapsed and respondent has filed neither a response nor a request for an extension of time. Accordingly, the Court proceeds to the merits without waiting further." *Ruelas v. Muniz*, No. SA CV 14-01761-VBF, 2016 WL 540769, *1 (C.D. Cal. Feb. 9, 2016).

"As required by Fed. R. Civ. P. 72(b)(3), the Court has engaged in de novo review of the portions of the R&R to which petitioner has specifically objected and finds no defect of law, fact, or logic in the . . . R&R." *Rael v. Foulk*, No. LA CV 14-02987 Doc. 47, 2015 WL 4111295, *1 (C.D. Cal. July 7, 2015), *COA denied*, No. 15-56205 (9th Cir. Feb. 18, 2016).

"The Court finds discussion of [the] objections to be unnecessary on this record. The Magistrates Act 'merely requires the district judge to make a de novo determination of those portions of the report or specified proposed findings or recommendation to which objection is made.'" It does not require the district judge to provide a written explanation of the reasons for rejecting objections. *See MacKenzie v. California AG*, SA CV 12-00432-VBF, 2016 WL 5339566, *1 (C.D. Cal. Sept. 21, 2016) (quoting *US v. Bayer AG*, 639 F. App'x 164, 168-69 (4th Cir.) (per curiam) ("The district court complied with this requirement. Accordingly, we find no procedural error in the district court's decision not to address specifically Walterspiel's objections."), *cert. denied*, – U.S. –, 137 S. Ct. 162 (2016)) (brackets & internal quote marks omitted). "This is particularly true where, as here, the objections are plainly unavailing." *Smith v. California Judicial Council*, No. ED CV 14-01413-VBF Doc. 93, 2016 WL 6069179, *2 (C.D. Cal. Oct. 17, 2016).

Accordingly, the Court will accept the Magistrate Judge's factual findings and legal conclusions and implement his recommendations.

ORDER

Petitioner's objection **[Doc # 19] is OVERRULED.**

The Magistrate Judge's Report and Recommendation **[Doc # 17] is ADOPTED.**

Petitioner's motion for leave to amend the habeas petition **[Doc #15] is DENIED.**

The 28 U.S.C. § 2254 petition for a writ of habeas corpus **[Doc # 1] is DENIED.**

Petitioner's "Request for Case Update" **[Doc #22] is GRANTED.**

The Court will issue a separate order ruling on a certificate of appealability.

Final judgment will be entered consistent with this order. "As required by Fed. R. Civ. P. 58(a), the Court will enter judgment by separate document." *Toy v. Soto*, 2015 WL 2168744, *1 (C.D. Cal. May 5, 2015) (citing *Jayne v. Sherman*, 706 F.3d 994, 1009 (9th Cir. 2013)) (n. 1 omitted), *COA denied*, No. 15-55866 (9th Cir. Jan. 20, 2016).

This action is DISMISSED with prejudice.

The case SHALL BE TERMINATED and closed (JS-6).

Dated: September 22, 2017

Valerie Baker Fairbank

Valerie Baker Fairbank

Senior United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BENJAMIN PATRICK LEE, Petitioner, v. SUSAN PERRY, Warden, Respondent.	CASE NO. 5:17-cv-00233-VBF (SK) **REPORT AND RECOMMENDATION TO DISMISS PETITION**

This Report and Recommendation is submitted to the Honorable Valerie Baker Fairbank, U.S. Senior District Judge, under 28 U.S.C. § 636 and General Order 05–07 of the U.S. District Court for the Central District of California.

I.

INTRODUCTION

Petitioner, a California state prisoner, filed a pro se petition for writ of habeas corpus under 28 U.S.C. § 2254, challenging his conviction and four-year sentence following a guilty plea for driving under the influence of alcohol. (ECF No. 1).[1] The Petition is time-barred by the applicable statute

[1] "ECF No." refers to the docket entry in the Court's Case Management/Electronic Court Filing system, and "LD" refers to the sequentially numbered Lodged Documents.

of limitations because it was filed more than one year after Petitioner's conviction became final and he has failed to demonstrate that sufficient tolling applies. The Petition is also barred by *Tollett v. Henderson*, 411 U.S. 258 (1973), and therefore not cognizable on habeas review, because it challenges alleged constitutional defects that occurred before Petitioner pled guilty. Accordingly, the Court recommends that the Petition and this action be dismissed with prejudice. The Court further recommends that Petitioner's request to amend the Petition to add new claims be denied as futile since any new claims would necessarily also be untimely.

II.

DISCUSSION

A. The Petition is Untimely

In January 2015, while on parole for other offenses, Petitioner was convicted by guilty plea for driving under the influence of alcohol. Petitioner appealed his DUI conviction to the California Court of Appeal, which affirmed in a reasoned decision on July 28, 2015. (LD 5). Petitioner did not file a petition for review in the California Supreme Court. Where a prisoner "does not seek review in a State's highest court, the judgment becomes 'final' on the date that the time for seeking such review expires." *Gonzalez v. Thaler*, 132 S. Ct. 641, 646 (2012). In California, the Court of Appeal's decision on direct appeal becomes final 30 days after issuance, *see* Cal. R. Ct. 8.366(b)(1), and a petition for review in the state's Supreme Court must be filed "within 10 days after the Court of Appeal decision is final." Cal. R. Ct. 8.500(e)(1). Therefore, Petitioner's conviction became final 40 days after the Court of Appeal's July 28, 2015 decision on direct appeal — that is, September 7, 2015. Under the federal statute of limitations, Petitioner then had one year until September 7, 2016, to file a timely federal habeas petition. *See* 28 U.S.C. § 2244(d)(1)(A). But Petitioner did not constructively file his

federal petition until January 31, 2017, which makes the Petition untimely by almost five months unless statutory tolling applies.

Statutory tolling is available so long as a "properly filed application for State post-conviction or other collateral review" is "pending" in the state courts. 28 U.S.C. § 2244(d)(2). In this case, Petitioner initiated two separate rounds of state habeas proceedings. In the first round, he filed three sequential petitions in the California courts between January and March 2015. (LD 7, 8, 10, 11). The California Supreme Court denied the last of these petitions in June 2015, still a month before the Court of Appeal affirmed Petitioner's conviction on direct appeal in July 2015 and three months before his conviction became final in September 2015. (LD 12). This round of state habeas petitions has no statutory tolling effect because state petitions filed before the commencement of the federal limitations period are not considered "pending" during the relevant time for purposes of § 2244(d)(2). *See Waldrip v. Hall*, 548 F.3d 729, 735 (9th Cir. 2008). Petitioner's claim to any statutory tolling thus depends on his second round of habeas proceedings and whether the petitions in that round were "properly filed."

A habeas petition that is untimely under state law is not "properly filed" within the meaning of § 2244(d)(2). *See Pace v. DiGuglielmo*, 544 U.S. 408, 413 (2005). Petitioner initiated his second habeas round on August 21, 2015, with a properly-filed petition to the California Superior Court that was summarily denied on September 14, 2015. (LD 13). But it was not until one full year later, on September 14, 2016, that Petitioner constructively filed a petition in the California Court of Appeal, which was summarily denied on September 28, 2016. (LD 14, 15). This "time between the denial of a petition in a lower California court and the filing of a subsequent petition in the next higher state court does not toll the statute of

limitations pursuant to 28 U.S.C. § 2244(d)(2) if the latter petition is not timely filed." *Stewart v. Cate*, 757 F.3d 929, 935 (9th Cir. 2014) (citing *Carey v. Saffold*, 536 U.S. 214, 225 (2002)). Where, as here, the California courts do not indicate whether a petition was timely, a federal court "must itself examine the delay . . . and determine what the state courts would have held in respect to timeliness." *Evans v. Chavis*, 546 U.S. 189, 198 (2006).

In California, a habeas petition is considered timely if filed within a "reasonable time" — an indeterminate period that the U.S. Supreme Court has benchmarked at 30 to 60 days. *See id.* at 192, 198. Petitions that are filed more than 60 days after the denial of an earlier petition in a lower court must be supported by a showing of good cause for the delay to be considered potentially reasonable. *See Stewart*, 757 F.3d at 936. Here, after the California Superior Court denied Petitioner's first petition in his second round of habeas proceedings on September 14, 2015, he waited one full year (366 days) to file his next petition in the Court of Appeal on September 14, 2016. An unexplained delay of that duration is too long to be considered reasonable even under California's indeterminate timing rule. *See Evans*, 546 U.S. at 201 ("We have found no authority suggesting, nor found any convincing reason to believe, that California would consider an unjustified or unexplained 6-month filing delay 'reasonable.'"); *Stewart*, 757 F.3d at 936 (100-day delay between denial of lower court petition and filing of next petition in higher court unreasonable under California law).

Petitioner offers no explanation that would provide good cause to excuse his substantial delay before filing his Court of Appeal petition. In the Petition itself, he asserts that it should be considered timely because he did not receive the Court of Appeal's September 2016 decision denying his second-round habeas petition until November 2016, and he lacked access to legal materials while he was supposedly assigned to a prison camp program

at some unknown time. (ECF No. 1 at 14–15). But neither of these reasons provides good cause: receiving the Court of Appeal decision late cannot explain why he failed in the first place to file the petition in that court on time, and there is no indication that the prison camp assignment coincided in time with the 366-day period between September 2015 and September 2016. Indeed, Petitioner's suggestion that his ability to litigate was hampered during that time by lack of access to legal materials is belied by Petitioner's active litigation beginning in May 2015 and continuing throughout the 366-day period in his parallel federal civil rights lawsuit that stems from the same underlying conviction at issue here. (*See* CM/ECF Docket in Case No. 5:15-cv-01051-VBF).

Petitioner's professed reasons for his year-long delay cannot justify equitable tolling either. Equitable tolling is available only where a petitioner can show that he has been pursuing his rights diligently and that some extraordinary circumstance stood in his way to prevent timely filing. *See Pace*, 544 U.S. at 418. Even if, as he claims, Petitioner received the Court of Appeal's decision denying his second-round habeas petition two months late, that cannot explain the year-long delay before the petition was filed that ran out the one-year clock. And even if Petitioner lacked access to legal materials, as he suggests, inadequate legal resources in prison is not an extraordinary circumstance that warrants equitable tolling. *See, e.g.*, *Chaffer v. Prosper*, 592 F.3d 1046, 1049 (9th Cir. 2010); *Ramirez v. Yates*, 571 F.3d 993, 998 (9th Cir. 2009).

In short, neither statutory nor equitable tolling can make the Petition timely. The petition filed in the Court of Appeal during Petitioner's second habeas round was untimely and therefore not "properly filed" for statutory tolling purposes. As such, none of the time before and during the Court of Appeal's consideration of that untimely petition is statutorily tolled. *See*

Pace, 544 U.S. at 413–14; *Curiel v. Miller*, 830 F.3d 864, 868 (9th Cir. 2016) (en banc). Because that delay between September 2015 and September 2016, by itself, amounted to more than one year (366 days + 14 days), the entire limitations period lapsed well before the Petition was filed — ultimately too late — in January 2017. Petitioner offers no explanation that might excuse the year-long delay or justify equitable tolling for that time.[2]

B. The Petition Is Not Cognizable on Federal Habeas Review

Even if the Petition were not time-barred, it is not cognizable on federal habeas review in any case because its claims are barred by *Tollett v. Henderson*, 411 U.S. 258 (1973). Petitioner alleges that his right to due process was violated by a delayed arraignment, that he was subjected to double jeopardy because his DUI offense resulted in both a conviction and a parole violation, and that his Fourth Amendment rights were infringed by unlawful searches and seizures. (ECF No. 1). But under *Tollett*, "a guilty plea represents a break in the chain of events which has preceded it in the criminal process," which means that once a defendant has entered a guilty plea, he "may not thereafter raise independent claims relating to the

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[2] Because Petitioner's year-long delay independently counts against the entire limitations period, the subsequent time before and during the California Supreme Court's consideration of the last habeas petition (filed on December 1, 2016, and denied on January 25, 2017) makes no difference. (LD 17, 18). Nor do the reasons given by the California Supreme Court for its denial of the last petition render the Court of Appeal petition timely. The California Supreme Court cited *People v. Duvall*, 9 Cal. 4th 464, 474 (1995); *In re Waltreus*, 62 Cal. 2d 218, 225 (1965); *In re Swain*, 34 Cal. 2d 300, 304 (1949); and *In re Miller*, 17 Cal. 2d 734, 735 (1941). (LD 18). In *Curiel*, the Ninth Circuit held that when the California Supreme Court cites *Swain* and *Duvall* — but "no other cases" — it is an indication that the court is overruling any prior untimeliness rulings by lower state courts. 830 F.3d at 870–71. In this case, however, the California Supreme Court did not cite just *Swain* and *Duvall*, but also cited *Waltreus*, invoking California's rule against relitigating habeas claims that were raised and decided on direct appeal, *see Ylst v. Nunnemaker*, 501 U.S. 797, 806 (1991), and *Miller*, invoking California's rule against considering the same claim twice, *see Dull v. Pickett*, 59 F.3d 174, 174 (9th Cir. 1995)). The addition of these two cases therefore makes *Curiel* inapplicable.

deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Id.* at 267. Any review of a conviction by guilty plea is limited to whether the underlying plea itself was knowing, intelligent and voluntary. *See Rishor v. Ferguson,* 822 F.3d 482, 499 (9th Cir. 2016) (citing *United States v. Broce,* 488 U.S. 563, 569 (1989)). Because Petitioner's claims do not challenge the knowing, intelligent and voluntary nature of his guilty plea, but instead attack alleged constitutional violations that were extinguished by his guilty plea under *Tollett*, the Petition is not cognizable on federal habeas review. *See Ortberg v. Moody*, 961 F.2d 135, 137–38 (9th Cir. 1992).

III.

CONCLUSION

For the reasons set forth above, the Court recommends that the District Judge issue an order accepting this Report and Recommendation, concurring in its findings and conclusions, and entering judgment dismissing the Petition and this action with prejudice. In light of that recommended dismissal, the Court further recommends that Petitioner's request to amend the Petition to add new claims be denied as futile. *See Bonin v. Calderon,* 59 F.3d 815, 845 (9th Cir. 1995). Amendment would be futile because if Petitioner's claims in the original petition are untimely, any new claims that he seeks to add now would also necessarily be untimely.[3]

DATED: July 7, 2017

HON. STEVE KIM
U.S. MAGISTRATE JUDGE

[3] Petitioner's proposed amendment includes claims that are also barred by *Tollett.* (ECF No. 15).

Additional material from this filing is available in the Clerk's Office.