UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 12 2018

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

CECIL L. MORTON, Petitioner-Appellant, v. MARGARET GILBERT, Superintendent, Respondent-Appellee.	No. 18-35027 D.C. No. 3:17-cv-05536-RJB Western District of Washington, Tacoma ORDER

Before: CANBY and SILVERMAN, 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.

Appendix "A"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CECIL L. MORTON,

Petitioner,

v.

MARGARET GILBERT,

Respondent.

CASE NO. 17-cv-5536 RJB DWC

ORDER ADOPTING REPORT AND RECOMMENDATION

This matter comes before the Court on the Report and Recommendation of U.S. Magistrate Judge David W. Christel. Dkt. 16. The Court has reviewed the Report and Recommendation, objections, and is fully advised.

Petitioner files this petition, challenging his 1994 rape, robbery and burglary convictions. Dkt. 1. Respondent has filed a motion to dismiss the petition. Dkt. 8. The Report and Recommendation recommends that the motion to dismiss be granted and the petition be dismissed as untimely. Dkt. 16. It also recommends denial of a certificate of appealability. *Id.*

Appendix "B"

The facts are in the Report and Recommendation (Dkt. 16, at 1-3), and are adopted here. Petitioner filed objections to the Report and Recommendation. Dkt. 17. Petitioner's objections do not provide a basis to reject the Report and Recommendation. The Report and Recommendation should be adopted and the petition dismissed.

DISCUSSION

A. STATUTE OF LIMITATIONS AND STATUTORY TOLLING

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), petitioners have one year to file a writ of habeas corpus. 28 U.S.C. § 2241. It provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-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.

28 U.S.C. § 2244 (d)(1)-(2).

As stated in the Report and Recommendation, one year after Petitioner's judgment was final for purposes on § 2241 (d)(1)(A) was on November 22, 2000. He filed this petition over 16

years later. Petitioner asserts in his objections that his petition is timely due to statutory tolling under § 2241 (d)(1)(B) and (D). Dkt. 17.

1. Timeliness Under § 2241 (d)(1)(B)

In his objections, Petitioner repeats his assertion that it was not until April of 2015 (the date that the prison in which he was held received a copy of a Washington State Supreme Court case *State v. W.R., Jr.,* 181 Wn.2d 757 (2014), decided on October 30, 2014), that a State created impediment was removed so that he could challenge his conviction. Dkt. 17. Petitioner explains that in *W.R., Jr.*, the Washington State Supreme Court held that prior state case law (*State v. Camera,* 113 Wash.2d 631 (1989)) impermissibly held that a defendant in a rape case must establish consent which, in violation of the due process clause, impermissibly shifted the state's burden to prove every element beyond a reasonable doubt to the defendant. Dkt. 17, at 5-6. He asserts that he could not have successfully challenged his convictions under the prior state case law; it wasn't until the State Supreme Court overruled *Camera* that his challenge could be made. *Id.*

This objection does not provide a basis to reject the Report and Recommendation. The federal habeas corpus statute, 28 U.S.C. § 2254, is the vehicle by which the petitioner could have raised a federal constitutional challenge to the state case law he contends was unconstitutionally applied to him. That is, Petitioner's claim (that the state courts' application of *Camera,* regarding whether he had the burden to establish consent or the state had to prove that the victim did not consent, was a violation of his federal constitutional rights), could have been raised before November of 2000. Aside from arguing that it would not have been a successful challenge, he makes no showing that the state courts' decisions in this or other cases "prevented [him] from filing [a federal petition]." § 2241 (d)(1)(B); *see Shannon v. Newland*, 410 F.3d 1083,

1087 (9th Cir. 2005)(state court's decisions were not an "impediment" under § 2241 (d)(1)(B) to the filing of a federal habeas petition; petition could have been filed at any time). As stated in the Report and Recommendation, merely asserting that the state "misapplied" federal law is insufficient to show a state action impeded him from filing a petition in federal court.

2. Timeliness under § 2241 (d)(1)(D)

Petitioner also claims that his petition is timely due to statutory tolling under § 2241 (d)(1)(D), "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." Dkt. 17, at 7-9. He maintains that it wasn't until April of 2015 that he discovered the Washington State Supreme Court's decision in *W.R., Jr.*, and that is the "factual predicate" of his current claim was discovered. *Id.* As stated in the Report and Recommendation, court decisions establishing propositions of law are not "factual predicates" under § 2241 (d)(1)(D). Dkt. 16, at 6 (*citing Shannon v. Newland,* 410 F.3d 1083, 1088-89 (9th Cir. 2005)). Petitioner makes no showing that the Washington State Supreme Court's decision in *W.R., Jr.*, was a "factual predicate."

B. EQUITABLE TOLLING

The Report and Recommendation recommends finding that Petitioner is not entitled to equitable tolling. Dkt. 16, at 6-7. This recommendation should be adopted. Petitioner does not show that "some extraordinary circumstance stood in his way" such that equitable tolling is appropriate here. Dkt. 16, at 7.

C. CERTIFICATE OF APPEALABILITY

The district court should grant an application for a Certificate of Appealability only if the petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(3). To obtain a Certificate of Appealability under 28 U.S.C. § 2253(c), a *habeas*

petitioner must make a showing that reasonable jurists could disagree with the district court's resolution of his or her constitutional claims or that jurists could agree the issues presented were adequate to deserve encouragement to proceed further. *Slack v. McDaniel*, 529 U.S. 473, 483–485 (2000) (*quoting Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). When the court denies a claim on procedural grounds, as it did here, a petitioner must show that jurists of reason "would find it debatable whether the district court was correct in its procedural ruling" and that jurists of reason "would find it debatable whether the petition states a valid claim of the denial of a constitutional right." *Slack v. McDaniel*, at 484.

Petitioner's objections do not provide a basis to reject the Report and Recommendation's recommendation that a Certificate of Appealability be denied. Petitioner has not shown that "jurists of reason would find it debatable whether [this Court] was correct in its procedural ruling." *Slack,* at 484. He has not demonstrated that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." Moreover, he failed to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c)(3). Jurists of reason could not agree that the issues presented were adequate to deserve encouragement to proceed further. *Slack,* at 483-485. The Report and Recommendation should be adopted, and a Certificate of Appealability should be denied.

ORDER

It is **ORDERED** that:

- The Report and Recommendation of U.S. Magistrate Judge David W. Christel (Dkt. 16) **IS ADOPTED**;
- The Petition **IS DISMISSED**; and
- The Certificate of Appealability **IS DENIED**.

The Clerk is directed to send uncertified copies of this Order to U.S. Magistrate Judge David W. Christel, all counsel of record, and to any party appearing pro se at said party's last known address.

Dated this 28th day of November, 2017.

ROBERT J. BRYAN
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CECIL L MORTON,

Petitioner,

v.

MARGARET GILBERT,

Respondent.

CASE NO. 3:17-CV-05536-RJB-DWC

REPORT AND RECOMMENDATION

Noting Date: November 10, 2017

The District Court has referred this action to United States Magistrate Judge David W. Christel. Petitioner Cecil L. Morton filed his federal habeas Petition ("Petition"), pursuant to 28 U.S.C. § 2254, seeking relief from a state court conviction. Dkt. 1. The Court concludes the Petition is time-barred and recommends the Petition be dismissed with prejudice.

BACKGROUND

On August 2, 1994, Petitioner was found guilty of three counts of rape in the first degree with a deadly weapon, one count of robbery in the first degree with a deadly weapon, and one count of burglary in the first degree. Dkt. 9, Exhibit 1. Petitioner was sentenced to 720 months imprisonment. *See id.* Petitioner challenged his conviction and sentence on direct appeal. *See*

Appendix "C"

Dkt. 8, 9, Exhibit 3. The Court of Appeals of the State of Washington affirmed Petitioner's conviction on March 13, 1998. Dkt. 9, Exhibit 3. Petitioner filed a petition for review, which the Washington State Supreme Court denied on September 2, 1998. *Id.* at Exhibit 4.

Petitioner filed an application for a state collateral attack, a Personal Restraint Petition ("PRP"), on October 14, 1999. *See id.* at Exhibit 5. The Court of Appeals of the State of Washington dismissed the PRP and, on October 5, 2000, the Washington State Supreme Court denied the motion for discretionary review. *Id.* at Exhibit 6.

On July 6, 2009, Petitioner filed a second direct appeal regarding the rape convictions. Dkt. 9, Exhibits 7, 8, 9. The Court of Appeals of the State of Washington affirmed the rape convictions on June 8, 2010. *Id.* at Exhibit 11. Petitioner did not file a motion for discretionary review, and the state court of appeals issued its mandate on August 6, 2010. *Id.* at Exhibit 12.

Petitioner also filed a second and third PRP. *See* Dkt. 10, Exhibit 13; Dkt. 12, Exhibit 19. Petitioner's second PRP was filed July 29, 2015. *See* Dkt. 10, Exhibits 13, 14; Dkt. 11, Exhibit 15. The Court of Appeals of the State of Washington dismissed the second PRP on January 7, 2016. Dkt. 11, Exhibit 16. The Washington State Supreme Court denied Petitioner's motion for discretionary review on December 13, 2016. *Id.* at Exhibits 17, 18. Petitioner filed his third PRP on March 31, 2017. Dkt. 12, Exhibit 19. On May 12, 2017, the Court of Appeals of the State of Washington dismissed the third PRP. *Id.* at Exhibit 20. Petitioner filed a motion for discretionary review with the Washington State Supreme Court, which is still pending. *Id.* at Exhibit 21; *see also* Dkt. 8.

On July 11, 2017, Petitioner filed the Petition. Dkt. 4, p. 15.[1] On August 28, 2017, Respondent filed a Motion to Dismiss, wherein she asserts the Petition was filed after the limitations period expired. Dkt. 8. Respondent maintains the Petition is therefore time-barred and should be dismissed with prejudice. Dkt. 8.[2]

DISCUSSION

I. Statute of Limitations

Pursuant to the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which is codified at 28 U.S.C. § 2241 *et seq.*, a one-year statute of limitations applies to federal habeas petitions. Section 2244(d)(1) states:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

If during the limitations period a "properly filed application for state post-conviction or other collateral review . . . is pending," the one-year period is tolled. 28 U.S.C. § 2244(d)(2); *see Pace v. DiGulielmo*, 544 U.S. 480, 410 (2005).

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[1] Under the prison "mailbox rule," a petition is deemed filed for purposes of AEPDA's statute of limitations the moment it is delivered to prison authorities for forwarding to the clerk of the district court. *See Patterson v. Stewart*, 251 F.3d 1243, 1245 n. 2 (9th Cir. 2001).

[2] After review of the record, the Court concludes an evidentiary hearing is not necessary in this case. *See* 28 U.S.C. §2254(e)(2) (1996).

A direct review generally concludes and the judgment becomes final either upon the expiration of the time for filing a petition for writ of certiorari with the United States Supreme Court, or when the Supreme Court rules on a timely filed petition for certiorari. *Bowen v. Roe*, 188 F.3d 1157, 1158-59 (9th Cir. 1999). Petitioner filed a direct appeal challenging his conviction and sentence. Dkt. 9, Exhibit 3. The Washington State Supreme Court denied review on September 2, 1998. *Id.* at Exhibit 4. Petitioner did not file a petition for writ of certiorari in the United States Supreme Court (*see* Dkt. 8, pp. 4-5), making his direct appeal final on December 1, 1998, the date the time for filing a petition for certiorari expired. *See* U.S. Sup. Ct. Rule 13 (a writ of certiorari must be filed within 90 days after entry of the judgment). The AEDPA limitations period began running on December 1, 1998.

The AEDPA limitations period ran for 317 days, then, on October 14, 1999 -- the date Petitioner filed his first PRP -- the limitations period tolled pursuant to 28 U.S.C. § 2244(d)(2). *See* Dkt. 9, Exhibit 5. The statute of limitations, therefore, stopped running from October 14, 1999 until October 5, 2000 -- the date on which Petitioner's PRP became final. *See Carey v. Saffold,* 536 U.S. 214, 220 (2002) (an application remains "pending" "until the application has achieved final resolution through the State's post-conviction procedures"); *Corjasso v. Ayers*, 278 F.3d 874, 879 (9th Cir. 2002) (finding the statute of limitations remains tolled until the state collateral attack becomes final). When his PRP became final, Petitioner had 48 days (for a total of 1 year) remaining to file his Petition. In other words, Petitioner had until November 22, 2000 to file a timely federal habeas petition. Petitioner did not file the Petition until July 11, 2017, which was approximately 16 ½ years after the limitations period expired.[3]

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[3] Petitioner's second direct appeal and second and third PRPs did not toll the limitations period because they were filed after the AEDPA limitations period expired. *See Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003) (holding "section 2244(d) does not permit the reinitiation of the limitations period that has ended before the

Petitioner states his Petition is timely filed because a state-created impediment delayed his filing. *See* Dkt. 15. Specifically, he contends Washington State created an impediment by misapplying the law and the impediment was removed when the state supreme court decided *State v. W.R., Jr.*, 181 Wn.2d 757 (2014) on October 30, 2014. *Id.* at pp. 2-3. Petitioner states he was not aware of *W.R.* until April of 2015, when it was available at Stafford Creek Corrections Center. *Id.* at p. 4.

The limitations period is statutorily tolled if the petitioner's delay in filing the habeas petition was attributable to "[an] impediment to filing an application created by State action in violation of the Constitution or laws of the United States ..., if the applicant was *prevented* from filing by such State action." 28 U.S.C. § 2244(d)(1)(B) (emphasis added); *Bryant v. Arizona Atty. Gen.*, 499 F.3d 1056, 1059–60 (9th Cir. 2007). "The limitations period would then run from the date on which the impediment is removed." *Bryant*, 499 F.3d at 1060. Here, Petitioner has not shown how the state court's actions prior to issuing *W.R.* in October of 2014 impeded his ability to timely file a federal habeas petition. Petitioner argues the state was misapplying the law; however, he does not explain how the alleged misapplication of the law impeded his ability to file a habeas action in this Court. *See* Dkt. 15. Further, the state's failure to provide Petitioner with access to the *W.R.* decision until April of 2015 did not impact Petitioner's ability to timely file his Petition before November 22, 2000 — the day by which Petitioner had to file a timely federal habeas petition. *See Bryant*, 499 F.3d at 1060 (finding "lack of access to case law during the relevant time period was not an impediment for purposes of statutory tolling because it did

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state petition was filed"); *Brown v. Curry*, 451 Fed.Appx. 693 (9th Cir. 2011) (finding the petitioner's state habeas petitions, which were filed after the expiration of the statute of limitations and denied as untimely, did not toll the statute).

not prevent [the petitioner] from filing his petition"). The Court therefore finds Petitioner has failed to show a state action prevented him from timely filing the Petition.

Petitioner also asserts the Petition is timely because it was filed within one year of the discovery of a factual predicate of his claim. Dkt. 15, pp. 4-5. Petitioner states he discovered the factual predicate of his claim when he learned of the *W.R.* decision in April of 2015. *Id.* at pp. 5-6. Section 2244(d)(1)(D) provides that the one-year period does not commence until "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). A court decision may qualify as a "fact" if the decision is in the petitioner's *own* case. *Shannon v. Newland,* 410 F.3d 1083, 1088–89 (9th Cir. 2005) (distinguishing between discovery of case law and discovery of factual predicate). However, court decisions establishing a proposition of law do not qualify as factual predicates. *Id.* Here, Petitioner argues the *W.R.* decision created a new factual predicate. Petitioner, however, has not shown *W.R.* was a decision in his own case, changed a fact, or has any impact on his legal status. Furthermore, Petitioner admits *W.R.* has not been applied retroactively. *See* Dkt. 15, p. 6; *see also Matter of Colbert*, 186 Wash.2d 614 (2016) (holding *W.R.* does not apply retroactively). Therefore, Petitioner has not shown *W.R.* qualifies as a "fact" under § 2244(d)(1)(D).

As Petitioner did not file the Petition within one year of his direct appeal becoming final, the Court finds the Petition is untimely.

II. Equitable Tolling

The AEDPA statute of limitations is subject to equitable tolling where the petitioner pursued his rights diligently and "some extraordinary circumstance stood in his way." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (internal quotations omitted). To receive equitable tolling, a petitioner at the very least must show the extraordinary circumstances "were the but-for and

proximate cause of his untimeliness." *Ansaldo v. Knowles*, 143 Fed. Appx. 839, 840 (9th Cir. 2005). Petitioner fails to demonstrate any extraordinary circumstance prevented him from filing a timely habeas petition. Rather, Petitioner argues his Petition was timely filed. *See* Dkt. 4, 15. As discussed above, the Petition was not timely filed. Accordingly, Petitioner fails to show he is entitled to equitable tolling and the Petition is barred by the § 2244 limitations period.

CERTIFICATE OF APPEALABILITY

A petitioner seeking post-conviction relief under 28 U.S.C. § 2254 may appeal a district court's dismissal of the federal habeas petition only after obtaining a certificate of appealability (COA) from a district or circuit judge. *See* 28 U.S.C. § 2253(c). "A certificate of appealability may issue . . . only if the [petitioner] has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner satisfies this standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). No jurist of reason could disagree with this Court's evaluation of Petitioner's claims or would conclude the issues presented in the Petition should proceed further. Therefore, the Court concludes Petitioner is not entitled to a certificate of appealability with respect to this Petition.

CONCLUSION

Petitioner's Petition is untimely as it was filed more than one year after the state court judgment became final. There are no extraordinary circumstances in this case requiring the application of equitable tolling principles. Therefore, the Petition is barred by the one-year

limitations period imposed under 28 U.S.C. § 2244(d) and should be dismissed with prejudice. No evidentiary hearing is required and a certificate of appealability should be denied.

Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of de novo review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C). Accommodating the time limit imposed by Fed. R. Civ. P. 72(b), the clerk is directed to set the matter for consideration on November 10, 2017, as noted in the caption.

Dated this 26th day of October, 2017.

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David W. Christel
United States Magistrate Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

CECIL L. MORTON, Petitioner-Appellant, v. MARGARET GILBERT, Superintendent, Respondent-Appellee.	No. 18-35027 D.C. No. 3:17-cv-05536-RJB Western District of Washington, Tacoma ORDER

Before: McKEOWN and N.R. SMITH, Circuit Judges.

The motion for reconsideration (Docket Entry No. 3) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

Appendix "D"