UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETER D. BOMMERITO, Jr., Petitioner-Appellant, v. SCOTT KERNAN, Secretary of Corrections and RONALD DAVIS, Warden, Respondents-Appellees.	No. 18-55749 D.C. No. 2:17-cv-06862-SVW-JEM Central District of California, Los Angeles ORDER

Before: GRABER and M. SMITH, Circuit Judges.

The motion for reconsideration (Docket Entry No. 13) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETER D. BOMMERITO, Jr., Petitioner-Appellant, v. SCOTT KERNAN, Secretary of Corrections and RONALD DAVIS, Warden, Respondents-Appellees.	No. 18-55749 D.C. No. 2:17-cv-06862-SVW-JEM Central District of California, Los Angeles ORDER

Before: FARRIS and LEAVY, Circuit Judges.

We have received and reviewed both parties' responses to this court's June 12, 2018 order to show cause.

The record sufficiently demonstrates that appellant deposited a notice of appeal for mailing within 30 days from entry of the March 28, 2018 judgment. *See* 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1) & (c). Appellant's prison mail log reflects that he deposited correspondence addressed to this court for mailing on April 11, 2018, although this court has no record of receiving that correspondence. In his reply submitted to this court on August 10, 2018, appellant declares under penalty of perjury that the April 11, 2018 mailing was a notice of appeal that was lost by prison officials after he deposited it for mailing. In support, appellant attaches a copy of his Prison Inmate report that reflects the prison did not deduct postage charges from his account in April 2018.

Accordingly, the June 12, 2018 order to show cause is discharged.

The request for a certificate of appealability is denied. 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.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PETER D. BOMMERITO, JR.,

Petitioner,

v.

SCOTT KERNAN,

Respondent.

Case No. CV 17-6862-SVW (JEM)

ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. Section 636, the Court has reviewed the pleadings, the records on file, and the Report and Recommendation of the United States Magistrate Judge. Petitioner has filed Objections, and the Court has engaged in a de novo review of those portions of the Report and Recommendation to which Petitioner has objected. The Court accepts the findings and recommendations of the Magistrate Judge. As explained more fully in the Report and Recommendation, Ground One is untimely by more than twenty years. Although Petitioner makes additional arguments in his Objections regarding equitable tolling, he has failed to show that he is entitled to tolling sufficient to render Ground One timely.

IT IS ORDERED that: (1) Respondent's Motion to Dismiss the Petition is granted; and (2) Judgment shall be entered dismissing the action with prejudice.

DATED: March 22, 2018

STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PETER D. BOMMERITO, JR.,

Petitioner,

v.

SCOTT KERNAN,

Respondent.

Case No. CV 17-6862-SVW (JEM)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Stephen V. Wilson, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

INTRODUCTION

On September 8, 2017, Peter D. Bommerito, Jr. ("Petitioner"), a California state prisoner, constructively filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 ("Petition" or "Pet.").[1] On December 22, 2017,

[1] Under the prison "mailbox rule," "a legal document is deemed filed on the date a petitioner delivers it to the prison authorities for filing by mail." Lott v. Mueller, 304 F.3d 918, 921 (9th Cir. 2002); accord Houston v. Lack, 487 U.S. 266, 276 (1988). The "[mailbox] rule applies to prisoners filing habeas petitions in both federal and state courts." Huizar v. Carey, 273 F.3d 1220, 1223 (9th Cir. 2001) (citation omitted); accord Anthony v. Cambra, 236 F.3d 568, 574-75 (9th Cir. 2000).

Respondent filed a Motion to Dismiss the Petition. On January 18, 2018, Petitioner filed an Opposition. Respondent did not file a Reply.

The Motion to Dismiss is now ready for decision. For the reasons set forth below, the Court recommends that the Motion to Dismiss be granted.

STATE COURT PROCEEDINGS

On February 3, 1975, in case number A308592, a Los Angeles County jury found Petitioner guilty of two counts of assault with a deadly weapon (Cal. Penal Code § 245a) and one count of first-degree murder (Cal. Penal Code § 187). The jury also found that Petitioner used a firearm on all counts. (Respondent's Lodged Document ("LD") 1; LD 2 at 3.) The trial court sentenced Petitioner to a term of life in prison. (LD 3.)

Petitioner's judgment of conviction was affirmed on appeal. (LD 2 at 3.) Petitioner filed a petition for writ of certiorari, which was denied by the Supreme Court on August 19, 1976. (LD 2 at 1.) Petitioner filed multiple state habeas petitions prior to the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). (See LD 2.)

On September 8, 2017, Petitioner constructively filed the instant Petition.

PETITIONER'S CONTENTIONS

1. Petitioner was denied effective assistance of counsel because his attorney allowed a second suppression hearing to be held after a prior court already had ruled that the challenged evidence was illegally seized. (Pet at 5-6.)[2]

2. (a) Petitioner was compelled to participate in a parolee group with Dr. Donald Viren and was sexually assaulted by Dr. Viren, Dr. Viren's brother, and another patient; (b) two game-show talent scouts sexually assaulted and humiliated Petitioner's former

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Here, the Petition indicates that it was delivered for mailing on September 8, 2017. (Pet. at 57.) Unless indicated otherwise, regardless of whether Petitioner's habeas corpus petitions were filed within the limitations period, see infra; Stillman v. Lamarque, 319 F.3d 1199, 1201 (9th Cir. 2003) (to benefit from the "mailbox rule" a petitioner must deliver the petition to prison officials within the limitations period), the Court will afford Petitioner the benefit of the mailbox rule.

[2] The Court refers to the pages of the Petition as numbered by the CM/ECF system.

girlfriend; (c) Dr. Viren's brother humiliated and threatened Petitioner's fiancee; and (d) Dr. Viren's grandsons humiliated and taunted Petitioner. (Pet. at 5, 7-10.)

DISCUSSION

I. GROUND TWO IS NOT COGNIZABLE ON FEDERAL HABEAS REVIEW

"Federal law opens two main avenues to relief on complaints related to imprisonment: a petition for habeas corpus, 28 U.S.C. § 2254, and a complaint under . . . 42 U.S.C. § 1983." Muhammad v. Close, 540 U.S. 749, 750 (2004) (per curiam). "Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus; requests for relief turning on circumstances of confinement may be presented in a § 1983 action." Id. (internal citation omitted). These avenues for relief are mutually exclusive, and federal courts lack habeas jurisdiction over claims by state prisoners that are not within "the core of habeas corpus." Nettles v. Grounds, 830 F.3d 922, 927, 933-34 (9th Cir. 2016) (en banc), cert. denied, 137 S. Ct. 645 (2017). A prisoner's claims are within the core of habeas corpus if they challenge the fact or duration of his conviction or sentence. Id. at 934. "[W]hen a prisoner's claim would not 'necessarily spell speedier release,' that claim does not lie at 'the core of habeas corpus,' and may be brought, if at all, under § 1983." Skinner v. Switzer, 562 U.S. 521, 534 n.13 (2011) (citing Wilkinson v. Dotson, 544 U.S. 74, 82 (2005)); Nettles, 830 F.3d at 934. Ground Two fails to meet these requirements.

In Ground Two, Petitioner alleges malfeasance by third parties: compulsory treatment with a therapist while on parole, sexual assault, and acts of humiliation. (Pet. at 5, 7-10.) Petitioner also alleges his fiancee and a former girlfriend were sexually assaulted and threatened. (Id. at 7-9.) Even if Petitioner were to succeed on these claims, there are no circumstances under which the remedy for these alleged harms would be his speedier release from prison or a grant of parole. If Petitioner would be entitled to any relief, the

exclusive vehicle for these claims would be an action under § 1983.[3] Accordingly, the claims in Ground Two do not lie in habeas and should be dismissed.

II. GROUND ONE IS BARRED BY THE STATUTE OF LIMITATIONS[4]

A. The Applicable Statute of Limitations

AEDPA "establishes a 1-year period of limitation for a state prisoner to file a federal application for a writ of habeas corpus." Wall v. Kholi, 131 S. Ct. 1278, 1283 (2011); Lawrence v. Florida, 549 U.S. 327, 329 (2007); 28 U.S.C. § 2244(d)(1). After the one-year limitations period expires, the prisoner's "ability to challenge the lawfulness of [his] incarceration is permanently foreclosed." Lott v. Mueller, 304 F.3d 918, 922 (9th Cir. 2002).

To determine whether the pending action is timely, it is necessary to determine when AEDPA's limitations period began and ended. Pursuant to 28 U.S.C. § 2244(d)(1)(A)-(D), AEDPA's limitations period "begins to 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

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[3] When an action is improperly brought as a habeas petition, "a district court may construe a petition for habeas corpus to plead a cause of action under § 1983 after notifying and obtaining informed consent from the prisoner." Nettles, 830 F.3d at 936. However, the court should only convert the petition to a Section 1983 action if it "is amenable to conversion on its face, meaning that it names the correct defendants and seeks the correct relief." Id. (citation and quotation marks omitted). Here, the Petition is not amenable to conversion on its face because it does not name the correct defendants, contains an untimely habeas claim, and does not appear to allege a viable civil rights claim.

[4] Respondent also argues that all but one of the sub-claims alleged in Ground Two are barred by the statute of limitations. (Motion at 5.) Respondent's argument is well-taken. However, the Court has found that the claims in Ground Two do not lie in habeas and should be dismissed on that basis. Thus, the Court does not further discuss the timeliness of Ground Two under AEDPA.

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

A habeas corpus claim can "be timely, even if filed after the one-year time period has expired, when statutory or equitable tolling applies." Jorss v. Gomez, 311 F.3d 1189, 1192 (9th Cir. 2002). However, "a court must first determine whether a [claim] was untimely under the statute itself before it considers whether equitable [or statutory] tolling should be applied. As a matter of logic, where a [claim] is timely filed within the one-year statute of limitation imposed by AEDPA, 28 U.S.C. § 2244(d)(1), then equitable [or statutory] tolling need not be applied. Similarly, equitable tolling need not be applied where a [claim] is timely due to statutory tolling under § 2244(d)(2)." Id. Following this framework, the Court begins its analysis with the relevant timeliness inquiry.

B. Ground One Is Facially Untimely

Under § 2244(d)(1)(A) of the AEDPA, "a federal petition for writ of habeas corpus . . . must be filed within one year after the state court judgment becomes final by the conclusion of direct review or the expiration of the time to seek direct review." Porter v. Ollison, 620 F.3d 952, 958 (9th Cir. 2010); 28 U.S.C. § 2244(d)(1)(A). Petitioner's judgment became final when his petition for writ of certiorari was denied on August 19, 1976. (See LD 2 at 1.) It is clear that § 2244(d)(1)(B)-(D) do not apply, since the factual and legal basis for Ground One were known and available to Petitioner at the time his conviction became final and there was no impediment to earlier filing. Thus, pursuant to 28 U.S.C. § 2244(d)(1)(A), the statute of limitations began to run when AEDPA became effective on April 24, 1996, and was set to expire one year later on April 24, 1997. Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001). The Petition was not constructively filed until September 8, 2017, more than twenty years after the limitations period expired. Thus, Ground One is facially untimely.

C. Petitioner Is Not Entitled to Statutory Tolling

Section 2244(d)(2) tolls the statute of limitations during the pendency of "a properly filed application for State post-conviction or other collateral review." The statute of

limitations is not tolled between the time the petitioner's conviction becomes final on direct review and the time the next state collateral challenge is filed because there is no case "pending" during that time. Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). There is no statutory tolling for a state court petition that is filed after the one-year limitations period already has expired. Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) ("section 2244(d) does not permit the reinitiation of the limitations period that has ended before the state petition was filed"); Jiminez v. Rice, 276 F.3d 478, 482 (9th Cir. 2001) (filing a state habeas petition after the AEDPA statute of limitations had expired "resulted in an absolute time bar").

Here, Petitioner is not entitled to statutory tolling because his state habeas petitions were filed and denied before the limitations period commenced. Waldrip v. Hall, 548 F.3d 729, 735 (9th Cir. 2008) (state habeas petition that was filed and denied before limitations period started to run "had no effect on the timeliness of the ultimate federal filing"). Accordingly, Petitioner is not entitled to statutory tolling.

D. Petitioner Is Not Entitled to Equitable Tolling

The AEDPA statute of limitations is subject to equitable tolling "in appropriate cases." Holland v. Florida, 560 U.S. 631, 645 (2010). "[A] petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his claims diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." Id. at 649 (internal quotation marks and citation omitted); see also Lawrence, 549 U.S. at 336. "The petitioner must show that the extraordinary circumstances were the cause of his untimeliness, and that the extraordinary circumstances made it impossible to file a petition on time." Porter, 620 F.3d at 959 (internal quotation marks and citations omitted).

"To apply the doctrine in extraordinary circumstances necessarily suggests the doctrine's rarity, and the requirement that extraordinary circumstances stood in [petitioner's] way suggests that an external force must cause the untimeliness, rather than . . . merely oversight, miscalculation or negligence on the petitioner's part, all of which would preclude the application of equitable tolling." Waldron-Ramsey v. Pacholke, 556 F.3d 1008, 1011

(9th Cir. 2009) (internal quotation marks, brackets and citation omitted); accord Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999) ("equitable tolling is unavailable in most cases"). "[T]he threshold necessary to trigger equitable tolling under AEDPA is very high, lest the exceptions swallow the rule." Mendoza v. Carey, 449 F.3d 1065, 1068 (9th Cir. 2006) (internal quotation marks and citation omitted); accord Bills v. Clark, 628 F.3d 1092, 1097 (9th Cir. 2010).

Here, Petitioner makes a general claim that he is entitled to equitable tolling. (Opposition at 1.) He also cites several cases regarding equitable tolling without any indication as to how they apply to his case. (Id. at 7-9.) However, Petitioner does not does not identify anything that occurred after his conviction became final, and certainly no extraordinary circumstances, that prevented him from filing Ground One on time nor has he shown that he pursued his rights diligently. Petitioner is not entitled to equitable tolling, and Ground One is barred by the statute of limitations.

RECOMMENDATION

THE COURT, THEREFORE, RECOMMENDS that the District Court issue an Order: (1) accepting this Report and Recommendation; (2) granting Respondent's Motion to Dismiss; and (3) directing that Judgment be entered dismissing this action with prejudice.

DATED: February 7, 2018

/s/ John E. McDermott
JOHN E. MCDERMOTT
UNITED STATES MAGISTRATE JUDGE

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