Appendix "F"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 26 2018

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

JOSE GARCIA MEJIA,

Petitioner-Appellant,

v.

SHAWN HATTON, Warden,

Respondent-Appellee.

No. 17-17206

D.C. No. 5:16-cv-04772-EJD
Northern District of California,
San Jose

ORDER

Before: PAEZ and RAWLINSON, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 4) is denied because the underlying 28 U.S.C. § 2254 petition fails to state any federal constitutional claims debatable among jurists of reason. *See* 28 U.S.C. § 2253(c)(2)-(3); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) ("When ... the district court denies relief on procedural grounds, the petitioner seeking a COA must show both '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.'") (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Any pending motions are denied as moot.

DENIED.

Appendix "E"

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOSE GARCIA MEJIA,

Petitioner,

v.

SHAWN HATTON, Warden,

Respondent.

Case No. 16-04772 EJD (PR)

ORDER GRANTING MOTION TO DISMISS; DENYING CERTIFICATE OF APPEALABILITY

(Docket No. 10)

Petitioner has filed a pro se petition for a writ of habeas corpus under 28 U.S.C. § 2254 challenging his state conviction. Respondent filed a motion to dismiss the petition as untimely. (Docket No. 10, hereafter "Mot.") Petitioner did not file an opposition although given an opportunity to do so. For the reasons set forth below, the Court grants the motion to dismiss.

I. BACKGROUND

On August 18, 2010, Petitioner was convicted in a court trial in Santa Clara County Superior Court of sexual intercourse or sodomy with a child 10 years of age or younger. (Mot. at 2.) On October 7, 2010, Petitioner was sentenced to state prison for an indeterminate term of 25 years to life. (Id.)

On November 30, 2012, the California Court of Appeal affirmed the conviction.

The California Supreme Court denied the petition for review on March 13, 2013. (Id.)

On September 17, 2013, Petitioner filed a habeas petition in this Court. See Mejia v. Diaz, Case No. 13-04692 EJD (PR). On May 12, 2014, Petitioner filed an amended petition in that action. (Id., Docket No. 11.) On November 5, 2014, Respondent filed a motion to dismiss the original petition for failure to exhaust state remedies. (Id., Docket No. 18.) On May 5, 2014, this Court vacated the motion and directed Petitioner to designate either his original petition or amended petition as the operative pleading. (Id., Docket No. 19.) After Petitioner designated his amended petition as the operative pleading, Respondent filed a motion to dismiss for failure to exhaust state court remedies as to claims 2 and 3 in amended petition. (Id., Docket No. 23.) On June 14, 2016, this Court granted the motion and dismissed the action. (Id., Docket No. 24.)

On August 18, 2016, Petitioner filed the instant habeas petition.

II. DISCUSSION

A. Statute of Limitations

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which became law on April 24, 1996, imposed for the first time a statute of limitations on petitions for a writ of habeas corpus filed by state prisoners. Petitions filed by prisoners challenging non-capital state convictions or sentences must be filed within one year of the latest of the date on which: (A) the judgment became final after the conclusion of direct review or the time passed for seeking direct review; (B) an impediment to filing an application created by unconstitutional state action was removed, if such action prevented petitioner from filing; (C) the constitutional right asserted was recognized by the Supreme Court, if the right was newly recognized by the Supreme Court and made retroactive to cases on collateral review; or (D) the factual predicate of the claim could have been discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1). Time during which a properly filed application for state post-conviction or other collateral review is pending is excluded from the one-year time limit. Id. § 2244(d)(2).

"Direct review" includes the period within which a petitioner can file a petition for a writ of certiorari from the United States Supreme Court, whether or not the petitioner actually files such a petition. Bowen v. Roe, 188 F.3d 1157, 1159 (9th Cir. 1999). Accordingly, if a petitioner fails to seek a writ of certiorari from the United States Supreme Court, AEDPA's one-year limitations period begins to run on the date the ninety-day period defined by Supreme Court Rule 13 expires. See Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002) (where petitioner did not file petition for certiorari, his conviction became final 90 days after the California Supreme Court denied review); Bowen, 188 F.3d at 1159 (same). As the Eighth Circuit put it: "[T]he running of the statute of limitations imposed by § 2244(d)(1)(A) is triggered by either (i) the conclusion of all direct criminal appeals in the state system, followed by either the completion or denial of certiorari proceedings before the United States Supreme Court; or (ii) if certiorari was not sought, then by the conclusion of all direct criminal appeals in the state system followed by the expiration of the time allotted for filing a petition for the writ." Smith v. Bowersox, 159 F.3d 345, 348 (8th Cir. 1998), cert. denied, 525 U.S. 1187 (1999).

Respondent asserts that absent tolling, the federal habeas petition was due on June 11, 2014. (Mot. at 3.) The relevant subdivision for calculating the one-year statute of limitations in this case is § 2244(d)(1)(A), such that Petitioner had one year from the date the judgment became final after the conclusion of direct review or the time passed for seeking direct review. Because Petitioner did not seek a petition for writ of certiorari from the United States Supreme Court, his one year limitations period began to run ninety-days after the conclusion of his direct criminal appeal. See Miranda, 292 F.3d at 1065. Petitioner's direct appeal concluded on March 13, 2013, when the California Supreme Court denied review. See supra at 2. Thus, Petitioner's one year limitations period began to run ninety days later, on June 11, 2013. Absent tolling, Respondent is correct that Petitioner had until June 11, 2014, to file a timely federal habeas petition. See 28 U.S.C. § 2244(d)(1)(A). Because Petitioner filed the instant petition on August 18, 2016, over two years after the limitations period had expired, it is untimely unless he is entitled to tolling.

Respondent asserts that although Petitioner filed a federal habeas petition in this Court on September 17, 2013, before the limitations period expired, that petition did not toll the AEDPA statute of limitations. (Mot. at 3.) Respondent is correct. An application for federal habeas corpus review is not an "application for State post-conviction or other collateral review" within the meaning of § 2244(d)(2). Duncan v. Walker, 533 U.S. 167, 180-81 (2001). Thus, the running of the limitations period is not tolled for the period during which Petitioner's first petition was pending in this Court. Id. at 181.

Petitioner has filed no opposition to Respondent's motion asserting any basis for tolling to save the instant action from being untimely. Accordingly, the instant petition is untimely, and Respondent's motion to dismiss based thereon must be granted.

III. CONCLUSION

For the foregoing reasons, Respondent's motion to dismiss the petition as untimely, (Docket No. 10), is **GRANTED**. The instant petition for a writ of habeas corpus is **DISMISSED**.

No certificate of appealability is warranted in this case. See Rule 11(a) of the Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254 (requiring district court to rule on certificate of appealability in same order that denies petition). Petitioner 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).

This order terminates Docket No. 10.

IT IS SO ORDERED.

Dated: 10/10/2017

EDWARD J. DAVILA
United States District Judge

United States District Court
Northern District of California