

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JUL 16 2019

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

CLARENCE LEONARD HEARNS, Jr.,

Petitioner-Appellant,

v.

K. HARRINGTON, Warden KVSP,

Respondent-Appellee.

No. 09-56974

D.C. No. 2:09-cv-04030-FMC-OP
Central District of California,
Los Angeles

ORDER

Before: SCHROEDER, CANBY, and GOULD, Circuit Judges.

The motions and supplemental motions to recall the mandate (Docket Entry Nos. 14, 15, 16, & 17) are denied because there are no “extraordinary circumstances” to support such relief. *See Calderon v. Thompson*, 523 U.S. 538, 550 (1998).

All other pending motions are denied.

No further filings will be accepted in this closed case.

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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10 CLARENCE LEONARD
11 HEARNS, JR.,

12 Petitioner,

13 vs.

14 K. HARRINGTON, WARDEN,


15 Respondent.
16

Case No. CV 09-4030-JHN (OP)
J U D G M E N T

17 Pursuant to the Order Adopting Findings, Conclusions, and Recommendations
18 of the United States Magistrate Judge,

19 IT IS ADJUDGED that the Petition is denied and this action is dismissed with
20 prejudice.

21
22 DATED: 1/12/10


23 HONORABLE JACQUELINE H. NGUYEN
United States District Judge

24 Prepared by:

25
26 
27 HONORABLE OSWALD PARADA
28 United States Magistrate Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CLARENCE LEONARD
HEARNS, JR.,

Petitioner,

vs.

K. HARRINGTON, WARDEN,

Respondent.

Case No. CV 09-4030-JHN (OP)

ORDER ADOPTING FINDINGS,
CONCLUSIONS, AND
RECOMMENDATIONS OF
UNITED STATES MAGISTRATE
JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, all the records and files herein, the Report and Recommendation of the United States Magistrate Judge, and the objections filed by Petitioner, de novo. The court concurs with and adopts the findings, conclusions, and recommendations of the Magistrate Judge,

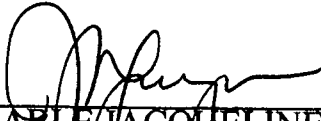
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1 IT IS ORDERED that Judgment be entered: (1) approving and adopting this
2 Report and Recommendation; (2) denying Petitioner's Request for Relief pursuant
3 to Rule 60(b); and (3) directing that Judgment be entered dismissing this action with
4 prejudice as untimely.

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7 DATED: 1/12/10


HONORABLE JACQUELINE H. NGUYEN
United States District Judge

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10 Prepared by:

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13 HONORABLE OSWALD PARADA
14 United States Magistrate Judge
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CLARENCE LEONARD
HEARNS, JR.,

Petitioner,

v.

K. HARRINGTON, WARDEN,

Respondent.

Case No. CV 09-4030-FMC (OP)

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE
JUDGE

This Report and Recommendation is submitted to the Honorable
Florence-Marie Cooper, United States District Judge, pursuant to the provisions of
28 U.S.C. § 636 and General Order 194 of the United States District Court for the
Central District of California.

I.

PROCEEDINGS

On June 5, 2009, Clarence Leonard Hearn, Jr., ("Petitioner"), filed the
current Petition for Writ of Habeas Corpus by a Person in State custody pursuant
to 28 U.S.C. § 2254 ("Petition"). Pursuant to Rule 4 of the Rules Governing
Section 2254 Cases in the United States District Courts, the Court examined the
Petition and found that it plainly appeared from its face that Petitioner was not
entitled to relief in the district court. Specifically, the Court found that the Petition

1 was subject to summary dismissal because the information provided indicated that
2 the Petition was untimely. On June 10, 2009, the Court issued an Order to Show
3 Cause ("OSC") why the Petition should not be dismissed as untimely. On July 10,
4 2009, Petitioner filed his "Motion to Respond to Judge's Order to Show Cause
5 Why Petition Is Not Untimely Under FRCP Rule 60(b)(4)" ("Response").

6 II.

7 BACKGROUND

8 On April 9, 1996, Petitioner was found guilty after a jury trial in the Los
9 Angeles County Superior Court, case no. BA085786-01, of one count of murder
10 with special circumstances (Cal. Penal Code § 187), two counts of robbery (Cal.
11 Penal Code § 211), and one count of assault with a deadly weapon (Cal. Penal
12 Code § 245). (Pet. at 2.) On May 9, 1996, Petitioner was sentenced to a state
13 prison term of twenty four years plus life without the possibility of parole. (*Id.*)

14 Petitioner appealed his judgment of conviction to the California Court of
15 Appeal. On May 5, 1997, the court of appeal affirmed the judgment. (Official
16 Records of California Courts.¹)

17 Petitioner filed a petition for review in the California Supreme Court. On
18 August 13, 1997, the supreme court denied the petition. (Official Records of
19 California Courts.)

20 On July 29, 2008, Petitioner filed a petition for writ of mandate in the
21 California Court of Appeal. On August 5, 2008, the court of appeal denied the
22 petition. (Pet. at 2, 3; Official Records of California Courts.)

23 On October 14, 2008, Petitioner filed a habeas corpus petition in the
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25 ¹ The Court takes judicial notice of the state appellate court records for
26 Petitioner's cases, which are available on the Internet at <http://appellatecases.courtinfo.ca.gov>. See *Smith v. Duncan*, 297 F.3d 809, 815 (9th Cir. 2002) (federal
27 courts may take judicial notice of relevant state court records in federal habeas
28 proceedings).

1 California Supreme Court. On April 1, 2009, the supreme court denied the
2 petition with citation to In re Clark, 5 Cal.4th 750 (1993), and In re Robbins, 18
3 Cal.4th 770, 780 (1998). (Id. at 4; Official Records of California Courts.)

4 III.

5 DISCUSSION

6 The current Petition was filed after the Antiterrorism and Effective Death
7 Penalty Act of 1996 ("AEDPA") was signed into law and is, thus, subject to the
8 AEDPA's one-year statute of limitations period, as set forth under 28 U.S.C. §
9 2244(d). See Calderon v. U. S. Dist. Court (Beeler), 128 F.3d 1283, 1286 (9th Cir.
10 1997).² In most cases, the limitation period begins to run from "the date on which
11 the judgment became final by conclusion of direct review or the expiration of the
12 time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). Here, Petitioner filed a
13 petition for review with the California Supreme Court which was denied on
14 August 13, 1997. (Official Records of California Courts.) Consequently, his
15 conviction became final on November 11, 1997, when the ninety-day period for
16 seeking review in the United States Supreme Court expired. Barefoot v. Estelle,
17 463 U.S. 880, 887, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983); Bowen v. Roe, 188
18 F.3d 1157, 1158-59 (9th Cir. 1999). As a result, absent applicable equitable or
19 statutory tolling, Petitioner had until November 11, 1998, to file the current
20 Petition. 28 U.S.C. § 2244(d)(1)(A); see also Patterson v. Stewart, 251 F.3d 1243,
21 1246 (9th Cir. 2001). The Petition was not filed until June 5, 2009, nearly ten and
22 one half years after the limitation period expired. Thus, absent applicable
23 statutory tolling, equitable tolling, or an alternate start date to the AEDPA's
24 limitations period under 28 U.S.C. § 2244(d)(1), the current Petition is untimely.

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27 ² Beeler was overruled on other grounds in Calderon v. U. S. Dist. Court
28 (Kelly), 163 F.3d 530, 540 (9th Cir. 1998) (en banc).

1 **A. Statutory Tolling of the Limitation Period Pursuant to 28 U.S.C. §**
 2 **2244(d)(2).**

3 Title 28 U.S.C. § 2244(d)(2) provides that “[t]he time during which a
 4 properly filed application for State post-conviction or other collateral review with
 5 respect to the pertinent judgment or claim is pending shall not be counted toward
 6 any period of limitation under this subsection.” Patterson, 251 F.3d at 1247.

7 The United States Supreme Court has held the statute of limitations is tolled
 8 where a petitioner is properly pursuing post-conviction relief. Carey v. Saffold,
 9 536 U.S. 214, 219-21, 122 S. Ct. 2134, 153 L. Ed. 2d 260 (2002). The period
 10 tolled includes the intervals between one state court’s disposition of a habeas
 11 petition and the filing of a habeas petition at the next level of the state court
 12 system. Id. In Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999), the Ninth
 13 Circuit held that “the statute of limitations is tolled from the time the first state
 14 habeas petition is filed until the California Supreme Court rejects the petitioner’s
 15 final collateral challenge.” Claims denied as untimely or determined by the
 16 federal courts to have been untimely in state court will not satisfy the requirements
 17 for statutory tolling. Evans v. Chavis, 546 U.S. 189, 192-93, 126 S. Ct. 846, 163
 18 L. Ed. 2d 684 (2006) (citing Carey, 536 U.S. at 222-23).³

19 As set forth above, Petitioner’s conviction became final on November 11,
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21 ³ The Court in Evans held that a California Supreme Court order silent on the
 22 grounds for the court’s decision is not equivalent to a holding that the filing was
 23 timely. Evans, 546 U.S. at 197-98. Thus, in the absence of clear direction or
 24 explanation from the California Supreme Court about the meaning of the term
 25 “reasonable time” (in which to file a habeas petition), or clear indication that a
 26 particular request for appellate review was timely or untimely, the federal court must
 27 itself examine the delay in each case and determine what the state courts would have
 28 held with respect to timeliness. Id. at 198. That is, “the federal court must decide
 whether the filing of the request for state-court appellate review (in state collateral
 review proceedings) was made within what California would consider a ‘reasonable
 time.’” Id.

1 1997, and the limitation period ended November 11, 1998. Statutory tolling is
2 unavailable where, as here, Petitioner's first state habeas petition in the California
3 Court of Appeal was not filed until July 29, 2008, nearly ten years after the
4 limitation period expired. (Official Records of California Courts.) Section
5 2244(d) does not permit the reinitiation of the AEDPA limitation period that has
6 ended before a state habeas petition is filed. Ferguson v. Palmateer, 321 F.3d 820,
7 823 (9th Cir. 2003) (holding that § 2244(d) "does not permit the reinitiation of the
8 limitations period that has ended before the state petition was filed," even if the
9 state petition was timely filed); see also Jiminez v. Rice, 276 F.3d 478, 482 (9th
10 Cir. 2001); Wixom v. Washington, 264 F.3d 894, 898-99 (9th Cir. 2001). For the
11 same reason, Petitioner is not entitled to statutory tolling for the other habeas
12 petition he filed in the California Supreme Court.

13 The Court also notes that the state supreme court denied Petitioner's habeas
14 petition with citation to In re Clark, 5 Cal. 4th 750 (1993), and In re Robbins, 18
15 Cal. 4th 770, 780 (1998). (Official Records of California Courts.) The Clark
16 decision dealt extensively with the requirement that a habeas petitioner explain
17 and justify any significant delay in seeking habeas corpus relief. In re Clark, 5
18 Cal. 4th at 765. Further, the pinpoint citation in Robbins deals entirely with the
19 issue of timeliness with respect to a habeas corpus petition. As a result, the state
20 supreme court denied the petition on timeliness grounds. Claims denied as
21 untimely by the state court will not satisfy the requirements for statutory tolling.
22 Evans, 546 U.S. at 192-93 (citing Carey, 536 U.S. at 222-23).

23 Since Petitioner filed his state habeas petitions well after the limitation
24 period expired, he may not avail himself of statutory tolling to render the current
25 Petition timely. Thus, absent equitable tolling or an alternate start date for the
26 statute of limitations, the current Petition is untimely.

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1 **B. Equitable Tolling.**

2 The one-year limitation period is subject to equitable tolling if a petitioner
 3 demonstrates: “(1) that he has been pursuing his rights diligently, and (2) that
 4 some extraordinary circumstance stood in his way.” Pace, 544 U.S. at 418.⁴ A
 5 petitioner bears the burden of alleging facts that would give rise to tolling. Id.
 6 “[T]he threshold necessary to trigger equitable tolling under [the] AEDPA is very
 7 high, lest the exceptions swallow the rule.” Miranda v. Castro, 292 F.3d 1063,
 8 1066 (9th Cir. 2002) (internal quotation marks and citation omitted). This high
 9 bar is necessary to effectuate the “AEDPA’s statutory purpose of encouraging
 10 prompt filings in federal court in order to protect the federal system from being
 11 forced to hear stale claims.” Guillory v. Roe, 329 F.3d 1015, 1018 (9th Cir. 2003)
 12 (internal quotation marks and citation omitted). Equitable tolling determinations
 13 are “highly fact-dependent.” Whalem/Hunt v. Early, 233 F.3d 1146, 1148 (9th
 14 Cir. 2000) (en banc) (per curiam); accord Lott v. Mueller, 304 F.3d 918, 923 (9th
 15 Cir. 2002) (observing that equitable tolling determinations “turn[] on an
 16 examination of detailed facts”). In the Petition and in his Response to the OSC,
 17 Petitioner has failed to provide any circumstances that would entitle him to
 18 equitable tolling. Thus, the Court finds that Petitioner is not entitled to equitable
 19 tolling.

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 25 ⁴ The Supreme Court in Pace noted that it has “never squarely addressed the
 26 question whether equitable tolling is applicable to AEDPA’s statute of limitations.”
 27 Pace, 544 U.S. at 418 n.8. The Supreme Court declined to consider the issue in that
 28 case and assumed for the sake of argument that it did, because the respondent
 assumed as much, and the petitioner was not entitled to tolling under any standard.
Id.

C. Alternate Start of the Statute of Limitations.

1. State-Created Impediment.

In rare instances, AEDPA provides that its one-year limitations period shall run from “the date on which the impediment of 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.” 28 U.S.C. § 2244(d)(1)(B). Asserting that the statute of limitations was delayed by a state-created impediment requires a showing of a due process violation. Lott, 304 F.3d at 925. Petitioner has failed to set forth any facts showing that he is entitled to relief under this provision.

2. Newly Recognized Constitutional Right.

The AEDPA also provides that, if a claim is based upon a constitutional right that is newly recognized and applied retroactively to habeas cases by the United States Supreme Court, the one-year limitations period begins to run on the date which the new right was initially recognized by the United States Supreme Court. 28 U.S.C. § 2244(d)(1)(C). Petitioner has failed to set forth any facts showing that he is entitled to relief under this provision.

3. Discovery of Factual Predicate.

The AEDPA further provides that, in certain cases, its one-year limitations period shall run from “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). Petitioner has failed to set forth any facts showing that he is entitled to relief under this provision.

D. Petitioner Is Not Entitled to Relief Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure.

Rule 60(b) allows a party to seek relief from a final judgment, order or proceeding under the following circumstances: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable

1 diligence, could not have been discovered in time to move for a new trial under
2 Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic),
3 misrepresentation, or misconduct by an opposing party; (4) the judgment is void;
4 (5) the judgment has been satisfied, released or discharged; it is based on an earlier
5 judgment that has been reversed or vacated; or applying it prospectively is no
6 longer equitable; or (6) any other reason that justifies relief. Fed. R. Civ. P.
7 60(b)(1)-(6). A motion under Rule 60(b) "must be made within a reasonable
8 time--and for reasons (1), (2), and (3) no more than a year after the entry of the
9 judgment or order or the date of the proceeding." Fed. R. Civ. P. 60(c)(1).

10 A final judgment is "void" for purposes of Rule 60(b)(4) only if the court
11 that considered it lacked jurisdiction, either as to the subject matter of the dispute
12 or over the parties to be bound, or acted in a manner inconsistent with due process
13 of law. United States v. Berke, 170 F.3d 882, 883 (9th Cir. 1999) (citing In re Ctr.
14 Wholesale, Inc., 759 F.2d 1440, 1448 (9th Cir.1985); Jones v. Giles, 741 F.2d 245,
15 248 (9th Cir.1984)). "A judgment is not void merely because it is erroneous." In
16 re Ctr. Wholesale, Inc., 759 F.2d at 1448.

17 Rule 60(b)(6) permits relief from judgment when the movant shows "any
18 other reason that justifies relief" other than the more specific circumstances set out
19 in Rule 60(b)(1)-(5). A movant seeking relief under Rule 60(b)(6) is required to
20 show "extraordinary circumstances" justifying relief. Gonzalez v. Crosby, 545
21 U.S. 524, 535, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005) (citing Ackerman v.
22 United States, 340 U.S. 193, 199, 71 S. Ct. 209, 212, 95 L. Ed. 207, 212 (1950)).
23 "Such circumstances will rarely occur in the habeas context." Id. at 535.

24 In his Response to the OSC, Petitioner attempts to seek relief pursuant to
25 Rule 60(b)(4) of the Federal Rules of Civil Procedure. Specifically, Petitioner
26 states as follows:

27 On October 22, 1993, Petitioner was arrested under the pretext
28 of a warrant out of Long Beach CA, for the purpose of investigation

1 fro Bank Robbery and Murder in location undefined at that time. See
2 Arrest Report - Exhibit "p" On or about October 28, 1993, Petitioner
3 was arraigned in Municipal court without an arrest report or an
4 criminal complaint.

5 On November 15, 1995, the Deputy District Attorney turn over
6 the arrest report, some five months after the Preliminary hearing.
7 And still the Criminal Complaint did not accompany the arrest report.
8 See R.T. Sept 7, 1995 p.3 & Nov. 15, 1995 p.26.

9 On August 30, 2007, Petitioner sought to get answers to the
10 issue of lack of Subject Matter Jurisdiction, under the authority of
11 California Public Record Act. see Govt. Coder § 6250 et. At.,
12 American Bar Association Rules 3.8(d) and DR 7-103(b).

13 Both the California Attorney General and the District Attorney
14 Offices by and through their agents fail and refuse to offer any
15 PROOF OF CLAIM regarding Subject Matter Jurisdiction. And a
16 Certificate of default was issued. See Exhibits "C + D"

17 (Response at unnumbered pg. 3.)

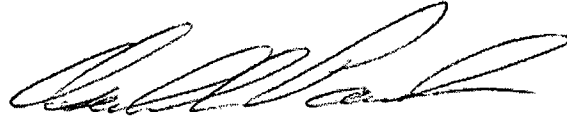
18 The argument Petitioner presents in support of his request for relief under
19 Rule 60(b)(4) is the same argument he presented to the state courts in his habeas
20 petitions and in the current Petition. He is in fact seeking habeas relief under the
21 guise of Rule 60(b)(4) for an alleged procedural irregularity and discovery
22 violation in connection with his arraignment and preliminary hearing. However,
23 Petitioner has not established that the trial court lacked jurisdiction or acted in a
24 manner inconsistent with due process of law. Berke, 170 F.3d at 883. Nor has
25 Petitioner raised this argument within a reasonable time. Fed. R. Civ. P. 60(c)(1).
26 Finally, he has not shown "extraordinary circumstances" justifying relief
27 alternatively under Rule 60(b)(6). Gonzalez, 545 U.S. at 535. Thus, the Court
28 finds that Petitioner is not entitled to relief pursuant to Rule 60(b).

IV.

RECOMMENDATION

Accordingly, IT IS RECOMMENDED that the District Court issue an Order: (1) approving and adopting this Report and Recommendation; (2) denying Petitioner's Request for Relief pursuant to Rule 60(b); and (3) directing that Judgment be entered dismissing this action with prejudice as untimely.

DATED: November 20, 2009



HONORABLE OSWALD PARADA
United States Magistrate Judge