

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

JUN 11 2020

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

DARRICK MICHAEL LOFF, AKA Darrick
Loff, AKA Darrick M. Loff,

Petitioner-Appellant,

v.

ATTORNEY GENERAL FOR THE STATE
OF ARIZONA; DAVID SHINN, Director,
Director of the Arizona Department of
Corrections,

Respondents-Appellees.

No. 20-15668

D.C. No. 3:18-cv-08180-DLR
District of Arizona,
Prescott

ORDER

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

We have received and reviewed both parties' responses to this court's April 15, 2020, order to show cause.

The request for a certificate of appealability is denied because the notice of appeal was not filed within 30 days after entry of the district court's judgment. *See* 28 U.S.C. §§ 2107, 2253(c)(2); Fed. R. App. P. 4(a)(1).

Any pending motions are denied as moot.

DENIED.

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Darrick Michael Loff,
10 Petitioner,

11 v.

12 Charles L Ryan, et al.,
13 Respondents.
14

NO. CV-18-08180-PCT-DLR

JUDGMENT IN A CIVIL CASE

15 **Decision by Court.** This action came for consideration before the Court. The
16 issues have been considered and a decision has been rendered.

17 IT IS ORDERED AND ADJUDGED adopting the Report and Recommendation
18 of the Magistrate Judge as the order of this Court. Petitioner's Petition for Writ of
19 Habeas Corpus pursuant to 28 U. S. C. § 2254 is denied and this action is hereby
20 dismissed.
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22 Debra D. Lucas
23 Acting District Court Executive/Clerk of Court

24 February 12, 2020

25 By s/ S. Strong
26 Deputy Clerk
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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Darrick Michael Loff,
10 Petitioner,

11 v.

12 Charles L Ryan, et al.,
13 Respondents.
14

No. CV-18-08180-PCT-DLR

ORDER

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16 Before the Court is United States Magistrate Judge Michelle H. Burns' Report and
17 Recommendation ("R&R") (Doc. 22), which recommends that Petitioner's Amended
18 Petition for Writ of Habeas Corpus be denied and dismissed with prejudice and that a
19 Certificate of Appealability and leave to proceed in forma pauperis be denied. The
20 Magistrate Judge advised the parties that they had fourteen days to file objections to the
21 R&R and that failure to file timely objections could be considered a waiver of the right to
22 obtain review of the R&R. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th
23 Cir. 2003). Neither party filed objections, which relieves the Court of its obligation to
24 review the R&R. *See Reyna-Tapia*, 328 F.3d at 1121; *Thomas v. Arn*, 474 U.S. 140, 149
25 (1985) ("[Section 636(b)(1)] does not . . . require any review at all . . . of any issue that is
26 not the subject of an objection."); Fed. R. Civ. P. 72(b)(3) ("The district judge must
27 determine de novo any part of the magistrate judge's disposition that has been properly
28 objected to."). "Unless this court has definite and firm conviction that the [Magistrate

1 Judge] committed a clear error of judgment, [this court] will not disturb [the] decision.”
2 *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990) (citation omitted).

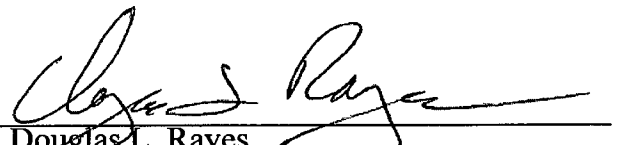
3 The Court has nonetheless independently reviewed the R&R and finds that it is well-
4 taken. The Court therefore will accept the R&R in its entirety. *See* 28 U.S.C. § 636(b)(1)
5 (stating that the district court “may accept, reject, or modify, in whole or in part, the
6 findings or recommendations made by the magistrate”); Fed. R. Civ. P. 72(b)(3) (“The
7 district judge may accept, reject, or modify the recommended disposition; receive further
8 evidence; or return the matter to the magistrate judge with instructions.”).

9 **IT IS ORDERED** that Magistrate Judge Burns’ R&R (Doc. 22) is **ACCEPTED**.
10 Petitioner’s Writ of Habeas Corpus is denied and the case is dismissed.

11 **IT IS FURTHER ORDERED** that a Certificate of Appealability and leave to
12 proceed in forma pauperis on appeal is denied.

13 **IT IS FURTHER ORDERED** that the Clerk of Court is directed to enter judgment
14 and terminate the case.

15 Dated this 11th day of February, 2020.

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20 Douglas L. Rayes
United States District Judge
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Darrick Michael Loff,

Petitioner,

vs.

David Shinn, et al.,

Respondents.

CV 18-08180-PCT-DLR (MHB)

REPORT AND RECOMMENDATION

TO THE HONORABLE DOUGLAS L. RAYES, UNITED STATES DISTRICT COURT:

On July 30, 2018, Petitioner Darrick Michael Loff, who is confined in the Arizona State Prison Complex, filed a pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. In an October 4, 2018 Order, the Court dismissed the habeas petition with leave to amend because Petitioner had failed to complete the court-approved form petition and had failed to identify a federal constitutional or statutory basis for each of his four claims. The Court gave Petitioner 30 days to file an amended petition that cured the deficiencies identified in the Order. After being granted a 30-day extension of time on November 16, 2018, Petitioner filed his Amended § 2254 Petition on December 13, 2018 (Doc. 8).

On May 15, 2019, Respondents filed a Limited Answer (Doc. 14), and Petitioner filed a reply on August 6, 2019 (Doc. 19).

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BACKGROUND

Petitioner was convicted by jury trial in Yavapai County Superior Court, case #CR 2011-80595, of one count each of offering for sale narcotic drugs, offering for sale marijuana, possession of narcotic drugs, and possession of marijuana. He was sentenced to concurrent terms of imprisonment, the longest of which was 15.75 years. (Doc. 9); See State v. Loff, 2014 WL 1713833 (Ariz. Ct. App. April 29, 2014). After an unopposed delay, appellate counsel filed an Anders brief, and requested an extension of time for Petitioner to file a pro se opening brief. (Exhs. E, F, G, H.) After the extension was granted, Petitioner filed his opening brief on January 15, 2014. (Exhs. I, J.) On April 29, 2014, the Arizona Court of Appeals “affirm[ed] [Petitioner’s] convictions and sentences as corrected.” See Loff, 2014 WL 1713833 (affirming Petitioner’s convictions and sentences, but awarding Petitioner 163 days of presentence incarceration credit as opposed to the 162 days awarded by the trial court).

Thereafter, Petitioner filed a petition for review, “Addendum to Petition for Review,” and a “Motion to Compel” in the Arizona Supreme Court. (Exhs. L, M, N.) On November 4, 2014, the Arizona Supreme Court summarily denied the petition for review and Motion to Compel. (Exh. O.) On December 30, 2014, Petitioner filed a “Motion for Clarification” in the Arizona Court of Appeals (Exh. P), as well as, a “Request for Judicial Review” in the Arizona Supreme Court (Exh. Q). The Court of Appeals took “no action” on the motion, as it did not “substantially comply with the Arizona Court Rules” (Exh. R). The Arizona Supreme Court denied the “Request” as an “unauthorized motion for reconsideration” (Exh. S).

While Petitioner was pursuing his direct appeal, on December 3, 2014, Petitioner filed a Notice of Post-Conviction Relief (PCR). (Exh. T.) Appointed counsel filed a motion to withdraw stating that he had completed review of the case and was unable to find any claims to raise in PCR proceedings. Counsel requested an extension of time for Petitioner to file a pro per PCR petition. (Exh. U.)

1 On May 5, 2015, Petitioner filed a "Supplemental Pro-Per Memorandum to Notice of
2 Post Conviction Rule 32." (Exhs. V, W, X.) On July 30, 2015, the trial court denied the PCR
3 petition. (Exh. Y.) Petitioner filed a Petition for Review in the Arizona Court of Appeals on
4 August 11, 2015. (Exhs. Z, AA.) On March 8, 2017, the Court of Appeals granted review,
5 but denied relief. See State v. Loff, 2017 WL 912014 (Ariz. Ct. App. March 8, 2017).
6 Petitioner did not file a motion for reconsideration or petition for review to the Arizona
7 Supreme Court. The Mandate issued on June 8, 2017. (Exh. CC.)

8 On April 23, 2018, Petitioner filed a document entitled, "Petition to Conduct DNA
9 Testing Pursuant to A.R.S. § 13-4240." (Exh. DD.) In response, the State advised that the
10 evidence in the case was destroyed pursuant to Arizona law and, as such, Petitioner's motion
11 was moot. (Exh. EE.) The trial court denied Petitioner's motion on June 20, 2018. (Exh. GG.)

12 In his amended habeas petition, Petitioner raises four grounds for relief. In Ground
13 One, he claims that his conviction was secured using evidence obtained in violation of the
14 Fourth Amendment. In Grounds Two and Four, Petitioner claims that he received ineffective
15 assistance of trial counsel, in violation of the Sixth and Fourteenth Amendments, when his
16 attorney failed to challenge the state's use of illegally obtained evidence, reliance on perjured
17 testimony, and failure to disclose exculpatory evidence (Ground Two) and failed to notify
18 Petitioner that certain evidence was scheduled to be destroyed, thereby denying Petitioner
19 the opportunity to conduct potentially exonerative testing (Ground Four). In Ground Three,
20 Petitioner alleges that he was vindictively prosecuted, in violation of the Sixth and
21 Fourteenth Amendments.

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DISCUSSION

In their Answer, Respondents contend that Petitioner's amended habeas petition is untimely and must be dismissed.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a statute of limitations on federal petitions for writ of habeas corpus filed by state prisoners.

See 28 U.S.C. § 2244(d)(1). The statute provides:

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.

"[T]he period of 'direct review' in 28 U.S.C. § 2244(d)(1)(A) 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, 1158-59 (9th Cir. 1999). Additionally, "[t]he 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 Petitioner not be counted toward" the limitations period. 28 U.S.C. § 2244(d)(2); see Lott v. Mueller, 304 F.3d 918, 921 (9th Cir. 2002). A state petition that is not filed, however, within the state's required time limit is not "properly filed" and, therefore, the petitioner is not entitled to statutory tolling. See Pace v. DiGuglielmo, 544 U.S. 408, 413 (2005). "When a postconviction petition is untimely under state law, 'that [is] the end of the matter' for purposes of § 2244(d)(2)." Id. at 414.

A post-conviction petition is "clearly pending after it is filed with a state court, but before that court grants or denies the petition." Chavis v. Lemarque, 382 F.3d 921, 925 (9th

likely than not that no reasonable juror would have convicted him in the light of the new evidence.” *Id.* at 327.

Petitioner fails to provide any new evidence supporting his claim of actual innocence. Rather, Petitioner addresses the facts and evidence previously at issue in his state court proceedings, and makes speculative and conclusory statements regarding the lack of “DNA evidence submitted to show [he] possessed the illegal drugs” and “perjured testimony of witnesses.” Petitioner’s bare assertion of innocence is insufficient to serve as a gateway to overcome the statute of limitations time bar. Accordingly, Petitioner is not entitled to any equitable tolling. Petitioner’s amended habeas petition is untimely.

CONCLUSION

Having determined that Petitioner's amended habeas petition is untimely, the Court will recommend that Petitioner's Amended Petition for Writ of Habeas Corpus (Doc. 8) be denied and dismissed with prejudice.

IT IS THEREFORE RECOMMENDED that Petitioner's Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 8) be **DENIED** and **DISMISSED WITH PREJUDICE**;

IT IS FURTHER RECOMMENDED that a Certificate of Appealability and leave to proceed *in forma pauperis* on appeal be **DENIED** because the dismissal of the Petition is justified by a plain procedural bar and jurists of reason would not find the procedural ruling debatable.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment. The parties have fourteen days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. See 28 U.S.C. § 636(b)(1); Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen days within which to file a response to the objections. Pursuant to Rule 7.2, Local Rules of Civil Procedure for the United States District Court for the District of Arizona, objections to the

1 Report and Recommendation may not exceed seventeen (17) pages in length. Failure timely
2 to file objections to the Magistrate Judge's Report and Recommendation may result in the
3 acceptance of the Report and Recommendation by the district court without further review.
4 See United States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure timely to file
5 objections to any factual determinations of the Magistrate Judge will be considered a waiver
6 of a party's right to appellate review of the findings of fact in an order or judgment entered
7 pursuant to the Magistrate Judge's recommendation. See Rule 72, Federal Rules of Civil
8 Procedure.

9 DATED this 22nd day of January, 2020.

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13 Honorable Michelle H. Burns
14 United States Magistrate Judge
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**Additional material
from this filing is
available in the
Clerk's Office.**