UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1534

DAVID CALHOUN,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA;
DISTRICT ATTORNEY PHILADELPHIA;
ATTORNEY GENERAL PENNSYLVANIA

(E.D. Pa. No. 2:19-cv-02533)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, and McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, and PHIPPS, Circuit Judges

The petition for rehearing filed by Appellant in the above-captioned case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc is **DENIED**.

By the Court,

s/Stephanos Bibas
Circuit Judge

Dated: December 3, 2020
CLW/cc: Mr. David Calhoun
Jennifer O. Andress, Esq.

BLD-300 September 10, 2020

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 20-1534

DAVID CALHOUN, Appellant

v.

COMMONWEALTH OF PENNSYLVANIA; ET AL.

(E.D. Pa. No. 2:19-cv-02533)

Present: AMBRO, GREENAWAY, JR., and BIBAS, Circuit Judges

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1) in the above-captioned case.

Respectfully,

Clerk

ORDER

Calhoun's request for a certificate of appealability is denied. Even if jurists of reason could debate whether the District Court erred in denying his request for documents, they would agree that Calhoun's claim that the docket sheet misstates the nature of his plea is barred by AEDPA's one-year limitation period and that his claim that the Commonwealth breached the plea agreement does not "state[] a valid claim of the denial of a constitutional right." Slack v. McDaniel, 529 U.S. 473, 484 (2000). The Commonwealth is directed, within 30 days of the date of this order, to serve on the petitioner a copy of the brief it filed in the Superior Court in Commonwealth v. Calhoun, No. 417 EDA 2018.

By the Court,

s/Stephanos Bibas
Circuit Judge

Dated: September 28, 2020
CLW/cc: Mr. David Calhoun
Jennifer O. Andress, Esq.

A True Copy:

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

PATRICIA S. DODSZUWEIT

CLERK

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790
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September 28, 2020

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RE: David Calhoun v. Commonwealth of Pennsylvania, et al
Case Number: 20-1534
District Court Case Number: 2-19-cv-02533

ENTRY OF JUDGMENT

Today, **September 28, 2020** the Court issued a case dispositive order in the above-captioned matter which serves as this Court's judgment. Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:
14 days after entry of judgment.
45 days after entry of judgment in a civil case if the United States is a party.

Form Limits:
3900 words if produced by a computer, with a certificate of compliance pursuant to Fed. R. App. P. 32(g).
15 pages if hand or type written.

Attachments:
A copy of the panel's opinion and judgment only.
Certificate of service.
Certificate of compliance if petition is produced by a computer.
No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. Pursuant to Fed. R. App. P. 35(b)(3), if separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to the form limits as set forth in Fed. R. App. P. 35(b)(2). If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very truly yours,
Patricia S. Dodszuweit, Clerk

By: s/Carmella
Case Manager
267-299-4928

cc: Ms. Kate Barkman

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID CALHOUN, **Petitioner,** **v.** **COMMONWEALTH OF PENNSYLVANIA, THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA, and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,** **Respondents.**	**CIVIL ACTION** **NO. 19-2533**

ORDER

AND NOW, this 20th day of February, 2020, upon consideration of Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus (Document No. 2, filed June 10, 2019), the record in this case, the Report and Recommendation of United States Magistrate Judge Lynne A. Sitarski dated December 5, 2019, *pro se* Petitioner's Objections to Report and Recommendation (Document No. 22, filed January 21, 2020), **IT IS ORDERED** as follows:

1. The Report and Recommendation of United States Magistrate Judge Lynne A. Sitarski dated December 5, 2019, is **APPROVED** and **ADOPTED**;

2. The Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus is **DENIED**.

IT IS FURTHER ORDERED that a certificate of appealability will not issue because reasonable jurists would not debate the propriety of this Court's procedural ruling with respect to petitioner's claims. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The decision of the Court is based on the following:

1. In 2000, *pro se* petitioner was arrested and charged with drug offenses for selling narcotics with a partner. On June 11, 2002, *pro se* petitioner entered a plea of *nolo contendere* to

two counts of possession with intent to deliver a controlled substance, criminal conspiracy, and possession of an instrument of crime. He was sentenced that same day to a term of three to six years incarceration. He did not file a direct appeal. The procedural history of the case thereafter, and the details of the related federal drug trafficking case, are set forth in the Report and Recommendation;

2. On May 29, 2019, *pro se* petitioner filed the instant Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus raising the following two claims for relief:

a. Ground One – plea of *nolo contendere* was rendered involuntary/unknowing.

b. Ground Two – petitioner's entry of *nolo contendere* was rendered involuntary/unknowing upon state court's refusal to correct the public record to reflect *nolo* rather than "guilty plea" and refusal to strike "guilty" adjudication.

The Magistrate Judge recommended that the Petition be denied without an evidentiary hearing as time barred;

3. Because *pro se* petitioner did not appeal, his judgment of sentence became final thirty days after sentencing on June 11, 2002, that is, on July 11, 2002, upon expiration of the thirty-day appeal period. Pa.R.Crim.P. 720(a)(3). Under the *habeas corpus* one-year statute of limitations, *pro se* petitioner thus had until July 11, 2003, to timely file a *habeas petition* under 28 U.S.C. § 2244(d)(1). The instant Petition was filed on May 29, 2019, sixteen years late;

4. In his Objections, *pro se* petitioner argues for a different timeliness analysis. The Court is in complete agreement with the timeliness analysis of the Magistrate Judge and rejects *pro se* petitioner's analysis on this issue;

5. The Court notes that all of *pro se* petitioner's claims – the substantive claim as well as his current claim in his Objections for a different "factual predicate" start date for the statute of limitations – relate to a mere clerical error on the Pennsylvania docket sheets for his underlying state court case. The Pennsylvania docket sheets list the disposition of the case as "guilty plea" as opposed to "*nolo contendere*." *Pro se* petitioner now claims that this clerical error somehow rendered his plea involuntary. He also asserts that the *habeas* limitations period should not have begun to run until he discovered the clerical error on the docket sheets in December of 2018. The Court rejects these claims and arguments asserted by *pro se* petitioner; and,

6. *Pro se* petitioner's judgment because final after the date he could have discovered the factual predicate for his alleged claims, June 11, 2002. That is the date *pro se* petitioner could have discovered in the exercise of ordinary care that there was a clerical error on the docket sheet. Thus, the judgment in this case became final on July 11, 2002, and the *pro se habeas corpus* petition is therefore time barred.

BY THE COURT:

/s/ Hon. Jan E. DuBois

DuBOIS, JAN E., J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID CALHOUN,	:	**CIVIL ACTION**
Petitioner,	:	
	:	
v.	:	**NO. 19-cv-2533**
	:	
COMMONWEALTH OF	:	
PENNSYLVANIA, et al.	:	
Respondents.	:	

REPORT AND RECOMMENDATION

LYNNE A. SITARSKI
UNITED STATES MAGISTRATE JUDGE **December 5, 2019**

Before the Court is a *pro se* Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 by David Calhoun ("Petitioner"), an individual currently incarcerated at the Federal Detention Center in Philadelphia, Pennsylvania. This matter has been referred to me for a Report and Recommendation. For the following reasons, I respectfully recommend that the petition for habeas corpus be DENIED.

I. FACTUAL AND PROCEDURAL HISTORY[1]

In 2000, Petitioner was arrested and charged with drug offenses in connection with selling narcotics with a partner. *Commonwealth v. Calhoun*, 417 EDA 2018, 2019 WL 1896517, at *1 (Pa. Super. Ct. 2019); (Crim. Docket at 4). On June 11, 2002, Petitioner entered a plea of

[1] Respondents have submitted the state court record ("SCR") in hard-copy format. The Court has also consulted the Philadelphia Court of Common Pleas criminal docket sheets for Petitioner's underlying criminal case in *Commonwealth v. Calhoun*, No. CP-51-CR-0601371-2000, (Phila. Cnty. Com. Pl.), *available at* https://ujsportal.pacourts.us/DocketSheets/CPReport.ashx?docketNumber=CP-51-CR-0601371-2000&dnh=WDqphuG9LGnNpOkv4AdjEQ%3d%3d (last visited Dec. 5, 2019) [hereinafter "Crim. Docket"].

nolo contendere to two counts of possession with intent to deliver a controlled substance, criminal conspiracy, and possession of an instrument of crime. *Calhoun*, 2019 WL 1896517, at *1; (Crim. Docket at 3). He was sentenced the same day to a term of three to six years' incarceration. *Id.* He did not file a direct appeal. *Id.*; (*see generally* Crim. Docket).

On September 3, 2003, Petitioner was released on parole. *Calhoun v. Pa. Bd. of Prob. & Parole*, 2007 WL 8058363, at *1 (Pa. Commw. Ct. 2007). While on parole, Petitioner was indicted and convicted of federal drug offenses in the Eastern District of Pennsylvania. *United States v. Calhoun*, No. 05-cr-363-6 (Indictment, ECF No. 1; Verdict, ECF No. 263). On August 11, 2006, the Honorable Marvin Katz sentenced Petitioner to twenty years' imprisonment followed by ten years of supervised release. *Calhoun*, No. 05-cr-363-6, (Judgment, ECF No. 354).

Based on this conviction, the Pennsylvania Board of Probation and Parole held a revocation hearing on November 16, 2006, and on January 8, 2007, the Board recommitted Petitioner as a convicted parole violator "to serve 36 months backtime when available." *Calhoun v. Pa. Bd. of Prob. & Parole*, No. 09-cv-1707, (ECF No. 11-1, Ex. A, Decl. of Cynthia L. Daub, at ¶¶ 19-20).[2] Petitioner then began serving his twenty-year federal sentence. (*Id.* at ¶ 23). The Board of Probation and Parole lodged a detainer against Petitioner with the Federal Bureau of Prisons to return Petitioner to state custody after the expiration of his federal sentence. (*Id.* at ¶ 24).

[2] Petitioner previously filed a petition for writ of habeas corpus challenging the Pennsylvania Board of Probation and Parole's decision recommitting him as a convicted parole violator. *Calhoun v. Pa. Bd. of Prob. & Parole*, No. 09-cv-1707, (ECF No. 1 (Order transferring matter from Northern District Ohio)). Cynthia L. Daub was then the Board Secretary and Custodian of Records for the Pennsylvania Board. No. 09-cv-1707 (ECF No. 11, Ex. A, Decl. of Daub, at ¶¶ 1-5).

Meanwhile, on December 28, 2005, Petitioner filed a *pro se* petition pursuant to Pennsylvania's Post-Conviction Relief Act, 42 Pa.C.S. §§ 9541, *et seq.* (Crim. Docket at 4). Petitioner sought credit for time served while he was on house arrest. *Calhoun*, 2019 WL 1896517, at *1. The PCRA Court granted relief on December 15, 2006, crediting Petitioner with time served from January 31, 2000, to February 24, 2000. *Id.*; (Crim. Docket at 4).

Nearly nine years later, on September 24, 2014, Petitioner filed a second PCRA Petition. (Crim. Docket at 5). On December 15, 2017, the PCRA Court issued a Rule 907 Notice of Intent to Dismiss the petition. (*Id.*). Petitioner responded to the Rule 907 Notice on December 26, 2017. (*Id.*); *Calhoun*, 2019 WL 1896517, at *1. On January 16, 2018, the PCRA Court dismissed his second petition as untimely. *Id.* Petitioner appealed the dismissal, and on April 29, 2019, the Superior Court affirmed the PCRA Court's dismissal. (Crim. Docket at 5); *Calhoun*, 2019 WL 1896517, at *3. The Superior Court found that Petitioner's judgment of sentence became final on July 11, 2002, so Petitioner had until July 11, 2003, to file a timely PCRA Petition under the one-year statute of limitations. *Id.* at *2-3 (citing 42 Pa.C.S. § 9545(b)). Because Petitioner filed the PCRA Petition in 2014, the Superior Court affirmed the PCRA Court's dismissal of the petition as untimely. *Id.* at *3.

On May 29, 2019, Petitioner filed the instant *pro se* petition for habeas corpus, raising the following two claims for relief (recited verbatim):

> Ground One: Plea of nolo contendere was rendered involuntary/unknowing.
>
> Ground Two: Petitioner's entry of nolo contendere was rendered involuntary/unknowing upon state court's refusal to correct the public record to reflect nolo rather than "guilty plea" and refusal to strike "guilty" adjudication.

(Hab. Pet., ECF No. 2, at ¶ 12).

The Honorable Jan E. DuBois referred this matter to me for a Report and Recommendation. (Order, ECF No. 6). On October 8, 2019, the Commonwealth filed its Response. (Resp., ECF No. 11). On October 25, 2019, Petitioner filed a motion to compel production of documents, arguing that "[t]he Clerk of Courts for Philadelphia County has yet to file a copy of the state record and [Petitioner] has not received a copy of said record." (Mot., ECF No. 12, at ¶ 3). He also filed a motion for extension of time to file a Reply to the Commonwealth's Response. (Mot., ECF No. 13). By Order dated October 30, 2019, I denied Petitioner's motion to compel, which I liberally construed as a motion for discovery. (Order, ECF No. 14). I explained that the Clerk of Courts of Philadelphia County had in fact sent the state court record to this Court. (*See* ECF No. 10 (acknowledging receipt of state court record on October 4, 2019)). I also explained that a habeas petitioner is not entitled to the state court record as a matter of course; rather, he must establish "good cause" which is shown where "specific allegations before the court show reason to believe that the [movant] may, if the facts are more fully developed, be able to demonstrate that he is . . . entitled to relief." *Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997). Petitioner did not explain how the discovery he sought could demonstrate he is entitled to habeas relief. I therefore denied the discovery request. (Order, ECF No. 14, n.1). I also granted his request for an extension of time to file a Reply. (*Id.*).

On November 18, 2019, Petitioner filed his Reply. (Pet'r's Reply, ECF No. 15). On November 26, 2019, he filed a Motion for Stay and Abeyance of his habeas proceedings. (Mot. Stay, ECF No. 16). This matter is now ripe for disposition.

II. LEGAL STANDARDS

A. Statute of Limitations

This petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. §§ 2241 *et seq.* A strict one-year time limitation on the filing of new petitions is set forth in the AEDPA. Under § 2244(d)(1), the AEDPA provides that a one-year statute of limitations applies to all petitions brought pursuant to § 2254, which 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
>
> (D) 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)(A)-(D). The one-year statute of limitations set out in § 2244(d)(1) is applied to each individual claim in a habeas petition. *Fielder v. Varner*, 379 F.3d 113, 117-18 (3d Cir. 2004).

The AEDPA creates a tolling exception, which states that "[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 shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2). An application "is 'properly filed' when its

delivery and acceptance are in compliance with the applicable laws and rules governing filings." *See Artuz v. Bennett*, 531 U.S. 4, 8 (2000).

The timeliness provision in the federal habeas corpus statute is also subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631, 634 (2010). To avail himself of equitable tolling, petitioner must show that he diligently pursued his rights and that an "extraordinary circumstance stood in his way." *Satterfield v. Johnson*, 434 F.3d 185, 195 (3d Cir. 2006). Equitable tolling should be used "only when the principle of equity would make the rigid application of a limitation period unfair." *Merritt v. Blaine*, 326 F.3d 157, 168 (3d Cir. 2003) (citation and quotation marks omitted). Ultimately, a statute of limitations should be equitably tolled "only in the rare situation where [it] is demanded by sound legal principles as well as the interests of justice." *LaCava v. Kyler*, 398 F.3d 271, 275 (3d Cir. 2005) (citation and quotation marks omitted).

B. Stay and Abeyance

The Supreme Court has approved the use of stay-and-abeyance procedures "only in limited circumstances." *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005). Faced with a mixed petition containing both exhausted and unexhausted claims, the Supreme Court recognized the potential "risk of [petitioners] forever losing their opportunity for any federal review of their unexhausted claims," and allowed courts to "stay the petition and hold it in abeyance while the petitioner returns to state court to exhaust his previously unexhausted claims." *Id.* at 275. The Third Circuit has extended *Rhines* to allow district courts to stay and abey petitions containing only unexhausted claims. *See Heleva v. Brooks*, 581 F.3d 187, 192 (3d Cir. 2009). A district court may issue a stay where: "(1) good cause exists for the petitioner's failure to exhaust his

claims; (2) the unexhausted claims are not plainly meritless; and (3) the petitioner has not engaged in dilatory or abusive tactics." *Id.* (citing *Rhines*, 544 U.S. at 277-78).

III. DISCUSSION

In his two claims for relief, Petitioner asserts that his "plea of nolo contendere was rendered involuntary[.]" (Hab. Pet., ECF No. 2, ¶ 12). The Commonwealth responds that the instant petition is untimely, Petitioner's claims are procedurally defaulted, and that his claims do not warrant relief. (Resp., ECF No. 11, at 4-9). I conclude the petition is time-barred and respectfully recommend the District Court deny the petition. I also recommend Petitioner's Motion for Stay and Abeyance be denied because his habeas petition is untimely.

A. The Petition is Time-Barred

As noted above, AEDPA imposes a one-year statute of limitations on state prisoners seeking federal habeas relief. 28 U.S.C. § 2244(d)(1). Here, the applicable starting point is the "date on which the judgment became final by conclusion of direct review or expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). On June 11, 2002, Petitioner entered his nolo contendere plea and was sentenced to three to six years' imprisonment. (Crim. Docket at 3-4). He did not file a direct appeal. (*See generally* Crim. Docket). Accordingly, his judgment of sentence became final on July 11, 2002, upon expiration of the thirty-day period to seek review. Pa. R. Crim. P. 720(A)(3) (stating that "the defendant's notice of appeal shall be filed within 30 days of imposition of sentence"); Pa. R. App. P. 903 (stating that an appeal "shall be filed within 30 days after entry of the order from which the appeal is taken."). Petitioner had one year from that date, or until July 11, 2003, to timely file a federal habeas petition. 28 U.S.C. § 2244(d)(1). Petitioner did not file the instant petition until May 29, 2019. (Hab. Pet., ECF No.

2). Absent statutory or equitable tolling, the petition is untimely.

Petitioner does not assert that he is entitled to statutory or equitable tolling, and I find that neither tolling exception applies. Petitioner is not entitled to statutory tolling because he filed his PCRA Petition on December 28, 2005, after the habeas statute of limitations expired on July 11, 2003. (Crim. Docket at 4). This PCRA petition did not toll the already-expired AEDPA statute of limitations. *See Long v. Wilson*, 393 F.3d 390, 395 (3d Cir. 2004) (finding that petitioner's untimely PCRA petition did not statutorily toll the limitations period because the federal habeas time limitations had already expired by the time it was filed); *Johnson v. Hendricks*, 314 F.3d 159, 161–62 (3d Cir. 2002) ("§ 2244(d)(2)'s tolling provision excludes time during which a properly filed state post-conviction [petition] is pending but does not reset the date from which the one-year limitations period begins to run") (internal citation omitted); *Perry v. Diguglielmo*, No. 06-1560, 2008 WL 564981, at *7 (W.D. Pa. Feb. 29, 2008) ("[T]he PCRA petition must be filed before the [AEDPA] limitations period runs out, otherwise there is nothing left to be tolled."); *Fried v. Horn*, No. 02-8314, 2003 WL 23142179, at *3 (E.D. Pa. Aug. 11, 2003). To avail himself of equitable tolling, Petitioner bears the burden of establishing two elements: "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland*, 560 U.S. at 649 (quoting *Pace*, 544 U.S. at 418). He has not even alleged, much less shown, that he is entitled to equitable tolling.

Accordingly, I conclude that Petitioner's petition is time-barred because he did not file it within the one-year AEDPA statute of limitations. He has not demonstrated he is entitled to either statutory or equitable tolling. Therefore, I respectfully recommend the petition be denied.[3]

[3] The petition may also be unreviewable because Petitioner might not satisfy the custody requirement of 28 U.S.C. § 2254. Under § 2254, the petitioner must be "'in custody' under the conviction or sentence under attack at the time his petition is filed." *Maleng v. Cook*, 490 U.S.

B. Stay and Abeyance is Not Warranted

I also respectfully recommend Petitioner's Motion for Stay and Abeyance be denied. (Mot., ECF No. 16). The "stay and abeyance" procedure applies in limited circumstances: where dismissal of a mixed habeas petition for the petitioner to properly exhaust his claims could result in the petition becoming time-barred. *Rhines*, 544 U.S. at 275 (recognizing the potential "risk of [petitioners] forever losing their opportunity for any federal review of their unexhausted claims," and allowing courts to "stay the petition and hold it in abeyance while the petitioner

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488, 491 (1989); *see also* 28 U.S.C. § 2254(a). On June 11, 2002, Petitioner entered a plea of nolo contendere and was sentenced to a term of three to six years' incarceration. *Calhoun*, 2019 WL 1896517, at *1. The Commonwealth notes "his maximum sentence would have expired in 2008" and this fact "strongly suggests that his sentence in the underlying Pennsylvania state case expired before he filed the instant habeas petition in 2019"; and, therefore, Petitioner is no longer "in custody." (Resp. ECF No. 11, at 3 n.2). However, a petitioner subject to parole still satisfies the "in custody" requirement. *Lee v. Stickman*, 357 F.3d 338, 342 (3d Cir. 2004). As noted above, after Petitioner's federal convictions, the Pennsylvania Board of Probation and Parole recommitted him "to serve 36 months backtime when available." *Calhoun*, No. 09-cv-1707, (ECF No. 11-1, Ex. A, Decl. of Daub, at ¶ 20). He then began serving the remainder of his federal sentence. (*Id.* at ¶ 23). The Board also lodged a detainer with the Federal Bureau of Prisons so that Petitioner could be returned to state custody after the expiration of his federal sentence. (*Id.* at ¶ 24). Petitioner attached to his petition a "Detainer Action Letter" dated May 12, 2016, which is directed to the Pennsylvania Board of Probation and Parole. (Hab. Pet., ECF No. 2, at p. 18). The Detainer Action Letter charges a parole violation, and includes Petitioner's State Court Docket Number and his Pennsylvania Parolee Number, No. 235CC. (*Id.*). Petitioner is also presently listed under Parolee No. 235CC on the "Parolee Locator" service maintained by the Pennsylvania Board of Probation and Parole. PA. BD. PROB. & PAROLE, *Parolee Locator*, http://inmatelocator.cor.pa.gov/#/ (last visited Dec. 5, 2019). Accordingly, although I agree with the Commonwealth that it seems possible Petitioner might not satisfy the "in custody" requirement because "his maximum sentence would have expired in 2008," the Board's decision recommitting him to serve "36 months backtime when available," Petitioner's attached Detainer Action Letter from May 2016, and the Pennsylvania Parolee Locator seem to indicate that Petitioner might still be subject to parole, thus satisfying the custody requirement. *See Lackawanna Cnty. Dist. Att'y v. Coss*, 532 U.S. 394, 401 (2001) (explaining the "in custody" requirement satisfied where "the State had lodged a detainer against him with the federal authorities." (citing *Maleng*, 490 U.S. at 493)); *Lee*, 357 F.3d at 342; *Gregory v. State of N.Y., Parole Comm'n*, 496 F. Supp. 748, 749 (M.D. Pa. 1980) ("A lodging of a detainer by a state satisfies the 'in custody' portion of the habeas corpus statute."). In any event, I do not decide the "in custody" issue, because the instant petition is approximately sixteen years untimely, and I recommend it be denied as time-barred.

returns to state court to exhaust his previously unexhausted claims."). Staying the petition and holding it in abeyance is unwarranted when the habeas petition is already time-barred. *E.g.*, *McWhorter v. McGinley*, No. 18-3704, 2019 WL 3848873, at *5 (E.D. Pa. July 26, 2019) ("The stay and abeyance procedure in *Rhines* is inapplicable to habeas petitions that already are time-barred at the time of their filing."), *adopted by* 2019 WL 3836350; *Sistrunk v. Rozum*, No. 06-5630, 2009 WL 1089557, at *9 (E.D. Pa. Apr. 21, 2009) (noting "there is nothing in *Rhines* or its progeny to suggest that the 'stay and abey' procedure was intended to create a 'back door' to the review of claims that were untimely at the time of their original filing date.").

Accordingly, because the instant petition is approximately sixteen years untimely, I recommend the request for stay and abeyance be denied. *E.g.*, *Antonetty-Rodriguez v. Giroux*, No. 16-1930, 2016 WL 8813990, at *3 (E.D. Pa. Sept. 29, 2016) (recommending motion to stay be denied because habeas petition itself was time-barred), *adopted by* 2017 WL 1493377, at *4 ("Here, [Petitioner's] petition is untimely; there is no reason the stay the petition[.]"); *Wise v. Rozum*, No. 12-1360, 2013 WL 5797659, at *7 (M.D. Pa. Oct. 28, 2013) ("The Court does not believe a stay of the instant habeas petition is warranted here because the petition is untimely."); *Chang-Cruz v. Hendricks*, No. 12-7167, 2013 WL 5966420, at *8 (D.N.J. Nov. 7, 2013) ("Because this federal habeas petition is untimely and will be dismissed, the request for a stay and abeyance will be denied."); *Foster v. Beard*, No. 07-2037, 2008 WL 161139, at *4 (E.D. Pa. Jan. 15, 2008) (explaining that "it would be pointless to hold the instant petition in abeyance [because] Petitioner is already time-barred from federal habeas review.").

IV. CONCLUSION

For the foregoing reasons, I respectfully recommend that the petition for writ of habeas

corpus be denied. I conclude the petition is time-barred because Petitioner filed it on May 29, 2019, approximately sixteen years after the AEDPA statute of limitations expired on July 11, 2003. I also find no tolling exceptions apply. I further conclude stay and abeyance is unwarranted because the petition is untimely.

Therefore, I respectfully make the following:

RECOMMENDATION

AND NOW this 5TH day of December, 2019, I respectfully RECOMMEND that the petition for writ of habeas corpus be DENIED as untimely without an evidentiary hearing and without the issuance of a certificate of appealability. I further RECOMMEND that Petitioner's Motion for Stay and Abeyance be DENIED.

Petitioner may file objections to this Report and Recommendation. *See* Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.

BY THE COURT:

/s/ Lynne A. Sitarski
LYNNE A. SITARSKI
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID CALHOUN,	:	**CIVIL ACTION**
Petitioner,	:	
	:	
v.	:	
	:	**NO. 19-2533**
COMMONWEALTH OF	:	
PENNSYLVANIA, *et al.*,	:	
Respondents.	:	

ORDER

AND NOW, this day of , 20____, upon careful and independent consideration of the petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, and after review of the Report and Recommendation of United States Magistrate Judge Lynne A. Sitarski, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED.
2. The petition for habeas corpus filed pursuant to 28 U.S.C. § 2254 is DENIED without an evidentiary hearing.
3. The Motion for Stay and Abeyance (ECF No. 16) is DENIED.
4. There is no basis for the issuance of a certificate of appealability.

BY THE COURT:

_____
JAN E. DUBOIS, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

12/6/2019

RE: CALHOUN v. COMMONWEALTH OF PENNSYLVANIA et al
CA No. 19-cv-02533

NOTICE

Enclosed herewith please find a copy of the Report and Recommendation filed by United States Magistrate Judge Lynne A. Sitarski, on this date in the above captioned matter. You are hereby notified that within fourteen (14) days from the date of service of this Notice of the filing of the Report and Recommendation of the United States Magistrate Judge, any party may file (in duplicate) with the clerk and serve upon all other parties written objections thereto (See Local Civil Rule 72.1 IV (b)). **Failure of a party to file timely objections to the Report & Recommendation shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to factual findings and legal conclusions of the Magistrate Judge that are accepted by the District Court Judge**.

In accordance with 28 U.S.C. §636(b)(1)(B), the judge to whom the case is assigned will make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. The judge may accept, reject or modify, in whole or in part, the findings or recommendations made by the magistrate judge, receive further evidence or recommit the matter to the magistrate judge with instructions.

Where the magistrate judge has been appointed as special master under F.R.Civ.P 53, the procedure under that rule shall be followed.

KATE BARKMAN
Clerk of Court

By: s/Ashley Mastrangelo
Ashley Mastrangelo, Deputy Clerk

cc: David Calhoun
Jennifer Andress

Courtroom Deputy to Judge DuBois

civ623.frm
(11/07)

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