

No. _____

**In The
Supreme Court of the United States**

ROBERT L. KELLY,

Petitioner,

v.

GARRETT LANEY,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT**

APPENDIX

**Robert L. Kelly #10670643
Oregon State Correctional Institution
3405 Deer Park Drive, SE
Salem, Oregon 97301**

Petitioner *pro se*

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APPENDIX A— Denial of Certificate of Appealability by the United States Court of Appeals for the Ninth Circuit (July 21, 2021)

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

JUL 21 2021

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

ROBERT L. KELLY,

Petitioner-Appellant,

v.

GARRETT LANEY,

Respondent-Appellee.

No. 21-35335

D.C. No. 6:20-cv-00436-SU
District of Oregon,
Eugene

ORDER

Before: CANBY and TALLMAN, Circuit Judges.

The request for a certificate of appealability is denied because 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.

**APPENDIX B – Order of the United States District Court for the
District of Oregon denying relief (March 24, 2021)**

ROBERT L. KELLY, Petitioner,
v.
GARRETT LANEY, Respondent.

Case No. 6:20-cv-436-SU

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

March 24, 2021

ORDER

Michael H. Simon, District Judge.

United States Magistrate Judge Patricia Sullivan issued Findings and Recommendation in this case on January 12, 2021. Judge Sullivan recommended that this Court deny Petitioner's Petition for Writ of Habeas Corpus as untimely and decline to issue a Certificate of Appealability.

Under the Federal Magistrates Act ("Act"), the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1). If a party files objections to a magistrate judge's findings and recommendations, "the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Id.*; Fed. R. Civ. P. 72(b)(3).

For those portions of a magistrate judge's findings and recommendations to which neither party has objected, the Act does not prescribe any standard of review. *See Thomas v. Arn*, 474

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U.S. 140, 152 (1985) ("There is no indication that Congress, in enacting [the Act], intended to require a district judge to review a magistrate's report to which no objections are filed."); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (holding that the court must review *de novo* magistrate judge's findings and recommendations if objection is made, "but not otherwise"). Although in the absence of objections no review is required, the Magistrates Act "does not preclude further review by the district judge[] *sua sponte* . . . under a *de novo* or any other standard." *Thomas*, 474 U.S. at 154. Indeed, the Advisory Committee Notes to Fed. R. Civ. P. 72(b) recommend that "[w]hen no timely objection is filed," the Court review the magistrate judge's recommendations for "clear error on the face of the record."

Petitioner timely filed an objection. Petitioner raises a new argument, asserting for the first time that the Court should apply the doctrine of equitable tolling to find his Petition timely. It is within this Court's discretion whether to accept new evidence or argument submitted with objections. *see Jones v. Blanas*, 393 F.3d 918, 935 (9th Cir. 2004) (discussing the district court's discretion to consider new arguments raised in objections); *Brown v. Roe*, 279 F.3d 742, 746 (9th Cir. 2002) (rejecting the Fourth Circuit's requirement that a district court *must* consider new arguments raised in objections to a magistrate judge's findings and recommendation); *United States v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000) (discussing the circuit split on whether a district court must or may consider new evidence when reviewing *de novo* a magistrate judge's findings and recommendation, and concluding that a district court "has discretion, but is not required" to consider new evidence); *see also* 28 U.S.C. § 636(b)(1) (stating that the district court judge "may also receive further evidence"). The Court declines to consider Petitioner's new argument. Before the Magistrate Judge, Respondent raised the timeliness of Petitioner's

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Habeas Petition in Respondent's brief, and Petitioner ignored that argument. Petitioner offers no explanation why he did not raise his equitable tolling argument before Judge Sullivan.

Even if the Court were to consider Petitioner's equitable tolling argument, it would fail. The Ninth Circuit has explained that "equitable tolling is unavailable in most cases and is appropriate only if *extraordinary* circumstances beyond a prisoner's control make it impossible to file a petition on time." *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002) (emphasis in original; quotation marks and citation omitted). Petitioner fails to make the requisite showing.

The Court has reviewed *de novo* those portions of Judge Sullivan's Findings and Recommendation to which Petitioner has objected, as well as Petitioner's objections and Respondent's response. The Court agrees with Judge Sullivan's reasoning regarding the timeliness of Petitioner's habeas petition and adopts those portions of the Findings and Recommendation.

For those portions of Judge Sullivan's Findings and Recommendation to which neither party has objected, this Court follows the recommendation of the Advisory Committee and reviews those matters for clear error on the face of the record. No such error is apparent.

The Court ADOPTS Judge Sullivan's Findings and Recommendation, ECF 24. The Court DENIES Petitioner's Petition for Writ of Habeas Corpus, ECF 1. The Court declines to issue a Certificate of Appealability on the basis that Petitioner has not made a substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

DATED this 24th day of March, 2021.

/s/ Michael H. Simon

Michael H. Simon

United States District Judge

**APPENDIX C – Findings and Recommendation of Magistrate Judge
of United States District Court for the District of
Oregon denying relief (January 12, 2021)**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ROBERT L. KELLY,

Petitioner,

v.

GARRETT LANEY,

Respondent.

Case No. 6:20-cv-00436-SU

FINDINGS AND RECOMMENDATION

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SULLIVAN, Magistrate Judge.

Petitioner brings this habeas corpus case pursuant to 28 U.S.C. § 2254 challenging the legality of various Baker County convictions from 2002. Because the action is untimely, the Petition for Writ of Habeas Corpus (#1) should be dismissed.

BACKGROUND

In 2002, Petitioner pleaded guilty to Using a Child in a Display of Sexually Explicit Conduct, Encouraging Child Sexual Abuse in the First Degree, and two counts of Sexual Abuse in the First Degree. Respondent's Exhibit 101. Petitioner attempted to take a direct appeal, but the Oregon Court of Appeals dismissed that appeal as untimely. Respondent's Exhibit 102. Petitioner did not seek further review in the Oregon Supreme Court.

Petitioner next filed for post-conviction relief in Umatilla County where the PCR court denied relief. Respondent's Exhibit 104. The Oregon Court of Appeals affirmed that decision without issuing a written opinion, and the Oregon Supreme Court denied review. *Kelly v. Blacketter*, 207 Or. App. 320, 141 P.3d 600 (2006), rev. denied, 341 Or. 579, 146 P.3d 884 (2006).

Petitioner proceeded to file for federal habeas corpus relief, but was unsuccessful. Respondent's Exhibits 106-108. On April 2, 2010, the Ninth Circuit Court of Appeals declined to issue a certificate of appealability. Respondent's Exhibit 109.

Petitioner's original Judgment erroneously reflected that Count Three, Encouraging Child Sexual Abuse, was a Class A felony conviction when it should have been classified as a Class B felony. This error exposed Petitioner to a longer term of

post-prison supervision than that authorized by law. As a result, on November 16, 2010, Petitioner asked the trial court to correct the Judgment. Respondent's Exhibit 134. On February 11, 2011, the trial court granted Petitioner's request and issued the Amended Judgment that correctly identifies the Count Three conviction as a Class B felony and reduced Petitioner's term of post-prison supervision. Respondent's Exhibit 101, pp. 2-8.

More than five years later, on May 25, 2016, Petitioner filed another PCR Petition in Marion County in which he challenged the Amended Judgment. The Marion County Circuit Court determined that the PCR Petition was improperly successive and dismissed the case. Respondent's Exhibits 121-123. The Oregon Court of Appeals summarily affirmed the PCR court's decision, denied reconsideration, and the Oregon Supreme Court denied review. Respondent's Exhibits 127, 130, 132. The Appellate Judgment from the successive PCR action became effective on October 7, 2019. Respondent's Exhibit 133.

Petitioner filed the current habeas corpus case on March 10, 2020 when he signed his pro se Petition.¹ Respondent asks the Court to dismiss the Petition because Petitioner failed to file it within the applicable statute of limitations.

///

¹ **Error! Main Document Only.** Under the "prison mailbox rule," a prisoner's documents are deemed filed at the moment the prisoner delivers them to prison authorities for forwarding to the Clerk of Court. *Saffold v. Newland*, 224 F.3d 1087, 1091 (9th Cir. 2000) (applying prison mailbox rule to state court petitions as well as federal petitions).

DISCUSSION

The Antiterrorism and Effective Death Penalty Act ("AEDPA") was enacted on April 24, 1996. AEDPA provides that a one-year statute of limitations applies to federal habeas corpus actions filed by state prisoners. The one-year period runs 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).

In this case, the Amended Judgment issued on February 11, 2011. Petitioner had 30 days in which to take a direct appeal under Oregon law. ORS 138.071(1). When he did not do so, the AEDPA's statute of limitations began to run on March 14, 2011. The limitations period ran unabated until Petitioner filed his

PCR action on May 25, 2016.² Although Petitioner's PCR filing tolled the AEDPA's statute of limitations, the statute had already run by more than four years.

Once the PCR Appellate Judgment issued on October 7, 2019, the AEDPA statute of limitations (that had already expired) once again resumed until Petitioner signed his Petition for Writ of Habeas Corpus on March 10, 2020. This six-month delay between the date the Oregon courts issued the PCR Appellate Judgment and the date Petitioner signed his Petition for Writ of Habeas Corpus rendered the habeas Petition even more untimely. In total, 2,054 untolled days accrued prior to Petitioner's filing of his Petition for Writ of Habeas Corpus, placing the Petition well beyond the 365-day deadline. Where Petitioner fails to establish that his Petition is timely, or that the Court should excuse the untimely filing, the Petition should be dismissed.

RECOMMENDATION

For the reasons identified above, the Court should dismiss the Petition for Writ of Habeas Corpus (#1) as untimely, and enter a judgment dismissing the case with prejudice. The Court should also decline to issue a Certificate of Appealability on the basis that petitioner has not made a substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253(c)(2).

² "The 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). I assume for purposes of this Findings and Recommendation that Petitioner's PCR filings were "proper" so as to qualify for statutory tolling.

SCHEDULING ORDER

This Findings and Recommendation will be referred to a district judge. Objections, if any, are due within 14 days. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

If objections are filed, then a response is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

DATED this 12th day of January, 2021.

/s/ Patricia Sullivan

Patricia Sullivan
United States Magistrate Judge