

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

JUN 22 2021

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

EDMOND MAYNOR,

No. 21-35168

Petitioner-Appellant,

D.C. No. 2:20-cv-01181-BHS

v.

Western District of Washington,
Seattle

RONALD HAYNES, Superintendent,

ORDER

Respondent-Appellee.

Before: CANBY and LEE, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) 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.

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AUG 16 2021

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U.S. COURT OF APPEALS

EDMOND MAYNOR,

Petitioner-Appellant,

v.

RONALD HAYNES, Superintendent,

Respondent-Appellee.

No. 21-35168

D.C. No. 2:20-cv-01181-BHS
Western District of Washington,
Seattle

ORDER

Before: M. SMITH and HURWITZ, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 5) is denied. *See*
9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

EDMOND MAYNOR,

Petitioner,

v.

RONALD HAYNES,

Respondent.

CASE NO. C20-1181 BHS

ORDER ADOPTING REPORT
AND RECOMMENDATION

This matter comes before the Court on the Report and Recommendation ("R&R") of the Honorable Mary Alice Theiler, United States Magistrate Judge, Dkt. 13, and Petitioner's objections to the R&R, Dkt. 15.

Petitioner Edmond Maynor proceeds pro se and *in forma pauperis* in this 28 U.S.C. § 2254 habeas corpus matter and challenges his conviction for robbery and assault in the first degree. Dkt. 4. Maynor raises two grounds for relief: ineffective assistance of trial counsel and ineffective assistance of appellate counsel. *Id.* On December 11, 2020,

1 Judge Theiler issued the R&R, recommending that the Court deny Maynor's petition as
2 time barred. Dkt. 13. On December 28, 2020, Maynor filed his objections.¹ Dkt. 15.

3 The district judge must determine de novo any part of the magistrate judge's
4 disposition that has been properly objected to. The district judge may accept, reject, or
5 modify the recommended disposition; receive further evidence; or return the matter to the
6 magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).

7 Maynor objects to the R&R's conclusion that his § 2254 petition was untimely.
8 However, he does not explain how this conclusion is contrary to or an unreasonable
9 application of federal law. Rather, Maynor repeats the substantive arguments for his
10 grounds for relief. Judge Theiler carefully and correctly concluded that Maynor's
11 judgment and sentence became final on April 16, 2018 and that the one-year federal
12 statute of limitations began to run from that date. Dkt. 13 at 6. The Court thus agrees that
13 Maynor's § 2254 petition is untimely.

14 The Court having considered the R&R, Petitioner's objections, and the remaining
15 record, does hereby find and order as follows:

16 (1) The R&R is **ADOPTED**;

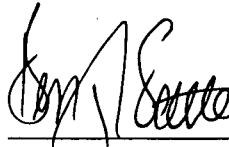
17 (2) Maynor's petition is **DENIED**;

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22 ¹ Maynor additionally filed two motions for extension of time. Dkts. 14, 17. Maynor's
objections were timely filed, and therefore the motions are **DENIED as moot**.

1 (3) A Certificate of Appealability is **DENIED**; and

2 (4) The Clerk shall enter a JUDGMENT and close the case.

3 Dated this 22nd day of February, 2021.

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6 BENJAMIN H. SETTLE
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

EDMOND MAYNOR,

Petitioner,

v.

RON HAYNES,

Respondent.

CASE NO. C20-1181-BHS-MAT

REPORT AND RECOMMENDATION

INTRODUCTION

Petitioner Edmond Maynor proceeds pro se and *in forma pauperis* in this 28 U.S.C. § 2254 habeas corpus matter. He is in custody pursuant to a King County Superior Court judgment and sentence entered for his convictions for robbery and assault in the first degree. (Dkt. 10, Ex. 1.)

Petitioner raises two grounds for relief in his habeas petition. (Dkt. 4.) Respondent submitted an answer, along with relevant portions of the state court record (Dkts. 9-10), and petitioner responded to the answer (Dkt. 12). Now, having considered the petition and documents submitted in support and opposition, the Court recommends the habeas petition be DENIED and this case DISMISSED.

REPORT AND RECOMMENDATION
PAGE - 1

BACKGROUND

The Washington Court of Appeals summarized the facts underlying petitioner's conviction and described the original judgment and sentence as follows:

On September 21, 2012, Maynor entered Westlake Center in downtown Seattle and went into the Express Jewelry store. He was wearing a mask, sunglasses, and a hat. Maynor approached the counter and told Tu Huynh, the only employee in the store, that he was looking for a diamond engagement ring priced at \$7,000 to \$15,000. Huynh responded that the store did not carry such expensive jewelry, but had a \$5,000 engagement ring. He then took a ring out of a tray of about 18 other rings and showed it to Maynor.

At this point, Maynor pulled out a gun, pointed it at Huynh, and demanded the whole tray of rings. Maynor told Huynh he would shoot him if he did not give him the tray. When Huynh pulled out the tray, Maynor grabbed it and ran. After running just a few steps, Maynor stopped, turned around, and shot at Huynh. The bullet nearly struck Huynh, tearing a hole in his shirt sleeve. The bullet continued through the wall and into the back of the neighboring store, nearly hitting the store manager.

Maynor fled. Huynh chased him through the mall until they reached the stairs to the Fourth Avenue entrance. Maynor jumped down the stairs and fell, but got up with the gun in his hand, pointed it at Huynh, and fired two more shots. Huynh ducked and avoided being struck by the bullets.

Roberto Sandoval, a bell [captain] at a nearby hotel, saw Maynor running down the street in a mask. Sandoval chased Maynor and pushed him. Maynor tried to hit Sandoval, but Sandoval pushed him down. Maynor then pulled out the gun and pointed it at Sandoval. Sandoval threw himself down on Maynor and began fighting for the gun. Three shots were fired, and one bullet struck Sandoval's right hand and arm. Sandoval continued to try to grab the gun, and Maynor hit him three times on the head with it. Sandoval yelled for help, and the gun was thrown out of reach. Several bystanders came to his aid, including a U.S. Marshal, who handcuffed Maynor and waited for Seattle police.

Seattle police arrived and took Maynor into custody. On the ground near the scene, police recovered the handgun, mask, sunglasses, and a small purse. Inside the purse was a notebook containing what appeared to be Maynor's robbery plans.

The State charged Maynor with one count of first degree robbery, alleged to have been committed with a deadly weapon, and three counts of first degree assault (two counts involving Huynh and one count involving Sandoval). Maynor testified and admitted to firing one shot in the store, but claimed that he did not

1 intend to hurt Huynh and was only trying to scare him into letting go of the jewelry.
2 He also admitted to firing additional shots at Huynh while fleeing, but claimed he
3 was only trying to keep Huynh from following him. Finally, Maynor admitted that
his gun discharged three times during his struggle with Sandoval, but claimed he
did not purposely shoot the gun.

4 The jury found Maynor guilty of first degree robbery, two counts of first
5 degree assault (one count involving Huynh and one count involving Sandoval), and
6 one count of the lesser included offense of second degree assault (on the other
assault count involving Huynh). By special verdict, the jury also found that Maynor
7 was armed with a firearm on each count. The court sentenced Maynor to 474
months of confinement.

8 (Dkt. 10, Ex. 2 at 2-3; *see also id.*, Ex. 3.)

9 Petitioner appealed, arguing the counts for robbery and second degree assault violated the
10 Fifth Amendment prohibition on double jeopardy, abuse of discretion in the denial of a motion for
11 mistrial, and ineffective assistance of counsel. (*Id.*, Ex. 4.) The Washington Court of Appeals
12 affirmed the convictions for robbery and first degree assault, reversed the conviction for second
13 degree assault because the crime merged with the robbery, and remanded the matter for
14 resentencing. (*Id.*, Ex. 2.) Petitioner did not seek review by the Washington Supreme Court and
15 the Court of Appeals issued the mandate on December 11, 2015. (*Id.*, Ex. 7.)

16 The superior court resentenced petitioner in April 2016 to a total of 327 months of
17 confinement. (*Id.*, Ex. 1.) In October 2016, by separate order, the court increased the amount of
18 restitution. (*Id.*, Ex. 8.) Petitioner appealed, with counsel, arguing the sentencing court exceeded
19 the scope of the mandate by holding a new restitution hearing and increasing the amount ordered.
20 (*Id.*, Ex. 9.) Respondent conceded the amount of restitution should not have been increased. (*Id.*,
21 Ex. 10.) Petitioner sought to proceed pro se and raise additional grounds for review. (*Id.*, Ex. 11.)
22 By Notation Ruling in August 2017, the Commissioner of the Court of Appeals denied the motion
23 to proceed pro se, but provided for petitioner's ability to submit an additional statement of grounds

1 for review. (*Id.*, Ex. 12.) Petitioner filed the additional statement, arguing ineffective assistance
2 of counsel during trial and error at re-sentencing. (*Id.*, Ex. 13.)

3 On February 12, 2018, the Washington Court of Appeals affirmed the judgment and
4 sentence, but remanded for the superior court to reinstate the original amount of restitution. (*Id.*,
5 Ex. 14.) Petitioner sought reconsideration, which the Court of Appeals denied on March 16, 2018.
6 (*Id.*, Exs. 15-16.) Petitioner did not seek review by the Washington Supreme Court, and the state
7 court issued the mandate on May 4, 2018. (*Id.*, Ex. 17.)

8 Petitioner filed a personal restraint petition on March 14, 2019, with claims of ineffective
9 assistance of trial and appellate counsel and prosecutorial misconduct. (*Id.*, Ex. 18.) The
10 Washington Court of Appeals denied the petition. (*Id.*, Ex. 21.) Petitioner sought review, which
11 the Commissioner of the Washington Supreme Court denied. (*Id.*, Exs. 22-23.) Petitioner moved
12 to modify the Commissioner's ruling and the motion was denied without comment on April 1,
13 2020. (*Id.*, Exs. 24-25.) The certificate of finality issued on April 10, 2020. (*Id.*, Ex. 26.)

14 DISCUSSION

15 Petitioner raises two grounds for relief: ineffective assistance of trial counsel and
16 ineffective assistance of appellate counsel. (Dkt. 4.) Respondent asserts that the Court need not
17 determine whether petitioner exhausted either of these claims because this matter is properly
18 dismissed as time-barred under 28 U.S.C. § 2244(d). (Dkt. 9.) In a response, petitioner again
19 argues his ineffective assistance of counsel claims and denies his claims are procedurally barred.
20 (Dkt. 10.) The Court, for the reasons set forth below, agrees with respondent the petition is
21 untimely under § 2244(d) and concludes the petition should be denied and this action dismissed.

22 A. Statute of Limitations

23 Pursuant to 28 U.S.C. § 2244(d)(1), a one-year statute of limitations applies to § 2254

1 habeas actions. That period of limitation runs from the latest of:

2 (A) the date on which the judgment became final by the conclusion of
3 direct review or the expiration of the time for seeking such review;

4 (B) the date on which the impediment to filing an application created
5 by State action in violation of the Constitution or laws of the United
6 States is removed, if the applicant was prevented from filing by such
7 State action;

8 (C) the date on which the constitutional right asserted was initially
9 recognized by the Supreme Court, if the right has been newly
10 recognized by the Supreme Court and made retroactively applicable to
11 cases on collateral review; or

12 (D) the date on which the factual predicate of the claim or claims
13 presented could have been discovered through the exercise of due
14 diligence.

15 § 2244(d)(1). The period of limitation usually commences when the criminal judgment becomes
16 final under state law; specifically “the date on which the judgment became final by the conclusion
17 of direct review or the expiration of the time for seeking such review[.]” § 2244(d)(1)(A).

18 The period of direct review ordinarily includes the ninety days in which a petitioner may
19 file a petition for writ of certiorari with the United States Supreme Court, whether or not such a
20 petition is actually filed. *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999); *see also* Sup. Ct.
21 Rule 13(1). However, if a petitioner fails to seek direct review from the highest state court, the
22 conviction becomes final when the time for seeking such review elapses. *Wixom v. Washington*,
23 264 F.3d 894, 897-98 (9th Cir. 2001). In Washington, a petitioner has thirty days to seek review
by the Supreme Court of an opinion by the Court of Appeals affirming a judgment and sentence
on direct review. Wash. RAP 13.4(a). As such, the end of this thirty-day period marks the
expiration of the time for seeking review pursuant to § 2244(d)(1)(A). *Wixom*, 264 F.3d at 898.

In this case, the Court begins the analysis of plaintiff’s statute of limitations from the April

1 2016 judgment and sentence under which he is being held in custody.¹ Petitioner appealed from
 2 his 2016 judgment and sentence to the Washington Court of Appeals and that court affirmed the
 3 judgment and denied the motion for reconsideration on March 16, 2018. (Dkt. 10, Exs. 14 & 16.)
 4 Petitioner had thirty days from the court's denial of his motion for reconsideration to seek review
 5 by the Washington Supreme Court. RAP 13.4(a). The thirtieth day fell on a Sunday and petitioner
 6 had until the next court day, April 16, 2018, to seek review. Because petitioner did not seek review,
 7 the period of direct review concluded, the judgment and sentence became final on April 16, 2018,
 8 and the federal statute of limitations began to run from that date.

9 The one-year limitations period for filing a § 2254 action is tolled for any "properly filed"
 10 collateral state challenge to the pertinent judgment or claim. 28 U.S.C. § 2244(d)(2). Petitioner's
 11 statute of limitations ran for 331 days, until March 14, 2019, when petitioner filed his personal
 12 restraint petition. (Dkt. 10, Ex. 18.) That petition ceased pending on April 10, 2020, when the
 13 Washington Court of Appeals issued a certificate of finality. (*Id.*, Ex. 26); *Phongmanivan v.*
 14 *Haynes*, 195 Wn.2d 309, 314-17 (2020) ("The date of issuance of the certificate of finality by the
 15 clerk of the appropriate appellate court establishes the date of finality for a PRP or other state
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17 ¹ As respondent observes, the date of the revised judgment and sentence and not the later revision
 18 to the restitution amount controls. *See United States v. Gilbert*, 807 F.3d 1197, 1201 (9th Cir. 2015) ("We
 19 hold that when a judgment imposes a sentence but leaves the amount of restitution to be determined, the
 20 one-year statute of limitations to file a § 2255 motion does not restart when the specific amount of restitution
 21 is later entered."), and *Colbert v. Haynes*, 954 F.3d 1232, 1236-37 (9th Cir. 2020) (finding, in a § 2254
 22 proceeding, the entry of an order removing a restitution obligation, issued after the judgment and sentence,
 23 did not constitute a new judgment). *See also Chamblee v. Florida*, 905 F.3d 1192, 1195-98 & n.5 (11th
 Cir. 2018) (a vacated fine "had no effect" on the judgment authorizing a petitioner's detention because,
 "[u]nder the federal habeas statute, . . . a state habeas petitioner may challenge only the state-court judgment
 'pursuant to' which the petitioner is being held 'in custody[.]'" and the only "judgment that matters for
 purposes of [§] 2244 is 'the judgment authorizing the prisoner's confinement.'") (quoted source omitted),
 and *Osbourne v. Sec'y, Fla. Dep't of Corr.*, 968 F.3d 1261, 1266 (11th Cir. 2020) (state court "'ameliorative
 changes in sentences . . . , such as the removal of a fine or a restitution obligation,'" does not result in a new
 judgment for purposes of federal habeas review) (quoted sources omitted).

1 collateral proceeding.”) The statute of limitations then ran for an additional thirty-four days, for a
2 total of 365 days, until its expiration on May 14, 2020. Petitioner filed his habeas petition on July
3 21, 2020, more than two months after his statute of limitations had expired. His petition is
4 therefore untimely and subject to dismissal.

5 B. Equitable Tolling

6 The statute of limitations is subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631,
7 645 (2010); *Laws v. Lamarque*, 351 F.3d 919, 922 (9th Cir. 2003). Equitable tolling is available
8 “only when extraordinary circumstances beyond a prisoner’s control make it impossible to file a
9 petition on time and the extraordinary circumstances were the cause of his untimeliness.” *Laws*,
10 351 F.3d at 922 (internal quotation marks and quoted source omitted). To be entitled to equitable
11 tolling, a petitioner must show “‘(1) that he has been pursuing his rights diligently, and (2) that
12 some extraordinary circumstance stood in his way’ and prevented timely filing.” *Holland*, 560
13 U.S. at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). In other words, equitable
14 tolling may be appropriate when external forces, rather than petitioner’s lack of diligence, prevent
15 timely filing. *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999).

16 Petitioner denies his claims are barred, but does not establish or even identify any possible
17 basis for equitable tolling. That is, neither his petition, nor his response to the answer shows he
18 had been pursuing his rights diligently and some extraordinary circumstance stood in his way and
19 prevented the timely filing of a petition. (See Dkt. 4 at 33-35 and Dkt. 12 at 26.) Because petitioner
20 filed his petition outside of the § 2254 statute of limitations period and because he does not
21 demonstrate his entitlement to tolling of the limitations period, his petition is time-barred.

22 CONCLUSION

23 Petitioner’s habeas petition is time-barred under 28 U.S.C. § 2244(d). The Court

1 recommends the petition be DENIED and this case DISMISSED. An evidentiary hearing is not
2 required as the record conclusively shows petitioner is not entitled to relief. A proposed Order
3 accompanies this Report and Recommendation.

4 CERTIFICATE OF APPEALABILITY

5 A petitioner seeking post-conviction relief under § 2254 may appeal a district court's
6 dismissal of his federal habeas petition only after obtaining a certificate of appealability (COA)
7 from a district or circuit judge. A COA may issue only where a petitioner has made "a substantial
8 showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2). A petitioner satisfies
9 this standard "by demonstrating that jurists of reason could disagree with the district court's
10 resolution of his constitutional claims or that jurists could conclude the issues presented are
11 adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327
12 (2003). Under this standard, petitioner is not entitled to a COA with respect to his claims.

13 OBJECTIONS

14 Objections to this Report and Recommendation, if any, should be filed with the Clerk and
15 served upon all parties to this suit within **twenty-one (21) days** of the date on which this Report
16 and Recommendation is signed. Failure to file objections within the specified time may affect
17 your right to appeal. Objections should be noted for consideration on the District Judge's motions
18 calendar for the third Friday after they are filed. Responses to objections may be filed within
19 **fourteen (14) days** after service of objections. If no timely objections are filed, the matter will be

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1 ready for consideration by the District Judge on January 8, 2021.

2 DATED this 11th day of December, 2020.

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5 Mary Alice Theiler
6 United States Magistrate Judge
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United States District Court

WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

EDMOND MAYNOR,

Petitioner,

v.

RON HAYNES,

Respondents.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: C20-1181-BHS

- ☐ **Jury Verdict.** This action comes before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- ☒ **Decision by Court.** This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

THE COURT HAS ORDERED THAT

By Order of the Court, Petitioner's habeas petition and this action are dismissed, with prejudice, and Petitioner is denied issuance of a certificate of appealability.

Dated this 23rd day of February, 2021.

WILLIAM M. MCCOOL

Clerk

s/Stefan Prater

Deputy Clerk