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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SCOTT MICHAEL HILL,

Petitioner-Appellant,

v.

PATRICK GLEBE,

Respondent-Appellee.

No. 17-35942

D.C. No. 3:14-cv-05330-RJB

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Robert J. Bryan, District Judge, Presiding

Argued and Submitted February 5, 2019
Seattle, Washington

Before: IKUTA and CHRISTEN, Circuit Judges, and CHOE-GROVES,** Judge.

Scott Hill appeals the district court's denial of his petition for a writ of habeas corpus. *See* 28 U.S.C. § 2254. We have jurisdiction under 28 U.S.C. § 1291.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Jennifer Choe-Groves, Judge for the United States Court of International Trade, sitting by designation.

The district court did not err in holding that the outcome at trial would not “reasonably likely have been different” had Hill’s counsel investigated a defense of diminished capacity. *Strickland v. Washington*, 466 U.S. 668, 696 (1984). Even if an investigation established that Hill suffered from post-traumatic stress disorder, such a diagnosis does not establish that Hill was unable to form the requisite criminal intent the night of the attack. Indeed, Hill’s psychiatric expert could testify only that it was a “possibility” that a diminished capacity defense could have been raised at trial. Further, pursuing a diminished capacity defense would have harmed Hill’s case in important ways. Hill would have been forced to submit to an examination by a prosecution expert, *see State v. Hutchinson*, 959 P.2d 1061, 1069 (Wash. 1998) (en banc), which could have led to evidence that Hill was not credible, given that Hill’s own psychiatric expert thought Hill had “a tendency to magnify illness” and may have been “malingering.” A diminished capacity defense would have also conflicted with Hill’s detailed recollection of his intent and deliberative actions on the night of the crime. Had Hill testified regarding his lack of criminal intent, such testimony would have conflicted with the theory that he was unable to form any intent. Accordingly, Hill has failed to show “a ‘substantial,’ not just ‘conceivable,’ likelihood of a different result.” *Cullen v.*

Pinholster, 563 U.S. 170, 189 (2011) (quoting *Harrington v. Richter*, 562 U.S. 86, 112 (2011)).

Hill’s claim that trial counsel rendered ineffective assistance for failing to ask for a lesser-included offense instruction is barred by the one-year statute of limitations in 28 U.S.C. § 2244(d)(1), which runs “on a claim-by-claim basis.” *Mardesich v. Cate*, 668 F.3d 1164, 1173 (9th Cir. 2012). Because Hill did not include this claim in his habeas petition, his claim is untimely and not properly before the court for consideration. Nor has Hill demonstrated that the untimely jury-instruction claim relates back to his claim that counsel was ineffective for failing to investigate and present a diminished capacity defense, because the two claims are not “tied to a common core of operative facts.” *Hebner v. McGrath*, 543 F.3d 1133, 1138–39 (9th Cir. 2008) (internal quotation marks omitted).

AFFIRMED.