

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JUL 17 2023

FOR THE NINTH CIRCUIT

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

LUIS RIOS,

No. 22-55140

Petitioner-Appellant,

D.C. No.

v.

2:20-cv-11678-CJC-MAR

PATRICK COVELLO,

MEMORANDUM*

Respondent-Appellee.

Appeal from the United States District Court
for the Central District of California
Cormac J. Carney, District Judge, Presiding

Submitted July 12, 2023**
Pasadena, California

Before: SANCHEZ and MENDOZA, Circuit Judges, and DONATO,** District Judge.

Luis Rios, a California state prisoner, appeals from the district court's judgment dismissing his petition for a writ of habeas corpus on the ground that it

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable James Donato, United States District Judge for the Northern District of California, sitting by designation.

was untimely pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244(d)(1). We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and we affirm.

The district court certified one issue for appeal: whether Rios’s Section 2254 petition was untimely under AEDPA’s one-year limitations period. As relevant here, the one-year period runs from the later of “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review,” or “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). Rios’s conviction became final in May 2014. His petition was not filed until December 2020. Consequently, Rios’s petition was untimely as measured against the date his judgment became final.

Rios contends that he is entitled to a later triggering date of January 2020 under Section 2244(d)(1)(D), because that is when a paralegal’s review of the case file confirmed Rios’s “suspicions” that the prosecutor in his Los Angeles case used a photograph of an unrelated firearm from his San Bernardino case to coerce him into accepting a plea deal. But in the district court proceedings, Rios indicated that, prior to entering his plea, he “knew the alleged weapon in the [Los Angeles] case was never recovered,” and was shown a photograph of a firearm that he knew “was that similar to a .380 [caliber], but was not the 9mm used at the [Los

Angeles] address he was being charged with.” Rios asked his lawyer to move to suppress the firearm evidence, and then “fired” his lawyer when no motion was filed. Consequently, Rios was aware of the factual predicate for his claims and could have asserted them “in objective good faith,” *Hasan v. Galaza*, 254 F.3d 1150, 1154 (9th Cir. 2001), well within the AEDPA limitations period.

Rios asks to expand the scope of the certificate of appealability for the question of whether his Section 2254 petition is timely through equitable tolling. We deny Rios’s request for the same reasons discussed above, namely that he could have sought relief in a timely manner without access to the additional evidence in his case file. *See Smith v. Davis*, 953 F.3d 582, 588 (9th Cir. 2020) (en banc) (“A petitioner seeking equitable tolling 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.””) (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)). Rios has not demonstrated “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).

AFFIRMED.