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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOSHUA STEVEN NOVAK,

Petitioner,

No. C 08-3302 PJH (PR)

vs.

JAMES A. YATES, Warden,

Respondent.

**ORDER GRANTING
RESPONDENT'S MOTION TO
DISMISS**

This is a habeas case brought pro se by a state prisoner under 28 U.S.C. § 2254. Respondent has filed a motion to dismiss on grounds that the petition is barred by the statute of limitations. Petitioner has filed an opposition and respondent a reply. For the reasons set out below, the motion is granted.

DISCUSSION

Respondent contends that this petition is barred by the statute of limitations. The statute of limitations is codified at 28 U.S.C. § 2244(d). Petitions filed by prisoners challenging non-capital state convictions or sentences must be filed within one year of the latest of the date on which: (A) the judgment became final after the conclusion of direct review or the time passed for seeking direct review; (B) an impediment to filing an application created by unconstitutional state action was removed, if such action prevented petitioner from filing; (C) the constitutional right asserted was recognized by the Supreme Court, if the right was newly recognized by the Supreme Court and made retroactive to cases on collateral review; or (D) the factual predicate of the claim could have been discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1). Time during which a properly filed application for state post-conviction or other collateral review is

1 pending is excluded from the one-year time limit. *Id.* § 2244(d)(2).

2 Respondent asserts, and petitioner does not dispute, that in 2004 he pled guilty to
3 attempted possession of a firearm by a felon. He appealed. The California Court of Appeal
4 affirmed, and on November 16, 2005, the California Supreme Court denied his petition for
5 review. The statute of limitations therefore began running on February 14, 2006, when the
6 time to apply to the United States Supreme Court for certiorari expired. See *Miranda v.*
7 *Castro*, 292 F.3d 1063, 1065 (9th Cir. 2002) (where petitioner did not file petition for
8 certiorari, his conviction became final 90 days after the California Supreme Court denied
9 review). The petition thus was due on or before February 14, 2007, absent tolling. See
10 *Patterson v. Stewart*, 251 F.3d 1243, 1246 (9th Cir. 2001) (adopting what is referred to as
11 the “anniversary method” because, absent any tolling, the expiration date of the limitation
12 period will be the same date as the triggering event but in the following year). It was not,
13 however, filed until July 9, 2008, long after expiration of the statute of limitations. It
14 therefore is untimely unless an exception to the statute of limitations applies.

15 **A. Statutory Tolling**

16 As to statutory tolling, petitioner filed a state habeas petition in superior court on
17 August 11, 2006. It was denied on October 3, 2006. He then filed in the court of appeal,
18 on January 5, 2007; that petition was denied on February 1, 2007. He filed in the supreme
19 court on March 26, 2007; that petition was denied on August 8, 2007. If petitioner is
20 entitled to tolling for the entire time between the date he filed his first state petition through
21 the decision on his last one, he would receive 362 days of tolling. Because the petition
22 here was filed 877 days after the limitations period began running, even tolling for the entire
23 time the state petitions were pending would not suffice to make the petition timely.

24 Although it does not affect the result as to statutory tolling, respondent is correct that
25 petitioner is not entitled to tolling for the ninety-four days between the denial of his superior
26 court petition and his filing in the court of appeal. This is because the time between a lower
27 court decision and a filing of a new petition in a higher court in the California system is
28 treated as time the petition is "pending," and thus as tolling the limitations period, only as

1 long as the petitioner did not "unreasonably delay" in seeking review. *Carey v. Saffold*, 536
2 U.S. 214, 221-23 (2002). Here the ninety-four days petitioner delayed was unreasonable,
3 so petitioner is not entitled to tolling for that time. *See Evans v. Chavis*, 546 U.S. 189,
4 199-200 (2006) (noting that states with determinate timeliness rules usually allow 30 to 60
5 days to appeal to higher court; because of continued lack of clarification from California
6 Supreme Court of words "reasonable time" in context of delayed petitions, federal courts
7 should assume that "California's 'reasonable time' standard would not lead to filing delays
8 substantially longer than those in States with determinate timeliness rules.").

9 **B. Equitable Tolling**

10 Petitioner attempts to avoid the statute of limitations bar by contending that he is
11 entitled to equitable tolling. The one-year limitation period can be equitably tolled because
12 § 2244(d) is a statute of limitations and not a jurisdictional bar. *Calderon v. United States*
13 *District Court (Beeler)*, 128 F.3d 1283, 1288 (9th Cir. 1997), *overruled in part on other*
14 *grounds by Calderon v. United States District Court (Kelly)*, 163 F.3d 530 (9th Cir. 1998)
15 (en banc). Equitable tolling should be granted only if "extraordinary circumstances beyond
16 a prisoner's control make it impossible to file a petition on time." *Id.* (citation and internal
17 quotation marks omitted).

18 Petitioner's contention that equitable tolling should be granted because of his
19 difficulty with English, lack of legal knowledge, and dependence on jailhouse lawyers is
20 without merit. *See Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006) (lack of legal
21 sophistication); *cf. Hughes v. Idaho State Bd. of Corrections*, 800 F.2d 905, 909 (9th Cir.
22 1986) (illiteracy of pro se petitioner); *Cantu-Tzin v. Johnson*, 162 F.3d 295, 299-300 (5th
23 Cir. 1998) (pro se status during state habeas proceedings did not justify equitable tolling);
24 *United States v. Flores*, 981 F.2d 231, 236 (5th Cir. 1993) (pro se status, illiteracy,
25 deafness and lack of legal training not external factors excusing abuse of the writ).

26 Two of petitioner's other grounds for equitable tolling require more consideration.
27 His first contention, that he has mental problems, is of the sort that might be grounds for
28 equitable tolling, at least when combined with other grounds. *See Calderon v. United*

1 *States District Court (Kelly)*, 163 F.3d 530, 541-42 (9th Cir.1998) (en banc) (prisoner
2 entitled to equitable tolling due to earlier court-ordered stay of habeas proceedings, alleged
3 mental incompetency, and existence of timely habeas proceedings pending at one time that
4 were mistakenly dismissed). Petitioner alleges that he has been “in and out” of mental
5 health treatment and foster homes “his entire life,” and that the medical records he submits
6 in opposition show that he was receiving mental health treatment throughout the period at
7 issue here.

8 Petitioner’s allegation regarding a lifetime of mental health treatment and foster care
9 placement is conclusory and not tied to his failure to file, so is insufficient. See *Gaston v.*
10 *Palmer*, 417 F.3d 1030, 1034-35 (9th Cir. 2005) (holding that where prisoner fails to show
11 causal connection between physical and mental disabilities and inability to timely file
12 petition, district court’s holding that he was not entitled to equitable tolling where he had
13 earlier filed a state habeas petition was not clear error). That is also the case with his claim
14 that he is entitled to tolling because was taking anti-depressants; he makes no showing of a
15 causal connection between his depression and his inability to file the federal petition on
16 time. In addition, the medical records provided by petitioner show that the medication
17 worked and that petitioner’s depression was in remission as of May of 2007, shortly before
18 the crucial time here. Petitioner has failed to show that his mental problems made it
19 impossible for him to file on time.

20 The second claim that might have some substance is petitioner’s contention that
21 prison officers lost his legal papers. See *Espinoza-Matthews v. California*, 432 F.3d 1021,
22 1027-28 (9th Cir. 2005) (equitable tolling warranted for inmate’s 11-month stay in ad-seg
23 because he was denied access to legal papers despite his repeated requests for them).
24 His papers were taken from him when he was moved to administrative segregation on
25 February 19, 2008. In his opposition to the motion to dismiss, petitioner argues only that
26 this lack of papers explains the ninety-four day delay between his state superior court
27 petition and his state court of appeal petition, and does not advance it as a basis for
28 equitable tolling. Because the ninety-four day period was at the end of 2006, the loss of the

1 papers in February of 2008 does not explain that delay, but the court will also consider
2 whether it might entitle him to equitable tolling.

3 Petitioner has provided very few facts regarding the loss of his papers, and none are
4 in proper form; the opposition and addendum are not verified, and no declaration is
5 provided. Leaving that point aside, in his opposition petitioner says only that the papers
6 were taken on February 19, 2008, and most of them were lost. He says that this “caused
7 further delay” in his seeking inmate assistance to file his petition. These allegations are
8 conclusory and do not establish that it was impossible for petitioner to file on time.

9 Petitioner attaches to his opposition an unverified complaint from a civil suit he filed
10 in the United States District Court for the Eastern District of California, in which the loss of
11 the papers is one claim. The only additional relevant facts alleged in it are that on February
12 26, 2008, a small portion of the missing material was returned, but otherwise petitioner had
13 to attempt to reconstruct the file from other sources; that “in May of 2008, Plaintiff’s former
14 trial attorney sent a copy of the California Supreme Court habeas corpus petition in order
15 that Plaintiff could seek assistance filing his federal habeas petition;” and that his appellate
16 counsel and the state superior court refused to provide documents. Opp’n Ex. B at 6.

17 The crucial time period in this analysis is between August of 2007, when petitioner’s
18 state petition was denied in the California Supreme Court, and the date the federal statute
19 of limitations expired, which was either November 9, 2007 (if no tolling is allowed for the
20 ninety-four days), or February 11, 2008 (if the entire time his state petitions were pending
21 was tolled). Both those dates had passed when, on February 19, 2008, petitioner’s papers
22 were lost. The loss of the papers thus could not have prevented petitioner from filing his
23 petition on time.

24 **C. “Actual Innocence” Exception**

25 Finally, petitioner contends that the statute of limitations should not bar the petition
26 because he comes within an exception for persons who are “actually innocent.” The Ninth
27 Circuit has stated in dictum that the actual innocence gateway established in *Schlup v.*
28 *Delo*, 513 U.S. 298 (1995), for procedural defaults also may be available to a petitioner

1 whose petition is otherwise barred by AEDPA's limitations period. See *Majoy v. Roe*, 296
2 F.3d 770, 776-77 (9th Cir. 2002) (implying that unavailability of actual innocence gateway
3 would raise serious constitutional concerns and remanding to district court for a
4 determination of whether actual innocence claim was established before deciding whether
5 gateway is available under AEDPA).

6 Petitioner pled no contest to one count of attempted possession of a firearm by a
7 convicted felon. See Cal. Penal Code §§ 664, 12021.1(a)(1)). He admitted allegations that
8 he had been convicted of thirteen prior offenses that were strikes under the Three Strikes
9 Law. See *id.* at §§ 667(b)-(i); 1170.12. He was sentenced to prison for twenty-five years to
10 life. His claim in the federal petition is that under California law there is no such crime as
11 attempted possession of a firearm, and that his counsel was ineffective in failing to so
12 argue.

13 To qualify for the actual innocence exception a habeas petitioner must show that "a
14 constitutional violation has probably resulted in the conviction of one who is actually
15 innocent." *Schlup v. Delo*, 513 U.S. 298, 327 (1995) (citing *Murray v. Carrier*, 477 U.S. at
16 496). The required new evidence must create a colorable claim of actual innocence, that
17 the petitioner is innocent of the charge for which he is incarcerated, as opposed to legal
18 innocence as a result of legal error. *Id.* at 321. "Actual innocence" means "factual
19 innocence," not merely legal insufficiency. See *Bousley v. United States*, 523 U.S. 614,
20 623-24 (1998).

21 1. Argument in Petition

22 Petitioner evidently realized that his federal petition was late and thus argued in the
23 petition itself that the untimeliness should be excused. As grounds for his actual innocence
24 claim, petitioner argues in the petition that there is no such crime as the one of which he
25 was convicted, attempted possession of a firearm by a felon. He does not, however, argue
26 that he is not a felon or did not, as a factual matter, attempt to obtain a firearm. He thus
27 does not argue *factual* innocence as is necessary to qualify for the actual innocence
28 exception of *Majoy* and *Schlup*. See *id.*

1 **2. Argument in Opposition**

2 In his opposition to the motion to dismiss, petitioner, presumably alerted to the
3 inadequacy of his petition’s “actual innocence” argument by respondent’s motion, contends
4 that he is factually innocent. He says that “[a]t no time did Petitioner own, possess, have in
5 his custody or control a firearm, nor was evidence presented that the officers involved
6 possessed a firearm or place Petitioner within the vicinity of a firearm on the dates in
7 question. This constitutes factual innocence.” Trav. at 5. Again petitioner has not provided
8 the facts in proper form in his opposition, but in the verified petition he does provide this
9 statement of facts, which he appears to have copied from his opening brief on direct
10 appeal:

11 On November 17, 2003, Santa Clara undercover Police Officer Loi Filo
12 called Petitioner regarding the acquisition of a firearm. In a second call the
13 following days, the Officer told Petitioner he would rent him a gun for \$300-500,
14 or \$1,000 if the gun was fired, and both men agreed to meet later that day at a
15 local Taco Bell restaurant. Both men met at the appointed time, and Officer Filo
16 told Petitioner he had a .38 caliber gun he would rent him. According to Officer
17 Filo, Petitioner responded by pulling out a bill of sale from his pocket for his car
18 and handed [sic] it to the officer. The officer stated that he asked Petitioner how
19 long he would need the gun for, and Petitioner allegedly responded that he
20 would return it the next day. [Petitioner then was arrested.]

21 Pet. at 8.

22 These facts by no means show that petitioner did not attempt to possess a firearm.
23 First, the offense was an “attempt,” not “possession,” of a firearm, so whether he ever had
24 possession or control of the gun is irrelevant; secondly, petitioner is trying to add an
25 element to the offense, a requirement that there actually *be* a gun, either in possession of
26 the undercover officer or nearby. Whether or not there is such a requirement under
27 California law – it seems unlikely – in making a showing of actual innocence it is petitioner’s
28 job to provide evidence of his innocence, not just complain about the lack of evidence. That
is, even assuming the correctness of his legal argument, it is up to him to show that there
was no gun, which he has not done.

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Assuming for purposes of this ruling that there is an “actual innocence” exception to

1 the statute of limitations, petitioner has not established that it applies to him.

2

CONCLUSION

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Respondent's motion to dismiss (document number 6 on the docket) is **GRANTED**.

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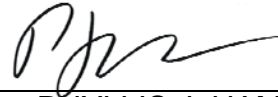
The petition is **DISMISSED**. The clerk shall close the file.

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IT IS SO ORDERED.

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Dated: August 25, 2009.



PHYLLIS J. HAMILTON
United States District Judge

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