UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BENITO GUTIERREZ, Petitioner, v. MARTIN D. BITER, Warden, Respondent.	NO. CV 12-3996-DDP(E) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Dean D. Pregerson, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

On April 9, 2012, Petitioner filed a "Petition for Writ of Habeas Corpus By a Person in State Custody" in the United States District Court for the Eastern District of California, bearing a signature date of March 30, 2012, and accompanied by an attached memorandum ("Pet.

Mem."). The Petition claims that Petitioner's trial counsel allegedly failed adequately to "investigate the nature of the offender," and failed to present mitigating evidence at sentencing including evidence of Petitioner's purported mental impairment, his alleged use of alcohol before the shooting, and an alleged cultural explanation for the shooting.

On May 3, 2012, the United States District Court for the Eastern District of California transferred the Petition to this Court.

On September 5, 2012, Respondent filed a "Motion to Dismiss, etc.," contending that the Petition is untimely and procedurally defaulted. Petitioner did not file any opposition to the Motion to Dismiss within the allotted time.

BACKGROUND

On November 20, 1998, a jury found Petitioner guilty of the September 20, 1981 murder of Chung Sang Yoon (Respondent's Lodgment 2; Respondent's Lodgment 5, pp. 6-7).[1] The jury found true the allegations that Petitioner personally used a firearm (a rifle) in the commission of the murder, and that Petitioner intentionally killed the victim while lying in wait (Respondent's Lodgment 2). Petitioner received a sentence of life without the possibility of parole plus two years (Respondent's Lodgments 1, 3).

[1] Petitioner apparently fled after the murder and was apprehended in New York in 1997 (Respondent's Lodgment 5, pp. 11-12).

On November 1, 2000, the California Court of Appeal remanded for reconsideration of the restitution fine, but otherwise affirmed the judgment (Respondent's Lodgment 4). Petitioner did not file a petition for review in the California Supreme Court (Petition, p. 3).

On August 9, 2000, while the appeal was pending, Petitioner, represented by counsel, filed a habeas corpus petition in the California Court of Appeal, in case number B143402 (Respondent's Lodgment 5).[2] On November 1, 2000, the Court of Appeal issued an Order to Show Cause, transferring the petition to the Los Angeles County Superior Court for a hearing concerning Petitioner's claim of ineffective assistance of trial counsel in failing to file a motion to suppress Petitioner's taped statement to police (Respondent's Lodgment 6). Following a hearing, the Superior Court issued a written decision on April 25, 2002, denying the petition (Respondent's Lodgment 7).

Over eight years later, on May 25, 2010, Petitioner filed a pro se habeas petition in the California Court of Appeal, in case number B224816, bearing a signature date of May 13, 2010 (Respondent's Lodgment 8). The Court of Appeal denied the petition summarily on May 27, 2010 (Respondent's Lodgment 9).

///

---

[2] The copy of this petition lodged by Respondent does not bear a file stamp. The Court takes judicial notice of the docket in In re Benito Gutierrez, California Court of Appeal case number B143402 (attached hereto). See Porter v. Ollison, 620 F.3d 952, 954-55 n.1 (9th Cir. 2010) (taking judicial notice of court dockets); Mir v. Little Company of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988) (court may take judicial notice of court records). The docket shows that Petitioner, represented by counsel, filed the Petition in that case on August 9, 2000.

Petitioner filed a pro se habeas corpus petition in the California Supreme Court on October 4, 2010, in case number S187025, bearing a signature date of September 30, 2010 (Respondent's Lodgment 10). The California Supreme Court denied the petition on April 13, 2011, with a citation to In re Robbins, 18 Cal. 4th 770, 77 Cal. Rptr. 2d 153, 959 P.2d 311 (1998), signifying that the court deemed the petition to be untimely (Respondent's Lodgment 11).[3]

On November 4, 2011, Petitioner filed another pro se habeas corpus petition in the California Supreme Court, in case number S197808. The California Supreme Court denied the petition on February 22, 2011, with citations to In re Robbins, supra, and In re Miller, 17 Cal. 2d 734, 112 P.2d 10 (1941), signifying that the petition was untimely and raised claims asserted and denied in the previous petition (Respondent's Lodgments 12, 13.[4]

DISCUSSION

The "Antiterrorism and Effective Death Penalty Act of 1996" ("AEDPA"), signed into law April 24, 1996, amended 28 U.S.C. section 2244 to provide a one-year statute of limitations governing habeas petitions filed by state prisoners:

///

///

---

[3] See Walker v. Martin, 131 S. Ct. 1120, 1124 (2011). In re Reno, 55 Cal. 4th 428, 460-62, 146 Cal. Rptr. 3d 297, 283 P.3d 1181 (2012).

[4] See In re Reno, 55 Cal. 4th at 497-98.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run 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.

(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.

"AEDPA's one-year statute of limitations in § 2244(d)(1) applies to each claim in a habeas application on an individual basis." Mardesich v. Cate, 668 F.3d 1164, 1171 (9th Cir. 2012).

Because Petitioner did not file a petition for review in the California Supreme Court, Petitioner's conviction became final on December 11, 2000, forty days from the date the Court of Appeal filed its decision. See Smith v. Duncan, 297 F.3d 809, 812-13 (9th Cir. 2002), overruled on other grounds, Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005); former Cal. R. Ct. 24(a), 28(b).[5] The statute of limitations began running on December 12, 2000, unless subsections B, C, or D of 28 U.S.C. section 2244(d)(1) furnish a later accrual date. See Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999), cert. denied, 529 U.S. 1104 (2000) (AEDPA statute of limitations is not tolled between the conviction's finality and the filing of the first state collateral challenge).

Subsection B of section 2244(d)(1) is inapplicable. Petitioner does not allege, and the record does not show, that any illegal conduct by the state or those acting for the state "made it impossible for him to file a timely § 2254 petition in federal court." See Ramirez v. Yates, 571 F.3d 993, 1000-01 (9th Cir. 2009).

///

///

[5] After Petitioner's conviction became final, Rule 24 and Rule 28 were renumbered as Rule 8.264 and Rule 8.500, respectively, and were amended in ways immaterial to the issues discussed herein.

Subsection C of section 2244(d)(1) is also inapplicable. Petitioner does not assert any claim based on a constitutional right "newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." See Dodd v. United States, 545 U.S. 353, 360 (2005) (construing identical language in section 2255 as expressing "clear" congressional intent that delayed accrual inapplicable unless the United States Supreme Court itself has made the new rule retroactive); Tyler v. Cain, 533 U.S. 656, 664-68 (2001) (for purposes of second or successive motions under 28 U.S.C. section 2255, a new rule is made retroactive to cases on collateral review only if the Supreme Court itself holds the new rule to be retroactive); Peterson v. Cain, 302 F.3d 508, 511-15 (5th Cir. 2002), cert. denied, 537 U.S. 1118 (2003) (applying anti-retroactivity principles of Teague v. Lane, 489 U.S. 288 (1989), to analysis of delayed accrual rule contained in 28 U.S.C. section 2244(d)(1)(C)). Petitioner appears to allege that a recent United States Supreme Court ruling, Ryan v. Detrich, 131 S. Ct. 2449 (2011), supports Petitioner's claim of ineffective assistance of counsel (Pet. Mem., p. 17).[6] It is unclear whether Petitioner argues for delayed accrual under section 2244(d)(1)(c) based upon this ruling. In Ryan v. Detrich, the United States Supreme Court vacated the Ninth Circuit's grant of habeas relief on the ground of ineffective assistance of counsel,[7] remanding

---

[6] The memorandum attached to the Petition does not bear consecutive page numbers. The Court employs the page numbers of this Court's docketed version of the memorandum.

[7] See Detrich v. Ryan, 619 F.3d 1038 (9th Cir. 2010), vacated, 131 S. Ct. 2449 (2011), on remand, 677 F.3d 958 (9th Cir. 2012), rehearing en banc granted, 2012 WL 4513226 (9th Cir. Oct. 3, 2012).

for reconsideration in light of Cullen v. Pinholster, 131 S. Ct. 1388 (2011). The Supreme Court's order in Ryan v. Detrich manifestly does not recognize any new constitutional right or make any such right retroactively applicable to cases on collateral review within the meaning of section 2244(d)(1)(C).

Section 2244(d)(1)(D) does not furnish an accrual date later than December 12, 2000, for Petitioner's claims. Under section 2244(d)(1)(D), "[t]ime begins when the prisoner knows (or through diligence could discover) the important facts, not when the prisoner recognizes their legal significance." Hasan v. Galaza, 254 F.3d 1150, 1154 n.3 (9th Cir. 2001) (citation and internal quotations omitted). "Due diligence does not require 'the maximum feasible diligence,' but it does require reasonable diligence in the circumstances." Ford v. Gonzalez, 683 F.3d 1230, 1235 (9th Cir. 2012), petition for certiorari filed, (Oct. 1, 2012) (No. 12-6782) (quoting Schlueter v. Varner, 384 F.3d 69, 74 (3d Cir. 2004), cert. denied, 544 U.S. 1037 (2005) (footnote omitted)). Section 2244(d)(1)(D) applies "only if vital facts could not have been known by the date the appellate process ended." Ford v. Gonzalez, 683 F.3d at 1235 (citations and internal quotations omitted). "The 'due diligence' clock starts ticking when a person knows or through diligence could discover the vital facts, regardless of when their legal significance is actually discovered." Id. (citations omitted). "Although section 2244(d)(1)(D)'s due diligence requirement is an objective standard, a court also considers the petitioner's particular circumstances." Id. (citations omitted).

///

///

Petitioner, who was present at sentencing on January 15, 1999,[8] knew or should have known, no later than December 12, 2000, of the facts supporting his claim that trial counsel ineffectively failed to investigate mitigating factors such as Petitioner's alleged impaired mental state or alleged inebriation at the time of the offense and Petitioner's purported cultural explanation for the shooting. Petitioner's alleged inability to speak, read or write English (see Petition, p. 13; Pet. Mem, p. 16) did not prevent Petitioner from understanding the events at sentencing. Petitioner had the services of an interpreter at trial and at sentencing, and addressed the court at sentencing.[9]

Therefore, the statute of limitations began running on December 12, 2000. See Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir.), cert. denied, 534 U.S. 978 (2001). Petitioner constructively filed the present Petition more than ten years later, on March 30, 2012.[10] Absent tolling, the Petition is untimely.

Section 2244(d)(2) tolls the statute of limitations during the pendency of "a properly filed application for State post-conviction or other collateral review." Petitioner is entitled to statutory tolling

---

[8] See Respondent's Lodgment 8, exhibit pp. 27-45 (sentencing transcript).

[9] See Respondent's Lodgment 5, p. 39; Respondent's Lodgment 8, exhibit, pp. 28-32.

[10] The Court assumes arguendo that Petitioner filed the present Petition on its signature date. See Porter v. Ollison, 620 F.3d 952, 958 (9th Cir. 2010) (prison mailbox rule applies to federal and state habeas petitions).

during the pendency of his first Court of Appeal habeas petition and Superior Court proceedings, until the Superior Court issued its decision denying the petition on April 25, 2002. However, Petitioner did not file any federal petition within one year of that date. Rather, Petitioner waited over eight years before constructively filing his second Court of Appeal petition in case number B224816 on May 13, 2010.[11]

In certain circumstances, a habeas petitioner may be entitled to "gap tolling" between the denial of a state habeas petition and the filing of a "properly filed" habeas petition in a higher state court. See Carey v. Saffold, 536 U.S. 214, 219-221 (2002). However, an untimely state habeas petition is not a "properly filed" petition for purposes of statutory tolling under section 2244(d)(2). Pace v. DiGuglielmo, 544 U.S. at 412-13; see also Allen v. Siebert, 552 U.S. 3, 6-7 (2007); Carey v. Saffold, 536 U.S. at 225 (California state habeas petition filed after unreasonable delay not "pending" for purposes of section 2244(d)(2)); see also Evans v. Chavis, 546 U.S. 189, 191 (2006) ("The time that an application for state postconviction review is 'pending' includes the period between (1) a lower court's adverse determination, and (2) the prisoner's filing of a notice of appeal, *provided that* the filing of the notice of appeal is timely under state law") (citation omitted).

///

///

---

[11] The Court assumes arguendo Petitioner filed this state petition on its signature date. See Porter v. Ollison, 620 F.3d at 958.

Here, the Court of Appeal in case number B224816 denied the petition summarily. Where, as here, a state court denies a habeas petition without a "clear indication" that the petition was timely or untimely, a federal habeas court "must itself examine the delay in each case and determine what the state courts would have held in respect to timeliness." Evans v. Chavis, 546 U.S. at 198; see also Banjo v. Ayers, 614 F.3d 964, 969 (9th Cir. 2010), cert. denied, 131 S. Ct. 3023 (2011) ("We cannot infer from a decision on the merits, or a decision without explanation, that the California court concluded that the petition was timely.") (citation omitted).

In California, a petition is timely if filed within a "reasonable time" after the petitioner learns of the grounds for relief. Carey v. Saffold, 536 U.S. at 235 (citations omitted). In Evans v. Chavis, the petitioner delayed over three years before filing his state court habeas petition, and failed to provide justification for six months of the delay. Evans v. Chavis, 546 U.S. at 192, 201. The Supreme Court deemed the petition untimely, finding "no authority suggesting, . . . [or] any convincing reason to believe, that California would consider an unjustified or unexplained 6-month filing delay 'reasonable.'" Id. at 201. Here, Petitioner's delay far exceeded the delay deemed unreasonable in Evans v. Chavis. Petitioner is not entitled to tolling between the Superior Court's denial on April 25, 2002, and the constructive filing of the California Court of Appeal petition in case number B224816 on May 13, 2010. See also Roberts v. Marshall, 627 F.3d 768, 771 n.4 (9th Cir. 2010), cert. denied, 132 S. Ct. 286 (2011) ("gap" of 19 months did not warrant gap tolling).

///

Hence, the statute of limitations expired on April 25, 2003, one year after statutory tolling ended. Petitioner's subsequently-filed state court petitions cannot revive the expired statute. See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir.), cert. denied, 540 U.S. 924 (2003) ("section 2244(d) does not permit the reinitiation of the limitations period that has ended before the state petition was filed"); Jiminez v. Rice, 276 F.3d 478, 482 (9th Cir. 2001), cert. denied, 538 U.S. 949 (2003) (filing of state habeas petition "well after the AEDPA statute of limitations ended" does not affect the limitations bar); Webster v. Moore, 199 F.3d 1256, 1259 (11th Cir.), cert. denied, 531 U.S. 991 (2000) ("[a] state-court petition . . . that is filed following the expiration of the limitations period cannot toll that period because there is no period remaining to be tolled"); see also Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999), cert. denied, 529 U.S. 1104 (2000) (AEDPA statute of limitations is not tolled between the conviction's finality and the filing of the first state collateral challenge). Absent equitable tolling, the present Petition is untimely.

AEDPA's statute of limitations is subject to equitable tolling "in appropriate cases." Holland v. Florida, 130 S. Ct. 2549, 2560 (2010) (citations omitted). "[A] 'petitioner' is entitled to 'equitable tolling' only if he shows '(1) that he has been pursuing his claims diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." Id. at 2562 (quoting Pace v. DiGuglielmo, 544 U.S. at 418); see also Lawrence v. Florida, 549 U.S. 327, 336 (2007). The threshold necessary to trigger equitable tolling "is very high, lest the exceptions swallow the

rule." Waldron-Ramsey v. Pacholke, 556 F.3d 1008, 1011 (9th Cir.), cert. denied, 130 S. Ct. 244 (2009) (citations and internal quotations omitted). Petitioner bears the burden to show equitable tolling. See Zepeda v. Walker, 581 F.3d 1013, 1019 (9th Cir. 2009). Petitioner must show that the alleged "extraordinary circumstances" were the "cause of [the] untimeliness." Roy v. Lampert, 465 F.3d 964, 969 (9th Cir. 2006), cert. denied, 549 U.S. 1317 (2007) (brackets in original; quoting Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003)). Petitioner must show that an "external force" caused the untimeliness, rather than "oversight, miscalculation or negligence." Waldron-Ramsey v. Pacholke, 556 F.3d at 1011 (citation and internal quotations omitted).

Petitioner contends that he does not read or write English, and that the materials in the prison law library are in English (Petition, p. 13). Petitioner allegedly "speaks no English, has little in the way of outside resources, and has exercised, to the best of his limitations, due diligence" (Pet. Mem., p. 16).

Petitioner's alleged ignorance of the law, indigence and lack of legal sophistication cannot justify equitable tolling. See Waldron-Ramsey v. Pacholke, 556 F.3d at 1013 n.4 ("we have held that a pro se petitioner's confusion or ignorance of the law is not, itself, a circumstance warranting equitable tolling") (citation omitted); Raspberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006) ("we now join our sister circuits and hold that a pro se petitioner's lack of legal sophistication is not, by itself, an extraordinary circumstance warranting equitable tolling"); Jimenez v. Hartley, 2010 WL 5598521,

at *5 (C.D. Cal. Dec. 6, 2010), adopted, 2011 WL 164536 (C.D. Cal. Jan. 13, 2011) (allegations that petitioner was uneducated, illiterate and indigent insufficient); Oetting v. Henry, 2005 WL 1555941 at *3 (E.D. Cal. June 24, 2005), adopted, 2005 WL 2000977 (E.D. Cal. Aug. 18, 2005) ("Neither an inmate's ignorance of the law nor pro se status are the sort of extraordinary events upon which a finding of equitable tolling may be based"; cf. Hughes v. Idaho State Bd. of Corrections, 800 F.2d 905, 909 (9th Cir. 1986) (illiteracy and pro se status insufficient cause to avoid procedural default).

Petitioner's claimed lack of English proficiency and lack of Spanish language law library materials also do not warrant equitable tolling under the circumstances presented. In Mendoza v. Carey, 449 F.3d 1065 (9th Cir. 2006), the Ninth Circuit held that an alleged combination of a prison law library's lack of Spanish-language legal materials and a Spanish-speaking prisoner's inability to obtain translation assistance before the expiration of the statute of limitations might warrant equitable tolling. Id. at 1068-69. In that case, the Spanish-speaking petitioner alleged that the prison law library contained only English-language materials and provided only English-speaking clerks and librarians, and that the petitioner obtained the assistance of a bilingual inmate only after the statute of limitations had expired. Id. at 1069. The Ninth Circuit held that, in order to show an entitlement to equitable tolling, a non-English speaking prisoner "must, at a minimum, demonstrate that during the running of the AEDPA time limitation, he was unable, despite diligent efforts, to procure either legal materials in his own language or translation assistance from an inmate, library personnel,

or other source." Id. at 1070 (footnote omitted). "[A] petitioner who demonstrates proficiency in English or who has the assistance of a translator would be barred from equitable relief." Id. (citations omitted).

Under these standards, Petitioner is not entitled to equitable tolling. Petitioner's alleged inability to speak English is belied by Petitioner's evident ability to run a business in Los Angeles before the shooting and to live for eighteen years with his family in New York before his apprehension (see Respondent's Ex. 5, pp. 11-12). Additionally, in the Superior Court's April 22, 2002 decision following an evidentiary hearing, the Superior Court credited the testimony of Petitioner's trial counsel, and rejected Petitioner's claim that counsel erred in failing to move to suppress Petitioner's taped statement to police (Respondent's Lodgment 7, pp. 55-61). Among other things, trial counsel had testified at the hearing that, although counsel interviewed Petitioner using an interpreter, Petitioner "had some basic knowledge of English" (id., p. 48).

Furthermore, and in any event, Petitioner's alleged English deficiencies and alleged lack of Spanish language legal materials did not prevent Petitioner from filing his pro se state court habeas petitions. Petitioner has provided no reason why he could not have obtained, within the limitations period, "translation assistance from an inmate, library personnel, or other source," assuming Petitioner needed any assistance. Mendoza v. Carey, 449 F.3d at 1070. Petitioner has alleged no facts showing Petitioner exercised "diligent efforts" either to obtain legal materials in Spanish or to obtain

assistance from another inmate, library personnel, or another source. See United States v. Aguirre-Ganceda, 592 F.3d 1043, (9th Cir.), cert. denied, 130 S. Ct. 3444 (2010) (rejecting equitable tolling where petitioner with alleged English proficiency failed to show diligence in obtaining legal materials in his language or other assistance).

In sum, Petitioner has not shown an entitlement to equitable tolling.[12] The Petition is untimely.[13]

///

///

///

///

///

///

///

---

[12] Although Petitioner faults trial counsel for failing to argue, at sentencing, the alleged mitigating circumstance of Petitioner's supposed mental impairment, Petitioner does not assert any mental difficulty as a basis for equitable tolling. In any event, the record does not support any such basis for equitable tolling. Petitioner has not shown that he suffered from a mental impairment so severe that Petitioner was unable rationally or factually personally to understand the need to file a timely federal petition, or that Petitioner's mental state rendered him unable personally to prepare a timely federal petition. See Bills v. Clark, 628 F.3d 1092, 1099-1100 (9th Cir. 2010). Nor has Petitioner shown that he exercised diligence in pursuing his claim but that any alleged mental impairment made it impossible for Petitioner to meet the filing deadline under the totality of the circumstances, including reasonably available access to assistance. See id. at 1110.

[13] In light of this conclusion, the Court need not, and does not, reach the procedural default issue raised by Respondent.

RECOMMENDATION

For the reasons discussed above, IT IS RECOMMENDED that the Court issue an order: (1) accepting and adopting this Report and Recommendation; and (2) denying and dismissing the Petition with prejudice.

DATED: October 26, 2012.

/S/
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

If the District Judge enters judgment adverse to Petitioner, the District Judge will, at the same time, issue or deny a certificate of appealability. Within twenty (20) days of the filing of this Report and Recommendation, the parties may file written arguments regarding whether a certificate of appealability should issue.