Donta C Green v. J. Soto Doc. 13 Att. 1

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DONTA C. GREEN,	)	NO. CV 15-5775-VBF(E)
Petitioner,	)	
v.	)	REPORT AND RECOMMENDATION OF
J. SOTO,	)	UNITED STATES MAGISTRATE JUDGE
Respondent.	)	

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

PROCEEDINGS

Petitioner filed a "Petition for Writ of Habeas Corpus By a Person in State Custody" on July 30, 2015. The Petition challenges the sufficiency of the evidence to support Petitioner's January 14, 2011 prison disciplinary conviction for possession of a controlled

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substance for sales and distribution. Narcotics and other related items were found in Petitioner's shared cell. Petitioner essentially contends that, under In re Rothwell, 164 Cal. App. 4th 160, 78 Cal. Rptr. 3d 723 (2008) ("Rothwell"), contraband in the possession of another can be deemed to be within the constructive possession of the defendant only where the defendant maintains control or the right to control the contraband (see Petition, ECF Dkt. No. 1, p. 6).[1]

Respondent filed a Motion to Dismiss on August 28, 2015, asserting that the Petition is untimely and procedurally defaulted. Petitioner filed an Opposition to the Motion to Dismiss on September 21, 2015.

BACKGROUND

On November 17, 2010, the Investigative Services Unit at the California Substance Abuse Center and State Prison conducted targeted canine cell searches of suspected drug dealers (Respondent's Ex. 1; Petition, Exhibits, ECF Dkt. 1, p. 34). A dog alerted to the presence of an odor of contraband in the upper bunk area in cell 212, a cell occupied by Petitioner and Petitioner's cellmate Lopez (Respondent's Ex. 1; Petition, Exhibits, ECF Dkt. 1, p. 34). A search of the cell revealed two large bindles lying under a blanket on the mattress of the top bunk (Respondent's Ex. 1; Petition, Exhibits, ECF Dkt. 1, p. 34). The combined weight of the bindles was 62.6 grams (Respondent's Ex. 1; Petition, Exhibits, ECF Dkt. 1, p. 36). The two large bindles

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[1] Because the Petition and attachments do not bear consecutive page numbers, the Court cites to the ECF pagination.

contained 45 smaller bindles, which tested positive for methamphetamine and heroin (Respondent's Lodgment 1; Petition, Exhibits, ECF Dkt. 1, p. 34).

A subsequent search revealed three additional bindles hidden inside the upper bunk mattress (Petition, Exhibits, ECF Dkt. 1, pp. 35-36). A shelf on a shelving unit in the cell held a peanut butter jar containing a cell phone and cell phone charger (id., pp. 36, 41).

Petitioner declined to make a statement to the investigative employee, but provided a written list of questions "for persons involved in his defense" (id., p. 43). Inmate Lopez admitted to the investigative employee that the narcotics were found on Lopez' bunk but denied prior knowledge that the narcotics were in the cell (id.).

At the hearing on January 14, 2011, Petitioner pled not guilty and stated: "I had no knowledge that it was in the cell. It wasn't mine." (id., p. 46). Inmate Lopez then stated: "The stuff was mine, he had no knowledge of it or that I had it. I received it on 11-06-2010. I bagged it up while he was in the dayroom. I was going to put it away the next day, but they came in." (id.).

The hearing officer found Petitioner guilty, based on, among other things, the reporting employee's Rules Violation Report, a Crime Incident Report, toxicology reports, photographic evidence, the amount of the heroin and methamphetamine found, and Petitioner's failure to submit evidence to refute or mitigate the charge (id., pp. 48-50). Petitioner was assessed a 180-day credit loss (id., p. 50).

Petitioner submitted an administrative appeal of his conviction (see Respondent's Ex. 2). On August 2, 2011, the appeal was denied at the final, director's level of review (id.). See Cal. Code of Regs., tit. 15, § 3084.7 (describing levels of administrative review in state prisons).

On October 14, 2011, Petitioner filed a habeas corpus petition in the Kings County Superior Court, which that court denied on December 15, 2011, on the ground that "some evidence" existed to support Petitioner's disciplinary conviction under the standard set forth in Superintendent, Massachusetts Correctional, Inst. v. Hill, 472 U.S. 445, 457 (1985) (Respondent's Ex. 3; Petition, Exhibits, ECF Dkt 1, p. 32). On April 18, 2013, Petitioner filed a habeas corpus petition in the California Court of Appeal, which that court denied on May 23, 2013, likewise finding "some evidence" to support the conviction (Respondent's Ex. 4; Petition, Exhibits, ECF Dkt. 1, p. 31).

On September 16, 2014, Petitioner filed a second habeas corpus petition in the Kings County Superior Court (Petition, Exhibits, ECF

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Dkt. 1, pp. 16-17).[2] The Superior Court denied the petition on November 24, 2014, as repetitive and untimely (id.). The court also noted that Rothwell was not "new law" sufficient to require reconsideration of the court's prior denial of Petitioner's request for habeas relief (id.).

On December 16, 2014, Petitioner filed a second habeas corpus petition in the California Court of Appeal, which that court denied on February 27, 2015 (Petition, Exhibits, ECF Dkt. 1, p. 19). The Court of Appeal observed that Rothwell did not present new law and did not demonstrate that the disciplinary conviction was unsupported by "some evidence" (id.).

On March 23, 2015, Petitioner filed a habeas corpus petition in the California Supreme Court, which that court denied on July 8, 2015, with citations to In re Robbins, 18 Cal. 4th 770, 77 Cal. Rptr. 2d 153, 959 P.2d 311 (1998), and In re Dexter, 25 Cal. 3d 921, 160 Cal. Rptr. 118, 120, 603 P.2d 35 (1979) ("Dexter") (Respondent's Ex. 5; Petition, Exhibits, ECF Dkt 1, p. 20). The citation to In re Robbins signified that the Supreme Court deemed the petition to be untimely. See Walker v. Martin, 562 U.S. 307, 310 (2011); Lee v. Jacquez, 788

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[2] With one exception, the record does not contain copies of any of Petitioner's state habeas corpus petitions. Petitioner attaches to the Petition a copy of a habeas petition directed to the Kings County Superior Court, but this petition does not bear a file stamp, a case number, a signature or a signature date (see Petition, Exhibits, ECF Dkt. 1, pp. 21-30). However, this petition mentions the denials of Petitioner's 2011 Kings County Superior Court petition and his first Court of Appeal petition, so possibly it is a copy of Petitioner's second Superior Court petition.

F.3d 1124, 1129 (9th Cir. 2015); Gaston v. Palmer, 417 F.3d 1030, 1036-37 (9th Cir. 2005), modified, 447 F.3d 1165 (9th Cir. 2006), cert. denied, 549 U.S. 1134 (2007); Bennett v. Mueller, 322 F.3d 573, 578-79 (9th Cir.), cert. denied, 540 U.S. 938 (2003). Dexter holds that, as a general rule, a litigant may not obtain judicial relief unless the litigant has exhausted available state administrative remedies. Dexter, 25 Cal. 3d at 925.

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:

> (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 –
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> (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;
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> (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.

Section 2244(d)(1)(D), not section 2244(d)(1)(A), generally governs the accrual of claims challenging a prison disciplinary decision. See Shelby v. Bartlett, 391 F.3d 1061, 1066 (9th Cir. 2004). Under section 2244(d)(1)(D), a claim challenging a prison disciplinary decision typically accrues no later than the conclusion of the administrative appeal. Id.; Tidwell v. Martel, 2013 WL 856734, at *2 (E.D. Cal. Mar. 6, 2013).

Petitioner asserts, however, that the limitations period did not commence until Petitioner learned of the Rothwell decision, (although Petitioner fails to allege when he assertedly acquired that knowledge). Under subsection D, 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." Ford v. Gonzalez, 683 F.3d 1230, 1235 (9th Cir.), cert. denied, 133 S. Ct. 769 (2012); Hasan v. Galaza, 254 F.3d 1150, 1154 n.3 (9th Cir. 2001); see also United States v. Pollard, 416 F.3d 48, 55 (D.D.C. 2005), cert. denied, 547 U.S. 1021 (2006) (habeas petitioner's alleged "ignorance of the law until an illuminating conversation with an attorney or fellow prisoner" does not satisfy the requirements of section 2244(d)(1)(D)). Petitioner knew or should have known the "vital facts" supporting his challenge to his disciplinary conviction no later than the date of the final administrative denial, August 2, 2011. The running of the statute of limitations does not await the issuance of judicial decisions that might help would-be petitioners recognize the legal significance of particular predicate facts. See Shannon v. Newland, 410 F.3d 1083, 1089 (9th Cir. 2005), cert. denied, 546 U.S. 1171 (2006) (intervening state court decision establishing abstract proposition of law arguably helpful to petitioner does not constitute a "factual predicate" under section 2244(d)(1)(D)).[3]

Accordingly, the limitations period in the present case commenced running no later than August 3, 2011 (the day after the conclusion of Petitioner's administrative appeal), unless subsection B or C of 28

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[3] Furthermore, as Rothwell itself indicates, the "constructive possession" rule upon which Petitioner purports to rely was well established in California at the time the Rothwell Court issued its decision in 2008. See Rothwell, 164 Cal. App. 4th at 170-71 (citing cases). In denying Petitioner habeas relief, both the Superior Court and the Court of Appeal stated that Rothwell did not establish any new rule of law in California.

U.S.C. section 2244(d)(1) furnishes a later accrual date. See Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir.), cert. denied, 534 U.S. 978 (2001).

Petitioner asserts an entitlement to deferred accrual pursuant to subsection B, arguing that state-created impediments purportedly prevented Petitioner from filing a federal habeas petition. Petitioner contends that the prison at which he is incarcerated does not assist inmates, and that the law library has only six computers and can hold only six people, with room for another twelve people in "overflow" (Opposition, pp. 1-2). Petitioner also appears to fault the Superior Court for failing to advise Petitioner of the existence of the Rothwell case (id.). Petitioner contends that he eventually received help from another inmate, and again contends that the limitations period purportedly did not begin to run until Petitioner assertedly became aware of the Rothwell case (id.).

To warrant delayed accrual on account of a "state impediment," Petitioner must show that 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). Petitioner also must show a causal connection between the unlawful impediment and his or her failure to file a timely petition. Bryant v. Arizona Atty. General, 499 F.3d 1056, 1059-60 (9th Cir. 2007) (citations omitted). Petitioner "must satisfy a far higher bar than that for equitable tolling." Ramirez v. Yates, 571 F.3d at 1000. A petitioner is entitled to delayed accrual only if the impediment "altogether prevented him from presenting his claims in any form, to

any court." Id. at 1001 (emphasis original; citation omitted).

Subsection B conceivably might apply if a prison law library were so inadequate as not even to include the code section containing the statute of limitations itself. See Whalem/Hunt v. Early, 233 F.3d 1146, 1148 (9th Cir. 2002). However, Petitioner has not shown that the alleged limited research conditions in the law library or alleged lack of legal assistance prevented Petitioner from filing a timely federal petition. To the contrary, Petitioner was able to prepare and file his first Superior Court petition within approximately two and a half months of the final administrative denial. Although the record does not contain that Superior Court petition, it is evident from the Superior Court's order denying that petition that Petitioner challenged the sufficiency of the evidence to support his disciplinary conviction. Here, Petitioner's allegations of inadequate library resources or assistance plainly do not show an impediment which "altogether prevented him from presenting his claims in any form, to any court." See Ramirez v. Yates, 571 F.3d at 1001. Nor did any pre-Rothwell California case law on the issue of "constructive possession" constitute an "impediment" which Rothwell allegedly removed. See Shannon v. Newland, 410 F.3d at 1087 (under section 2244(d)(1)(B), state courts' previous interpretations of state law adverse to petitioner did not constitute "impediment" removed by later, more favorable decision).

Subsection C of section 2244(d)(1) also does not furnish a later accrual date. 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)).

Accordingly, the statute of limitations began running on August 3, 2011. See Patterson v. Stewart, 251 F.3d at 1246. Petitioner constructively filed the present Petition nearly four years later, on July 29, 2015.[4] Absent sufficient tolling or an equitable exception, 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." The statute of limitations is not tolled between the conviction's finality and the filing of Petitioner's first state habeas petition. See Nino v. Galaza, 183 F.3d 1003, 1006 (9th

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[4] The Petition does not bear a signature date or a proof of service. The Court assumes arguendo that Petitioner constructively filed the Petition on the date he lodged it with this Court, July 29, 2015.

Cir. 1999), cert. denied, 529 U.S. 1104 (2000). Here, the limitations period ran until October 14, 2011, when Petitioner filed his first Superior Court petition, and was tolled from that date until December 15, 2011, when the Superior Court denied that petition. At that time, less than 300 days remained in the limitations period. Petitioner did not file his next state habeas petition until April 18, 2013, approximately a year and four months later.

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. 408, 412-13 (2005); 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).

Here, the Court of Appeal denied Petitioner's first habeas petition filed in that court without indicating whether the petition was untimely. Where a state court denies a collateral application without a "clear indication" that the application 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 habeas 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 California Supreme Court habeas petition, and failed to provide justification for six months of the delay. Evans v. Chavis, 546 U.S. at 192, 201. The United States 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. Because California courts have given "scant guidance" on the issue, courts in this circuit apply a "thirty-to-sixty day benchmark" to determine the reasonableness of a delay in filing a subsequent state petition. Stewart v. Cate, 757 F.3d 929, 935 (9th Cir.), cert. denied, 135 S. Ct. 341 (2014) (citation, internal quotations and footnote omitted).

In the present case, Petitioner waited approximately one year and four months following the Superior Court's denial before filing a petition in the California Court of Appeal. The length of this unjustified delay well exceeds those gaps the Ninth Circuit has held to have been unreasonable. See, e.g., Stewart v. Cate, 757 F.3d at

935-36 (no gap tolling for 100 day delay; benchmark for reasonableness of such delays remains 30-60 days); Stancle v. Clay, 692 F.3d 948, 956 (9th Cir. 2012), cert. denied, 133 S. Ct. 1465 (2013) (82 days); Velasquez v. Kirkland, 639 F.3d 964, 968 (9th Cir.), cert. denied, 132 S. Ct. 554 (2011) (81 days); Chaffer v. Prosper, 592 F.3d 1046, 1048 (9th Cir. 2010) (101 days). In accordance with these controlling authorities, Petitioner is not entitled to gap tolling between the Superior Court's December 15, 2011 denial and the April 18, 2013 filing of Petitioner's first habeas corpus petition in the California Court of Appeal. Accordingly, by the time Petitioner filed his April 18, 2013 Court of Appeal petition, the limitations period already had expired.

Petitioner's state court habeas petitions belatedly filed after the expiration of the limitations period cannot revive or otherwise toll the 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"). Hence, absent equitable tolling or an equitable exception to the statute of limitations, the present Petition is untimely.

The statute of limitations is subject to equitable tolling "in appropriate cases." Holland v. Florida, 560 U.S. 631, 645 (2010). "[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 649 (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, 558 U.S. 897 (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 also 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's alleged lack of legal sophistication, his alleged ignorance of the law and his alleged need to rely on assistance from a fellow inmate do not constitute "extraordinary circumstances" meriting equitable tolling. See Chaffer v. Prosper, 592 F.3d at 1049 (reliance on jailhouse helpers "who were transferred or too busy to attend to [petitioner's] petitions" did not justify equitable tolling); 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); Rasberry 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"); Turner v. Johnson, 177 F.3d 390, 392 (5th Cir.), cert. denied, 528 U.S. 1007 (1999) ("[N]either a plaintiff's unfamiliarity with the legal process nor his lack of representation during the applicable filing period merits equitable tolling. . . . It is irrelevant whether the unfamiliarity is due to illiteracy or any other reason"); 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"; see also Loza v. Soto, 2014 WL 1271204, at *6 (C.D. Cal. Mar. 26, 2014) ("To allow equitable tolling based on the fact that most prisoners do not have legal knowledge or training would create a loophole that would negate the intent and effect of the AEDPA limitation period."); 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).

Nor do the allegedly limited library resources or Petitioner's alleged confinement in administrative segregation for an unspecified period of time show any entitlement to equitable tolling. See, e.g.,

United States v. Lemusu, 575 Fed. App'x 805, 806 (9th Cir. 2014) (placement in administrative segregation is not an "extraordinary circumstance" warranting equitable tolling) (citing Pace v. DiGuglielmo, 544 U.S. at 418); Soto v. Lopez, 575 Fed. App'x 740 (9th Cir.), cert. denied, 135 S. Ct. 376 (2014) (no entitlement to equitable tolling where prisoner alleged he lacked law library access and his legal materials while he was in administrative segregation and during a prison transfer; petitioner had not shown that such "ordinary prison limitations" were "extraordinary circumstance[s] beyond his control preventing him from timely filing a federal habeas petition") (citation omitted); Rhodes v. Kramer, 451 Fed. App'x 697, 698 (9th Cir. 2011) (limited library access and lockdowns did not merit equitable tolling); Ramirez v. Yates, 571 F.3d 993, 998 (9th Cir. 2009) (ordinary prison limitations on library access due to confinement in administrative segregation insufficient to show "extraordinary circumstances").

Petitioner also contends he purportedly is a "mental health patient" who began participating in the "Mental Health Program" before he filed his "second state writ" (Opposition, pp. 1-2). In Bills v. Clark, 628 F.3d 1092, 1099-1100 (9th Cir. 2010), the Ninth Circuit held that proof of a severe mental impairment can qualify for equitable tolling where the petitioner meets a two-part test:

> (1) *First*, a petitioner must show his [or her] mental impairment was an "extraordinary circumstance" beyond his [or her] control [citation], by demonstrating the impairment was so severe that either

(a) petitioner was unable rationally or factually to personally understand the need to timely file, or

(b) petitioner's mental state rendered him [or her] unable personally to prepare a habeas petition and effectuate its filing.

(2) *Second*, the petitioner must show diligence in pursuing the claims to the extent he [or she] could understand them, but that the mental impairment made it impossible to meet the filing deadline under the totality of the circumstances, including reasonably available access to assistance. [citation].

In the present case, Petitioner has not demonstrated the existence of any severe mental impairment which rendered it impossible for him to file a timely federal petition. Petitioner's conclusory statement that he is a "mental health patient" falls far short of establishing the requirements for tolling on the ground of mental disability set forth in Bills v. Clark. Nothing in the record supports the conclusion that Petitioner suffered from any mental impairment rendering it impossible for him to file a timely federal petition. The Rules Violation Report stated that, at the time of the Report, Petitioner was "NOT a participant in the Mental Health Services Delivery System at any level of care, and he did not display any bizarre, unusual, or uncharacteristic behavior at the time of the rules violation" (Petition, Exhibits, ECF Dkt. 1, p. 41) (original emphasis). The Rules Violation Report stated Petitioner's TABE score

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was 10.5 (id.).[5] The report of the disciplinary hearing stated that Petitioner was "not currently a participant in the Mental Health Program at any level of care, nor did he exhibit any bizarre behavior at the time of the Rules Violation Report, and therefore, a Mental Health Assessment request was not completed" (id., p. 45). The hearing officer assertedly determined that Petitioner was capable of understanding the proceedings (id.). Furthermore, nothing in any of Petitioner's state habeas petitions remotely suggests that Petitioner was suffering from any mental impairment so severe that Petitioner was "unable rationally or factually to personally understand the need to timely file" or that his mental state "rendered him unable personally to prepare a habeas petition and effectuate its filing." See Bills v. Clark, 628 F.3d at 1099-1100; see also Alva v. Busby, 588 Fed. App'x 621, 622 (9th Cir. 2014) (equitable tolling based on Bills v. Clark unavailable where the petitioner "does not claim that he did not understand the need to file timely, or that his mental condition made it impossible for him to prepare the petition personally. . . . He does not claim that he personally was unable to prepare the petition in a timely manner for any reason aside from his lack of understanding of the law"); Davis v. Mule Creek Prison, 2015 WL 4342854, at *1 (C.D. Cal. July 10, 2015) ("petitioner's conclusory statement that he suffers from mental illness and receives mental health care while incarcerated is insufficient to demonstrate that petitioner is entitled to equitable tolling").

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[5] "The TABE (Tests of Adult Basic Education) scores reflect an inmate's educational achievement level and are expressed in numbers reflecting grade level." In re Roderick, 154 Cal. App. 4th 242, 253 n.10, 65 Cal. Rptr. 3d 16 (2007).

Although it is unclear whether Petitioner argues that his purported actual innocence excuses his failure to file a timely federal petition, in the Petition itself Petitioner does assert a freestanding claim of alleged actual innocence (see Petition, ECF Dkt. 1, at p. 5). "[A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . [or] expiration of the statute of limitations." McQuiggin v. Perkins, 133 S. Ct. 1924, 1928 (2013); see also Lee v. Lampert, 653 F.3d 929, 934-37 (9th Cir. 2011) (en banc). However, "tenable actual-innocence gateway pleas are rare." McQuiggin v. Perkins, 133 S. Ct. at 1928. The Court must apply the standards for gateway actual innocence claims set forth in Schlup v. Delo, 513 U.S. 298 (1995) ("Schlup"). See McQuiggin v. Perkins, 133 S. Ct. at 1928. "[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." Id. (quoting Schlup, 513 U.S. at 329).

In order to make a credible claim of actual innocence, a petitioner must "support his allegations of constitutional error with new reliable evidence - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence - that was not presented at trial." Schlup, 513 U.S. at 324; see also Griffin v. Johnson, 350 F.3d 956, 963 (9th Cir. 2003), cert. denied, 541 U.S. 998 (2004) (holding that "habeas petitioners may pass Schlup's test by offering 'newly presented' evidence of actual innocence"); Shumway v. Payne, 223 F.3d 982, 990 (9th Cir. 2000) ("[A] claim of actual innocence must be based on reliable evidence not

presented at trial.”).

Petitioner offers no new reliable evidence showing his purported actual innocence. Therefore, Petitioner has not satisfied the exacting Schlup standard.

In sum, Petitioner is not entitled to equitable tolling or to the application of the “actual innocence” exception to the habeas statute of limitations. The Petition is untimely.

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 6, 2015.

/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.