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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

GABRIEL FAVELA,)	NO. CV 16-8896-JAK(E)
)	
Petitioner,)	
)	
v.)	REPORT AND RECOMMENDATION OF
)	
RAYMOND MADDEN, Warden,)	UNITED STATES MAGISTRATE JUDGE
)	
)	
Respondent.)	
_____)	

This Report and Recommendation is submitted to the Honorable John A. Kronstadt, 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 December 1, 2016, Petitioner filed a "Petition for Writ of Habeas Corpus By a Person in State Custody," which bears a signature and service date of October 30, 2016. The Petition asserts claims arising out of Petitioner's 2013 nolo contendere plea and sentence in

1 Los Angeles Superior Court. On January 27, 2017, Respondent filed an
2 Answer, asserting that the Petition is untimely and procedurally
3 defaulted. On March 3, 2017, Petitioner filed a Reply.
4

5 BACKGROUND

6

7 An Amended Information charged Petitioner, his brother Noe Favela
8 Salazar and two other individuals with two counts of conspiracy to
9 commit the crime of dissuading a witness from testifying in violation
10 of California Penal Code sections 182(a)(1) [conspiracy] and 136.1
11 [dissuading a witness] (Counts 2 and 3) (Petition, Exhibits, ECF Dkt.
12 No. 1, pp. 31-37).¹ The Amended Information further alleged that
13 these offenses were committed for the benefit of, at the direction of
14 or in association with a criminal street gang within the meaning of
15 California Penal Code section 186.22(b)(4) (*id.*).² In pertinent part,
16 section 186.22(b)(4) provides that a person convicted of certain
17 felonies coupled with a street gang enhancement shall receive an
18 indeterminate life term with a minimum term calculated as the greater
19 of: (1) the term determined pursuant to California Penal Code section
20 1170 for the underlying conviction, including any enhancement; or
21 (2) a term of seven years if the felony is "threats to victims and
22 witnesses, as defined in [California Penal Code] Section 136.1."
23 California Penal Code section 186.22(b)(5) states that, except as
24

25 ¹ Because the Petition and attached exhibits do not bear
26 consecutive page numbers, the Court uses the ECF pagination.

27 ² The Amended Information also charged Noe Favela Salazar
28 with the attempted wilful, deliberate and premeditated murder of
one of the witnesses (*id.* p. 33).

1 provided in section 186.22(b)(4), "any person who violates this
2 subdivision in the commission of a felony punishable by imprisonment
3 in the state prison for life shall not be paroled until a minimum of
4 15 calendar years have [sic] been served."
5

6 On September 11, 2012, Petitioner pled nolo contendere to one
7 count of conspiracy in violation of California Penal Code section
8 182(a)(1), and admitted the allegation that Petitioner committed the
9 crime for the benefit of, at the direction of or in association with a
10 criminal street gang within the meaning of California Penal Code
11 section 186.22(b)(1)(C) (Respondent's Lodgment 1, pp. 3-4).³ On
12 April 25, 2013, Petitioner received a sentence of twelve years,
13 consisting of the two-year midterm on the conspiracy charge plus a
14 mandatory ten-year enhancement on the gang allegation pursuant to
15 California Penal Code section 186.22(b)(1)(C) (Respondent's Lodgment
16 1, pp. 6-7).
17

18 Petitioner did not appeal. On January 11, 2016, Petitioner filed
19 a habeas corpus petition in the Los Angeles County Superior Court
20 (Respondent's Lodgment 1, p. 7).⁴ The Superior Court denied the
21 petition in a written order on March 1, 2016 (Respondent's Lodgment 1,
22 pp. 7-8). The Superior Court ruled, inter alia, that: (1) Petitioner
23

24 ³ Section 186.22(b)(1)(C) provides for a ten-year
25 sentence enhancement if the felony is a violent felony as defined
26 in California Penal Code section 667.5(c). Section 667.5(c)
27 defines "violent felony" to include "[t]hreats to victims or
witnesses, as defined in Section 136.1, which would constitute a
felony violation of Section 186.22."

28 ⁴ This petition is not in the record.

1 had failed to justify the delay in filing the petition; (2) the
2 petition raised claims which could have been raised on appeal, but
3 were not; (3) Petitioner's claim of ineffective assistance of trial
4 counsel lacked merit; (4) Petitioner's challenge to his plea appeared
5 to arise from the appellate court decision following the trial,
6 conviction and sentencing of Petitioner's brother, in which the
7 appellate court remanded the brother's case for resentencing;⁵ and
8 (5) in Petitioner's case, the trial court had advised Petitioner that
9 the maximum term was "life," which was "a correct statement of the law
10 given the pleadings that were pending against petitioner"
11 (Respondent's Lodgment 1, p. 8). The court added that Petitioner
12 could not rely on alleged errors in his brother's trial (id.).

13
14 Petitioner filed a habeas corpus petition in the California Court
15 of Appeal on April 28, 2016 (Respondent's Lodgment 2). The Court of
16 Appeal denied the petition in a brief order on May 10, 2016
17 (Respondent's Lodgment 3). The Court of Appeal indicated, among other
18 things, that: (1) the petition was "procedurally defaulted" due to
19 Petitioner's "inadequately explained delay in seeking relief";

21 ⁵ See People v. Salazar, 2014 WL 1303223, at *8 (Cal.
22 App. Apr. 1, 2014) (holding, in pertinent part, that Salazar's
23 life sentences on the conspiracy convictions were unauthorized
24 because: (1) the underlying crime of conspiracy to dissuade a
25 witness did not carry a term of fifteen years to life so as to
26 render section 186.22(b)(5) applicable; and (2) a sentence of
27 seven years to life under section 186.22(b)(4)(C) could only be
28 imposed if the jury found the defendant made either an implied or
express threat of force, and Salazar's jury had made no such
finding). In Petitioner's case, Petitioner's nolo contendere
plea obviated the need for a trial and eliminated the risk that a
jury would make a finding concerning Petitioner's use of an
implied or express threat of force.

1 (2) Petitioner's plea estopped him from challenging his sentence; and
2 (3) Petitioner had failed to present a prima facie case of ineffective
3 assistance of counsel (Respondent's Lodgment 3). The Court of Appeal
4 also denied Petitioner's request to file a belated notice of appeal
5 and request for a certificate of probable cause (id.).

6
7 Petitioner filed a habeas corpus petition in the California
8 Supreme Court on July 21, 2016 (Respondent's Lodgment 4). The
9 California Supreme Court denied the Petition summarily on
10 September 21, 2016 (Respondent's Lodgment 5).

11
12 **PETITIONER'S CONTENTIONS**

13
14 Petitioner contends:⁶

15
16 1. Petitioner's plea allegedly was the product of a "mutual
17 mistake of law or fact" because the prosecutor and Petitioner's
18 counsel assertedly advised Petitioner that Petitioner faced two
19 consecutive life sentences on Counts 2 and 3; the prosecutor allegedly
20 advised Petitioner that Petitioner faced consecutive sentences of
21 fifteen years to life, while Petitioner's counsel allegedly advised
22 Petitioner that Petitioner faced consecutive sentences of seven years
23 to life; the trial judge allegedly should have known that the plea
24 bargain assertedly was not knowing and intelligent and the trial judge
25 allegedly had a sua sponte duty to advise Petitioner of Petitioner's

26
27 _____
28 ⁶ The form Petition incorporates the arguments contained
in Petitioner's California Supreme Court habeas petition,
attached to the Petition.

1 appeal rights (Petition, Ground One; Traverse, supporting memorandum,
2 pp. 8-9);

3
4 2. Petitioner's trial counsel allegedly rendered ineffective
5 assistance by assertedly: (a) failing to advise Petitioner of his
6 right to appeal;⁷ and (b) failing to research the proposed plea and to
7 advise Petitioner that Petitioner allegedly was not facing a life
8 sentence on Count 2 or Count 3, and hence that the "guilty plea was
9 defective ab initio" (Petition, Ground Two);⁸ and

10
11 3. The prosecutor allegedly violated due process by failing to
12 inform Petitioner that Petitioner purportedly was not facing any life
13 sentence in the case (Petition, Ground Three).

14 15 **DISCUSSION**

16
17 The "Antiterrorism and Effective Death Penalty Act of 1996"
18 ("AEDPA"), signed into law April 24, 1996, amended 28 U.S.C. section
19 2244 to provide a one-year statute of limitations governing habeas
20 petitions filed by state prisoners:

21
22

23 ⁷ Under California law, in order to appeal a judgment
24 based on a plea of guilty or nolo contendere, a defendant
25 generally must file, along with a notice of appeal, a statement
seeking the issuance of a certificate of probable cause. See
Cal. Penal § 1237.5; Cal. Ct. R. 8.304(b).

26 ⁸ Although Ground Two does not allege expressly that
27 counsel failed to advise Petitioner of his right to appeal,
28 Ground Two incorporates the "supporting facts" alleged in support
of Ground One, which do contain this allegation (see Petition,
ECF Dkt. No. 1, pp. 20, 26).

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

5
6 (A) the date on which the judgment became final by the
7 conclusion of direct review or the expiration of the time
8 for seeking such review;

9
10 (B) the date on which the impediment to filing an
11 application created by State action in violation of the
12 Constitution or laws of the United States is removed, if the
13 applicant was prevented from filing by such State action;

14
15 (C) the date on which the constitutional right asserted was
16 initially recognized by the Supreme Court, if the right has
17 been newly recognized by the Supreme Court and made
18 retroactively applicable to cases on collateral review; or

19
20 (D) the date on which the factual predicate of the claim or
21 claims presented could have been discovered through the
22 exercise of due diligence.

23
24 (2) The time during which a properly filed application for
25 State post-conviction or other collateral review with
26 respect to the pertinent judgment or claim is pending shall
27 not be counted toward any period of limitation under this
28 subsection.

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

4
5 Because Petitioner did not appeal, his conviction became final on
6 June 24, 2013, sixty days from the April 25, 2013 sentencing. See
7 Mendoza v. Carey, 449 F.3d 1065, 1067 (9th Cir. 2006); People v.
8 Knauer, 206 Cal. App. 3d 1124, 1127 n.2, 253 Cal. Rptr. 910 (1988);
9 Cal. Ct. R. 8.308(a). Therefore, the statute of limitations commenced
10 running on June 25, 2013, unless subsections B, C or D of 28 U.S.C.
11 section 2244(d)(1) apply in the present case. See 28 U.S.C. §
12 2244(d)(1)(A); Porter v. Ollison, 620 F.3d 952, 958 (9th Cir. 2010)
13 (AEDPA statute of limitations is not tolled between the conviction's
14 finality and the filing of the first state collateral challenge).

15
16 **Section 2244(d)(1)(B)**

17
18 To warrant delayed accrual under section 2244(d)(1)(B),
19 Petitioner must show that illegal conduct by the state or those acting
20 for the state "made it impossible for him to file a timely § 2254
21 petition in federal court." See Ramirez v. Yates, 571 F.3d 993, 1000-
22 01 (9th Cir. 2009). Petitioner must show a causal connection between
23 the impediment and his failure to file a timely petition. See Bryant
24 v. Arizona Atty. General, 499 F.3d 1056, 1059-60 (9th Cir. 2007)
25 (citations omitted). Petitioner "must satisfy a far higher bar than
26 that for equitable tolling." Ramirez v. Yates, 571 F.3d at 1000.
27 Petitioner is entitled to delayed accrual under subsection (d)(1)(B)
28 only if the alleged impediment "altogether prevented him from

1 presenting his claims in any form, to any court." Id. at 1001
2 (emphasis original; citation omitted).

3
4 Petitioner argues that his trial counsel's allegedly incorrect
5 advice concerning the maximum sentence and counsel's alleged failure
6 to advise Petitioner of his right to appeal constitute a state-created
7 impediment supposedly warranting delayed accrual (see Traverse,
8 supporting memorandum, pp. 3-6). This argument must be rejected.
9 Subsection B requires a state-created impediment. The purported
10 actions or omissions of Petitioner's counsel are not attributable to
11 the state. See Lawrence v. Florida, 421 F.3d 1221, 1226 (11th Cir.
12 2005), aff'd on other grounds, 549 U.S. 327 (2007) (rejecting argument
13 that the state created an impediment by providing incompetent counsel;
14 "[t]his is not the type of State impediment envisioned in §
15 2244(d)(1)(B)"); Ibarra v. Ground, 2012 WL 3259898, at *3 (C.D. Cal.
16 July 9, 2012), adopted, 2012 WL 3257883 (C.D. Cal. Aug. 8, 2012) ("the
17 actions of petitioner's appellate counsel cannot be imputed to the
18 state for purposes of extending the limitations period under §
19 2244(d)(1)(B)") (citations omitted); Lopez v. On Habeas Corpus, 2010
20 WL 2991689, at *4 (E.D. Cal. July 29, 2010) (even a state-appointed
21 attorney cannot create an "impediment" "by State action" within the
22 meaning of section 2244(d)(1)(B)).

23
24 In any event, Petitioner has not shown that his attorney's
25 alleged failures prevented Petitioner from filing a federal habeas
26 petition. See Randle v. Crawford, 604 F.3d 1047, 1058 (9th Cir.),
27 cert. denied, 562 U.S. 969 (2010) (state-appointed counsel's alleged
28 failure to perfect state court appeal did not merit delayed accrual

1 under section 2244(d)(1)(B), where nothing prevented the petitioner
2 from filing a federal habeas petition); Bryant v. Arizona Att’y
3 General, 499 F.3d at 1060 (petitioner must show causal connection
4 between alleged impediment and failure to file timely federal
5 petition).

6
7 Petitioner further appears to contend that the state court
8 created an “impediment” to the timely filing of a federal habeas
9 petition by assertedly failing to advise Petitioner of his appeal
10 rights (see Traverse, supporting memorandum, pp. 4, 6). Petitioner
11 also asserts that the prosecutor supposedly created an impediment to
12 the filing of a timely federal petition by allegedly misleading
13 Petitioner concerning the maximum sentence Petitioner faced (see
14 Traverse, supporting memorandum, pp. 4, 7-8). Petitioner has failed
15 to show how these alleged errors by the state court and the prosecutor
16 made it impossible for Petitioner to file a timely federal habeas
17 petition. See Randle v. Crawford, 604 F.3d at 1058; Bryant v. Arizona
18 Att’y General, 499 F.3d at 1060.

19
20 Moreover, any purported “impediment” certainly ended no later
21 than April 1, 2014, when the Court of Appeal issued its opinion in the
22 case on which Petitioner relies, People v. Salazar, 2014 WL 1303223
23 (Cal. App. Apr. 1, 2014). Yet, Petitioner did not file the present
24 federal petition within one year of April 1, 2014, and no alleged
25 state-created impediment made it impossible for Petitioner to file a
26 federal petition within that time. Accordingly, section 2244(d)(1)(B)
27 cannot rescue the present Petition from the bar of limitations.

28 ///

1 Section 2244 (d) (1) (C)

2
3 Subsection C of section 2244(d) (1) does not furnish a later
4 accrual date than June 25, 2013. Petitioner does not assert any claim
5 based on a constitutional right "newly recognized by the Supreme Court
6 and made retroactively applicable to cases on collateral review." See
7 Dodd v. United States, 545 U.S. 353, 360 (2005) (construing identical
8 language in section 2255 as expressing "clear" congressional intent
9 that delayed accrual inapplicable unless the United States Supreme
10 Court itself has made the new rule retroactive); Tyler v. Cain, 533
11 U.S. 656, 664-68 (2001) (for purposes of second or successive motions
12 under 28 U.S.C. section 2255, a new rule is made retroactive to cases
13 on collateral review only if the Supreme Court itself holds the new
14 rule to be retroactive); Peterson v. Cain, 302 F.3d 508, 511-15 (5th
15 Cir. 2002), cert. denied, 537 U.S. 1118 (2003) (applying anti-
16 retroactivity principles of Teague v. Lane, 489 U.S. 288 (1989), to
17 analysis of delayed accrual rule contained in 28 U.S.C. section
18 2244(d) (1) (C)).

19
20 Section 2244 (d) (1) (D)

21
22 Under subsection D, the "'due diligence' clock starts ticking
23 when a person knows or through diligence could discover the vital
24 facts, regardless of when their legal significance is actually
25 discovered." Ford v. Gonzalez, 683 F.3d 1230, 1235 (9th Cir.), cert.
26 denied, 133 S. Ct. 769 (2012); Hasan v. Galaza, 254 F.3d 1150, 1154
27 n.3 (9th Cir. 2001); see also United States v. Pollard, 416 F.3d 48,
28 55 (D.D.C. 2005), cert. denied, 547 U.S. 1021 (2006) (habeas

1 petitioner's alleged "ignorance of the law until an illuminating
2 conversation with an attorney or fellow prisoner" does not satisfy the
3 requirements of section 2244(d)(1)(D)). Petitioner knew or should
4 have known, upon the expiration of sixty days after the date of
5 sentencing, that Petitioner had not filed any timely notice of appeal
6 or request for a certificate of probable cause. Petitioner knew or
7 should have known all of the other "vital facts" upon which Petitioner
8 bases his present claims no later than April 1, 2014, the date the
9 Court of Appeal issued its decision in People v. Salazar.

10
11 Assuming arguendo that Petitioner's claims did not accrue until
12 April 1, 2014, the statute of limitations began running on April 2,
13 2014 and expired on April 1, 2015. See Patterson v. Stewart, 251 F.3d
14 1243, 1246 (9th Cir. 2001). Petitioner constructively filed the
15 present Petition a year and a half later, on October 30, 2016. Absent
16 sufficient tolling, the Petition is untimely.

17
18 **Statutory Tolling**

19
20 Section 2244(d)(2) tolls the statute of limitations during the
21 pendency of "a properly filed application for State post-conviction or
22 other collateral review." The statute of limitations is not tolled
23 between the conviction's finality and the filing of Petitioner's first
24 state court habeas petition. See Porter v. Ollison, 620 F.3d at 958.

25
26 Petitioner filed all of his state court habeas petitions on or
27 after January 11, 2016, a date which followed the expiration of the
28 limitations period. Petitioner's belatedly filed state court habeas

1 petitions cannot revive or otherwise toll the statute. See Ferguson
2 v. Palmateer, 321 F.3d 820, 823 (9th Cir.), cert. denied, 540 U.S. 924
3 (2003) (“section 2244(d) does not permit the reinitiation of the
4 limitations period that has ended before the state petition was
5 filed”); Jiminez v. Rice, 276 F.3d 478, 482 (9th Cir. 2001), cert.
6 denied, 538 U.S. 949 (2003) (filing of state habeas petition “well
7 after the AEDPA statute of limitations ended” does not affect the
8 limitations bar); Webster v. Moore, 199 F.3d 1256, 1259 (11th Cir.),
9 cert. denied, 531 U.S. 991 (2000) (“[a] state-court petition . . .
10 that is filed following the expiration of the limitations period
11 cannot toll that period because there is no period remaining to be
12 tolled”). Therefore, Petitioner is not entitled to statutory tolling.

13 14 Equitable Tolling

15
16 AEDPA’s statute of limitations is subject to equitable tolling
17 “in appropriate cases.” Holland v. Florida, 560 U.S. 631, 645 (2010)
18 (citations omitted). “[A] ‘petitioner’ is entitled to ‘equitable
19 tolling’ only if he shows ‘(1) that he has been pursuing his claims
20 diligently, and (2) that some extraordinary circumstance stood in his
21 way’ and prevented timely filing.” Id. at 649 (quoting Pace v.
22 DiGuglielmo, 544 U.S. 408, 418 (2005); accord, Menominee Indian Tribe
23 of Wisconsin v. United States, 136 S. Ct. 750, 755-56 (2016); see also
24 Lawrence v. Florida, 549 U.S. 327, 336 (2007). The second prong of
25 this test “is met only where the circumstances that caused a
26 litigant’s delay are both extraordinary and beyond its control.”
27 Menominee Indian Tribe of Wisconsin v. United States, 136 S. Ct. at
28 756 (footnote omitted) (applying Holland v. Florida).

1 The threshold necessary to trigger equitable tolling "is very
2 high, lest the exceptions swallow the rule." Waldron-Ramsey v.
3 Pacholke, 556 F.3d 1008, 1011 (9th Cir.), cert. denied, 558 U.S. 897
4 (2009) (citations and internal quotations omitted). Petitioner bears
5 the burden to prove equitable tolling. See Zepeda v. Walker, 581 F.3d
6 1013, 1019 (9th Cir. 2009). Petitioner must show that the alleged
7 "extraordinary circumstances" were the "cause of his untimeliness."
8 Roy v. Lampert, 465 F.3d 964, 969 (9th Cir. 2006), cert. denied, 549
9 U.S. 1317 (2007) (brackets in original; quoting Spitsyn v. Moore, 345
10 F.3d 796, 799 (9th Cir. 2003)).

11
12 Petitioner does not assert any basis for equitable tolling. Any
13 assertion that the alleged ineffectiveness of Petitioner's counsel
14 merits equitable tolling would fail. See Holland v. Florida, 560 U.S.
15 at 651-52 (a "garden variety" claim of attorney negligence does not
16 merit equitable tolling); Velasquez v. Kirkland, 639 F.3d 964, 969
17 (9th Cir.), cert. denied, 565 U.S. 1016 (2011) (petitioner "must have
18 been delayed by circumstances beyond his direct control, and not by
19 his or his counsel's own mistake") (citation, internal brackets and
20 quotations omitted); Stillman v. LaMarque, 319 F.3d 1199, 1203 (9th
21 Cir. 2003) (citation and footnote omitted) ("[R]outine instances of
22 attorney negligence do not constitute an 'extraordinary circumstance'
23 that requires equitable tolling."); Garcia v. Hedgpeth, 2011 WL
24 1666866, at *6-7 (C.D. Cal. Mar. 22, 2011), adopted, 2011 WL 1659410
25 (C.D. Cal. May 3, 2011) (attorney's failure to advise petitioner of
26 appeal rights and to file a notice of appeal did not warrant equitable
27 tolling). Moreover, Petitioner has not shown that counsel's alleged
28 failure to advise Petitioner concerning an appeal prevented Petitioner

1 from filing a timely federal petition. See Randle v. Crawford, 604
2 F.3d at 1058 (counsel's failure to perfect appeal "had little to no
3 bearing on [petitioner's] ability to file a timely federal habeas
4 petition").

5
6 Petitioner's purported ignorance of the law also cannot warrant
7 equitable tolling. See Waldron-Ramsey v. Pacholke, 556 F.3d at 1013
8 n.4 ("we have held that a pro se petitioner's confusion or ignorance
9 of the law is not, itself, a circumstance warranting equitable
10 tolling") (citation omitted); Raspberry v. Garcia, 448 F.3d 1150, 1154
11 (9th Cir. 2006) ("a pro se petitioner's lack of legal sophistication
12 is not, by itself, an extraordinary circumstance warranting equitable
13 tolling"); Loza v. Soto, 2014 WL 1271204, at *6 (C.D. Cal. Mar. 26,
14 2014) ("To allow equitable tolling based on the fact that most
15 prisoners do not have legal knowledge or training would create a
16 loophole that would negate the intent and effect of the AEDPA
17 limitation period.").

18 19 Actual Innocence Exception

20
21 "[A]ctual innocence, if proved, serves as a gateway through which
22 a petitioner may pass whether the impediment is a procedural bar . . .
23 [or] expiration of the statute of limitations." McQuiggin v. Perkins,
24 133 S. Ct. 1924, 1928 (2013); see also Lee v. Lampert, 653 F.3d 929,
25 934-37 (9th Cir. 2011) (en banc). However, "tenable actual-innocence
26 gateway pleas are rare." McQuiggin v. Perkins, 133 S. Ct. at 1928.
27 The Court must apply the standards for gateway actual innocence claims
28 set forth in Schlup v. Delo, 513 U.S. 298 (1995) ("Schlup"). See

1 McQuiggin v. Perkins, 133 S. Ct. at 1928. "[A] petitioner does not
2 meet the threshold requirement unless he persuades the district court
3 that, in light of the new evidence, no juror, acting reasonably, would
4 have voted to find him guilty beyond a reasonable doubt." Id.
5 (quoting Schlup, 513 U.S. at 329).

6
7 In order to make a credible claim of actual innocence, a
8 petitioner must "support his allegations of constitutional error with
9 new reliable evidence - whether it be exculpatory scientific evidence,
10 trustworthy eyewitness accounts, or critical physical evidence - that
11 was not presented at trial." Schlup, 513 U.S. at 324; see also
12 Griffin v. Johnson, 350 F.3d 956, 963 (9th Cir. 2003), cert. denied,
13 541 U.S. 998 (2004) (holding that "habeas petitioners may pass
14 Schlup's test by offering 'newly presented' evidence of actual
15 innocence"); Shumway v. Payne, 223 F.3d 982, 990 (9th Cir. 2000) ("[A]
16 claim of actual innocence must be based on reliable evidence not
17 presented at trial.").

18
19 "[A]ctual innocence' means factual innocence, not mere legal
20 insufficiency." Bousley v. United States, 523 U.S. 614, 623 (1998);
21 Calderon v. Thompson, 523 U.S. 538, 559 (1998); Muth v. Fondren, 676
22 F.3d 815, 819, 822 (9th Cir.), cert. denied, 133 S. Ct. 292 (2012).
23 "The evidence of innocence 'must be so strong that a court cannot have
24 confidence in the outcome of the trial unless the court is also
25 satisfied that the trial was free of nonharmless constitutional
26 error.'" Lee v. Lampert, 653 F.3d at 937-38 (quoting Schlup, 513 U.S.
27 at 316). The court must consider "'all the evidence, old and new,
28 incriminating and exculpatory,' admissible at trial or not." Lee v.

1 Lampert, 653 F.3d at 938 (quoting House v. Bell, 547 U.S. 518, 538
2 (2006). The court must make a “probabilistic determination about what
3 reasonable, properly instructed jurors would do.” Id. (quoting House
4 v. Bell, 547 U.S. at 538).

5
6 Petitioner’s plea forecloses any claim of alleged factual
7 innocence of the conspiracy offense and gang allegation. See Johnson
8 v. Knowles, 541 F.3d 933, 936-37 (9th Cir. 2008), cert. denied, 556
9 U.S. 1211 (2009) (petitioner’s concession of guilt fatal to actual
10 innocence claim).⁹ Furthermore, Petitioner has not provided any “new
11 reliable” evidence showing his alleged innocence of the conspiracy
12 offense or the gang allegation.

13
14 As to Petitioner’s sentence, even assuming arguendo the “actual
15 innocence” exception to the habeas statute of limitations applies to a
16 noncapital sentence,¹⁰ Petitioner has not shown that he is “actually
17 innocent” of the sentence imposed. The sentencing court applied the
18 mid-term of two years for the conspiracy conviction and imposed the
19 mandatory ten-year enhancement for the gang allegation. Petitioner

20
21 ⁹ Under California law, the legal effect of a nolo
22 contendere plea is the same as that accorded to a plea of guilty.
23 See Cal. Penal Code § 1016; People v. Bradford, 15 Cal. 4th 1229,
1374-75, 65 Cal. Rptr. 2d 145, 939 P.2d 259 (1997), cert. denied,
523 U.S. 1118 (1998).

24 ¹⁰ But see Dretke v. Haley, 541 U.S. 386, 393-94 (2004)
25 (declining to rule whether Schlup’s “actual innocence” exception
26 extends to challenges to noncapital sentences); Johnson v.
27 Knowles, 541 F.3d at 937 n.2 (declining to reach issue); Kiesz v.
28 Spearman, 2014 WL 462864, at *8 (C.D. Cal. Feb. 3, 2014) (noting
absence of Ninth Circuit authority); Perry v. Uribe, 2011 WL
6257139, at *10 (C.D. Cal. Nov. 10, 2011), adopted, 2011 WL
6288107 (C.D. Cal. Dec. 15, 2011) (same).

1 **NOTICE**

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

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

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