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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JARED HARRIS,

Petitioner,

v.

SUPREME COURT OF
CALIFORNIA,

Respondent.

NO. CV 17-6570-VBF (AGR)

ORDER TO SHOW CAUSE

Petitioner, a state inmate, has filed a petition for writ of habeas corpus on California form MC-275, which the Court construes as a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons discussed below, it appears that the one-year statute of limitations has expired.

The court therefore orders Petitioner to show cause on or before **November 20, 2017** why the court should not recommend dismissal of the petition with prejudice based on expiration of the one-year statute of limitations.

I.

PROCEDURAL BACKGROUND

In 1996, a Los Angeles County Superior Court jury found Petitioner guilty of two counts of robbery and one count of attempted carjacking. He was sentenced to two consecutive terms of 25 years to life in prison, plus 4 years. (Petition at 2.¹) On February 18, 1998, the California Court of Appeal affirmed in Case No. B104870. (*Id.* at 5.)² On April 29, 1998, the California Supreme Court denied a petition for review. *People v. Harris*, 1998 Cal. LEXIS 2851 (1998).

The Court takes judicial notice of online public records of the trial court (www.lacourt.org). On March 13, 2017, Petitioner filed a state habeas petition in his criminal case (No. BA122438). The court addressed the petition on May 5, 2017.

Although Petitioner states that a petition was filed in the California Court of Appeal, the exhibit refers to a habeas petition filed in the California Supreme Court. (Petition at 6 & Exh. C.) The online appellate database does not reflect any habeas petitions filed by Petitioner in the California Court of Appeal. On June 12, 2017, Petitioner filed a habeas petition in the California Supreme Court. That court denied relief on August 9, 2017, stating: “See *In re Robbins* (1998) 18 Cal.4th 770, 780 [courts will not entertain habeas corpus claims that are untimely].” (Petition at 6 & Exh. C); *In re Harris*, 2017 Cal. LEXIS 6285 (2017).

On August 30, 2017, Petitioner constructively filed the current petition. (See Petition at 16 (date on back of envelope).)

¹ Page citations are to the page numbers assigned by the CM/ECF system in the header.

² The Court takes judicial notice of public records of the state courts (<http://appellatecases.courtinfo.ca.gov/>). The docket reflects that the judgment was affirmed in full.

1 II.

2 **STATUTE OF LIMITATIONS**

3 The petition was filed after enactment of the Antiterrorism and Effective
4 Death Penalty Act of 1996 (“AEDPA”). Therefore, the court applies the AEDPA in
5 reviewing the petition. *Lindh v. Murphy*, 521 U.S. 320, 336 (1997).

6 The AEDPA contains a one-year statute of limitations for a petition for writ
7 of habeas corpus filed in federal court by a person in custody pursuant to a
8 judgment of a state court. 28 U.S.C. § 2244(d)(1). The one-year period starts
9 running on the latest of either the date when a conviction becomes final under 28
10 U.S.C. § 2244(d)(1)(A) or on a date set in § 2244(d)(1)(B)-(D).

11 **A. The Date on Which Conviction Became Final – § 2244(d)(1)(A)**

12 Petitioner's conviction became final on Tuesday, July 28, 1998, 90 days
13 after the California Supreme Court denied review on April 29, 1998. *See Bowen*
14 *v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999). The statute of limitations expired
15 one year later, on July 28, 1999. Absent tolling, the Petition is over seventeen
16 years late.

17 The statute of limitations is tolled during the time “a properly filed
18 application for State post-conviction or other collateral review with respect to the
19 pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2). Petitioner
20 cannot benefit from tolling for his 2017 state habeas petitions, for he did not file
21 them until after the limitations period had expired. *Ferguson v. Palmateer*, 321
22 F.3d 820, 823 (9th Cir. 2003).

23 **B. Date of Discovery – 28 U.S.C. § 2244(d)(1)(D)**

24 The statute of limitations may also start to run on the date a petitioner
25 discovered (or could have discovered) the factual predicate for a claim. 28
26 U.S.C. § 2244(d)(1)(D). The time starts to run when the petitioner knows or
27 through diligence could discover the factual predicate, not when the petitioner
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1 realizes their legal significance. *Hasan v. Galaza*, 254 F.3d 1150, 1154 n.3 (9th
2 Cir. 2001).

3 Petitioner states: “My public defender failed me in his investigative duties.
4 Instead of obtaining my arrest report, to use as evidence, he told me that it was
5 quote, missing.” (Petition at 3.)

6 Petitioner states that he “recently” came into possession of the missing
7 arrest report through a private investigator. (*Id.* at 5-6.) He argues that the police
8 report establishes that he was not Mirandized and that the handgun and jewelry
9 should have been suppressed. The attached arrest report completely contradicts
10 Petitioner’s argument. It describes the victims’ report of an armed robbery on
11 July 16, 1995. According to the report, police subsequently conducted a traffic
12 stop of a vehicle. As one officer approached the passenger side, he saw the gun
13 lying on the front passenger floor board where Petitioner was sitting. Petitioner, a
14 second suspect and a witness in the car were taken to the station and the second
15 suspect was transferred to juvenile hall. (*Id.* at 12-13.) The report states that,
16 while conducting a booking search at the police station, police found jewelry and
17 cash in Petitioner’s front pocket. The gun recovered from the floor board was
18 loaded with five live rounds of ammunition. Petitioner and the second suspect
19 “refused to talk” with officers. (*Id.* at 13.)

20 The predicate facts of Petitioner’s arrest were known to Petitioner long
21 before his conviction became final. The factual predicate of his claim could have
22 been discovered through exercise of due diligence at the time of trial. *See Ford*
23 *v. Gonzalez*, 683 F.3d 1230, 1235-36 (9th Cir. 2012). Petitioner offers no
24 explanation as to why he waited over 17 years to obtain the report. The Petition
25 remains time barred.

26 **C. Actual Innocence**

27 “[A]ctual innocence, if proved, serves as a gateway through which a
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1 petitioner may pass . . . the impediment . . . of the statute of limitations."
2 *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1928 (2013). "[T]enable actual-innocence
3 gateway pleas are rare: '[A] petitioner does not meet the threshold requirement
4 unless he persuades the district court that, in light of the new evidence, no juror,
5 acting reasonably, would have voted to find him guilty beyond a reasonable
6 doubt.'" *Id.* (quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995) and citing *House v.*
7 *Bell*, 547 U.S. 518, 538 (2006) (emphasizing that the *Schlup* standard is
8 'demanding' and seldom met)).

9 To satisfy the standard, a petitioner must present "new reliable evidence."
10 *House*, 547 U.S. at 537. Based on all the evidence, both old and new, "the court
11 must make 'a probabilistic determination about what reasonable, properly
12 instructed jurors would do.'" *Id.* at 538 (citation omitted). "The court's function is
13 not to make an independent factual determination about what likely occurred, but
14 rather to assess the likely impact of the evidence on reasonable jurors." *Id.*

15 Petitioner does not meet the "stringent showing" required by actual
16 innocence. The police report, even assuming it is new evidence, does not
17 support actual innocence for the reasons set forth above. Petitioner has failed to
18 "persuade[] the . . . court that, in light of the [allegedly] new evidence, no juror,
19 acting reasonably, would have voted to find him guilty beyond a reasonable
20 doubt." *McQuiggin*, 133 S. Ct. at 1928; see *Hermanski v. Baca*, 649 Fed. Appx.
21 386, 387 (9th Cir. 2016).

22 **D. Equitable Tolling**

23 "[T]he timeliness provision in the federal habeas corpus statute is subject to
24 equitable tolling." *Holland v. Florida*, 560 U.S. 631, 634(2010). "[A] 'petitioner' is
25 'entitled to equitable tolling' only if he shows '(1) that he has been pursuing his
26 rights diligently, and (2) that some extraordinary circumstance stood in his way'
27 and prevented timely filing." *Id.* at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S.

1 408, 418 (2005)). “The diligence required for equitable tolling purposes is
2 ‘reasonable diligence,’ not ‘maximum feasible diligence.’” *Id.* at 653 (citations
3 and quotation marks omitted). The extraordinary circumstances must have been
4 the cause of an untimely filing. *Pace*, 544 U.S. at 418. “[E]quitable tolling is
5 available for this reason only when “extraordinary circumstances beyond a
6 prisoner’s control make it impossible to file a petition on time” and “the
7 extraordinary circumstances” were the cause of [the prisoner’s] untimeliness.”
8 *Bills v. Clark*, 628 F.3d 1092, 1097 (9th Cir. 2010) (citations omitted, emphasis in
9 original).

10 Because Petitioner fails to show that he exercised due diligence or that an
11 extraordinary circumstance prevented a timely filing, Petitioner would not be
12 entitled to equitable tolling. See *Ford*, 683 F.3d at 1238.

13 **III.**

14 **ORDER TO SHOW CAUSE**

15 IT IS THEREFORE ORDERED that on or before **November 20, 2017**,
16 Petitioner shall show cause why the court should not recommend dismissal of the
17 petition based on expiration of the one-year statute of limitations.

18 **If Petitioner fails to respond to this order to show cause by November**
19 **20, 2017, the court will recommend that the petition be dismissed with**
20 **prejudice based on expiration of the one-year statute of limitations.**

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23 DATED: October 20, 2017



ALICIA G. ROSENBERG
United States Magistrate Judge