Pablo Morales v. Patrick Covello Doc. 24 Att. 1

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PABLO MORALES, Petitioner, v. PATRICK COVELLO, Warden, Respondent.	NO. CV 20-850-JLS(E) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Josephine L. Staton, 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

Petitioner filed a "Petition for Writ of Habeas Corpus By a Person in State Custody" on January 28, 2020, accompanied by an attached memorandum and exhibits. Respondent filed a "Motion to

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Dismiss Petition, etc." on March 6, 2020, asserting that the Petition is untimely. Petitioner filed "Opposition etc." on April 6,2020.

BACKGROUND

On March 30, 1978, Petitioner pled guilty to murder (Petition, pp. 2, 3; Exhibits, p. 54).[1] On April 27, 1978, the court sentenced Petitioner to a term of seven years to life (Petition, p. 2; Exhibits, p. 54). Petitioner did not appeal (Petition, p. 3).

On October 4, 2013, Petitioner filed a habeas corpus petition in the California Court of Appeal, challenging a denial of parole (Respondent's Lodgment 1). On October 16, 2013, the Court of Appeal denied the petition (Respondent's Lodgment 2). On November 4, 2013, Petitioner filed a petition for review in the California Supreme Court, which that court denied summarily on January 22, 2014 (Respondent's Lodgment 3).

On March 19, 2019, Petitioner filed in the California Court of Appeal a petition for writ of error coram vobis and to vacate the judgment (Petition, Exhibits, pp. 44-75; Respondent's Lodgment 4). The Court of Appeal summarily denied the petition on April 5, 2019 (Respondent's Lodgment 5).

On July 8, 2019, Petitioner filed a habeas corpus petition in the California Supreme Court, which that court denied summarily on

[1] Because Petitioner's exhibits do not bear sequential page numbers, the Court uses the ECF pagination.

November 20, 2019 (Petition, Exhibits, pp. 18-77; Respondent's Lodgments 6, 7).

PETITIONER'S CONTENTIONS

Petitioner contends:

1. Petitioner allegedly lacked the mental capacity to commit the crime or to plead guilty competently; the California Court of Appeal allegedly abused its discretion by rejecting these claims;

2. Petitioner's trial counsel allegedly rendered ineffective assistance by failing to present a "mental state" defense and/or an insanity defense; and

3. The California Court of Appeal allegedly abused its discretion by denying Petitioner's coram vobis petition challenging his conviction (Petition, attachment, pp. 1-5).

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DISCUSSION

I. The Statute of Limitations Bars All of the Claims Alleging Error in Petitioner's 1978 Conviction.

A. The Statute

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;
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> (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).

B. Accrual

Because Petitioner did not appeal, his conviction became final sixty days after his April 27, 1978 sentencing. See Mendoza v. Carey, 449 F.3d 1065, 1067 (9th Cir. 2006); People v. Knauer, 206 Cal. App. 3d 1124, 1127 n.2, 253 Cal. Rptr. 910 (1988); Cal. Ct. R. 8.308(a). However, because Petitioner's conviction became final prior to the April 24, 1996 effective date of the AEDPA, Petitioner had a one-year "grace period" following April 24, 1996, within which to file a federal habeas petition. See Wood v. Milyard, 566 U.S. 463, 468 (2012); Rhoades v. Henry, 598 F.3d 511, 519 (9th Cir. 2010).

Therefore, the statute of limitations began to run on April 25, 1996, unless subsections B, C, or D of 28 U.S.C. section 2244(d)(1) furnish a later accrual date. Porter v. Ollison, 620 F.3d 952, 958 (9th Cir. 2010) (AEDPA statute of limitations is not tolled between the conviction's finality and the filing of the first state collateral challenge).

Subsection B of 28 U.S.C. section 2244(d)(1) has no application in the present case. Petitioner does not allege, and this Court finds no indication, that any illegal state action prevented Petitioner from filing the present Petition sooner.

Subsection C of 28 U.S.C. section 2244(d)(1) also has no application in the present case. The Petition does not assert any "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)).

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Application of subsection D of 28 U.S.C. section 2244(d)(1) also does not furnish a date later than April 25, 1996, for commencement of the one-year period of limitations. 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, 568 U.S. 1053 (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)). More than a decade before April 25, 1996, Petitioner knew, or with reasonable diligence could have known, all of the facts on which he bases his present claims challenging his 1978 conviction. The Superior Court's acts and omissions, and those of Petitioner's counsel, were known in 1978. The diagnoses of "mild mental retardation" and "mental illness" on which Petitioner now purports to rely were known no later than 1985 (Petition at Ex. A, p. 35; Opposition at 1).

In sum, Petitioner is not entitled to delayed accrual. Absent tolling, therefore, the statute of limitations expired on April 24, 1997. See Patterson v. Stewart, 251 F.3d 1243 (9th Cir. 2001) (AEDPA statute of limitations expires on the anniversary date of the date the statute begins to run). As discussed below, no theory of tolling can rescue the present Petition from the bar of limitations.

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C. Statutory Tolling

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." As previously indicated, the statute of limitations is not tolled between the conviction's finality and the filing of Petitioner's first state court habeas petition. See Porter v. Ollison, 620 F.3d at 958; Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999), cert. denied, 529 U.S. 1104 (2000).

Petitioner did not file his first state court habeas petition until 2013, long after the statute expired. Petitioner's belatedly filed state court petitions 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

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remaining to be tolled").[2] Therefore, Petitioner is not entitled to statutory tolling.

D. Equitable Tolling

AEDPA's statute of limitations is subject to equitable tolling "in appropriate cases." Holland v. Florida, 560 U.S. 631, 645 (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 649 (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005); accord, Menominee Indian Tribe v. United States, 136 S. Ct. 750, 755-56 (2016); 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 an entitlement to

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[2] Furthermore, even assuming arguendo that the statute began running on January 23, 2014, the day after the California Supreme Court denied Petitioner's petition for review, (and even assuming that petition for review contained the claims in the instant Petition), Petitioner plainly would not be entitled to "gap" tolling between the Supreme Court's 2014 denial and the Petitioner's 2019 filing in the Court of Appeal. See Carey v. Saffold, 536 U.S. 214, 225 (2002) (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, 201 (2006) (unjustified six-month delay unreasonable); Stewart v. Cate, 757 F.3d 929, 935 (9th Cir.), cert. denied, 574 U.S. 900 (2014) (applying "thirty-to-sixty day benchmark" to determine the reasonableness of a delay in filing a subsequent state petition).

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 his 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 appears to argue that his asserted "mild mental retardation" and "mental illness" should entitle him to equitable tolling. For the reasons discussed below, such argument must be rejected.

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
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> > (a) petitioner was unable rationally or factually to personally understand the need to timely file, or
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> > (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 him unable to file a timely federal petition. Petitioner's statements that he is a "mental health patient" who has been diagnosed with "mild mental retardation" and "mental illness" fall far short of establishing the requirements for tolling set forth in Bills v. Clark. See Gray v. Secretary, 2012 WL 6007314, at *6 (M.D. Fla. Dec. 3, 2012) ("Simply claiming one has been diagnosed as mildly retarded does not establish entitlement to equitable tolling"). Nothing in the record supports the conclusion that Petitioner suffered from any mental impairment rendering him unable to file a timely federal petition.

To the contrary, Petitioner's alleged mental problems did not prevent him from filing several actions in the federal courts in the 1990's.[3] In 1994, Petitioner filed a civil rights action in the United States District Court for the Eastern District of California, in Morales v. Gifford, case number 1:94-cv-05350-REC-SMS. Petitioner litigated this action for more than a year before the district court dismissed the action without prejudice.

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[3] The Court takes judicial notice of the docket and documents filed in Petitioner's prior federal actions described herein. See Porter v. Ollison, 620 F.3d at 954-55 n.1.

On February 19, 1997, while the statute of limitations was running, Petitioner filed another civil rights action in the United States District Court for the Eastern District of California, in Morales v. Parker, case number 2:97-cv-00262-GEB-DAD. Petitioner filed an amended complaint on April 22, 1997, again while the statute of limitations was running. Petitioner thereafter filed a motion for entry of default and several discovery-related motions, and he also submitted letters and documents to the court. The court eventually dismissed the action without prejudice on August 18, 1998. Petitioner later filed a notice of appeal, but the Ninth Circuit dismissed the appeal for lack of jurisdiction.

The fact that Petitioner filed and prosecuted these federal actions in the 1990's, including during the running of the limitations period, belies Petitioner's assertions that any alleged mental difficulties were the cause of Petitioner's failure to file a timely federal habeas petition. The possibility that someone assisted Petitioner in filing and prosecuting these federal actions does not alter this conclusion. See Bills v. Clark, 628 F.3d at 1100 (the analysis of whether a petitioner's mental impairment warrants equitable tolling takes into account "reasonably available access to assistance").

Furthermore, and even assuming arguendo Petitioner suffered from truly disabling mental disabilities for some period of time after the commencement of the limitations period so as to entitle Petitioner to equitable tolling, Petitioner's filing of additional federal court actions in 2014 shows that equitable tolling for any earlier period(s)

of time would not rescue the present Petition from the bar of limitations.

On March 27, 2014, Petitioner filed a petition for writ of mandate in the Ninth Circuit in Morales v. United States District Court, case number 14-70921. The Ninth Circuit dismissed the petition for lack of jurisdiction on June 12, 2014.

On April 8, 2014, Petitioner filed a civil rights action in the United States District Court for the Southern District of California, in Morales v. State of Calif., case number 3:14-cv-00880-BTM-BGS. The Court dismissed the action on August 4, 2014.

Thus, any possible purported equitable tolling ended when Petitioner exhibited an ability to file federal actions in 2014, some six years ago. The filing of those actions compellingly refutes any assertion that Petitioner was unable to file a federal petition until recently. The fact that Petitioner was able to, and did, file prior federal actions without filing a timely federal habeas petition, also demonstrates Petitioner's lack of diligence.

This Court further observes that nothing in Petitioner's October 4, 2013 state habeas petition, petition for review or March 19, 2019 petition for writ of error coram vobis reflects 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 . . ."); cf. Yeh v. Martel, 751 F.3d 1075, 1078 (9th Cir.), cert. denied, 574 U.S. 996 (2014) (the petitioner's demonstrated ability to file court actions, including a state court habeas petition, refuted claim of mental impairment so debilitating as to warrant equitable tolling).

Additionally, the record shows that Petitioner was able to, and did, participate extensively in prison programming. A May 4, 2008 "Psychological Evaluation" of Petitioner prepared for the Board of Parole Hearings records that: (1) during the interview Petitioner "was able to effectively understand and communicate"; (2) from May 29, 2003 until November of 2004, Petitioner worked as a recreational aide and as a porter, the latter position resulting in an assessment of "exceptional above-average work performance"; (3) from November 24, 2003 to February 10, 2004, Petitioner participated in an effective communication group; (4) from August 11, 2004 through September 29, 2005 Petitioner worked as a clothing room clerk and vocational dry

cleaning worker, receiving positive reviews; (5) from October 22, 2005 through October 26, 2007, Petitioner worked as a vocational engineer and received satisfactory reviews; (6) from October 2006 through December 2, 2006, Petitioner participated in Alcoholics' Anonymous; (7) in May of 2006, Petitioner received a participation chrono for completing an anger management program (Petition, Exhibits, pp. 30-40). Such prison programming further refutes any suggestion Petitioner lacked the mental capacity to file a timely federal petition. See Orthel v. Yates, 795 F.3d 935, 939 (9th Cir. 2015) (court cited the petitioner's prison programming, which demonstrated that the petitioner possessed "substantial mental competence," in rejecting an argument for equitable tolling based on the petitioner's alleged mental incompetence).

Additionally, the transcript of Petitioner's 2008 parole hearing, which is attached to Petitioner's October 4, 2013 habeas petition (see Respondent's Lodgment 1), further dispels any suggestion that Petitioner's mental state supposedly prevented him from filing a federal petition until recently. At the hearing, Petitioner stated that he had not taken any psychotropic medications for two years (id., p. 41). Petitioner denied suffering any disability preventing him from participating in the hearing (id., pp. 41-42). Petitioner coherently described his version of the crime (claiming the crime was the fault of PCP), his family, his substance abuse history, his prison programming and his parole plans (id., pp. 49-61, 67-73). Nothing in the transcript suggests that Petitioner then was: (a) unable rationally or factually to understand the need to file timely; or (b) unable personally to prepare a habeas petition and effectuate its

filing. As to both (a) and (b), the transcript demonstrates the contrary.[4]

In sum, Petitioner's demonstrated abilities to participate in court litigation, prison programming and administrative proceedings compellingly refutes Petitioner's current conclusory allegations of mental incapacity. As a matter of law, Petitioner is not entitled to equitable tolling.

E. Actual Innocence

"[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, 569 U.S. 383, 386 (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, 569 U.S. at 386. 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, 569 U.S. at 386. "[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror [or other trier of fact],

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[4] The Court also observes that the evaluating psychologist stated in 2008 that Petitioner's "thinking was well organized and goal directed and he was able to express his thoughts in a clear, coherent manner. Memory, language functioning, pace of speed and cognition were all considered to be within normal limits" (Petition, Exhibit A at 33). In 2008, Petitioner told the psychologist that Petitioner "no longer has any mental health issues" (id.).

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.").

"'[A]ctual innocence' means factual innocence, not mere legal insufficiency." Bousley v. United States, 523 U.S. 614, 623 (1998); Calderon v. Thompson, 523 U.S. 538, 559 (1998); Muth v. Fondren, 676 F.3d 815, 819, 822 (9th Cir.), cert. denied, 568 U.S. 894 (2012). "The evidence of innocence 'must be so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error.'" Lee v. Lampert, 653 F.3d at 937-38 (quoting Schlup, 513 U.S. at 316). The court must consider "'all the evidence, old and new, incriminating and exculpatory,' admissible at trial or not." Lee v. Lampert, 653 F.3d at 938 (quoting House v. Bell, 547 U.S. 518, 538 (2006). The court must make a "probabilistic determination about what reasonable, properly instructed jurors would do." Id. (quoting House

v. Bell, 547 U.S. at 538).

Petitioner has produced no evidence, much less new evidence, to demonstrate his alleged actual innocence of the charge to which he pled guilty. In any event, Petitioner's plea tends to refute any claim of actual innocence. See Johnson v. Medina, 547 Fed. App'x 880, 885 (9th Cir. 2013) (petitioner's plea "simply undermine[d]" his claim of actual innocence); Chestang v. Sisto, 522 Fed. App'x 389, 390 (9th Cir.), cert. denied, 571 U.S. 1012 (2013) (petitioner's plea "seriously undermine[d]" his claim of actual innocence); Stonebarger v. Williams, 458 Fed. App'x 627, 629 (9th Cir. 2011), cert. denied, 566 U.S. 927 (2012) (denying certificate of appealability on claim of actual innocence, where no reasonable juror would deem petitioner to be actually innocent in light of his confession, his guilty plea and the lack of any facts inconsistent with guilt); People v. McNabb, 228 Cal. App. 3d 462, 470-71, 279 Cal. Rptr. 11 (1991) ("the issue of guilt or innocence is waived by a guilty plea").[5] Therefore, Petitioner is not entitled to an equitable exception to the statute of limitations.

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[5] In Smith v. Baldwin, 510 F.3d 1127, 1140 n.9 (9th Cir. 2007) (en banc), cert. denied, 555 U.S. 830 (2008), the Ninth Circuit flagged but declined to decide the issue of when, if ever, an "actual innocence" gateway claim can be available to a petitioner who has pled guilty or no contest. Under the circumstances of the present case, Petitioner's plea appears highly material to the Schlup analysis. See, e.g., Stonebarger v. Williams, 458 Fed. App'x at 629.

II. All Claims Alleging Error During Petitioner's 2019 State Post-Conviction Review Proceedings Fail to Raise any Issue Cognizable on Federal Habeas Corpus.

Federal habeas corpus relief may be granted "only on the ground that [Petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Mere errors in the application of state law are not cognizable on federal habeas review. Id.; Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) ("it is not the province of a federal habeas corpus court to reexamine state-court determinations on state-law questions"); accord Pulley v. Harris, 465 U.S. 37, 41 (1984).

Accordingly, "federal habeas relief is not available to redress alleged procedural errors in state post-conviction proceedings." Ortiz v. Stewart, 149 F.3d 923, 939 (9th Cir. 1998), cert. denied, 526 U.S. 1123 (1999); Franzen v. Brinkman, 877 F.2d 26, 26 (9th Cir.), cert. denied, 493 U.S. 1012 (1989) ("a petition alleging errors in the state post-conviction review process is not addressable through habeas corpus proceedings"). This rule applies to alleged procedural errors in the state appeals process. See Paniagua v. Gipson, 2013 WL 4590740, at *23 (C.D. Cal. Aug. 28, 2013) (applying Franzen v. Brinkman to a claim alleging that the California Supreme Court's denial of a petition for review was procedurally improper); Madrid v. Marshall, 1995 WL 91329, *2 (N.D. Cal. Jan. 30, 1995), aff'd, 99 F.3d 1146 (9th Cir. 1996), cert. denied, 519 U.S. 1130 (1997) ("Petitioner alleges that the California Court of Appeal erred in striking his supplemental brief contesting issues his appellate counsel would not

raise. Because Petitioner's assertions of error in the state post-conviction review process do not represent an attack on his detention, they are not addressable through habeas corpus proceedings") (citing Frazen v. Brinkman). Thus, even if the California Court of Appeal erred in 2019 by not remanding the matter to the trial court or otherwise, any such procedural errors would not entitle Petitioner to federal habeas relief.

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.[6]

DATED: April 14, 2020.

/s/
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

[6] Petitioner's requests for the appointment of counsel are denied. Petitioner has failed to demonstrate a prima facie case of present incompetence or present inability to articulate Petitioner's claims as a result of mental illness or otherwise. See Knaubert v. Goldsmith, 791 F.2d 722, 728-30 (9th Cir.), cert. denied, 479 U.S. 867 (1986); compare Allen v. Calderon, 408 F.3d 1150 (9th Cir. 2005).

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.