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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GREGORY WAYNE RIMPSON,) Case No.: 1:15-cv-01499-LJO-JLT
)
Petitioner,) FINDINGS AND RECOMMENDATIONS TO
) DISMISS PETITION FOR WRIT OF HABEAS
v.) CORPUS FOR VIOLATION OF THE ONE-YEAR
) STATUTE OF LIMITATIONS
MULE CREEK STATE PRISON WARDEN,)
)
Respondent.) ORDER DIRECTING THAT OBJECTIONS BE
) FILED WITHIN THIRTY DAYS

After reviewing the petition, the Court determined that the petition was untimely and ordered Petitioner to show cause why it should not be dismissed. (Doc. 10). Because Petitioner’s response fails to show that the petition was timely or that Petitioner qualifies for an exception to the timeliness bar (Doc. 12), the Court will recommend that the petition be **DISMISSED**.

DISCUSSION

I. Review of Petition

Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition if it “plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court” Rule 4 of the Rules Governing Section 2254 Cases. The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of habeas corpus, either on its own motion under Rule 4, pursuant to the respondent’s motion to dismiss, or after an answer to the petition has been filed. Herbst v. Cook, 260 F.3d 1039 (9th Cir.2001).

1 The Ninth Circuit, in Herbst v. Cook, concluded that a district court may dismiss *sua sponte* a
2 habeas petition on statute of limitations grounds so long as the court provides the petitioner adequate
3 notice of its intent to dismiss and an opportunity to respond. 260 F.3d at 1041-42. By issuing the
4 Order to Show Cause, the Court afforded Petitioner the notice required by the Ninth Circuit in Herbst.

5 **II. Limitation Period For a Petition for Writ of Habeas Corpus**

6 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of
7 1996 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas corpus
8 filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997);
9 Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc), *cert. denied*, 118 S.Ct. 586 (1997).
10 The instant petition was filed on September 3, 2015, and thus, it is subject to the provisions of the
11 AEDPA.

12 The AEDPA imposes a one-year period of limitation on petitioners seeking to file a federal
13 petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As amended, § 2244, subdivision (d)
14 reads:

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

17 (A) the date on which the judgment became final by the conclusion of direct
18 review or the expiration of the time for seeking such review;

19 (B) the date on which the impediment to filing an application created by
20 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;

21 (C) the date on which the constitutional right asserted was initially
22 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

23 (D) the date on which the factual predicate of the claim or claims presented
24 could have been discovered through the exercise of due diligence.

25 (2) The time during which a properly filed application for State post-conviction or
26 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.

27 28 U.S.C. § 2244(d).

28 In most cases, the limitation period begins running on the date that the petitioner's direct

1 review became final. The AEDPA, however, is silent on how the one year limitation period affects
2 cases where direct review concluded *before* the enactment of the AEDPA. The Ninth Circuit has held
3 that if a petitioner whose review ended before the enactment of the AEDPA filed a habeas corpus
4 petition within one year of the AEDPA's enactment, the Court should not dismiss the petition pursuant
5 to § 2244(d)(1). Calderon v. United States Dist. Court (Beeler), 128 F.3d 1283,1286 (9th Cir.), *cert.*
6 *denied*, 118 S.Ct. 899 (1998); Calderon v. United States Dist. Court (Kelly), 127 F.3d 782, 784 (9th
7 Cir.), *cert. denied*, 118 S.Ct. 1395 (1998). In such circumstances, the limitations period would begin
8 to run on April 25, 1996 and would expire one year later, i.e., on April 24, 1997. Patterson v. Stewart,
9 2001 WL 575465 (9th Cir. Ariz.).

10 Petitioner alleges he was convicted on January 11, 1994, and that he appealed his conviction to
11 the California Court of Appeal, Fifth Appellate District ("5th DCA"), which affirmed his conviction on
12 June 15, 1995 in case no. F021144. (Doc. 1, pp. 1-2). According to the California Rules of Court, a
13 decision of the Court of Appeal becomes final thirty days after filing of the opinion, Cal. Rules of
14 Court, Rule 8.264(b)(1), and an appeal must be taken to the California Supreme Court within ten days
15 of finality. Cal. Rules of Court, Rule 8.500(e)(1). Thus, Petitioner's conviction would become final
16 forty days after the Court of Appeal's decision was filed, or on July 25, 1995. However, the record
17 indicates that remittitur issued on August 8, 1995; thus, the Court will accept that later date as the date
18 when direct review became final. (Doc. 1, p. 164).

19 Because Petitioner's direct appeal became final prior to the enactment of the AEDPA, the one-
20 year limitation period applicable to Petitioner's 1994 conviction began on April 25, 1996 and expired
21 on April 24, 1997. As mentioned, Petitioner did not file the instant petition until September 3, 2015,
22 over nineteen years after his one-year limitation period expired. Thus, unless Petitioner is entitled to
23 some form of tolling, his petition is untimely and should be dismissed.

24 **III. Tolling of the Limitation Period Pursuant to 28 U.S.C. § 2244(d)(2)**

25 Under the AEDPA, the statute of limitations is tolled during the time that a properly filed
26 application for state post-conviction or other collateral review is pending in state court. 28 U.S.C. §
27 2244(d)(2). A properly filed application is one that complies with the applicable laws and rules
28 governing filings, including the form of the application and time limitations. Artuz v. Bennett, 531

1 U.S. 4, 8 (2000). An application is pending during the time that ‘a California petitioner completes a
2 full round of [state] collateral review,” so long as there is no unreasonable delay in the intervals
3 between a lower court decision and the filing of a petition in a higher court. Delhomme v. Ramirez,
4 340 F. 3d 817, 819 (9th Cir. 2003), abrogated on other grounds as recognized by Waldrip v. Hall, 548
5 F. 3d 729 (9th Cir. 2008)(per curium)(internal quotation marks and citations omitted); see Evans v.
6 Chavis, 546 U.S. 189, 193-194 (2006); see Carey v. Saffold, 536 U.S. 214, 220, 222-226 (2002); see
7 also, Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999).

8 Nevertheless, there are circumstances and periods of time when no statutory tolling is allowed.
9 For example, no statutory tolling is allowed for the period of time between finality of an appeal and
10 the filing of an application for post-conviction or other collateral review in state court, because no
11 state court application is “pending” during that time. Nino, 183 F.3d at 1006-1007; Raspberry v.
12 Garcia, 448 F.3d 1150, 1153 n. 1 (9th Cir. 2006). Similarly, no statutory tolling is allowed for the
13 period between finality of an appeal and the filing of a federal petition. Id. at 1007. In addition, the
14 limitation period is not tolled during the time that a federal habeas petition is pending. Duncan v.
15 Walker, 563 U.S. 167, 181-182 (2001); see also, Fail v. Hubbard, 315 F. 3d 1059, 1060 (9th Cir.
16 2001)(as amended on December 16, 2002). Further, a petitioner is not entitled to statutory tolling
17 where the limitation period has already run prior to filing a state habeas petition. Ferguson v.
18 Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (“section 2244(d) does not permit the reinitiation of the
19 limitations period that has ended before the state petition was filed.”); Jiminez v. White, 276 F. 3d
20 478, 482 (9th Cir. 2001). Finally, a petitioner is not entitled to continuous tolling when the
21 petitioner’s later petition raises unrelated claims. See Gaston v. Palmer, 447 F.3d 1165, 1166 (9th Cir.
22 2006).

23 Petitioner alleges that he filed the following state habeas petitions: (1) consolidated petitions
24 filed in the Superior Court of Merced County on September 5 and September 12, 2014, and denied on
25 September 29, 2014 (Doc. 1, p. 165);¹ (2) petition filed in the 5th DCA on November 12, 2014, and
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28 ¹ In computing the running of the statute of limitations, the day an order or judgment becomes final is excluded and time begins to run on the day after the judgment becomes final. See Patterson v. Stewart, 251 F.3d 1243, 1247 (9th Cir. 2001) (Citing Rule 6 of the Federal Rules of Civil Procedure).

1 denied on December 2, 2014 (Doc. 1, p. 168); and (3) petition filed in the California Supreme Court
2 on February 2, 2015 and denied on April 15, 2015. Although Petitioner does not specify the precise
3 dates on which he filed all of these petition(s), the Court has accessed the California court system's
4 electronic database to ascertain the exact dates of filing and denial.²

5 However, none of these petitions entitles Petitioner to statutory tolling under the AEDPA
6 because they were all filed *after* the one-year period expired. A petitioner is not entitled to tolling
7 where the limitations period has already run prior to filing a state habeas petition. Green v. White, 223
8 F.3d 1001, 1003 (9th Cir. 2000); Jiminez v. Rice, 276 F.3d 478 (9th Cir. 2001); see Webster v. Moore,
9 199 F.3d 1256, 1259 (11th Cir. 2000)(same); Ferguson v. Palmateer, 321 F.3d 820 (9th Cir.
10 2003)("section 2244(d) does not permit the reinitiation of the limitations period that has ended before
11 the state petition was filed."); Jackson v. Dormire, 180 F.3d 919, 920 (8th Cir. 1999) (petitioner fails to
12 exhaust claims raised in state habeas corpus filed after expiration of the one-year limitations period).
13 Here, as mentioned, the limitations period expired on April 24, 1997, approximately seventeen years
14 *before* Petitioner filed his first state habeas petition. Accordingly, he cannot avail himself of the
15 statutory tolling provisions of the AEDPA.

16 **IV. Equitable Tolling**

17 The running of the one-year limitation period under 28 U.S.C. § 2244(d) is subject to equitable
18 tolling in appropriate cases. See Holland v. Florida, 560 U.S. 631, 651-652, 130 S.Ct. 2549, 2561
19 (2010); Calderon v. United States Dist. Ct., 128 F.3d 1283, 1289 (9th Cir. 1997). The limitation period
20 is subject to equitable tolling when "extraordinary circumstances beyond a prisoner's control make it
21 impossible to file the petition on time." Shannon v. Newland, 410 F. 3d 1083, 1089-1090 (9th Cir.
22 2005)(internal quotation marks and citations omitted). "When external forces, rather than a
23 petitioner's lack of diligence, account for the failure to file a timely claim, equitable tolling of the

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25 ² The court may take notice of facts that are capable of accurate and ready determination by resort to sources whose
26 accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b); United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th
27 Cir. 1993). The record of state court proceeding is a source whose accuracy cannot reasonably be questioned, and judicial
28 notice may be taken of court records. Mullis v. United States Bank. Ct., 828 F.2d 1385, 1388 n.9 (9th Cir. 1987); Valerio v.
Boise Cascade Corp., 80 F.R.D. 626, 635 n. 1 (N.D.Cal.1978), *aff'd*, 645 F.2d 699 (9th Cir.); see also Colonial Penn Ins.
Co. v. Coil, 887 F.2d 1236, 1239 (4th Cir. 1989); Rodic v. Thistledown Racing Club, Inc., 615 F.2d 736, 738 (6th. Cir.
1980). As such, the internet website for the California Courts, containing the court system's records for filings in the Court
of Appeal and the California Supreme Court are subject to judicial notice.

1 statute of limitations may be appropriate.” Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999).
2 “Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: “(1) that
3 he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his
4 way.” Holland, 560 U.S. at 651-652; Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807
5 (2005). “[T]he threshold necessary to trigger equitable tolling under AEDPA is very high, lest the
6 exceptions swallow the rule.” Miranda v. Castro, 292 F. 3d 1062, 1066 (9th Cir. 2002)(citation
7 omitted). As a consequence, “equitable tolling is unavailable in most cases.” Miles, 187 F. 3d at
8 1107.

9 Petitioner has made no express claim of entitlement to equitable tolling and, based on the
10 record now before the Court, the Court sees no basis for such a claim. Thus, the petition appears to be
11 untimely and should be dismissed.

12 **V. Actual Innocence.**

13 The petition refers to actual innocence several times. As a result, in the order to show cause,
14 the Court presumed Petitioner was raising that contention as a way to avoid dismissal for untimeliness.
15 The Court discussed the Ninth Circuit rules for establishing a defense to untimeliness through actual
16 innocence. In McQuiggin v. Perkins, 569 U.S.____, 2013 WL 2300806 (2013), the United States
17 Supreme Court held that “actual innocence” could be an exception to the one-year limitation bar in the
18 AEDPA:

19 We hold that actual innocence, if proved, serves as a gateway through which a petitioner may
20 pass whether the impediment is a procedural bar, as it was in Schlup and House,³ or, as in this
21 case, expiration of the statute of limitations. We caution, however, that tenable actual-
22 innocence gateway pleas are rare: “[A] petitioner does not meet the threshold requirement
23 unless he persuades the district court that, in light of the new evidence, no juror, acting
24 reasonably, would have voted to find him guilty beyond a reasonable doubt.” Schlup, 513 U.S.,
25 at 329; see House, 547 U.S., at 538 (emphasizing that the Schlup standard is “demanding” and
26 seldom met). And in making an assessment of the kind Schlup envisioned, “the timing of the
27 [petition]” is a factor bearing on the “reliability of th[e] evidence” purporting to show actual
28 innocence. Schlup, 513 U.S., at 332.

29 McQuiggin, at *3. The Supreme Court went on to explain that an “unexplained delay in presenting
30 new evidence bears on the determination whether the petitioner has made the requisite showing, and,
31 _____

32 ³ Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851 (1995); House v. Bell, 547 U.S. 518, 126 S.Ct. 2064 (2006).

1 thus, “a court may consider how the timing of the submission and the likely credibility of [a
2 petitioner’s] affidants bear on the probable reliability of evidence [of actual innocence].” Id. at *11,
3 quoting Schlup, 513 U.S. at 332. See also Lee v. Lampert, 653 F.3d 929, 932-933 (9th Cir. 2011)(*en*
4 *banc*)(“a credible claim of actual innocence constitutes an equitable exception to AEDPA’s limitations
5 period, and a petitioner who makes such a showing may pass through the Schlup gateway and have his
6 otherwise time-barred claims heard on the merits.”) The “Schlup gateway,” however, may only be
7 employed when a petitioner “falls within the narrow class of cases...implicating a fundamental
8 miscarriage of justice. Schlup, 513 U.S. at 314-315; McQuiggin, at *9. However, “[t]o ensure that the
9 fundamental miscarriage of justice exception would remain ‘rare’ and would only be applied in the
10 ‘extraordinary case,’ while at the same time ensuring that the exception would extend relief to those
11 who were truly deserving,” the Supreme Court explicitly limited the equitable exception to cases
12 where a petitioner has made a showing of innocence. Schlup, 513 U.S. at 321. “The Supreme Court
13 did not hold that a petitioner may invoke Schlup whenever he wants a trial do-over.” Lee, 653 F.3d at
14 946 (Kozinski, J., concurring.)

15 The rule announced in McQuiggin is not a type of equitable tolling, which provides for an
16 extension of the time statutorily prescribed, but an equitable exception to § 2244(d)(1). McQuiggin at
17 *7. Moreover, the Court noted that actual innocence, if proven, merely allows a federal court to
18 address the merits of a petitioner’s constitutional claims; the Court has yet to address whether “a
19 freestanding claim of actual innocence” provides a separate basis for granting habeas relief.
20 McQuiggin at *7.

21 However, the petition fails to meet Schlup’s exacting standard. Petitioner makes the claim of
22 actual innocence and includes this allegation along with claims of ineffective assistance of trial
23 counsel and violations of due process at trial. (E.g., Doc. 1, p. 22). However, as discussed above,
24 actual innocence means just that: factual and actual innocence of the charge, not merely legal
25 innocence. In other words, “actual innocence” is not met merely by presenting constitutional claims
26 the might require reversal of his conviction and a new trial. Unless Petitioner can produce evidence
27 establishing his factual innocence of the charges for which he was convicted in 1994 under Schlup, he
28 cannot use the actual innocence doctrine to avoid the one-year limitation period.

1 In his response to the Order to Show Cause, Petitioner again argues actual innocence.
2 However, repeated readings of Petitioner’s response reveals no evidence of factual innocence.
3 Instead, Petitioner’s argument appears to be twofold. First, Petitioner contends that he was convicted
4 on insufficient evidence because no physical evidence tied him to the victim’s murder and the
5 prosecution’s eyewitnesses were not credible. Again, this is not the type of proof of actual innocence
6 envisioned in Schlup and McQuiggen. Petitioner is essentially asking this Court to re-weigh the
7 credibility of the multiple witnesses at trial who identified him as the shooter, and to agree with him
8 that the prosecution witnesses were so lacking in credibility that no reasonable juror could have
9 convicted him. This weighing of credibility was already done by the jury, the trial judge, the Court of
10 Appeal, and the California Supreme Court. Petitioner has not presented new evidence that would meet
11 the “demanding” standard in Schlup that no reasonable juror would have found him guilty beyond a
12 reasonable doubt. Schlup, 513 U.S., at 329.

13 Second, Petitioner argues that his ineffective assistance claims are legitimate and should be
14 heard on the merits. What Petitioner fails to appreciate is that this Court does not have the latitude to
15 disregard the timeliness bar simply because a petitioner believes he has legitimate constitutional
16 claims. The mere fact that the claims themselves may be meritorious does not in any way establish
17 actual innocence. At best, they might establish entitlement to habeas relief. However, absent a
18 showing of actual innocence that would avoid the timeliness bar, this Court cannot reach the merits of
19 Petitioner’s claims. Nothing in either the petition nor the response to the order to show cause meet
20 Schlup’s demanding standard which would show that this is one of those “rare” instances where actual
21 innocence has been proven.

22 The burden of demonstrating that the AEDPA’s one-year limitation period was sufficiently
23 tolled, whether statutorily or equitable, rests with the petitioner. *See, e.g., Pace v. DiGuglielmo*, 544
24 U.S. 408, 418 (2005); Gaston v. Palmer, 417 F.3d 1030, 1034 (9th Cir. 2005); Smith v. Duncan, 297
25 F.3d 809, 814 (9th Cir. 2002); Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002). For the reasons
26 discussed above, the Court finds and concludes that Petitioner has not met his burden with respect to
27 the tolling issue. Accordingly, the petition is late and should therefore be dismissed.

28 ///

1 **RECOMMENDATION**

2 Accordingly, the Court HEREBY RECOMMENDS that the habeas corpus petition be
3 **DISMISSED** for Petitioner’s failure to comply with 28 U.S.C. § 2244(d)’s one year limitation period.

4 This Findings and Recommendation is submitted to the United States District Court Judge
5 assigned to this case, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304 of the
6 Local Rules of Practice for the United States District Court, Eastern District of California.

7 **Within 21 days** after being served with a copy, any party may file written objections with the court
8 and serve a copy on all parties. Such a document should be captioned “Objections to Magistrate
9 Judge’s Findings and Recommendation.” Replies to the objections shall be served and filed **within 10**
10 **days** (plus three days if served by mail) after service of the objections. The Court will then review the
11 Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to
12 file objections within the specified time may waive the right to appeal the District Court’s order.
13 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

14
15 IT IS SO ORDERED.

16 Dated: January 21, 2016

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE