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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JOHN'EL BAILEY,

Petitioner,

v.

M.E. SPEARMAN, Warden,

Respondent.

Case No. 1:17-cv-01262-SKO HC

ORDER DISMISSING PETITION AS
UNTIMELY

(Doc. 1)

SCREENING MEMORANDUM

Petitioner, John'El Bailey, a state prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenges his four year prison sentence for assault with a deadly weapon. He raises three claims: (1) the plea was not voluntarily and intelligently made; (2) the illegality of the sentence under California law; and (3) he is actually innocent. Because the petition is untimely, the Court will dismiss it.

I. Procedural and Factual Background

On April 19, 2012, Petitioner pled no contest to assault with a deadly weapon (Cal. Penal Code § 4501). (Doc. 1 at 26.) The court sentenced Petitioner to a four-year term of imprisonment. *Id.* at 32.

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1 Petitioner did not directly appeal his conviction; instead, Petitioner filed a writ of habeas
2 corpus in Kings County Superior Court on December 1, 2016, which the Court denied on January
3 11, 2017. *Id.* at 41-42. The appellate court denied Petitioner’s contention that the trial court failed
4 to properly advise him of his rights or imposed an illegal sentence. *Id.* The Fifth Appellate District
5 Court of Appeal denied the petition for writ of habeas corpus on February 15, 2017, and the
6 California Supreme Court denied the petition on June 28, 2017.

7 On September 21, 2017, Petitioner filed his federal petition in this Court.

8
9 **II. The Federal Petition Is Untimely**

10 **A. Commencement of the Statutory Limitations Period**

11 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death
12 Penalty Act of 1996 (AEDPA), which applies to all petitions for writ of habeas
13 corpus filed after its enactment. *Lindh v. Murphy*, 521 U.S. 320, 327 (1997).
14 AEDPA provides a one-year period of limitation in which a petitioner may file a
15 petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). The limitations period is
16 measured from the latest of:

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

20 (B) the date on which the impediment to filing a State action in
21 violation of the Constitution or laws of the United States is removed, if
the applicant was prevented from filing by such state action;

22 (C) the date on which the constitutional right asserted was initially
23 recognized by the Supreme Court and made retroactively applicable to
cases on collateral review; or

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

26 28 U.S.C. § 2244(d)(1).

1 In this case, Petitioner did not seek direct review in the state court. The federal statutory
2 limitation period began on June 19, 2012, following the expiration of the 60-day period in which to
3 seek review in the California Court of Appeal. Absent tolling, the one-year statutory limitation
4 period expired on June 20, 2013.

5 **B. Tolling of Statutory Limitation Period**

6 The limitation period is tolled during the pendency of a properly filed application for State
7 post-conviction relief or other collateral review with respect to the pertinent judgment or claim. 28
8 U.S.C. § 2244(d)(2). As detailed in the procedural and factual background above, Petitioner filed his
9 habeas petition with the Kings County Superior Court on December 1, 2016.
10

11 Under California law, “a state prisoner may seek review of an adverse lower court decision
12 by filing the original petition (rather than a notice of appeal) in the higher court, and that petition is
13 timely if filed within a ‘reasonable time.’” *Evans v. Chavis*, 546 U.S. 189, 192-93 (2006). “As long
14 as the prisoner filed a petition for appellate review within a ‘reasonable time,’ he could count as
15 ‘pending’ (and add to the 1-year time limit) the days between (1) the time the lower state court
16 reached an adverse decision; and (2) the day he filed a petition in the higher state court.” *Id.* at 193.
17

18 When the state court has explicitly ruled that the gap period between the lower court’s
19 decision and the prisoner’s filing of an appeal or new petition was unreasonable, a federal court need
20 conduct no further inquiry. *Carey v. Saffold*, 536 U.S. 214, 225-26 (2002). If the state court did not
21 explicitly state whether the gap period was reasonable or unreasonable, the federal court must look
22 to the state supreme court’s decisions to determine whether the state would consider the second
23 action to have been filed within a reasonable time. *Evans*, 546 U.S. at 198.
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25 In California, unjustified delays greater than six months are clearly unreasonable. *Id.* at 201.
26 The Ninth Circuit agreed that in the absence of unusual facts justifying further delay, “a time gap in
27 excess of six months was too long.” *Waldrip v. Hall*, 548 F.3d 729, 731 (9th Cir. 2008). In many
28 cases, shorter gaps have been found unreasonable. *See, e.g., Stanclie v. Clay*, 692 F.3d 948, 956 (9th

1 Cir. 2012) (denying tolling for an 82-day delay); *Velasquez v. Kirkland*, 639 F.3d 964, 967-69 (9th
2 Cir. 2011) (denying tolling for 80 and 91-day gaps); *Banjo v. Ayers*, 614 F.3d 964, 970 (9th Cir.
3 2010) (finding 146-day gap unreasonable); *Chaffer v. Prosper*, 592 F.3d 1046, 1048 (9th Cir. 2010)
4 (*per curiam*) (no tolling for delays of 101 and 115 days).

5 The statutory limitations period began on June 19, 2012, and ran for 1,626 days, or over 4
6 years, before Petitioner filed a habeas petition in the Kings County Superior Court on December 1,
7 2016. Under the cases summarized above, Petitioner is not entitled to tolling during the 1,626 day
8 gap. A four year delay in filing a habeas petition is unreasonable. Therefore, filed on September 21,
9 2017, the above-captioned petition is untimely.

11 **III. No Actual Innocence**

12 Petitioner contends that he is not procedurally barred from bringing his claims because he is
13 “actually innocent” of the charged offense. (Doc. 1 at 22.)

14 A prisoner’s actual innocence, if proven, permits him to circumvent the statute of limitations.
15 *Schlup v. Delo*, 513 U.S. 298, 315 (1995). “[T]enable actual-innocence gateway pleas are rare.”
16 *McQuiggin v. Perkins*, 133 S.Ct. 1924, 1928 (2013). “[A] petitioner does not meet the threshold
17 requirement unless he persuades the district court that, in light of the new evidence, no juror, acting
18 reasonably, would have voted to find him guilty beyond a reasonable doubt.” *Schlup*, 513 U.S. at
19 329. “[T]he *Schlup* standard is demanding and permits review only in the extraordinary case.”
20 *House v. Bell*, 547 U.S. 518, 538 (2006) (internal quote omitted).

21 In evaluating an actual innocence claim, “[t]he court’s function is not to make an
22 independent factual determination about what likely occurred, but rather to assess the likely impact
23 of the evidence on reasonable jurors.” *Id.* To do so, the court must consider the “overall, newly
24 supplemented record,” including the credibility of the witnesses presented at trial. *Id.*

25 “To be credible, [] a claim [of actual innocence] requires petitioner to support his
26 allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific
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1 evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at
2 trial.” *Schlup v. Delo*, 513 U.S. 298, 324 (1995). Here, Petitioner claims that he had a defense to the
3 charge in that the fight that precipitated the weapons charge was “actually a mutual combat initiated
4 by the victim in this case.” (Doc. 1 at 20). Although Petitioner alleges a new defense, Petitioner has
5 provided no evidence in his petition to support his actual innocence allegation. Therefore, his actual
6 innocence claim does not create a new basis for Petitioner to pursue habeas relief despite the
7 untimeliness of his claim.
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9 **IV. Certificate of Appealability**

10 A petitioner seeking a writ of habeas corpus has no absolute entitlement to appeal a district
11 court's denial of his petition, but may only appeal in certain circumstances. *Miller-El v. Cockrell*,
12 537 U.S. 322, 335-36 (2003). The controlling statute in determining whether to issue a certificate of
13 appealability is 28 U.S.C. § 2253, which provides:

14 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a
15 district judge, the final order shall be subject to review, on appeal, by the court of
16 appeals for the circuit in which the proceeding is held.

17 (b) There shall be no right of appeal from a final order in a proceeding to test the
18 validity of a warrant to remove to another district or place for commitment or
19 trial a person charged with a criminal offense against the United States, or to test
20 the validity of such person's detention pending removal proceedings.

21 (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an
22 appeal may not be taken to the court of appeals from—

23 (A) the final order in a habeas corpus proceeding in which the detention
24 complained of arises out of process issued by a State court; or

25 (B) the final order in a proceeding under section 2255.

26 (2) A certificate of appealability may issue under paragraph (1) only if the
27 applicant has made a substantial showing of the denial of a constitutional right.

28 (3) The certificate of appealability under paragraph (1) shall indicate which
specific issues or issues satisfy the showing required by paragraph (2).

1 If a court denies a habeas petition, the court may only issue a certificate of appealability "if
2 jurists of reason could disagree with the district court's resolution of his constitutional claims or that
3 jurists could conclude the issues presented are adequate to deserve encouragement to proceed
4 further." *Miller-El*, 537 U.S. at 327; *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Although the
5 petitioner is not required to prove the merits of his case, he must demonstrate "something more than
6 the absence of frivolity or the existence of mere good faith on his . . . part." *Miller-El*, 537 U.S. at
7 338.

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9 Reasonable jurists would not find the Court's determination that the above-captioned habeas
10 petition is untimely to be debatable or wrong. Accordingly, the Court should decline to issue a
11 certificate of appealability.

12 **V. Conclusion**

13 The Petition for Writ of Habeas Corpus is untimely. Accordingly, the Court hereby
14 ORDERS that:

- 15 1. The Petition for Writ of Habeas Corpus is DISMISSED WITH PREJUDICE.
- 16 2. The Clerk of Court is DIRECTED to enter judgment; and
- 17 3. The Court DECLINES to issue a certificate of appealability.

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20 IT IS SO ORDERED.

21 Dated: October 24, 2017

22 /s/ Sheila K. Oberto
23 UNITED STATES MAGISTRATE JUDGE