UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM JAMES HARRIS,

Petitioner,

v.

TIM VIRGA,

Respondent.

No. 2:12-cv-02846-LKK-AC

ORDER & FINDINGS AND RECCOMENDATIONS

Petitioner is a state prisoner proceeding pro se with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner is serving a sentence of fifty-three years following his 1998 conviction on thirteen charges of second-degree armed robbery, one charge of attempted second degree robbery, one charge of assault and battery, and two charges of false imprisonment. The petition was filed on November 20, 2012 and claims that the state trial court violated petitioner's Fifth and Sixth Amendment rights when it sentenced him to consecutive sentences "for crimes committed on same occasion with single intent within close temporal proximity." Petitioner also claims that the state trial court violated his due process rights when it sentenced him to the statutory upper terms for his offenses in violation of the rule stated by the United States Supreme Court in Apprendi v. New Jersey, 530 U.S. 466 (2000).

Respondent has filed a motion to dismiss the petition as untimely. ECF No. 15. Petitioner opposes this motion (ECF No. 24) and respondent has filed a reply to petitioner's opposition (ECF No. 30).

ANALYSIS

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 . . . ." The Ninth Circuit Court of Appeals has referred to a respondent's motion to dismiss as a request for the court to dismiss under Rule 4 of the Rules Governing § 2254 Cases. See, e.g., O'Bremski v. Maass, 915 F.2d 418, 420 (1991); White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989); Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n.12 (E.D. Cal. 1982). Accordingly, the court will review respondent's motion to dismiss pursuant to its authority under Rule 4.

I. The Statute of Limitations and Statutory Tolling Under 28 U.S.C. § 2244

As amended by the Antiterrorism and Effective Death Penalty Act (AEDPA), the statutory scheme governing federal habeas proceedings provides as follows:

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

28 U.S.C. § 2244(d)(1).

Section 2244(d)(2) provides that "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" the limitations period. 28 U.S.C. § 2244(d)(2). Generally, this means that the statute of limitations is tolled during the time after a state habeas petition has

been filed, but before a decision has been rendered. Nedds v. Calderon, 678 F.3d 777, 780 (9th Cir. 2012). However, "a California habeas petitioner who unreasonably delays in filing a state habeas petition is not entitled to the benefit of statutory tolling during the gap or interval preceding the filing." Id. at 781 (citing Carey v. Saffold, 536 U.S. 214, 225-27 (2002)). Furthermore, the AEDPA "statute of limitations is not tolled from the time a final decision is issued on direct state appeal and the time the first state collateral challenge is filed because there is no case 'pending' during that interval." Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999), overruled on other grounds by Carey v. Saffold, 536 U.S. 214 (2002). In Carey v. Saffold, 536 U.S. 214 (2002), the United States Supreme Court held that the limitation period is statutorily tolled during one complete round of state post-conviction review, as long as such review is sought within the state's time frame for seeking such review. Id. at 220, 222-23. State habeas petitions filed after the one-year statute of limitations has expired do not revive the statute of limitations and have no tolling effect. See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003); Jimenez v. Rice, 276 F.3d 478, 482 (9th Cir.2001); Green v. White, 223 F.3d 1001, 1003 (9th Cir. 2000) (petitioner is not entitled to tolling where the limitations period has already run).

II. Procedural Facts

For purposes of timeliness analysis, the relevant chronology of this case is as follows:

1. Petitioner was convicted on October 26, 1998 in the Sacramento County Superior Court. See Lodged Document No. 1.
2. On March 22, 2000, the California Court of Appeal for the Third Appellate District affirmed petitioner's conviction.[1] See Lodged Document No. 2.
3. On June 29, 2001, petitioner filed his first petition for writ of habeas corpus in the California Supreme Court.[2] This petition was denied on October 31, 2001. See Lodged Document Nos. 3-4.

[1] The state appeals court struck an enhancement to count 3 of the charges for which petitioner had been convicted. The court otherwise affirmed the trial court's sentencing judgment.

[2] The petition was signed and dated by petitioner on June 29, 2001, which appears to be the date it was delivered to prison officials for mailing to the court. That date is therefore deemed its filing date. See Houston v. Lack, 487 U.S. 266 (1988).

4. On April 15, 2008, petitioner filed a second petition for writ of habeas corpus in the Sacramento County Superior Court, which was denied on May 27, 2008. See Lodged Document Nos. 5-6.

5. On May 13, 2009, petitioner filed a third petition for writ of habeas corpus in the California Court of Appeals Third Appellate District, which was denied on May 21, 2009. See Lodged Document Nos. 7-8.

6. On November 24, 2009, petitioner filed a fourth petition for writ of habeas corpus in the California Supreme Court. That petition was denied on June 9, 2010, citing, *inter alia*, In re Robbins, 18 Cal.4th 770, 780 (1998). See Lodged Document Nos. 9-10.

7. On September 29, 2010, petitioner filed a fifth petition for writ of habeas corpus in the Sacramento County Superior Court.[3] This petition was denied on November 18, 2010. See Lodged Document Nos. 11-12.

8. On May 31, 2011, petitioner filed a sixth petition for writ of habeas corpus in the California Court of Appeals Third Appellate District, which was summarily denied by order on June 2, 2011. See Lodged Document Nos. 13-14.

9. On June 16, 2011, petitioner filed a seventh petition for writ of habeas corpus in the California Supreme Court.[4] This petition was denied on November 16, 2011, citing In re Robbins, 18 Cal.4th 770, 780 (1998) and In re Clark 5 Cal.4th 750, 767-69. See Lodged Document Nos. 15-16.

10. Petitioner filed the instant action on November 20, 2012, which petition was signed November 18, 2012.[5]

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[3] The petition was signed and dated by petitioner on September 29, 2010, which appears to be the date it was delivered to prison officials for mailing to the court. That date is therefore deemed its filing date. See Houston v. Lack, 487 U.S. 266 (1988).

[4] That petition was signed and dated by petitioner on June 16, 2011, which appears to be the date it was delivered to prison officials for mailing to the court. That date is therefore deemed its filing date. See Houston v. Lack, 487 U.S. 266 (1988).

[5] This action is deemed filed on the date the original petition was delivered to prison officials for mailing. See Houston v. Lack, 487 U.S. 266, 270-71 (1988).

III. Application of Statutory Principles

The California Court of Appeal affirmed petitioner's conviction on March 22, 2000, and petitioner did not seek further review of his conviction in the California Supreme Court.[6] Accordingly, his conviction became final on May 1, 2000. See California Rules of Court 8.366(b)(1) (decision of Court of Appeal is final in that court 30 days after filing), 8.500(e)(1) (party has 10 days after finality in Court of Appeal to seek review in the California Supreme Court). The limitations period therefore commenced on May 2, 2000,[7] and absent tolling the federal petition was due on or before May 1, 2001.

Petitioner did not file his first state petition in the California Supreme Court until June 29, 2001, see Lodged Document No. 3, fifty-eight days after the federal limitations period had run its course. None of petitioner's seven petitions in state court operated to toll the limitations period because they were all filed after the limitations period had expired and there was nothing left to toll. See Jimenez, 276 F.3d at 482. The instant action, filed November 20, 2012, is therefore time-barred unless petitioner is entitled to equitable tolling of the limitations period.

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[6] In the instant habeas corpus petition, petitioner alleges that he did seek further direct review of his case by filing an appeal in the California Supreme Court, which was denied on October 31, 2000. (ECF No. 1 at 2.) However, petitioner fails to include any supporting documentation or even a filing number for this court's consideration. Nevertheless, a review of petitioner's prior state habeas petitions indicates that the decision petitioner refers to was actually his first state habeas petition that he had filed with the California Supreme Court which was denied on October 31, 2001. See Lodged Document Nos. 4, 11 at 5. It appears that petitioner has erroneously stated that his first state habeas petition constituted a direct appeal. Accordingly, in the absence of any other evidence indicating that petitioner did file for further direct review of his conviction in the California Supreme Court, the court finds that petitioner case became final for purposes of § 2244(d)(1)(A) on May 1, 2001.

[7] The court finds that the other three possible commencement dates provided in 28 U.S.C. § 2244(d)(1)(B)-(D) do not apply in this case. Petitioner has failed to show that illegal conduct by the state or those acting for the state actually prevented petitioner from preparing or filing a timely federal habeas petition, thus making subsection B of section 2244(d)(1) inapplicable. Subsection C of section 2244(d)(1) also does not apply because petitioner does not assert any claim based on a constitutional right "newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." Finally, petitioner does not argue, and the record does not show, that section 2244(d)(1)(D) furnishes an accrual date later than May 2, 2000 for petitioner's claims.

IV. Actual Innocence

In opposition to the motion, petitioner contends that he is actually innocent of the charges of which he was convicted. ECF No. 24 at 10-17. A showing of actual innocence supports an equitable exception to the statute of limitations. Lee v. Lampert, 653 F.3d 929, 937 (9th Cir. 2011) (en banc); McQuiggin v. Perkins, 133 S. Ct. 1924, 1928 (2013). "[W]here an otherwise time-barred habeas petitioner demonstrates that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt, the petitioner may pass through the Schlup [v. Delo, 513 U.S. 298 (1995)[8]] gateway and have his constitutional claims heard on the merits." Lee, 653 F.3d at 937; accord, McQuiggin, 133 S.Ct. at 1928.

A petitioner claiming actual innocence must satisfy the Schlup standard by demonstrating "that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." Lee, 653 at 938. Actual innocence in this context "means factual innocence, not mere legal insufficiency." Bousley v. United States, 523 U.S. 614, 623-24 (1998); Sawyer v. Whitley, 505 U.S. 333, 339 (1992) (citing Smith v. Murray, 477 U.S. 527 (1986)); Jaramillo v. Stewart, 340 F.3d 877, 882-83 (9th Cir. 2003) (accord). To make a credible claim of actual innocence, petitioner must produce "new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." Schlup v. Delo, 513 U.S. 298, 324 (1995). The habeas court then considers all the evidence: old and new, incriminating and exculpatory, admissible at trial or not. House v. Bell, 547 U.S. 518, 538 (2006). On this complete record, the court makes a "'probabilistic determination about what reasonable, properly instructed jurors would do.'" Id. (quoting Schlup, 513 U.S. at 330).

Petitioner contends that the following evidence shows that he is actually innocent of the of the crimes of attempted robbery (Count 6), armed robbery (Counts 8, 9, 10, 12, 13, and 15), and false imprisonment (Counts 16 and 17):

[8] In Schlup, the Supreme Court announced that a showing of actual innocence could excuse a procedural default and permit a federal habeas court to reach the merits of otherwise barred claims for post-conviction relief.

> Count 6: attempted robbery of Sheree Pina; the witnesses stated on the record that petitioner was not the perpetrator who ruffled through her brief case or had any contact with her whatsoever. No other evidence exist [sic] to establish that fact. . . . Count 8: armed robbery of Anthony Apilado; the record illustrates that he could not make a positive identification of the perpetrator testifying: "One of the robbers is not in the courtroom." No other evidence exist [sic] to establish petitioner committed the offense. . . .
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> Count 9: armed robbery of Regina Apilado; the record illustrates that Ms. Apilado could not identify petitioner as being the perpetrator of the offense. No other evidence exist [sic] to establish that fact. . . .
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> Count 10: armed robbery of Gregory Curo; the record illustrates that Mr. Curo testified that he could not make an identification "beyond a reasonable doubt" that petitioner committed the offense. No other evidence exist [sic] placing petitioner at the crime scene. . . .
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> Count 12: armed robbery of James Estelle; the record illustrates that Mr. Estelle testified that petitioner was not the perpetrator of the crime. He never made an identification of anyone as the perpetrator. No other evidence exist [sic] that places petitioner at the crime scene.
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> Count 13: armed robbery of Kristina Rozman McLemore; the record illustrates that Ms. McLemore testified that she could not identify the perpetrator in the photo line-up (that included petitioner) except that the eyes could look the same as petitioner's, but she was not 100% sure even about that. No other evidence exist [sic] against petitioner on this offense. . . .
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> Count 15: armed robbery of Lanny P. Olis; Ms. Olis testified that she could not identify any of the perpetrators. The only evidence linking petitioner to counts 15-17 is that a fingerprint was allegedly found in what became debatable throughout the testimony as to whether the area was publicly accessible. The records stated that a Nicorette gum stand was located for customers behind the counter that is publicly accessible by a couple of inches. The only identification witness testified that could he [sic] not identify petitioner as the perpetrator wearing gloves on both hands.
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> Count 16: false imprisonment of Peter Fleenor; Mr. Fleenor testified that petitioner, for purposes of identification, was never in the store. . . .
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> Count 17: false imprisonment of Greg Mitchell; Mr. Mitchell testified that he also could not identify the perpetrator of the offense, neither as petitioner nor in general.

ECF No. 24 at 12-14.

None of this evidence is "newly discovered" or "newly presented" for purposes of

petitioner's actual innocence claim; rather, it is all testimony that was given during petitioner's criminal trial in state court. Perhaps in recognition of this fact, petitioner argues "that it has been clearly established now, since Bousley v. U.S., 523 U.S. 614 (1998), and its progeny, that there is no requirement for proffering either 'newly discovered' or 'newly presented' evidence in support of a claim for actual innocence of a sentence, or where a statute does not reach the conduct of a petitioner." ECF No. 24 at 14-15. Petitioner further insists that the court use the Bousley standard rather than the "newly discovered" or "newly presented" standard developed in Schlup. Id. Petitioner misapprehends the significance of Bousley.

Bousley involved the validity of a guilty plea to a charge of using a firearm in violation of 18 U.S.C. § 924(c)(1). The petitioner collaterally challenged the factual basis for and voluntariness of his plea, but the claim was rejected as procedurally defaulted. While the appeal of the denial of petitioner's motion under 28 U.S.C. § 2255 was pending, the U.S. Supreme Court clarified the scope of § 924(c) liability in Bailey v. United States, 516 U.S. 137 (1995). The issue presented in Bousley was whether the petitioner could attempt to overcome his default on actual innocence grounds in light of Bailey. The Court held that a showing of actual innocence of firearm use would permit petitioner to challenge the voluntariness of his plea. Bousley, 523 U.S. at 624. Bousley has no application to a case such as this one, in which a prisoner convicted following a trial brings an actual innocence claim on the basis of evidence previously considered during that trial. Hunt v. Kernan, 2008 WL 2446064 (C.D. Cal. June 17, 2008).

Moreover, nothing in Bousley purported to alter the requirements of Schlup. The Court in Bousley expressly quoted Schlup's actual innocence standard. Bousley, 523 U.S. at 623 (quoting Schlup, 513 U.S. at 327-28). Since Bousley, the Supreme Court has reaffirmed Schlup's requirement that a credible showing of actual innocence be predicated on "new reliable evidence." See House v. Bell. 547 U.S. at 537-38; see also McQuiggin, 133 S.Ct.at 1928 (analytical framework articulated in Schlup and House governs actual innocence exception to AEDPA's statute of limitations). For these reasons, the court rejects petitioner's attempt to circumvent the requirement that he present "new reliable evidence. . . that was not presented at trial." Schlup, 513 U.S. at 324.

Petitioner also submits a declaration "illustrating what his testimony would have been had his trial counsel allowed him to testify." ECF No. 24 at 15-16, Exhibit A. In his declaration, petitioner states: "Had I testified in the trial, I would have said that I did not rob these places in Counts 6, 8, 9, 10, 12, 13, 15, 16, and 17. I would have also testified that I do remember committing the remaining counts alleged in the Accusatory Pleading." Id. at pages 3-4 of Exhibit A. Even assuming that such a declaration constitutes "newly discovered" or "newly presented" evidence, these statements fail to satisfy Schlup's reliability requirement. A petitioner's uncorroborated and self-serving protestation of innocence does not bear any of the hallmarks of reliability suggested by Schlup. See Schlup, 513 U.S. at 324 ("reliable evidence" includes "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence"). Petitioner has not met the heavy burden of demonstrating that "no reasonable juror would have convicted him" in light of the new evidence. See id. at 329.

For all these reasons, petitioner's assertion of actual innocence does not excuse the untimeliness of his petition.

V. Equitable Tolling

AEDPA's one-year limitation period may be equitably tolled "in appropriate cases." Holland v. Florida, 130 S. Ct. 2549, 2560 (2010); accord Bills v. Clark, 628 F.3d 1092, 1097 (9th Cir. 2010). Equitable tolling presents a "high hurdle" for petitioners, however, and should be invoked only if extraordinary circumstances beyond a prisoner's control make it impossible for him to timely file a petition. See Bills, 628 F.3d at 1097 (quoting Miranda v. Castro, 292 F.3d 1063, 1066 (9th Cir. 2002)) ("Indeed, 'the threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the exceptions swallow the rule.'"). "[A] litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." Pace v. DiGuglielmo, 544 U.S. 408, 418 & n.8 (2005). "The diligence required for equitable tolling purposes is 'reasonable diligence,' not 'maximum feasible diligence.'" Ford v. Gonzalez, 683 F.3d 1230, 1237 (9th Cir. 2012) (quoting Bills, 628 F.3d at 1097, in turn quoting Holland, 130 S. Ct. at 2565). "The 'general rule' is that 'equitable tolling is available where the prisoner can show

extraordinary circumstances were the cause of an untimely filing.'" Id. (quoting Bills, 628 F.3d at 1097). Under the case law of this circuit, "equitable tolling is available for this reason only when extraordinary circumstances beyond a prisoner's control make it *impossible* to file a petition on time and the extraordinary circumstances were the *cause* of [the prisoner's] untimeliness." Id. (quoting Bills, 628 F.3d at 1097) (emphasis in original). Equitable tolling will be unavailable in most cases. See Corjasso v. Ayers, 278 F.3d 874, 877 (9th Cir. 2002); Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999).

Petitioner's allegations present three possible bases for equitable tolling, which are now addressed in turn.

A. Deficiency of Appellate Counsel

First, and specific to his Sixth Amendment sentencing claim based on Apprendi v. New Jersey, 530 U.S. 466 (2000), petitioner contends his appellate counsel acted ineffectively by failing to discover the pendency of Apprendi in the United States Supreme Court during the pendency of petitioner's direct appeal, and failing to seek a stay of petitioner's appeal until Apprendi was decided.[9] ECF No. 24 at 17-19.

Under a very limited set of circumstances, equitable tolling may be available where the untimeliness of a petition is caused by misconduct committed by the petitioner's attorney. See Holland, 130 S. Ct. at 2564; Porter v. Ollison, 620 F.3d 952, 959 (9th Cir. 2010). Those

[9] Petitioner does not directly argue that his appellate attorney's misconduct constitutes grounds for equitable tolling. Rather, petitioner asserts that his attorney's alleged misconduct was sufficient to demonstrate cause and prejudice for purposes of overcoming procedural default of his Apprendi claim, which he states is still unexhausted because the California Supreme Court dismissed the claim as untimely in its November 16, 2011 order (Lodged Document No. 16). ECF No. 24 at 4-10, 17-21. Generally, procedural default is a defense that the respondent must affirmatively raise. See Nardi v. Stewart, 354 F.3d 1134, 1141 (9th Cir. 2004), abrogated on other grounds by, Day v. McDonough, 547 U.S. 198 (2006) ("[T]he state waives its statute of limitations defense by filing a responsive pleading that fails to affirmatively set forth the defense."). Here, respondent has not raised a procedural default defense in his motion to dismiss; rather, respondent claims only that petitioner failed to file within the AEDPA's statute of limitations. Because respondent does not affirmatively claim that petitioner has procedurally defaulted any of his claims, the court disregards petitioner's arguments regarding procedural default. Instead, the undersigned construes petitioner's allegations as proffered basis for equitable tolling.

circumstances involve only "attorney misconduct that is sufficiently egregious to meet the extraordinary misconduct standard." Porter, 620 F.3d at 959; see also Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003) (holding that petitioner's attorney's complete failure to prepare and file petitioner's habeas petition constituted sufficiently egregious misconduct for tolling purposes when the attorney was retained a year in advance of the filing deadline and petitioner repeatedly contacted the attorney about filing the petition). "Garden variety" claims of attorney neglect including the "miscalculation of a filing deadline" and other forms of negligence are an insufficient basis for tolling the limitations period. Holland, 130 S. Ct. at 2564. Regardless of the attorney's neglect, the petitioner must still act with reasonable diligence in seeking to file his petition. Porter, 620 F.3d at 959 (citing Spitsyn, 345 F.3d at 802).

Here, petitioner alleges that his appellate counsel acted deficiently by not discovering the pendency of Apprendi and seeking a stay of proceedings in the California Court of Appeal until Apprendi was decided so that it could be applied to petitioner's case. ECF No. 24 at 17-19. This allegation fails to demonstrate egregious misconduct. The United States Supreme Court did not issue its opinion in Apprendi until June 26, 2000, over three months after the California appeals court affirmed petitioner's conviction on March 22, 2000. Appellate counsel's failure to raise a claim that was non-existent at the time of the relevant proceedings does not constitute egregious misconduct, nor does failing to have the proceedings stayed in expectation of a legal development that has not yet occurred. See Moore v. Mitchell, 708 F.3d 760, 793 (6th Cir. 2013) ("Appellate counsel must be competent, not clairvoyant; failing to make a then-non-existent claim . . . was not deficient performance and cannot have prejudiced [the petitioner]."). Accordingly, the actions petitioner alleges do not amount to egregious attorney misconduct sufficient to equitably toll the statutory period under section 2244(d)(1).

Moreover, petitioner fails to sufficiently allege how his appellate counsel's actions caused him to delay filing his federal habeas petition until well after the statute of limitations had run its course. Petitioner argues that he was left unaware of the applicability of the ruling in Apprendi to his own case until 2010 when the California Court of Appeal decided In re Watson, 181 Cal.App.4th 956 (2010), which led him to file a second round of state habeas petitions beginning

in September 2010. However, petitioner does not indicate how this fact was caused by his appellate counsel's earlier alleged failings. Accordingly, petitioner's putative claim that his appellate attorney's misconduct entitles him to equitable tolling is without merit.

B. Mental Incompetence

Petitioner's primary contention is that the delay in filing his federal petition was the result of mental incompetence. ECF No. 24 at 21. A sufficiently serious mental impediment may constitute an "extraordinary circumstance" beyond the petitioner's control for purposes of equitable tolling. Bills, 628 F.3d at 1097 ("[W]e . . . have long recognized equitable tolling in the context of a petitioner's mental illness."). Under the case law in this circuit, the court may apply equitable tolling when a petitioner demonstrates the following:

> (1) *First*, a petitioner must show his mental impairment was an "extraordinary circumstance" beyond his control, . . . , 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 unable personally to prepare a habeas petition and effectuate its filing.
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> (2) *Second*, the petitioner must show diligence in pursuing the claims to the extent he 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.

Id. at 1099-1100 (citations omitted). In evaluating such a claim, "the district court must: (1) find the petitioner has made a non-frivolous showing that he had a severe mental impairment during the filing period that would entitle him to an evidentiary hearing; (2) determine, after considering the record, whether the petitioner satisfied his burden that he was in fact mentally impaired; (3) determine whether the petitioner's mental impairment made it impossible to timely file on his own; and (4) consider whether the circumstances demonstrate the petitioner was otherwise diligent in attempting to comply with the filing requirements." Id. at 1100-01. With regard to the diligence consideration, "the petitioner must diligently seek assistance and exploit whatever assistance is reasonably available." Id. at 1101. "[A] petitioner's mental impairment might

justify equitable tolling if it interferes with the ability to understand the need for assistance, the ability to secure it, or the ability to cooperate with or monitor assistance the petitioner does secure. The petitioner therefore always remains accountable for diligence in pursuing his or her rights." Id. at 1100.

In his verified opposition, petitioner alleges the following in support of his contention that he suffers from a mental impairment sufficient to entitle him to equitable tolling of his claims:

> Petitioner alleges that his mental health problems began as a teenager at the age of 16 years old. His erratic, self-defeating abnormal behavior had escalated so intensively, that it led his mother and family to report it to a psychologist, with which led to his hospitalization for emergency measures for a period of 30 days. Petitioner's diagnosis was classified as a bipolar personality disorder. This has been the case until this day as the disorder worsened over the years.
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> Petitioner moved from California to the state of Connecticut until, at the age of 19 years old, his mental impairment worsened, leading to his first attempt at committing suicide where he ingested a multitude of pills for the goal. This led to a second round of hospitalization.
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> In the year 1999, petitioner began to entertain erratic abnormal behavior and was offered to participate in the Men's Support Group at CSP-SAC (New Folsom), in an effort to look into his emotional issues. His behavior summoned the attention of other inmates at the prison, who eventually encouraged him to report his behavior to the mental health professionals; however, petitioner did not report anything until 2001, leading him to wrestling with suicidal thoughts again. Petitioner was since then admitted into the California Department of Corrections & Rehabilitation's mental health program entitled, Clinical Case Management System (CCCMS).
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> Petition [sic] was prescribed psychiatric medication: between 2001 to 2003 – beginning with 25 mg. of mirtazapine and uplifting it to 50 mg. Between 2003-2007 – his medication changed to 100 mg of triloptal. After none of these medications were having an effect in an overall way, petitioner stopped taking any medications between 2007 to [sic] 2009. Finally, in 2009, until present, the mental health department found the proper psychiatric medication, at least it appears so, until present – 125 mg., and again after this, 125 mg, then 150 mg, and finally he's currently at 200 mg.
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> Petitioner's mental health began to worsen in the year when he entertained strong suicidal thoughts again in 2013, leading to a higher mental health classification and housing, from CCCMS to the Enhanced Outpatient Program (EOP) until present. The new care requires a drastic difference from CCCMS level of care. Petitioner alleges that when he reports to medical staff versus what he goes through personally, has been problematic for him because

> he is not cognizant that he has to report the behavior that his peers witness, with which began in CDCR 1999, although finally worsening and reporting it in 2001. This has been the case even when he was in society at large during his teenage years. He holds in issues that eventually explodes [sic] into suicidal attempts and thoughts. Although petitioner did not take any psychotropic medications between the years 2007 and 2009, he remained a part of the CCCMS mental health program and all aspects of its care.

ECF No. 24 at 29-31, Exhibit A. Petitioner further alleges that it has taken years for him to discover the correct dosage of medication to take, that he suffered without medication between 2007 and 2009, and that he experienced psychological issues between 1999 and 2001 that were similar to the ones he suffered between 2007 and 2009 when he was not taking medication. Id. at 32.

Petitioner submits as an additional exhibit a declaration by Stanley J. Finney, an inmate legal assistant who helped petitioner draft and file his current petition, who declares that he has personal knowledge of and experience with petitioner's alleged medical impairment through his work with petitioner in the Men's Support Group at CSP-Sacramento. Id. at Exhibit B. Mr. Finney further states that he has sought to create an evidentiary record of petitioner's mental health issues and medications for the court to review in determining whether petitioner's mental state constitutes an "extraordinary circumstance" for purposes of equitable tolling, but has been unable to acquire the proper documents at this time due to petitioner's indigence. Id.

These allegations, even when taken as true, are inadequate to show that petitioner's mental impairment caused his more than twelve-year delay in filing his current petition. Petitioner has alleged no facts demonstrating a causal connection between his mental illness and his inability to file a timely petition. Furthermore, petitioner fails to include any medical records or other evidence that would suggest that his mental impairment was so severe that it kept him from filing his federal habeas petition during the relevant time period. Cf. Henderson v. Allison, 2012 WL 3292010, at *7-9 (E.D. Cal. Aug. 13, 2012) (reviewing numerous mental health records in assessing the petitioner's equitable tolling claim based on mental incompetence). "Without any allegation or evidence of how petitioner's symptoms actually caused him not to be able to file despite his diligence, the court cannot find that he is entitled to equitable tolling." Taylor v.

Knowles, 2009 WL 688615, at *6 (E.D. Cal. March 13, 2009), aff'd, 368 Fed. Appx. 796 (9th Cir. 2010) (no equitable tolling where petitioner failed to show his auditory hallucinations, severe depression, and anxiety "actually caused him not to be able to file despite his diligence"); see Henderson v. Allison, 2012 WL 3292010 (E.D. Cal. Aug. 13, 2012) (denying petitioner's equitable tolling argument based on mental incompetence because petitioner made no allegations demonstrating a causal connection between petitioner's alleged depression and adjustment disorder and his inability to timely file a federal petition); see also Howell v. Roe, 2003 WL 403353, *4 (N.D. Cal. Feb. 20, 2003) (rejecting equitable tolling where petitioner's suicidal nature and depression did not make him mentally incompetent). Moreover, the fact that petitioner filed seven state court petitions during the period for which he seeks tolling demonstrates that his mental illness did not, in fact, make filing impossible.

Petitioner argues in a separate motion filed September 3, 2013 (ECF No. 35) that, even if the current record includes insufficient evidence of mental incompetence to support equitable tolling, he is entitled to an evidentiary hearing on the matter under Laws v. Lamarque, 351 F.3d 919 (9th Cir. 2003). In Laws, the prisoner alleged that mental incompetence "deprived [him] of any kind of consciousness," thus preventing him from timely filing a petition. Id. at 921. The Ninth Circuit noted that the record supported the petitioner's allegation because prior to the trial of the underlying criminal case, the state trial court had "expressed concern about [petitioner's] competency and ordered psychiatric examinations and a hearing under California Penal Code § 1368." Id. Further, the court noted that numerous psychiatrists had been appointed to examine the petitioner, and they offered conflicting opinions about his mental competency to stand trial. Id. Under these circumstances, the court held that an expansion of the record was necessary to determine whether equitable tolling was warranted. Id. at 921, 924.

Laws is distinguishable, and does not suggest that expansion of the record is warranted in this case. Unlike in Laws, where the petitioner alleged that his mental condition "deprived him of any kind of consciousness" during the relevant tolling period, petitioner in this case has not explained how his mental state made it impossible for him to file a timely federal habeas petition. See Washington v. McDonald, 2010 WL 1999469 at * 2 (C.D. Cal. Feb. 19, 2010). Also unlike

Laws, petitioner points to nothing in his trial record or correctional records indicating possible legal incompetence at any time. Petitioner identifies no facts that, if true, would support a conclusion that his specific mental impairments or psychiatric symptoms have interfered with his functioning in ways that implicate the ability to prepare and file a petition, the ability to understand the need to timely file, or the ability to seek assistance.[10] See Bills, 628 F.3d at 1099-1100.

The allegations in petitioner's opposition suggest that at some point between May 2, 2000 and May 2, 2001, the one-year limitations period in which petitioner had to file his federal petition under section 2244(d)(1)(A), petitioner was possibly admitted into the CCCMS level of care at CSP-Sacramento and had begun to take the medication Mirtazapine. ECF No. 32 at 30. Assignment to the CCCMS level of care, without more, does not support equitable tolling because it "suggests that petitioner was able to function despite his mental problems." Henderson v. Allison, 2012 WL 3292010 at *9 (E.D. Cal. Aug. 13, 2012). While petitioner's further allegations suggest that his mental condition has worsened in the years between the end of the limitations period and his filing of the current petition, these allegations are insufficient even if true to support equitable tolling. See Laws, 351 F.3d at 921, 924 (hearing necessary because petitioner's allegations, if true, would entitle him to equitable tolling).

The fact that petitioner was able to file seven habeas petitions in state court during the years for which he seeks tolling ultimately defeats his argument. See Brown v. McKee, 232 F.Supp.2d 761, 768 (E.D. Mich. 2002) (rejecting a claim that mental illness and use of prescribed psychotropic medication warranted equitable tolling where the petitioner was able to file several actions during period of alleged mental incapacitation, and explaining that "[t]he exceptional circumstances that would justify equitable tolling on the basis of mental incapacity are not present when the party who seeks the tolling has been able to pursue his or her legal claims during the period of his or her alleged mental incapacity"). Even if petitioner required the assistance of

[10] Nothing in the trial court record suggests that petitioner's mental state was seen as a cause for concern. See, e.g., Lodged Document No. 17 (Probation Officer's Report and Recommendation) at 14 (stating that petitioner had graduated high school with a "C" average, was planning on continuing his education, and reported being in good physical and emotional health).

other inmates to file those petitions, the availability of such assistance and petitioner's apparent ability to utilize that assistance weigh against equitable tolling. See Bills, 628 F.3d at 1100-01.

For all these reasons, petitioner has not made a "good-faith allegation that would, if true, entitle him to equitable tolling" on the basis of his mental competency. Laws, 351 F.3d at 921. Further development of the record therefore is not warranted. See Davis v. Farwell, 253 Fed.Appx. 631, 632 (9th Cir. 2007) (distinguishing Laws, and denying the petitioner's request for an evidentiary hearing "to demonstrate in better fashion just how his below-average intelligence caused his untimely filing," reasoning that the petitioner had not made a "good-faith allegation that would, if true, entitle him to equitable tolling"), cert. denied, 552 U.S. 1286 (2008); Humphrey v. Clark, 2010 WL 148199, *6 (C.D. Cal. 2010) (distinguishing Laws, and finding development of the record was not warranted on the petitioner's allegation that he was entitled to equitable tolling for mild mental retardation and functional illiteracy). Petitioner's assertion of equitable tolling should be rejected. In addition, for the same reasons, petitioner's September 9, 2013 motion for an evidentiary hearing on this issue (ECF No. 35) should be denied.

C. Law Library Deficiencies

Finally, petitioner alleges that the inadequacy of the law library at California State Prison-Sacramento ("CSP-Sacramento"), where he was housed between the finality of his conviction and the filing of the current petition, impeded timely filing. ECF No. 24 at 32-34. Petitioner's allegations regarding the deficiencies of the prison law library are intended to demonstrate that he acted diligently in spite of the extraordinary circumstances posed by his mental incompetence. ECF No. 24 at 33-34. Because the court has rejected petitioner's equitable tolling theory based on mental incompetence, this diligence argument is unavailing. Nevertheless, because petitioner contends that the law library's deficiencies impeded his efforts to file the federal petition, the undersigned considers whether the alleged facts support equitable tolling in their own right.

Petitioner identifies three law library deficiencies that allegedly caused him to delay filing his federal habeas petition until after the statute of limitations had run. First, he argues that the law library held insufficient legal resources. ECF No. 24 at 33. However, petitioner's acknowledgement that a copy of the AEDPA was present in the library, see id., and the fact that

petitioner was able to submit seven state habeas petitions over the course of the more than ten years before he filed his current petition, defeat this basis for tolling. See Lewis v. Casey, 518 U.S. 343, 355 (1996) (holding that the United States Constitution requires that inmates be provided with the legal resources they "need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement").

Next, petitioner argues that the law library "access scheme" improperly limited his access to legal materials from 1999 until 2009. ECF No. 24 at 33-34. Specifically, petitioner claims that the limited capacity of the library allowed for between five and seven inmates at a time, which made access problematic for petitioner. Id. This restriction is not the type of extraordinary circumstance which will support equitable tolling. See Lindquist v. Idaho State Bd. of Corr., 776 F.2d 851, 858 (9th Cir. 1985) ("[T]he Constitution does not guarantee a prisoner unlimited access to a law library. . . . The fact that an inmate must wait for a turn to use the library does not necessarily mean that he has been denied meaningful access to the courts.") (citations omitted). Furthermore, as respondent points out, this purportedly limited access to the prison's law library has not kept petitioner from filing seven separate petitions for writ of habeas corpus in state court between 2001 and 2011. For these reasons, the court finds petitioner's contention unpersuasive.

Petitioner also claims that he was unable to file his current petition in a timely fashion because he had received erroneous advice from the inmate law clerks at CSP-Sacramento regarding his filing deadline under the AEDPA. ECF No. 24 at 34. However, "the Ninth Circuit has made clear that erroneous advice regarding the limitations period 'do[es] not constitute extraordinary circumstances sufficient to warrant equitable tolling.'" Aparicio-Lopez v. United States, 2013 WL 1010478 (C.D. Cal. Mar. 13, 2013) (quoting Miranda v. Castro, 292 F.3d 1063, 1067-68 (9th Cir. 2002)); see also Frye v. Hickman, 273 F.3d 1144, 1146 (9th Cir. 2001).

For the foregoing reasons, petitioner fails establish entitlement to equitable tolling of the statute of limitations. Accordingly, petitioner's claims are untimely and defendants' motion to dismiss should be granted in full.

V. Change of Respondent

Since the time that petitioner filed his current petition, he has been moved from

CSP-Sacramento to Corcoran State Prison. See ECF No. 12. Respondent has informed the court that the current Warden of Corcoran State Prison is Connie Gipson. ECF No. 15 at 1 n.1. Because Connie Gipson is the individual who now has custody of petitioner at Corcoran State Prison, the caption of this case will be changed pursuant to Rule 25(d) of the Federal Rules of Civil Procedure to reflect the proper party respondent. See Brittingham v. United States, 982 F.2d 378, 397 (9th Cir. 1992).

VI. Conclusion

Because all of petitioner's claims were filed outside the applicable limitations period, and are not saved by any tolling provision or miscarriage of justice exception, they are time-barred. For the reasons explained above, petitioner's motion for an evidentiary hearing regarding equitable tolling (ECF No. 35) should be denied. Additionally, because the petition must be dismissed as untimely, all of petitioner's other currently pending motions, namely his Motion for Discovery (ECF No. 25), Motion to Expand the Record (ECF No. 32), and "Motion and Request for Service of Subpoena Duces Tecums" (ECF No. 33), should be denied as moot.

Accordingly, IT IS HEREBY ORDERED that

1. The Clerk of Court is directed to change the name of respondent to Connie Gipson; and

IT IS HEREBY RECOMMENDED that

1. Respondent's March 21, 2013 Motion to Dismiss (ECF No. 15) be granted in full;

2. Petitioner's June 26, 2013 Motion for Discovery (ECF No. 25) be denied;

3. Petitioner's August 14, 2013 Motion to Expand the Record (ECF No. 32) be denied;

4. Petitioner's August 14, 2013 motion styled as "Motion and Request for Service of Subpoena Duces Tecums" (ECF No. 33) be denied;

5. Petitioner's September 3, 2013 Motion for an Evidentiary Hearing (ECF No. 35) be denied;

6. The Clerk of court be directed to close this case.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty-one days after being served with these findings and recommendations, any party may file written

objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any response to the objections shall be served and filed within fourteen days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: January 3, 2014

ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE