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United States District Court  
For the Northern District of California

\*E-Filed 2/11/14\*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

LARRY REDIC,  
Petitioner,  
v.  
TERRI L. GONZALES, Warden,  
Respondent.

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No. C 08-5010 RS (PR)  
**ORDER GRANTING MOTION FOR RECONSIDERATION;**  
**ORDER DISMISSING CERTAIN CLAIMS;**  
**ORDER SETTING BRIEFING SCHEDULE**

**INTRODUCTION**

For the reasons stated herein, respondent’s motion for reconsideration of the Court’s denial of the motion to dismiss five of petitioner’s eight federal habeas claims as procedurally defaulted (Docket No. 64) is GRANTED. Claims 4–8<sup>1</sup> in the second amended habeas petition are DISMISSED. Respondent shall file an answer addressing the remaining claims on or before May 20, 2014.

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<sup>1</sup> “(4) there was prosecutorial misconduct; (5) defense and appellate counsel rendered ineffective assistance; (6) there was cumulative error; (7) trial court failed to issue an instruction on a lesser included offense; and (8) the jury was biased against him because of his drug addiction.” (Order to Show Cause, Docket No. 52, at 2.)



1 years, he filed various petitions in the state superior and appellate courts, the last of which  
2 was denied by the state appellate court on May 27, 2009. (*Id.* at 16.) Sixteen months later,  
3 on October 18, 2010, he filed his first habeas petition in the state supreme court, which, as  
4 noted above, summarily denied it with a citation to *In re Robbins*. (*Id.*) This petition was  
5 nearly identical to a petition petitioner filed a year before in the state appellate court.

6       Considering the delays between filings and the lack of justification for such delays, it  
7 was not unreasonable for the state supreme court to reject the petition as untimely, especially  
8 as the United State Supreme Court had affirmed a finding by that same court deeming a  
9 petition with a lesser delay untimely. *Walker*, 131 S. Ct. at 1129–30. There is no indication  
10 that the state supreme court’s ruling was an attempt to discriminate against petitioner’s  
11 claims of violations of his federal rights, or that it imposed the timeliness bar in an unfair  
12 manner, or that the timeliness bar operated to “the particular disadvantage of petitioners  
13 asserting federal rights.” *Martin*, 131 S. Ct. at 1131. On this record, respondent has shown  
14 that the five claims at issue here were procedurally defaulted. It is now petitioner’s burden to  
15 overcome this bar by showing cause and prejudice.

16       Procedural default can be overcome if the prisoner can demonstrate cause for the  
17 default and actual prejudice as a result of the alleged violation of federal law, or demonstrate  
18 that failure to consider the claims will result in a fundamental miscarriage of justice.  
19 *Coleman*, 501 U.S. at 750. “[C]ause’ under the cause and prejudice test must be something  
20 external to the petitioner, something that cannot fairly be attributed to him: [W]e think that  
21 the existence of cause for a procedural default must ordinarily turn on whether the prisoner  
22 can show that some objective factor external to the defense impeded counsel’s efforts to  
23 comply with the State’s procedural rule.” *Id.* at 729 (internal quotation marks and citation  
24 omitted). “To establish prejudice resulting from a procedural default, a habeas petitioner  
25 bears ‘the burden of showing not merely that the errors at his trial constituted a possibility of  
26 prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire  
27 trial with errors of constitutional dimension.’” *White v. Lewis*, 874 F.2d 599, 603 (9th  
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1 Cir.1989) (citing *United States v. Frady*, 456 U.S. 152, 170 (1982)). A petitioner must  
2 establish factual innocence in order to show that a fundamental miscarriage of justice would  
3 result from application of procedural default. See *Gandarela v. Johnson*, 275 F.3d 744,  
4 749-50 (9th Cir. 2002); *Wildman v. Johnson*, 261 F.3d 832, 842–43 (9th Cir. 2001).

5 Petitioner has not shown cause for the delay. In his filings, he makes conclusory  
6 allegations regarding access to the law library (citing lockdowns, unhelpful staff, prison  
7 transfers), inability to find counsel, a lack of legal knowledge, and a lack of mental capacity  
8 to represent himself. He fails, however, to give sufficient detail about library access to  
9 justify a sixteen-month delay. Also, his filing of many petitions (some of considerable  
10 length) in the state superior and appellate courts over the years belie his assertions that he  
11 lacked the mental ability or legal knowledge to file a timely petition with the state supreme  
12 court. Furthermore, as stated above, the petition he filed sixteen months after his last petition  
13 was denied was nearly identical to one he filed a year earlier.

14 Petitioner makes no arguments concerning prejudice. He also fails to satisfy the  
15 requirements of the actual innocence exception to the procedural default rule. Specifically,  
16 he has failed to show “new reliable evidence — whether it be exculpatory scientific  
17 evidence, trustworthy eyewitness accounts, or critical physical evidence — that was not  
18 presented at trial.” *Schlup v. Delo*, 513 U.S. 298, 324 (1996).

19 On this record, the five claims at issue here are procedurally defaulted. Petitioner has  
20 failed to overcome this bar to review. Accordingly, respondent’s motion for reconsideration  
21 will be granted.

## 22 CONCLUSION

23 Respondent’s motion for reconsideration (Docket No. 64) is GRANTED, and the five  
24 claims at issue here are DISMISSED. The Clerk shall terminate Docket No. 64.

25 Respondent shall file an answer addressing the merits of the remaining claims on or  
26 before May 20, 2014. He shall file with the answer and serve on petitioner a copy of all  
27 portions of the state trial record that previously have been transcribed and that are relevant to  
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1 a determination of the issues presented by the petition. If petitioner wishes to respond to the  
2 answer, he shall do so by filing a traverse with the Court and serving it on respondent's  
3 counsel within 30 days of the date the answer is filed. Petitioner is reminded that all  
4 communications with the Court must be served on respondent by mailing a true copy of the  
5 document to respondent's counsel. Upon a showing of good cause, requests by either party  
6 for a reasonable extension of time will be granted provided that such requests are filed on or  
7 before the deadline they seek to extend.

8 It is petitioner's responsibility to prosecute this case. He must keep the Court and  
9 respondent informed of any change of address and must comply with the Court's orders in a  
10 timely fashion. Failure to do so may result in the dismissal of this action for failure to  
11 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

12 **IT IS SO ORDERED.**

13 DATED: February 11, 2014

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15 RICHARD SEEBORG  
16 United States District Judge  
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