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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ERICKA SHIRLEY GALLEGO,  
Petitioner,  
v.  
DEBORAH K. JOHNSON,  
Respondent.

Case No. [16-cv-02720-EMC](#)

**ORDER GRANTING RESPONDENT’S  
MOTION TO DISMISS BASED ON  
PROCEDURAL DEFAULT GROUNDS**

Docket No. 16

**I. INTRODUCTION**

Petitioner Ericka Shirley Gallego filed a petition seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent moved to dismiss the petition on procedural default grounds. For the reasons stated below, the Court **GRANTS** Respondent’s motion to dismiss.

**II. FACTUAL & PROCEDURAL BACKGROUND**

On April 15, 2013, the Contra Costa County trial court found Gallego guilty of kidnapping of a child under 14 years of age (Ct. 1, Cal. Penal Code § 207(a)/208(b)) and first degree residential burglary (Ct. 2, Cal. Penal Code § 459/460(a)), with an enhancement for non-accomplices present at the time of offense (Cal. Penal Code § 667.5(c)(21)). Docket No. 16 (“Motion”), Ex. 1. On May 24, 2013, Gallego was sentenced to eight years in state prison. Motion Ex. 2. Gallego appealed her conviction to the California Court of Appeal on December 17, 2013. Motion Ex. 3. The court affirmed the conviction on July 29, 2014. Motion Ex. 5. She is currently detained at the Central California Women’s Facility in Chowchilla, California. Docket No. 1 (“Mem.”) at 1.

Gallego initially filed her first Petition for Writ of Habeas Corpus to the California Court of Appeal on September 3, 2015. The court denied the petition without prejudice. Motion Exs. 6

1 and 9. Gallego then filed the same Petition for Writ of Habeas Corpus with the Contra Costa  
2 County Superior Court on November 3, 2015. Motion Ex. 10. The court denied the petition on  
3 January 8, 2016, stating, in part that “the present petition is not timely. (*See In re Clark* (1993) 5  
4 Cal.4th 750).” Motion Ex. 11.

5 Gallego subsequently filed the same Petition for Writ of Habeas Corpus with the California  
6 Court of Appeal on January 12, 2016. Motion Ex. 12. The court denied that petition with a one-  
7 line disposition on February 10, 2016. Motion Ex. 15. Gallego submitted a Petition for Writ of  
8 Habeas Corpus to the California Supreme Court on February 26, 2016. Motion Ex. 16. The Court  
9 again denied the petition on May 18, 2016 in a one-line summary disposition. Motion Ex. 17.

10 On May 19, 2016, Gallego filed a Petition for Writ of Habeas Corpus with the federal  
11 court. Docket No. 1. Gallego alleges: (1) Trial counsel rendered ineffective assistance by failing  
12 to investigate Gallego’s mental state at the time of the crime; (2) Trial counsel rendered ineffective  
13 assistance by failing to present evidence at sentencing to show that Gallego lacked the requisite  
14 mental state to commit the crimes and failing to present evidence of her deteriorating physical  
15 health; (3) Gallego could not knowingly enter into a “slow plea” because Gallego was not advised  
16 of her right against self-incrimination and therefore did not waive it, and trial and appellate  
17 counsel rendered ineffective assistance; and (4) Gallego was denied due process because the court  
18 relied on factors outside the record when exercising its sentencing discretion. *Id.*

19 This Court issued an Order to Show Cause on June 29, 2016. Respondent Deborah K.  
20 Johnson did not file an answer, but rather, moved to dismiss the petition on grounds of procedural  
21 default.

22 **III. DISCUSSION**

23 A. Federal Habeas Relief is Unavailable Because the California Court Denied the Petition on  
24 Independent and Adequate State Procedural Grounds

25 The federal court cannot “review a question of federal law decided by a state court if the  
26 decision of that court rests on a state law ground that is independent of the federal question and  
27 adequate to support the judgment.” *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). A state’s  
28 determination of the timeliness of a habeas petition filed in state court is independent of the federal

1 questions the petition raises. Where a state court rejects a petitioner’s federal claims simply  
2 because the petitioner failed to meet a valid state procedural requirement, the subsequent federal  
3 habeas claim is barred absent certain exceptions. *Id.* at 729-30.

4 The United States Supreme Court has specifically held that California’s bar against  
5 untimely state habeas petitions is “adequate” to support a judgment denying federal habeas relief.  
6 *Walker v. Martin*, 562 U.S. 307, 321 (2011). In *Walker*, the Court upheld a California Supreme  
7 Court’s summary disposition order, which stated, in its entirety: “Petition for writ of habeas  
8 corpus is DENIED. (See *In re Clark* (1993) 5 Cal. 4th 750, 21 Cal.Rptr.2d 509, 855 P.2d 729, *In re*  
9 *Robbins* (1998) 18 Cal.4th 770, 780, 77 Cal.Rptr.2d 153, 959 P.2d 311.)” *Id.* at 314. The Court  
10 held that even where a California state court does not explicitly state that a petition is untimely,  
11 “[a] summary denial citing *Clark* and *Robbins* means that the petition is rejected as untimely.”<sup>1</sup>  
12 *Id.* at 313. In the instant case, the Contra Costa County Superior Court *explicitly* held that “the  
13 present petition is not timely. (See *In re Clark* (1993) 5 Cal. 4th 750).” Motion Ex. 11. Under  
14 *Walker*, this constitutes an adequate and independent state law ground upon which to deny the  
15 petition. Gallego’s habeas claim is thus barred.<sup>2</sup>

16 Gallego contends that the California superior court did not clearly deny her petition as  
17 untimely because it cited *In re Clark*, but failed to cite to a specific page number and did not cite  
18 *In re Robbins*. This contention misunderstands the holding of *Walker*. There, the Court held  
19 merely that “California courts signal that a habeas petition is denied as untimely by citing the  
20 controlling decisions, *i.e.*, *Clark* and *Robbins*. A spare order denying a petition without  
21 explanation or citation ordinarily ranks as a disposition on the merits.” *Walker v. Martin*, 562 U.S.  
22 at 310. In other words, *Walker* held that a California court’s citation to *Clark* and *Robbins* is

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25 <sup>1</sup> The California Supreme Court’s decisions in *Clark* and *Robbins* set out the state rule requiring  
26 that petitions for writs of habeas corpus be brought “without substantial delay.” *Clark*, 5 Cal. 4th  
27 at 799.

28 <sup>2</sup> Because the California Court of Appeal and the California Supreme Court issued only summary  
denials of Gallego’s petition, this Court relies on the reasoning of the Superior Court. See *Ylst v.*  
*Nunnemaker*, 501 U.S. 797, 803 (1991) (“[W]here, as here, the last reasoned opinion on the claim  
explicitly imposes a procedural default, we will presume that a later decision rejecting the claim  
did not silently disregard that bar and consider the merits.”).

1 *sufficient* to indicate that a petition is being dismissed as untimely, but it did not hold that citations  
2 to those cases are *necessary*. Here, the superior court expressly stated that the petition was  
3 untimely under *In re Clark*; its ruling was clear and unambiguous.

4 Gallego nonetheless argues that this Court may consider her claims because “an  
5 erroneously applied procedural rule does not bar federal habeas review.” *Sivak v. Hardison*, 658  
6 F.3d 898, 907 (9th Cir. 2011). Gallego contends that, contrary to the state court’s determination,  
7 she “actually and effectively complied with the state timeliness requirement.” Docket No. 29 at 3.  
8 As the Supreme Court has observed, while most states “specify precise time limits, such as 30 or  
9 45 days, within which an appeal must be taken, . . . California applies a general ‘reasonableness’  
10 standard.” *Carey v. Saffold*, 536 U.S. 214, 222 (2002). Specifically, California law mandates that  
11 habeas petitions be brought “without substantial delay.” *Robbins*, 18 Cal. 4th at 779.

12 In this case, the California Court of Appeal affirmed Gallego’s conviction on direct appeal  
13 on July 29, 2014; she filed her habeas petition with the Superior Court on November 3, 2015. She  
14 argues that this interval of fifteen months does not constitute “substantial delay” because she  
15 needed time to hire habeas counsel, who in turn “needed to investigate the case and prepare a  
16 meritorious habeas petition.” Opp. at 8. Regardless of the merits of this position, however, the  
17 determination of whether the delay in a given case is reasonable is one for the state court, not this  
18 Court, to make. Indeed, the Supreme Court has emphasized that the fact that California employs a  
19 general timeliness standard does not lessen the importance of the values of “comity, finality, and  
20 federalism” promoted by deference to state timeliness laws. *Carey*, 536 U.S. at 222. And to the  
21 extent the general standard may “make it more difficult for federal courts to determine just when a  
22 review application . . . comes too late,” the Court emphasized that state courts can themselves  
23 interpret the requirements of the general standard as needed. *Id.* That is precisely what happened  
24 here. The state court determined that Gallego’s petition was untimely under the state’s  
25 “substantial delay” standard, and this court may not disturb that determination.

26 For that reason, Gallego’s reliance on *Sivak* is misplaced. In *Sivak*, the Circuit Court  
27 rejected the state court’s application of the state procedural bar because it rested on an erroneous  
28 factual determination that was flatly contradicted by the record. In this case, by contrast, Gallego

1 objects not to a state’s erroneous factual determination, but rather to the state’s own interpretation  
2 of a state law standard. A federal court may, consistent with the principles of comity and  
3 federalism embodied in federal habeas law, overrule a state court’s application of its own rule  
4 when that application rests on a factual error. But absent such error, a federal court may not  
5 substitute its own interpretation of a state law for that of a state court.

6 B. The *Martinez* Exception Does Not Apply to Gallego’s Claims

7 Where a petitioner has procedurally defaulted a claim, the Court may nonetheless consider  
8 the merits of the claim if the petitioner can establish “cause for the default and actual prejudice as  
9 a result of the alleged violation of federal law.” *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).  
10 Gallego contends that she can show cause and prejudice for her default under *Martinez v. Ryan*,  
11 which held that “inadequate assistance of counsel at initial-review collateral proceedings may  
12 establish cause for a prisoner’s procedural default of a claim of ineffective assistance at trial.” 566  
13 U.S. 1, 4 (2012). Gallego argues that “[i]f any default existed, ineffective assistance of appellate  
14 counsel caused the default.” This argument fails for two reasons. First, Gallego does not explain  
15 how the ineffective assistance of her direct-appeal appellate counsel could have caused her late  
16 filing of her state habeas petition with the Superior Court. Second, even if she could make such a  
17 showing, the Supreme Court has recently squarely foreclosed her argument. In *Davila v. Davis*,  
18 16-6219, slip op. at 4 (U.S. June 26, 2017), the Supreme Court held that *Martinez* does not extend  
19 to claims of ineffectiveness of appellate counsel – precisely the claim that Gallego urges here.  
20 Because Gallego makes no claim that her state habeas counsel was ineffective, *Martinez* cannot  
21 provide cause to excuse her default.


22 **IV. CONCLUSION**

23 For the foregoing reasons, the Court **GRANTS** Respondent’s motion to dismiss.

24 This order disposes of Docket No. 16.

25 **IT IS SO ORDERED.**

26 Dated: July 28, 2017

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28 EDWARD M. CHEN  
United States District Judge