UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

GARTH JASON GUMIENNY,

Petitioner,

v.

MICHAEL F. MARTEL, et al.,

Respondent.

Case No. 14-cv-2002-BAS-DHB

ORDER:

(1) OVERRULING PETITIONER'S OBJECTIONS;

(2) ADOPTING REPORT AND RECOMMENDATION;

(3) GRANTING RESPONDENT'S MOTION TO DISMISS; AND

(4) DISMISSING PETITION FOR WRIT OF HABEAS CORPUS WITHOUT PREJUDICE

On August 18, 2014, Petitioner Garth Jason Gumienny, a state prisoner proceeding *pro se*, filed the instant Petition for Writ of Habeas Corpus ("Petition") under 28 U.S.C. § 2254. (ECF No. 1.) Petitioner seeks relief from a sentence of 21 years to life imposed after he pled guilty to (1) sexual penetration of a child ten years of age or younger and (2) committing a lewd act upon a child. *Id*. On November 17, 2014, Respondent moved to dismiss the petition. (ECF No. 10.) On July 8, 2015, United States Magistrate Judge David H. Bartick issued a Report and Recommendation ("Report" or "R&R") recommending that this Court grant

Respondent's motion to dismiss and deny Petitioner's motion to amend the Petition. (ECF No. 34.) Petitioner filed objections to the Report. (ECF No. 39.)

For the following reasons, the Court **OVERRULES** Petitioner's objections, **ADOPTS** the Report in its entirety, **GRANTS** Respondent's motion to dismiss, and **DENIES** Petitioner's motion to amend. Furthermore, the Court **DENIES** Petitioner's application for a certificate of appealability. (ECF No. 41.)

I. LEGAL STANDARD

The Court reviews *de novo* those portions of an R&R to which objections are made. 28 U.S.C. § 636(b)(1). The Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." *Id.* But "[t]he statute [28 U.S.C. § 636(b)(1)(c)] makes it clear that the district judge must review the magistrate judge's findings and recommendations de novo *if objection is made*, but not otherwise." *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (emphasis in original); *see also Schmidt v. Johnstone*, 263 F. Supp. 2d 1219, 1226 (D. Ariz. 2003) (concluding that where no objections were filed, the district court had no obligation to review the magistrate judge's report). "Neither the Constitution nor the statute requires a district judge to review, de novo, findings and recommendations that the parties themselves accept as correct." *Reyna-Tapia*, 328 F.3d at 1121. This legal rule is well-established in the Ninth Circuit and this district. *See Wang v. Masaitis*, 416 F.3d 992, 1000 n.13 (9th Cir. 2005) ("Of course, de novo review of a[n] R & R is only required when an objection is made to the R & R."); *Nelson v. Giurbino*, 395 F. Supp. 2d 946, 949 (S.D. Cal. 2005) (Lorenz, J.) (adopting report in its entirety without review because neither party filed objections to the report despite the opportunity to do so); *see also Nichols v. Logan*, 355 F. Supp. 2d 1155, 1157 (S.D. Cal. 2004) (Benitez, J.).

II. DISCUSSION

Judge Bartick makes two relevant findings in the Report: (1) the Petition is untimely and (2) equitable tolling does not apply. (Report 4:2–4; 8:22–23.) Petitioner

does not challenge Judge Bartick's finding that the Petition is untimely, but argues that he is entitled to an evidentiary hearing on the question of Petitioner's mental competence during the relevant filing period. The gravamen of Petitioner's objection is that Petitioner put forward allegations of mental illness sufficient to compel the magistrate to "order[] development of [the] factual record on eligibility for equitable tolling due to mental incompetence." (Pet'r's Obj. 4:21–5:6.) Petitioner asserts that further development of the record through an evidentiary hearing would allow him to demonstrate that he is entitled to equitable tolling of the one-year limitation period that governs his Petition under 28 U.S.C. § 2244.

A. Equitable Tolling and Mental Impairment

Pursuant to the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a one-year period of limitation applies to an application for writ of habeas corpus filed "by a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2244(d)(1). This one-year statute of limitations may be tolled for equitable reasons. *See Holland v. Florida*, 560 U.S. 631, 645 (2010). Equitable tolling has been deemed appropriate in cases arising under § 2244 if the petitioner can show: (1) that he has been diligently pursuing his rights and (2) that an extraordinary circumstance prevented timely filing. *Holland*, 560 U.S. at 649 (2010); *Ramirez v. Yates*, 571 F.3d 993, 997 (9th Cir. 2009). The petitioner must show that the extraordinary circumstances actually caused the untimeliness. *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). "[A] pro se petitioner's lack of legal sophistication is not, by itself, an extraordinary circumstance warranting equitable tolling." *Raspberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006). That includes a petitioner's inability to correctly calculate the limitations period. *Id*. Consequently, equitable tolling is "unavailable in most cases" and has a "very high" threshold before it can be applied. *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002).

Where, as here, a petitioner's purported mental impairment serves as the basis for an equitable tolling claim, a petitioner must demonstrate the impairment was so

severe that either: "(a) petitioner was unable rationally or factually to personally understand the need to timely file, or (b) petitioner's mental state rendered him unable personally to prepare a habeas petition and effectuate its filing." *Bills v. Clark*, 628 F.3d 1092, 1099–1100 (9th Cir. 2010). In addition, "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 reasonable available access to assistance." *Id*. Here, Judge Bartick found that the "scant evidence" presented by Petitioner (1) failed to demonstrate mental impairment of sufficient severity to justify equitable tolling and (2) did not constitute a non-frivolous showing of mental impairment such that Petitioner was entitled to an evidentiary hearing. (Report 7:17–8:8.) Judge Bartick further found that even assuming Petitioner's claims of mental impairment should be credited, and that Petitioner is entitled to equitable tolling, the Petition would still be untimely. (Report 8:9–21.) This Court agrees with Judge Bartick and finds Petitioner's objections unavailing.

B. Petitioner Was Not Entitled to an Evidentiary Hearing on the Question of Mental Impairment

Petitioner's objection that he was entitled to an evidentiary hearing on the question of mental competency misconstrues the relevant standard. (Pet'r's Obj. 3–5; 7:15–24.) Petitioner argues that his mere declaration that he was on mind-altering medications is sufficient to compel an evidentiary hearing. This is incorrect. The standard governing whether a petitioner is entitled to an evidentiary hearing is not whether the petitioner has made conclusory assertions that mental impairment prevented a timely filing. Rather, the standard is whether "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[.]" *Bills*, 628 F.3d at 1100. Such a showing requires "circumstances consistent with petitioner's petition . . . under which he would be entitled to a finding of" mental impairment. *Laws v.*

Lamarque, 351 F.3d 919, 924 (9th Cir. 2003.) Petitioner has not made a non-frivolous showing of such circumstances. Instead, Petitioner simply asserts that during the relevant filing period "he was suffering from mental incompetency" due to psychiatric and pain medications "that limited his ability to understand legal procedures[.]" (Pet'r's Obj. 3, 4.) The record reflects that the psychiatric and pain medications to which Petitioner refers consisted of one or more anti-depressants and pain relievers. (ECF No. 1 at 40; ECF No. 4 at 31.) Petitioner makes no suggestion that there was something extraordinary about his pain medication or anti-depressants, or that there were other medications not identified, such that he can establish that he was "unable to rationally or factually understand the need to timely file" or that his mental state "rendered him unable personally to prepare a habeas petition and effectuate its filing." *Bills*, 628 F.3d at 1099–1100. Thus, Petitioner has not shown that further development of the record would allow Petitioner to demonstrate the severe mental incompetency he asserts. Under such circumstances, a court is not required to grant an evidentiary hearing. *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) ("In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief.").

Furthermore, Petitioner admits that during the period in which he claims mental incompetency, he "ask[ed] 'Jailhouse Lawyers' about [his] avenues on appeal" and thought "the process they explained seemed utterly impossible[.]" (ECF No. 1 at 29–30.) Petitioner also explains that "for about 12 months" after his transfer to state prison on August 26, 2010, Petitioner "made attempts to access the court to appeal his case" even as he was "suffering from a mental defect and on mind altering mediations." (ECF No. 1 at 152.) In other words, Petitioner's alleged mental impairment did not, in fact, prevent him from seeking out legal advice during the relevant filing period. Under these circumstances, where Petitioner's actions rebut

his factual allegations, the court is not required to hold an evidentiary hearing. *See Schriro*, 550 U.S. at 474 ("[I]f the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing."); *see also Totten v. Merkle*, 137 F.3d 1172, 1176 (9th Cir. 1998) (affirming denial of an evidentiary hearing where the applicant's factual allegations "fl[ew] in the face of logic in light of . . . [the applicant's] deliberate acts which are easily discernible from the record).

C. Crediting Petitioner's Claim of Mental Impairment Would Not Render the Petition Timely

Petitioner apparently fails to understand that even if the Court credits Petitioner's contention that he "came out of mental incompetency" on January 15, 2012, the one-year limitations period still would have expired by the time Petitioner filed his first state habeas petition on October 2, 2013. Judge Bartick made this point explicitly in his report, and his analysis is correct. (Report 8:9–21.) Thus, even assuming Petitioner is entitled to equitable tolling based on mental impairment severe enough to satisfy *Bills*, the petition would nonetheless be time barred because Petitioner made no filing by January 15, 2013—i.e., the end of a hypothetical limitations period that credits Petitioner's claimed mental impairment. Accordingly, the court is not required to hold an evidentiary hearing. *See Jiminez v. Rice*, 276 F.3d at 482 (a state habeas petition filed after the limitations period expires "result[s] in an absolute time bar"); *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003); *see also Schriro*, 550 U.S. at 474 ("[I]f the record refutes the applicant's factual allegations *or otherwise precludes habeas relief*, a district court is not required to hold an evidentiary hearing.") (emphasis added).

D. Petitioner Was Not Misled by the Superior Court

Petitioner also objects that the Magistrate failed to address Petitioner's claim that he was "affirmatively misled" by Superior Court Judge John Thompson and that this deception constitutes an "extraordinary circumstance" entitling Petitioner to

equitable tolling. (Pet'r's Obj. 8, 9.) Petitioner argues that Judge Thompson misled the Petitioner by "telling him the court would consider the pleadings seeking relief from the conviction" and then denying habeas relief after finding the petition was untimely and did not present a prima facie case for relief. (Pet'r's Obj. 9:7–21.)

This accusation is meritless and misguided. Judge Thompson's September 12, 2012 order denying Petitioner's motion for transcripts—the order at the heart of the alleged deception—simply states that even though Petitioner "failed to set forth sufficient facts to show that the transcripts of his case are necessary at the present time," he still "has the ability to set forth his contentions without the transcripts and then the court considering his pleadings . . . can determine if a transcript of the hearing is necessary." (ECF No. 1, Exh. D at 65.) There is no reasonable way to read this statement as misleading. In fact, this portion of Judge Thompson's order impliedly urges Petitioner to move forward with his habeas petition. Petitioner instead waited another year before filing his first habeas petition, and the court ultimately found that Petitioner had not set forth a prima facie statement of facts that would entitle him to relief. (Lodgment No. 5; ECF No. 11-6 at 43.) This finding represents the court's implicit determination that a transcript of the hearing was unnecessary. Thus, there was nothing misleading about Judge Thompson's order. Petitioner's groundless claim to the contrary cannot support a finding that equitable tolling is warranted.

E. Amending the Petition is Futile Under the Circumstances

Petitioner's precise objections to the Report's recommendation that his motion to amend be denied are difficult to discern, but not difficult to decide. Petitioner's objections fail to address the principle that a denial of leave to amend is appropriate where amendment of a petitioner's petition would be futile. *See Ascon Props., Inc. v. Mobile Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989) (leave to amend under Rule 15(a)(2) "need not be granted where the amendment . . . constitutes an exercise in futility"); *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987). Here, the Magistrate correctly found that the Petition is time barred. Thus, amendment is

futile because the claims that Petitioner seeks to add would become part of this time-barred Petition. Petitioner apparently believes the futility principle involves an assessment of the merits of the additional claims asserted, but this is incorrect. (Pet'r's Obj. 11.) Here, amendment is not futile because the additional claims are weak; amendment is futile because regardless of the strength of the additional claims, the petition itself is deficient. Accordingly, Petitioner's objection on this point fails.[1]

III. CONCLUSION & ORDER

After considering Petitioner's objections and conducting a *de novo* review, the Court concludes that Judge Bartick's reasoning is sound. Petitioner's habeas petition is untimely and not entitled to equitable tolling, and amendment of the Petition would be futile. In light of the foregoing, the Court **OVERRULES** Petitioner's objections, **APPROVES** and **ADOPTS** the Report in its entirety, **GRANTS** Respondent's motion to dismiss, **DENIES** Petitioner's motion to amend, and **DISMISSES WITHOUT PREJUDICE** the Petition.

Moreover, a certificate of appealability may issue only if the applicant makes a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). Under this standard, a petitioner must show that reasonable jurists could debate

---

[1] Petitioner makes a number of other objections that are either insufficiently specific, redundant, or meritless. Viewing these difficult to discern objections in a light most favorable to Petitioner, *see* Pet'r's Obj. 2–7, Petitioner is essentially arguing that even though he "came out of mental incompetence on January 15, 2012," a lack of access to materials from May 16, 2012 through October 2, 2013, allegedly caused by obstruction by the state court, constitutes an extraordinary circumstance entitling him to equitable tolling. (Pet'r's Obj. 7:3–7.) Petitioner, however, fails to acknowledge that the Magistrate did, in fact, address this argument, noting that "Petitioner could have filed his habeas petition without the transcripts, which it appears he ultimately did." (Report 6:23–24.) Indeed, the Superior Court Judge advised Petitioner of this option in the Judge's motion denying Petitioner's request for transcripts. In short, Petitioner has not shown that "the hardship caused by lack of access to his materials was an extraordinary circumstance that caused him to file his petition . . . late." *Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1013 (9th Cir. 2009).

The Court also reviewed objections Petitioner made under other headings of his Objection. Petitioner's arguments in Section I (titled "Denial of Right to Appeal") and Section V (titled "Cause and Prejudice") fail because, among other reasons, they fail to show that Petitioner was entitled to equitable tolling. Petitioner's objection in Section VI (titled "Judicial Notice") is off point as it reflects a misunderstanding of Federal Rule of Evidence 201.

whether the petition should been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Here, Petitioner has not made the requisite showing. Because reasonable jurists would not find the Court's assessment of the claims in the petition debatable or wrong, the Court **DENIES** Petitioner's application for a certificate of appealability. *See Slack*, 529 U.S. at 484.

IT IS SO ORDERED.

DATED: November 4, 2015

Hon. Cynthia Bashant
United States District Judge