
No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

TRAVIS MICHAEL EASTER,

Petitioner,

v.

JERI TAYLOR,

Respondent.

MOTION FOR LEAVE
TO PROCEED *IN FORMA PAUPERIS*

The petitioner, Travis Easter, requests leave to file the attached petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed *in forma pauperis* pursuant to Rule 39.1 of this

Court and 18 U.S.C. § 3006A(d)(7) (2006). The petitioner was represented by counsel appointed under the Criminal Justice Act in the District of Oregon and on appeal in the United States Court of Appeals for the Ninth Circuit, and therefore no affidavit is required.

Respectfully submitted August 8, 2018.

Tonia L. Moro
Attorney for Petitioner

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TRAVIS MICHAEL EASTER,

Petitioner,

v.

JERI TAYLOR,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Medford, Oregon
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Attorney for Petitioner

QUESTIONS PRESENTED

WHETHER THE STATE OF OREGON'S IMPOSITION OF A TRUE LIFE SENTENCE UNDER A THREE STRIKES SENTENCING RECIDIVIST ENHANCEMENT STATUTE IS A MISCARRIAGE OF JUSTICE - DUE TO FACTUAL AND LEGAL INNOCENCE OF THE SENTENCE - BECAUSE MR. EASTER DID NOT HAVE THE REQUISITE QUALIFYING PREDICATE CONVICTIONS.

WHETHER THE MISCARRIAGE OF JUSTICE/INNOCENCE EXCEPTIONS TO PROCEDURAL AND LIMITATION BARS APPLY TO SUCH NON-CAPITAL SENTENCING ERROR WHICH CAUSED MR. EASTER'S SENTENCE TO EXCEED THE PERMISSIBLE STATUTORY PENALTY TO EXCUSE THE DEFAULTS AND REACH THE MERITS OF MR. EASTER'S CLAIMS.

WHETHER, ALTERNATIVE TO THE MISCARRIAGE OF JUSTICE/INNOCENCE EXCEPTION, MR. EASTER IS ENTITLED TO MERITS REVIEW BECAUSE HE IS ENTITLED TO EQUITABLE TOLLING DUE TO THE EXTRAORDINARY CIRCUMSTANCES OF HIS TRIAL AND POST-CONVICTION COUNSEL'S FAILURE TO UNDERSTAND THAT HE WAS NOT QUALIFIED FOR A LIFE SENTENCE AND THAT THE CONSTITUTION PREVENTS A WAIVER OF COLLATERAL CHALLENGES RELATED TO INEFFECTIVE ASSISTANCE OF COUNSEL WHICH CAUSED HIS FAILURE TO FILE TIMELY.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TRAVIS MICHAEL EASTER,

Petitioner,

v.

JERI TAYLOR,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

The petitioner, Travis Easter, respectfully requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the ninth Circuit affirming the District Court's decision denying his petition for writ of habeas corpus.

The United States District Court for the District of Oregon issued its unpublished opinion and Order and Judgment on September 20, 2016. Appendix (App) C . The opinion and Order denies Mr. Easter's 28 U.S.C. § 2254 habeas corpus petition - letting stand an

erroneous three strikes true life sentence - by rejecting Mr. Easter's arguments that he is entitled to statutory and equitable tolling of the statute of limitations.

The Ninth Circuit decision affirmed the district court's rejection of Mr. Easter's arguments that he is entitled to statutory and equitable tolling of the statute of limitations. The memorandum opinion of the United States Court of Appeals for the Ninth Circuit affirming the District Court's decision issued on March 13, 2018. Appendix B. The order denying Mr. Easter's petition for rehearing entered on May 11, 2018. Appendix A.

1. Opinions Below

Trial Level Conviction

During the plea and sentencing phases of his case, Mr. Easter's trial attorney and the district attorney told Mr. Easter and the sentencing court that he was subject to a three-strikes life sentence and that he could never file a collateral challenge - including specifically his right to file a habeas corpus petition based upon ineffective assistance of counsel - because he agreed to an appeal and collateral challenge waiver that the prosecutor had demanded during his guilty plea. They further led Mr. Easter to believe that he had to agree to the appeal and collateral challenge waiver in order to avoid a trial on all of the allegations regarding all of the complainants. They further told him that he had to submit to a three-strike life-sentence because of his prior convictions. In fact, Mr. Easter was not eligible for that three-strikes sentence because one of the predicate convictions, his first conviction, did not qualify because he had received a probation sentence.

State Post-Conviction

Three years after Mr. Easter's sentencing, the Oregon Court of Appeals issued a decision holding that trial counsel in another case was ineffective when failing to challenge the imposition of a similar life sentence imposed (in the same year as Mr. Easter's sentence) when one of the defendant's alleged predicate convictions - his first conviction - resulted in only a probationary sentence. Mr. Easter did not learn of this ruling, *Gordon v. Hall*, 232 Or. App.174 (2009), until years later, however.

Nevertheless, Mr. Easter eventually filed a state collateral challenge after he learned about the holding in *Washington v Lampert* 422 F3d 864, 871 (9th Cir 2005) *cert den* 547US 1074 (2006), in which the Ninth Circuit held that a plea agreement that waives the right to file a federal habeas petition pursuant to 28 U.S.C. § 2254 is unenforceable with respect to an ineffective assistance of counsel claim that challenges the voluntariness of the waiver. He argued that trial counsel was ineffective for several reasons including that she failed to challenge the waiver, failed to argue that he should obtain the benefit of an exception to the third strike law, and failed to argue that the conviction was not a predicate because the offense conduct occurred prior to his second conviction. He was still not aware that his first conviction did not qualify and neither did his post-conviction counsel learn of and raise that ground. In fact, his post-conviction counsel failed to submit any response whatsoever to the state's motion to enforce the waiver and the case was dismissed when the state court ruled that Mr. Easter's waiver was valid. The ruling left Mr. Easter with no hope that he might obtain relief until he later learned that he was actually innocent of the life sentence by learning of the holding in the *Gordon* case in 2013.

Federal Habeas Corpus - District and Ninth Circuit Rulings

Mr. Easter filed his habeas petition in 2014 within a year of learning of the *Gordon* case; within a year of learning that as a legal matter he was not eligible for the life sentence he had received.

In the district court, he argued that his sentence is substantively illegal for the reasons stated in *Montgomery v. Louisiana*:

A conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void. See [*Ex Parte*] *Siebold*, 100 U.S. [371], at 376 [(1879)]. It follows, as a general principle, that a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced.

136 S.Ct. 718, 731 (2016). He further argued that with the Court's rulings regarding unlawful sentences in *Welch v. United States*, 136 S.Ct. 1257 (2016), *Alleyne v. United States*, 570 U.S. 99 (2013), *Schriro v. Summerlin*, 542 U.S. 348 (2004), and *Bousely v. United States*, 523 U.S. 614 (1998), he should be entitled to a merits review under the miscarriage of justice gateway of *Schlup v. Delo*, 513 U.S. 298 (1994).

Both the district court and the circuit court determined that Mr. Easter needed to show something more than that his sentence was imposed in violation of a substantive rule to obtain relief. The district court found and the circuit court affirmed that he had to present “new evidence” and demonstrate that he was actually innocent of “the charge.” Both denied his layered tolling arguments some of which presented tolling grounds related to certain periods of time. They denied his statutory tolling argument finding that a proposition of law

is not a “factual predicate” of a claim triggering the discovery provision of the statute. Both denied his equitable tolling arguments including one premised on the fact that both trial and post-conviction counsel had abandoned him. The circuit court found that his counsels’ failings did not make it “impossible” for him to file a petition on time. Finally, both rejected his argument that the state corrective process was ineffective and

The circuit court’s decision denying relief on the basis of a miscarriage of justice conflicts with this Court’s decisions referenced above and the circuit court’s decision denying relief on the basis of equitable tolling conflict with this Court’s decisions in *Holland v. Florida*, 560 U.S. 631 (2010) and *Maples v. Thomas*, 565 U.S. 266 (2012).

2. Jurisdictional Statement

The circuit court’s order denying Mr. Easter’s request for rehearing was filed on May 11, 2018. App. B. This Court’s jurisdiction is invoked under 28 U.S.C. § 1254(1).

3. Constitutional and Statutory Provisions

The Fifth Amendment to the United States Constitution provides in pertinent part that “... nor shall any person ... [] be deprived of life, liberty, or property, without due process of law....

The Sixth Amendment to the United States Constitution provides in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation . . . and to have the Assistance of Counsel for his defence.”

28 U.S.C. § 2244(d) provides:

(d)(1) 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--

- (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;
- (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;
- (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
- (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. § 2254(b)(1) provides:

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

- (A) the applicant has exhausted the remedies available in the courts of the State; or
- (B)(i) there is an absence of available State corrective process; or
- (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(d) provides:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

4. Statement of the Case

Miscarriage of Justice - Innocence of Sentence Grounds for Avoidance of Procedural Bars

In *Schlup*, this Court held that if a petitioner can establish a colorable claim of actual innocence, this functions as a ‘gateway’ permitting a court to consider the merits of claims that would otherwise be procedurally barred. *Id.* at 316-317. The actual innocence, or *Schlup*, gateway is available whenever a petitioner can establish that, considering all available evidence, it is more likely than not that no reasonable juror would convict him of the relevant crime. *House v. Bell*, 547 U.S. 518 (2006) (reaffirming the Miscarriage of Justice exception.). Demonstrating innocence can also overcome a failure to comply with the statute of limitations. *McQuiggin v. Perkins*, 133 S.Ct. 1924, 1931 -34 (2013) (a plea of actual innocence can overcome the one-year statute of limitations for filing a federal habeas petition under the AEDPA).

Any fact that increases a minimum sentence produces a new penalty and constitutes an element of the offense that must be proven to exist or the sentence is unconstitutionally void. *Alleyne*, 570 US at 111-112.. Applying the constitutional principles applied in *Apprendi v. New Jersey*, 530 U.S. 466 (200), the Court in *Alleyne*, found that, by definition, facts that increase the minimum range of a penalty are factual elements of the legal offense and must be found beyond a reasonable doubt. *Id.* at 112. Thus,

there are sentencing facts, which if they do not exist, the aggravated offense has not been committed, i.e. the offender is innocent of the “predicate crime.”

Moreover, a judge made finding that a defendant qualifies for an enhanced minimum sentence that is constitutionally erroneous, whether it rests largely on legal conclusions or not, is no different from a jury finding for purposes of conviction. Mr. Easter is actually innocent of his sentence because he was not eligible for the sentence imposed as that concept has been discussed in *Gibbs v. United States*, 655 F.3d 473 (6th Cir.2011) cert. denied, ___ U.S. ___, 132 S.Ct. 1909 (2012) and *Gilbert v. United States*, 640 F.3d 1293 (11th Cir. 2011), and because the application of the enhanced minimum was unconstitutional because it violated due process as hinted at in *Higgins v. Smith*, 991 F.2d 440 (8th Cir.1993).

These concepts of non-capital sentence actual innocence in the context of a *Bousely* type claim - that a sentence violates the constitution based upon a subsequent substantive interpretation of the law narrowing the scope of the crime- have been adopted by circuits as the basis for default relief for collateral challenge merits review in the contexts of a 28 U.S.C. § 2255 challenge.

The values underpinning finality and comity, must, based upon the rule of law, give way to the need to avoid convictions the law does not make criminal or punishments the law

cannot impose. See also, *Welch* , 136 S.Ct. at 1266 (the countervailing imperative (to finality) is to ensure that criminal punishment is imposed only when authorized by law.).

Finally, the long-standing doctrine of habeas corpus has everything to do with unlawful incarceration as a miscarriage of justice. The concept that a substantively unlawful sentence is prohibited in our jurisprudence significantly pre-dates the AEDPA. See *Ex Parte Siebold*, 100 U.S. 371, 376 (1879) (A conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void).

As Mr. Easter has demonstrated his legal and factual innocence of the true life-sentence imposed, he should get a merits review of his habeas corpus claims and this Court should clarify that such is the correct application of this Court's rulings related to predicate and fact based enhanced sentencing.

Alternatively, Attorney Abandonment Justifies Tolling under the policies of *Maples* and *Martinez* and 28 U.S.C. 2254(B)(1)(B)

The district and circuit courts' holdings are at odds with the test set out by this Court in *Holland* which requires only that a petitioner demonstrate that (1) some "extraordinary circumstance" prevented him from filing on time, and (2) he has diligently pursued his rights. Moreover, the panel, without explanation, rejected Mr. Easter's claim that his trial and post-conviction counsel's acts and omissions constituted egregious misconduct or actual abandonment to warrant a finding of extraordinary circumstances as presented in *Maples* and *Martinez v. Ryan*, 132 S. Ct. 1309, 1315-16 (2012).

Mr. Easter stated separate grounds in his state post-conviction proceeding related to counsel's duty to understand the law and advocate on behalf of Mr Easter in the pre-plea stage. He alleged that counsel should have asserted constitutional bases including proportionality (as to the life sentence) and single criminal episode double jeopardy issues (related to the fact that the state had investigated the allegations leading to the 2006 conviction challenged in this proceeding and failed to seek an indictment before prosecuting him for what the state asserted was his second predicate conviction which occurred in 2005). He claimed that he received no consideration for his plea and unintelligently waived numerous rights, including the right to trial without any benefit. And he claimed that counsel failed to properly advise him about the nature of his plea which included his appeal and collateral challenge waivers. These grounds are all related to counsel's performance at the plea stage to which the Sixth Amendment applies. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012); *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948) ("Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered.").

Instead, counsel allowed Mr. Easter to accept a plea agreement that provided no benefit in relation to the risk of trial. The potential impact to Mr. Easter, a true life sentence, was no more than what he would have received had he gone to trial. Counsel claimed in the post-conviction proceedings, that the benefit to Mr. Easter was that his daughter did not have to testify which was something he said he wanted. A true life sentence was too high a price

to pay for that benefit, however, in the context of this case and the professional standards governing counsel's duties because there were other ways to avoid that circumstance.¹

Counsel, however, was ineffective in this phase of the case and abandoned Mr. Easter after learning that he did not wish to try some of the allegations. Counsel failed to utilize tools to obtain a more favorable resolution and she failed to advise Mr. Easter that he did not have to agree to a life sentence to accomplish his goal. Moreover, counsel's failure to understand the applicable law related to the life sentence and her failure to understand that the state could not compel an agreement to waive a Sixth Amendment challenge to counsel's own plea phase performance rendered Mr. Easter's plea unintelligent, unknowing and involuntary.

Post-conviction counsel also abandoned Mr. Easter when he utterly failed to file any response whatsoever to the state's motion to dismiss on the basis of the invalidity of the

¹ Counsel should have learned that the policy basis for the constitutionality of the three strike authority was based on the theory that the defendant had opportunity for rehabilitation twice before, and because that had not happened in Mr. Easter's case, he had a powerful mitigating factor to negotiate a better sentence recommendation or to seek a better sentence after trial, because the court maintained authority to impose a lesser sentence based upon a statutory exception of which it appeared counsel was not aware. Counsel could have raised Oregon's double jeopardy clause in a pre-trial hearing, which prohibits a second prosecution if the prosecutor reasonably should have known of the facts relevant to the second prosecution at the time of the first. Again, given the facts of Mr. Easter's case this could have resulted in leverage in the negotiation and the possibility of allowing Mr. Easter to assert his trial rights regarding some of the allegations. By raising these constitutional issues it is likely Mr. Easter could have accomplish his goal of avoiding trial on some counts without giving up the right to go to trial on others or to seek a sentence less than the life sentence given the Court's ability to exercise discretion to impose a different sentence.

collateral challenge waiver. With the state asserting that the waiver agreement was valid, the court finding it valid without exception and post-conviction counsel abandoning Mr. Easter by not asserting otherwise or advising him of his right to file a federal habeas corpus petition, the equitable tolling continued because these errors “enter the realm of ‘professional misconduct’ may give rise to extraordinary circumstances” and because the “misconduct is sufficiently egregious.” The circumstances continued until the actual innocence claim is actually discovered. Mr. Easter never “waited” for relief.

There is a seeming legal bar created by the state when the prosecutor and the state appointed trial counsel cause Mr. Easter to believe that he had to and did waive his federal right to challenge his conviction and sentence on the bases of ineffective assistance of counsel. In doing so trial counsel also abandoned Mr. Easter and put her own interests before his. Thus, that waiver was unethical, invalid and unenforceable. That seeming legal bar was then perpetuated by the abandoning post-conviction counsel and a post-conviction process that perpetuated the erroneous validity of the entirety of the waiver without the right to meaningful review. This circumstance justifies equitable tolling.

5. Reasons For Granting The Writ

Given the Court’s jurisprudence, some of it recent, on the invalidity of enhanced sentences when the relevant substantive rules narrow the scope of a criminal statute, it is time to make clear that the *Schlup* gateway applies in this context. If we abide by the rule of law, we should not raise the risk that people who have been convicted of violating a subsequently narrowed statute or whose punishment has been enhanced for violating that statute “stand[]

convicted of an act that the law does not make criminal or face[] a punishment that the law cannot impose upon [them].” *Summerlin*, 542 U.S. at 352.

Moreover, as this Court noted in *Martinez*, pro se petitioners are incapable of vindicating substantial ineffective-assistance of counsel claims. They are unlearned in the law and may not comply with procedural rules or may misapprehend the substantive details of the law. 132 S. Ct. at 1317. An effective attorney is necessary to present such a claim in accordance with state procedures. *Id.* It is time to also make clear that in such unusual circumstances - counsel abandonment coupled with an unethical effort to prevent collateral review - that such pro se petitioners are eligible for equitable tolling under this Court’s jurisprudence.

6. Conclusion

For these reasons, the Court should grant the writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted on August 8, 2018.

Tonia L. Moro
Attorney for Petitioner

No. _____

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v.

JERI TAYLOR,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

CERTIFICATE OF SERVICE AND MAILING

I, Tonia L. Moro, counsel of record, certify that pursuant to Rule 29.3 service has been made of the within MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR WRIT OF CERTIORARI on the counsel for the respondent by

depositing in the United States Post Office, in Medford, Oregon, on this 8th day of August, 2018, first class postage prepaid, a true, exact and full copy thereof addressed to:

Benjamin Gutman
Oregon Solicitor General
1162 Court Street N.E.
Salem, OR 97301-4096

U.S. Solicitor General
Department of Justice
950 Pennsylvania Ave. N.W.
Washington, D.C. 20530-0001

Additionally, an electronic copy of the MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR WRIT OF CERTIORARI was served on the Solicitor General via email at: SupremeCtBriefs@USDOJ.gov

Further, the original and ten copies were mailed to Scott Harris, Clerk of the United States Supreme Court, by depositing them in a United States Post Office Box, addressed to 1 First Street, N.E., Washington, D.C., 20543, for filing on September 7, 2017, with first-class postage prepaid and an electronic copy filed with the Court via its electronic filing system.

DATED this 8th day of August, 2018.

Tonia L. Moro
Attorney for Petitioner

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 11 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

TRAVIS MICHAEL EASTER,

Petitioner-Appellant,

v.

JERI TAYLOR,

Respondent-Appellee.

No. 16-35814

D.C. No. 2:14-cv-00999-HZ
District of Oregon,
Pendleton

ORDER

Before: N.R. SMITH, CHRISTEN, and HURWITZ, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc, Dkt. 43, is **DENIED**.

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAR 13 2018

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

TRAVIS MICHAEL EASTER,

No. 16-35814

Petitioner-Appellant,

D.C. No. 2:14-cv-00999-HZ

v.

MEMORANDUM*

JERI TAYLOR,

Respondent-Appellee.

Appeal from the United States District Court
for the District of Oregon
Marco A. Hernandez, District Judge, Presiding

Submitted March 9, 2018**
Portland, Oregon

Before: N.R. SMITH, CHRISTEN, and HURWITZ, Circuit Judges.

Travis Easter, an Oregon state prisoner, appeals the district court's dismissal of his 28 U.S.C. § 2254 habeas corpus petition. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and affirm.

1. The district court correctly held that the petition was untimely under the

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

one-year period of limitation in 28 U.S.C. § 2244(d). Easter’s Oregon conviction became final in October 2006, and the § 2254 petition was not filed until June 2014. Easter argues that the statute was not triggered until he learned in 2013 that one of his prior convictions might not qualify as a predicate under Or. Rev. Stat. § 137.719 pursuant to *Gordon v. Hall*, 221 P.3d 763 (Or. Ct. App. 2009). But, 28 U.S.C. § 2244(d)(1)(D) tolls the one-year statute until a petitioner exercising due diligence could have discovered the “factual predicate” of a claim, and “a state-court decision establishing an abstract proposition of law arguably helpful to the petitioner’s claim does not constitute the ‘factual predicate’ for that claim.” *Shannon v. Newland*, 410 F.3d 1083, 1089 (9th Cir. 2005). Moreover, Easter does not explain why he was unable, in the exercise of due diligence, to learn of the Oregon decision until 2013.

2. Easter also argues that he is entitled to equitable tolling because his trial counsel failed to argue that the 1989 conviction was not a predicate under § 137.719, and allowed him to accept a plea agreement that waived the right to attack the conviction and sentence. But, counsel’s alleged failings did not “make it *impossible* to file a petition on time,” *Bills v. Clark*, 628 F.3d 1092, 1097 (9th Cir. 2010) (citation omitted), nor does it amount to attorney abandonment or egregious professional misconduct, *see Maples v. Thomas*, 565 U.S. 266, 270–71 (2012); *Luna*

v. Kernan, 784 F.3d 640, 646 (9th Cir. 2015).¹

3. The district court did not err in finding that Easter’s claim of “actual innocence” cannot excuse the untimely filing. *See McQuiggin v. Perkins*, 569 U.S. 383, 386–87 (2013). Easter does not assert that he is innocent of the underlying criminal conduct to which he pleaded guilty, just that his sentence is improper under state law.

4. The district court did not err in holding that Easter had not established that an ineffective state post-conviction relief process excused the delay in filing the federal habeas petition. The period of limitation had already run before Easter filed for relief in state court, and he waited two years after state proceedings concluded before filing the federal petition. *See* 28 U.S.C. § 2244(d).

AFFIRMED.

¹ Easter also argues that the state prosecutor “impeded” his ability to bring the habeas petition by asserting that the 1989 conviction was a predicate under Or. Rev. Stat. § 137.719, “erroneously or vindictively” bringing charges against him, and demanding an appeal waiver as a condition of the plea. But, none of these alleged actions made it impossible for Easter to file the habeas petition timely. *See Bills*, 628 F.3d at 1097.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

TRAVIS MICHAEL EASTER,
Petitioner,

Case No. 2:14-cv-00999-HZ
OPINION AND ORDER

v.

JERI TAYLOR,
Respondent.

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HERNANDEZ, District Judge.

Petitioner brings this habeas corpus case pursuant to 28 U.S.C. § 2254 challenging the legality of his state court Sexual Abuse conviction from 2006 and resulting life sentence. For the reasons that follow, the Petition for Writ of Habeas Corpus (#2) is dismissed as untimely.

BACKGROUND

In August 1989, petitioner entered a guilty plea to Rape in the Second Degree in Jackson County. In exchange for his guilty plea, the court allowed him to enter into a deferred sentencing agreement whereby it required him to adhere to certain probationary conditions for a period of two years. If he failed to satisfy the probationary conditions, he would be summoned to appear in court for imposition of a sentence on the Rape II charge. However, if he satisfied the probationary conditions for the two-year duration, the prosecutor would so inform the court "and the court shall dismiss with prejudice the criminal charge herein." Petitioner's Exhibit 3, p. 2. Petitioner complied with the terms of his probation and avoided a prison sentence.

In the summer of 2004, petitioner was indicted on four counts of Sexual Abuse in the First Degree pertaining to incidents involving two girls under the age of 14.¹ The case proceeded to trial in 2005 where a jury returned guilty verdicts as to all four charges, and the trial court sentenced petitioner to 150 months in prison.

¹ These convictions were previously at issue in this District in *Easter v. Franke*, Case No. 2:11-cv-00906-JE.

In 2006, while incarcerated based upon the 2005 convictions, the Jackson County Grand Jury indicted petitioner on six counts of Sexual Abuse in the First Degree, and one count each of Sodomy in the First Degree, Unlawful Sexual Penetration in the Second Degree, and Rape in the First Degree. Respondent's Exhibit 102. Petitioner elected to enter a guilty plea to one count of Sex Abuse I, and signed a plea agreement wherein he acknowledged that, although the statutory maximum for his crime was 10 years, the presumptive sentence in his case was life in prison. Respondent's Exhibit 103. Petitioner was subject to the true life sentence because the presumptive sentence for a felony sex crime in Oregon was elevated to life without parole where the offender "has been sentenced for sex crimes that are felonies at least two times prior to the current sentence." ORS 137.719. Petitioner did not take a direct appeal.

Three years later, the Oregon Court of Appeals decided *Gordon v. Hall*, 232 Or. App. 174 (2009). In *Gordon*, the appellate court concluded that a trial attorney rendered ineffective assistance when he did not challenge the use of a suspended sentence as a qualifying predicate for purposes of imposing a true life sentence pursuant to ORS 137.719.

On November 18, 2010, petitioner filed for post-conviction relief ("PCR") in Umatilla County. His PCR Petition raised several claims of ineffective assistance of counsel, none of which were predicated upon his assertion in this case that his 1989 probationary term was not a sentence for purposes of ORS 137.719. Respondent's Exhibit 106. The State moved for summary

judgment because the PCR Petition was untimely, and petitioner had waived his right to seek collateral relief when he entered his guilty plea. Respondent's Exhibit 110. The PCR court granted the State's Motion for Summary Judgment and dismissed the case as meritless. Respondent's Exhibits 115-116. The Oregon Court of Appeals dismissed the subsequent appeal *sua sponte* as meritless, and the Oregon Supreme Court denied review. Respondent's Exhibits 118, 122. The appellate judgment became effective May 29, 2012. Respondent's Exhibit 123.

Petitioner filed this federal habeas corpus case on June 20, 2014 raising a variety of challenges to his 2006 Sexual Abuse conviction and resulting life sentence. The State contends petitioner allowed 2,261 untolled days to elapse between the finality of his conviction and the filing of this habeas corpus case, placing it well outside of the one-year statute of limitations contemplated by the Anti-terrorism and Effective Death Penalty Act ("AEDPA"). Petitioner does not dispute that calculation, but argues that the court should excuse his untimely filing because: (1) he is "actually innocent" of his sentence; (2) statutory and equitable tolling are appropriate where petitioner's trial and PCR attorneys failed to understand that he did not qualify for a true life sentence under ORS 137.719; and (3) the state PCR process was ineffective to protect his rights.

DISCUSSION

I. Actual Innocence

Habeas corpus petitioners must generally file federal challenges to their state convictions within one year of the time

those convictions become final by the conclusion of their direct review. 28 U.S.C. 2244(d)(1)(A). A petitioner who fails to comply with this deadline may overcome such a default if he is able to show that he is actually innocent of his underlying criminal conduct. *McQuiggin v. Perkins*, 133 S.Ct. 1924, 1928 (2013). In *McQuiggin*, the Supreme Court underscored that such an exception "applies to a severely confined category: cases in which new evidence shows 'it is more likely that not that no reasonable juror would have convicted [the petitioner].'" *Id.* at 1933 (citing *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). "Without any new evidence of innocence, even the existence of a . . . meritorious constitutional violation is not sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim." *Schlup*, 513 U.S. at 316.

Petitioner in the case at bar does not allege that he is innocent of the underlying criminal conduct of which he was convicted. Instead, he claims to be "innocent" of his true life sentence because his 1989 Rape II conviction resulted in a probationary term that is not considered a "sentence" under Oregon law and therefore did not constitute a qualifying predicate sentence for purposes of ORS 137.719.

Neither the Supreme Court nor the Ninth Circuit has extended the concept of actual innocence to a non-capital sentencing issue, and the Ninth Circuit has recognized that a showing of actual innocence requires a petitioner to demonstrate "that the petitioner is innocent of the charge for which he is

incarcerated. . . ." *Gandarela v. Johnson*, 286 F.3d. 1080, 1085 (9th Cir. 2001) (citing *Schlup*, 513 U.S. at 321). In the context of an Oregon inmate who alleged that his consecutive sentences were plainly unlawful under the applicable Oregon statute, the Ninth Circuit concluded that the inmate could not avail himself of the actual innocence exception to procedural default where he failed to establish his factual innocence as to his crime of conviction. *Wildman v. Johnson*, 261 F.3d 832, 842-43 (9th Cir. 2001).

Where the actual innocence exception to procedural default is firmly rooted in the fundamental question of an inmate's factual innocence as to the crime(s) of conviction, this court declines to extend the actual innocence exception to non-capital sentencing error. See *Bousley v. United States*, 523 U.S. 538, 559 (1998) (actual innocence means factual innocence, not legal insufficiency); see also *Sawyer v. Whitley*, 505 U.S. 333, 340 (1992) (A "prototypical example" of actual innocence "is the case where the State has convicted the wrong person of the crime."); *Johnson v. Knowles*, 541 F.3d 933, 937-38 (9th Cir. 2008) ("the miscarriage of justice exception is limited to those extraordinary cases where the petitioner asserts his innocence and establishes that the court cannot have confidence in the contrary **finding of guilt.**") (italics in original, bold added). Consistent with this theme, the Supreme Court in *McQuiggin* extended the actual innocence exception only to those untimely petitioners who can demonstrate that in light of new evidence, it is more likely than not that no reasonable juror would have

convicted them. 133 S.Ct. at 1928. Jurors do not convict defendants of sentences. Accordingly, petitioner cannot overcome his untimely filing by way of his allegation of sentencing error.

II. Statutory Tolling

Petitioner next argues that he is entitled to statutory tolling pursuant to 28 U.S.C. § 2244(d)(1) because his trial attorney did not understand that her client had agreed to a sentence that was not supported by his criminal history, and petitioner's PCR attorneys also failed to detect the error even in the wake of *Gordon*. He concludes that he could not reasonably be expected to discover the issue until his appointed attorney in this habeas case discovered it "sometime in the Fall 2015," Memo in Support (#38), p. 23, and reasons that, pursuant to § 2244(d)(1), AEDPA's one-year limitation period was statutorily tolled until that time.

Pursuant to 28 U.S.C. § 2244(d)(1), the one-year period in which to file for habeas corpus relief runs from the latest of:

(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;

(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;

(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

(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).

Petitioner filed this habeas corpus action *pro se* on June 20, 2014 alleging that he was the victim of ineffective assistance of counsel in a variety of particulars beyond the sentencing issue upon which he now focuses. Consequently, he cannot assert that he was effectively precluded from filing this case until his habeas attorney discovered his sentencing issue in the Fall of 2015.

In addition, contrary to his argument here, it is evident from the record that petitioner discovered his sentencing claim without attorney assistance. Where petitioner claims his trial and PCR attorneys failed to advise him of the sentencing issue, he nevertheless specifically included it in his 2014 *pro se* Petition for Writ of Habeas Corpus which he filed before this court appointed an attorney to represent him:

counsel (both trial and appellate) failed to otherwise object to or effectively object to, or assign error to the imposition of the life sentence pursuant to Or. Rev. Stat. § 137.719. Petitioner['s] 1989 second degree rape conviction was deemed a predicate under Or. Rev. Stat. § 137.719. It was not a predicate because petitioner receive[d] a probation sentence. See *Gordon v. Hall* 232 Or. App. 174 (2009) and *State v. Carmickle*, 307 Or 1, 762 P2d 290 (1988).

Petition (#2), p. 3.

Moreover, at the time petitioner entered his guilty plea, he knew the facts that would support his claim of sentencing error and, by extension, ineffective assistance of counsel. Even if he may not have understood the legal significance of those facts at that time, his awareness of the factual predicate of the claim was sufficient for the AEDPA's statute of limitations to commence running. See *Hasan v. Galaza*, 254 F.3d 1150, 1154 n. 3 (9th Cir. 2001). For all of these reasons, petitioner's statutory tolling argument lacks merit.

II. Equitable Tolling

Petitioner also argues that errors by the prosecutor and his trial and PCR attorneys justify equitable tolling of the statute of limitations. Equitable tolling is available to toll the one-year statute of limitations available to 28 U.S.C. § 2254 habeas corpus cases. *Holland v. Florida*, 560 U.S. 631, 645 (2010). A litigant seeking to invoke equitable tolling must establish: (1) that he has been pursuing his rights diligently; and (2) that some extraordinary circumstance prevented him from timely filing his petition. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). A petitioner who fails to file a timely petition due to his own lack of diligence is not entitled to equitable tolling. *Tillema v. Long*, 253 F.3d 494, 504 (9th Cir. 2001). Petitioner bears the burden of showing that this "extraordinary exclusion" should apply to him. *Miranda v. Castro*, 292 F.3d 1063, 1065 (9th Cir. 2002).

According to petitioner, the prosecutor in his case impeded his ability to challenge his sentence when he: (1) erroneously

asserted that the 1989 rape conviction resulted in a qualifying predicate offense under ORS 137.719; (2) either erroneously or vindictively brought additional charges in 2006 that arose from the same course of conduct as the 2005 convictions; (3) stated that two of the 2005 convictions sentenced together were separate predicates to a true life sentence; and (4) demanded that petitioner waive his direct and collateral review remedies in exchange for nothing. The State's filing of criminal charges and negotiation of a plea bargain did not constitute an extraordinary circumstance that rendered it impossible for petitioner to timely file this case.

Petitioner's principal claim for equitable tolling appears to be that his trial and PCR attorneys failed to understand that his sentence was unlawful. He further asserts that trial counsel: (1) told petitioner he could not file a PCR petition; (2) abandoned petitioner when counsel advised him to enter into a plea agreement whereby he waived all collateral challenges, including any such claims against her; and (3) not only failed to understand that her client was not eligible for a true life sentence, but did not understand the law regarding proportionality, double jeopardy, and collateral remedy waivers.

Generally, claims for equitable tolling based upon attorney error do not arise to the level of an extraordinary circumstance sufficient to warrant equitable tolling. See, e.g., *Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir. 2001) (attorney negligence in general does not justify equitable tolling); *Holland*, 560 U.S. at 651-52 ("garden variety" negligence does not warrant equitable

tolling). "Justice Alito explained his understanding of the logic behind this framework, reasoning that, 'the principal rationale . . . is that the error of an attorney is constructively attributable to the client and thus is not a circumstance beyond the litigant's control.'" *Gibbs v. Legend*, 767 F.3d 879, p. 885 (9th Cir. 2014) (quoting *Holland*, 560 U.S. 657 (Alito, J., concurring)). Equitable tolling based upon attorney performance is only appropriate where: (1) an attorney's performance goes beyond error and amounts to "egregious professional misconduct;" or (2) the attorney abandons her client altogether. *Luna v. Kernan*, 784 F.3d 640, 646 (9th Cir. 2015); *Maples v. Thomas*, 132 S.Ct. 912, 923-24 (2012).

The fact that petitioner's trial and PCR attorneys were not aware that his 1989 probationary term might not qualify as a predicate sentence for purposes of ORS 137.719 is, at most, a legal error imputed to petitioner. While petitioner contends that his trial attorney advised him he could not file a PCR action, not only did counsel dispute this during the underlying PCR action,² but such advice would not, and did not, actually prevent petitioner from filing for collateral relief.

Although petitioner casts trial counsel's advice regarding his guilty plea as "abandonment" sufficient to warrant equitable tolling, nothing in the record shows any attorney abandoned petitioner in the sense contemplated by *Maples*. See *Maples*, 132 S.Ct. at 918-20 (two out-of-state attorneys left their law firm without transferring petitioner's case to another attorney or

² Respondent's Exhibit 111, p. 1.

notifying their client or the state court of their withdrawal such that petitioner never received notice that his appeal was due). Moreover, where petitioner now points to the Oregon Court of Appeals' decision in *Gordon* as the point in time where it became clear that his 2006 sentence was invalid,³ the fact that it took petitioner another five years to raise the issue *pro se* in a habeas corpus challenge shows that he failed to act diligently, especially where his Petition presents a variety of claims independent of the *Gordon* issue. Equitable tolling is therefore not appropriate.

III. Ineffective Corrective Process

Finally, petitioner also asserts that the state corrective process was ineffective to protect his rights. Where the PCR court dismissed the action, at least in part, because it was untimely, this does not render the process ineffective. Even if it did, petitioner not only failed to come straight to federal court in the face of an allegedly ineffective state corrective process, but also allowed two additional years to pass after the Oregon Supreme Court denied review in his PCR action and the Appellate Judgment became final. Thus even if the court were to toll the limitation period until his Appellate Judgment issued on May 29, 2012, this case would still be untimely. For all of these reasons, petitioner is unable to excuse his untimely filing.

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³ As noted earlier, petitioner's Petition grounds his challenge in Oregon law dating back to 1983.

CONCLUSION

For the reasons identified above, the Petition for Writ of Habeas Corpus (#2) is dismissed, with prejudice, as untimely. The court does, however, issue a Certificate of Appealability on the basis that petitioner has made a substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

DATED this 20 day of September, 2016.

A handwritten signature in blue ink, reading "Marco Hernandez", is written over a horizontal line.

Marco A. Hernandez
United States District Judge