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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TERRY ALFRED COXE, Petitioner-Appellant, v. PATRICK R. GLEBE, Respondent-Appellee.	No. 17-35518 D.C. No. 3:16-cv-05450-BHS Western District of Washington, Tacoma ORDER

Before: SILVERMAN and IKUTA, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012).

Any pending motions are denied as moot.

DENIED.

APPENDIX H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

TERRY ALFRED COXE, Petitioner, v. PATRICK GLEBE, Respondent.	CASE NO. 16-5450 BHS ORDER ADOPTING REPORT AND RECOMMENDATION AND DENYING PETITIONER'S MOTION TO AMEND

This matter comes before the Court on the Report and Recommendation ("R&R") of the Honorable J. Richard Creatura, United States Magistrate Judge (Dkt. 24), and Petitioner Terry Alfred Coxe's ("Coxe") motion to file amended petition (Dkt. 22) and objections to the R&R (Dkt. 25).

On November 18, 2016, Coxe moved to file an amended petition. Dkt. 22. On March 23, 2017, Judge Creatura issued the R&R recommending that the Court dismiss Coxe's petition as time barred because Coxe failed to timely file his federal petition, he is not entitled to equitable tolling, and he failed to meet his burden to show actual innocence. Dkt. 24. On April 6, 2017, Coxe filed objections. Dkt. 25.

The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).

In this case, Coxe requests that the Court consider his claim on the merits or, in the alternative, issue a certificate of appealability. Dkt. 25 at 7. Regarding timeliness of Coxe's petition and equitable tolling, the Court agrees with Judge Creatura. The statute of limitations expired on June 21, 2013, and Coxe did not file his federal petition until June 2016. Moreover, Coxe fails to show that he was diligent or that any impediment stood in his way to filing his federal petition. Therefore, the Court adopts the R&R on these issues.

Regarding Coxe's actual innocence claim, he objects to Judge Creatura's conclusion that a structural error does not support an actual innocence claim. Coxe cites numerous authorities for the proposition that ineffective assistance of counsel constitutes prejudice. Dkt. 25 at 2–5. Prejudice, however, does not establish actual innocence. As Judge Creatura concluded, this exception requires a showing of new evidence in support of factual innocence. Dkt. 24 at 11 (citing *Schlup v. Delo*, 513 U.S. 298, 314–15 (1995)). In the absence of any new evidence, the Court adopts the R&R on this issue.

Regarding a certificate of appealability, the Court agrees with Judge Creatura that Coxe is not entitled to a certificate of appealability with respect to this petition.

Finally, Coxe's motion to file an amended petition is without merit. Any existing issue is time barred and, without any new evidence in support of actual innocence, amending the petition is futile.

Therefore, the Court having considered the R&R, Coxe's objections, and the remaining record, does hereby find and order as follows:

(1) The R&R is **ADOPTED**;

(2) Coxe's motion to amend (Dkt. 22) is **DENIED**;

(3) Coxe's petition is **DENIED** as time barred;

(4) A Certificate of Appealability is **DENIED**; and

(5) The Clerk shall enter **JUDGMENT** against Coxe and close this case.

Dated this 23rd day of May, 2017.

BENJAMIN H. SETTLE
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

TERRY ALFRED COXE,

Petitioner,

v.

PATRICK R GLEBE,

Respondent.

CASE NO. 3:16-CV-05450-BHS-JRC

REPORT AND RECOMMENDATION

NOTED FOR: APRIL 20, 2017

The District Court has referred this petition for a writ of habeas corpus to United States Magistrate Judge J. Richard Creatura. The Court's authority for the referral is 28 U.S.C. § 636(b)(1)(A) and (B), and local Magistrate Judge Rules MJR3 and MJR4. Petitioner filed the petition pursuant to 28 U.S.C. § 2254.

Petitioner Terry Alfred Coxe seeks 28 U.S.C. § 2254 habeas relief from his 2009 state court conviction by jury verdict of two counts of first-degree child molestation. Dkt. 16, Exhibit 1. The court imposed an exceptional 134-month sentence. Dkt. 16, Exhibit 1. Respondent contends that the petition is barred by the federal statute of limitations. Dkts. 15, 20.

The Court finds that petitioner's federal habeas corpus petition is untimely because this federal habeas petition was filed more than one year after his state court judgment became final. There are no extraordinary circumstances in his case that require the application of equitable tolling principles. Therefore, this federal habeas petition should be dismissed with prejudice. The Court also recommends denying a certificate of appealability.

BACKGROUND

Petitioner Terry Alfred Coxe filed a habeas corpus petition challenging his custody under a state court judgment and sentence. Dkt. 3. Petitioner also filed a memorandum in support of his petition, which raised several other grounds for relief. Dkt. 3-1. In his original answer, respondent only addressed petitioner's first two grounds for relief. Dkts. 15, 16. The Court ordered respondent to file a supplemental answer addressing petitioner's additional grounds for relief. Dkt. 19.

Respondent filed his supplemental answer on November 4, 2016. Dkt. 20. Petitioner filed a supplemental traverse on November 18, 2016. Dkt. 22. In his traverse, petitioner asked the Court for leave to amend his petition and to file a corrected habeas petition. Dkt. 22 at 3. Petitioner stated that he filled out pages 6-8 in error and sought leave of court to amend ground one of his petition. *Id.* Petitioner stated that he intended to raise a single issue of counsel abandonment with reference to the memorandum for argument in support. *Id.* at 3-4. Petitioner also requested that he be able to remove issues 1 and 2 from his petition. *Id.* at 4.

The Court ordered petitioner to submit a copy of the proposed amended petition no later than January 30, 2017. Dkt. 23. The Court advised petitioner that if he failed to file a proposed amended petition, the Court would deny the motion to amend and this case will proceed on the original petition and memorandum (Dkt. 3, Dkt. 3-1). *Id.* Petitioner failed to file a proposed

amended petition and thus, the Court proceeds on his original petition and memorandum. The Court denies petitioner's motion to file an amended petition (Dkt. 22).

BASIS FOR CUSTODY AND FACTS

The Washington Court of Appeals summarized the facts in petitioner's case as follows:

> Terry Coxe was convicted of two counts of first degree child molestation against his step-granddaughter, B.K. B.K., who was in second grade when the crime occurred, was living with her mother, Eden Kelly, in the household of Coxe and his wife Myrna, B.K.'s grandmother. B.K. told Kelly that Coxe had touched her buttocks inside her underwear while B.K. was sitting on Coxe's lap at the computer. B.K. said she asked Coxe to stop, which he did, but he soon did it again, again stopping when B.K. told him to. Kelly brought B.K. to B.K.'s school counselor, Sharon Hedlund. B.K. told Hedlund that Coxe had touched her buttocks inside her underwear twice within a few minutes while in front of the computer, and once on a prior occasion. Hedlund reported the incident to the police.
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> Deputy Matthew Wallace conducted a voluntary interview with Coxe, who told Deputy Wallace that he had held B.K. on his lap, rubbed her tummy and back, had tickled her and wrestled with her. Coxe said he might have accidentally touched B.K.'s bottom during wrestling. At a second interview, Coxe admitted to Deputy Wallace that he had been struggling with sex addiction all his life. Coxe said that he had given B.K. a belly rub once, but stopped because he thought it might be inappropriate. Coxe also said that B.K. was a very intelligent girl and was not prone to being coached. Coxe said that he might have touched B.K. inappropriately, but that his mind could be blocking the incident.
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> The State charged Coxe with two counts of first degree child molestation. Before trial, Coxe moved to waive his right to trial by jury. The trial court denied Coxe's motion because the case turned on the credibility of witnesses, making it proper for a jury. At trial, B.K. testified that Coxe put his hand inside her underwear and touched her buttocks while she was on his lap in front of the computer, and before that, when she was sitting on his lap on a green chair. Kelly and Hedlund testified about B.K.'s statements to them. Deputy Wallace recounted Coxe's statements from the voluntary interviews. Defense counsel did not object to the admission of Coxe's statements. At the close of the State's case, defense counsel moved to dismiss the charges, arguing that the State had failed to prove the element of sexual gratification. The trial court denied the motion. At the close of Coxe's case, defense counsel renewed the motion to dismiss. The trial court again denied the motion. The jury found Coxe guilty of both counts of first degree child

> molestation. The jury also issued a special verdict finding that Coxe had abused his position of trust with B.K on both counts.
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> The trial court sentenced Coxe to two consecutive 67 month sentences for a total of 134 months. The trial court stated that the sentence might have been lower but for the aggravating factor that Coxe abused his position of trust, and but for the fact that Coxe accepted no responsibility for the crime.

Dkt. 15, Exhibit 5 (unpublished opinion), at 1-3.

STATE PROCEDURAL HISTORY

Petitioner filed a direct appeal of his conviction and three personal restraint petitions.

1. Direct Appeal

Through counsel, petitioner appealed to the Washington Court of Appeals. Dkt. 16, Exhibits 2, 3. Petitioner raised four grounds for relief: (1) insufficient evidence; (2) ineffective assistance of trial counsel; (3) improper denial of petitioner's jury trial waiver; and (4) excessive sentence. Dkt.16, Exhibit 2. On November 24, 2010, the Washington Court of Appeals denied petitioner's appeal in an unpublished opinion. *Id.* at Exhibit 5. Petitioner did not file for discretionary review with the Washington Supreme Court and did not file a petition for writ of certiorari with the United States Supreme Court. On January 6, 2011, the Washington Court of Appeals issued its mandate stating that petitioner's direct appeal became final on December 28, 2010. Dkt. 16, Exhibit 6.

2. First Personal Restraint Petition

Petitioner, proceeding *pro se,* filed a collateral attack of his sentence – his first personal restraint petition ("PRP") on December 1, 2011.[1] Dkt. 16, Exhibit 7. Petitioner raised two ineffective assistance of counsel claims: (1) trial counsel failed to disclose evidence with

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[1] The prison "mailbox rule" is not available when filing a PRP in Washington State; therefore, petitioner's first PRP was deemed filed on the date it was received by the state clerk's office. *In re Carlstad*, 150 Wash.2d. 583, 590 (2003).

respect to Deon Mill's testimony and (2) trial counsel failed to call Mary (Kelly) Weaver as a witness. Dkt. 16, Exhibit 7. The Washington Court of Appeals dismissed the petition on September 12, 2012. Dkt. 17, Exhibit 10. Petitioner filed a motion for discretionary review with the Washington Supreme Court. Dkt. 16, Exhibit 11.

Petitioner moved for discretionary review and raised the same two grounds he presented in his first PRP. Dkt. 16, Exhibit 11. The Washington Supreme Court denied the motion through a ruling by the commissioner. Dkt. 16, Exhibit 12. Petitioner's first PRP became final on May 23, 2013. Dkt. 16, Exhibit 13.

3. Second Personal Restraint Petition

Petitioner, proceeding *pro se,* filed a second PRP on July 18, 2013. Dkt. 16, Exhibit 14. Petitioner argued that the trial court erred in imposing consecutive sentences, in imposing an excessive sentence and in ordering that he not consume alcohol. Dkt. 16, Exhibit 14. The Washington Court of Appeals dismissed the petition on December 6, 2013 as untimely. *Id.*, Exhibit 15. Petitioner did not file a motion for discretionary review with the Washington Supreme Court and his second PRP became final on January 7, 2014. Dkt. 16, Exhibit 16.

4. Third Personal Restraint Petition

On August 15, 2014, petitioner filed his third PRP. Dkt. 16, Exhibit 17. Petitioner filed his petition directly with the Washington Supreme Court, and the petition was transferred to the Washington Court of Appeals. Dkt. 16, Exhibit 18. Petitioner argued that his trial and appellate counsel rendered ineffective assistance of counsel. Dkt. 16, Exhibit 17. The Washington Court of Appeals dismissed petitioner's third PRP as untimely on February 19, 2014. Dkt. 16, Exhibit 18.

On March 19, 2015, petitioner filed a motion for discretionary review. Dkt. 16, Exhibit 19. On October 12, 2015, the Washington Supreme Court entered a ruling denying review. Dkt.

16, Exhibit 20. On November 5, 2015, petitioner filed a motion for reconsideration, which the state court treated as a motion to modify the commissioner's ruling denying review. Dkt. 16, Exhibits 21, 22. On January 6, 2016, the Washington Supreme Court denied petitioner's motion to modify. Dkt. 16, Exhibit 23. Petitioner's third PRP became final on January 6, 2016. Dkt. 16, Exhibit 24.

Petitioner signed this federal habeas corpus petition on June 6, 2016. Dkt. 3; Dkt. 3-1 at 46. The Court notes that petitioner signed the form petition but only included a date on his memorandum in support. Dkt. 3-1 at 46. Under the prison "mailbox rule," a petition is deemed filed for purposes of the federal statute of limitations the moment it is delivered to prison authorities for forwarding to the clerk of the district court. *See Patterson v. Stewart*, 251 F.3d 1243, 1245 n. 2 (9th Cir. 2001).

EVIDENTIARY HEARING

The decision to hold a hearing is committed to the Court's discretion. *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). "[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." *Landrigan*, 550 U.S. at 474. In determining whether relief is available under 28 U.S.C. § 2254(d)(1), the Court's review is limited to the record before the state court. *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011). "[A]n evidentiary hearing is not required on issues that can be resolved by reference to the state court record." *See Totten v. Merkle*, 137 F.3d 1172, 1176 (9th Cir. 1998). Here, no hearing is required because the matter can be decided based on the state court record.

Petitioner's habeas claims raise only questions of law and may be resolved by a review of the existing state court record. Therefore, the Court finds it unnecessary to hold an evidentiary hearing.

DISCUSSION

Petitioner raises ten grounds for relief. Dkts. 3, 3-1.

Among other things, respondent argues that the Court should not decide these issues because the petition is time-barred. Dkts. 15 (original answer), 16, 20 (supplemental answer). Because the Court agrees that the petition is time-barred, it declines to address respondent's additional arguments.

1. Statute of Limitations - 28 U.S.C. § 2244(d)

The Antiterrorism and Effective Death Penalty Act (AEDPA) established a statute of limitations for petitions filed by prisoners challenging their custody under a state court judgment and sentence. 28 U.S.C. § 2244(d). Where the challenged judgment became final after April 24, 1996, the statute generally begins to run from "the date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). For purposes of 28 U.S.C. § 2244(d)(1)(A), direct review generally concludes and the judgment becomes final either upon the expiration of the time for filing a petition for writ of certiorari with the Supreme Court, or when the Court rules on a timely filed petition for certiorari. *Bowen v. Roe*, 188 F.3d 1157, 1158-59 (9th Cir. 1999). However, the judgment becomes final on an earlier date where the direct review has terminated prior to reaching the state's highest court. *Gonzalez v. Thaler*, 132 S. Ct. 641, 652-56 (2012); *Wixom v. Washington*, 264 F.3d 894 (9th Cir. 2001).

The Washington Court of Appeals denied petitioner's direct appeal on November 24, 2010. Dkt. 16, Exhibit 5. Petitioner's judgment and sentence was final on December 28, 2010 and the federal statute of limitations started to run the next day. Dkt. 16, Exhibit 6. 28 U.S.C. § 2244(d)(1)(A); Wash R. App. P. 13.4. *See Patterson v. Stewart,* 251 F.3d 1243, 1245-46 (9th Cir. 2001) (explaining that time limits under AEDPA are calculated in accordance with the provisions of Fed. R. Civ. P. 6(a): "In computing any period of time prescribed or allowed by these rules ... or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included); *Corjasso v. Ayers*, 278 F.3d 874, 877 (9th Cir. 2002). The statute ran uninterrupted for 337 days until petitioner filed his first PRP on December 1, 2011. Dkt. 16, Exhibit 7. The statute of limitations began running again on May 24, 2013, the day after petitioner's first PRP became final. Dkt. 16, Exhibit 16. The federal statute of limitations expired 28 days later on June 21, 2013.

Petitioner filed his second PRP on July 18, 2013, however, by that time, the federal statute of limitations had run out and petitioner was time-barred from filing his federal habeas corpus petition. *See* 28 U.S.C. § 2244(d)(2); *Pace v. DiGuglielmo*, 544 U.S. 408, 410 (2005) (an untimely state court petition for post-sentence relief does not toll federal statute of limitations because petition did not constitute a "properly filed" petition); *Allen v. Siebert*, 552 U.S. 3, 6 (2007); *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003) (holding "section 2244(d) does not permit the reinitiation of the limitations period that has ended before the state petition was filed"). Similarly, the filing of petitioner's third PRP has no bearing on the fact that his habeas corpus petition is untimely as the AEDPA 28 U.S.C. § 2244(d) statute of limitations ran out in June 2013 and petitioner's federal habeas petition was not signed and submitted for filing in this Court until June 6, 2016. Dkt. 3, Dkt. 3-1 at 46.

Nevertheless, even if petitioner was entitled to statutory tolling while his second and third PRPs were pending in state court, petitioner has not accounted for the remaining delay of over a year, from January 7, 2014 to August 15, 2014 and from January 6, 2016 and June 6, 2016. Accordingly, petitioner's claim would still be time-barred under § 2244(d).

Based on the foregoing, the Court concludes that the petition is barred under the statute of limitations unless he can demonstrate an entitlement to equitable tolling.

2. Equitable Tolling

Respondent argues that petitioner is not entitled to equitable tolling because his federal claims relate to issues he raised in the state court, and there is nothing new about them. Dkt. 15 at 14. Respondent also contends that petitioner has failed to show that he was diligently pursuing his rights under federal law and that there are no extraordinary circumstances that prevented him from filing his petition within the federal statute of limitations. *Id.*

The statute of limitations may be subject to equitable tolling if the petitioner shows "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland v. Florida*, 130 S. Ct. 2549, 2562 (2010). To obtain equitable tolling, extraordinary circumstances beyond a petitioner's control must have prevented the petitioner from filing a federal petition on time. *Whalem/Hunt v. Early*, 233 F.3d 1146, 1148 (9th Cir. 2000) (en banc); *Gaston v. Palmer*, 387 F.3d 1004, 1008 (9th Cir. 2004); *Laws v. Lamarque*, 351 F.3d 919, 923-24 (9th Cir. 2003). *See Miranda v. Castro,* 292 F.3d 1063, 1065 (9th Cir. 2002) (Petitioner bears the burden of establishing his entitlement to equitable tolling).

The basis for petitioner's equitable tolling claim appears to be couched on his ineffective assistance of counsel claim. *See* Dkt. 22. Petitioner contends that both his trial and appellate

attorneys misunderstood the law, and that their legal advice was misleading. Dkt. 22 at 9-10. However, petitioner does not allege, and there is no evidence from the Court's review of the record, that petitioner was impeded in his ability to prepare and file his federal habeas petition in a prompt fashion. Moreover, petitioner's general allegation that his status as a *pro se* prisoner entitles him to equitable tolling is insufficient to meet this burden. *See e.g. Marsh v. Soares,* 223 F.3d 1217, 1220 (10th Cir. 2000) ("[I]t is well established that 'ignorance of the law, even for an incarcerated *pro se* petitioner, generally does not excuse prompt filing' "of a habeas petition) (quoting *Fisher v. Johnson,* 174 F.3d 710, 714 (5th Cir.1999), *cert. denied,* 531 U.S. 1164 (2001)).

Petitioner also contends that his structural error claim requires consideration of his claims regardless of whether the petition is time-barred, arguing that "[28 U.S.C. §] 2244(d)(1) and RCW 10.73.090(1) cannot restrict this Court's power to review a structural error claim." Dkt. 22 at 10. However, there is no authority for the proposition that a claim of structural error supersedes the federal statute of limitations. *See* 28 U.S.C. § 2244(d); *Tiffin v. Hartley,* 2011 WL 2580344, at *3 (C.D. Cal. May 19, 2011), *report and recommendation adopted,* 2011 WL 2565573 (C.D. Cal. June 28, 2011) (rejecting petitioner's claim that he was entitled to equitable tolling because the arbitrary application of the statute of limitations would not correct structural defect, miscarriage of justice, and denial of counsel).

Thus, petitioner is not entitled to equitable tolling based on the alleged failure of his trial and appellate counsel, his status as a prisoner, or his structural error claim.

C. Newly Discovered Evidence

Petitioner also appears to argue an actual innocence claim, which would allow him to have his otherwise time-barred claims heard on the merits. Dkt. 22 at 8. The Supreme Court has

held that the "actual innocence" exception applies to AEDPA's statute of limitations. *See McQuiggin v. Perkins,* —— U.S. ——, 133 S.Ct. 1924 (2013). "[A] credible claim of actual innocence constitutes an equitable exception to AEDPA's limitations period, and a petitioner who makes such a showing may pass through the *Schlup* gateway and have his otherwise time-barred claims heard on the merits." *Lee v. Lampert,* 653 F.3d 929, 932 (9th Cir. 2011). Under *Schlup v. Delo,* 513 U.S. 298, 314–15 (1995), a petitioner must produce sufficient proof of his actual innocence to bring him "within the narrow class of cases ... implicating a fundamental miscarriage of justice." (quotations omitted). A petitioner must "show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Id.* at 327. Actual innocence in this context "means factual innocence, not mere legal insufficiency." *Bousley v. United States,* 523 U.S. 614, 623–24 (1998). A petitioner must support his claim of actual innocence with new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial." *Schlup,* 513 U.S. at 324.

Petitioner fails to meet this burden because he provides no new evidence of his factual innocence. Instead, he argues that he recently discovered new legal theories through the assistance of a fellow inmate. Dkt. 22 at 8. However, absent any new evidence, these purported new legal theories are insufficient to satisfy *Schlup's* exacting "actual innocence" standard. *Lee,* 653 F.3d at 937–38; *see also Jaramillo v. Stewart,* 340 F.3d 877, 882 (9th Cir. 2003).

In its ruling dismissing petitioner's third PRP as untimely, the Washington Supreme Court recognized that petitioner's equitable tolling claim was without merit:

> Coxe contends that his trial and appellate attorneys rendered ineffective assistance, denying him the right to counsel. Cox[e] made a similar claim in a previous petition. [state court footnote omitted]

> A personal restraint petition challenging a judgment and sentence generally must be filed within one year after the judgment becomes final. RCW 10.73.090(1). Coxe's judgment became final when this court's mandate issued on January 6, 2011. Coxe did not file this petition until August 15, 2014. [state court footnote omitted] Coxe recognizes that his petition is untimely but nonetheless invites this court to consider it on the round that he claims he is factually innocent. Coxe thus requests this Court to grant him an evidentiary hearing to prove his innocence. Coxe also appears to argue that RCW 10.73.100(1) applies to except his petition from the one-year time bar based on newly discovered evidence.
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> A gateway actual innocence claim is used to avoid procedural time bars so that a court may review other claimed constitutional errors. *State v. Weber,* 175 Wn.2d 247, 256 (2012). To be credible, a gateway actual innocence claim requires the petitioner to support his allegations with newly presented and reliable evidence. *Weber,* 175 Wn. 2d at 258-59. Coxe makes no such showing here.
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> ...
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> Coxe does not actually claim that he has any newly discovered evidence, however, and the new information he relies on consists of novel legal theories supplied by a cellmate, which theories Coxe alleges he could not have discovered without the assistance of his cellmate. This does not qualify as newly discovered evidence within the meaning of RCW 10.73.100(1).

Dkt. 16, Exhibit 18.

Petitioner has failed to present any newly discovered evidence that shows he is innocent and thus, he is not entitled to equitable tolling due to his claim of actual innocence.

D. Certificate of Appealability

A petitioner seeking post-conviction relief under 28 U.S.C. § 2254 may appeal a district court's dismissal of the federal habeas petition only after obtaining a certificate of appealability (COA) from a district or circuit judge. A certificate of appealability may issue only if petitioner has made "a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2). Petitioner satisfies this standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further."

Miller-El v. Cockrell, 537 U.S. 322, 327 (2003) (*citing Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Pursuant to this standard, this Court concludes that petitioner is not entitled to a certificate of appealability with respect to this petition.

CONCLUSION

Thus, the undersigned recommends dismissing the petitioner as time barred. The undersigned also recommends denying the issuance of a certificate of appealability.

Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of *de novo* review by the district judge, *see* 28 U.S.C. § 636(b)(1)(C), and can result in a result in a waiver of those objections for purposes of appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *Miranda v. Anchondo*, 684 F.3d 844, 848 (9th Cir. 2012) (citations omitted). Accommodating the time limit imposed by Fed. R. Civ. P. 72(b), the clerk is directed to set the matter for consideration on **April 20, 2017**, as noted in the caption.

Dated this 23rd day of March, 2017.

J. Richard Creatura
United States Magistrate Judge

Additional material from this filing is available in the Clerk's Office.