Doc. 6

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 12 2020

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

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| JOE CERVANTES, Jr.,<br><br>Petitioner-Appellant,<br><br>v.<br><br>CHARLES L. RYAN; et al.,<br><br>Respondents-Appellees. | No. 19-16042<br><br>D.C. No. 3:17-cv-08279-DLR<br>District of Arizona,<br>Prescott<br><br>ORDER |

Before: TROTT and N.R. SMITH, Circuit Judges.

This appeal is from the denial of appellant's 28 U.S.C. § 2254 petition and subsequent Federal Rule of Civil Procedure 59(e) motion. The request for a certificate of appealability (Docket Entry Nos. 2 & 4) 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); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015); *Lynch v. Blodgett*, 999 F.2d 401, 403 (9th Cir. 1993) (order).

Any pending motions are denied as moot.

**DENIED.**

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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AUG 6 2020

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|---|---|
| JOE CERVANTES, Jr.,<br><br>Petitioner-Appellant,<br><br>v.<br><br>CHARLES L. RYAN; et al.,<br><br>Respondents-Appellees. | No. 19-16042<br><br>D.C. No. 3:17-cv-08279-DLR<br>District of Arizona,<br>Prescott<br><br>ORDER |

Before: McKEOWN and BADE, Circuit Judges.

Appellant's motion for reconsideration en banc (Docket Entry No. 7) is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

APPENDIX H

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**

Joe Cervantes, Jr.,

Petitioner,

v.

Charles L Ryan, et al.,

Defendants.

**NO. CV-17-08279-PCT-DLR**

**JUDGMENT IN A CIVIL CASE**

**Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED adopting the Report and Recommendation of the Magistrate Judge as the order of this Court. Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 is denied and this action is hereby dismissed with prejudice.

Brian D. Karth
District Court Executive/Clerk of Court

May 6, 2019

By s/ D. Draper
Deputy Clerk

APPENDIX F

**UNITED STATES DISTRICT COURT**
**DISTRICT OF ARIZONA**

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|---|---|
| Joe Cervantes, Jr.,<br>Petitioner<br>-vs-<br>Charles L. Ryan, et al.,<br>Respondents. | CV-17-8279-PCT-DLR (JFM)<br><br>**Report & Recommendation on Petition for Writ of Habeas Corpus** |

## I. MATTER UNDER CONSIDERATION

Petitioner, presently incarcerated in the Arizona State Prison Complex at Florence, Arizona, filed a Second Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on May 10, 2018 (Doc. 13). On August 8, 2018, Respondents filed their Limited Answer (Doc. 20). Petitioner filed a Reply on September 13, 2018 (Doc. 22).

The Petitioner's Petition is now ripe for consideration. Accordingly, the undersigned makes the following proposed findings of fact, report, and recommendation pursuant to Rule 8(b), Rules Governing Section 2254 Cases, Rule 72(b), Federal Rules of Civil Procedure, 28 U.S.C. § 636(b) and Rule 72.2(a)(2), Local Rules of Civil Procedure.

## II. RELEVANT FACTUAL & PROCEDURAL BACKGROUND

### A. FACTUAL BACKGROUND AND PROCEEDINGS AT TRIAL

In disposing of Petitioner's direct appeal, the Arizona Court of Appeals summarized the background as follows:

> ¶ 2 The offenses involved two victims, "KT" and "MR." KT was the daughter of one of Defendant's former girlfriends. MR was the niece of another of Defendant's former girlfriends. At the time of the offenses, KT was nine or ten years old and MR was eight or nine. Both KT and MR occasionally spent the night at Defendant's home.
> ¶ 3 Defendant committed five counts of sexual conduct with a minor and one count of sexual exploitation of a minor against KT between January 1, 2004 and April 2005. He committed the remainder of the

> offenses against MR between January 15, 2004 and July 31, 2006. Defendant videotaped all but one of the offenses. He hid the videotape, but his fiancé became suspicious, discovered the videotape, and viewed it. She then copied it to a DVD and provided the DVD to police.
> ¶ 4 At trial, Defendant's former fiancé, the victims' mothers, and MR's aunt identified Defendant and the victims in the video. They also identified Defendant's home as the site of the offenses as well as other scenes depicted in the video. KT, who was fifteen by the time of trial, testified regarding the charge of sexual conduct with a minor that did not appear in the video.
> ¶ 5 The jury found Defendant guilty on all counts. The trial court sentenced Defendant to a presumptive, aggregate term of thirteen consecutive terms of life imprisonment without a possibility of parole for thirty-five years plus 234 years' imprisonment.

(Exhibit D, Mem. Dec. 12/20/11.) [1] (Exhibits to the Answer, Doc. 20, are referenced herein as "Exhibit ___.")

**B. PROCEEDINGS ON DIRECT APPEAL**

Petitioner appealed, filing through counsel an Opening Brief (Exhibit B), raising claims of: (1) denial of his 6th and 14th Amendment rights to self-representation; (2) denial of due process under the 14th Amendment by admission of DVD annotated by prosecution; (3) denial of his 5th, 6th, and 14th Amendment rights by a multiplicitous indictment, lack of substantial evidence, and illegal amendment of the indictment after the close of evidence; and (4) denial of due process under the 14th Amendment because of vouching, presentation of evidence and argument beyond the scope in rebuttal on closing argument, with opportunity for Petitioner to reply.

On December 20, 2011, the Arizona Court of Appeals issued its Memorandum Decision (Exhibit D) affirming Petitioner's convictions and sentences.

Petitioner sought review by the Arizona Supreme Court, who summarily denied review on May 30, 2012. (Exhibit E.)

Petitioner did not seek certiorari review by the U.S. Supreme Court. (Petition, Doc.

[1] The copy of Exhibit D appended to the Answer is largely unreadable. Because the decision is available at *State v. Cervantes*, 2011 WL 6652609 (2011), Plaintiff has not objected, and the contents of the decision are not relevant to the disposition herein, Respondents have not been ordered to supplement the record with a legible copy.

13 at 3.)

**C. PROCEEDINGS ON FIRST POST-CONVICTION RELIEF**

Thereafter, on July 2, 2012, Petitioner filed his Notice of Post-Conviction Relief (Exhibit F), which was dated June 21, 2012, but contains no representations as to its delivery for filing. Counsel was appointed, who ultimately filed a "Notice of No Claim" (Exhibit G), evidencing an inability to find an issue for review. Counsel was permitted to withdraw, but was ordered to "continue to be available to the Defendant should his services be needed." Petitioner was granted leave to file a "*pro se*" PCR petition. (Exhibit H, M.E. 2/17/12.)

Petitioner filed his "pro-per" Petition on March 19, 2013 (Exhibit J) reasserting the four claims raised on direct appeal, and arguing: (5) ineffective assistance by limited assistance from counsel; and (6) vouching by the prosecution.

In a minute order filed July 26, 2013, the PCR court denied the petition, concluding that with the exception of the ineffective assistance claim, the claims "are either precluded or were raised in Defendant's direct appeal." (Exhibit L, M.O. 7/26/13 at 1.) The ineffective assistance claim was rejected on the merits.

Petitioner did not seek review.

On October 4, 2016, Petitioner filed a Motion to Acquire Case File (Exhibit M), which was denied on October 21, 2016 (Exhibit N).

**D. STATE HABEAS AND SECOND POST-CONVICTION RELIEF**

On December 21, 2017, Petitioner filed in the Yavapai County Superior Court a Petition for Writ of Habeas Corpus (Exhibit O), which included a certificate of mailing through the prison mail system on December 18, 2017. The Petition argued a lack of subject matter jurisdiction based on the U.S. Supreme Court's exclusive jurisdiction over

cases in which a State is the party, under Article 3, Section 2 of the U.S. Constitution.[2]

On January 3, 2018, the trial court concluded the habeas petition was without merit and dismissed it.

The court also construed it as a second petition for post-conviction relief under Rule 32 and dismissed it for failure to file a *notice* of post-conviction relief, and on the basis that the claims were precluded because not previously raised. (Exhibit P, M.O. 1/3/18.)

Petitioner sought review from the Arizona Court of Appeals by filing a Petition for Review on January 29, 2018 (Exhibit Q). On May 15, 2018, review was granted but relief denied. (Exhibit V, Mem. Dec. 5/15/18.)

**E. PROCEEDINGS ON THIRD POST-CONVICTION RELIEF**

During the pendency of review on Petitioner's second PCR petition, on February 21, 2018, Petitioner filed with the Superior Court a Motion to Dismiss for Lack of Subject Matter Jurisdiction (Exhibit R). On February 21, 2018, the court construed the filing as a successive petition for post-conviction relief, and denied it as asserting the same issues raised in the prior habeas petition. (Exhibit S, M.O. 2/21/18.)

Petitioner sought review by the Arizona Court of Appeals (Exhibit T), which was denied on May 3, 2018. (Exhibit U, Mem. Dec. 5/3/18.)

**F. PRESENT FEDERAL HABEAS PROCEEDINGS**

**Original Petition** - Petitioner commenced the current case by filing his original Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on December 27, 2017 (Doc. 1). The Petition included a certification that it had been submitted for electronic

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[2] "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction." U.S. Const. art. III, § 2, cl. 2. *But see* U.S. Const. art. III, § 2, cl. 1 (limiting judicial power of federal courts to, *inter alia*, "Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects", and thus not encompassing criminal prosecutions by a state).

filing on December 26, 2017. (*Id.* at 8.)

On February 8, 2018, Petitioner filed a Memorandum in Support (Doc. 8), asserting his claim that the U.S. Supreme Court had exclusive jurisdiction over his case.

On February 14, 2108, the Court dismissed the Petition with leave to amend for failure to properly utilize the Court approved form as required by Local Rule of Civil Procedure 3.5(a). (Order 2/14/18, Doc. 10.)

**First Amended Petition** – On March 14, 2018, Petitioner filed his First Amended Petition (Doc. 11). That petition was dismissed on April 12, 2018, with leave to amend, for failure to name a proper respondent (Petitioner had substituted the Governor for the Director of the Department of Corrections), and for failure to complete the required form. (Order 4/12/18, Doc. 12.)

**Second Amended Petition** – On May 10, 2018, Petitioner filed his Second Amended Petition (Doc. 13). Despite Petitioner's failure to again properly complete the required form (e.g. by providing the convicting court, case number, crimes, and length of sentence), the Court ordered an answer, and summarized Petitioner's four claims as:

> 1. "The State of Arizona imprisoned Petitioner, without due process of law, and the State has brought NO criminal case 'at law' against Petitioner under the provisions of the Arizona Constitution. This denied Petitioner the right to not be deprived of life, liberty, or property without due process of law, and violated Section 4 of Article 2 of the Arizona Constitution, and Amendments 6 and 14 to the U.S. Constitution."
> 2. "The State of Arizona provided Petitioner NO constitutional notice of the nature and cause of any charge. This denied Petitioner the right to be informed of the nature and cause of the accusation, and violation Section 24 of Article 2 of the Arizona Constitution, and Amendments 6 and 14 to the U.S. Constitution."
> 3. "The State of Arizona provided Petitioner NO constitutional counsel. This denied Petitioner the right to counsel, and violated Section 24 of Article 2 of the Arizona Constitution, and Amendments 6 and 14 to the U.S. Constitution."
> 4. "The State of Arizona has provided Petitioner NO constitutional speedy and public trial, by an impartial jury. This denied Petitioner the right to trial by jury, and violated Section 24 of Article 2 of the Arizona Constitution, and Amendments 6 and 14 to the U.S. Constitution."

(Order 5/31/18, Doc. 14.)

**Response** - On August 8, 2018 Respondents filed their Limited Answer (Doc. 20), arguing that Petitioner's Petition is barred by the statute of limitations, and that Petitioner has procedurally defaulted his state remedies on his claims.

**Reply** - On September 13, 2018, Petitioner filed his Reply (Doc. 22). Petitioner argues: (1) Respondents fail to show a proper conviction because the state's Superior Court was acting as a de facto federal court; (2) there was no contract between Petitioner and the State of Arizona, and thus no subject matter jurisdiction; (3) he is entitled to equitable tolling because of defects in the indictment and notice of the charges; (*id.* at 1) (4) there were various defects in the state proceedings which were "withheld and concealed," *i.e.* various legal defenses (*id.* at 2-9); (3) because of various defects in the indictment, and other legal defenses, his conviction was not properly entered and thus his limitations period has not commenced (*id.* at 9-13); and (4) the denial of his habeas petition would constitute a fundamental miscarriage of justice (*id.* at 13).

## III. APPLICATION OF LAW TO FACTS

### A. TIMELINESS

#### 1. One Year Limitations Period

Respondents assert that Petitioner's Petition is untimely. As part of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Congress provided a 1-year statute of limitations for all applications for writs of habeas corpus filed pursuant to 28 U.S.C. § 2254, challenging convictions and sentences rendered by state courts. 28 U.S.C. § 2244(d). Petitions filed beyond the one year limitations period are barred and must be dismissed. *Id.*

#### 2. Commencement of Limitations Period

##### a. Conviction Final

The one-year statute of limitations on habeas petitions generally begins to run on "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).[3]

Petitioner argues a final judgement cannot be shown because Respondents have failed "to produce and submit any indictment filed in the 'Superior Court of [Yavapai] (sic) County, State of Arizona." (Reply, Doc. 22 at 9-10.) But Petitioner posits no reason why an indictment of any kind need be shown. An indictment is the early stages of the conviction process; finality is at its tail. To the extent that Petitioner contends that there was a defect in the indictment which renders any judgment invalid, Petitioner attempts to subsume a validity requirement in the statute of limitations that would render it largely meaningless; if finality didn't attach if the judgment were not sustainable, then a defendant could avoid the statute of limitations simply by asserting a defect in the proceedings. Section 2244(d) does not require that the judgement of conviction be valid, only that it have been entered and have become procedurally final.

For the same reason, the commencement (or expiration) of the limitations period is not affected by Petitioner's other arguments about the validity of his conviction, including: (1) the U.S. Supreme Court has exclusive jurisdiction because the state is a party; (2) that the Governor of Arizona (as the chief executive) was required to act as prosecutor; (3) or that the styling of the prosecution was improper (e.g. by designating the state in its "corporate capacity", or failing to properly name Petitioner with proper capitalization); (4) that the state statutes were invalid; (5) that Petitioner's rights were denied in the prosecution; and (6) that the absence of a contract with Petitioner precluded a valid conviction. (Reply, Doc. 22 at 10-13.)

Here, Petitioner's direct appeal remained pending through May 30, 2012, when the Arizona Supreme Court denied his Petition for Review. (Exhibit E.)

For purposes of 28 U.S.C. § 2244, "direct review" includes the period within which a petitioner can file a petition for a writ of certiorari from the United States Supreme Court,

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[3] Later commencement times can result from a state created impediment, newly recognized constitutional rights, and newly discovered factual predicates for claims. *See* 28 U.S.C. § 2244(d)(1)(B)-(D). Except as discussed hereinafter, Petitioner proffers no argument that any of these apply.

whether or not the petitioner actually files such a petition. *Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012). The rules of the Supreme Court of the United States, requires that a petition for a writ of certiorari be filed "within 90 days after entry of the order denying discretionary review." U.S.S.Ct. R. 13(1). Accordingly, because Petitioner did not file a petition for a writ of certiorari, his conviction became final on Tuesday, August 28, 2012, 90 days after the Arizona Supreme Court denied review.[4]

**b. New Facts**

Although the conclusion of direct review normally marks the beginning of the statutory one year, section 2244(d)(1)(D) does provide an alternative of "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." Accordingly, where despite the exercise of due diligence a petitioner was unable to discover the factual predicate of his claim, the statute does not commence running on that claim until the earlier of such discovery or the elimination of the disability which prevented discovery. However, the commencement is not delayed until actual discovery, but only until the date on which it "could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D).

In his Reply, Petitioner argues that various "FACTS" were concealed, including: (1) there was no victim; (2) the offense was not a dangerous crime against children; (3) offenses were double counted; (4) the indictment charged a dangerous felony (e.g. use of a deadly weapon, etc.); (5) the state statutes are unconstitutional; (6) there was no contract between Petitioner and the State of Arizona; (7) Petitioner had no liability under the state statutes; (8) the state lacked authority to charge Petitioner; (9) that State was acting in a corporation capacity; (10) the State had no right to sue; (11) the State was not acting in its governmental capacity; (12) Petitioner was not named in the indictment; (13) the State had

[4] Although acknowledging the May 30, 2018 Arizona Supreme Court denial, and the 90 day time limit, Respondents inexplicably calculate a certiorari deadline of August 13, 2018. (Answer, Doc. 20 at 5.)

no authority to bring Petitioner to Court; (14) the charges could not lawfully be found by the Grand Jury; (15) the indictment violated the Arizona Constitution; (16) Petitioner was denied his state and federal constitutional rights; (17) the state court was acting as a federal court; (18) commercial law governs the case; (19) the facts alleged in the indictment did not establish the offenses; and (20) the court lacked subject matter jurisdiction. (Reply, Doc. 22 at 2-3.)

Regarding the first "fact," that there was no victim, Petitioner fails to show how this was concealed, in light of the fact that the purported victim(s) were depicted, identified/and or testified at trial. To the extent that Petitioner contends that somehow they did not legally qualify as victims, that is not a "fact" but a legal theory.

Similarly, the remainder of these are not "factual predicates" of claims, but legal theories for claims.

Nor does Petitioner show the exercise of due diligence to discover these matters before his federal limitations period expired.

Accordingly, Petitioner is not entitled to the benefit of a delayed commencement under 28 U.S.C. § 2244(d)(1)(D).

**c. Conclusion re Commencement**

Therefore, Petitioner's one year began running on August 20, 2012, and without any tolling would have expired on August 19, 2013.

**3. Timeliness Without Tolling**

Petitioner's Second Amended Petition (Doc. 13) was filed on May 10, 2018, the same date Petitioner declared it was placed in the prison mailing system. (*Id.* at 22.)

As determined in subsection (1) above, without any tolling Petitioner's one year habeas limitations period expired no later than Wednesday, August 28, 2013, making his Petition over four years delinquent.

**Relation Back** - Federal Rule of Civil Procedure 15 governs the amendment of

habeas petitions. *Mayle v. Felix*, 545 U.S. 644, 655 (2005). Rule 15(c) provides that an "amendment of a pleading relates back to the date of the original pleading when . . . (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." However, an amended petition "does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." *Mayle*, 545 U.S. at 650. The original and amended claims must, instead, be "tied to a common core of operative facts." *Id.* at 664.

Because it does not affect the outcome, the undersigned assumes for purposes of this Report and Recommendation that Petitioner's Second Amended Petition relates back to the filing of his original Petition (Doc. 1). That petition was filed on December 27, 2017.

However, the Petition reflects it was submitted for electronic filing on December 26, 2017. "In determining when a pro se state or federal petition is filed, the 'mailbox' rule applies. A petition is considered to be filed on the date a prisoner hands the petition to prison officials for mailing." *Porter v. Ollison*, 620 F.3d 952, 958 (9th Cir. 2010). Accordingly, the undersigned assumes, for purposes of this Report and Recommendation, in Petitioner's favor, that the original Petition should be deemed filed as of December 26, 2017.

With those assumptions *arguendo* in Petitioner's favor, Petitioner's petition would still be over four years delinquent.

**4. Statutory Tolling**

The AEDPA provides for tolling of the limitations period when a "properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). This provision only applies to state proceedings, not to federal proceedings. *Duncan v. Walker*, 533 U.S. 167 (2001).

**Mailbox Rule** - For purposes of calculating tolling under § 2244(d), the federal

prisoner "mailbox rule" applies. Under this rule, a prisoner's state filings are deemed "filed" (and tolling thus commenced) when they are delivered to prison officials for mailing. In *Anthony v. Cambra*, 236 F.3d 568 (9th Cir. 2000), the Ninth Circuit noted:

> [I]n *Saffold v. Newland*, 224 F.3d 1087 (9th Cir.2000), we squarely held that the mailbox rule applies with equal force to the filing of state as well as federal petitions, because "[a]t both times, the conditions that led to the adoption of the mailbox rule are present; the prisoner is powerless and unable to control the time of delivery of documents to the court." *Id.* at 1091.

*Id.* at 575.

**Application to Petitioner** - Petitioner's limitations period commenced running on August 29, 2012. Petitioner's First PCR proceeding was commenced on July 2, 2012, before his limitations period began running. It remained pending until July 26, 2013, when the PCR court dismissed the proceeding. (Exhibit L.) Thus, Petitioner's habeas limitations period was tolled from its commencement through July 26, 2013, roughly eleven months. It commenced running again on July 27, 2013, and expired one year later on July 26, 2014. July 26, 2014 was a Saturday. For purposes of counting time for a federal statute of limitations, the standards in Federal Rule of Civil Procedure 6(a) apply. *Patterson v. Stewart*, 251 F.3d 1243, 1246 (9th Cir. 2001). Under that Rule, because the last day was a weekend, the limitations deadline was extended to the following Monday, July 28, 2014.

Petitioner's next PCR proceeding was not commenced until December 21, 2017, when Petitioner filed his second PCR petition/state habeas petition (Exhibit O).[5] At that time, his one year had been expired for over three years. Once the statute has run, a subsequent post-conviction or collateral relief filing does not reset the running of the one year statute. *Jiminez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001); *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003). Accordingly, Petitioner has no statutory tolling

[5] That petition was dated December 18, 2017. (Exhibit O at "6.") Even if deemed deposited in the prison mail system on that date, and thus subject to the prison mailbox rule, the three days difference would not render the filing early enough to result in any tolling.

resulting from his second PCR/state habeas proceeding, or from his subsequent third PCR proceedings, and his limitations period expired on July 28, 2014.

It is true that in the interim between the dismissal of his first PCR petition and the filing of his second PCR/habeas petition, Petitioner filed a Motion to Acquire Case File (Exhibit M). However, "discovery motions [that] 'did not challenge his conviction,' but simply 'sought material he claimed might be of help' in later state proceedings" does not result in statutory tolling. *Ramirez v. Yates*, 571 F.3d 993, 1000 (9th Cir. 2009). *But see Johnson v. Knowles*, 116 Fed. Appx. 822, 823 (9th Cir. 2004) (concluding that a filing denominated as a motion for discovery, liberally construed, may sufficiently assert claims attacking a judgment to qualify for tolling). Even assuming that this filing qualified as an "application for State post-conviction or other collateral review with respect to the pertinent judgment or claim," it was not filed until October, 2016, over two years after Petitioner's statute of limitations expired.

Consequently, even with all available statutory tolling, Petitioner's original habeas petition was over three years delinquent.

**5. Equitable Tolling**

"Equitable tolling of the one-year limitations period in 28 U.S.C. § 2244 is available in our circuit, but only when 'extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time' and 'the extraordinary circumstances were the cause of his untimeliness.'" *Laws v. Lamarque*, 351 F.3d 919, 922 (9th Cir. 2003).

> To receive equitable tolling, [t]he petitioner must establish two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way. The petitioner must additionally show that the extraordinary circumstances were the cause of his untimeliness, and that the extraordinary circumstances ma[de] it impossible to file a petition on time.

*Ramirez v. Yates,* 571 F.3d 993, 997 (9th Cir. 2009) (internal citations and quotations omitted). "Indeed, 'the threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the exceptions swallow the rule.' " *Miranda v. Castro,*292 F.3d 1063, 1066

(9th Cir. 2002) (quoting *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir.).

Even if extraordinary circumstances prevent a petitioner from filing for a time, equitable tolling will not apply if he does not continue to diligently pursue filing afterwards. "If the person seeking equitable tolling has not exercised reasonable diligence in attempting to file after the extraordinary circumstances began, the link of causation between the extraordinary circumstances and the failure to file is broken, and the extraordinary circumstances therefore did not prevent timely filing." *Valverde v. Stinson*, 224 F.3d 129, 134 (2nd Cir. 2000). Ordinarily, thirty days after elimination of a roadblock should be sufficient. *See Guillory v. Roe*, 329 F.3d 1015, 1018, n.1 (9th Cir. 2003).

Petitioner bears the burden of proof on the existence of cause for equitable tolling. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); *Rasberry v. Garcia*, 448 F.3d 1150, 1153 (9th Cir. 2006) ("Our precedent permits equitable tolling of the one-year statute of limitations on habeas petitions, but the petitioner bears the burden of showing that equitable tolling is appropriate.").

Petitioner argues he is entitled to equitable tolling because: (1) the state deprived him of his right to be informed of the charges; and (2) he had no knowledge of the facts necessary to constitute the offenses of convictions or opportunity to object to them. (Reply, Doc. 22 at 1.)

Petitioner fails to show how any deficiency in the indictment kept him from filing his federal habeas petition. At best, this is a backhanded attempt to rely on § 2244(d)(1)(D) (newly discovered factual predicates), which fails for the reasons discussed hereinabove. Moreover, any limitation in Petitioner's notice of the charges would have been apparent at least from the time of Petitioner's conviction.

Petitioner's lack of legal understanding on the elements of the offenses or on his potential defenses does not justify equitable tolling. "[I]gnorance of the law, even for an incarcerated *pro se* petitioner, generally does not excuse prompt filing." *Fisher v. Johnson*, 174 F.3d 710, 714 (5th Cir.1999). *See also Rasberry v. Garcia,* 448 F.3d 1150, 1154 (9th Cir. 2006) ("a *pro se* petitioner's lack of legal sophistication is not, by itself, an

extraordinary circumstance warranting equitable tolling").

Accordingly, Petitioner fails to show extraordinary circumstances that prevented him from filing a timely federal habeas petition.

**6. Actual Innocence**

To avoid a miscarriage of justice, the habeas statute of limitations in 28 U.S.C. § 2244(d)(1) does not preclude "a court from entertaining an untimely first federal habeas petition raising a convincing claim of actual innocence." *McQuiggin v. Perkins*, 133 S.Ct. 1924, 1935 (2013). To invoke this exception to the statute of limitations, a petitioner "'must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.'" *Id.* at 1935 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). This exception, referred to as the "*Schlup* gateway," applies "only when a petition presents 'evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error.' " *Id.* at 1936 (quoting *Schlup,* 513 U.S. at 316).

Petitioner makes no such claim of new evidence of actual innocence.

Petitioner does argue that because of his various claimed legal errors, a denial of his petition will result in "MANIFEST ERROR and a FUNDAMENTAL MISCARRIAGE OF JUSTICE." (Reply, Doc. 22 at 13 (emphasis in original).) But neither the statutes nor any case law have expanded the exceptions to the habeas statute of limitations beyond equitable tolling and actual innocence based on new evidence of factual innocence. "It is important to note in this regard that 'actual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. U.S.*, 523 U.S. 614, 623-624 (1998). "[T]he miscarriage of justice exception is concerned with actual as compared to legal innocence." *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992).

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**7. Summary re Statute of Limitations**

Taking into account the available statutory tolling, Petitioner's one year habeas limitations period commenced running no later than July 27, 2013, and expired on Monday, July 28, 2014, making his original Petition, assumed to be deemed filed as of December 18, 2017 over three years delinquent. Petitioner has shown no basis for additional statutory tolling, and no basis for equitable tolling or actual innocence to avoid the effects of his delay. Consequently, the Petition must be dismissed with prejudice.

**B. OTHER DEFENSES**

Because the undersigned concludes that Petitioner's Petition is plainly barred by the statute of limitations, Respondents other defenses are not reached.

## IV. CERTIFICATE OF APPEALABILITY

**Ruling Required** - Rule 11(a), Rules Governing Section 2254 Cases, requires that in habeas cases the "district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Such certificates are required in cases concerning detention arising "out of process issued by a State court", or in a proceeding under 28 U.S.C. § 2255 attacking a federal criminal judgment or sentence. 28 U.S.C. § 2253(c)(1).

Here, the Petition is brought pursuant to 28 U.S.C. § 2254, and challenges detention pursuant to a State court judgment. The recommendations if accepted will result in Petitioner's Petition being resolved adversely to Petitioner. Accordingly, a decision on a certificate of appealability is required.

**Applicable Standards** - The standard for issuing a certificate of appealability ("COA") is whether the applicant has "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v.*

*McDaniel*, 529 U.S. 473, 484 (2000). "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, 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." *Id.*

**Standard Not Met** - Assuming the recommendations herein are followed in the district court's judgment, that decision will be on procedural grounds. Under the reasoning set forth herein, jurists of reason would not find it debatable whether the district court was correct in its procedural ruling.

Accordingly, to the extent that the Court adopts this Report & Recommendation as to the Petition, a certificate of appealability should be denied.

## V. RECOMMENDATION

**IT IS THEREFORE RECOMMENDED** that the Petitioner's Second Amended Petition for Writ of Habeas Corpus, filed May 10, 2018 (Doc. 13) be **DISMISSED WITH PREJUDICE**.

**IT IS FURTHER RECOMMENDED** that, to the extent the foregoing findings and recommendations are adopted in the District Court's order, a Certificate of Appealability be **DENIED**.

## VI. EFFECT OF RECOMMENDATION

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to *Rule 4(a)(1), Federal Rules of Appellate Procedure*, should not be filed until entry of the district court's judgment.

However, pursuant to *Rule 72(b), Federal Rules of Civil Procedure,* the parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. *See also* Rule 8(b), Rules

Governing Section 2254 Proceedings. Thereafter, the parties have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any findings or recommendations of the Magistrate Judge will be considered a waiver of a party's right to *de novo* consideration of the issues, *see United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003)(*en banc*), and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the recommendation of the Magistrate Judge, *Robbins v. Carey*, 481 F.3d 1143, 1146-47 (9th Cir. 2007).

In addition, the parties are cautioned Local Civil Rule 7.2(e)(3) provides that "[u]nless otherwise permitted by the Court, an objection to a Report and Recommendation issued by a Magistrate Judge shall not exceed ten (10) pages."

Dated: February 28, 2019

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James F. Metcalf
United States Magistrate Judge

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