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MAY 7 2020

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELLERY DENNIS THOMAS, Petitioner-Appellant, v. RAYMOND MADDEN, Warden; XAVIER BECERRA, The Attorney General of the State of the California, Additional Respondent, Respondents-Appellees.	No. 20-55341 D.C. No. 5:19-cv-00850-JAK-JC Central District of California, Riverside ORDER

Before: M. SMITH and LEE, Circuit Judges.

We have received and reviewed appellant's response to this court's April 1, 2020, order to show cause.

The request for a certificate of appealability 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.

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FOR THE NINTH CIRCUIT

ELLERY DENNIS THOMAS, Petitioner-Appellant, v. RAYMOND MADDEN, Warden; XAVIER BECERRA, The Attorney General of the State of the California, Additional Respondent, Respondents-Appellees.	No. 20-55341 D.C. No. 5:19-cv-00850-JAK-JC Central District of California, Riverside ORDER

Before: McKEOWN and BADE, Circuit Judges.

Appellant's "motion to vacate and remand" (Docket Entry No. 5) is construed as a motion for reconsideration. So construed, the motion is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ELLERY DENNIS THOMAS, Petitioner, v. MADDEN, Warden, et al., Respondents.	Case No. 5:19-cv-00850-JAK-JC ORDER DENYING A CERTIFICATE OF APPEALABILITY

An appeal may not be taken from the denial by a United States District Judge of an application for a writ of habeas corpus in which the detention complained of arises from process issued by a state court "unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c)." Fed. R. App. P. 22(b).

Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts, the District Court "must issue or deny a certificate of appealability when it enters a final order adverse to applicant."

"A certificate of appealability may issue . . .only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Concurrently with the issuance of this Order, the Court has accepted the Magistrate Judge's finding and conclusion that the Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus filed in this action is time-barred under 28 U.S.C. § 2244(d), and has directed that a final judgment adverse to the petitioner be entered. Thus, the Court's determination of whether a certificate of appealability should issue is governed by Slack v. McDaniel, 529 U.S. 473 (2000), in which the Supreme Court held that "[w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a [certificate of appealability] 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." 529 U.S. at 484. As the Supreme Court further explained:

> Section 2253 mandates that both showings be made before the court of appeals may entertain the appeal. Each component of the § 2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments.

529 U.S. at 485.

Here, the Court finds that petitioner has not shown that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling" with respect to the time bar issue.

THEREFORE, pursuant to 28 U.S.C. § 2253, a certificate of appealability is denied.

DATED: February 13, 2020

John A. Kronstadt, U.S. District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ELLERY DENNIS THOMAS, Petitioner, v. MADDEN, Warden, et al., Respondents.	Case No. 5:19-cv-00850-JAK-JC ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

I. SUMMARY

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition for Writ of Habeas Corpus ("Petition") and accompanying documents, the Motion to Dismiss the Petition and supporting documents, the October 28, 2019 original Report and Recommendation of United States Magistrate Judge ("Original R&R"), petitioner's late-filed Response to the Motion to Dismiss which the Court received after its issuance of the Original R&R and which contains requests for discovery and related tolling, a stay, and the appointment of counsel (Docket No. 21), the December 4, 2019 Superseding Report and Recommendation of United States Magistrate Judge ("Superseding R&R"), petitioner's Motion to Reconsider (Docket No. 22), which the Court received after its issuance of the Superseding R&R and which appears to seek reconsideration of/to object to the Original R&R,

and all of the records herein. Although petitioner has not filed objections to the Superseding R&R, the Court construes the Motion to Reconsider to constitute objections thereto.

The Court has made a *de novo* determination of those portions of the Superseding Report and Recommendation to which objection is made. The Court concurs with and accepts the findings, conclusions, and recommendations of the United States Magistrate Judge, denies the Motion to Reconsider/overrules petitioner's objections, and denies the requests contained within petitioner's Response to the Motion to Dismiss. Although the Court has considered and overruled all of petitioner's objections and requests, the Court further addresses certain of petitioner's objections and requests below.

II. DISCUSSION

A. Petitioner Has Not Shown He Is Entitled to a Delayed Accrual Date for the Statute of Limitations or to Equitable Tolling

Petitioner asserts that there are "many particulars [he] did not know at trial," *e.g.*, defense counsel did not interview petitioner's family which "may have changed the outcome and verdict of trial," and defense counsel told petitioner that California was a "one party" state when it is a "two party" state. (Motion to Reconsider at 4-5, 10). To the extent petitioner is arguing for a later accrual date for the statute of limitations under 28 U.S.C. § 2244(d)(1)(D), he has not shown entitlement to a later date. The claims petitioner has raised in the Petition were raised with the state courts on direct appeal and predicated upon events that occurred at trial.

Petitioner also asserts that the Petition should not be considered time-barred because of his confinement in prison and the special restrictions that incarceration imposes. (Motion to Reconsider at 3). Petitioner generally cites to lockdowns on a Level III yard, his transfer at some unknown time from one prison to another for two weeks, and his lack of an attorney or legal assistance as reasons for his failure

to timely file the Petition. (Motion to Reconsider at 3, 10-11). These alleged impediments do not entitle petitioner to tolling of the statute of limitations.

The asserted prison lock-downs and prison transfer do not warrant equitable tolling because they do not constitute "extraordinary circumstances" that stood in petitioner's way. Holland v. Florida, 560 U.S. 631, 649 (2010). Despite the alleged lockdowns and prison transfer, petitioner was able to file *pro se* one state habeas petition with the San Bernardino County Superior Court within the statute of limitations period. (Lodged Doc. 4). There is no suggestion that any lockdowns or the prison transfer prevented petitioner from filing timely the instant Petition – which simply repeats the claims raised by petitioner's counsel on direct review.

A petitioner who is denied access to his legal files while in administrative segregation or during a prison transfer may be entitled to equitable tolling so long as he is diligently pursuing his claims. See Espinoza-Matthews v. California, 432 F.3d 1021, 1027-28 (9th Cir. 2005) (petitioner denied access to legal materials while in administrative segregation entitled to equitable tolling); Lott v. Mueller, 304 F.3d 918, 924-25 (9th Cir. 2002) (petitioner denied access to legal files during transfer per prison policy entitled petitioner to equitable tolling). Here, petitioner has not alleged if or when he may have been without his legal materials, or demonstrated that he was reasonably diligent in pursuing his claims during the running of the statute of limitations. See Rhodes v. Kramer, 451 Fed. Appx. 697, 698 (9th Cir. 2011) (limited library access and lockdowns did not merit equitable tolling); Chaffer v. Prosper, 592 F.3d 1046, 1049 (9th Cir. 2010) (per curiam) (*pro se* status, deficient prison library, and reliance on helpers who were transferred or too busy to assist him did not warrant equitable tolling; inmate failed to demonstrate diligence in accessing prison law library when inmate failed to make any specific allegation as to what he did to pursue his claims and complain about situation) (citation omitted); Ramirez v. Yates, 571 F.3d 993, 998 (9th Cir. 2009) (ordinary prison limitations on a petitioner's access to the law library do not

constitute extraordinary circumstances); Miller v. Marr, 141 F.3d 976, 978 (10th Cir.) (denying equitable tolling when petitioner "provided no specificity regarding the alleged lack of access and the steps he took to diligently pursue his federal claims."), cert. denied, 525 U.S. 891 (1998); Giraldes v. Ramirez-Palmer, 1998 WL 775085, *2 (N.D. Cal. Nov. 3, 1998) (lockdown expected, albeit unpredictable, part of prison life and not "extraordinary circumstance" that would justify equitable tolling where petitioner made no showing that it actually impeded his efforts to prepare petition, and had been able to file three state petitions during period he allegedly was hindered in his effort to file the federal petition).

Petitioner's lay status/ignorance of the law is not itself a basis for equitable tolling. See Waldron-Ramsey v. Pacholke, 556 F.3d 1008, 1013 n.4 (9th Cir.) ("[A] pro se petitioner's confusion or ignorance of the law is not, itself, a circumstance warranting equitable tolling."), cert. denied, 558 U.S. 897 (2009); Rasberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006) (*pro se* petitioner's lack of legal sophistication not by itself extraordinary circumstance warranting equitable tolling).

Petitioner also cites to the alleged lack of notes from his trial attorney and others as a basis for tolling. (Motion to Reconsider at 4, 10). While the denial of access to legal materials may in some circumstances entitle a habeas petitioner to equitable tolling (see Lott v. Mueller, 304 F.3d at 924), petitioner fails to demonstrate that his asserted lack of access to notes from his trial attorney and others caused him to file a late Petition or that it otherwise entitles him to equitable tolling. Again, the Petition merely presents the claims petitioner's counsel raised on direct review, which petitioner could have raised and did raise without the notes he alleges he is missing. See Waldron-Ramsey, 556 F.3d at 1014 (no equitable tolling where petitioner did not have state court records; diligent petitioner could have prepared basic form habeas petition and filed it to satisfy AEDPA deadline or at least filed it sooner); Ford v. Pliler, 590 F.3d 782, 790 (9th Cir. 2009) (lack of

legal files does not entitle a petitioner to equitable tolling when the petitioner knows the factual bases of his claims), cert. denied, 562 U.S. 843 (2010).

Finally, petitioner also cites to a purported 14-day delay from the California Court of Appeal's order on direct appeal directing the Superior Court to prepare a new sentencing order as a basis for tolling. (Motion to Reconsider at 3 (referencing Lodged Doc. 1 at 32-33)). The Court of Appeal's order and any related 14-day delay predate the time petitioner's conviction became final and accordingly do not entitle petitioner to any tolling of the statute of limitations.

B. Petitioner Has Not Made a Credible Claim of Actual Innocence

Petitioner makes various allegations which could be construed as arguments that he is actually innocent of the crimes of which he was convicted. (Motion to Reconsider at 5-11). Once again, the Court does not find that any of petitioner's bald, self-serving allegations credibly suggest that he is actually innocent of his crimes, and do not provide the kind of new reliable evidence not introduced at trial that is required for this Court to hear his untimely claims. Schlup v. Delo, 513 U.S. 298, 329 (1995).

C. Petitioner Is Not Entitled to a Stay of These Proceedings to Exhaust Any Unexhausted Claims

To the extent petitioner is again asking for a stay of these proceedings so that he may exhaust new claims in state courts (see Motion for Reconsideration at 5-12 (including new claims/arguments not raised in the Petition)), petitioner has not shown good cause for failing to exhaust his unexhausted claims, or that his claims are not plainly meritless, or that such claims are not themselves time-barred so as to warrant a stay. See Superseding Report and Recommendation at 11-13 (discussing petitioner's burden in showing entitlement to a stay to exhaust unexhausted claims).

III. ORDERS

IT IS HEREBY ORDERED that petitioner's requests for discovery and

related tolling, a stay, and the appointment of counsel are denied, the Motion to Dismiss the Petition is granted, the Motion to Reconsider is denied, and the Petition and this action are dismissed with prejudice because petitioner's claims are time-barred.

IT IS FURTHER ORDERED that the Clerk serve copies of this Order and the Judgment herein on petitioner and counsel for respondents.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: February 13, 2020

John A. Kronstadt
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ELLERY DENNIS THOMAS, Petitioner, v. MADDEN, Warden, et al., Respondents.	Case No. 5:19-cv-00850-JAK-JC SUPERSEDING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Superseding Report and Recommendation is submitted to the Honorable John A. Kronstadt, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I. SUMMARY

On April 5, 2019, petitioner signed and is deemed to have constructively filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 by a Person in State Custody ("Petition") with exhibits ("Petition Ex."), which was formally filed on May 1, 2019.[1] Petitioner challenges a 2015 conviction in San Bernardino County Superior Court Case No. FVI1401296 for, *inter alia*, two counts of

[1] See Houston v. Lack, 487 U.S. 266, 276 (1988).

forcible rape, four counts of forcible oral copulation, and two counts of sexual penetration with a foreign object, alleging that: (1) his conviction based on the victim's "generic testimony" about when alleged events occurred violated his due process rights (Ground One); (2) there was insufficient evidence to show that he accomplished force through duress for the forcible rape and forcible oral copulation counts (Ground Two); (3) the trial court violated petitioner's constitutional rights by admitting testimony regarding petitioner's alleged molestation of a child in 2003 (Ground Three); and (4) the trial court erred in failing to instruct the jury on the lesser included offense of sexual battery for the forcible sexual penetration counts (Ground Four).

On June 25, 2019, respondents filed and served petitioner by mail with a Motion to Dismiss the Petition ("Motion to Dismiss"), arguing that petitioner's claims are barred by the statute of limitations. Respondents concurrently lodged multiple supporting documents ("Lodged Doc."). Petitioner's response to the Motion to Dismiss was originally due on July 29, 2019. As petitioner did not file any response to the Motion to Dismiss by such deadline, but did file a Notice of Change of Address on July 22, 2019, this Court, on August 21, 2019, ordered respondents to re-serve petitioner with the Motion to Dismiss at his new address and extended petitioner's deadline to file a response to within thirty days of re-service of the Motion to Dismiss. As respondents re-served petitioner by mail with the Motion to Dismiss on August 22, 2019, petitioner's extended deadline to file an opposition to the Motion to Dismiss was September 26, 2019.

On September 3, 2019, petitioner formally filed a Motion for Extension of Time ("Petitioner's Motion") which appears to have been signed by petitioner on August 28, 2019, reflects that petitioner actually received the originally served Motion to Dismiss on July 25, 2019, and sought a sixty-day extension of time to file a response thereto. As it did not appear that petitioner had received the Court's August 22, 2019 order before filing Petitioner's Motion, the Court

construed Petitioner's Motion to seek a sixty-day extension of the original July 29, 2019 deadline, *i.e.*, until September 27, 2019, to file a response to the Motion to Dismiss. As the Court had just extended petitioner's deadline to September 26, 2019, it denied Petitioner's Motion without prejudice to any future extension request which established good cause for a further extension of time.

Petitioner's September 26, 2019 deadline to file a response to the Motion to Dismiss expired without petitioner filing such response or any further request to extend the deadline to do so. On October 28, 2019, the Court filed a Report and Recommendation recommending that the Petition be dismissed with prejudice because petitioner's claims are time-barred. Later on October 28, 2019, the Clerk received and formally filed petitioner's "Response to Dismissal" ("Response") with exhibits ("Response Ex."), which Response petitioner appears to have signed on October 21, 2019, and which, given the timing of its signature and submission, the Court has construed to be and has considered as, a late-filed opposition to the Motion to Dismiss. Respondents did not file a reply.

Based upon the record and the applicable law and for the reasons explained below, this Court again recommends that the Motion to Dismiss be granted and that the Petition and this action be dismissed with prejudice because petitioner's claims are time-barred.

II. PROCEDURAL HISTORY

A. State Conviction, Sentence, and Direct Appeal

On October 2, 2015, a San Bernardino County Superior Court jury found petitioner guilty of two counts of forcible rape, four counts of forcible oral copulation, two counts of forcible sexual penetration, one count of incest, and one count of misdemeanor sexual battery. (Petition at 1-2; Lodged Doc. 1 at 2). The trial court sentenced petitioner to a total of 64 years and eight months in state prison. (Petition at 1; Lodged Doc. 1 at 2).

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On August 4, 2017, in Case No. E064888, the California Court of Appeal, Fourth Appellate District, Division Two ("Court of Appeal"), affirmed the judgment in a reasoned decision rejecting claims corresponding to the grounds raised herein. (Lodged Doc. 1). Petitioner raised the same claims in a petition for review to the California Supreme Court in Case No. S244197. (Lodged Doc. 2). On November 1, 2017, the California Supreme Court denied review without comment. (Lodged Doc. 3).

B. State Habeas Petitions

On October 8, 2018, petitioner constructively filed a state habeas petition with the San Bernardino County Superior Court in Case No. WHC1800381, raising a prosecutorial misconduct claim. (Lodged Doc. 4). On November 2, 2018, the Superior Court denied the petition, on the merits and also on procedural grounds, citing, *inter alia*, In re Dixon, 41 Cal. 2d 756, 759 (1953) (courts will not entertain habeas corpus claims that could have been but were not raised on appeal). (Lodged Doc. 5).

A search of the state court appellate dockets available online at https://appellatecases.courtinfo.ca.gov does not reflect that petitioner has filed any habeas petitions with the California Court of Appeal or the California Supreme Court.

C. The Instant Petition

As noted above, petitioner constructively filed the instant Petition on April 5, 2019.

III. DISCUSSION

A. Accrual of the Statute of Limitations

Pursuant to 28 U.S.C. § 2244(d), a one-year statute of limitations applies to a petition for a writ of habeas corpus by a person in state custody. The limitation period runs from the latest of: (1) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review (28 U.S.C. § 2244(d)(1)(A)); (2) 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 (28 U.S.C. § 2244(d)(1)(B)); (3) 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 (28 U.S.C. § 2244(d)(1)(C)); or (4) 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)(D)).

Petitioner's conviction became final on January 30, 2018 – ninety days after the California Supreme Court denied review on direct appeal (on November 1, 2017) – when the time to file a petition for a writ of certiorari with the United States Supreme Court expired. See Jimenez v. Quarterman, 555 U.S. 113, 119 (2009) ("direct review cannot conclude for purposes of § 2244(d)(1)(A) until the availability of direct appeal to the state courts, and to this Court, has been exhausted") (internal citations omitted); Zepeda v. Walker, 581 F.3d 1013, 1016 (9th Cir. 2009) (period of "direct review" after which state conviction becomes final for purposes of section 2244(d)(1)(A) includes the 90-day period during which the state prisoner can seek a writ of certiorari from the United States Supreme Court) (citation omitted); see also Porter v. Ollison, 620 F.3d 952, 959 (9th Cir. 2010) (same). Accordingly, the statute of limitations commenced to run on January 31, 2018, and absent tolling, expired on January 30, 2019, unless subsections B, C or D of 28 U.S.C. § 2244(d)(1) apply in the present case. See 28 U.S.C. § 2244(d)(1)(A).

In his Response, petitioner essentially argues that he should be entitled to a later accrual date for the statute of limitations under 28 U.S.C. section 2244(d)(1)(B) because of an alleged state-created impediment, asserting that he has not received: (1) copies of his own notes from trial that assertedly should have been a part of the public defender's file; (2) transcripts of a plea bargain hearing;

(3) a copy of an alleged warrant for a cell phone that the victim was using; and (4) a copy of an allegedly forged letter entered into evidence at trial. (Response at 4-6; Response Ex. C). Petitioner asks that the Court compel the San Bernardino County Public Defender's Office to relinquish petitioner's notes, order respondent to produce the other items assertedly withheld, and toll the statute of limitations until such time that petitioner receives these items. (Response at 4-6).

Petitioner has not shown any illegal state action prevented petitioner from filing the Petition raising his current claims sooner. Subsection (d)(1)(B) applies to impediments created by "state action" which violate the Constitution or laws of the United States. See Shannon v. Newland, 410 F.3d 1083, 1087-88 & n.4 (9th Cir. 2005), cert. denied, 546 U.S. 1171 (2006). The purported actions or omissions of petitioner's counsel in failing to provide petitioner's trial notes or other items in his file are not a state-created impediment. See, e.g., Stewart v. McComber, 2014 WL 2510927, at *2 (C.D. Cal. Apr. 25, 2014) (state-appointed defense counsel's actions are not "state action" that would trigger § 2244(d)(1)(B)), report and recommendation adopted, 2014 WL 2511216 (C.D. Cal. June 4, 2014), cert. appeal denied, No. 14-56053 (9th Cir. Feb. 6, 2015); Olivera v. Grounds, 2013 WL 5675368, at *5 (C.D. Cal. Oct. 17, 2013) (same); Lopez on Habeas Corpus, 2010 WL 2991689, at *4 (E.D. Cal. July 29, 2010) (same); see generally Georgia v. McCollum, 505 U.S. 42, 53-54 (1992) (public defender is not a state actor when representing a criminal defendant). Petitioner's appellate counsel was able to raise on direct appeal all of the claims asserted by petitioner in the instant Petition.[2] There is no indication that any state action

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[2]Petitioner accordingly has no need for and fails to establish good cause to grant his requests for discovery and related tolling. See Rich v. Calderon, 187 F.3d 1064, 1068 (9th Cir. 1999) (discovery in habeas cases is not a matter of right, but rather is available only in the discretion of the Court and for good cause shown), cert. denied, 528 U.S. 1092 (2000); Rule 6(a) of the Rules Governing Section 2254 Cases in the United States District Courts (judge may authorize discovery for good cause).

prevented petitioner from raising his current claims with this Court once counsel had exhausted them. Petitioner is not entitled to a later accrual date under subsection (d)(1)(B).

Subsection C of 28 U.S.C. § 2244(d)(1) also has no application in the present case. Petitioner's claims are not predicated on a constitutional right "newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review."

Subsection D of 28 U.S.C. § 2244(d)(1) also has no application in the present case, since petitioner raised the claims he raises herein with the state courts on direct appeal and all such claims are predicated upon events which occurred at trial.

Accordingly, absent tolling, petitioner had until January 30, 2019, to file a federal habeas petition.

B. Statutory Tolling

Title 28 U.S.C. § 2244(d)(2) provides that the "time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward" the one-year statute of limitations period. Petitioner "bears the burden of proving that the statute of limitations was tolled." Banjo v. Ayers, 614 F.3d 964, 967 (9th Cir. 2010), cert. denied, 564 U.S. 1019 (2011). The statute of limitations is not tolled from the time a final decision is issued on direct state appeal and the time the first state collateral challenge is filed because there is no case pending during that interval. Porter v. Ollison, 620 F.3d at 958 (citations omitted).

The statute is tolled where a petitioner is properly pursuing post-conviction relief. See Carey v. Saffold, 536 U.S. 214, 219-20 (2002) (application "pending" as long as ordinary state collateral review process in continuance – *i.e.*, until completion of that process; application remains "pending" until it has achieved final resolution through state's post-conviction procedures); Harris v. Carter, 515

F.3d 1051, 1053 n.3 (9th Cir.) (statute of limitations tolled for all of time during which state prisoner attempting, through proper use of state court procedures, to exhaust state court remedies with regard to particular post-conviction application) (citation omitted), cert. denied, 555 U.S. 967 (2008). In this case, statutory tolling does not render the Petition timely filed.

As noted above, the statute of limitations commenced to run on January 31, 2018. Petitioner constructively filed his only state habeas petition on October 8, 2018, which was denied 26 days later on November 2, 2018. (Lodged Docs. 4-5). Petitioner is not entitled to statutory tolling for the 250-day period between January 31, 2018 (the date the statute of limitations commenced to run) and October 8, 2018 (the date he constructively filed his state habeas petition), as no case was pending during such time frame. See Porter v. Ollison, 620 F.3d at 958. Assuming that petitioner is entitled to statutory tolling for the 26 days during which his state habeas petition was pending with the San Bernardino County Superior Court, the statute of limitations expired on February 25, 2019 – 39 days before petitioner constructively filed the instant Petition.

C. Equitable Tolling

The statute of limitations period may be subject to equitable tolling if petitioner can demonstrate both that: (1) he has been pursuing his rights diligently; and (2) some extraordinary circumstance stood in his way. Holland v. Florida, 560 U.S. 631, 649 (2010). It is a petitioner's burden to demonstrate that he is entitled to equitable tolling. Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir.), cert. denied, 537 U.S. 1003 (2002).

"[T]he threshold necessary to trigger equitable tolling is very high, lest the exceptions swallow the rule." Mendoza v. Carey, 449 F.3d 1065, 1068 (9th Cir. 2006) (quoting Miranda v. Castro, 292 F.3d at 1066). Petitioner must prove that the alleged extraordinary circumstance was a proximate cause of his untimeliness and that the extraordinary circumstance made it impossible to file a petition on

time. Ramirez v. Yates, 571 F.3d 993, 997 (9th Cir. 2009); Roy v. Lampert, 465 F.3d 964, 973 (9th Cir. 2006) (citing Stillman v. Lamarque, 319 F.3d 1199, 1203 (9th Cir. 2003)), cert. denied, 549 U.S. 1317 (2007).

Here, petitioner has not alleged that he is entitled to equitable tolling. If petitioner were to argue that he is entitled to equitable tolling because he was without copies of the briefing filed in his direct appeal until some time after May 24, 2018 (see Response Ex. D, letter request to appellate counsel dated May 24, 2018, stating that petitioner did not have a full copy of his petition for review or any of appellate counsel's briefs), there is no basis on the current record to conclude that petitioner is entitled to any equitable tolling. The proof of service attached to the Petition for Review indicates that appellate counsel mailed a copy to petitioner in care of Candace C. Shield at the time it was filed. (Lodged Doc. 2 at 46).[3] Petitioner arguably had access to the Petition for Review on which the claims in the current Petition are based at the time the Petition for Review was filed. Petitioner knew as early as March 15, 2018, that he had exhausted his appeals process and was proceeding with seeking habeas relief with "a time restraint." See Response Ex. D (letter dated March 15, 2018, to petitioner's trial counsel acknowledging same). Petitioner has not suggested what, if any, steps he may have taken beyond the May 24, 2018 letter to obtain copies of his claims raised on direct appeal to suggest that he was pursuing his rights diligently for equitable tolling to apply during any period in which petitioner may have been waiting on his appellate file. Based on the current record, petitioner is not entitled to equitable tolling.

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[3]The record does not reflect who Candace C. Shield is. Respondents have not provided the briefing petitioner's appellate counsel filed with the California Court of Appeal, so the Court cannot discern whether counsel served petitioner with copies of those pleadings when they were filed.

D. Actual Innocence

Petitioner does not argue specifically that the Court should hear his claims because he is actually innocent of the crimes for which he was convicted, but he does suggest that the charges arose from acts occurring during a consensual sexual relationship with his daughter/the alleged victim. (Response at 1-2). In rare and extraordinary cases, a plea of actual innocence, if proved, can serve as a gateway through which a petitioner may pass to overcome the statute of limitations otherwise applicable to federal habeas petitions. McQuiggin v. Perkins, 569 U.S. 383, 386 (2013); see also Lee v. Lampert, 653 F.3d 929, 934-37 (9th Cir. 2011) (en banc). "[T]enable actual-innocence gateway pleas are rare." Perkins, 569 U.S. at 386. "[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him [or her] guilty beyond a reasonable doubt." Id. (quoting Schlup v. Delo, 513 U.S. 298, 329 (1995)).

In order to make a credible claim of actual innocence, a petitioner must "support his allegations of constitutional error 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; see also Griffin v. Johnson, 350 F.3d 956, 963 (9th Cir. 2003) (holding that "habeas petitioners may pass Schlup's test by offering 'newly presented' evidence of actual innocence"), cert. denied, 541 U.S. 998 (2004); Shumway v. Payne, 223 F.3d 982, 990 (9th Cir. 2000) ("[A] claim of actual innocence must be based on reliable evidence not presented at trial.").

None of petitioner's bald, self-serving allegations credibly suggest that he is actually innocent of his crimes, or meet the requisite showing under Schlup by providing new reliable evidence of petitioner's innocence. Accordingly, petitioner's suggestion of "actual innocence" does not provide a gateway for consideration of his otherwise time-barred claims.

E. Petitioner's Request to Stay and Abey These Proceedings and for the Appointment of Counsel Should Be Denied

Petitioner's Response asks that the Court stay these proceedings so that petitioner can "add amendments" for unspecified/unexhausted claims of ineffective assistance of trial and appellate counsel and prosecutorial vindictiveness and misconduct. (Response at 6). Petitioner also has requested that the Court appoint him counsel to assist him in adding the proposed amendments. (Response at 6).

"Only in limited circumstances," does a District Court have discretion to stay and hold in abeyance a habeas corpus petition pending exhaustion of state remedies. Rhines v. Weber, 544 U.S. 269, 277-78 (2005).[4] A petitioner seeking a Rhines stay must demonstrate: (1) good cause for petitioner's failure to exhaust his claims first in state court; (2) the unexhausted claims are not plainly meritless; and (3) he has not engaged in abusive litigation tactics or intentional delay. Id.; Dixon v. Baker, 847 F.3d 714, 720, 722 (9th Cir. 2017) (citations omitted).

Rhines does not define what constitutes good cause for failure to exhaust. The Ninth Circuit has found that good cause does not require a showing of "extraordinary circumstances." Jackson v. Roe, 425 F.3d at 661-62; but see Wooten v. Kirkland, 540 F.3d 1019, 1024 (9th Cir.) (noting that although a showing of "extraordinary circumstances" is not required, a court must interpret Rhines's good cause requirement "in light of the Supreme Court's instruction in Rhines that the district court should only stay mixed petitions in 'limited circumstances'"), cert. denied, 556 U.S. 1285 (2009). "[G]ood cause turns on

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[4]Although the Court addresses Rhines herein, such decision – unlike Kelly v. Small, 315 F.3d 1063 (9th Cir.), cert. denied, 538 U.S. 1042 (2003), overruled on other grounds, Robbins v. Carey, 481 F.3d 1143 (9th Cir. 2007), does not apply to stays of fully exhausted petitions such as the Petition herein. See Jackson v. Roe, 425 F.3d 654, 661 (9th Cir. 2005); cf. Mena v. Long, 813 F.3d 907, 912 (9th Cir. 2016) (finding that Rhines applies to wholly unexhausted petitions, as well as "mixed" petitions containing both exhausted and unexhausted claims).

whether the petitioner can set forth a reasonable excuse, supported by sufficient evidence" to justify a failure to exhaust. Blake v. Baker, 745 F.3d 977, 982 (9th Cir. 2014) (citation omitted), cert. denied, 135 S. Ct. 128 (2014); see also Dixon v. Baker, 847 F.3d at 721-22 (fact that petitioner was without counsel in state post-conviction proceedings can constitute good cause under Rhines).

Petitioner's Response does not specify what his unexhausted claims are with any detail or offer a clear explanation for petitioner's failure to exhaust his unexhausted claims. (Response at 6). Petitioner has not shown good cause for failing to exhaust his unexhausted claims, or that these claims are not plainly meritless to merit a Rhines stay. Nor has he demonstrated cause for a stay under Kelly v. Small, which allows for stays of fully exhausted federal petitions without a showing of good cause. See supra note 4. Under Kelly, a petitioner may seek a stay of his fully exhausted petition with the understanding that he will be allowed to amend the operative petition to add any newly exhausted claims only if such claims are timely or "relate back" to the original exhausted claims. See Mayle v. Felix, 545 U.S. 644, 664 (2005). Here, the Court has found that petitioner's original claims are untimely. Petitioner has not made any showing that his new, unspecified claims would be timely if raised independently and such claims would be untimely even if they relate back to his original claims.

Petitioner's request for "legal aid" to assist in "adding the amendments" (unexhausted claims) to the Petition (Response at 6), should be denied. There is no constitutional right to counsel on habeas corpus. Ryan v. Gonzales, 568 U.S. 57, 66-68 (2013) (discussing Ninth Circuit's acknowledgment of same in Rohan v. Woodford, 334 F.3d 803, 810 (9th Cir.), cert. denied, 540 U.S. 1069 (2003)). The right to counsel extends "to the first appeal of right and no further." Pennsylvania v. Finley, 481 U.S. 551, 555 (1987). Where, as here, no evidentiary hearing is required, the decision to appoint counsel in a non-death penalty habeas case is within the discretion of the court. Knaubert v. Goldsmith, 791 F.2d 722, 728 (9th

Cir.), cert. denied, 479 U.S. 867 (1986). "In deciding whether to appoint counsel in a habeas proceeding, the district court must evaluate the likelihood of success on the merits as well as the ability of the petitioner to articulate his claims pro se in light of the complexity of the legal issues involved." Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983). Here, it appears that petitioner's effective ability to articulate his claims pro se is adequate. Further, at this stage of the proceedings petitioner has not demonstrated a likelihood of success on the merits to warrant appointment of counsel. On the current record, the Court finds no cause to appoint counsel in this case.

IV. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Judge issue an Order: (1) approving and accepting this Superseding Report and Recommendation; (2) denying petitioner's requests for discovery and related tolling, a stay and the appointment of counsel; (3) granting the Motion to Dismiss and dismissing the Petition and this action with prejudice because petitioner's claims are time-barred; and (4) directing that Judgment be entered accordingly.

DATED: December 4, 2019

/s/

Honorable Jacqueline Chooljian
UNITED STATES MAGISTRATE JUDGE