

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

SEP 16 2022

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

LLOYD LESLIE KINDRED,

Petitioner-Appellant,

v.

T. CISNEROS,

Respondent-Appellee.

No. 22-16145

D.C. No. 2:21-cv-00750-KJM-EFB  
Eastern District of California,  
Sacramento

ORDER

Before: TALLMAN and BRESS, Circuit Judges.

Appellant's request to submit additional documents in support of his request for a certificate of appealability (Docket Entry No. 3) is granted. The court has considered all documents filed by appellant in this court to date.

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 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);

~~8-17-22~~

APPENDIX A

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*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.**

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v.

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No. 22-16145

D.C. No. 2:21-cv-00750-KJM-EFB  
Eastern District of California,  
Sacramento

ORDER

Before: SCHROEDER and BYBEE, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 5) is denied. *See*  
9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

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APPENDIX C

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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

LLOYD LESLIE KINDRED,

Petitioner,

v.

T. CISNEROS,

Respondent.

No. 2:21-cv-0750-KJM-EFB P

FINDINGS AND RECOMMENDATIONS

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Petitioner is a state prisoner proceeding without counsel in this petition for writ of habeas corpus under 28 U.S.C. § 2254. Respondent moves to dismiss the petition as untimely. ECF No. 11. As discussed below, the petition is untimely and the motion must be granted.

**I. Background**

Petitioner was convicted of multiple counts of child molestation in the Sacramento County Superior Court in late 2010. ECF No. 13-1 at 1. He received a sentence of four years plus 150-years-to-life. *Id.* at 1-4. The state appellate court affirmed the convictions and sentences on June 14, 2012, and petitioner did not seek review in the California Supreme Court. ECF No. 13-2.

Petitioner filed three collateral attacks on his conviction and sentence in state court. A petition to the Sacramento County Superior Court filed on September 9, 2020 was denied on October 6, 2020. ECF Nos. 13-3 & 13-4. A petition to the California Court of Appeal filed on October 29, 2020 was denied on November 30, 2020. ECF Nos. 13-5 & 13-6. Finally, a petition

1 to the California Supreme Court filed on February 18, 2021 was denied on April 14, 2021. ECF  
2 Nos. 13-7 & 13-8. Petitioner filed this action on April 22, 2021. ECF No. 1.

3 **II. The Limitations Period**

4 Under the Anti-terrorism and Effective Death Penalty Act ("AEDPA"), a one-year  
5 limitations period for seeking federal habeas relief begins to run from the latest of: (1) the date the  
6 judgment became final on direct review or the expiration of the time for seeking such review (or  
7 April 25, 1996, if the judgment became final prior to AEDPA's enactment), (2) the date on which  
8 a state-created impediment to filing is removed, (3) the date the United States Supreme Court  
9 makes a new rule retroactively applicable to cases on collateral review, or (4) the date on which  
10 the factual predicate of a claim could have been discovered through the exercise of due diligence.  
11 28 U.S.C. § 2244(d)(1)(A)-(D); *Malcom v. Payne*, 281 F.3d 951, 955 (9th Cir. 2002).

12 **a. Statutory Tolling**

13 No statute tolls the limitations period "from the time a final decision is issued on direct  
14 state appeal [to] the time the first state collateral challenge is filed . . . ." *Nino v. Galaza*, 183  
15 F.3d 1003, 1006 (9th Cir. 1999). However, if a petitioner properly files a state post-conviction  
16 application prior to the expiration of the limitations period, the period is tolled and remains tolled  
17 for the entire time that application is "pending." 28 U.S.C. § 2244(d)(2). A federal habeas  
18 application does not provide a basis for statutory tolling, *Duncan v. Walker*, 533 U.S. 167, 181-82  
19 (2001), nor does a state petition filed after the federal limitations period has expired, *Ferguson v.*  
20 *Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003).

21 **b. Equitable Tolling**

22 The limitations period may also be equitably tolled where a habeas petitioner establishes  
23 two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary  
24 circumstance stood in his way and prevented timely filing. *Holland v. Florida*, 560 U.S. 631  
25 (2010). Petitioner has the burden of showing facts entitling him to equitable tolling. *Smith v.*  
26 *Duncan*, 297 F.3d 809, 814 (9th Cir. 2002); *Miranda v. Castro*, 292 F.3d 1063, 1065 (9th Cir.  
27 2002). The threshold necessary to trigger equitable tolling is very high, "lest the exceptions  
28 swallow the rule." *Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1011 (9th Cir. 2009). Equitable

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1 tolling may be applied only where a petitioner shows that some external force caused the  
2 untimeliness. *Id.*

3 **c. The Equitable Exception for Innocence**

4 In addition, the statute of limitations is subject to an actual innocence exception.<sup>1</sup> A  
5 petitioner may have her untimely filed case heard on the merits if she can persuade the district  
6 court that it is more likely than not that no reasonable juror would have convicted her.  
7 *McQuiggin v. Perkins*, 569 U.S. 383, 386-87, 394-95 (2013); *Lee v. Lampert*, 653 F.3d 929, 937  
8 (9th Cir. 2011) (en banc). “Unexplained delay in presenting new evidence bears on the  
9 determination whether the petitioner has made the requisite showing.” *McQuiggin*, 569 U.S. at  
10 399. For example, the “court may consider how the timing of the submission and the likely  
11 credibility of a petitioner’s affiants bear on the probable reliability” of his evidence of innocence.  
12 *Id.*

13 **III. Analysis**

14 Respondent moves to dismiss the petition on the ground that it is untimely under AEDPA.  
15 For the reasons that follow, the undersigned agrees.

16 Respondent argues that the limitations period began to run on July 24, 2012, which was  
17 the day on which petitioner’s opportunity to seek direct review in the California Supreme Court  
18 expired. 28 U.S.C. § 2244(d)(1)(A). Absent tolling, the limitations period expired on July 24,  
19 2013.

20 All of petitioner’s state habeas petitions were filed in 2020 or later, well outside the  
21 federal limitations period. State petitions filed after the expiration of the federal limitations  
22 period cannot toll the limitations period. *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir.  
23 2003). Thus, this case presents no grounds for statutory tolling.

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26 <sup>1</sup> This exception is also known variably as the “miscarriage of justice” exception and the  
27 “*Schlup* gateway,” after *Schlup v. Delo*, 513 U.S. 298 (1995), in which the U.S. Supreme Court  
28 held that a habeas petitioner whose claims were procedurally barred could nevertheless obtain a  
determination on the merits of his petition if he made the requisite showing of actual innocence.

93  
1 In his opposition, petitioner argues that the limitations period is no bar to his petition due  
2 to "newly presented evidence" and his actual innocence of the many crimes for which he was  
3 convicted.

4 To the extent that petitioner argues that "newly presented evidence" should justify a later  
5 limitations period start-date under § 2244(d)(1)(D), his argument fails because he acknowledges  
6 that the evidence on which he relies was "available during court and trial proceedings." ECF No.  
7 14 at 5. He provides no argument or evidence showing that this evidence was unavailable to him  
8 at that time.

9 Petitioner's actual innocence claim is equally unavailing. The innocence exception is  
10 demanding and thus seldom met. *McQuiggin*, 569 U.S. at 401; *Stewart v. Cate*, 757 F.3d 929,  
11 938 (9th Cir. 2014) (describing the standard governing the exception as "exacting" and setting  
12 "an extremely high hurdle" for the habeas petitioner). It requires the petitioner to support his  
13 claim of innocence with new reliable evidence that was not presented at trial. *Lee*, 653 F.3d at  
14 938. The sole evidence of innocence petitioner presents here does not meet this high threshold.  
15 Although it is not entirely clear, petitioner appears to claim that various documents from the IRS  
16 show that his wife, who presumably testified against him at trial, had been dishonest with the IRS  
17 so that she would receive some funds that were rightfully payable to petitioner. Petitioner fails to  
18 explain how this evidence shows that his wife would have benefitted from his conviction such  
19 that she would lie under oath. Nor does petitioner make any argument to attempt to show that,  
20 without his wife's allegedly self-interested testimony, he would not have been convicted.

21 The petition is untimely and, accordingly, must be dismissed.

22 **IV. Recommendation**

23 For the foregoing reasons is RECOMMENDED that respondent's July 15, 2021 motion to  
24 dismiss (ECF No. 11) be granted and the Clerk be directed to close the case.

25 These findings and recommendations are submitted to the United States District Judge  
26 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
27 after being served with these findings and recommendations, any party may file written  
28 objections with the court and serve a copy on all parties. Such a document should be captioned

1 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections  
2 shall be served and filed within fourteen days after service of the objections. Failure to file  
3 objections within the specified time may waive the right to appeal the District Court's order.  
4 *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir.  
5 1991). In his objections petitioner may address whether a certificate of appealability should issue  
6 in the event he files an appeal of the judgment in this case. See Rule 11, Rules Governing Section  
7 2254 Cases (the district court must issue or deny a certificate of appealability when it enters a  
8 final order adverse to the applicant).

9 DATED: September 24, 2021.

  
EDMUND F. BRENNAN  
UNITED STATES MAGISTRATE JUDGE

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8 UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA  
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11 Lloyd Leslie Kindred,

12 Petitioner,

13 v.

14 T. Cisneros,

15 Respondent.  
16

No. 2:21-cv-00750-KJM-EFB

ORDER

17 Petitioner Lloyd Kindred moves for reconsideration of the court's order adopting the  
18 Magistrate Judge's findings and recommendations. *See* Mot. Recons., ECF No. 25; Order, ECF  
19 No. 23. "Under Rule 59(e), a motion for reconsideration should not be granted, absent highly  
20 unusual circumstances, unless the district court is presented with newly discovered evidence,  
21 committed clear error, or if there is an intervening change in the controlling law." *389 Orange St.*  
22 *Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999) (citation omitted). Mr. Kindred presents  
23 "newly discovered evidence," namely an unsigned and unauthenticated email from his trial  
24 attorney saying she "hurt [her] back halfway through [his] trial." *See* Ex. B at 8, ECF No. 25.  
25 Even if the email were authenticated, Mr. Kindred explains neither why his trial counsel's injury  
26 rendered her performance unreasonable nor how it prejudiced him, stating only that the "injury  
27 made her performance level so low as it affected her job performance." Mot. Recons. at 2. This  
28 "newly discovered evidence" does not support relief under Rule 59(e). *See Far Out Products,*

~~4 ECF 10~~

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1 *Inc. v. Oskar*, 247 F.3d 986, 998 (9th Cir. 2001) (to compel relief under Rule 59(e), new evidence  
2 must be "of such magnitude that it would likely have changed the outcome of the case"). Nor  
3 does it justify a delayed commencement of the statute of limitations under § 2244(d)(1)(D).

4 Mr. Kindred also requests that the court issue a certificate of appealability. *See* ECF No.  
5 26. A court may only issue a certificate of appealability "if the applicant has made a substantial  
6 showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The applicant must  
7 show both "that jurists of reason would find it debatable whether the petition states a valid claim  
8 of the denial of a constitutional right and that jurists of reason would find it debatable whether the  
9 district court was correct in its procedural ruling." *Gonzalez v. Thaler*, 565 U.S. 134, 140-41  
10 (2012) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). On this record, the court finds  
11 that jurists of reason would not debate whether the petition states a valid claim, nor could they  
12 find it debatable whether the court is correct in its ruling. Thus, no certificate of appealability  
13 will issue.

14 Mr. Kindred's requests are **denied**.

15 This order resolves ECF Nos. 25 & 26.

16 IT IS SO ORDERED.

17 DATED: March 22, 2022.

  
CHIEF UNITED STATES DISTRICT JUDGE

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