NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DESMOND ALAN MACKAY,

Petitioner - Appellant,

v.

PETER BLUDWORTH; ATTORNEY GENERAL OF THE STATE OF MONTANA,

Respondents - Appellees.

No. 23-4413

D.C. No. 4:23-cv-00051-BMM-JTJ

MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Brian M. Morris, Chief District Judge, Presiding

Submitted February 5, 2025**
Portland, Oregon

Before: BEA, KOH, and SUNG, Circuit Judges.

Desmond Alan Mackay ("Petitioner") appeals the district court's order that denied his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The

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

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

district court denied the petition as untimely and granted a certificate of appealability as to whether Petitioner is entitled to equitable tolling to excuse that untimeliness. *See* 28 U.S.C. § 2253(c). We have jurisdiction to consider that question pursuant to 28 U.S.C. §§ 1291 and 2253(a).

We review the denial of a habeas petition on the basis of the statute of limitations de novo. *Miles v. Prunty*, 187 F.3d 1104, 1105 (9th Cir. 1999). Because the parties are familiar with the facts, we recite them here only as necessary to explain our decision. For the reasons that follow, we affirm the district court's denial of the petition.

The limitations period for the kind of petition at issue here is one year. 28 U.S.C. § 2244(d)(1); *see also Ramirez v. Yates*, 571 F.3d 993, 997 (9th Cir. 2009). All agree that Petitioner filed over five years late because his petition was not filed until August 2023 when it would have been due on March 13, 2018. Petitioner argues that the untimeliness should be excused via equitable tolling. In our Circuit, "equitable tolling is unavailable in most cases, and is appropriate only if *extraordinary* circumstances beyond a prisoner's control make it impossible to file a petition on time." *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002) (internal citation and quotation marks omitted). To obtain the benefits of equitable tolling, Petitioner must establish that he has been pursuing his rights diligently and that some extraordinary circumstance prevented him from timely filing his habeas petition.

Holland v. Florida, 560 U.S. 631, 649 (2010). Petitioner must also demonstrate that the extraordinary circumstance was the actual cause of his failure to timely file the petition. *See Porter v. Ollison*, 620 F.3d 952, 959 (9th Cir. 2010).

The district court correctly concluded that none of Petitioner's asserted bases for equitable tolling have merit. First, Petitioner's attempts to obtain postconviction relief in state court do not excuse his failure to file his habeas petition in federal court before the March 13, 2018, deadline. Petitioner concedes that his first postconviction filing in state court was a motion to withdraw his guilty plea filed in May 2018—two months after the limitations period for his § 2254 petition expired. It cannot be true that this state court proceeding, or any subsequent ones, prevented Petitioner from filing within the limitations period when they did not even begin until after that period had already expired.

As to any mental or cognitive impairment, Petitioner has failed to make the required showing that "the impairment was so severe that either (a) [he] was unable rationally or factually to personally understand the need to timely file, or (b) [his] mental state rendered him unable personally to prepare a habeas petition and effectuate its filing." *Bills v. Clark*, 628 F.3d 1092, 1099–1100 (9th Cir. 2010). While Petitioner points to medical records that he says show he "suffers from learning disabilities [and] that he suffers from major depressive disorder," among other illnesses, he does not proffer evidence to support or explain why those

disabilities were so severe that they prevented him from timely filing his petition. Mental or cognitive impairment is therefore not a basis for equitable tolling here.

Petitioner's argument that the "conditions of his confinement" excuse his untimely filing fares no better. Petitioner's brief does not describe the specific conditions to which he refers or explain why they were so severe that they caused him to file his petition more than five years late. *See Ramirez*, 571 F.3d at 998 (holding that "ordinary prison limitations on [the petitioner's] access to the law library" were not a basis for equitable tolling without further explanation). Petitioner's failure to explain how the conditions of his confinement went beyond ordinary restrictions is fatal to this argument.

We also reject Petitioner's argument that allegedly deceitful representations by his trial counsel, which led him to voluntarily dismiss his direct appeal in state court, caused Petitioner to miss the deadline. Petitioner's conviction became final after that direct appeal was dismissed, when the Montana Sentence Review Division affirmed his sentence. Even if the alleged misrepresentations by his counsel somehow had a later effect on Petitioner's ability to file for habeas relief, Petitioner does not explain what those misrepresentations were or how they affected his ability to file his federal habeas petition on time.

In sum, Petitioner has not cleared the high burden of establishing an entitlement to equitable tolling. His asserted bases for excusing his more than five-

year delay are conclusory, and he does not explain how any of them caused his untimeliness, as he is required to do. We therefore affirm the district court's conclusion that Petitioner has not demonstrated that he is entitled to equitable tolling.[1]

AFFIRMED.

[1] Given the record before the district court, we also reject Petitioner's alternative request for an evidentiary hearing to evaluate his claims. *See Roberts v. Marshall*, 627 F.3d 768, 773 (9th Cir. 2010) (explaining a district court is not obligated to hold evidentiary hearings to develop a factual record under these circumstances).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

DESMOND ALAN MACKAY, Petitioner, vs. PETER BLUDWORTH, WARDEN, CROSSROADS CORRECTIONAL CENTER, AND AUSTIN KNUDSEN, Respondents.	Cause No. CV 23-51-GF-BMM-JTJ ORDER DISMISSING PETITION AND GRANTING CERTIFICATE OF APPEALABILITY

This case comes before the Court on Petitioner Desmond Alan Mackay's petition for a writ of habeas corpus under 28 U.S.C. § 2254. Mackay is a state prisoner proceeding pro se. The Court directed Mackay to show cause why his petition should not be dismissed as untimely on October 13, 2023. (Doc. 5.) Mackay responded. (Doc. 6.) The petition will be dismissed.

I. Preliminary Review

Before the State is required to respond, the Court must determine whether "it plainly appears from the petition and any attached exhibits that the prisoner is not entitled to relief." Rule 4(b), Rules Governing § 2254 Cases in the United States District Courts. A petitioner "who is able to state facts showing a real possibility of constitutional error should survive Rule 4 review." *Calderon v. United States Dist. Court*, 98 F.3d 1102, 1109 (9th Cir. 1996) ("*Nicolas*") (Schroeder, C.J.,

concurring) (referring to Rules Governing § 2254 Cases). The Court should "eliminate the burden that would be placed on the respondent by ordering an unnecessary answer." Advisory Committee Note (1976), Rule 4, § 2254 Rules.

II. Background

The Court outlined the procedural history of Mackay's case in the Court's prior Order. (Doc. 5.) Based on the dates in Mackay's petition, the Court concluded his petition should have been filed by March 13, 2018, as explained in the previous Order. (Doc. 5 at 2.) Mackay filed the petition on August 28, 2023.

III. Analysis

A one-year limitations period applies to petitions filed by state prisoners under 28 U.S.C. § 2254. *See* 28 U.S.C. § 2244. The Court directed Mackay to show why his petition should not be dismissed with prejudice as time-barred. Mackay does not dispute that his petition is late. Instead, Mackay raises four points in support of his contention that the Court should consider his petition nonetheless.

A. Equitable Tolling

The statute of limitations may be tolled if the petitioner has been pursuing his rights diligently, but an extraordinary circumstance stood in his way and prevented him from filing on time. *Holland v. Florida*, 560 U.S. 631, 649 (2010). Mackay provides two arguments in support of his claim that he is entitled to equitable tolling. First, Mackay advises the Court he has limited education and

encourages the Court to take his pro se status into account in considering whether his petition should move forward. (Doc. 6 at 2 – 3.) Mackay contends that the case law and statutes governing the statute of limitations are confusing and contradictory, thus obliging the Court to construe his pro se actions liberally. (Doc. 6 at 3 – 4.) When confronted with the clear requirement that he present his claims to the state court first, Mackay proceeded down that path, even though it turned a potentially two-month late filing into a five-year late filing. (Doc. 6 at 6.) Mackay states that he has "filed a challenge to his unconstitutional conviction nearly every year since his conviction in 2015," thereby demonstrating diligence. (Doc. 6 at 7.)

Second, Mackay relies on the main argument of his petition to illustrate the impediment external to himself that prevented his timely filing. Mackay asserts that his trial counsel conspired with the prosecutor to prevent Mackay from pursuing his proper appeals. Mackay alleges that his trial counsel and prosecutor promised him that the state district court's unconstitutional biases would be corrected upon sentence review, convinced him to dismiss his direct appeal, and then abandoned him. (Doc. 6 at 8.) Mackay claims this misconduct constitutes an extraordinary circumstance that entails him to equitable tolling. (Doc. 6 at 9.)

Mackay blames his dismissal of his state court direct appeal on his trial counsel and the prosecutor. Mackay's motion to dismiss in the Montana Supreme Court shows, however, that he was represented by appellate counsel, and made a

knowing, intelligent, and voluntary waiver of direct appeal. *See State v. Mackay*, No. DA 16-0028, motion to dismiss, (Mont. Oct. 28, 2016) and Or. (Mont. Oct. 31, 2016). Mackay mentions nothing in his response in this Court to establish ineffectiveness by his appellate counsel, coercion in dismissing his appeal, or anything otherwise to undermine that decision. As of March 13, 2017, Mackay knew that any promise of his prior counsel about the sentence review division was false. Mackay had one year from that date to file his federal petition, and any portion of that year during which a "properly filed application for State postconviction or other collateral review" was pending in state court would be tolled. 28 U.S.C. § 2244(d)(2). Mackay waited to move for relief in the Montana state district court until May 24, 2018. The statute had already expired before Mackay attempted any post-conviction relief. The actions of his trial counsel do not affect this calculation.

Mackay's pro se status also fails to excuse the delay. To the extent that Mackay believes the Court should equitably toll the statute of limitations, see e.g., *Holland*, 560 U.S. at 649, due to his lack of legal training and knowledge, such an argument proves unavailing. The Ninth Circuit instructs that "a pro se petitioner's lack of legal sophistication is not, by itself, an extraordinary circumstance warranting equitable tolling." *Rasberry v. Garcia*, 448 F. 3d 1150, 1154 (9th Cir. 2006); see also, *Ford v. Pliler*, 590 F. 3d 782, 789 (9th Cir. 2009) (equitable tolling

"standard has never been satisfied by a petitioner's confusion or ignorance of the law alone"); *Waldron-Ramsey v. Pacholke*, 556 F. 3d 1008, 1013 n. 4 (9th Cir. 2009)("[A] pro se petitioner's confusion or ignorance of the law is not, itself, a circumstance warranting equitable tolling."). Additionally, normal prison limitations on law library access normally do not warrant equitable tolling. See, *Ramirez v. Yates*, 571 F. 3d 993, 998 (9th Cir. 2009) ("Ordinary prison limitations on Ramirez's access to the law library and copier...were neither 'extraordinary' nor made it impossible for him to file his petition in a timely manner."); *Frye v. Hickman*, 273 F. 3d 1144, 1146 (9th Cir. 2001) (recognizing that a lack of access to library materials does not automatically qualify as grounds for equitable tolling.). Mackay has failed to show at this time a basis that would entitle him to equitable tolling.

B. Miscarriage of Justice

Next, Mackay argues that the Montana state district court's violations of his rights and abuse of power were so severe as to result in a serious miscarriage of justice. (Doc. 6 at 10 – 12.) Mackay appears to seek to take advantage of the "actual innocence gateway," by which a petitioner may bypass a procedural restriction on his or her habeas petition, such as the expiration of the statute of limitations. *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). "[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 guilty beyond a reasonable doubt." *McQuiggin v. Perkins*, 569 U.S. 383, 386 (emphasizing that the standard is "demanding" and seldom met). Mackay "thus seeks an equitable *exception* to § 2244(d)(1), not an extension of the time statutorily prescribed." *Id.*, 569 U.S. 383, 392, (2013). Mackay fails to provide any "new" evidence that was unavailable to him at the time of his conviction, and he fails to present any colorable claim of innocence.

The thrust of Mackay's petition is that the conduct of the presiding Montana state district court so deeply flawed his proceeding that it rendered his conviction unconstitutional. These violations include improperly disallowing Mackay bail, Doc. 1 at 5 – 7, improper analysis regarding charges at his change of plea hearing, which violated the separation of powers, *id.* at 8 – 10, not following the terms of the plea agreement, *id.* at 11 – 13, and failing to recuse herself. These errors, Mackay claims, violated his rights to due process and a fair trial. (Doc. 1 at 15.) Mackay also contends his rights were violated because he was not indicted by a grand jury. (Doc. 1 at 16.)

These contentions do not meet the standard required of the actual innocence exception. None of the contentions constitute new evidence. Mackay instead asserts only alleged errors in his district court proceedings that would have been available for argument on direct appeal. Further, none of these errors changes the

fact that he pled guilty and admitted his conduct in open court. No plausible claim exists that a juror would not find him guilty.

Finally, Mackay's indictment argument is unavailing. The Fifth Amendment Grand Jury Clause, which guarantees indictment by grand jury in federal prosecutions, was not incorporated by the Fourteenth Amendment to apply to the states. *See Branzburg v. Hayes, 408 U.S. 665, 687-88 n. 25 (1972)* (noting that "indictment by grand jury is not part of the due process of law guaranteed to state criminal defendants by the Fourteenth Amendment"); *Hurtado v. California, 110 U.S. 516, 535* (holding that the Fourteenth Amendment did not incorporate the Fifth Amendment right to a grand jury); *see also Rose v. Mitchell*, 443 U.S. 545, 557 n. 7 (1979); *Gerstein v. Pugh*, 420 U.S. 103, 118-119 (1975); *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972); *Beck v. Washington*, 369 U.S. 541, 545 (1962); *Gaines v. Washington*, 227 U.S. 81, 86 (1928). To the extent that Mackay believes he was constitutionally entitled to indictment by a grand jury, and that his right to due process was violated when he was prosecuted via information, he is mistaken. This Court consistently has rejected such a claim as frivolous and wholly lacking in substantive merit.

C. Constitutionality of AEDPA's statute of limitations

Finally, Mackay asserts that the statute of limitations in the AEDPA is unconstitutional, violating Article I, § 9. (Doc. 6 at 14 – 17.) It is well-settled Ninth

Circuit law that AEDPA's statute of limitations is not an unconstitutional restriction on Mackay's right to petition for a writ of habeas corpus. *Ferguson v. Palmateer*, 321 F.3d 820 (9th Cir. 2003).

IV. Certificate of Appealability

"The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a), Rules Governing § 2254 Proceedings. A COA should issue as to those claims on which the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The standard is satisfied if "jurists of reason could disagree with the district court's resolution of [the] constitutional claims" or "conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack*, 529 U.S. at 484). Where a claim is dismissed on procedural grounds, the court must also decide whether "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Gonzalez v. Thaler*, 656 U.S. 134, 140-41 (2012) (quoting *Slack*, 529 U.S. at 484).

Mackay has made a substantial showing that he allegedly was deprived of a constitutional right. He has made a colorable claim of equitable tolling, but has not demonstrated the availability of the actual innocence exception. Accordingly, his

is petition is time-barred. Reasonable jurists could find a basis to encourage further proceedings. A certificate of appealability will be granted.

Accordingly, **IT IS ORDERED**:

1. The Petition (Doc. 1) is DISMISSED with prejudice.
2. The Clerk of Court is directed to enter by separate document a judgment in favor of Respondents and against Petitioner.
3. A certificate of appealability is GRANTED.

DATED this 5th day of December, 2023.

Brian Morris, Chief District Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
GREAT FALLS DIVISION

DESMOND ALAN MACKAY,

Petitioner,

vs.

PETER BLUDWORTH, et al.,

Respondents.

JUDGMENT IN A CIVIL CASE

CV 23-51-GF-BMM

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came before the Court for bench trial, hearing, or determination on the record. A decision has been rendered.

IT IS ORDERED AND ADJUDGED that, pursuant to the Court's Order of December 5, 2023 (Doc. 7), judgment is entered in favor of Respondents, and this action is DISMISSED.

Dated this 5th day of December, 2023.

TYLER P. GILMAN, CLERK

By: /s/ T. Gesh
T. Gesh, Deputy Clerk

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