IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT DELGADO, Petitioner, v. DERRAL G. ADAMS, Warden, Respondent.	No. C 04-1234 CW (PR) ORDER GRANTING RESPONDENT'S MOTION TO DISMISS THE PETITION AS UNTIMELY (Docket no. 7)

INTRODUCTION

Petitioner Robert Delgado, a State prisoner incarcerated at the California State Prison at Corcoran, filed this pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging the validity of his State conviction and the denial of his application for parole by the State Board of Prison Terms (BPT). In an Order dated November 10, 2004, the Court directed Respondent to show cause why the petition should not be granted. Respondent has filed a motion to dismiss the petition on the grounds that it is untimely or, in the alternative, that it is unexhausted. Petitioner has opposed the motion, and Respondent has filed a reply to the opposition. For the reasons discussed below, the Court GRANTS the motion to dismiss.

BACKGROUND

The following factual and procedural background is based on the allegations in the petition, on Respondent's motion to dismiss and the exhibits attached thereto, and on Petitioner's opposition to the motion to dismiss.

The Monterey County District Attorney charged Petitioner

with one count of first degree murder (Cal. Pen. Code § 187[1]) with an enhancement for personal use of a weapon (§ 12022) and six counts of robbery (§ 211).

Pursuant to a plea bargain, Petitioner plead guilty to second degree murder and the robbery counts. On June 11, 1993, the court sentenced Petitioner to twenty-one years to life in State prison, with the possibility of parole. Petitioner did not appeal.

On August 23, 2000, Petitioner filed a federal habeas corpus petition, Delgado v. Terhune, C 00-3036 CW. Exh. 10. Prior to the Court's entry of any order in the matter, Petitioner moved to dismiss the petition voluntarily so that he could return to State court to exhaust additional claims. On November 6, 2000, the Court granted Petitioner's motion to dismiss the petition and closed the case.

On August 16, 2001, Petitioner filed his first habeas corpus petition in Monterey County Superior Court. Exh. 1. On September 6, 2001, the court denied the petition, citing In re Dixon, 41 Cal. 2d 756 (1953), which states that "[t]he general rule is that habeas corpus cannot serve as a substitute for an appeal." Exh. 2. Meanwhile, on August 23, 2001, Petitioner filed another habeas corpus petition in Monterey County Superior Court. Exh. 3. On September 12, 2001, the court denied the petition citing In re Miller, 17 Cal. 2d 734 (1941) and In re Hochenberg, 2 Cal. 3d 870 (1970), which stand for the proposition that a court will not consider a second habeas

[1]Unless otherwise noted, all statutory references are to the California Penal Code.

corpus petition, and that a petitioner who is denied relief must file another habeas corpus petition in the appellate court. Exh. 4.

On February 19, 2002, Petitioner filed a habeas corpus petition in the California Court of Appeal. The petition was denied on April 8, 2002. Exh. 5.

On May 30, 2002, Petitioner filed a habeas corpus petition in the California Supreme Court. Exh. 6. The court denied the petition on November 26, 2002, citing In re Clark, 5 Cal. 4th 750 (1993) and In re Robbins, 18 Cal. 4th 770, 780 (1998), which indicates that the court found the petition untimely. Exh. 7.

On February 18, 2003, Petitioner filed a petition for a writ of certiorari in the United States Supreme Court. Exh. 8. Petitioner claims that he filed an amended petition for a writ of certiorari in April, 2003. On October 6, 2003, certiorari was denied. Exh. 9.

Petitioner filed the present petition on March 29, 2004. In the Order to Show Cause, the Court identified the following claims for relief: (1) Petitioner's guilty plea was coerced, and therefore invalid, based on counsel's representations that Petitioner's parents could be incarcerated if Petitioner went to trial, that Petitioner would be released in ten years, and that Petitioner did not have a viable defense to the murder charge;

(2) trial counsel's ineffective assistance rendered the plea unknowing and involuntary because his advice to Petitioner was based on threats, erroneous sentencing information and legal

errors, and counsel refused to file a notice of appeal on Petitioner's behalf; (3) the terms of the plea agreement were breached when Petitioner was not released from prison after serving ten years and the BPT found him unsuitable for parole; (4) the implementation of former California Governor Grey Davis's no-parole policy with respect to those convicted of murder changed Petitioner's sentence from one of life with the possibility of parole to one of life without the possibility of parole, thereby violating the terms of his plea agreement, the Ex Post Facto Clause and the doctrine of the separation of powers; and (5) as a matter of law Petitioner is factually innocent of second degree murder.

DISCUSSION

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which became law on April 24, 1996, imposed for the first time a statute of limitations on petitions for a writ of habeas corpus filed by State prisoners. Petitions filed by prisoners challenging non-capital State convictions or sentences must be filed within one year of the latest of the date on which the judgment became final after the conclusion of direct review or the time passed for seeking direct review; an impediment to filing an application created by unconstitutional State action was removed, if such action prevented the petitioner from filing; the constitutional right asserted was recognized by the Supreme Court, if the right was newly recognized by the Supreme Court and made retroactive to cases on collateral review; or the factual predicate of the claim could have been discovered through the exercise of due

diligence. See 28 U.S.C. § 2244(d)(1)(A)-(D). Because Petitioner was convicted prior to the date the AEDPA was enacted, he had until April 23, 1997, to file a federal petition. See Calderon v. United States District Court (Beeler), 128 F.3d 1283, 1287 (9th Cir. 1997). Because he did not file the present petition until March 29, 2004, the petition is untimely unless he can show that he is entitled to statutory or equitable tolling or to delayed commencement of the limitations period.

I. Statutory Tolling

The one year statute of limitations is tolled under § 2244(d)(2) for 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." Dictado v. Ducharme, 244 F.3d 724, 726 (9th Cir. 2001). In California, this means that the statute of limitations is not tolled for the time between the date the judgment became final on direct review and the date the first State collateral challenge was filed, but is tolled from the time the first State habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral challenge. Carey v. Saffold, 536 U.S. 214, 223 (2002).

In the present case, Petitioner filed his first State habeas corpus petition on August 16, 2001, which was more than seven years after his conviction became final. It also was more than four years after the April 23, 1997, deadline for filing his federal habeas corpus petition. Because the State habeas petition was filed after the federal one year statute of

limitations had expired, the time it was pending in State court cannot serve to toll the statute. See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003). Accordingly, Petitioner is not entitled to statutory tolling of the statute of limitations.

II. Delayed Commencement of Limitations Period

Commencement of the limitations period may be statutorily delayed in certain circumstances. Under § 2244(d)(1)(B), the one year limitations period starts on the date on which "an 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." Under § 2244(d)(1)(C), the one year limitations period starts on the date a constitutional right asserted in the petition was recognized by the Supreme Court, if the right was newly recognized by the Supreme Court and made retroactive to cases on collateral review. Under § 2244(d)(1)(D), the one year limitations period starts on the date on which "the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence."

Petitioner does not allege facts which would bring him within the language of either section (B) or (C). Liberally construed, his assertions allege that commencement of the statute of limitations should be delayed under section (D) until August 16, 2001, because that is the date on which, acting with due diligence, he was able to file his first State habeas petition. He maintains that he was not able to do so earlier because he was unaware that his conviction and sentence

were invalid, he was indigent and his parents were unable to obtain counsel for him.

Under section (D), the statute begins to run "'when the prisoner knows (or through diligence could discover) the important facts, not when the prisoner recognizes their legal significance.'" Hasan v. Galaza, 254 F.3d 1150, 1154 n.3 (9th Cir. 2000) (quoting Owens v. Boyd, 235 F.3d 356, 359 (7th Cir. 2000)). Section 2244(d)(1)(D) accordingly allows the limitation period to start running at a later date "when the facts on which a federal habeas claim is based would not have been discovered by a duly diligent petitioner." Ybanez v. Johnson, 204 F.3d 645, 646 (5th Cir. 2000) (citation omitted). Courts should be careful not to confuse a petitioner's knowledge of the factual predicate of his claims with the time permitted for gathering evidence in support of the claims: "Section 2244(d)(1)(D) does not convey a statutory right to an extended delay . . . while a habeas petitioner gathers every possible scrap of evidence that might . . . support his claim[s]." Flanagan v. Johnson, 154 F.3d 196, 198-99 (5th Cir. 1998). See, e.g., United States v. Battles, 362 F.3d 1195, 1198 (9th Cir. 2004) (§ 2255 petition) (even though petitioner did not have access to trial transcripts, the facts supporting his claims, which occurred at the time of his conviction, could have been discovered if he "at least consult[ed] his own memory of the trial proceedings;" because he did not do so, he did not exercise due diligence and was not entitled to a delayed start of the limitations period under § 2255(4)).

Here, the factual predicates underlying Petitioner's claim

of ineffective assistance of counsel based on his allegations that counsel coerced him into pleading guilty by telling him that his parents could be incarcerated if he went to trial, that he did not have a viable defense to the murder charge and that counsel failed to file a notice of appeal, were known to him when he plead guilty in 1993 and shortly thereafter. His failure to pursue these claims in a timely manner reflects a lack of due diligence; therefore, he is not entitled to delayed commencement of the statute of limitations with respect to these claims.

Petitioner further argues that he could not have discovered until 2003 the claims that counsel was ineffective for telling him that in ten years he would be released on parole and that the Governor's no-parole policy violated the terms of his plea agreement, because by then ten years had passed since his conviction and he had not been released. Again, however, the factual predicate of Petitioner's ineffective assistance of counsel claim--that counsel told him he would be released on parole in ten years--was known to Petitioner in 1993 and he makes no showing that, based on these facts and the applicable law, with due diligence he could not have discovered that he would not be released on parole automatically after ten years and timely raised his claim in State court.

With respect to Petitioner's no-parole policy claim, he does not provide a date on which the alleged policy went into effect. As noted by Respondent, however, according to Petitioner's own exhibits, parole grants for prisoners with indeterminate life sentences declined sharply starting in 1992,

remained low throughout the rest of the 1990s, and in 1999 the Governor overruled every BPT grant of parole. See Petition, Exh. D at 14. Thus, with due diligence Petitioner could have discovered the possible ramifications of the no-parole policy on his own situation well before 2003. Moreover, although he states that he did not realize the impact of the policy in his case until 2003, Petitioner raised this claim in his last petition to the California Supreme Court, filed on May 30, 2002, which was dismissed by the State court as untimely. Thus, the record does not support his allegation as to when he discovered the factual predicate underlying his claim.[2]

The facts underlying Petitioner's claims were known to him well before he filed his untimely State petition, and his failure to pursue them in a timely manner resulted from a lack of due diligence. Accordingly, he is not entitled to the delayed commencement of the statute of limitations as to these claims.

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[2]The Court distinguishes Petitioner's challenge to the validity of his plea based on the ex post facto application of the Governor's no-parole policy from Petitioner's allegation that he was denied a finding of parole suitability because of the no-parole policy. In his State supreme court habeas petition filed on May 30, 2002, Petitioner alleged that he "recently" was denied parole by the BPT and blamed this on the no-parole policy. He alleges the same in his federal petition, but indicates that he was denied parole in 2003. In neither instance does Petitioner provide any factual background about his hearing, including when or why he was denied parole and whether he challenged the decision through BPT grievance procedures. In short, other than stating conclusorily that he was denied parole because of the no-parole policy, he raises no challenge to the constitutional validity of his hearing. Also, he makes no showing that he has exhausted in State court a challenge to the procedures used at his hearing. Accordingly, the Court does not find that Petitioner has asserted a constitutionally cognizable claim with respect to the BPT finding him unsuitable for parole. If Petitioner wants to raise such a claim in federal court he must first exhaust his State remedies and then file a timely federal petition.

III. Equitable Tolling

The one year limitations period can be equitably tolled because § 2244(d) is a statute of limitations and not a jurisdictional bar. Beeler, 128 F.3d at 1288. "When external forces, rather than a petitioner's lack of diligence, account for the failure to file a timely claim, equitable tolling of the statute of limitations may be appropriate." Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999). Equitable tolling will not be available in most cases because extensions of time should be granted only if "extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." Beeler, 128 F.3d at 1288 (citation and internal quotation marks omitted). The prisoner must show that "the 'extraordinary circumstances' were the cause of his untimeliness." Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003) (citations omitted). The petitioner bears the burden of showing that this "extraordinary exclusion" should apply to him. Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002).

Although Petitioner does not state expressly in his opposition to the motion to dismiss that he is entitled to equitable tolling, he does explain the reasons for his delay. Based on a thorough review of the facts asserted in Petitioner's State and federal petitions and in his opposition to the motion to dismiss the Court concludes that the facts Petitioner alleges do not support equitable tolling. That is, he alleges no facts which show that his failure to raise his claims in State court until more than seven years after his conviction became final was because of circumstances which were beyond his control and which made it impossible to file a

timely federal petition. Neither his indigence, his parents' inability to find counsel for him, nor his trial counsel's refusal to file a notice of appeal (of which Petitioner was aware) constitute the type of extraordinary circumstances beyond his control required for equitable tolling. See Hughes v. Idaho State Bd. of Corrections, 800 F.2d 905, 909 (9th Cir. 1986) (illiteracy of pro se petitioner not sufficient cause to avoid procedural bar); Jihad v. Hvass, 267 F.3d 803, 806 (8th Cir. 2001) (time expended seeking counsel does not warrant equitable tolling); Cantu-Tzin v. Johnson, 162 F.3d 295, 299-300 (5th Cir. 1998) (pro se status during State habeas proceedings did not justify equitable tolling); United States v. Flores, 981 F.2d 231, 236 (5th Cir. 1993) (pro se status, illiteracy, deafness and lack of legal training not external factors excusing abuse of the writ). The Court finds that it would be futile to provide Petitioner leave to amend his petition in order to attempt to claim equitable tolling.

IV. Actual Innocence Exception

Claims which challenge the constitutionality of the length of a sentence are subject to review at any time under the standard of review which allows a federal court to hear the merits of successive, abusive or procedurally defaulted claims if the failure to hear the claims would constitute a miscarriage of justice. See Sawyer v. Whitley, 505 U.S. 333, 330-40 (1992). Under the traditional understanding of habeas corpus, a "miscarriage of justice" occurs whenever a conviction or sentence is secured in violation of a constitutional right. See Smith v. Murray, 477 U.S. 527, 543-44 (1986). However, the Supreme Court limits the "miscarriage of justice" exception to

habeas petitioners who can show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup v. Delo, 513 U.S. 298, 327 (1995); see, e.g., Wildman v. Johnson, 261 F.3d 832, 842-43 (9th Cir. 2001) (petitioner must establish factual innocence in order to show that a fundamental miscarriage of justice would result from application of procedural default). Under this exception, a petitioner may establish a procedural "gateway" permitting review of claims which otherwise would be barred from federal review if he demonstrates "actual innocence." Schlup, 513 U.S. at 316 & n.32.

The Supreme Court has not held that the miscarriage of justice exception applies to petitions which are barred by the one year statute of limitations. However, the Ninth Circuit has raised the possibility that a showing of actual innocence might overcome the timeliness bar. See Majoy v. Roe, 296 F.3d 770, 776-77 (9th Cir. 2002). Even if the miscarriage of justice exception does apply in such cases, Petitioner's allegations come nowhere near establishing that the exception applies to him. The actual innocence exception applies only if the petitioner presents evidence which creates a colorable claim of actual innocence, that is, that the petitioner is factually innocent of the charge for which he is incarcerated as opposed to legally innocent as a result of legal error. Schlup, 513 U.S. at 321; see Bousley v. United States, 523 U.S. 614, 623-24 (1998) (actual innocence means factual innocence, not merely legal insufficiency).

Petitioner initially was charged with first degree murder and later plead guilty to second degree murder. He argues that

he is not guilty of second degree murder, however, because he did not possess the requisite intent. But at no point does he make a showing that he is factually innocent of the crime of murder. The miscarriage of justice exception is not applicable. Accordingly, Petitioner is not entitled to review of his petition under the actual innocence exception.

CONCLUSION

For the foregoing reasons, the Court GRANTS Respondent's motion to dismiss the petition as untimely; the petition hereby is DISMISSED with prejudice. The Clerk of the Court shall terminate all pending motions and shall enter judgment and close the file.

IT IS SO ORDERED.

DATED: 9/6/05

/s/ CLAUDIA WILKEN

CLAUDIA WILKEN
United States District Judge