No. 99-55000

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANTHONY BURTON,

Petitioner-Appellant,

v.

J.W. FAIRMAN, Warden, et al.,

Respondents-Appellees.

SUPPLEMENTAL BRIEF FOR PETITIONER-APPELLANT IN RESPONSE TO THE TWO ADDITIONAL QUESTIONS CERTIFIED IN THE COURT'S ORDER OF JANUARY 9, 2001

Appeal from the United States District Court for the
Central District of California (CV 98-3915-ABC (SH)
The Honorable Audrey B. Collins, District Judge

CHARLES D. WEISSELBERG (# 105015)
CENTER FOR CLINICAL EDUCATION
University of California
School of Law (Boalt Hall)
Berkeley, CA 94720-7200
Telephone: 510-643-8159
Facsimile: 510-642-3856

GEORGE A. CUMMING, JR. (#40743)
KIRSTIN E. WOLF (#203488)
BROBECK, PHLEGER & HARRISON LLP
One Market, Spear Street Tower
San Francisco, California 94105
Telephone: 415-442-1198
Facsimile: 415-442-1010

On the Brief:
Khari Tillery
Law Student Intern

Attorneys for Petitioner-Appellant Anthony Burton

TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 5

A. Petitioner Filed his Federal Habeas Corpus Petition Within the Limitations Period Under 28 U.S.C. § 2244(d)(1)(D) 5

B. Equitable and Statutory Tolling of the Limitations Period Also Make the Petition Timely 9

CONCLUSION 15

INDEX OF AUTHORITIES

Page

Cases

Anthony v. Cambra, 236 F.3d 568 (9th Cir. 2000) 3, 12

Calderon v. District Court (Beeler), 128 F.3d 1283 (9th Cir. 1997)..... passim

Calderon v. United States District Court (Kelly), 163 F.3d 530 (9th Cir. 1998) (*en banc*), *cert. denied*, 526 U.S. 1060 (1999) 3, 5, 14

Easterwood v. Champion, 213 F.3d 1321 (10th Cir. 2000)..... 2, 11

Gilles v. Department of Human Resources Development, 11 Cal.3d 313, 113 Cal.Rptr. 374 (1974) 10

Mt. Hood Stages v. Greyhound Corp., 616 F.2d 394 (9th Cir. 1980)..... 13

Nino v. Galaza, 183 F.3d 1003 (9th Cir. 1999)..... 3, 6

People v. Duvall, 9 Cal. 4th 464, 37 Cal. Rptr. 2d 259 (1995) 1, 5, 6

Safford v. Newland, 224 F.3d 1087 (9th Cir. 2000)..... 3

Schlup v. Delo, 513 U.S. 298 (1995)..... 14

Whalem/Hunt v. Early, 233 F.2d 1146 (9th Cir. 2000) (*en banc*)..... 13, 14

Statutes and Rules

28 U.S.C. § 2244(d) (Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)) ..... passim

28 U.S.C. § 2254(e)(2)..... 7

CAL. RULES OF COURT Rule 2(a)..... 11

F.R.Civ.P. 15(c)..... 3, 12

F.R.Civ.P. 81(a)(2) 12

Other Authorities

BLACKS LAW DICTIONARY (6th ed.).....10

INTRODUCTION

This Supplemental Brief is submitted in response to the two additional questions certified by the Court in its Order of January 9, 2001. Before addressing each specific question in turn, a few general observations may be useful.

1. Everyone knows that in ordinary civil litigation, a lawyer can "beat the clock" of limitations by filing a bare-bones complaint and supplementing it later. In habeas jurisprudence, however, courts demand considerably "more"—a detailed, meaningful petition that will significantly aid the process of prompt and full adjudication. At the state level, California itself insists that the initial petition must

> "(i) state fully and with particularity the facts on which relief is sought, … as well as (ii) include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations.… Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing." (*People v. Duvall*, 9 Cal. 4th 464, 474, 37 Cal. Rptr. 2d 259, 265 (1995) (internal citations omitted)).

When it comes their turn, federal district courts demand *both* a showing of meaningful exhaustion of state remedies as a condition precedent, *and* a petition similarly containing the detailed allegations and information necessary to prompt adjudication. Often, *pro se* petitions must be submitted on lengthy, court-prescribed forms, such as that filed below by petitioner-appellant Anthony Burton. *See* ER. 11-20.[1] Any interpretation of AEDPA's limitations provisions that provokes the filing of vacuous, "beat the clock" protective state or federal habeas petitions therefore has nothing to recommend it.

---

[1] We cite the record as in our Opening and Reply briefs previously submitted. The full text of the relevant section of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(d), appears in the Statutory Addendum to our Opening Brief.

2. AEDPA was adopted primarily to curtail delays of the "old regime," during which "state prisoners had almost unfettered discretion in deciding when to file a federal habeas petition." *Calderon v. District Court (Beeler)*, 128 F.3d 1283, 1286-87 (9th Cir. 1997). The present case, however, is different in many respects, for it is neither a troublesome "second or successive petition," nor one in which the petitioner ignored his obligations to proceed with dispatch under the circumstances with which he was confronted. To the contrary, in subpart (D) of the statute, Congress expressly recognized that there are occasional instances in which the petition will be based upon "later discovered" evidence not available at trial, which a prisoner may be unable to present to a court until years after his conviction. Accordingly, the limitations period does not begin to run until "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). In this setting, a crabbed construction of the statute—particularly one that ignores the practical " reality of the prison system," *Easterwood v. Champion*, 213 F.3d 1321, 1323 (10th Cir. 2000)—works against the larger goals of assuring that the state-court habeas petition performs its essential exhaustion function, and that the federal petition—if one is needed—will lead to a prompt and meaningful adjudication of the claims presented.

3. Many of these ideas inform this Court's AEDPA jurisprudence, in which it has consistently rejected the invitation to stand on ceremony, rather than substance. In *Beeler, supra*, the prisoner's appointed counsel had to withdraw before completing the petition. Because this was "a turn of events over which Beeler had no control," the Court had no difficulty approving a six-month extension of time for substituted counsel to file the petition, saying that these were "extraordinary circumstance which

justified tolling." *Id*., 128 F.3d at 1289 (internal citation omitted). In *Calderon v. United States District Court (Kelly)*, 163 F.3d 530, 537-38 (9th Cir. 1998) (*en banc*), *cert. denied*, 526 U.S. 1060 (1999), the Court went further, and held that a case is "pending" under AEDPA upon the filing of a petition for appointment of counsel, and that the petition counsel filed years later was nonetheless timely. Similarly, in *Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999), and in *Safford v. Newland*, 224 F.3d 1087 (9th Cir. 2000), the Court held that a collateral relief effort is "pending" in the state courts during the entire time that a prisoner is seeking such relief. It refused to "count against" the prisoner the intervening days between denial of his petition by one state tribunal, and its filing in the next-higher state court. The Court emphasized that this was a "sensible construction of AEDPA's requirements" that "reinforces the orderly presentation of claims to the appropriate state tribunals." *Nino*, 183 F.3d at 1005. And, in *Anthony v. Cambra*, 236 F.3d 568 (9th Cir. 2000), the Court broadly construed F.R.Civ.P. Rule 15(c)'s "relation-back" language to reach a conclusion that claims were not time-barred under the AEDPA. These decisions recognize that, as a "run-of-the-mill statute of limitations," AEDPA is informed by ideas and precedents that eschew standing on ceremony (*Beeler, supra*, 128 F.3d at 1288), and that allowing reasonable room for play in the joints is appropriate and preferable to a "gotcha" approach.

4. The case at bench is another illustration of the need for informed, sensible jurisprudence, for it arises under subpart "(D)" of §2244(d)(1), and presents claims of actual innocence, prosecutorial misconduct and ineffective assistance of counsel, each flowing from belated discovery of evidence of treachery committed years ago. Following receipt of Ronald Washington's 1995 letter of recantation, Anthony Burton

and his wife consulted a California judge , who urged them to seek counsel to "begin an investigation with a view to determining if it would be appropriate to seek" post conviction relief. ER. 180. Mr. and Mrs. Burton followed that advice, and after months of searching, finally found a lawyer (James Farley) willing to handle the mater *pro bono.* He investigated the case, engaged a *pro bono* investigator (William Kurta) to interview Ronald at Tehachapi prison, and then engaged a *pro bono* handwriting expert (Richard Fox), whose November 19, 1996 report (ER. 119-46) established that the original letter of recantation was, in fact, signed by Ronald Washington. Attorney Farley then prepared and presented a meaningful habeas petition to the Supreme Court of California. *See* Pet. Opening Br. at 6-12.[2] This is precisely the kind of behavior that the law should encourage, not sanction, as did the district court here.

After denial of the state court petition, Mr. Burton's counsel had to withdraw because, like many state-court practitioners, he had a heavy trial case load, and was unfamiliar with federal habeas procedures. ER. 008. This left Mr. Burton in the same unenviable position as the prisoner faced in *Beeler, supra.*. He had no counsel, and no meaningful access to prison law library facilities, and the prescription of the new AEDPA statute was running against him. Yet, Mr. and Mrs. Burton prepared and filed the habeas petition below on May 19, 1998, less than two months after Mr. Burton learned of the state court's denial and his counsel's inability to assist him further. ER. 001, 007-09.

Moreover, the federal petition was vastly more thorough than any vacuous, "beat the clock" pleading—including an application for appointment of counsel that,

---

[2] For the convenience of the Court, we list all of the dates discussed in this brief, and in our prior briefs, in an "Appendix A—Timeline" printed following the signature page, *post.*

under *Beeler* and *Kelly*, might well have overcome petitioner's limitations predicament. Under these circumstances, Petitioner's actions were faultless and to be encouraged, and not the dilatory behavior to which AEDPA is addressed. It is with these ideas in mind that we now answer the two additional questions certified in the Court's order of January 9, 2001.

ARGUMENT

A. Petitioner Filed his Federal Habeas Corpus Petition Within the Limitations Period Under 28 U.S.C. § 2244(d)(1)(D)

As we explained in our Opening Brief (at 42-46) this case primarily implicates the "factual predicate" date under Section 2241(d)(1)(D). Adopting the Magistrate's report, the district court held that Robin Burton's receipt of the 1995 letter from Ronald—whose evidentiary value the court then denigrated as "not addressed to anyone" and signed only by a "Ronald W"—was nevertheless the "date on which the factual predicate of the claim was discovered." ER. 103, n.5. This Court reviews de novo a dismissal on grounds that a federal habeas petition is barred by AEDPA's one-year statute of limitations (*Saffold v. Newland, supra*, 224 F.3d at 1089 n. 2), but we have found no decisions squarely defining "factual predicate" for purposes of subpart (D). We therefore submit that

- The "factual predicate" date is the date on which the prisoner has evidence in hand to permit the filing of a non-frivolous, state habeas corpus petition that satisfies the rigorous pleading obligations that California demands (see *People v. Duvall, supra*); and

- In this case, the factual predicate date was November 19, 1996, when the pro bono handwriting expert (Richard Fox) presented his report that the author of "Ronald W's" 1995 letter was Ronald Washington. (ER. 118-146).

This view of "factual predicate" provides a "sensible construction of AEDPA's requirements," *Nino v. Galaza, supra*, 183 F.3d at 1005, because it is both consistent with a number of considerations relevant to habeas jurisprudence, and provides a reasonable bright-line rule for district courts to administer.

1. Comity and Exhaustion: The exhaustion requirement rests on important principles of state-federal comity, which at bottom are meant to allow state courts a full opportunity to consider a prisoner's petition before a federal court may intervene. If the State insists—as does California—that a prisoner petition must include as much detail and admissible evidence as possible, it is simply not appropriate for the State to then turn around and argue that AEDPA begins to "run" from the date on which the petitioner first receives information that would not support a petition—and would lead to its summary denial—under the *Duvall* standards. Here, "a contrary construction would be antithetical to the entire theory of state remedy exhaustion and would inevitably lead to the filing of protective federal petitions." *Nino v. Galaza, supra*, 183 F.3d at 1005.

2. Meaningful Pleadings: At both state and federal levels, there are strong jurisprudential reasons for insisting upon a meaningful first petition, and equally strong reasons not to encourage the filing of bare-bones, "beat the clock" petitions. AEDPA should be interpreted consistent with these considerations. It is one thing to say that the new statute curtails the extremes of a regime that allowed prisoners to game the system with "almost unfettered discretion in deciding when to file a federal habeas petition,"(*Beeler, supra*, 128 F.3d at 1286), but quite another to then construe the statutory words intended to accommodate the realities of "late accruing" claims in a way that ignores those realities. Least of all is it appropriate to do so in the case now

at bench, where the record discloses not a scintilla of "unfettered" dilatory behavior.[3] Here, petitioner's former state court counsel diligently pursued and obtained the very kind of evidence our system demands, yet now we are told that this was a labor to no purpose because the claims were "discovered" upon the bare receipt of a letter that the State now disdainfully labels "an undated, unaddressed, unsworn, almost unintelligible letter purportedly written by Ronald." *See* ER. 169. Simply put, if "purportedly" won't suffice, then there must be reasonable statutory accommodation of the need to establish the letter's authorship and veracity, particularly where this and other meaningful evidence of petitioner's claims are in the hands of those not predisposed to reveal it.

3. Avoidance of "Catch-22" Dilemmas: Requiring Mr. Burton to go forward on the basis of an unauthenticated letter would have forced him into another dilemma. With two narrow exceptions, 28 U.S.C. § 2254(e)(2) forbids an evidentiary hearing in federal court "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings…." Had Mr. Burton filed a habeas petition in state court using the unauthenticated letter, and had the petition been dismissed without a hearing, a federal court might fault him for not developing a factual basis for the claim in state court. Congress could not have meant to place habeas corpus petitioners in such an untenable position, trying to juggle the requirements of state pleading and

---

[3] Indeed, crabbed interpretation of the AEDPA's limitations proviso may well produce the very delays that habeas jurisprudence ought to avoid. This case is a quintessential example. Anthony Burton filed his federal petition May 19, 1998, less than two months after his state court counsel withdrew. If viewed as timely, this *pro se* petition—vastly more informative than most—would have led to the appointment of counsel, an evidentiary hearing, and prompt resolution of the merits of the serious claims presented. Instead, the District Court labored for six months to find a way to declare it 25 days "late" under AEDPA (ER.105), and we are now well past two years of the appellate process of reviewing that determination.

evidentiary requirements without losing the opportunity to have their claims adjudicated in federal court.

4. Statutory Construction: Although undefined by Congress, the words "factual predicate" plainly denote something well beyond a single, isolated "fact," particularly if that "fact" (Ronald's letter) is inadmissible, and cannot support a claim without further investigation and discovery. Here, the Magistrate read "factual predicate" essentially as meaning "any fact that might lead to the discovery of admissible evidence." Respectfully, if Congress had intended this result, it would have said so in plain English.

As well, the Magistrate's approach essentially reads out of the statute the words "could have been discovered through the exercise of due diligence." If the receipt of a letter, or a jailhouse rumor, triggered the running of the statute, there would be no occasion to inquire into "diligence." Either Robin Burton received Ronald's letter, or she did not, and if she did not, it would be rather pointless to inquire whether she could have received it sooner "in the exercise of due diligence." Therefore, the obvious purpose of the "diligence" requirement is to deal with situations in which a prisoner does receive information worthy of investigation, but then unaccountably fails to pursue it. Had Anthony Burton done nothing following his wife's receipt of Ronald's letter — ignoring the California Judge's advice to find a lawyer and have the lawyer investigate the matter (ER. 180) — then there might be room to argue that the failure to interview Ronald, and the failure to obtain expert handwriting analysis, bears upon the statutory question of when the factual predicate "could have been discovered" had Mr. Burton acted diligently. Here, of course, the State has never claimed, and the record will not support any claim, that Mr. Burton failed to discharge

his obligation to diligently pursue the lead of Ronald's letter to gather the admissible evidence needed to support a well-pleaded state habeas petition, and a federal one thereafter.

For all these reasons, we respectfully submit that the petition below was timely under the "factual predicate" subpart—2244(d)(1)(D)—of the AEDPA.

B. Equitable and Statutory Tolling of the Limitations Period Also Make the Petition Timely

If the Court agrees with our submission that AEDPA began to run on November 19, 1996 (the date of handwriting expert Fox's report) then the petition was timely, and it need not consider any "tolling" considerations. If the Court does not agree, however, the "factual predicate" date could not be any earlier than May 22, 1996, when Investigator Kurta interviewed Ronald Washington, or else inmates will be forced to file state habeas corpus petitions whenever they merely surmise or suspect any facts to support a constitutional claim. If May 22, 1996 is the "factual predicate" date,[4] then it is necessary to consider whether there was tolling between the date of the California Supreme Court's denial of the petition—January 14, 1998—and the date on which the district court found that Mr. Burton first received notice of that decision—

---

[4] We do not think it would be proper to use the date of Investigator Kurta's interview of Ronald Washington in prison (May 22, 1996; ER 115-17) as the "factual predicate" date for AEDPA purposes. Ronald acknowledged the accuracy of some of the statements in his letter, but did not admit to its authorship, and expressed cold feet about assisting petitioner. As Kurta explained in his report, "Throughout the interview, it was obvious that the way Washington was telling it he was the actual shooter but is not going to say so as he believes that he would then be charged with the murder." (ER 116). However well-founded, this conclusion might be inadmissible; hence, Investigator Kurta wisely obtained a handwriting sample from Ronald, and this was submitted to expert Fox on July 5, 1996. (ER 119). The Fox report of November 19, 1998 thus established the solid evidentiary basis for the state petition, and the petition below. ER. 118-46.

March 21, 1998. If this period is tolled, then Mr. Burton would have had 62 days after March 21 in which to file his federal habeas corpus petition. The petition was filed on May 19, the 59th day. There are five grounds upon which the Court can comfortably find tolling during this short period.

First, the period until March 21, when Mr. Burton received notice of the court's ruling, should be equitably tolled. "Equitable" tolling invokes the classic office of chancery to administer justice according to fairness, "as contrasted with the strictly-formulated … harsh rules of common law." BLACKS LAW DICTIONARY (6th ed.) at 540; *see also Gilles v. Department of Human Resources Development*, 11 Cal.3d 313, 322, 113 Cal.Rptr. 374 (1974) (equitable considerations eschew "channeliz[ing] ... within rigid and specific rules.") Mr. Burton was represented by counsel, who failed to tell him of the ruling until March 21. ER. 008, 102. A habeas corpus petitioner represented by counsel must be able to rely upon the lawyer to inform him of decisions in his case. Any contrary rule would lead to daily collect telephone calls from prisons to the state courts and to inmates' attorneys, which is not behavior this Court should intentionally provoke. Just as in *Beeler*, where counsel's withdrawal led this Court to equitably toll the statute of limitations, here counsel's failure to tell his client of the court's ruling ought in no way to be attributed to Mr. Burton. And exacerbating counsel's failure is that Mr. Burton was repeatedly transferred during this critical period, and did not have regular access to the phones. ER. 7. Equitably tolling this short period would "do justice." [5]

---

[5] Moreover, if a case is deemed pending in the state court until the prisoner receives actual notice of denial, the State can start the clock running by the simple expedient of notifying the prisoner immediately, and advising how much time remains under AEDPA. The State wishes to take forceful advantage of a limitations statute that may often require prisoners "to investigate, prepare and file a petition in however

Second, statutory "tolling" is available, because the AEDPA itself expressly provides for tolling during the period in which Mr. Burton's state-court petition was "pending" in the state court. 28 U.S.C. § 2244(d)(2). It would do no violence to any principle reflected in AEDPA to hold that a state petition is "pending" until the prisoner is informed of its of its denial. In a somewhat analogous setting, the Tenth Circuit held that where a court decision is the basis for a prisoner's federal claim, AEDPA runs from the date on which the decision was first available in the prison library, not the date on which the decision was filed. *See Easterwood v. Champion*, *supra*, 213 F.3d at 1323 (any other result "simply ignores the reality of the prison system.").

Third, because Anthony Burton was without counsel or library access in the weeks after he learned that the state court had denied his petition, he had no way of knowing that the sand of AEDPA's hourglass had nearly run. Nor could he have discovered prior to March 21 that, by seeking appointment of counsel, the prior year's decision in *Beeler* might have obviated the dilemma. It is therefore appropriate to revisit *Beeler*, *supra*, which held that the loss of appointed counsel was an "extraordinary circumstance[] which justified tolling." *Beeler*, 128 F.3d at 1289. It is a matter of judicial notice that volunteer counsel familiar with both state *and* federal habeas jurisprudence are difficult to find. It is perverse under these circumstances to sanction a prisoner who files his own petition promptly, instead of delaying the

---

much time remained—perhaps as little as one day." *Beeler*, *supra*., 128 F.3d at 1287. It is certainly not inequitable to require the State to give notice, for it knows precisely where even a frequently-transferred inmate is located, and how many days remain under AEDPA. *Cf.*, CAL. RULES OF COURT Rule 2(a), which permits a litigant to halve his adversary's time to file a notice of appeal by serving upon his adversary written notice of the entry of judgment.

petition by asking the district court, under *Beeler* and *Kelly*, to appoint counsel for him. Equitable tolling would both accommodate this reality and administer justice fairly.

Fourth, in *Anthony v. Cambra, supra*, this Court refused the State's invitation to hold that allegations contained in an amended federal petition were untimely under AEDPA. It held that "relation-back" to the original federal petition was appropriate under F.R.Civ.P. Rule 15(c). The Court held that no legitimate state interest would be compromised by allowing relation-back, because "the state clearly had prior notice of the claims and Anthony's intention to raise them at the earliest possible time." *Id*. 236 F.3d at 577. The Court further noted "no inconsistency between AEDPA's statute of limitations and Rule 15(c)'s amendment regime where, as here, the state is on notice of the claims to be raised." *Id*. at 576.

In rejecting Mr. Burton's plea for tolling on the basis of lack of prison library facilities, the Magistrate below observed that "*the claims petitioner is seeking to raise in the instant Petition are the same claims petitioner raised before the California Supreme Court.*" ER. 102. But as we have already said in our Opening Brief (at 22), this assertion proves to much, for it shows that the statute's object of providing prompt notice to the State was completely fulfilled by the filing of Mr. Burton's state court petition in 1997. If "relation-back" is not technically available under F.R.Civ.P. 15(c), still its application as an equitable principle would neither defeat any legitimate interest of the State, nor be inconsistent with F.R.Civ.P. 81(a)(2), which provides that the Rules of Civil Procedure are applicable to habeas corpus proceedings to the extent not otherwise described by statute." Permitting equitable tolling in this setting would result in an outcome quite like that approved in *Mt. Hood Stages v. Greyhound Corp.*,

616 F.2d 394, 400-01 (9th Cir. 1980) (complaint filed in the district court after the plaintiff first exhausted its administrative remedies is timely under the statute of limitations, because the administrative agency petition gave the defendant ample notice and an opportunity to muster its defenses).

Fifth, in *Whalem/Hunt v. Early*, 233 F.2d 1146, 1148 (9th Cir. 2000) (*en banc*), this Court held that the lack of meaningful access to library resources may excuse a petition otherwise untimely under AEDPA, either as an "impediment" to filing sooner (28 U.S.C. § 2244(d)(1)(B)), or under equitable tolling. It remanded that case for further factual development, but here, we believe the record supports a finding of timeliness on either or both grounds discussed in *Whalem/Hunt.* On March 22, 1998—one day after he learned that his state habeas petition had been denied, and that his prior counsel (Mr. Farley) could not assist him in preparing a federal petition (ER. 008)—Anthony Burton requested that the Corcoran prison library provide him suitable federal reference books and the form of petition required by the district court. He was informed that the books he wanted were not available, and no forms were provided to him, necessitating his wife's having to obtain them from the district court herself. *Id*. The State's prison librarian told Mr. Burton that all of his requests for assistance were given low priority because he had no "verifiable court deadline" (ER. 49) even though, as we now know, the State knew full well that he did have a deadline under AEDPA. For the Court's convenience, portions of these documents (filed with the Respondent's Reply to Opp. to Report and Recommendation. Dkt #23) are appended to this brief as Appendix B.

Moreover, the State now admits that during this entire period, there were serious deficiencies in the Corcoran library procedures: As the prison staff acknow-

ledged a few months later, the federal habeas reference books requested by Mr. Burton "were not and still are not available. The new edition has been ordered." App. B, p. 2. As well, there was a "long wait period for responses from the library;" there was "a problem with the mail system;" and "every department was" — and still is — "shortstaffed." There were also "regrettable surroundings in the library," and these were all "circumstances ... often not conducive to such provision" of library materials. App. B, p. 7.

The Magistrate below dismissed this evidence primarily on the "ground" that because Mr. Burton largely had to recycle his state petition as his federal petition, the "lack of access to the prison law library " was irrelevant. ER 102. But that is not the whole of it at all. Without library access, Mr. Burton could not have known of the rapidly approaching AEDPA deadline, much less that under *Beeler* or *Kelly, supra,* application to the district court for appointment of counsel might have alleviated the problem he did not even know he faced.[6] As Judge Tashima explained in his concurring opinion in *Whalem/Hunt, supra*:

> "A prisoner acting pro se can be prevented from discovering the most basic procedural rules essential to avoid being summarily thrown out of court, even if the claims alleged in the petition are meritorious, well-drafted, and supported by every pertinent citation entitling him to relief on the merits. A petitioner's knowledge of the legal basis of his claims is not the same as knowledge of the procedural rules that must be complied with in order to get a hearing on the merits. The fact that, like a broken clock, a petitioner who has no way of learning the limitations period may nonetheless be timely occasionally is not pertinent to determining whether there is an 'impediment' (under the statute) or an 'extraordinary

[6] Similarly, petitioner might have discovered that, under *Schlup v. Delo*, 513 U.S. 298 (1995), his claims of actual innocence could be a basis for persuading the district court to deny the State's "untimeliness" position. Indeed, there is rich irony here, for the district court itself was evidently unaware of *Schlup*, and its failure to consider *Schlup* was what predicated the two questions certified by this Court in the original COA issued by its motions panel.

> circumstance' (under our equitable tolling cases) because of the inability to learn and be guided by such critically important procedural rules as the governing limitations period. The legal standard applied by the magistrate judge and adopted by the district court in judging the timeliness issue was, therefore, erroneous." (*Id*., 233 F.3d at 1148-49 (Tashima, J., concurring) (internal citation omitted)).

Respectfully, this Court can and should find either "impediment" or "equitable tolling" here, under application of the principles just quoted.

CONCLUSION

The judgment below, dismissing the petition with prejudice, should be reversed. The petition was timely filed, and the case should be remanded for a hearing on the merits of the claims presented in the petition. Alternatively, the cause should be remanded for a hearing on both factual innocence and the merits of the petition.

DATED: February 12, 2000

Respectfully submitted,

GEORGE A. CUMMING, JR.
KIRSTIN E. WOLF
BROBECK, PHLEGER & HARRISON LLP

CHARLES D. WEISSELBERG
CENTER FOR CLINICAL EDUCATION

By _____
George A. Cumming, Jr.

Attorneys for Petitioner-Appellant Anthony Burton

On the Brief:
Khari Tillery
Law Student Intern
Boalt Hal

APPENDIX A — TIMELINE

- **c. August 1995** — Robin Burton receives Ronald's letter, recanting his trial testimony against her husband, Anthony. (ER 109-10) This is the letter that the State has consistently called "*an undated, unaddressed, unsworn, almost unintelligible letter, purportedly written by Ronald.*" ER. 169; Appellee's Br. at 36.

- **August 15, 1995** — Los Angeles County Superior Court Judge Theodore Piatt advises Robin Burton to "seek counsel" and have counsel begin an investigation" to determine "if it would be appropriate" to seek judicial relief. "A judge would simply not have the jurisdiction to act on your request without the assistance of attorneys." ER. 180.

- **Late 1995 or Early 1996** — Attorney James Farley agrees to represent Anthony Burton *pro bono*, and commences his investigation of the court records and other particulars of the case. Later, he persuades Investigator William Kurta and Handwriting Expert Richard Fox to assist him, also on a *pro bono* basis. ER. 161.

- **April 24, 1996** — AEDPA enacted

- **May 22, 1996** — Investigator Kurta interviews Ronald Washington at Tehachapi Prison. Ronald confirms some of the information in his 1995 letter, but expresses cold feet toward assisting Mr. Burton, lest Ronald be charged with the murder. Investigator Kurta therefore obtains a handwriting sample from Ronald. ER. 115-17.

- **July 5, 1996** — Handwriting expert Richard Fox begins his work on the case. ER. 118, ¶ 5; ER. 161.

- **July 12, 1996** — Ronald mails a "cold feet" letter to Robin Burton. The postmark date is July 12, 1996. ER. 119 ¶¶ 15, 15; ER. 144-46.

- **November 19, 1996** — Handwriting expert Fox submits his written report, confirming the authenticity of Ronald's original letter of recantation. ER. 119 ¶ 17; ER. 120.

- **March 21, 1997** Attorney Farley files a lengthy and detailed habeas petition, accompanied by seven volumes of declarations and exhibits, with the California Supreme Court. These include the letters written by Ronald Washington, and the reports of Investigator Kurta and handwriting expert Fox.

- **Jan. 14, 1998** "Petition for writ of habeas corpus DENIED. /s/ George, C.J." ER. 179.

- **February - March 1998** Anthony Burton is transferred from Folsom to Corcoran prison. He is without telephone access and unable to advise his family or his attorney of his new whereabouts for approximately 3 weeks. ER. 007.

- **March 21, 1998** Anthony Burton is notified by his wife of the state Supreme Court's denial of his petition. He later contacts the office of Attorney Farley, and is advised that Mr. Farley "could not represent him on the Federal Level as he is not familiar with Federal Procedure and due to his trial case load." ER. 008.

- **March 22, 1998** Anthony Burton requests federal habeas research materials, and the petition form prescribed by the federal court in Los Angeles, from the prison law library at Corcoran. Inmate/Parolee Appeal Form, Dkt. #23 (*see* Appendix B, p. 6).

- **March 31, 1998** The Prison's librarian advises Mr. Burton only that "we don't have the prisoner's handbook." *Id.*

- **February-May 1998** Corcoran prison staff acknowledges that throughout this period, "there was a long wait period for responses from the library;" that "there was a problem with the mail system;" that "every department was shortstaffed"; that there were "regrettable surroundings" in the library"; and that the "circumstances are often not conducive to such provision" of library materials. (*Id.*, p. 7). As well, the library staff advised petitioner that his requests were given low priority because he had no "verifiable court deadline." ER. 49.

- **May 18, 1998** Mr. Burton, with his wife's assistance, completes and files his federal petition in the Court below.

APPENDIX B – DOCUMENTS ESTABLISHING UNAVAILABILITY OF LEGAL MATERIALS (FILED WITH RESPONDENT'S REPLY, DKT. # 23)

PROOF OF SERVICE BY OVERNIGHT COURIER (FEDERAL EXPRESS)

I am employed in the City and County of San Francisco, State of California. I am over the age of 18 years and not a party to the within action. My business address is Brobeck, Phleger & Harrison LLP, Spear Street Tower, One Market Plaza, San Francisco, California 94105. a Federal Express office is located downstairs in this same building

On February 12, 2001, I served two copies of the

SUPPLEMENTAL BRIEF FOR PETITIONER-APPELLANT IN RESPONSE TO THE TWO ADDITIONAL QUESTIONS CERTIFIED IN THE COURT'S ORDER OF JANUARY 9, 2001

on the parties in this action by placing them in a sealed envelope, addressed as follows:

William H. Davis, Jr., Esq.
Deputy Attorney General
State of California
300 South Spring Street
Los Angeles, CA 90013

I placed each such sealed envelope, with charges fully prepaid for express, overnight delivery by Federal Express, for collection and mailing at Brobeck, Phleger & Harrison LLP, San Francisco, California, following ordinary business practices. I am readily familiar with Brobeck, Phleger & Harrison LLP's practice for collecting and processing of correspondence, said practice being that in the ordinary course of business, correspondence (with Federal Express charges thereon fully prepaid) is delivered to a Federal Express office located in our building the same day as it is placed for collection.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on February 12, 2001 at San Francisco, California.

_____
Lynda Rosenblatt