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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRYANT KEITH BROWN,

Petitioner,

No. 2:10-cv2040 MCE KJN P

vs.

WARDEN,

Respondent.

FINDINGS & RECOMMENDATIONS

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I. Introduction

Petitioner is a state prisoner proceeding without counsel with an application for petition of writ of habeas corpus pursuant to 28 U.S.C. § 2254. Presently pending before the court is respondent’s motion to dismiss this action as barred by the statute of limitations. Petitioner filed a timely opposition; respondent did not file a reply. As explained more fully below, after careful review of the record, the court finds respondent’s motion should be granted and this action be dismissed.

II. Legal Standards

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act (“AEDPA”) was enacted. Section 2244(d)(1) of Title 8 of the United States Code provides:

A 1-year period of limitation shall apply to an application for a writ

1 of habeas corpus by a person in custody pursuant to the judgment  
2 of a State court. The limitation period shall run from the latest of –

3 (A) the date on which the judgment became final by the conclusion  
4 of direct review or the expiration of the time for seeking such  
5 review;

6 (B) the date on which the impediment to filing an application  
7 created by State action in violation of the Constitution or laws of  
8 the United States is removed, if the applicant was prevented from  
9 filing by such State action;

10 (C) the date on which the constitutional right asserted was initially  
11 recognized by the Supreme Court, if the right has been newly  
12 recognized by the Supreme Court and made retroactively  
13 applicable to cases on collateral review; or

14 (D) the date on which the factual predicate of the claim or claims  
15 presented could have been discovered through the exercise of due  
16 diligence.

17 28 U.S.C. § 2244(d)(1). Section 2244(d)(2) provides that “the time during which a properly filed  
18 application for State post-conviction or other collateral review with respect to the pertinent  
19 judgment or claim is pending shall not be counted toward” the limitations period. 28 U.S.C.  
20 § 2244(d)(2).

### 21 III. Chronology

22 For purposes of the statute of limitations analysis, the relevant chronology of this  
23 case is as follows:

24 1. In 2005, petitioner was convicted of eight counts of second degree robbery, one  
25 count of attempted robbery, personally using a handgun, having previously served five prior  
26 prison terms, and having been convicted of a serious felony that is a “strike” for purposes of  
sentencing under California’s “three strikes law.” (Respondent’s Lodged Document (“LD”) at  
1.) On July 22, 2005, petitioner was sentenced to an indeterminate state prison term of 68 years  
and six months. (LD 2.)

2. Petitioner appealed his sentence. On July 3, 2007, the California Court of  
Appeal, Third Appellate District, affirmed the judgment. (LD 1.)

1           3. Petitioner did not request rehearing in the California Court of Appeal or seek  
2 review by the California Supreme Court.

3           4. On November 6, 2005,<sup>1</sup> petitioner filed his first petition for writ of habeas  
4 corpus in the Sacramento County Superior Court. (LD 3.) The petition was granted<sup>2</sup> on March  
5 23, 2006. (LD 4.)

6           5. On November 13, 2006, petitioner filed his second petition for writ of habeas  
7 corpus in the Sacramento County Superior Court. (LD 5.) The Superior Court denied the  
8 petition on January 18, 2007. (LD 6.)

9           6. On February 22, 2007, petitioner filed his third petition for writ of habeas  
10 corpus in the California Court of Appeal, Third Appellate District. (LD 7.) The Court of Appeal  
11 denied the petition on March 1, 2007. (LD 7.)

12           7. On December 5, 2007, petitioner filed his fourth petition for writ of habeas  
13 corpus in the United States District Court, Eastern District of California. (LD 8.) On April 4,  
14 2008, the petition was denied based on petitioner's failure to exhaust state court remedies. (LD  
15 8.)

16           8. Petitioner filed his fifth petition for writ of habeas corpus in the Sacramento  
17 County Superior Court on March 5, 2008. (LD 9.) The Superior Court denied the petition on  
18 May 1, 2008. (LD 10.) Petitioner filed a motion for reconsideration of the denial in the  
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20           <sup>1</sup> Petitioner has been given the benefit of the mailbox rule for the filing dates of the  
21 petitions for writ of habeas corpus, except for the third, sixth and ninth petitions. Houston v.  
22 Lack, 487 U.S. 266 (1988). Petitioner was not given benefit of the mailbox rule for his third,  
23 sixth and ninth petitions filed in the California Court of Appeal, Third Appellate District. Rule  
24 3(d) of the Federal Rules Governing Section 2254 Cases. Nevertheless, as explained below, the  
few additional days or weeks petitioner might claim in connection with the filing of the third,  
sixth and ninth petitions would not make a difference in the outcome of these findings and  
recommendations.

25           <sup>2</sup> Petitioner was granted relief from the default in filing a late notice of appeal in  
26 Sacramento County Superior Court Case No. 05F01559, and the clerk of the court was directed  
to treat petitioner's November 2, 2005 notice of appeal as having been timely filed, and to  
proceed forthwith. (LD 4.)

1 Sacramento County Superior Court on June 25, 2008. (LD 11.) The motion for reconsideration  
2 was denied on July 7, 2008. (LD 12.)

3 9. On July 10, 2008, petitioner filed his sixth petition for writ of habeas corpus in  
4 the California Court of Appeal, Third Appellate District. (LD 13.) The Court of Appeal denied  
5 the petition on July 17, 2008. (LD 13.)

6 10. On August 13, 2008, petitioner filed his seventh petition for writ of habeas  
7 corpus in the California Supreme Court. (LD 14.) On October 23, 2008, petitioner filed an  
8 amended petition for writ of habeas corpus in the California Supreme Court. (LD 15.) On  
9 February 11, 2009, the California Supreme Court denied the petition, citing In re Swain, 34  
10 Cal.2d 300 (1949). (LD 16.)

11 11. On September 17, 2009, petitioner filed his eighth petition for writ of habeas  
12 corpus in the Sacramento County Superior Court. (LD 17.) On November 9, 2009, the petition  
13 was denied as successive and untimely. (LD 18.) On November 16, 2009, petitioner filed a  
14 motion for reconsideration. (LD 19-20.) On December 2, 2009, the Sacramento County  
15 Superior Court denied the motion for reconsideration, citing In re Robbins, 18 Cal.4th 770, 811-  
16 12 n.32 (1998); In re Clark, 5 Cal.4th 750, 774-75 (1993); and In re Martinez, 46 Cal.4th 945,  
17 950 n.1 (2009). (LD 21.)

18 12. On December 18, 2009, petitioner filed his ninth petition for writ of habeas  
19 corpus in the California Court of Appeal, Third Appellate District. (LD 22.) On January 7,  
20 2010, the Court of Appeal denied the petition. (LD 22.)

21 13. On January 10, 2010, petitioner filed his tenth petition for writ of habeas  
22 corpus in the California Supreme Court. (LD 23.) The California Supreme Court denied the  
23 petition on July 21, 2010, citing In re Robbins, 18 Cal.4th 770, 811-12 n.32 (1998); In re Clark, 5  
24 Cal.4th 750, 774-75 (1993); In re Miller, 17 Cal.2d 734 (1941); and In re Swain, 34 Cal.2d 300  
25 (1949). (LD 24.)

26 14. The instant action was filed on July 26, 2010. (Dkt. No. 1.)

1 IV. Analysis

2 Initially, it appears petitioner does not contend his petition was timely-filed. (Dkt.  
3 No. 12, passim.) Rather, petitioner argues he is actually innocent and therefore he is not subject  
4 to the statute of limitations bar. Therefore, the court will first analyze the timeliness of  
5 petitioner's filing and will then address petitioner's actual innocence claim.

6 On July 3, 2007, the California Court of Appeal, Third Appellate District,  
7 affirmed petitioner's conviction. (LD 1.) When a habeas petitioner does not seek review of a  
8 Court of Appeal decision affirming his conviction, the conviction is final for statute of  
9 limitations purposes forty days after the decision was issued. Waldrip v. Hall, 548 F.3d 729, 735  
10 (9th Cir. 2008); Cal. Ct. R. 8.366(b)(1) & 8.500(e)(1). Because petitioner did not seek review in  
11 the California Supreme Court, his conviction became final on August 13, 2007,<sup>3</sup> forty days after  
12 the July 3, 2007 order by the California Court of Appeal affirming the judgment. The AEDPA  
13 statute of limitations period began to run the following day, on August 14, 2007. Patterson v.  
14 Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001). Absent tolling, petitioner's federal petition was  
15 due on or before August 13, 2008.

16 The limitations period commenced on August 14, 2007. Petitioner's first three  
17 petitions were filed prior to the beginning of the limitations period and therefore do not toll the  
18 statute of limitations period. Waldrip, 548 F.3d at 735.

19 Petitioner's fourth petition, filed in federal court, also does not toll the statute of  
20 limitations because it is not an "application for state post-conviction or other collateral review"  
21 under 28 U.S.C. § 2244(d)(2). Duncan v. Walker, 533 U.S. 167, 181 (2001) (statutory tolling  
22 provision contained in § 2244(d)(2) authorizes tolling while a petitioner is pursuing state, but not  
23 federal, post-conviction remedies).

24 Petitioner's fifth petition, his first filing after the statute of limitations period

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25 <sup>3</sup> Because August 12, 2007, fell on a Sunday, petitioner had until Monday, August 13,  
26 2007, in which to file his federal petition. Fed. R. Civ. P. 6(a)(1)(C).

1 began, was filed in the Sacramento County Superior Court on March 5, 2008. (LD 9.) Between  
2 August 14, 2007, the commencement of the limitations period, and March 5, 2008, the filing of  
3 his superior court petition, 204 days of the 365 day period expired. Respondent does not argue  
4 that the fifth, sixth or seventh state habeas petitions were improperly filed, so petitioner is  
5 entitled to tolling from March 5, 2008, through February 11, 2009, the date the seventh petition  
6 was denied by the California Supreme Court. See Evans v. Chavis, 546 U.S. 189, 191 (2006);  
7 Pace v. DiGuglielmo, 544 U.S. 408, 414 (2005).

8 By February 11, 2009, petitioner had 161 days left in the limitations period to file  
9 his federal petition. Absent further tolling, the statute of limitations period expired on July 22,  
10 2009.

11 Petitioner's next filing, however, was not until his eighth state habeas petition on  
12 September 17, 2009. State habeas petitions filed after the one-year statute of limitations period  
13 has expired do not revive the statute of limitations and have no tolling effect. See Ferguson v.  
14 Palmateer, 321 F.3d 820, 823 (9th Cir. 2003); Jimenez v. Rice, 276 F.3d 478, 482 (9th Cir.  
15 2001). In addition, petitioner is not entitled to statutory tolling for the eighth and subsequent  
16 state court habeas petitions because in pursuing his eighth and subsequent state habeas petitions,  
17 petitioner did not go from a lower state court to a higher state court. See Banjo v. Ayers, 614  
18 F.3d 964, 968 (9th Cir. 2010) ("Only the time period during which a round of habeas review is  
19 pending tolls the statute of limitations; periods between different rounds of collateral attack are  
20 not tolled."); Biggs v. Duncan, 339 F.3d 1045, 1048 (9th Cir. 2003) (finding that petitioner  
21 "kicked off a new round of collateral review" when he filed a non-ascending petition in the  
22 Superior Court and was "no longer pursuing his application for habeas relief up the ladder of the  
23 state court system") Therefore, petitioner's eighth state habeas petition, as well as all his  
24 subsequently-filed habeas petitions, had no effect on the limitations period.

25 The instant petition was not filed until July 26, 2010, over one year after the  
26 statute of limitations period expired on July 22, 2009. Accordingly, this action is time-barred

1 unless petitioner can demonstrate he is entitled to equitable tolling.

2 V. Equitable Tolling

3 The court turns now to the doctrine of equitable tolling. To be entitled to  
4 equitable tolling, petitioner bears the burden of establishing “(1) that he has been pursuing his  
5 rights diligently, and (2) that some extraordinary circumstance stood in his way.” Pace, 544 U.S.  
6 at 418.

7 In his opposition, petitioner failed to address the issue of equitable tolling.  
8 Moreover, given the present record, it is unlikely petitioner can demonstrate he is entitled to  
9 equitable tolling for the period of one year and four days. On March 7, 2008, prior to the July 22,  
10 2009 expiration of the limitations period, petitioner was cautioned that the habeas corpus statute  
11 imposes a one year statute of limitations for filing non-capital habeas corpus petitions in federal  
12 court. Brown v. Felkner, 2:07cv-2649 GEB JFM P, March 7, 2008 Findings and  
13 Recommendations, at 2 n.2 (E.D. Cal.).<sup>4</sup> The court also informed petitioner that his federal  
14 petition was unexhausted because petitioner had failed to present his claims to the California  
15 Supreme Court. Id. at 2. Petitioner diligently pursued his fifth, sixth and seventh state court  
16 petitions, but upon receiving the February 11, 2009 California Supreme Court denial, with 161  
17 days left in the limitations period, petitioner opted to return to the Sacramento County Superior  
18 Court rather than timely file a petition for writ of habeas corpus in federal court. Given the  
19 warnings petitioner was provided long before the statute of limitations period expired, petitioner  
20 has not satisfied his burden of establishing that he acted diligently in filing his federal petition or  
21 that he encountered extraordinary circumstances that prevented him from filing his federal  
22 petition in a timely manner. Therefore, petitioner is not entitled to equitable tolling, and  
23 respondent’s motion to dismiss should be granted as this action is time-barred.

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25 <sup>4</sup> A court may take judicial notice of court records. See MGIC Indem. Co. v. Weisman,  
26 803 F.2d 500, 505 (9th Cir. 1986).

1 VI. Alleged Actual Innocence

2 Finally, petitioner claims he should be excused from the statute of limitations  
3 because he is actually innocent of the underlying offense, relying on Schlup v. Delo, 513 U.S.  
4 298, 314-15 (1995). In Schlup, the Supreme Court held that a habeas petitioner who makes “a  
5 colorable showing of actual innocence” that would implicate a “fundamental miscarriage of  
6 justice” may be entitled to have “otherwise barred constitutional claim[s]” considered on the  
7 merits. Id. In Majoy v. Roe, 296 F.3d 770, 775-76 (9th Cir. 2002), the Ninth Circuit assumed  
8 that a sufficient Schlup showing might overcome the bar of the statute of limitations. However,  
9 in Lee v. Lampert, 610 F.3d 1125, 1136 (9th Cir. 2010), that court joined four other circuits in  
10 holding that “there is no Schlup actual innocence exception to override AEDPA’s statute of  
11 limitations.” Lee, 610 F.3d at 1136. This court is bound by that decision. Therefore, petitioner’s  
12 claim should be denied.

13 For all of the above reasons, IT IS RECOMMENDED that respondent’s October  
14 25, 2010 motion to dismiss (dkt. no. 10) be granted.

15 These findings and recommendations are submitted to the United States District  
16 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-  
17 one days after being served with these findings and recommendations, any party may file written  
18 objections with the court and serve a copy on all parties. Such a document should be captioned  
19 “Objections to Magistrate Judge’s Findings and Recommendations.” If petitioner files  
20 objections, he shall also address whether a certificate of appealability should issue and, if so, why  
21 and as to which issues. A certificate of appealability may issue under 28 U.S.C. § 2253 “only if  
22 the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C.  
23 § 2253(c)(3). Any reply to the objections shall be served and filed within fourteen days after  
24 service of the objections. The parties are advised that failure to file objections within the

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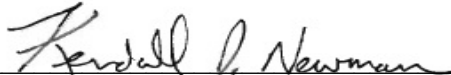
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1 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951  
2 F.2d 1153 (9th Cir. 1991).

3 DATED: December 3, 2010

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KENDALL J. NEWMAN  
UNITED STATES MAGISTRATE JUDGE

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