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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

James William Gates,)
)
Petitioner,)
vs.)
Dora B. Schriro,)
)
Respondent.)

No. CV-06-2251-PHX-PGR (CRP)

ORDER

Having reviewed *de novo* the Report and Recommendation of Magistrate Judge Pyle in light of Petitioner’s Objection to Report and Recommendation of Magistrate Judge (doc. #14) and Respondents’ [sic] Response to Petitioner’s Objection to Report and Recommendation (doc. #15), the Court finds that the petitioner’s objections should be overruled as legally meritless and that the Magistrate Judge correctly determined that the petitioner’s habeas petition, filed pursuant to 28 U.S.C. § 2254, should be dismissed as time-barred.

The Magistrate Judge concluded that the petition was untimely because it was filed after the expiration of the one-year limitations period set forth in 28 U.S.C. § 2244(d)(1)(A).¹ The petitioner, who concedes in his Objection that his

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Section 2244(d)(1)(A), the limitations period normally applied to § 2254

1 petition was untimely if the applicable limitations period is § 2244(d)(1)(A), argues
2 that his petition was timely filed under 28 U.S.C. § 2244(d)(1)(B) or, alternatively,
3 under § 2244(d)(1)(D). The Court disagrees.

4 Pursuant to § 2244(d)(1)(B), the limitations period begins to run from the
5 date any impediment to the filing of the federal habeas petition created by
6 unconstitutional state action is removed. The sole claim raised by the petitioner
7 in this action is that his right to present a defense secured to him by the
8 Fourteenth Amendment's Due Process Clause and the Sixth Amendment's
9 Confrontation Clause was denied when the state trial court precluded him from
10 presenting third party culpability evidence. The petitioner argues that the
11 limitations period began to run anew on May 1, 2002, which is when the Arizona
12 Supreme Court issued its decision in State v. Gibson, 44 P.3d 1001 (Ariz.2002).
13 The petitioner contends that Gibson removed an impediment to the filing of a
14 meritorious federal habeas petition by him, with the impediment being what he
15 conclusorily refers to as Arizona's previous "clearly unconstitutional" ban on the
16 admission of third-party culpability evidence. The Court agrees with the
17 Magistrate Judge that the Gibson case did not remove an "impediment" for
18 purposes of § 2244(d)(1)(B).

19 In Gibson, the Arizona Supreme Court, without citing to any federal
20 precedent or the federal constitution, clarified that the standard for the admission
21 of evidence that a third party committed the crime at issue was not some

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23 petitions, provides that the one-year limitations period begins to run on "the date
24 on which the judgment became final by the conclusion of direct review or the
25 expiration of the time for seeking such review[.]" According to the respondent,
26 the petitioner was required to file his petition no later than April 24, 2002 pursuant
to § 2244(d)(1)(A), but he did not file it until September 19, 2006, approximately
four years and five months late.

1 “inherent tendency” test that lower state courts had gleaned from State v.
2 Fulminante, 778 P.2d 602 (Ariz.1988), but rather that the standard of admissibility
3 was that set forth in Rules 401-403 of the Arizona Rules of Evidence.² As the
4 Magistrate Judge correctly determined, the petitioner’s contention that
5 § 2244(d)(1)(B) is applicable to him as a result of Gibson is foreclosed by
6 Shannon v. Newland, 410 F.3d 1083, 1087-88 (9th Cir.2005), *cert. denied*, 546
7 U.S. 1171 (2006), wherein the Ninth Circuit determined that § 2244(d)(1)(B) did
8 not apply to a state court’s clarification of its own law. In so doing, the Ninth
9 Circuit rejected any construction of § 2244(d)(1)(B) that would provide that
10 “[w]henever a state court clarified its own substantive or procedural law, any
11 prisoner convicted under the understanding of the state’s legal standard or
12 procedure previously prevailing in state courts - no matter how long ago he was
13 convicted - would be free to file a federal habeas petition.” *Id.* at 1088.

14 Notwithstanding the petitioner’s contention that his ability to maintain a
15 “meritorious” habeas case in federal court was stymied by Arizona’s pre-Gibson
16 case law, the Court agrees with the Magistrate Judge that the existence of such
17 case law did not impede the petitioner from actually filing a timely federal habeas
18 petition. *See id.* at 1087-88 (Court noted that no support exists for “the
19 proposition that a state’s determination of its own substantive law in a way that
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22 In Fulminante, the court stated that before a defendant could introduce
23 evidence of third-party culpability, the defendant had to show that the evidence
24 had “an inherent tendency to connect such other person with the actual
25 commission of the crime. Vague grounds of suspicion are not sufficient.” 778
26 P.2d at 617. In Gibson, although the court found that the phrase “inherent
tendency” was “unhelpful” to the determination of the proper admissibility
standard, 44 P.3d at 1004, the court never discussed, much less determined,
whether an “inherent tendency” test was constitutionally infirm.

1 leaves a convict with no meritorious federal claim can constitute an ‘impediment’
2 under § 2244(d)(1)(B)” since the plain meaning of § 2244(d)(1)(B) is that it
3 “applies when a petitioner has been impeded from *filing* a federal habeas
4 petition[,] and that in that case the petitioner “was free to *file*” a habeas petition at
5 any time notwithstanding the existing state law.) (Emphases in original).

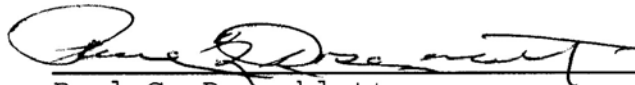
6 Pursuant to § 2244(d)(1)(D), the limitations period may also begin to run
7 from the date on which the factual predicate underlying a claim could have been
8 discovered through the exercise of due diligence. The petitioner alternatively
9 argues that the limitations period began to run from the issuance of the Gibson
10 decision “under the equitable tolling principles codified in 28 U.S. § 2254(d)(1)(D)”
11 because that decision served as the factual predicate for his federal constitutional
12 claim. The Court agrees with the Magistrate Judge that this argument is also
13 foreclosed by Shannon v. Newland, as the Ninth Circuit concluded therein that “a
14 state-court decision establishing an abstract proposition of law arguably helpful to
15 the petitioner’s claim does not constitute the ‘factual predicate’ for that claim” for
16 purposes of § 2244(d)(1)(D). 410 F.3d at 1089. As the Ninth Circuit noted, “[i]f a
17 change in (or clarification of) state law, by a state court, in a case in which the
18 [petitioner] was not a party, could qualify as a ‘factual predicate,’ then the term
19 ‘factual’ would be meaningless.” *Id.* at 1088. See *also*, Lo v. Endicott, 506 F.3d
20 572, 576 (7th Cir. 2007), *cert. denied*, 128 S.Ct. 1487 (2008) (“[W]e do not find
21 that a state court decision modifying substantive law constitutes a ‘factual
22 predicate’ under § 2244(d)(1)(D) justifying a new one-year limitations period. ...
23 We have never held that a change in state substantive law constitutes an
24 ‘extraordinary circumstance’ that warrants equitable tolling.”) Therefore,

25 IT IS ORDERED that the Magistrate Judge’s Report and Recommendation
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1 (doc. #13) is accepted and adopted by the Court.

2 IT IS FURTHER ORDERED that the petitioner's Petition for Writ of Habeas
3 Corpus by a Person in State Custody, filed pursuant to 29 U.S.C. § 2254, is
4 denied as time-barred and that this action is dismissed. The Clerk of the Court
5 shall enter judgment accordingly.

6 DATED this 2nd day of February, 2009.

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10 Paul G. Rosenblatt
11 United States District Judge
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