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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

SEAN JEFFREY RICHSON,	}	Case No. CV 14-7276-SJO (KK)
Petitioner,	}	FINAL REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE
v.	}	
M.D. BITER, Warden,	}	
Respondent.	}	

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This Final Report and Recommendation is submitted to the Honorable S. James Otero, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

**I.**  
**SUMMARY OF RECOMMENDATION**

On September 4, 2014, Petitioner Sean Jeffrey Richson, a California state prisoner proceeding *pro se*, filed a petition for writ of habeas corpus by a person in state custody pursuant to 28 U.S.C. § 2254, challenging his 2002 state conviction for robbery and murder. Respondent has filed a motion to dismiss this action as untimely. Petitioner opposes the motion, arguing this action should proceed

1 because he is entitled to equitable tolling and because he is actually innocent.  
2 Petitioner has also filed a Request for Stay and Abeyance, requesting that this  
3 action be stayed and held in abeyance until he exhausts an additional claim in state  
4 court. For the reasons set forth below, the Court recommends granting  
5 Respondent’s motion, denying Petitioner’s Request for Stay and Abeyance, and  
6 dismissing this action as untimely.

7 **II.**

8 **PROCEDURAL BACKGROUND**

9 **A. State Court Proceedings**

10 On April 22, 2002, after a jury trial in Los Angeles County Superior Court,  
11 Petitioner and co-defendant Eric Lamont Nicholson were convicted of first-degree  
12 murder, in violation of California Penal Code section 187(a), and second-degree  
13 robbery, in violation of California Penal Code section 211. Lodged Documents  
14 (“Lodgs.”) 1, 2.<sup>1</sup> The jury also found true allegations that a principal had been  
15 armed with a handgun, in violation of California Penal Code section 12022(a). *Id.*  
16 On May 20, 2002, Petitioner was sentenced to a term of 26 years to life in prison.  
17 Lodg. 1.

18 Petitioner appealed his conviction. On November 24, 2003, the California  
19 Court of Appeal affirmed Petitioner’s conviction. Lodg. 2 at 2.

20 On December 26, 2003, Petitioner filed a petition for review in the  
21 California Supreme Court. Lodg. 3. On February 18, 2004, the California  
22 Supreme Court denied the petition for review. Lodg. 5.

23 On May 24, 2010, the Los Angeles County Superior Court denied  
24 Petitioner’s request “for all transcripts and records” to assist him in an “appeal.”  
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27 <sup>1</sup> Respondent lodged numerous documents with a Motion to Dismiss filed on April  
28 24, 2015. *See* ECF No. 29.

1 Lodg. 6 at 137-39.<sup>2</sup> The court gave several reasons for denying the request,  
2 including that Petitioner did not “explain” his “delay” in seeking to collaterally  
3 attack his conviction or state any valid basis for such an attack. Id. at 138.

4 On October 9, 2012, Petitioner filed a request in Los Angeles County  
5 Superior Court to vacate his convictions. Id. at 140. The court denied the request  
6 by referring Petitioner to the May 24, 2010, denial of Petitioner’s request for  
7 records. Id.

8 On November 27, 2012, Petitioner filed a state habeas petition in Los  
9 Angeles County Superior Court. Id. at 142. On December 6, 2012, the court  
10 denied the petition, explaining Petitioner had “failed to demonstrate that he was  
11 prejudiced by the claimed errors of counsel.” Id. at 141-43.

12 On January 28, 2013, Petitioner filed a state habeas petition in the California  
13 Court of Appeal. Lodg. 7. On February 6, 2013, the court summarily denied the  
14 petition. Lodg. 8.

15 On March 18, 2013, Petitioner filed a state habeas petition in the California  
16 Supreme Court. Lodg. 9. On May 15, 2013, the court denied the petition, citing  
17 People v. Duvall, 9 Cal. 4th 464, 474 (1995), and In re Swain, 34 Cal. 2d 300, 304  
18 (1949). Lodg. 10.

19 On April 29, 2014, the Los Angeles County Superior Court denied a state  
20 habeas petition that Petitioner filed, explaining he had “not stated a claim in which  
21 habeas relief can be granted.” Lodg. 6 at 143-44.

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25 <sup>2</sup> Lodged Document 6 is a printout of Los Angeles County Superior Court’s  
26 electronic docket for Petitioner’s case. See ECF No. 28 at 8 n.3. Respondent  
27 submitted this docket to the Court because Respondent “was unable to obtain a  
28 copy of . . . various superior court habeas petitions and denial orders” Id.

1 On May 30, 2014, the Los Angeles County Superior Court denied a state  
2 habeas petition that Petitioner filed, explaining he had “not stated a claim in which  
3 habeas relief can be granted.” Id. at 145-46.

4 On June 26, 2014, Petitioner filed a state habeas petition in the California  
5 Supreme Court. Lodg. 11. On August 27, 2014, the court denied the petition.  
6 Lodg. 12.<sup>3</sup>

7 On February 18, 2015, Petitioner filed a state habeas petition in Los Angeles  
8 County Superior Court. Lodg. 13. On February 26, 2015, the court denied the  
9 petition, explaining Petitioner’s claims were without merit. Lodg. 6 at 147-48.

10 **B. Federal Court Proceedings**

11 On September 4, 2014, Petitioner constructively filed the instant action.<sup>4</sup>  
12 ECF No. 1 at 9. On September 23, 2014, the Court issued an Order to Show Cause  
13 (“OSC”) why this action should not be dismissed as untimely under the  
14 Antiterrorism and Effective Death Penalty Act (“AEDPA”). ECF No. 4 at 4. On  
15 October 3, 2014, Petitioner filed a response to the OSC, along with supporting

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17 <sup>3</sup> Lodged Document 12 is a printout of the California Supreme Court’s electronic  
18 docket. This Court cannot discern from the printout the grounds on which the  
19 California Supreme Court denied Petitioner’s June 26, 2014, petition.

20 <sup>4</sup> Under the “mailbox rule,” when a *pro se* prisoner gives prison authorities a  
21 pleading to mail to court, the court deems the pleading constructively “filed” on the  
22 date it is signed. Roberts v. Marshall, 627 F.3d 768, 770 n.1 (9th Cir. 2010)  
23 (citation omitted). Here, Plaintiff signed the petition that commenced this action  
24 on September 4, 2014. ECF No. 1 at 9. Thus, the Court considers that date to be  
25 the date of filing.

26 Shortly after filing this action, Petitioner initiated another federal habeas action,  
27 challenging the same state conviction as this action. See Richson v. Biter, No.  
28 2:14-cv-7723-SJO-KK, ECF No. 1. On November 20, 2014, with Petitioner’s  
consent, the Court consolidated the actions and made the instant action the  
operative one. Id., ECF No. 12.

1 documents. ECF No. 7. In his response, Petitioner argues he is entitled to  
2 equitable tolling of AEDPA's statute of limitations because his post-conviction  
3 attorneys were ineffective and because he was mentally incompetent during the  
4 direct appeals process. Id. at 2-3. Petitioner further argues the Court should  
5 consider his petition because he is actually innocent of the conviction he seeks to  
6 challenge. Id. at 3.

7 On December 17, 2014, with leave of the Court, Petitioner filed a First  
8 Amended Petition for Writ of Habeas Corpus ("Petition"), which is the operative  
9 petition in this case. ECF No. 32. Petitioner alleges multiple grounds for relief,  
10 under the Fifth, Sixth, and Fourteenth Amendments. ECF No. 32 at 5-6.

11 On December 22, 2014, the Court ordered Respondent to address, in either a  
12 motion to dismiss or answer, "the issues raised in the Court's September 23, 2014  
13 Order to Show Cause and petitioner's response filed on October 3, 2014." ECF  
14 No. 19 at 1. On April 24, 2015, Respondent filed a Motion to Dismiss the Petition  
15 ("Motion"), arguing the Petition is untimely. ECF No. 28. On May 11, 2015,  
16 Petitioner filed an Opposition to the Motion ("Opposition"), along with supporting  
17 exhibits. ECF No. 30.

18 On June 18, 2015, the Court issued a Report and Recommendation that the  
19 Petition be denied as untimely and this action be dismissed with prejudice. ECF  
20 No. 33. On July 23, 2015, Petitioner filed a Request for Stay and Abeyance  
21 ("Request"), requesting that this action be stayed and held in abeyance until he  
22 exhausts an additional unexhausted claim in state court. ECF No. 36. On August  
23 5, 2015, Respondent filed an opposition to Petitioner's Request. ECF No. 41. On  
24 August 13, 2015, Petitioner filed Objections to the Court's original Report and  
25 Recommendation. ECF No. 42. The Court herein issues a Final Report and  
26 Recommendation, addressing Petitioner's Request for Stay and Abeyance and  
27 Objections to the original Report and Recommendation.



1 with their cash drawers pulled out.

2  
3 Other officers saw Nicholson and Richson walking near the  
4 restaurant. After checking the descriptions of the suspects, the  
5 officers shined the patrol car spotlight on the subjects. As soon  
6 as the spotlight illuminated Nicholson and Richson, they ran  
7 toward an apartment complex.

8  
9 After a short pursuit, Richson complied with the officer's order  
10 to stop. Nicholson hid in the apartment complex carport.  
11 Eventually, Nicholson complied with the officer's orders to  
12 come out of hiding.

13  
14 At the time of Richson's arrest, he was carrying a white plastic  
15 bag. Inside the bag police found a brown cloth glove, \$180 and  
16 Juarez's wallet. During a booking search of Richson, police  
17 found a dark brown glove, a black bandana and a cutting tool.  
18 Near Nicholson's hiding place police found a .38-caliber  
19 revolver. The revolver contained five live rounds and one  
20 expended round. Police also found Juarez's gold necklace about  
21 six inches away from Nicholson as they handcuffed him. Police  
22 found keys to the restaurant in the shrubbery between the  
23 restaurant and the apartment complex.

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26 After the police handcuffed Richson and Nicholson at the  
27 scene, they put paper bags on their hands to preserve any  
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1 gunshot residue (GSR). A sheriff's department criminalist later  
2 tested Richson and Nicholson for GSR. Nicholson tested  
3 positive for one particle unique to gunshot primer residue. This  
4 indicated Nicholson either handled a gun, fired a gun, had been  
5 in close proximity to a discharging firearm or had otherwise  
6 been in contact with GSR. Tests disclosed no particles on  
7 Richson.

8  
9 Criminalists found an expended bullet in Juarez's clothing. The  
10 firearms examiner was unable to determine whether the bullet  
11 was fired from the .38-caliber gun found where Nicholson was  
12 hiding. He testified, however, that the expended bullet was  
13 similar to a bullet found in the gun. They both had a surface  
14 content that was primarily zinc. Neither the examiner or other  
15 experts in his laboratory were familiar with ammunition of this  
16 type.

17  
18 Police obtained a videotape from the restaurant's security  
19 system. The tape shows Juarez with his hands on his head and a  
20 man standing behind him. Another man is in the restaurant.  
21 Juarez took money out of the cash register drawers. At one  
22 point, Juarez is kneeling with his hands behind his head. The  
23 two men leave the restaurant. A short time later, the two men  
24 reenter the restaurant, go out of the camera's view for a moment  
25 and leave the restaurant again. One has a white plastic bag. The  
26 arresting officer testified that the two men on the videotape  
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1 were similar in appearance to Richson and Nicholson at the  
2 time of their arrest.

3  
4 Neither defendant put on an affirmative defense.

5 Lodg. 2 at 2-3.

6 The Court will discuss additional facts as they relate to the parties’  
7 arguments.

8 **IV.**

9 **DISCUSSION**

10 The instant Petition was filed after April 24, 1996, the effective date of  
11 AEDPA. Therefore, the Court must apply the requirements for habeas relief set  
12 forth in AEDPA when reviewing the Petition. Soto v. Ryan, 760 F.3d 947, 956-57  
13 (9th Cir. 2014). AEDPA sets a one-year statute of limitations for a petition for writ  
14 of habeas corpus filed in federal court by a person in custody pursuant to a  
15 judgment of a state court. 28 U.S.C. § 2244(d)(1).

16 **A. Petitioner Did Not File His Petition Within AEDPA’s One-Year**  
17 **Limitations Period.**

18 AEDPA “sets a one-year limitations period in which a state prisoner must  
19 file a federal habeas corpus petition.” Thompson v. Lea, 681 F.3d 1093, 1093 (9th  
20 Cir. 2012) (citation omitted). Ordinarily, the limitations period runs from the date  
21 on which the prisoner’s judgment of conviction “became final by the conclusion of  
22 direct review or the expiration of the time for seeking such review.” 28 U.S.C. §  
23 2244(d)(1).<sup>6</sup> “When, on direct appeal, review is sought in the state’s highest court  
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25 <sup>6</sup> “Although § 2244(d)(1) sets forth three alternative possible starting dates for the  
26 commencement of the running of the statute of limitations, [Petitioner] does not  
27 argue that any of these apply in this case.” Miranda v. Castro, 292 F.3d 1063,  
28

(continued...)

1 but no petition for *certiorari* to the United States Supreme Court is filed, direct  
2 review is considered to be final when the *certiorari* petition would have been due,  
3 which is 90 days after the decision of the state’s highest court. Porter v. Ollison,  
4 620 F.3d 952, 958-59 (9th Cir. 2010) (citations omitted).

5 Under AEDPA, Petitioner’s conviction became final on May 18, 2004, *i.e.*,  
6 90 days after the California Supreme Court denied Petitioner’s petition for review  
7 on February 18, 2004. Porter, 620 F.3d at 958-59. AEDPA’s one-year limitations  
8 period began to run the next day, on May 19, 2004, and expired on May 19, 2005.  
9 28 U.S.C. § 2244(d)(1). The instant action was not constructively filed until  
10 September 4, 2014. Therefore, this action is untimely by over nine years under  
11 Section 2244(d)(1), absent tolling.

12 **B. Statutory Tolling Does Not Render this Action Timely.**

13 “A habeas petitioner is entitled to statutory tolling of AEDPA’s one-year  
14 statute of limitations while a ‘properly filed application for State post-conviction or  
15 other collateral review with respect to the pertinent judgment or claim is pending.’”  
16 Nedds v. Calderon, 678 F.3d 777, 780 (9th Cir. 2012) (quoting 28 U.S.C. §  
17 2244(d)(2)). “A petitioner who unreasonably delays in filing a state habeas  
18 petition would not be granted the benefit of statutory tolling because the petition  
19 would not be considered ‘pending’ or ‘properly filed’ within the meaning of §  
20 2244(d)(2).” Id. (internal citations omitted). Moreover, “section 2244(d) does not  
21 permit the reinitiation of the limitations period that has ended before the state  
22 petition was filed.” Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003)  
23 (citation omitted).

24 Here, Petitioner filed his first state habeas petition on November 27, 2012,  
25 more than seven years after AEDPA’s statute of limitations expired. Section

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26  
27 <sup>6</sup>(...continued)  
28 1065 n.1 (9th Cir. 2002).

1 2244(d) does not permit the reinitiation of the limitations period. Id. Thus,  
2 statutory tolling does not render this action timely.

3 **C. Equitable Tolling Does Not Render this Action Timely.**

4 **1. Legal Standard**

5 In addition to statutory tolling, the “AEDPA limitations period may be  
6 tolled” when it is “equitably required.” Doe v. Busby, 661 F.3d 1001, 1011 (9th  
7 Cir. 2011) (citations omitted). The “threshold necessary to trigger equitable tolling  
8 [under AEDPA] is very high, lest the exceptions swallow the rule.” Bills v. Clark,  
9 628 F.3d 1092, 1097 (9th Cir. 2010) (citation and internal quotation marks  
10 omitted). “The petitioner must establish two elements: (1) that he has been  
11 pursuing his rights diligently, and (2) that some extraordinary circumstance stood  
12 in his way.” Raspberry v. Garcia, 448 F.3d 1150, 1153 (9th Cir. 2006) (citation and  
13 internal quotation marks omitted). The petitioner “must show that the  
14 extraordinary circumstances were the cause of his untimeliness.” Spitsyn v.  
15 Moore, 345 F.3d 796, 799 (9th Cir. 2003) (citations and internal quotation marks  
16 omitted). Equitable tolling determinations “turn[] on an examination of detailed  
17 facts.” Lott v. Mueller, 304 F.3d 918, 923 (9th Cir. 2002).

18 **2. Petitioner’s Alleged Grounds for Equitable Tolling**

19 **a. Ineffective Post-Conviction Counsel**

20 Petitioner argues he is entitled to equitable tolling because his post-  
21 conviction lawyers were negligent and ineffective. ECF No. 7 at 1-2. Petitioner  
22 states that, on March 15, 2004, attorney Sheldon L. Levitin “was hired to file a writ  
23 of habeas corpus” on Petitioner’s behalf but failed to do so. Id. at 1. On October  
24 26, 2005, Petitioner’s parents, who had hired Levitin, filed a complaint against him  
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1 with the California State Bar, with Petitioner’s authorization and consent.<sup>7</sup> Id. at 8-  
2 9. On January 4, 2006, Levitin terminated his retainer agreement with Petitioner’s  
3 parents. Id. at 5-7. On March 8, 2006, Levitin sent Petitioner’s file, including the  
4 trial transcript and briefs on direct appeal, to Petitioner’s parents. Id. at 13. On  
5 March 15, 2006, Petitioner’s parents signed that they received the file. Id. at 12.

6 Petitioner appears to claim that, after the termination of the retainer  
7 agreement with Levitin, he hired a series of other lawyers to file a habeas petition  
8 on his behalf, each of whom failed to render their promised services or properly  
9 communicate with Petitioner. Id. at 1-2.

10 **b. Mental Impairment**

11 In arguing for equitable tolling, Petitioner also “urges this esteemed Court to  
12 consider Petitioner’s mental disposition at the time of the offense.” Id. at 2.  
13 Petitioner states he was 14 years old at the time of the offense, in April of 2000.  
14 Id. Petitioner states he was “a subject of” the “California Department of  
15 Corrections’ mental health program” through the “direct appeal process.” Id.  
16 Petitioner states he was therefore “not competent to assist in the appellate process.”  
17 Id. at 3.

18 **3. Analysis**

19 **a. Ineffective Post-Conviction Counsel**

20 “Though ordinary attorney negligence will not justify equitable tolling, . . .  
21 where an attorney’s misconduct is sufficiently egregious, it may constitute an  
22 ‘extraordinary circumstance’ warranting equitable tolling of AEDPA’s statute of  
23 limitations.” Spitsyn, 345 F.3d at 800 (citation omitted). Here, Petitioner is  
24 arguably entitled to equitable tolling for the duration of Levitin’s alleged  
25 misconduct, *i.e.*, from March 15, 2004, when Levitin was hired, until March 15,  
26 \_\_\_\_\_

27 <sup>7</sup> The State Bar concluded Petitioner’s parents’ complaint against Levitin did “not  
28 warrant action.” ECF No. 7 at 12.

1 2006, when Levitin returned the case file to Petitioner’s parents. See id. at 798  
2 (finding petitioner entitled to equitable tolling, where the attorney he hired to file a  
3 habeas petition failed to do so and refused to return relevant records until after the  
4 filing deadline). However, Petitioner did not constructively file this action until  
5 September 4, 2014, more than eight years after the completion of Levitin’s alleged  
6 misconduct on March 15, 2006. Petitioner’s assertions about the lawyers he hired  
7 after Levitin are “vague and unsubstantiated” and, hence, do not warrant additional  
8 equitable tolling. Milligan v. Scribner, 220 F. App’x 746, 747 (9th Cir. 2007); see  
9 also Lott, 304 F.3d at 923 (stating equitable tolling requires an “examination of  
10 detailed facts”). Thus, even assuming equitable tolling for the period of alleged  
11 misconduct by Levitin, this action is untimely by over eight years.

12 **b. Mental Impairment**

13 “[E]ligibility for equitable tolling due to mental impairment requires the  
14 petitioner to meet a two-part test . . . .” Bills, 628 F.3d at 1099. First, the  
15 petitioner “must show that his mental impairment was an extraordinary  
16 circumstance beyond his control, by demonstrating the impairment was so severe  
17 that either (a) petitioner was unable rationally or factually to personally understand  
18 the need to timely file, or (b) petitioner’s mental state rendered him unable  
19 personally to prepare a habeas petition and effectuate its filing.” Id. at 1099-1100  
20 (citation, footnote, and paragraph breaks omitted). Second, “the petitioner must  
21 show diligence in pursuing the claims to the extent he could understand them, but  
22 that the mental impairment made it impossible to meet the filing deadline under the  
23 totality of the circumstances, including reasonably available access to assistance.”  
24 Id. at 1100 (citation omitted). “In practice, then, to evaluate whether a petitioner is  
25 entitled to equitable tolling, the district court must: (1) find the petitioner has made  
26 a non-frivolous showing that he had a severe mental impairment during the filing  
27 period that would entitle him to an evidentiary hearing; (2) determine, after  
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1 considering the record, whether the petitioner satisfied his burden that he was in  
2 fact mentally impaired; (3) determine whether the petitioner’s mental impairment  
3 made it impossible to timely file on its own; and (4) consider whether the  
4 circumstances demonstrate the petitioner was otherwise diligent in attempting to  
5 comply with the filing requirements.” Id. at 1100-01.

6         Petitioner has not specified what severe mental impairment he was being  
7 treated for during the direct appeals process, or how that impairment prevented him  
8 from providing assistance. However, even assuming Petitioner had a severe mental  
9 impairment that prevented him from assisting during the direct appeals process,  
10 Petitioner has not alleged or shown (1) the impairment continued after the  
11 conclusion of the direct appeals process; (2) the impairment made it impossible for  
12 him to timely file a habeas petition; or (3) he was otherwise diligent in attempting  
13 to comply with the filing requirements. Bills, 628 F.3d at 1100-01. Thus,  
14 Petitioner’s claim of mental impairment is insufficient to merit equitable tolling.  
15 See Lott, 304 F.3d at 923; see also Foolen v. Felker, No. CV 07-8161-GW (AN),  
16 2009 WL 6058449, at \*8 (C.D. Cal. 2009) (citing other cases in which a petitioner  
17 alleged mental impairment but failed to allege how the impairment prevented the  
18 petitioner from filing a timely habeas petition).

19 **D. Petitioner Has Not Demonstrated Actual Innocence.**

20         Petitioner also argues the Court should excuse the Petition’s untimeliness  
21 because he is actually innocent of the crimes of which he was convicted. ECF No.  
22 30 at 1. In support of this argument, Petitioner notes (1) on the night of the  
23 offense, Nicholson, his co-defendant, made a statement to police, which the trial  
24 court ruled inadmissible, in which Nicholson “accepted full responsibility and  
25 exonerated Petitioner”; (2) during a January 2002 interview with a police detective  
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28

1 and a deputy district attorney, Petitioner’s co-defendant Stanley Johnson, Jr.<sup>8</sup> stated  
2 Petitioner had never met Nicholson prior to April 17, 2000 and was sitting down at  
3 the time of the shooting; (3) an evaluation by a court-appointed psychiatrist, dated  
4 February 21, 2001, which was not admitted at trial, stated “it would be reasonable  
5 to believe” Petitioner “did not act of his own free will” during the offense; and (4)  
6 the prosecution presented no evidence showing Petitioner knew Nicholson was  
7 armed or intended to kill, or showing Petitioner’s motive in entering the restaurant  
8 with Nicholson. *Id.* at 2-5; see also ECF No. 30-2 at 3 (police report stating  
9 Nicholson said Petitioner “had nothing to do with” the offense); ECF No. 30-3 at  
10 9, 26 (transcript of Johnson’s January 2002 interview with police detective and  
11 deputy district attorney); ECF No. 30-4 (court-appointed psychiatrist’s confidential  
12 report to defense counsel).

13 “A federal habeas petitioner can overcome a procedural default, including a  
14 failure to comply with the statute of limitations, by demonstrating actual innocence  
15 of the crime underlying his conviction.” Vosgien v. Persson, 742 F.3d 1131, 1134  
16 (9th Cir. 2014) (citing, *inter alia*, Schlup v. Delo, 513 U.S. 298, 313-15, 115 S. Ct.  
17 851, 130 L. Ed. 2d 808 (1995)). Prisoners “asserting innocence as a gateway to  
18 defaulted claims must establish that, in light of new evidence, it is more likely than  
19 not that no reasonable juror would have found petitioner guilty beyond a  
20 reasonable doubt.” Larsen v. Soto, 742 F.3d 1083, 1088 (9th Cir. 2013) (citations  
21 and internal quotation marks omitted). “This exacting standard sets an extremely  
22 high hurdle” that is met “only in the extraordinary case.” Stewart v. Cate, 757 F.3d  
23 929, 938 (9th Cir. 2014) (citations and internal quotation marks omitted).

24 Here, Petitioner has not submitted any evidence, let alone “new evidence”  
25 that would lead the Court to conclude “it is more likely than not that no reasonable

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26  
27 <sup>8</sup> It is unclear from the record what offenses Johnson was convicted of in  
28 connection with the events of April 17, 2000.

1 juror would have found petitioner guilty beyond a reasonable doubt.” Id. Thus,  
2 Petitioner has not demonstrated actual innocence to overcome his failure to comply  
3 with AEDPA’s statute of limitations. Vosgien, 742 F.3d at 1134.

4 **E. Petitioner’s Request for Stay and Abeyance Should Be Denied.**

5 In his July 23, 2015 Request for Stay and Abeyance, Petitioner requests that  
6 the Court stay this action and hold the Petition in abeyance while he exhausts an  
7 unexhausted claim based upon the California Supreme Court’s June 2, 2014  
8 decision in People v. Chiu, 59 Cal. 4th 155, 172 Cal. Rptr. 3d 438, 325 P.3d 972  
9 (2014).<sup>9</sup> See ECF No. 36.

10 **1. Requirements for a Stay and Abey Procedure**

11 A state prisoner must exhaust his or her state court remedies before a federal  
12 court may consider granting habeas corpus relief. 28 U.S.C. § 2254(b)(1)(A);  
13 O’ Sullivan v. Boerckel, 526 U.S. 838, 842, 119 S. Ct. 1728, 144 L. Ed. 2d 1  
14 (1999). To satisfy the exhaustion requirement, a habeas petitioner must fairly  
15 present his or her federal claims in the state courts in order to give the State the  
16 opportunity to pass upon and correct alleged violations of the prisoner’s federal  
17 rights. Duncan v. Henry, 513 U.S. 364, 365, 115 S. Ct. 887, 130 L. Ed. 2d 865  
18 (1995) (*per curiam*). The inclusion of both exhausted and unexhausted claims in a  
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21  
22 <sup>9</sup> Petitioner does not specify the nature of this unexhausted claim. In Chiu, the  
23 California Supreme Court held “an aider and abettor may not be convicted of first  
24 degree premeditated murder under the natural and probable consequences  
25 doctrine” and that “liability for that crime must be based on direct aiding and  
26 abetting principles.” Chiu, 59 Cal. 4th at 158. Hence, the California Supreme  
27 Court found a trial court committed instructional error when it failed to instruct the  
28 jury as to this principle. Id. The California Supreme Court’s ultimate holding in  
Chiu suggests Petitioner’s unexhausted claim is a claim of instructional error in the  
trial court proceedings.



1 federal habeas petition renders it mixed and subject to dismissal without prejudice.  
2 See Rose v. Lundy, 455 U.S. 509, 522, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982).

3 The Court may stay a mixed federal habeas petition pursuant to either  
4 Rhines v. Weber, 544 U.S. 269, 125 S. Ct. 1528, 161 L. Ed. 2d 440 (2005) or Kelly  
5 v. Small, 315 F.3d 1063 (9th Cir. 2003). Under Rhines, a district court has  
6 discretion to stay all of the claims in a mixed federal habeas petition to allow a  
7 petitioner time to present his unexhausted claims to state courts. Rhines, 544 U.S.  
8 at 276. This “stay and abeyance” procedure is available only in limited  
9 circumstances, and only when: (1) there is “good cause” for the failure to exhaust  
10 unexhausted claims; (2) the unexhausted claims are not “plainly meritless”; and (3)  
11 the petitioner did not intentionally engage in dilatory litigation tactics. Id. at 277-  
12 78. The “good cause” inquiry is centered on “whether the petitioner can set forth a  
13 reasonable excuse, supported by sufficient evidence,” to justify his failure to  
14 exhaust the unexhausted claim in state court. Blake v. Baker, 745 F.3d 977, 982  
15 (9th Cir. 2014).

16 Contrarily, a stay pursuant to Kelly requires compliance with the following  
17 three-step procedure: (1) a petitioner must file an amended petition deleting his  
18 unexhausted claims; (2) the district court “stays and holds in abeyance the  
19 amended, fully exhausted petition, allowing petitioner the opportunity to proceed  
20 to state court to exhaust the deleted claims”; and (3) petitioner must subsequently  
21 seek to amend the federal habeas petition to reattach “the newly-exhausted claims  
22 to the original petition.” King, 564 F.3d at 1135. However, the petitioner is only  
23 allowed to amend his newly-exhausted claims back into his federal petition if the  
24 claims are timely under AEDPA or “relate back” to the exhausted claims in the  
25 pending petition. Id. at 1140-41, see also Mayle v. Felix, 545 U.S. 644, 662-64,  
26 125 S. Ct. 2562, 162 L. Ed. 2d 582 (2005). If the newly-exhausted claim is not  
27 timely under AEDPA or the relation-back doctrine, it may not be added to the  
28

1 existing petition. Haskins v. Schriro, No. CV 05-2352-PHX-MHM (JM), 2009  
2 WL 3241836, at \*3 (D. Ariz. Sept. 30, 2009). If amendment is futile, a stay is  
3 inappropriate. Id. at \*7.

## 4           **2.     Analysis**

5           In his instant Request for Stay and Abeyance, Petitioner does not specify  
6 whether he requests a stay pursuant to either Rhines or Kelly. See ECF No. 36.  
7 The Court construes the Request liberally and considers Petitioner’s eligibility for  
8 both procedures.

9           The Court finds Petitioner is not entitled to a Rhines stay. Petitioner has not  
10 demonstrated “good cause” (or any cause) for his failure to exhaust his  
11 unexhausted claim in state court earlier. Rhines, 544 U.S. at 277. The California  
12 Supreme Court’s June 2014 decision in People v. Chiu—the case on which  
13 Petitioner’s unexhausted claim relies—was issued over a year prior to Petitioner’s  
14 Request and approximately three months before Petitioner commenced the instant  
15 action. 59 Cal. 4th 155. In the instant Request, Petitioner does not provide any  
16 reason as to why he did not exhaust his claim in state court sooner upon issuance of  
17 the California Supreme Court’s decision. Moreover, the Court notes Petitioner  
18 delayed in filing the instant Request until after the Court’s original Report and  
19 Recommendation that this action be dismissed. The timing of the Request suggests  
20 it is an intentionally dilatory litigation tactic designed to prolong this action and  
21 avoid dismissal of the Petition. Rhines, 544 U.S. at 278. Accordingly, Petitioner  
22 is ineligible for a stay under Rhines.

23           Furthermore, the Court finds a Kelly stay would be futile here because  
24 Petitioner’s unexhausted claim would be untimely. As discussed in Sections IV.A-  
25 C., the instant Petition is untimely by over eight years, even with tolling. If  
26 Petitioner were to raise his unexhausted claim after exhausting it in state court, it  
27 would also be untimely. Hence, to the extent Petitioner requests a Kelly stay,  
28

1 Petitioner's request must be denied as futile. See Haskins, 2009 WL 3241836, at  
2 \*3.

3 V.

4 **RECOMMENDATION**

5 IT IS THEREFORE RECOMMENDED that the Court issue an Order: (1)  
6 accepting this Final Report and Recommendation; (2) granting Respondent's  
7 Motion to Dismiss; (3) denying Petitioner's Request for Stay and Abeyance; and  
8 (4) directing Judgment be entered denying the Petition and dismissing this action  
9 with prejudice.

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12 DATED: August 24, 2015

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15 HON. KENLY KIWA KATO  
16 UNITED STATES MAGISTRATE JUDGE  
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