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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KEITH EDWARD ADCOX,)
)
 Petitioner,)
)
 vs.)
)
 VINCENT CULLEN, Acting Warden)
 of San Quentin State Prison,)
)
 Respondent.)

Case No. 1:92-cv-5830-OWW
DEATH PENALTY CASE

Order Regarding Petitioner’s Motion
for Stay and Abeyance of Second
Amended Petition (Doc. 140) and
Amendment of March 31, 2009 Order
on Exhaustion (Doc. 139)

Petitioner Keith Edward Adcox (“Adcox”), a state prisoner facing capital punishment, filed in federal court seeking habeas relief December 1, 1992. Counsel was appointed to represent Adcox in his federal proceedings September 2, 1993. Adcox filed his initial federal petition for writ of habeas corpus April 3, 1995, and filed an amended petition September 7, 1995. Seven claims, and portions of four other claims, were denied on the merits June 11, 1998. Fifteen claims were determined to be completely unexhausted, and six claims were found to be partially unexhausted. The proceedings were subsequently held in abeyance pending the exhaustion of state remedies. Adcox filed his state exhaustion petition October 8, 1998.

While the matter was pending state exhaustion, lead counsel J. Jeffries

1 Goodwin moved to withdraw, and the Federal Defender for the Eastern District
2 of California, Capital Habeas Unit, was appointed. The California Supreme
3 Court summarily denied Adcox's state exhaustion petition, both on the merits
4 and as untimely, January 3, 2007. Upon resumption of the federal proceedings,
5 Wendy Peoples was substituted as co-counsel in place of Eric Fogderude. Adcox
6 filed his second amended petition for writ of habeas corpus February 28, 2008.
7 Respondent Vincent Cullen ("the Warden") filed an answer January 26, 2009.

8 The parties filed a Joint Statement on Exhaustion February 25, 2009,
9 agreeing that six claims or subclaims were unexhausted. (Claims V(A)(4)-(6); VI;
10 XVI; XX(A)(2)(a), (b), (c)(iii), (d)(i)-(iii), (g); XLIII; and XLIV.) The parties did not
11 agree about the exhaustion status of another ten claims or subclaims. An order
12 on exhaustion was issued March 31, 2009, finding the ten claims or subclaims
13 where the parties did not agree about the exhaustion status to be exhausted.
14 Adcox filed his second motion for stay and abeyance May 29, 2009, the Warden
15 filed an opposition to stay and abeyance June 26, 2009, and Adcox filed a reply
16 July 10, 2009.

17 While Adcox's second motion for stay and abeyance was pending, he filed
18 a fourth state habeas petition (case number S180912) with the California Supreme
19 Court on March 12, 2010, presenting Claims V(A)(4), (5) and (6), XVI, XX(A)(2)(a),
20 (b), (c), (d), and (g); XX(A)(3), and XLIII; as well as three claims which were not
21 included in the second amended federal petition - cumulative error from the
22 prosecutor's misconduct, cumulative error from all asserted claims, and a juror
23 misconduct claim asserting the misuse of extraneous information. Claims VI and
24 XLIV, which the parties had agreed were unexhausted, were not presented to the
25 state court in Adcox's fourth state habeas petition. The California Supreme Court
26 directed that an informal response to the fourth state petition, which is

1 anticipated to be filed by December, 2010. Concurrent with filing his fourth state
2 habeas petition, Adcox filed in this court a notice of supplemental authority
3 asserting a Ninth Circuit case issued March 5, 2010, expressly held that
4 amendments to a federal habeas petition filed prior to enactment of the AEDPA
5 is not subject to the one-year statute of limitations, even when it is amended after
6 the AEDPA's effective date. *See Smith v. Mahoney*, 596 F.3d 1133, 1149 (9th Cir.
7 2010).

8
9 Claim XLIII - Unconstitutional Delay

10 Adcox asserts the factual predicate for this claim only came into existence
11 when the California Supreme Court failed to timely dispose of his direct appeal
12 and habeas petitions and denied relief. Adcox asserts the nearly quarter century
13 of delay in his proceedings have resulted in the loss of potentially exculpatory
14 and/or mitigating evidence, violated due process, and that his execution now
15 would be cruel and unusual punishment. Adcox alleges he has been prejudiced
16 by the deaths of numerous witnesses who have died without his being able to
17 preserve their testimony, and that documentary evidence has been lost or
18 destroyed.

19 The Warden contends Adcox could have raised this claim at numerous
20 points in the past: when his direct appeal was final in 1989; prior to the denials of
21 his first or second state habeas petitions in 1992; before the exhaustion order on
22 his federal petition in 1998; or during the pendency of his third state habeas
23 petition from 1998 to 2007.¹ The Warden asserts Adcox has not shown good
24

25 ¹ Adcox was sentenced to death on July 11, 1983. His direct appeal was final
26 on denial of his certiorari petition, less than seven years later on March 19, 1990. His
first two state habeas petitions were denied July 15, 1992, a total of nine years after

1 cause for failing to exhaust this claim previously, that the claim is not supported
2 by existing federal law and so would be barred under *Teague v. Lane*, 489 U.S. 288
3 (1989), and that no loss of evidence which would have a harmful or injurious
4 effect has been shown.

5 The Warden denies the proceedings to review Adcox's death sentence
6 have been unreasonably or excessively delayed, alleging the delay due to the
7 automatic appeal was reasonable, and that all other proceedings were voluntarily
8 instituted by Adcox. The Warden contends, in light of Adcox's failure to exhaust
9 this claim, that there is insufficient information on which to say whether certain
10 witnesses have died during the pendency of the proceedings, whether those
11 witnesses (or others who have died) could have provided material information or
12 testimony, or whether records have been lost.

13 *Conclusion*

14 The California Supreme Court's review of Adcox's direct appeal and first
15 round of state habeas lasted nine years. Adcox took six years to file his federal
16 petition and state exhaustion petition. The California Supreme Court's denial of
17 the state exhaustion petition occurred about eight years later. Adcox took over a
18 year to file his amended federal petition.

19 Lengthy incarceration on death row during the pendency of capital
20 appeals does not violate the Constitution's prohibition against cruel and unusual
21 punishment. *McKenzie v. Day*, 57 F.3d 1493, 1494 (9th Cir. 1995) (en banc); *see also*
22 *Smith v. Mahoney, supra*, 596 F.3d at 1153 (rejecting same claim under *Teague*).

23 _____
24 he was sentenced. His first filing in federal court was December 1, 1992, his initial
25 federal petition was filed April 3, 1995, and amended five months later on
26 September 7, 1995, twelve years after sentencing. His third state (exhaustion)
petition was filed October 8, 1998, over fifteen years after sentencing, and was
denied January 9, 2007, twenty-three and a half years after sentencing.

1 Although Adcox raises this claim in his initial federal proceedings, unlike
2 McKenzie's claim which was raised in a subsequent petition just prior to his
3 scheduled execution, the reasons for rejecting the claim remain the same. "A
4 defendant must not be penalized for pursuing his constitutional rights, but he
5 also should not be able to benefit from the ultimately unsuccessful pursuit of
6 those rights." *McKenzie v. Day*, 57 F.3d 1461, 1466 (9th Cir. 1995) (panel opinion
7 denying stay of execution). Claim XLIII is denied on the merits.

8
9 **Claims as to which some legal grounds are unexhausted**

10 Two of the claims agreed by the parties to contain some unexhausted legal
11 grounds were previously denied on the merits. See June 11, 1998 Memorandum
12 and Order Regarding Dismissal, Exhaustion and Abeyance (Doc. No. 75). The
13 portion of Claim III asserting an Equal Protection violation from the denial of a
14 change of venue, and Claim XXV, regarding the penalty instructions on age,
15 agreed to be unexhausted "to the extent it relied on constitutional provisions
16 other than the Eighth Amendment," were previously denied on the merits.
17 Adcox states Claims III and XXV were retained in his second amended petition to
18 avoid possible confusion and to preserve possible appellate review. Abeyance is
19 not required for these claims.

20
21 **Amendment of March 31, 2009 Exhaustion Order**

22 Claim V(A)(6) - Failure to Disclose Second Side of Tape of Tillery Interview

23 Adcox argues Tillery's earliest statements about the shooting are pivotal
24 since her testimony helped establish that the killing was intentional and that
25 Adcox was the shooter. Adcox asserts the interview reveals Tillery's confusion
26 about who said what, that it would have supported the defense theory that there

1 was never a plan to murder the victim, and that it could have effectively
2 impeached her testimony, calling into question the prosecution's theory about
3 how the shooting occurred. Adcox contends the suppressed evidence also was
4 relevant to sentencing, as it would likely have produced lingering doubt about
5 his involvement in the murder, and shown the favorable treatment given to
6 Tillery by the prosecution.

7 The Warden asserts Adcox was on notice that there was more to the
8 interview than was reflected on the transcript, since a report of the same
9 interview reveals significantly more content than is reflected on the transcript,
10 and the transcript ends in the middle of a sentence, suggesting there was more to
11 the interview. The Warden observes the complete tape was obtained through
12 informal discovery, but that Adcox provides no reason why informal discovery
13 was not, or could not have been, pursued earlier. Also, the Warden suggests it
14 would appear Adcox will be permitted to rely on the second side of the tape to
15 support his claim that Tillery was intimidated into testifying as she did.

16 Adcox replies he had no reason to suspect that the interview with Tillery
17 had not been fully transcribed and provided to trial counsel. Adcox contests the
18 Warden's description of the transcript as ending mid-sentence, asserting it ends
19 mid-page with Tillery stating "I want to go home. (whispered) (further
20 inaudible)." This follows an announcement by the DA Investigator that he was
21 "done" with the questioning, and appears to be nothing more than quiet
22 conversation occurring before Tillery was escorted from the interrogation room.
23 Adcox contends the belief this was the end of the interview is reinforced by the
24 document stamp which appears only on that page, indicating it was the
25 conclusion of the document. Adcox asserts reasonable persons would not have
26 realized the transcript was incomplete.

1 The Warden contends this claim is without merit because the allegedly
2 new information is not material. Adcox's argument, based on the second side of
3 the tape, that Tillery said "they" shot Orozco, does not show that Love was the
4 actual shooter nor exculpate Adcox, and is not significantly different from other
5 statements Tillery made. The Warden observes Adcox testified he told Tillery
6 that he had shot the victim, as well as described how Love shot him. The
7 Warden asserts that impeachment of Tillery on this point would have been
8 immaterial.

9 Adcox asserts the tape recording was obtained through state court
10 discovery, which was not authorized until March 2004, and after learning
11 through informal discovery that the tape recording was in the possession of the
12 Tuolumne County Sheriff's department. Adcox claims it was a complete surprise
13 to learn an entire side of the tape had not previously been transcribed. The
14 Warden contends the second side of the taped interview does not contain
15 statements which significantly differ from Tillery's other statements or her
16 testimony, and contains no threats which could have influenced Tillery.

17
18 *Conclusion*

19 The submitted briefs of the parties regarding abeyance indicated their
20 agreement that this claim was unexhausted, and that conclusion was adopted in
21 the March 31, 2009 exhaustion order. Subsequent review of the record reveals
22 that conclusion is erroneous. This claim of prosecutorial misconduct was
23 presented in Claim V of Adcox's amended federal petition filed September 7,
24 1995. The tape recording and transcript are admissible under *Vasquez v. Hillery*,
25 474 U.S. 254 (1986), as additional evidence in support of the petition. Claim
26 V(A)(6) is exhausted.

1 Claim XVI - Ineffective Assistance of Appellate Counsel

2 Claim XVI, regarding ineffective assistance of appellate counsel, was
3 agreed to be partially unexhausted with respect to Adcox’s “rights to Due
4 Process, Equal Protection and to present an affirmative appeal, insofar as it was
5 related to Claim XX, ineffective assistance of counsel, except for allegations
6 relating to subclaim XX(A)(2)(c)(ii) (Guidice’s failure to adequately cross-examine
7 prosecution witness Jerry Chisum). The Warden contends Adcox does not
8 attempt to justify his failure to exhaust this claim or to show that it has merit.
9 Thus, the Warden asserts Adcox should not be permitted a further stay to
10 exhaust this claim.

11
12 *Conclusion*

13 The submitted briefs of the parties regarding abeyance indicated their
14 agreement that certain legal bases for this claim were unexhausted. Review of
15 the record in these proceedings reveal that conclusion is erroneous. This claim of
16 ineffective assistance of appellate counsel was presented to the state court in
17 Adcox’s third (exhaustion) petition, filed October 8, 1998, as Claim XIV, and
18 included violations under the rights of Due Process, Equal Protection, and to
19 present an affirmative appeal. Claim XVI is exhausted.

20
21 **The Parties’ Arguments Regarding Stay and Abeyance²**

22 Adcox argues *Rhines v. Weber*, 544 U.S. 269 (2005), supports a stay of
23 federal habeas proceedings on a petition containing unexhausted claims where
24 the petitioner has good cause for his failure to exhaust, his unexhausted claims

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26 ² These arguments were submitted in these proceedings before the Ninth Circuit issued *Smith v. Mahoney*, 596 F.3d 1133 (9th Cir. 2010) (*see* discussion below).

1 are potentially meritorious, and there is no indication he has been intentionally
2 dilatory. *Id.* at 278. Adcox asserts he meets each of the requirements from *Rhines*:
3 first, there is good cause for his failure to exhaust because changes in state law
4 have only recently allowed discovery of the facts supporting the unexhausted
5 claims; second, the unexhausted claims have sufficient merit to justify stay and
6 abeyance; and third, he has not engaged in intentionally dilatory litigation tactics
7 which would justify denial of a stay. Adcox concedes it is somewhat unusual for
8 a second round of abeyance to be ordered by a district court, but contends it has
9 happened in other capital cases. Adcox further asserts the lack of a stay could
10 result in his losing the right to federal review of his unexhausted claims, and
11 issuing a stay will serve the legitimate interests of this Court and the state courts.

12 The Warden opposes further stay and abeyance, arguing that stay and
13 abeyance is only available in limited circumstances and should be refused where
14 the unexhausted claims are plainly meritless. *Rhines*, 544 U.S. at 277. The
15 Warden asserts the newly-discovered evidence on which Adcox's request for
16 abeyance is based could have been discovered with reasonable diligence and the
17 proffered new information adds little to the claims. Further, the Warden asserts
18 the claims based on new facts are barred by the one-year AEDPA statute of
19 limitations because they are not based on the "same core of operative facts" as
20 any properly-raised claim. *See Mayle v. Felix*, 545 U.S. 644 (2005).

21 Adcox replies that *Rhines* only requires a single meritorious claim to justify
22 abeyance, so requiring briefing and consideration of why every unexhausted
23 claim was not raised in the prior proceeding and whether it has potential merit is
24 an unnecessary expenditure of resources. Adcox argues that if there is
25 justification for staying the federal proceedings based on a single claim, no
26 genuine purpose is served to determine whether the stay would be justified for

1 other claims.

2
3 **Newly Discovered Evidence**

4 Adcox asserts Claims V(A)(4) and (5), alleging prosecutorial misconduct,
5 are based on facts that were only recently discovered after obtaining and
6 reviewing the transcript from co-defendant Howard Love’s trial. Adcox claims
7 neither he, nor his attorneys, had any reason to think the transcript from Love’s
8 trial would reveal the basis for a constitutional claim in his case. The transcript
9 was not available from prior counsel, the trial court, the appellate court, or the
10 state archive, but was eventually obtained by tracking down the retired court
11 reporter.

12 *Smith v. Mahoney*, 596 F.3d 1133 (9th Cir. 2010) held the one-year AEDPA
13 statute of limitations does not apply to post-AEDPA amendments if the petition
14 was filed before the effective date of the AEDPA. *Id.* at 1148. Similarly, *Smith*
15 found the relation-back doctrine, applied to habeas petition amendments in
16 *Mayle v. Felix*, 545 U.S. 644 (2005), does not apply to amendments of petitions that
17 were filed before the AEDPA was enacted. The Ninth Circuit observed that the
18 petition at issue in *Mayle* was filed after the AEDPA’s effective date and
19 concluded that the Supreme Court’s interpretation of the relation-back doctrine
20 there was resolved in the context of the AEDPA’s intents and constraints. *Id.* at
21 1149-1150.

22 Adcox argued that *Rhines v. Weber*, *supra*, 544 U.S. 269, provides the
23 standard for granting abeyance of his second amended federal habeas petition.
24 However, under the holding of *Smith v. Mahoney*, like the relation-back doctrine
25 in *Mayle*, the standard in *Rhines* is not applicable to this case. The petition at
26 issue in *Rhines* also was subject to the AEDPA, as was the petition in *Mayle*, so the

1 standard from *Rhines* does not apply to Adcox’s pre-AEDPA petition.

2 Prior to the enactment of the AEDPA, *McCleskey v. Zant*, 499 U.S. 467 (1991)
3 set the standard regarding the showing a petitioner must make to avoid abuse of
4 the writ. Once the government met their burden of pleading a petitioner’s abuse
5 of the writ (by showing the claims now raised were not in a previous habeas
6 petition), the burden shifts to the petitioner to show cause for the failure to raise
7 an issue and actual prejudice resulting from the errors complained of. *Id.* at 494
8 (applying the standard from procedural default cases to instances of abuse of the
9 writ). Cause “requires the petitioner to show that ‘some objective factor external
10 to the defense impeded counsel’s efforts’ to raise the claim.” *Id.* at 493 (citing
11 *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). Objective factors which constitute
12 cause include governmental interference, the reasonable unavailability of a
13 factual or legal basis for the claim, or constitutional ineffective assistance of
14 counsel. *McCleskey*, 499 U.S. at 494. If a petitioner cannot establish cause, the
15 court can still excuse failure to raise the claims in an earlier petition if the
16 petitioner can show that dismissal of the claim will result in a fundamental
17 miscarriage of justice – the conviction of an innocent person. *McCleskey*, 499 U.S.
18 at 494.

19 The doctrines of procedural default and abuse of the writ are both
20 concerned with the significant costs of federal habeas corpus review, especially
21 regarding the finality of state convictions. *McCleskey*, 499 U.S. at 490-491. When
22 a habeas petitioner obtains a new trial, the “erosion of memory” and “dispersion
23 of witnesses” prejudice the government and diminish the chances of a reliable
24 criminal adjudication. *Id.* at 491. Federal habeas review of state convictions
25 frustrate “the States’ sovereign power to punish offenders and their good-faith
26 attempts to honor constitutional rights.” *Id.* Habeas corpus has further costs: it

1 burdens scarce federal judicial resources; it threatens the capacity of the system
2 to resolve primary disputes; and it may give litigants incentives to withhold
3 claims for manipulative purposes or disincentives to present claims when
4 evidence is fresh. *Id.* at 491-492.

5 “If collateral review of a conviction extends the ordeal of trial for both
6 society and the accused, the ordeal worsens during subsequent collateral
7 proceedings.” *McCleskey*, 499 U.S. at 492 (citing *Engle v. Isaac*, 456 U.S. 107, 126-
8 127 (1982)). If the review of a conviction in the first round of federal habeas
9 offends federalism and comity and stretches resources, examination of new
10 claims raised in a second or subsequent petition increases the offense to
11 federalism and comity and spreads resources thinner still. *Id.* The doctrines of
12 procedural default and abuse of the writ impose on petitioners a burden of
13 reasonable compliance with procedures designed to discourage baseless claims
14 and to keep the system open for valid claims. Both abuse of the writ and
15 procedural default doctrines are designed to vindicate the State's interest in the
16 finality of its criminal judgments and to lessen the injury to a State from
17 reexamination of a state conviction on a ground that the State did not have the
18 opportunity to address the claim at a prior, appropriate time. *Id.* at 493.

19
20 Claim V(A)(4) - Prosecutorial Misconduct: Examination of Criminalist Chisum

21 In the opening statement at Adcox’s trial, the prosecutor maintained the
22 victim Orozco had been shot from a distance of 30 feet, but on direct examination
23 Chisum’s opinion was that the fatal shot was fired from a distance of about eight
24 feet. The prosecutor used Chisum’s testimony to vigorously argue that Adcox’s
25 account of the events was false. Months later, at Howard Love’s trial, the
26 prosecutor elicited testimony from Chisum asserting the evidence permitted two

1 theories about where the shooter was positioned, but stating the evidence
2 favored the account consistent with Adcox's testimony.

3 By failing to elicit Chisum 's opinion that the crime occurred in a manner
4 consistent with Adcox's testimony, Adcox asserts the prosecutor failed to correct
5 misleading testimony, which along with the use of inconsistent theories at the
6 two trials, violated Adcox's rights. Adcox contends that in light of the jury's
7 struggle over whether to credit his testimony, the prosecutor's reliance on
8 misleading testimony that contradicted his account of the crime had a substantial
9 and injurious effect on the verdicts at both stages of the trial.

10 Adcox's counsel assert the transcript of the testimony of criminalist Jerry
11 Chisum from Love's trial was not available from the Court of Appeal in February
12 2007. The Warden contends the Court of Appeal did have the transcript during
13 Love's appeal in 1984-85, and that a copy of the transcript has been in the
14 possession of the Attorney General's Office since 1984. The Warden asserts
15 reasonable diligence required Adcox to request a copy from the Attorney General
16 if the transcript was not available from the Court of Appeal. Regardless, the
17 Warden argues that Chisum's testimony at Love's trial is inconsequential to the
18 asserted claim, and that Chisum's testimony from Adcox's preliminary hearing
19 already provided support for the asserted claim. The Warden contends this
20 claim lacks substance because it only shows a good faith uncertainty as to the
21 exact place from which the fatal shot was fired, and regardless of whether the
22 shot was fired from eight feet away or from 15 to 20 feet away, either place is
23 inconsistent with Adcox's testimony. Further, the Warden asserts it is likely
24 Adcox will be permitted to present Chisum's testimony from Love's trial in
25 support of his claim asserting ineffective assistance of counsel with respect to the
26 handling of Chisum's testimony.

1 Adcox replies that Chisum's testimony about the distance between the
2 shooter and the victim was extremely important, because if the jury credited it,
3 Adcox's account of the crime was rendered implausible and the jury's finding on
4 Adcox's credibility was critical to his defense. Adcox asserts he cannot be faulted
5 for failing to earlier secure the Love transcript, as he had no reason to suspect
6 Chisum would have retreated from the opinion expressed at his trial. Further,
7 Adcox contends that state procedures require the existence of triggering facts
8 before an investigation may be conducted, so counsel for Adcox on his state
9 appeals were under no duty to obtain the Love transcript.

10 The Warden argues this claim is without merit because Chisum was
11 questioned by both the prosecution and defense on the exact point about which
12 Adcox complains. Chisum testified he changed his opinion regarding the
13 distance from which the fatal shot was fired based on his examination of the
14 victim's hat and test shots fired with Adcox's gun and ammunition. Further, the
15 Warden denies that Chisum's testimony at Love's trial was in any way
16 inconsistent with his testimony at Adcox's trial, and denies that the prosecutor
17 relied on a different theory regarding the distance at Love's trial. The Warden
18 asserts the prosecutor's factual theories were controlled by the evidence available
19 at the time and denies any bad faith or misconduct.

20
21 Claim V(A)(5) - Prosecutorial Misconduct: Theory re: the Victim's Wallet

22 At Adcox's trial, the prosecutor attempted to establish that Adcox was in
23 possession of the victim's wallet, encouraging the jury to infer from that fact that
24 Adcox's account of the crime was fabricated. Adcox alleges the prosecutor
25 switched tactics at Love's trial and argued, consistent with Adcox's account, that
26 Love was the one who removed the victim's wallet. Adcox asserts this use of

1 inconsistent theories violated his rights, and given the importance to his defense
2 of the jury's belief in his testimony, the prosecutor's manipulation of the evidence
3 had a substantial and injurious influence on the verdicts.

4 The Warden asserts this claim lacks substance, as the prosecutor did not
5 pursue inconsistent theories about who had the victim's wallet after the shooting,
6 but consistently held to the position that Love took the wallet from the victim
7 because Adcox did not want to touch the body, but that Love gave the wallet to
8 Adcox, who then removed the money and discarded the wallet. This was
9 consistent with Adcox's testimony that he received the wallet from Love, and is
10 consistent with the evidence about which Adcox now complains. The Warden
11 contends the record refutes the factual predicate of this claim and precludes any
12 finding of prejudice, and that Adcox has failed to show good cause for not
13 exhausting this claim earlier.

14
15 To avoid dismissal of these claims due to abuse of the writ, Adcox must
16 show that counsel's efforts' to raise the claims were impeded by an objective
17 factor external to the defense: e.g., governmental interference, the reasonable
18 unavailability of a factual or legal basis for the claims, or constitutional ineffective
19 assistance of counsel. If an external impediment cannot be shown, the failure to
20 raise the claims in an earlier petition can still be excused if Adcox can show that
21 dismissal of the claims will result in a fundamental miscarriage of justice – i.e.,
22 affirming the conviction of an innocent person.

23 Adcox presented Claims V(A)(4) and (5) for the first time in his amended
24 federal petition filed February 28, 2008. The factual predicate for these claims
25 were contained in a public court record. Although Adcox asserts the transcript
26 from Love's trial was not available from the Court of Appeal in February 2007, it

1 was able to be obtained from the court reporter, and the Warden contends the
2 California Attorney General has possessed a copy of the transcript since 1984.

3 Adcox has failed to show his efforts to raise these claims were impeded by
4 an objective factor external to the defense. Adcox's arguments that he had no
5 reason to suspect Chisum would have retreated from the opinion he expressed at
6 Adcox's trial, and that state procedures require the existence of triggering facts
7 before an investigation may be conducted, so his state appellate counsel were
8 under no duty to obtain the Love trial transcript, indicate his counsel was not
9 ineffective for failing to raise these claims. Also, Adcox has failed to show the
10 Love trial transcript was unavailable due to governmental interference or some
11 other factor external to the defense. Finally, Adcox has not shown that dismissal
12 of these claims will result in a fundamental miscarriage of justice – i.e., affirming
13 the conviction of an innocent person.

14
15 *Conclusion*

16 Since the government met their burden of pleading abuse of the writ by
17 asserting these claims were not in Adcox's previous habeas petition, the burden
18 shifted to Adcox to show cause and actual prejudice. Adcox has failed to show
19 cause, or some objective factor external to the defense which impeded counsel's
20 efforts' to raise these claims. Claims V(A)(4) and (5) are dismissed under abuse
21 of the writ.

22
23 **New Ineffective Assistance of Counsel Claims**

24 Adcox presented these claims for the first time in his 2008 amended federal
25 petition. The parties agree these claims have not been presented to the state
26 court.

1 Claim XX(A) - ineffective assistance of counsel at guilt phase:

- 2 a. Subclaim (2)(a) - Guidice's failure to adequately voir dire re: the
- 3 victim's church membership;
- 4 b. Subclaim (2)(b) - Guidice's failure to raise the conflict by Vanover;
- 5 c. Subclaim (2)(c)(iii) - Guidice's failure to elicit on cross examination of
- 6 Michael Adcox his statement of that he observed burn marks on
- 7 Love's face shortly after the shooting;
- 8 d. Subclaim (2)(d)(i)-(iii) - Guidice's failure to present evidence: (i)
- 9 consistent with the defense theory from defense investigator Bob
- 10 Heitman regarding the statement by Richard Carr that Love
- 11 admitted shooting the victim; (ii) from Rhonda Voorheis regarding
- 12 Tillery's reputation as a liar; and (iii) regarding Love's flight after the
- 13 crime;
- 14 e. Subclaim (2)(g) - Guidice's failure to request a poll of the jury
- 15 regarding their potential exposure to newspaper articles about the
- 16 case;
- 17 f. Subclaim (3) - cumulative impact of errors by Lamb and Guidice.

18
19 The Warden asserts none of these claims are prejudicial. The Warden
20 contends, regarding claim (2)(c)(iii), Michael Adcox's statement about burn
21 marks on Love's "cheeks and forehead" are not consistent with having fired a
22 modern small-bore rifle like the one used to shoot the victim, disputing Adcox's
23 contrary allegation in his petition at page 120. The Warden states, regarding
24 claim (2)(d)(i)-(iii), that the testimony of both the defense investigator and Carr
25 revealed that Love admitted shooting the victim; that Tillery's veracity was
26 attacked by other means making this evidence cumulative as well as moot since

1 Adcox testified almost everything in Tillery’s testimony was true; and that there
2 was ample evidence Adcox, Love and Tillery fled after the murder, but the fact
3 Love “eluded capture longer” does not show he had more consciousness of guilt
4 than Adcox.

5 The Warden asserts, regarding Claim (2)(g), the California Supreme Court
6 on direct appeal found no reason to believe the jurors had read any of the
7 allegedly prejudicial articles in violation of the court’s admonition *People v.*
8 *Adcox*, 47 Cal.3d 207, 252-253 (1988) (denying Adcox’s claim of trial court error
9 for failing to sua sponte voir dire the jury regarding statements attributed to the
10 prosecutor in newspaper articles, finding no abuse of discretion as there was no
11 affirmative evidence that any juror had read any of the articles in question, the
12 defense counsel characterized the quotes as “innocuous,” and the trial court
13 admonished the jury “not to read any newspapers or listen” to any report
14 connected with the case). The Warden further asserts competent counsel could
15 decide to rely on a mistrial motion based on the news articles instead of
16 requesting that the jurors be questioned, which might emphasize the articles in
17 the jurors’ minds or confirm that Adcox was not harmed. The Warden concludes
18 that since the news articles were not incurably prejudicial and there is no reason
19 to believe any of the jurors were exposed to prejudicial material, there is no
20 reasonable probability of a different result.

21
22 As above, since the Warden has met their burden of pleading abuse of the
23 writ, Adcox must show some objective factor external to the defense impeded
24 presentation of these claim. If an external impediment cannot be shown, the
25 failure to raise the claims in an earlier petition can still be excused if Adcox can
26 show that dismissal of the claims will result in a fundamental miscarriage of

1 justice – i.e., affirming the conviction of an innocent person.

2 Adcox presented these claims for the first time in his amended federal
3 petition filed February 28, 2008. The factual predicates underlying these claims
4 were contained in the transcript of Adcox’s trial, defense counsel’s files, or local
5 newspaper articles. Adcox has failed to show his efforts to raise these claims
6 were impeded by an objective factor external to the defense. Adcox has not
7 shown these claims could not be raised because his appellate counsel was
8 ineffective³, or due to governmental interference or some other factor external to
9 the defense. Finally, Adcox has not demonstrated that dismissal of these claims
10 will result in affirming the conviction of an innocent person.

11
12 *Conclusion*

13 Since the government met their burden of pleading abuse of the writ by
14 asserting these claims were not in Adcox’s previous habeas petition, the burden
15 shifted to Adcox to show cause and actual prejudice. Adcox has failed to show
16 cause, or some objective factor external to the defense which impeded the efforts
17 to raise these claims. Subclaims XX(A)(2)(a), (b), (c)(iii), (d)(i)-(iii) and (g), and
18 (A)(3) to the extent it relies on the above allegations in XX(A)(2), are dismissed
19 under abuse of the writ.

20
21 **Claims Not Presented in Fourth State Habeas Petition**

22 Claim VI (trial counsel’s failure to request a special prosecutor due to the
23 hiring of Tillery’s counsel Vanover, who had previously negotiated her plea
24 agreement, by the DA’s office and his subsequent involvement in Adcox’s case)

25
26

³ This analysis only applies to facts not included in Claim XVI, which is exhausted.

1 and Claim XLIV (lack of California jurisdiction in the Stanislaus National Forest)
2 were agreed by the parties to be unexhausted. Adcox did not include these
3 claims in his fourth state habeas petition filed with the California Supreme Court
4 March 12, 2010. In light of the failure to present these claims to the state court,
5 they are considered abandoned and are dismissed.

6
7 ORDER:

8 Adcox's motion for stay and abeyance is DENIED. The parties' agreement
9 regarding the lack of exhaustion of Claims V(A)(6) and XVI, adopted in the
10 March 31, 2009 Exhaustion Order, is erroneous and those claims are exhausted.
11 Claims V(A)(4) and (5) are dismissed as abusive. Claims XX(A)(2)(a), (b), (c)(iii),
12 (d)(i)-(iii) and (g); XX(A)(3), to the extent it relies on XX(A)(2), are dismissed as
13 abusive. Claims VI and XLIV are considered abandoned and are dismissed.

14 Adcox's brief of the merits of the remaining claims in his petition is due
15 120 days from the date of this order. The Warden's opposing brief is due 120
16 days after Adcox's brief is filed, and Adcox's reply brief, if any, is due 90 days
17 after the filing of the Warden's opposition brief.

18
19 IT IS SO ORDERED.

20
21 DATED: July 1, 2010

22 /s/ Oliver W. Wanger

23 Senior United States District Judge
24
25
26