UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

LARRY VICKERS, JR., Petitioner, v. DERRAL G. ADAMS, et al., Respondents.	1:08-CV-01961 LJO GSA HC FINDINGS AND RECOMMENDATION REGARDING RESPONDENT'S MOTION TO DISMISS [Doc. #12]

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

BACKGROUND

Petitioner is currently in the custody of the California Department of Corrections pursuant to a judgment of the Superior Court of California, County of Kern, following his conviction by jury trial on February 21, 1996, of first degree murder, assault with a firearm, shooting from a motor vehicle, and discharging a firearm from a motor vehicle. (LD 1.[1]) On June 21, 1996, Petitioner was sentenced to serve an indeterminate term of 34 years and 4 months to life in state prison. (LD 1.)

Petitioner appealed the judgment to the California Court of Appeals, Fifth Appellate District. On March 24, 1999, the appellate court affirmed the judgment. (LD 2.) Petitioner filed a petition for

[1] "LD" refers to the documents lodged by Respondent with his motion to dismiss.

review in the California Supreme Court. (LD 3.)The petition was denied on July 14, 1999. (LD 4.)

Petitioner filed fourteen post-conviction collateral challenges with respect to the judgment in the state courts, all petitions for writ of habeas corpus, as follows:

1. Monterey County Superior Court
Filed: August 17, 1999[2];
Denied: January 3, 2000[3];

2. California Court of Appeals, Fifth Appellate District
Filed: April 26, 2000[4];
Denied: March 2, 2001;

3. California Supreme Court
Filed: May 9, 2001;
Denied: October 31, 2001;

4. Kern County Superior Court
Filed: June 20, 2002;
Denied: July 29, 2002;

5. California Court of Appeals, Fifth Appellate District
Filed: October 21, 2002;
Denied: September 11, 2003;

6. California Supreme Court
Filed: October 8, 2003;
Denied: September 15, 2004;

7. Kern County Superior Court
Filed: September 5, 2004;
Denied: October 6, 2004;

8. Kern County Superior Court
Filed: October 17, 2004;
Denied: February 7, 2005;

9. California Court of Appeals, Fifth Appellate District
Filed: March 3, 2005;
Denied: August 25, 2005;

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[2]Pursuant to the mailbox rule set forth in Houston v. Lack, the Court deems the several habeas petitions filed on the date Petitioner signed them and presumably handed them to prison authorities for mailing, as opposed to the date of their receipt by the court clerk, unless otherwise noted. Huizar v. Carey, 273 F.3d 1220, 1222, (9th Cir. 2001), *citing* Houston v. Lack, 487 U.S. 266, 276, 108 S.Ct. 2379, 2385 (1988).

[3]The petition was filed in Monterey County but then transferred to Kern County. The Kern County Superior Court issued the opinion denying the petition.

[4]The petition does not contain a proof of service; however, the petition bears a signature of February 28, 2000. It is unreasonable to assume for purposes of the mailbox rule that the petition was mailed out on the date of this signature given the petition was actually filed on April 26, 2000. Therefore, the Court will consider the petition filed on April 26, 2000.

10. Kern County Superior Court
Filed: December 12, 2005;
Denied: January 26, 2006;

11. California Court of Appeals, Fifth Appellate District
Filed: April 5, 2006;
Denied: April 27, 2006;

12. California Supreme Court
Filed: September 25, 2006;
Denied: May 23, 2007;

13. California Supreme Court
Filed: May 31, 2007;
Denied: November 14, 2007;

14. California Supreme Court
Filed: January 9, 2008;
Denied: July 16, 2008.

(LD 5-35.)

On December 24, 2008, Petitioner filed the instant federal petition for writ of habeas corpus in this Court. On April 28, 2009, Respondent filed a motion to dismiss the petition as being filed outside the one-year limitations period prescribed by 28 U.S.C. § 2244(d)(1). Petitioner filed his opposition to Respondent's motion to dismiss on June 3, 2009. Respondent filed a reply on July 30, 2009.

DISCUSSION

A. Procedural Grounds for Motion to Dismiss

Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition if it "plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court . . . ." Rule 4 of the Rules Governing Section 2254 Cases.

The Ninth Circuit has allowed respondents to file a motion to dismiss in lieu of an answer if the motion attacks the pleadings for failing to exhaust state remedies or being in violation of the state's procedural rules. See, e.g., O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990) (using Rule 4 to evaluate motion to dismiss petition for failure to exhaust state remedies); White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (using Rule 4 as procedural grounds to review motion to dismiss for state procedural default); Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n.12 (E.D. Cal. 1982) (same). Thus, a respondent can file a motion to dismiss after the court orders a response, and the Court

should use Rule 4 standards to review the motion. See Hillery, 533 F. Supp. at 1194 & n. 12.

In this case, Respondent's motion to dismiss is based on a violation of 28 U.S.C. 2244(d)(1)'s one-year limitations period. Because Respondent's motion to dismiss is similar in procedural standing to a motion to dismiss for failure to exhaust state remedies or for state procedural default and Respondent has not yet filed a formal answer, the Court will review Respondent's motion to dismiss pursuant to its authority under Rule 4.

B. Limitation Period for Filing a Petition for Writ of Habeas Corpus

On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA"). The AEDPA imposes various requirements on all petitions for writ of habeas corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc), *cert. denied,* 118 S.Ct. 586 (1997).

In this case, the petition was filed on December 24, 2008, and therefore, it is subject to the provisions of the AEDPA. The AEDPA imposes a one-year period of limitation on petitioners seeking to file a federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As amended, § 2244, subdivision (d) reads:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
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> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
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> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

In most cases, the limitations period begins running on the date that the petitioner's direct review became final. In this case, the petition for review was denied by the California Supreme Court on July 14, 1999. Thus, direct review concluded on October 12, 1999, when the ninety (90) day period for seeking review in the United States Supreme Court expired. Barefoot v. Estelle, 463 U.S. 880, 887 (1983); Bowen v. Roe, 188 F.3d 1157, 1159 (9th Cir.1999); Smith v. Bowersox, 159 F.3d 345, 347 (8th Cir.1998). Petitioner had one year commencing on October 13, 1999, until October 12, 2000, absent applicable tolling, in which to file his federal petition for writ of habeas corpus. Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir.2001). However, Petitioner delayed filing the instant petition until December 24, 2008, over eight years beyond the due date. Absent any applicable tolling, the instant petition is barred by the statute of limitations.

C. Tolling of the Limitation Period Pursuant to 28 U.S.C. § 2244(d)(2)

Title 28 U.S.C. § 2244(d)(2) states that the "time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward" the one year limitation period. 28 U.S.C. § 2244(d)(2). In Carey v. Saffold, the Supreme Court held the statute of limitations is tolled where a petitioner is properly pursuing post-conviction relief, and the period is tolled during the intervals between one state court's disposition of a habeas petition and the filing of a habeas petition at the next level of the state court system. 536 U.S. 214, 215 (2002); see also Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999), *cert. denied,* 120 S.Ct. 1846 (2000). Nevertheless, state petitions will only toll the one-year statute of limitations under § 2244(d)(2) if the state court explicitly states that the post-conviction petition was timely or was filed within a reasonable time under state law. Pace v. DiGuglielmo, 544 U.S. 408 (2005); Evans v. Chavis, 546 U.S. 189 (2006). Claims denied as untimely or determined by the federal courts to have been untimely in state court will not satisfy the requirements for statutory tolling. Id.

1. Petitions One, Two and Three

Petitioner filed his first state habeas petition on August 17, 1999 in the superior court. This filing took place before the commencement of the statute of limitations. Respondent concedes the statute of limitations was tolled during the pendency of this petition, from October 13, 1999, the date

the limitations period commenced, until January 3, 2000, the date the petition was denied.

Petitioner next filed a habeas petition in the appellate court on April 26, 2000. Respondent contends that this interval of 113 days should not be tolled because Petitioner unduly delayed. Petitioner argues the interval should be tolled because the appellate court did not opine that the petition was untimely. Under Chavis, in the absence of an explicit state court finding of untimeliness, the federal court must "examine the delay in each case and determine what the state courts would have held in respect to timeliness." 546 U.S. at 198. In Chavis, the Supreme Court determined that an unexplained delay of six months is far longer than the short period of time of 30 to 60 days that most states provide for filing an appeal. The Supreme Court concluded that such a long period of time was unreasonable. Here, the delay of 113 days is twice the short period of time of 30 to 60 days provided by most states for filing an appeal. In addition, the petition submitted to the appellate court is identical to the superior court petition. Indeed, it contains the same date of August 12, 1999, and the same 44 pages of argument. Therefore, the delay of 113 days is clearly unreasonable. Chavis, 546 U.S. at 201. Respondent is correct that the interval should not be tolled. However, Respondent concedes the limitations period was tolled for the pendency of the second petition until it was denied on March 2, 2001.

Petitioner then filed a habeas petition in the California Supreme Court on May 9, 2001. Respondent also argues that the 67 day interval between the two petitions is unreasonable and should not be tolled. On one hand, 67 days is just outside the 30 to 60 days normally granted by state courts to file an appeal. On the other hand, as Respondent points out, the petition filed with the California Supreme Court is identical to the appellate court petition. A period of 30 to 60 days is more than adequate for a prisoner to submit the identical petition to a higher court. Further, California only allows ten days for a petitioner to file a *petition for review*. Therefore, given the facts in this case, the period of 67 days appears to be unreasonable and should not be tolled. Nevertheless, in the grand scheme, the instant federal petition is so untimely that even if the Court were to grant Petitioner tolling for these 67 days, it would make no difference to the outcome. Accordingly, another 67 days of the limitations period ran at the time the third petition was filed for a total of 180 days. Respondent concedes that the limitations period was tolled for the time the third petition was

pending until it was denied on October 31, 2001.

2. Petitions Four, Five, and Six

Petitioner commenced a second round of collateral review on June 20, 2002, by filing a habeas petition in the Kern County Superior Court. There can be no tolling for the interval between the third petition and the fourth petition, because the fourth petition constituted a new round of review. Hammerle v. Schriro, 495 F.3d 1069, 1075 (9th Cir.2007); Gaston v. Palmer, 447 F.3d 1165, 1166 (9th Cir.2006), *cert. denied*, 127 S.Ct. 979 (2007). In addition, Petitioner is not entitled to statutory tolling for the time the fourth petition was pending, because the superior court specifically determined the petition to be untimely. (LD 15.) The superior court stated, "[Petitioner] fails to explain why [these issues] were not discovered before and raised in the prior Petition." (LD 15.) Under Pace, the action was not "properly filed" for purposes of tolling. 544 U.S. at 414-415.

Likewise, Petitioner is not entitled to tolling for the intervals between the fourth, fifth and sixth petitions, or during the pendency of the fifth and sixth petitions. The fifth and sixth petitions were summarily denied without comment or citation to authority. In such cases, the federal court must "look through" the summary dispositions to the last reasoned decision. Pham v. Terhune, 400 F.3d 740, 742 (9th Cir.2005); Shackleford v. Hubbard, 234 F.3d 1072, 1079 n.2 (9th Cir.2000), *citing* Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991). Thus, the fifth and sixth petitions are assumed to have been denied on the same grounds as the fourth petition, which was for untimeliness. Accordingly, Petitioner is entitled to no tolling for the second round of collateral review. With 185 days remaining (365-180), the limitations period expired on May 5, 2002. The instant federal petition was not filed for another six and one-half years.

3. Petitions Seven through Fourteen

The remaining state petitions were filed after the limitations period expired and therefore cannot serve to toll the period. The statute of limitations cannot be revived once it has expired. Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir.2003); Green v. White, 223 F.3d 1001 (9th Cir.2000). Thus, the instant petition is untimely by six and one-half years.

D. Equitable Tolling

The limitations period is subject to equitable tolling if the petitioner demonstrates: "(1) that

he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005); see also Irwin v. Department of Veteran Affairs, 498 U.S. 89, 96 (1990); Calderon v. U.S. Dist. Ct. (Kelly), 163 F.3d 530, 541 (9th Cir. 1998), *citing* Alvarez-Machain v. United States, 107 F.3d 696, 701 (9th Cir. 1996), *cert denied*, 522 U.S. 814 (1997). Petitioner bears the burden of alleging facts that would give rise to tolling. Pace, 544 U.S. at 418; Smith v. Duncan, 297 F.3d 809 (9th Cir.2002); Hinton v. Pac. Enters., 5 F.3d 391, 395 (9th Cir.1993).

In his opposition, Petitioner argues he should be excused from the statute of limitations for the following reasons: 1) Delayed receipt of state transcripts; 2) Security policy instituted at prison created an impediment to timely filing; and 3) Placement in administrative segregation deprived Petitioner of his legal property.

First, Petitioner claims he did not receive his appellate record until April 2000, and this wait caused him substantial delay in filing his fourth habeas petition. Courts have generally held that delays in obtaining transcripts do not warrant equitable tolling. Gassler v. Bruton, 255 F.3d 492, 495 (8th Cir.2001); Lloyd v. Van Natta, 296 F.3d 630, 634 (7th Cir.2002); Jihad v. Hvass, 267 F.3d 803, 806 (8th Cir.2001); Fadayiro v. U.S., 30 F.Supp.2d 772, 779-80 (D.N.J. 1998). In Gassler, the Eight Circuit stated:

> [W]e understand petitioner's desire to have a transcript before filing for post-conviction relief. Possession of a transcript, however, is not a condition precedent to the filing of such proceedings. A petition seeking collateral relief could have been filed, following which, if necessary for decision of the issues raised, the court could have ordered production of the transcript.

255 F.3d at 495.

In any case, the claims brought by Petitioner in his second round of collateral relief were known to him during his prosecution, and did not require transcripts. Petitioner alleged: 1) Ineffective assistance of counsel due to failure to request instructions on lesser included offenses of murder and failure to investigate facts and law; 2) Trial court's failure to sua sponte instruct on lesser included offenses of murder and to provide complete instructions; and 3) Trial court improperly determined that a witness was unavailable, thereby admitting the witness's testimony. Petitioner's presence at trial obviated the need for transcripts to raise these claims. Moreover, Petitioner unduly

delayed even after receiving the transcripts. He received them in April of 2000, but he failed to present his claims for another two years until June 20, 2002. (LD 36.) Clearly, he has not shown the lack of transcripts to be an extraordinary circumstance which prevented him from filing his claims, nor has he demonstrated diligence.

Next, Petitioner alleges a security policy was implemented in December of 1999 due to the attempted murder of a correctional officer which "systematically denied law library access to all prisoners without a court ordered deadline." See Opposition at 6. Petitioner claims this policy remained in effect until he was transferred to another institution in October of 2005. Id. The Ninth Circuit has stated that equitable tolling may be available based on a denial of access to legal materials and the law library. Lott v. Mueller, 304 F.3d 918, 925 (9th Cir.2002). However, Petitioner must still demonstrate under the facts that the circumstances in his case were extraordinary and did in fact prevent him from timely complying. Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir.1999). In this case, Petitioner fails to do so. As Respondent notes, Petitioner's claim is completely belied by the fact that he filed nine of his fourteen petitions during this time period. Additionally, Petitioner provides no evidence of such a security policy being in effect for those five years. He provides a copy of a November 15, 2001, inmate appeal which was partially granted; Petitioner was advised to "submit a request to physically access the legal library to Mr. Burk and you'll be placed on the ducat list." See Opposition at 27. This demonstrates that Petitioner may have had difficulties accessing the law library for only the first two months of the limitations period, but there is no evidence that he could not do so beyond that date. Moreover, Petitioner had access using the institution's paging system, a fact he admits in one of his state habeas petitions. (LD 16.) Thus, Petitioner's circumstances are not extraordinary but are very similar to those shared by most inmates.

Last, Petitioner complains that his placement in administrative segregation ("ad-seg") on October 8, 2001, through May 20, 2002, prevented him from accessing his legal property. Petitioner's claim is without merit on several bases. For one thing, he admits a property officer did provide him with legal materials shortly after his placement. See Opposition at 6-9. Second, Petitioner conceded in his fifth state habeas petition that his legal materials were returned to him on December 21, 2001, after he filed an inmate appeal form. (LD 16, 37.) At most, he was without his

legal materials for only the first two months. Third, his placement in ad-seg was completely his own doing. Petitioner blames his placement in ad-seg on the prison, alleging he was illegally placed in ad-seg on a weapons possession charge that was dismissed for lack of evidence, but this contention is a complete misrepresentation of the facts. According to the Rules Violation Report, two correctional officers observed Petitioner holding his left thigh area with his left hand. (LD 38.) The officers then ordered him to "Get on the wall." (LD 38.) Petitioner turned and ran. (LD 38.)The officers gave chase and ordered him to "Get down." (LD 38.) Petitioner was then observed pulling an inmate-manufactured deadly weapon out of his altered gray sweat pants. (LD 38.) As he approached a urinal, he threw the object in and tried to flush it down. (LD 38.) The weapon was recovered and described as having a piece of metal five inches in length sharpened to a point, with a plastic handle, and having a sheath made of paper and masking tape. (LD 38.)

The Court has concerns about Petitioner's credibility when he refers to a memorandum prepared by the Investigative Services Unit ("ISU") that found the incident did not meet the minimum requirements for prosecution by the district attorney because a weapon had not been located. See Opposition, Exh. 1. He claims that in spite of this finding, he was "illegally placed in ad-seg." See Opposition at 7. This appears to be less than truthful. The memorandum he attaches was voided by the ISU and a subsequent memorandum was prepared showing the case was accepted for prosecution by the Monterey County District Attorney's Office. (LD 38.) Indeed, on March 13, 2002, Petitioner pleaded guilty to possession or manufacture of a weapon while confined in a correctional institution and was sentenced to four years in prison. (LD 38.) In addition, on March 29, 2002, an institutional hearing was held and Petitioner was found guilty of possessing a deadly weapon. (LD 38.) For these reasons, Petitioner should not be granted any equitable tolling for the time he was in ad-seg. Petitioner was in possession of his legal property for most of that time, and he bore the responsibility for his ad-seg placement because he committed a crime.

E. Later Start Date Pursuant to 28 U.S.C. § 2244(d)(1)(C)

Petitioner contends that the Court is not precluded from reviewing ground seven of his petition, because of § 2244(d)(1)(C)'s provision that the statute of limitations begins to run on the date a constitutional right is newly recognized by the Supreme Court and made retroactively

applicable to cases on collateral review. He alleges the Supreme Court's decision in Crawford v. Washington, 541 U.S. 36 (2004) established a new rule that was made retroactively applicable by Bockting v. Bayer, 399 F.3d 1010 (9th Cir.2005).

While it is true that the Ninth Circuit did hold in Bockting that Crawford was a new rule that was retroactively applicable to cases on collateral review, the Ninth Circuit was reversed by the Supreme Court in Whorton v. Bockting, 549 U.S. 406 (2007). In Whorton, the Supreme Court determined that Crawford established a new rule, but that the rule was not retroactively applicable because it was not a watershed rule of criminal procedure. Accordingly, Respondent is correct that Petitioner is not entitled to a later start date under § 2244(d)(1)(C).

F. Later Start Date Pursuant to 28 U.S.C. § 2244(d)(1)(D)

Petitioner also claims to have acquired newly discovered evidence which entitles him to a later start date under 28 U.S.C. § 2244(d)(1)(D). He points to a declaration purportedly made by James Oliver, the murder victim's brother, as well as some documents which he claims show the existence of an undisclosed third bullet wound.

Title 28 U.S.C. § 2244(d)(1)(D) states that the limitation period shall run from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." The objective standard in determining when time begins to run under Section 2241(d)(1)(D) is "when the prisoner knows (or through diligence could discover) the important facts, not when the prisoner recognizes their legal significance." Hasan v. Galaza, 254 F.3d 1150 (9th Cir.2001), *quoting*, Owens v. Boyd, 235 F.3d 356, 359 (7th Cir.2000). Petitioner claims in his opposition to Respondent's motion that the factual predicate for the instant claims did not become known until he acquired James Oliver's February 14, 2004, declaration. (LD 22: Ex. A.) In his declaration, Oliver states he had an altercation with Petitioner prior to the shooting incident. He claims he and others chased Petitioner and Petitioner's friends, but Petitioner escaped. He further claims Petitioner returned only after he and others assaulted Shondell Ross, at which time a shootout occurred. He states he did not witness Petitioner shooting the victim, and states his testimony was based on what others told him. He asserts he was never questioned by the prosecution or defense about the shooting incident.

As discussed above, the relevant trigger date under § 2244(d)(1)(D) is when Petitioner knew the relevant facts, or could have discovered them through due diligence, not when he recognized their legal significance. Respondent correctly argues that Petitioner, having been an active participant in both the earlier incident as well as the shooting incident, knew the relevant facts. The facts provided by Oliver would have only confirmed what Petitioner already knew. Also, Oliver testified that he did not have personal knowledge that Petitioner shot the victim. (LD 39: 316.) Thus, the declaration offers nothing new. In light of these facts, Petitioner is not entitled to a later start date based on Oliver's declaration.

Petitioner also claims that newly discovered evidence of a third gunshot wound qualifies for a later start date. Petitioner states that he researched the record and "discovered that one of [the victim's] three wounds was described as a small flesh wound by the coroner, distinguishing it from the other two wounds." See Opposition at 10. He alleges that this distinction showed the victim was struck by different calibers of bullets; therefore, at least two people shot the victim. Id.

His claim for a later start fails again. As argued by Respondent, this evidence was contained in the Clerk's Transcript on Appeal and was therefore available to Petitioner at the very latest in April of 2000. Therefore, only Petitioner can be blamed for his failure to timely research and discover these facts. As stated above, the statute of limitations runs from the time the facts were known or could have been discovered, not from the time Petitioner discovered their legal significance. Thus, Petitioner is not entitled to tolling under 28 U.S.C. § 2241(d)(1)(D).

G. Actual Innocence

Petitioner claims he should be excused from the statute of limitations defense because he is actually innocent in light of Oliver's declaration and the third wound evidence.

Neither the Supreme Court nor the Ninth Circuit has addressed whether there is an actual innocence exception to a violation of section 2244(d)'s limitation period. But even if the Court were to conclude that an actual innocence exception to a violation of the limitations period exists, Petitioner has not met the standard. Petitioner must show that the alleged constitutional error "has probably resulted in the conviction of one who is actually innocent." Bousley v. United States, 523 U.S. 614, 623 (1998), *quoting*, Murray v. Carrier, 477 U.S. 478, 496 (1986). Petitioner must

demonstrate that in light of the evidence no reasonable juror would have found him guilty. Schlup v. Delo, 513 U.S. 298, 329 (1995). Petitioner presents no such evidence in this case.

First, Oliver's declaration is not credible and offers nothing to weaken the prosecution's case. In light of Petitioner's various misrepresentations in his opposition and the apparent retraction by Oliver of his sworn trial testimony, the declaration is highly suspect. Moreover, the declaration does not undermine the prosecution's case. Oliver avers that the prosecution intentionally left out pertinent information so that Petitioner would be found guilty. (LD 22: Exh. A.) Respondent correctly argues that this statement is speculative and conclusory. Oliver's declaration fails to state what pertinent facts were left out and how this would ensure Petitioner would be found guilty. As to the shootout he refers to in the declaration, Oliver fails to name the "five shooters." Id. Oliver also fails to describe the shootout that occurred in any detail. Id. In addition, his recollection of the facts surrounding the shootout do not differ greatly from the facts he testified to at trial. Petitioner's defense at trial was a multiple shooter theory, and Oliver testified that he did not witness Petitioner shoot the victim. (LD 39: 316.) He testified he heard shots and turned to see Petitioner firing his gun, but the victim was already lying in the street. (LD 39: 308-09.) Oliver testified he did not see who Petitioner was shooting. In his declaration, Oliver does not contradict this testimony. He declares that he did not have personal knowledge that Petitioner shot the victim.

Second, the third bullet wound evidence does not prove Petitioner is actually innocent of the murder. Respondent correctly points out that the evidence of a third bullet wound was not initially noted by the attending physician. (LD 22: Att. 1 at pp. 1-2.) However, the two bullet wounds that were noted were non-survival wounds: one being an entry wound to the right rear of the head and exiting the left rear of the head; and the other being an entry wound to the right side of the neck and exiting the left side of the neck. (LD 22: Att. 1 at p. 1.) The third bullet wound was noted in the autopsy report, but that wound was described as a non-fatal flesh wound. (LD 22: Att. 1 at unnumbered p. 19.) This third bullet wound was not the cause of the victim's death; the fatal shot was the first wound described by the attending physician. Therefore, this third wound offers nothing to exonerate Petitioner of murder. Moreover, there was simply no evidence of a second shooter or second weapon. During the murder investigation, five shell casings were recovered and all were .9-

mm. (LD 22: Att. 1 at unnumbered p. 11.)

Rather, the evidence of Petitioner's culpability was overwhelming. Multiple witnesses described how Petitioner ran to the scene of a fistfight, pulled out a gun, leveled the gun at the victim's head, and fired multiple times. Petitioner fails to demonstrate that in light of the evidence no reasonable juror would have found him guilty. Schlup, 513 U.S. at 329.

H. Exhaustion Requirement as Reason to Excuse Untimeliness

Last, Petitioner claims the exhaustion requirement set forth in 28 U.S.C. § 2254(b)(1)(A) excuses him from any allegation of untimeliness, because he was properly pursuing all state remedies prior to presenting his claims in federal court. He claims therefore that all of the time he spent exhausting his claims, from his first petition to his fourteenth, should be tolled. As Respondent correctly argues, 28 U.S.C. § 2244(d)(2) already takes the exhaustion requirement into account by allowing for tolling during the time a properly filed state post-conviction action is pending. In addition, Petitioner did not progress through the state courts in an orderly and timely fashion. Several petitions were dismissed as improperly filed, and others were dismissed as procedurally defaulted. Therefore, the exhaustion requirement does not excuse Petitioner's delay in bringing his federal petition.

RECOMMENDATION

Accordingly, the Court hereby RECOMMENDS that Respondent's motion to dismiss be GRANTED, and the petition for writ of habeas corpus be DISMISSED WITH PREJUDICE for violating the statute of limitations. The Court also RECOMMENDS that Petitioner's motion to amend be DENIED.

These Findings and Recommendations are submitted to the Honorable Lawrence J. O'Neill, United States District Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 72-304 of the Local Rules of Practice for the United States District Court, Eastern District of California.

Within thirty (30) days after being served with a copy, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Replies to the objections shall be served and

filed within ten (10) court days (plus three days if served by mail) after service of the objections. The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: August 18, 2009 **/s/ Gary S. Austin**
UNITED STATES MAGISTRATE JUDGE