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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

LENY PETERSEN GALAFATE,  
Petitioner,  
v.  
DARRYL ADAMS, Warden  
Respondent.

Case No. 1:17-cv-00708-AWI-MJS (HC)  
**FINDINGS AND RECOMMENDATIONS  
(1) TO GRANT RESPONDENT'S MOTION TO  
DISMISS AND (2) TO DISMISS THE  
PETITION AS TIME-BARRED  
(ECF NOS. 1, 12)  
THIRTY (30) DAY OBJECTION DEADLINE**

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus under 28 U.S.C. § 2254. Respondent is represented by Justain Paul Riley of the Office of the California Attorney General.

Before the Court is Respondent's motion to dismiss the petition as time-barred. (ECF No. 12.) It is beyond dispute that the petition was not timely filed under 28 U.S.C. § 2244(d). The only question before the Court is whether Petitioner is entitled to an equitable exception to the statute of limitations on the basis of actual innocence. For the reasons stated below, the Court concludes that she is not. Accordingly, the undersigned will recommend the petition be dismissed.

1 **I. Factual Background**

2 The following facts are taken from the Fifth District Court of Appeal's April 8, 1991  
3 opinion. They are not meaningfully disputed, except as discussed below in reference to  
4 the relatively recent post-trial declarations of Petitioner and her ex-husband. See 28  
5 U.S.C. § 2254(e)(1) (state court factual findings are presumed correct, unless rebutted  
6 by clear and convincing evidence).

7 In the mid-1980's, defendants Roman Galafate and his wife,  
8 Leny Petersen Galafate, resided with family members in  
9 Delano, California. Roman Galafate was an agent for Midland  
10 National Life Insurance Company and had an office in the  
11 MGM Professional Building at 1201 Jefferson Street in  
12 Delano. On September 9, 1985, defendants filed a voluntary  
13 petition in the United States Bankruptcy Court for the Eastern  
14 District of California. The court discharged their debts  
15 pursuant to chapter 7 of the Federal Bankruptcy Code on  
16 February 5, 1986.

17 Defendants maintained close ties with members of their  
18 extended family, including Reny and Violeta Petersen. Reny  
19 Petersen was Leny's uncle, her father's brother. Defendant  
20 Leny Galafate regularly visited her aunt by marriage, Violeta  
21 Petersen, and was godmother of Reny and Violeta's minor  
22 son, Chris. Roman Galafate wrote insurance policies for  
23 various family members, including a \$75,000 life insurance  
24 policy on Violeta Petersen in October 1985. That policy  
25 named her husband, Reny Petersen, as the beneficiary of the  
26 proceeds.

27 Approximately two weeks after the defendants received their  
28 discharge in bankruptcy, Roman Galafate processed an  
application for a \$250,000 insurance policy on the life of  
Violeta Petersen. The application was dated February 18,  
1986, and named "Leny Petersen" as beneficiary of the  
proceeds. "Leny Petersen" was defendant Leny Galafate's  
maiden name. Leny signed her aunt's name on the policy  
application. Although Violeta's address was 20857 Francis  
Drive in Richgrove (Tulare County), the application bore  
Roman Galafate's post office box number in Delano.

Sometime prior to Sunday, February 23, 1986, Roman  
Galafate purchased an \$83 money order from the Miracle  
Market at 1643 Cecil Avenue in Delano. Store manager Pete  
Medrano required customers to pay cash for money orders

1 but did not require presentation of identification. According to  
2 Medrano, the store personnel generally filled in the amount of  
3 the money order and the customer completed the rest of the  
4 information. Although Roman admitted purchasing the \$83  
5 money order, the face of the instrument indicated Violeta  
6 Petersen purchased it on February 18, 1986.

7 Roman Galafate transmitted the completed application and  
8 money order to Midland National Life Insurance Company in  
9 Sioux Falls, South Dakota. Midland received the documents  
10 sometime between 6:15 a.m. on Friday, February 21, 1986,  
11 and 6:15 a.m. on Monday, February 24, 1986.[FN3]

12 [FN3: The Sioux Falls office was not open on  
13 Saturday, February 22, 1986, or Sunday, February 23,  
14 1986. The parties stipulated there was mail pickup at  
15 6:15 a.m. on Friday, February 21, and the next pickup  
16 was at 6:15 a.m. on Monday, February 24. The  
17 insurance application was collected during the latter  
18 pickup. United States Postal Service Supervisor  
19 Martoria Sherman testified it would take a minimum of  
20 two days, and probably three, for a letter mailed in  
21 Delano to reach Sioux Falls.]

22 Reny Petersen last saw his 34-year-old wife, Violeta, at their  
23 Richgrove home on Saturday morning, February 22, 1986.  
24 Violeta had received her paycheck the day before and was  
25 carrying \$500 in cash. She planned to pay bills that day.

26 At 6:50 p.m. that day, Martha Salinas was traveling  
27 northbound on Browning Road from McFarland to Delano. At  
28 the intersection of Browning and Pond Roads, Salinas saw a  
large car speeding westbound on Pond. The car went  
through a stop sign, swayed, and almost crashed into  
Salinas's car. Salinas saw the male driver pull the car over  
and park. A few minutes after 7 p.m., Salinas returned by the  
same route and saw a body in the roadway in the vicinity of  
where the car had been parked. The body had not been there  
earlier. Salinas stayed at the scene until law enforcement  
officers arrived. Kern County sheriff's deputies were  
dispatched to the scene and found the body of a fully clothed  
female lying on her back. A blueish-colored tongue protruded  
from the victim's mouth. The victim's sweater was pulled up  
over her head and a distinctive bruise surrounded her neck.  
Officers found a purse, jewelry, and several bank books  
scattered about the victim as well as loose fibers on her face  
and body. A wallet contained a driver's license in the name of

1 Violeta Bacena Petersen. The officers did not find any money  
2 in either the purse or the wallet.

3 That same evening, Reny Petersen stopped by his father's  
4 grave on his way home from work. Sometime after 6 p.m.  
5 Reny realized Violeta was gone. After unsuccessfully  
6 attempting to locate her, Reny filed a missing person report  
7 with Tulare County Sheriff's Detective Charles Denchfield  
8 around 10:30 p.m. Denchfield relayed the information to his  
9 communications unit, the Delano Police Department, and the  
10 Kern County Sheriff's Department. Around midnight, Kern  
11 County sheriff's detectives advised Reny his wife was dead.  
12 Detective Sergeant Craig Fraley took carpet samples from  
13 Reny Petersen's home several days later.

14 On February 24, 1986, Dr. Armand L. Dollinger, a forensic  
15 pathologist, performed an autopsy on the five-foot-three-inch,  
16 one-hundred-and-two-pound body of Violeta Petersen.  
17 Dollinger concluded Violeta died by asphyxiation caused by  
18 ligature strangulation sometime prior to 2 p.m. on February  
19 22, 1986. The ligature could have been a rope or cord. The  
20 particularly prominent mark of the neck wound demonstrated  
21 considerable force was used to hold the ligature. Dollinger  
22 testified death by ligature strangulation would have taken  
23 several minutes. The right hyoid, a small bone in the throat,  
24 was fractured. Aside from the wounds to the neck, the victim  
25 had bruises on the back of the head, over the left eye, on the  
26 cheeks, and on the left wrist. The livor mortis (color from  
27 blood settling to the lower portion of the body), facial  
28 petechial hemorrhaging (breakage of small vessels), and  
flattening of the face showed the victim had been face down  
for at least two to six hours after death. James A. Malouf, a  
Kern County coroner's investigator, concluded the victim  
must have been killed elsewhere, placed face down for a  
time, and later left face up on Browning Road. The victim's  
pants were wet and her panty shield was soaked. However,  
there was no evidence of sexual assault. Dollinger said  
urination is a frequent occurrence during death by ligature  
strangulation.

During the autopsy, Kern County Criminalist Bernadetta  
Rickard collected trace evidence and took biological samples  
for analysis. She recovered fibers from the victim's neck  
wounds, body sheet, mouth, and hair. Rickard testified these  
fibers were collected before the body was disrobed. However,  
the fiber taken from the victim's mouth was recovered much  
later than the ones taken from the body sheet. Further, the  
envelope containing the mouth fiber did not specifically state

1 it had been recovered before the disrobing of the victim. The  
2 recovered fibers were various colors, including green, red,  
3 black, and multicolored. There were several red fibers but no  
4 green fibers in the neck wounds. There were one or two  
5 green fibers, and various multi-colored fibers in the mouth  
6 and on the tongue. Rickard found one green fiber on a lock of  
7 hair, another green fiber on another portion of the victim's  
8 hair, and at least two green fibers on the body sheet. Overall,  
9 the fibers were primarily green.

10 On the date of the autopsy, Roman Galafate III telephoned  
11 Midland National Life Insurance Company in Sioux Falls and  
12 reported Violeta Petersen had died on February 22. Roman  
13 requested instructions on completing a claim and also  
14 inquired whether Midland had received the victim's most  
15 recent policy application. Roman told Midland personnel the  
16 application had been filled out the preceding Tuesday or  
17 Wednesday. He reported there were two policies—one for  
18 \$75,000 and one for \$250,000. Roman said the victim had  
19 been so pleased with the first policy that she wanted a  
20 second policy. Donald Lemke, Midland Vice President of  
21 Claims, testified no policy was ever issued on the \$250,000  
22 application.

23 On February 26, 1986, Kern County sheriff's officers found  
24 Violeta's brown Honda Civic at the Sundance Inn, 405 Cecil  
25 Avenue, in Delano. The vehicle had been parked at the motel  
26 for a couple of days. The driver's seat had been adjusted to  
27 accommodate a driver taller than Violeta. The car was very  
28 clean and even the decedent's fingerprints could not be found  
on the vehicle. Law enforcement personnel unsuccessfully  
attempted to identify a print on the sun visor.

Sergeant Fraley took carpet samples from the motel. On  
March 18, 1986, Kern County Criminalist Gregory Laskowski  
conducted a fiber analysis on the material recovered from the  
victim's body. Laskowski concluded those fibers did not come  
from the carpet in the Petersen residence or the Sundance  
Inn.

On March 18, 1986, Roman telephoned Donald Lemke at the  
Midland office in Sioux Falls, and advised that Leny Petersen  
was his wife. Lemke questioned why the victim used the  
name of Petersen instead of Galafate in the beneficiary  
designation. Lemke noted Leny used the name Leny P.  
Galafate when she applied for status as an authorized agent  
with Midland on October 22, 1985. Roman promised to send  
Lemke information on the usage of Leny's maiden name. On

1 March 24, 1986, Lemke received a letter dated March 18,  
2 1986, from Roman. However, the letter did not explain why  
3 the name Leny Petersen was used in the beneficiary  
4 designation. Lemke sent Roman a letter dated April 1, 1986,  
5 explaining what needed to be done to submit a claim  
6 regarding the \$250,000 policy application. On April 7, 1986,  
7 Midland received a \$250,000 claim dated April 4, 1986, and  
8 signed "L. Petersen."

9 Earlier in March 1986, Midland retained Donald Lake of  
10 Equifax Services to investigate the questionable claim. Lake  
11 obtained a statement from Leny Galafate on April 8, 1986.  
12 Leny said she learned of Violeta's death when her uncle  
13 Reny telephoned her late in the evening of February 22 or  
14 early morning of February 23. On April 14, 1986, Lake  
15 telephoned Kern County Sheriff's Detective Craig Fraley, the  
16 primary investigator assigned to the Violeta Petersen  
17 homicide case. Fraley immediately telephoned Donald Lemke  
18 in South Dakota and obtained several documents, including  
19 applications for insurance policies on Violeta's life.

20 On April 18, 1986, Donald Lake interviewed Roman in his  
21 Delano office and obtained a signed statement from him.  
22 Roman said Violeta took out a \$75,000 insurance policy in  
23 October 1985 and designated her husband, Reny, as the  
24 beneficiary. Roman said Violeta decided to purchase a  
25 second, larger policy after making a number of visits to his  
26 office. Violeta also mentioned she was considering changing  
27 the beneficiary on the \$75,000 policy. Violeta frequently  
28 visited her niece, Leny, at Roman's insurance office. During  
these Friday visits, Violeta often spoke with Roman about  
acquiring another policy.[FN4] However, it was not until a  
week before her death that Violeta actually applied for the  
policy. Roman told Lake he and Violeta were alone when the  
policy application was completed. Violeta's son, Chris, was in  
another room of the office suite until the "tail end" of the  
transaction. Roman was under the impression Violeta did not  
want Reny to know about the second policy. Roman said  
Violeta gave him cash to pay the premium because her  
checkbook was "kind of fouled up." Roman claimed he had  
taken the money to Presidio Savings and Loan in Delano on  
Saturday, February 15, 1986, but it was closed. He obtained  
a money order from the bank on Monday, February 17, 1986,  
and mailed the money order and application to Midland on  
the same day.

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[FN4: Reny Petersen stated his wife had not been interested in insurance at all because she believed it was like a curse.]

On May 8, 1986, Sergeant Fraley conducted a consensual interview of Roman Galafate at his Delano office. Roman claimed he had last seen Violeta on the evening of Friday, February 21, 1986, at his insurance office. Roman admitted selling a \$75,000 insurance policy to Violeta in 1985. A short time later, Violeta "started questioning" Roman about a \$250,000 life insurance policy. Roman said Violeta also "attempted to change" the primary beneficiary on the \$75,000 policy from her husband, Reny, to her niece, defendant Leny Galafate. Roman further claimed he sold Violeta the \$250,000 insurance policy one week before her death and she had signed the application for it. Violeta gave Roman about \$80 in cash so he could purchase a money order for the policy. Roman acknowledged sending the application to Midland National Life Insurance Company. Roman maintained Violeta wanted him to use a Richgrove post office box number as a return address. However, the application bore defendant Roman Galafate's post office box number. Roman informed Fraley about the pending insurance claim investigation and said he did not expect any payment to be made on the \$250,000 policy application.

On June 2, 1986, Roman called Lemke for an update on the claims investigation. Lemke advised the insurance company was concerned about the authenticity of Violeta Petersen's signature on the \$250,000 policy application. Roman said, "Right, well, you'll [sic] be sending a letter on that." On June 10, 1986, Lemke wrote Roman and repeated his concern about the signature on the policy application. Roman responded with a letter on his personal stationery, stating: "As addressed in your letter of June 10, 1986, which I have enclosed a copy, I will try to explain any unanswered questions you have directed to me." According to Roman, Violeta thought the \$75,000 policy had lapsed and that Leny would apply for guardianship of Chris in the event of Violeta's demise. Roman indicated Leny had orally agreed to care for Violeta's child. Roman's letter did not answer Lemke's questions about the signature on the \$250,000 policy application.

On June 11, 1986, Midland mailed Reny Petersen a check for \$76,362.50, representing the proceeds from Violeta's 1985 policy plus interest. Before Reny cashed the check, defendants engaged him in a discussion about the insurance

1 money. Both defendants initially said he could not "get  
2 anything because the paper has been lapsed." Roman told  
3 Reny he would be in trouble because Violeta's policy had  
4 lapsed. Leny told her uncle he could not keep the money and  
said he should return it. Leny said she would accompany him  
to the bank so he could return the funds.

5 On June 23, 1986, Reny deposited \$65,962.50 of the  
6 insurance money at Presidio Savings and Loan in Delano.  
7 Reny also put some of the insurance money in his Bank of  
8 America account. On June 25, 1986, Leny drove her uncle to  
9 the Delano branch of Bank of America and he withdrew  
10 \$9,000 in cash from his account. Reny handed over all of this  
11 money to Leny while they were still in the bank. Reny also  
12 gave Leny another \$1,000 in cash he had previously retained  
13 when he first deposited the insurance check.

14 On July 8, 1986, Leny and Reny went to the Presidio Savings  
15 and Loan and Reny signed a document in Leny's presence.  
16 Reny believed that document would return the insurance  
17 proceeds to Midland National. In fact, Presidio issued Reny a  
18 cashier's check in the sum of \$66,000. On the same date,  
19 someone deposited \$68,330.60 into an account at the main  
20 branch of Santa Barbara Savings in Bakersfield. The account  
21 was in the name of "Roman Galafate Insurance and Financial  
22 Services Center." Part of that deposit consisted of a \$66,000  
23 cashier's check issued by Presidio Savings to Reny B.  
24 Petersen. Santa Barbara Savings Supervisor Raul Holquin  
25 could not identify the person who deposited the cashier's  
26 check. However, Santa Barbara Savings' policy prohibited a  
27 third person from making a deposit on someone else's  
28 account. On the same date, someone withdrew \$61,180 from  
Roman Galafate's account. Midland National never received  
any money back from the \$75,000 Petersen claim.

On July 25, 1986, Donald Lemke wrote defendants and  
denied the \$250,000 claim. The company did not issue a  
policy in response to the application.

On November 13, 1986, Detective Fraley interviewed Leny at  
her home after advising her of her Miranda[FN5] rights.  
Roman was present during a portion of the interview. Leny  
claimed Violeta was going to go shopping with Leny's mother  
on Saturday, February 22, 1986. Three times during the  
course of the interview, Leny denied signing the insurance  
application.[FN6] Leny provided Fraley with four handwriting  
exemplars.



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[FN5: Miranda v. Arizona, (1966) 384 U.S. 436.]

[FN6: The Court cautioned the jury it could only consider Roman's statements to Fraley against Roman and Leny's statements to Fraley against Leny.]

Fraley submitted Leny's handwriting exemplars to Kern County Deputy Sheriff Cheryl Gottesman, an examiner of questioned documents. Gottesman examined Leny's exemplars, the signature on the \$250,000 application, and the signatures on the credit cards issued to Violeta Petersen. Magnification of the signature on the application disclosed the letters had been carefully and individually formed, and later linked together. The style of subsequently connecting separate letters suggested a forgery. On March 18, 1987, Gottesman reported the person who signed Violeta's name on the application was not the same person who had signed the credit cards. She further reported there was a strong similarity between the signature on the application and Leny Galafate's handwriting. However, Leny's exemplars were basically printed and Gottesman lacked sufficient cursive writing to make a positive comparison.

On September 23, 1987, Leny provided another handwriting exemplar for Gottesman's examination. In a report dated September 29, 1987, Gottesman concluded the person who completed and signed the two sets of exemplars with the name Leny P. Galafate was the same person who had signed the name Violeta Petersen on the insurance application. Gottesman explained Leny's signature was consistently raised above the signature line on the exemplars in the same fashion as the signature on the insurance application.

On January 12, 1988, Christopher Hillis, an investigator for the Kern County District Attorney's office, seized carpet samples from Roman's insurance office.[FN7] Hillis also noticed a large stain on the green carpeting. He returned later to cut out the stained carpet section for a urine analysis. On February 11, 1988, Hillis delivered the carpet samples from Roman's office to Laskowski. Laskowski determined the green carpeting in Roman's insurance office was "microscopically and chemically consistent" with the green fibers found on Violeta's body. Laskowski testified it was impossible to determine whether the green fibers came from the carpet in Roman's office because carpeting is manufactured in bulk and is widely distributed. Subsequent tests on the stained section of the carpet neither revealed nor ruled out the presence of urine.

1 [FN7: In 1986, Criminalist Gregory Laskowski  
2 concluded neither the carpet in the Petersen home nor  
3 the carpet at the Sundance Inn was similar to the  
4 green fibers removed from Violeta's body. No carpet  
5 samples were taken from Roman's office until 1988.  
6 The green carpeting in Roman's office had been  
7 installed prior to February 1986.]

8 On cross-examination, Laskowski conceded there are several  
9 types of nylon fiber and his test did not show whether or not  
10 the fibers recovered from the body were of the same type of  
11 nylon as that contained in Roman's office carpet. Assuming  
12 the fibers were recovered from the victim's back, mouth, and  
13 hair, the criminalist concluded the victim had "total body  
14 contact" with the carpet. In other words, she either had been  
15 wrapped up in the carpet or had been laying upon it.  
16 However, there was no evidence any of the fibers were  
17 recovered from the victim's back. Laskowski also testified  
18 some of the mouth fibers could have come from the victim's  
19 clothing.

20 On March 9, 1988, Investigator Hillis spoke with Leny  
21 Galafate on the telephone to "give her an opportunity to clear  
22 up some inconsistencies," since she was suspected of  
23 forgery. The next day, Hillis and Assistant Chief Investigator  
24 Dwight Pendleton contacted Mrs. Galafate at her in-laws'  
25 home in Earlimart and asked her to come to the Delano  
26 police station for an interview. Leny Galafate requested an  
27 opportunity to contact her attorney, Heberto Sala of  
28 Bakersfield. She eventually accompanied the investigators to  
the police station after they allegedly threatened to put her  
children in a shelter. At the station, Leny acknowledged to  
Hillis she had signed Violeta Petersen's name on the  
insurance application four days before Violeta's death. Leny  
claimed Violeta asked her to sign the document because her  
child was "acting up." Although Roman was present at the  
time, his back was turned and he did not know Leny had  
signed the document.

Investigator Hillis testified the Kern County District Attorney  
charged defendants with the murder of Violeta Petersen on  
March 23, 1988.

### Defense

Family members attested to the close relationship between  
the Galafates and the Petersens. Leny Galafate was the  
godmother of the Petersen's son, Chris. Defense counsel

1 argued the jury would have to believe Leny conspired to kill a  
2 friend and family member who trusted her. Counsel claimed  
3 Violeta sought a larger policy so Leny would be able to care  
for Chris.

4 Dr. Dollinger testified the victim died sometime prior to 2 p.m.  
5 on February 22, 1986. Leny's sister, Sol Petersen, lived with  
6 the defendants and testified they were at home the entire day  
7 of February 22, 1986. She said they slept in until noon, took  
8 showers and ate lunch, and then stayed at the house to  
watch television and do housework. Leny's younger sister,  
9 Joey Petersen, testified Leny felt ill after Violeta died.

10 Defense counsel proffered alternative theories of the case  
11 during closing argument. First, counsel suggested the green  
12 fibers on Violeta's body might have come from clothes she  
13 regularly wore to Roman's insurance office. Second, counsel  
14 suggested a robbery for \$500 as a possible motive for the  
15 crime. Third, counsel also suggested some sort of sordid  
16 affair led to Violeta's death. Counsel pointed out Violeta's car  
17 was discovered at a motel, her wedding band was found at  
home after the murder, and she was planning an extended  
trip to the Philippines without her husband. Fourth, counsel  
pointed out it made no sense for the Galafates to kill Violeta  
before Midland National received the policy application in  
Sioux Falls. Finally, counsel argued it did not make sense to  
kill Violeta in the insurance office because the MGM  
Professional Building was located near the Delano police and  
fire stations.

18 Defense counsel also introduced evidence of defendants'  
19 good and kind character. Several defense witnesses testified  
20 Roman and Leny Galafate were not violent people. The  
defendants did not testify on their own behalf.

21 (Lodged Doc. 2.)

## 22 **II. Procedural History**

23 On January 23, 1989, Petitioner was convicted of first degree murder for financial  
24 gain and conspiracy to commit murder for financial gain. She was sentenced to life  
25 without the possibility of parole on the murder count and twenty-five years to life on the  
26 conspiracy count. (Lodged Docs. 1-2.)

1 Petitioner appealed. On April 8, 1991, the California Court of Appeal for the Fifth  
2 Appellate District affirmed. (Lodged Doc. 2.) Petitioner filed a petition for review with the  
3 California Supreme Court, which was denied on July 11, 1991. (Lodged Docs. 3-4.)

4 Petitioner proceeded to file eight post-conviction challenges, as follows<sup>1</sup>:

- 5 1. Kern County Superior Court  
6 Filed: April 17, 1997;  
7 Denied: May 8, 1997;
- 8 2. Kern County Superior Court  
9 Filed: July 15, 2013;  
10 Denied: October 23, 2013;
- 11 3. California Court of Appeal, Fifth Appellate District  
12 Filed: January 8, 2014;  
13 Denied: February 14, 2014;
- 14 4. Kern County Superior Court  
15 Filed: February 26, 2015;  
16 Denied: June 2, 2015.
- 17 5. California Court of Appeal, Fifth Appellate District  
18 Filed: July 13, 2015  
19 Denied: October 23, 2015
- 20 6. California Court of Appeal, Fifth Appellate District  
21 Filed: March 10, 2016  
22 Denied: May 27, 2016
- 23 7. California Court of Appeal, Fifth Appellate District  
24 Filed: August 23, 2016  
25 Denied: November 23, 2016
- 26 8. California Supreme Court  
27 Filed: January 23, 2017  
28 Denied: March 1, 2017

(Lodged Docs. 5-20.)

#### **A. Fourth Petition**

Beginning with her fourth post-conviction challenge, filed February 26, 2015,  
Petitioner began to raise the issue presented on the instant petition, i.e., her actual  
innocence of the offense as demonstrated by a confession authored by her ex-husband

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<sup>1</sup> Under the mailbox rule, the Court deems petitions filed on the date Petitioner handed a petition to prison authorities for mailing. Houston v. Lack, 487 U.S. 266, 276 (1988); Campbell v. Henry, 614 F.3d 1056 (9th Cir. 2010); see also Rule 3(d) of the Rules Governing Section 2254 Cases.

1 and co-defendant, Roman Galafate III. (Lodged Doc. 11.) In a December 12, 2014,  
2 declaration, Roman<sup>2</sup> confessed, reportedly for the first time, that he carried out the  
3 murder. Roman explained that the murder was not pre-planned and had occurred  
4 accidentally and on the spur of the moment during an argument. He stated that  
5 Petitioner had no knowledge of or involvement in the murder. (Id.) Petitioner also  
6 presented her own declaration, denying any knowledge of or involvement in the murder.  
7 (Id.)

8 The Superior Court denied the petition as follows:

9  
10 Petitioner contends that given the recent extrajudicial  
11 confession of sole culpability by her ex-husband, she is  
12 innocent. She divorced Roman in 2009. She contends that  
13 the confession declaration signed by Roman Galafate on  
14 December 12, 2014 is newly discovered evidence which  
15 fundamentally undermines the prosecution's case. She  
16 further asserts in her own declaration that had she known of  
17 Roman's plans, she would have called the police or did what  
18 she could to stop the murder. Roman's declaration was as  
19 shocking to her as the death of her aunt. It is due to her ex-  
20 husband's actions that she has been unjustly languishing in  
21 prison for all this time. All this time she did not know who  
22 murdered her aunt on January 22, 1986, and like her ex-  
23 husband, asserted her innocence. She did not testify at the  
24 trial upon the advice of counsel.

25 . . . .

26  
27 Generally, newly discovered evidence is not cognizable in  
28 habeas corpus unless it fundamentally undermines the  
prosecution's evidence, not merely casts doubt upon it. *In re Lindley (1947) 29 Cal.2d 709, 723, 725, People v. Ebaniz (2009) 175 Cal.App.4th 142*. To prevail in a claim of innocence, petitioner must also show that the newly discovered evidence not only fundamentally undermines the prosecution's case, but also demonstrates reduced culpability. *In re Hall (1981) 30 Cal.3d 408, 410, 424, In re Clark (1993) 5 Cal.4th 750, 766*.

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<sup>2</sup> Because Petitioner and her husband share the same last name, his first name is used herein for purposes of brevity and clarity.

1 There is a cogent argument that Mr. Galafate's role in the  
2 crime is not newly discovered evidence since it existed as of  
3 on or before January 22, 1986. The confession however did  
4 not become available until December 18, 2014. The question  
5 is as to the reliability of the confession. Extrajudicial  
6 confessions such as we have here are inherently  
7 untrustworthy because there is no way to cross-examine the  
8 confessor. *Bruton v. U.S.* (1968) 391 U.S. 123, *People v.*  
9 *Anderson* (1987) 43 Cal.3d 1104, 1122. The same reliability  
10 problems exist with recantation of witnesses. *In re Clark*  
11 (1993) 5 Cal.4th 750, 766, *Cotton v. Shriro* (9th Cir. 2009)  
12 360 Fed. Appx. 779.

13 Mr. Galafate's confession is unreliable since it is self-  
14 serving. He has nothing to lose by confessing since he  
15 cannot suffer any greater punishment. Though confessing his  
16 involvement in Violeta Peterson's [sic] murder may clear his  
17 conscience, it does very little if anything to clear petitioner of  
18 culpability. It does not exonerate her because there is still an  
19 abundance of circumstantial evidence linking petitioner to her  
20 aunt's murder. Where such circumstantial evidence exists, a  
21 confession by a co-defendant is not enough to sustain a  
22 claim of innocence. *People v. Homick* (2012) 55 Cal.4th 816,  
23 850, *People v. Hajek* (2014) 58 Cal.4th 1144, 1173.

24 Mrs. Peterson [sic] was strangled without any excuse  
25 of justification. Petitioner assisted her husband in taking out a  
26 \$250,000 life insurance policy on her aunt's life by forging her  
27 signature. Petitioner defrauded her uncle of \$75,000.00 life  
28 insurance proceeds by false pretenses, as Rene Peterson  
[sic] was in fact eligible for those funds. Instead, petitioner  
conspired to and hand knowledge that her husband Roman  
converted those proceeds by placing them into the bank to  
inure to the benefit of her husband and herself. The fact that  
Midland Life Insurance Co. never paid out on the \$250,000  
life insurance policy is of no consequence. The circumstantial  
evidence establishes that petitioner and her husband  
conspired to commit murder and did in fact murder Violeta  
Peterson [sic] for the life insurance proceeds. Though  
Petitioner may have played a lesser role in the actual murder,  
this does not absolve her of culpability. She had knowledge  
of her husband's acts, and did nothing about it believing that  
the life insurance policies would take care of their financial  
problems after previously filing for bankruptcy in October  
1985.

Petitioner's declaration is also self-serving in that it  
virtually mirrors that of her ex-husband. It mentions nothing

1 about forging the life insurance policy and deposit of funds  
2 which did not belong to the couple in their bank account. All  
3 these above-mentioned factors along with the circumstantial  
4 evidence not only provide a motive to murder Violeta  
Peterson [sic] but to also link petitioner to the murder. . . .

(Lodged Doc. 12.)

5 **B. Fifth Petition**

6 Petitioner presented these same arguments and declarations to the Fifth District  
7 Court of Appeal on July 13, 2015. (Lodged Doc. 13.) The Court of Appeal denied the  
8 petition without prejudice on the ground that the declarations “are on information and  
9 belief and, thus, ‘were devoid of any evidentiary value.’” (Lodged Doc. 14 (citation  
10 omitted)).

11 **C. Sixth Petition**

12 On March 10, 2016, Petitioner returned to the Fifth District Court of Appeal with  
13 revised declarations. (Lodged Doc. 15.) The substantive facts contained in the  
14 declarations were unchanged from the prior versions. The Court of Appeal again denied  
15 the petition without prejudice, noting the following:

16 There are three aspects of the declaration of Roman Galafate  
17 (Declaration) which undermine its credibility

18 First, the Declaration asserts that the victim was killed by  
19 strangling her with her sweater. This assertion is inconsistent  
20 with the type of wound described in the nonpublished  
21 appellate opinion in *People v. Galafate* (Apr. 8, 1991,  
F012067) (Opinion), which could have been made with “a  
rope or cord.”

22 Second, the Opinion also states that the strangulation  
23 required “considerable force” that had to be applied for  
24 “several minutes,” which supports an inference that the killing  
was intentional contrary to the assertions in the Declaration.

25 Third, the Declaration also does not mention or explain the  
26 other injuries to the victim.

27 More importantly, the Declaration does not undermine the  
28 facts linking petitioner to the killing. (*Hardy, supra*, 41 Cal.4th  
at pp. 1016-1018.) The Opinion notes that petitioner

1 confessed that she signed the victim's name on an insurance  
2 application for \$250,000 four days before the victim's death  
3 and petitioner was the beneficiary. On the application,  
4 petitioner signed her name, "Leny Petersen," instead of her  
5 married name, Leny Galafate, which creates an inference  
6 that there was an intent to mislead the insurance company.  
7 Roman was asked by an insurance agent to explain the  
8 discrepancy in petitioner's name on the application. He did  
9 not provide an explanation at that time or in his Declaration.  
10 In April 1986, the insurance company received a claim for  
11 \$250,000, which was signed, "L. Petersen." The Declaration  
12 does not attempt to explain petitioner's conduct in submitting  
13 the claim or persuading the victim's husband to give her the  
14 insurance proceeds from the victim's life insurance policy.

15 (Lodged Doc. 16.)

16 **D. Seventh Petition**

17 On August 23, 2016, Petitioner returned again to the Fifth District Court of Appeal  
18 with new declarations. (Lodged Doc. 17.) In her own declaration, Petitioner explained  
19 that her actions in relation to the two life insurance policies were undertaken at her  
20 husband's direction and control. Roman declared likewise that he directed Petitioner in  
21 this conduct, through manipulation, dominion, and Petitioner's obedience. Both declared  
22 that, in undertaking these actions, Petitioner was unaware that Roman had any intent to  
23 commit murder. The petition was summarily denied. (Lodged Doc. 18.)

24 **E. Eighth Petition**

25 On January 23, 2017, Petitioner presented her claim of actual innocence –  
26 including the declarations presented with her seventh petition – to the California  
27 Supreme Court. (Lodged Doc. 19.) The petition was summarily denied. (Lodged Doc.  
28 20.)

**F. Federal Petition**

Petitioner filed the instant petition on May 21, 2017. (ECF No. 1.) On August 29,  
2017, Respondent filed a motion to dismiss. (ECF No. 12.) Petitioner filed no opposition  
and the time for doing so has passed. The matter is submitted.



1 **III. Procedural Grounds for Motion to Dismiss**

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

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

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

22 **IV. Discussion**

23 **A. Commencement of Limitations Period**

24 The instant petition was filed after April 24, 1996 and is subject to the  
25 Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter “AEDPA”). AEDPA  
26 imposes various requirements on all petitions for writ of habeas corpus filed after the  
27 date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997);  
28

1 Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997).

2 AEDPA imposes a one-year period of limitation on petitioners seeking to file a  
3 federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As amended, § 2244,  
4 subdivision (d) reads:

5 (1) A 1-year period of limitation shall apply to an application for a writ of  
6 habeas corpus by a person in custody pursuant to the judgment of a State  
7 court. The limitation period shall run from the latest of –

8 (A) the date on which the judgment became final by the conclusion  
9 of direct review or the expiration of the time for seeking such  
10 review;

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

15 (C) the date on which the constitutional right asserted was initially  
16 recognized by the Supreme Court, if the right has been newly  
17 recognized by the Supreme Court and made retroactively  
18 applicable to cases on collateral review; or

19 (D) the date on which the factual predicate of the claim or claims  
20 presented could have been discovered through the exercise of due  
21 diligence.

22 (2) The time during which a properly filed application for State post-  
23 conviction or other collateral review with respect to the pertinent judgment  
24 or claim is pending shall not be counted toward any period of limitation  
25 under this subsection.

26 28 U.S.C. § 2244(d).

27 Under § 2244(d)(1)(A), the limitations period begins running on the date that the  
28 petitioner's direct review became final or the date of the expiration of the time for seeking  
such review.<sup>3</sup> Here, however, Petitioner's conviction became final prior to AEDPA's  
enactment. Accordingly, Petitioner had a one-year "grace period" following AEDPA's  
April 24, 1996 enactment to file her federal petition. Absent tolling, her petition was due  
one year later, on April 24, 1997. Malcom v. Payne, 281 F.3d 951, 955 (9th Cir. 2002);  
Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001).

<sup>3</sup> The limitations period may begin running later under certain specified circumstances, none of which are applicable here. 28 U.S.C. § 2244(d)(1)(B)-(D).

1           **B.     Statutory Tolling**

2           28 U.S.C. § 2244(d)(2) states that the “time during which a properly filed  
3 application for State post-conviction or other collateral review with respect to the  
4 pertinent judgment or claim is pending shall not be counted toward” the one year  
5 limitation period. Here, Petitioner filed one state post-conviction challenge during the  
6 limitations period. She therefore is entitled to statutory tolling from the filing of her first  
7 petition on April 17, 1997, to the disposition of that petition on May 8, 1997, for twenty-  
8 two total days of tolling. See Tillema v. Long, 253 F.3d 494 (9th Cir.2001) (state petition  
9 filed before limitations period begins to run tolls the limitations period); Pace v.  
10 DiGuglielmo, 544 U.S. 408, 410 (2005). This tolling extended the deadline for filing her  
11 federal petition from April 24, 1997 to May 16, 1997.

12           Petitioner did not file another State post-conviction challenge until July 15, 2013,  
13 more than fifteen years later. Neither this petition, nor her subsequent petitions served to  
14 toll the statute of limitations under § 2244(d)(2). Ferguson v. Palmer, 321 F.3d 820, 823  
15 (9th Cir. 2003) (petitions filed after the limitations period expires do not toll the statute of  
16 limitations); Jimenez v. Rice, 276 F.3d 478, 482 (9th Cir. 2001) (same).

17           Petitioner’s federal petition was due on or before May 16, 1997. It was filed May  
18 21, 2017, more than twenty years too late.<sup>4</sup>

19           **C.     Actual Innocence Exception to the Statute of Limitations**

20           “[A]ctual innocence, if proved, serves as a gateway through which a petitioner  
21 may pass whether the impediment is a procedural bar . . . or . . . expiration of the statute  
22 of limitations.” McQuiggin v. Perkins, 569 U.S. 383, 386 (2013). Thus, “a petitioner is not  
23 barred by the AEDPA statute of limitations from filing an otherwise untimely habeas  
24 petition if the petitioner makes a credible showing of ‘actual innocence’ under Schlup v.  
25 Delo.” Lee v. Lampert, 653 F.3d 929, 945 (9th Cir. 2011) (citing Schlup, 513 U.S. 298  
26 (1995)). To pass through the “Schlup gateway” a petitioner must present evidence of  
27

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28 <sup>4</sup> Petitioner has not presented any argument to suggest she is entitled to equitable tolling.

1 innocence so strong that “it is more likely than not that no reasonable juror would have  
2 convicted him in the light of the new evidence.” Schlup, 513 U.S. at 327; see also  
3 McQuiggin, 569 U.S. at 384. “[A] petitioner does not meet the threshold requirement  
4 unless he persuades the district court that, in light of the new evidence, no juror, acting  
5 reasonably, would have voted to find him guilty beyond a reasonable doubt.” McQuiggin,  
6 569 U.S. at 386 (citing Schlup, 513 U.S. at 329); see also House v. Bell, 547 U.S. 518,  
7 538 (2006) (emphasizing that the Schlup standard is demanding and seldom met).

8 The petitioner must “support his allegations of constitutional error with new  
9 reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness  
10 accounts, or critical physical evidence—that was not presented at trial.” Schlup, 513 U.S.  
11 at 324. In the few cases where a petitioner has qualified for an actual innocence  
12 exception, the new evidence typically consisted of “credible evidence that the petitioner  
13 had a solid alibi for the time of the crime, numerous exonerating eyewitness accounts of  
14 the crime, DNA evidence excluding the petitioner and identifying another potential  
15 perpetrator, a credible confession by a likely suspect explaining that he had framed the  
16 petitioner, and/or evidence contradicting the very premise of the prosecutor's case  
17 against the petitioner.” Stidham v. Cate, Case No. 10-CV-0120-GAF, 2010 WL 5463795,  
18 at \*8 (C.D. Cal. Oct. 28, 2010) (collecting cases).

19 Here, Petitioner has brought a free-standing actual innocence claim but does not  
20 expressly argue that her evidence is sufficient to allow her to pass through the “Schlup  
21 gateway” and to avail herself of an equitable exception to the statute of limitations.  
22 Nonetheless, because this is the only apparent means by which the Court may consider  
23 the petition, the Court will consider whether Petitioner has met the “extremely high  
24 hurdle” posed by Schlup. See Stewart v. Cate, 757 F.3d 929, 938 (9th Cir. 2014). The  
25 Court concludes she has not.

26 The declaration submitted by Roman, Petitioner’s ex-husband and co-defendant  
27 is insufficiently credible, reliable, or trustworthy to persuade the Court that “no juror,  
28

1 acting reasonably, would have voted to find [Petitioner] guilty beyond a reasonable  
2 doubt.” McQuiggin, 569 U.S. at 386. Roman is serving a life sentence and the  
3 opportunities for him to challenge his sentence have long passed. He therefore has  
4 nothing to lose by professing his exclusive role in the murder or lying about Petitioner’s  
5 participation. In other words, he may assume responsibility for the offense with no real  
6 risk to his own liberty. Such confessions are regularly rejected as the basis for an actual  
7 innocence finding unless combined with other credible evidence. See House, 547 U.S.  
8 at 552 (confessions by inmates and suspects have less probative value than  
9 confessions by “eyewitnesses with no evident motive to lie”); Morris v. Hill, No. 13–  
10 55143, 2015 WL 1021120, at \*2 (9th Cir. Mar. 10, 2015) (citing House and noting that “a  
11 credible confession by the actual perpetrator may affirmatively demonstrate actual  
12 innocence,” but a felon serving a life sentence has “nothing to lose by confessing”);  
13 Garmon v. Foulk, No. CV 14-0125 JCG, 2015 WL 1457629, at \*6 (C.D. Cal. Mar. 30,  
14 2015) (same); Smith v. Baldwin, 510 F.3d 1127, 1141 (9th Cir. 2007) (noting that  
15 declarant was “serving a life term in prison” and thus “face[d] almost no consequences  
16 for lying”); Carriger v. Stewart, 132 F.3d 463, 476 (9th Cir. 1997) (confession of alleged  
17 perpetrator was considered as evidence in support of actual innocence claim where the  
18 alleged perpetrator “was opening himself to prosecution for capital murder and a  
19 possible sentence of death” by confessing).

20 Furthermore, the only explanation given for Roman having waited nearly twenty  
21 years before confessing is that he wished to clear his conscience. This largely  
22 unexplained delay casts some doubt on the reliability of the confession. See Cotton v.  
23 Schriro, 360 F. App'x 779, 780 (9th Cir. 2009) (discounting recantation affidavits  
24 presented two, six, and ten years after trial where there was “[n]o satisfactory  
25 explanation . . . given as to why” the affiants waited to come forward); Garmon, No. CV  
26 14-0125 JCG, 2015 WL 1457629, at \*6 (C.D. Cal. Mar. 30, 2015) (discrediting affidavit  
27 identifying someone other than the petitioner as the shooter, where it was presented five  
28

1 years after the incident and without explanation for the delay); Herrera v. Collins, 506  
2 U.S. 390, 423 (1993) (O'Connor, J., concurring) (affidavits made many years after trial,  
3 purporting to exculpate a convicted prisoner through a new version of events, are "not  
4 uncommon" and "are to be treated with a fair degree of skepticism").

5 Finally, the facts set forth in Roman's declaration do little to persuasively prove  
6 Petitioner's factual innocence. As an initial matter, and as noted by the Fifth District  
7 Court of Appeal, Roman's account of the murder is inconsistent with the trial evidence,  
8 as summarized on appeal. (Lodged Doc. 16.) Cf. Carriger, 132 F.3d at 476 (confession  
9 found credible where it contained details that could only have been known to participant  
10 in the crime). Additionally, it is undisputed at this stage that the jury was presented with  
11 substantial evidence to support Petitioner's involvement in murder for financial gain and  
12 conspiracy to commit same. One week before the murder, Petitioner forged a life  
13 insurance policy on behalf of the victim, which named Petitioner herself as the  
14 beneficiary by way of her maiden name. Petitioner then collected on a separate life  
15 insurance policy under the pretense that she was returning the proceeds from the  
16 beneficiary (the victim's husband) to the insurance company. Instead, the proceeds were  
17 deposited into Roman's account and then withdrawn in cash. While Petitioner now  
18 attempts to explain these actions by claiming she was under the influence of her  
19 husband, this explanation, even if true, does not constitute new evidence. Furthermore,  
20 this explanation was not presented until after the state courts found Roman's prior  
21 declarations insufficient. While the changes to Petitioner's and Roman's declarations are  
22 not inconsistent with their prior declaration, the continuing evolution of Petitioner's claim  
23 of actual innocence is clearly influenced by the deficiencies perceived by the state  
24 courts.

25 These attempts to adapt the declarations to enhance their credibility has the  
26 opposite effect.

1 In light of these factors, the Court cannot conclude that “all reasonable jurors  
2 would choose to believe the proffered testimony.” Smith v. Baldwin, 510 F.3d at 1142 &  
3 n.11 (en banc) (noting that petitioner must show that every reasonable juror would find it  
4 more likely than not that the actual perpetrator “at long last, has decided to tell the  
5 truth.”) Accordingly, Petitioner is not entitled to an equitable exception to the statute of  
6 limitations, and her petition should be dismissed as time-barred.

7 **V. Conclusion and Recommendation**

8 In light of the foregoing analysis, it is HEREBY RECOMMENDED that  
9 Respondent’s motion to be dismissed be granted and that the petition be dismissed as  
10 time-barred.

11 The findings and recommendation are submitted to the United States District  
12 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within  
13 **thirty** (30) days after being served with the findings and recommendation, any party may  
14 file written objections with the Court and serve a copy on all parties. Such a document  
15 should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.”  
16 Any reply to the objections shall be served and filed within fourteen (14) days after  
17 service of the objections. The parties are advised that failure to file objections within the  
18 specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772  
19 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir.  
20 1991)).

21  
22 IT IS SO ORDERED.

23 Dated: December 29, 2017

1st Michael J. Seng  
24 UNITED STATES MAGISTRATE JUDGE