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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DENZEL DEMAR CRISP,
Petitioner,
v.
DAVE DAVEY,
Respondent.

No. 2: 15-cv-0938 KJN P

ORDER AND FINDINGS AND
RECOMMENDATIONS

I. Introduction

Petitioner is a state prisoner, proceeding through counsel, with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 2010 convictions for discharging a firearm from a motor vehicle, assault with a semi-automatic firearm, use of a semi-automatic firearm, personal infliction of great bodily injury, and personal discharge of a firearm causing great bodily injury. Petitioner is serving a sentence of 30 years to life.

Pending before the court is respondent’s motion to dismiss on the grounds that four claims raised in the amended petition are barred by the statute of limitations. (ECF No. 25.) For the reasons stated herein, the undersigned recommends that respondent’s motion be denied.

II. Factual Background

In order to put the pending motion in context, the undersigned herein sets forth the factual background of petitioner’s offense contained in the opinion of the California Court of Appeal:

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In this unprovoked and random drive-by shooting with a semiautomatic handgun, the two teenage defendants both testified that the other one was the shooter. A jury convicted 17-year-old Denzel Demar Crisp, the passenger, of discharging a firearm from a motor vehicle and assault with a semiautomatic firearm, but failed to reach a verdict on the attempted murder charge. The related gun and great bodily injury enhancements were found to be true. Eighteen-year-old Steven Brown, Jr., the driver, was convicted of assault with a semiautomatic firearm, knowingly permitting another person to discharge a firearm from his vehicle, and carrying a concealed firearm. The related firearm enhancement was also found to be true.

Neither boy had a prior record. Whereas the trial court sentenced Crisp to state prison for an aggregate term of 30 years to life, it sentenced Brown to seven years eight months. On appeal, defendants challenge several jury instructions, the sufficiency of the evidence, and, in Crisp's case, the constitutionality of his sentence. We affirm.

FACTS

On the night of December 18, 2009, defendants had difficulty finding a party hosted by Jennifer Ly. Thinking they had found it, they walked up to a group of people standing outside a residence at what turned out to be a family 21st birthday party. They were told there was no Jennifer at the party and they left. One guest testified that Brown appeared to be “[a] little angry.” No one else, including defendants, testified there was any altercation, any unkind or agitated interaction, or any hard feelings. Defendants were simply at the wrong party.

They got back in their car. There is some dispute as to the route they then took, but they ended up in front of the same party with their lights off, and as the driver slowed down, witnesses saw an arm stick out of the passenger window and heard two or three gunshots. Andrew Tapalla had just arrived at the party when he was shot in the buttocks. Emergency personnel took him to the hospital, where he was given morphine to control the pain, but the bullet was not removed. He missed four days of work.

Defendants fled the scene. Shocked that Crisp had just fired a gun out of the window of his car, Brown testified he asked Crisp, “What the fuck are you doing?” He did not know Crisp had fired into a group of people or that anyone had been hit. He planned to take Crisp home. Crisp, who testified that it was he who was shocked that Brown reached in front of him to shoot out of the passenger window, claimed they had no conversation at all. Both defendants testified it was not their gun, they had never shot a gun before, and they did not shoot it at the group of partygoers after they left.

Several witnesses testified that someone fired the shots from the passenger side of a Ford Mustang. At least two witnesses testified

1 they saw an arm sticking out of the window, and one testified it was
2 out at least as far as his elbow.

3 Brown pulled into a gasoline station with the police in hot pursuit.
4 He testified that after he parked he asked Crisp to hand him the gun
5 because he was afraid of what Crisp would do with it. He planned
6 to turn it over to the police. Although he testified he had never
7 owned or used a gun before, he saw a small button on the bottom of
8 the gun, depressed it, and removed the magazine. But he then
9 reloaded the gun, placed it in his waistband, and got out of the car.

10 A police officer testified that he asked Brown if he had a gun, and
11 Brown shook his head to indicate he did not. Brown denied the
12 police officer had asked him. Rather, according to Brown, the
13 police officers threw him against a police car, banged his head into
14 the car, and yelled at him. In the process, the gun fell from his left
15 pant leg to the ground. Officers found a .25-caliber spent cartridge
16 casing fired by the gun retrieved from Brown in the space between
17 the center console and the front passenger seat.

18 Crisp testified he did not know Brown was armed that night until he
19 saw him pull a gun out of the pocket of his peacoat. Because the
20 night was so cold, he asked Brown if he could borrow some gloves.
21 He testified that he wore the gloves all night, including while he
22 was texting Jennifer and his mother.

23 A criminalist testified that both Brown and Crisp tested positive for
24 gunshot residue. From the testing he conducted, the criminalist
25 found more on Crisp's hand than on Brown's, but he did not do a
26 complete reading of Brown's sample. Based on the gunshot residue
27 evidence, it could not be determined who had fired the gun.

28 People v. Brown, 2013 WL 5978681 at *1-2 (2013).

29 III. Background

30 On April 29, 2015, petitioner filed the original petition and a motion to stay in order to
31 exhaust additional claims in state court. (ECF Nos. 1, 2). On May 15, 2017, the court granted
32 petitioner's motion to stay pursuant to Rhines v. Weber, 544 U.S. 269 (2005). On June 20, 2016,
33 petitioner filed an amended petition. (ECF No. 12.) On December 2, 2016, respondent filed the
34 pending motion to dismiss. (ECF No. 25). On February 15, 2017, petitioner filed his opposition.
35 (ECF No. 32.)

36 The original petition raised the following claims. In claim one, petitioner argued that his
37 sentence violated the Eighth Amendment. (ECF No. 1 at 37-49.)

38 In claim two, petitioner alleged eleven grounds of ineffective assistance of trial counsel.
(Id. at 49.) First, petitioner alleged that counsel was ineffective for failing to investigate and

1 obtain eyewitness and forensic expert witnesses. (Id. at 52.) Petitioner argued that an eyewitness
2 expert consulted with by habeas counsel would have been able to raise serious doubts about the
3 reliability of eyewitness testimony regarding the shooting. (Id. at 57-60.) Petitioner also argued
4 that his trial counsel retained a firearms expert who could have testified that it was more likely
5 that the gun was fired from inside the car rather than outside the car, suggesting that petitioner's
6 co-defendant fired the gun. (Id. at 65-66.) Petitioner argued that his trial counsel was ineffective
7 for failing to call the retained firearms expert as a witness. (Id. at 66-67.)

8 Second, petitioner argued that his trial counsel was ineffective for failing to investigate,
9 preserve and introduce evidence of cell phone records and the phones, belonging to petitioner, his
10 mother and Jennifer Ly. (Id. at 69.) Petitioner argues that this evidence would have corroborated
11 petitioner's testimony that he was texting at the time the shots were fired. (Id.)

12 Third, petitioner argued that his trial counsel was ineffective for failing to communicate
13 with and advise him effectively during plea negotiations. (Id. at 71.) Petitioner argued that trial
14 counsel failed to advise him that if convicted, he would face a mandatory term of 5 years plus 25
15 years to life, run consecutively, after the prosecution amended the charges. (Id. at 72.) Petitioner
16 also argued that trial counsel failed to inform him of the prosecution's plea offer. (Id. at 73-74.)

17 Fourth, petitioner argued that trial counsel was ineffective in his opening statement for
18 promising expert opinion evidence that he never introduced, conceding factual issues that
19 eviscerated co-defendant Brown's motive to shoot, conceding petitioner's culpability, for
20 confusing petitioner and co-defendant Brown with one another, and for failing to articulate a
21 theory of defense. (Id. at 74-78.)

22 Fifth, petitioner argued that trial counsel was ineffective for failing to argue the
23 appropriate evidentiary bases, both statutory and constitutional, for admission of the testimony of
24 Odgen Shipman. (Id. at 79-99.) Shipman, a mutual friend of petitioner and co-defendant Brown,
25 could have testified about Brown's fascination with guns, a previous incident where Brown stole
26 guns, and his penchant for lying. (Id. at 79.)

27 Sixth, petitioner argued that trial counsel was ineffective for failing to prepare petitioner
28 to testify and then compounding the harm by locking him into a false statement on direct

1 examination. (Id. at 100-05.)

2 Seventh, petitioner argued that trial counsel was ineffective for failing to object to witness
3 examinations by the prosecutor and attorney Staten, who represented Brown. (Id. at 105-10.)

4 Eighth, petitioner argued that trial counsel was ineffective for failing to develop and argue a
5 theory of the case in his closing argument. (Id. at 110-23.) Ninth, petitioner argued that trial
6 counsel was ineffective for failing to object to Staten's misstatements about the witnesses'
7 testimony. (Id. at 123-26.) Tenth, petitioner argued that trial counsel was ineffective for failing
8 to effectively argue that petitioner's sentence of 30 years to life violated California's prohibition
9 on cruel or unusual punishment. (Id. at 126.). Eleventh, petitioner argued that trial counsel was
10 ineffective for failing to argue that petitioner's sentence violated the federal constitutional ban
11 against cruel and unusual punishment. (Id. at 145-47.)

12 In the motion to stay, petitioner stated that his ineffective assistance of counsel claim,
13 including all eleven subparts, was unexhausted. (Id. at 7.)

14 After the court granted the motion to stay, petitioner filed a habeas corpus petition in the
15 Sacramento County Superior Court on June 1, 2015. (Respondent's Lodged Document 4.) The
16 Superior Court denied this petition on July 22, 2015. (Respondent's Lodged Document 5.)
17 Petitioner filed a habeas corpus petition in the California Court of Appeal on September 29, 2015.
18 (Respondent's Lodged Document 6.) The California Court of Appeal denied this petition on
19 December 14, 2015. (Respondent's Lodged Document 7.) Petitioner filed a habeas corpus
20 petition in the California Supreme Court on January 1, 2016. (Respondent's Lodged Document
21 8.) The California Supreme Court denied this petition on April 20, 2016. (Respondent's Lodged
22 Document 9.)

23 On May 19, 2016, petitioner filed a motion in this court to lift the stay. (ECF No. 10.) On
24 May 20, 2016, the undersigned granted the motion to lift the stay and ordered petitioner to file an
25 amended petition within thirty days. (ECF No. 11.)

26 Petitioner filed the amended petition on June 20, 2016. (ECF No. 12.) The amended
27 petition raises six claims. Claim one of the amended petition raises all of the ineffective
28 assistance of counsel claims raised in the original petition except for subclaim 7, alleging that trial

1 counsel was ineffective for failing to object to the witness examinations by the prosecutor and
2 Staten. The amended petition raises one new claim of ineffective assistance of counsel, alleging
3 that trial counsel was ineffective for failing to ask the trial court to present petitioner's case and
4 closing argument after co-defendant Brown's. (ECF No. 12 at 143-45.)

5 Claim two of the amended petition alleges that petitioner's sentence violates the Eighth
6 Amendment. (Id. at 170-78.) Claim three alleges a claim based on Brady v. Maryland, 373 U.S.
7 83 (1963). (Id. at 178-81.) Claim four alleges cumulative error based on ineffective assistance of
8 counsel and Brady violations. (Id. at 181-84.) Claim five alleges ineffective assistance of
9 appellate counsel based on appellate counsel's failure to argue that trial counsel was ineffective
10 for failing to argue that petitioner's sentence violates the California prohibition on cruel or
11 unusual punishment. (Id. at 184-85.) Claim six alleges a freestanding actual innocence claim.
12 (Id. at 164-89.)

13 IV. Statute of Limitations

14 A. Calculation of Limitations Period

15 The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which became
16 law on April 24, 1996, imposed for the first time a statute of limitations on petitions for a writ of
17 habeas corpus filed by state prisoners. This statute of limitations provides that,

18 A 1-year period of limitation shall apply to an application for a writ
19 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 –

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

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

25 (C) the date on which the constitutional right asserted was initially
26 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

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

1 28 U.S.C. § 2244 (d)(1).

2 The California Supreme Court denied petitioner’s petition for review on January 29, 2014.
3 (Respondent’s Lodged Document 3.) Petitioner’s conviction became final 90 days later on April
4 29, 2014, when the period for filing a petition for writ of certiorari with the United States
5 Supreme Court expired. See Bowen v. Roe, 188 F.3d 1157 (9th Cir. 1999). The one year
6 limitations period commenced running the following day, i.e., April 30, 2014. See Patterson v.
7 Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001). Petitioner had one year from that date to file a
8 timely federal petition.

9 Because the original petition was filed on April 29, 2015, i.e., the last day of the
10 limitations period, respondent concedes that the claims raised in the amended petition that were
11 raised in the original petition are timely.¹

12 Respondent argues that the four new claims raised in the amended petition, i.e., Brady
13 error, ineffective assistance of appellate counsel, cumulative error and actual innocence, are time
14 barred because the amended petition was filed after the limitations period. Petitioner is not
15 entitled to statutory tolling with respect to these new claims because he did not file state petitions
16 exhausting these claims until after the statute of limitations ran. See 28 U.S.C. § 2244(d)(2);
17 Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (“[S]ection 2244(d) does not permit the
18 reinitiation of the limitations period that has ended before the state petition was filed.”); Jiminez
19 v. Rice, 276 F.3d 478, 482 (9th Cir. 2001) (filing a state habeas petition after the AEDPA statute
20 of limitations had expired “resulted in an absolute time bar”).

21 In the opposition, petitioner does not argue that he is entitled to equitable tolling. See
22 Holland v. Florida, 560 U.S. 631, 645 (2010) (the one year statute of limitations for filing a
23 habeas petition may be equitably tolled if extraordinary circumstances beyond a prisoner’s
24 control prevent the prisoner from filing on time).

25 Both parties agree that the new claims raised in the amended petition are time barred
26 unless they relate back to the claims raised in the original petition.

27 ¹ Respondent does not argue that new ineffective assistance of counsel claim raised in the
28 amended petition is not timely.

1 B. Relation Back

2 A habeas petition “may be amended or supplemented as provided in the rules of procedure
3 applicable to civil actions.” 28 U.S.C. § 2242. Under Federal Rule of Civil Procedure 15(c), a
4 petitioner may add an otherwise untimely claim to his habeas petition if it relates back to a
5 timely-filed claim. Rule 15(c) provides, in relevant part, that an amendment relates back to a
6 timely-filed claim when the newly-asserted claim “arose out of the conduct, transaction, or
7 occurrence set out” in the previous filing. Fed. R. Civ. P. 15(c)(1)(B). As the Supreme Court
8 explained in Mayle v. Felix, 545 U.S. 644 (2005), Rule 15(c) permits relation back only when
9 new claims “arise from the same core facts as the timely filed claims, and not when the new
10 claims depend upon events separate in both time and type from the originally raised episodes.”
11 Id. at 657 (internal quotation marks omitted).

12 The “time and type” language in Mayle “refers not to the claims, or grounds for relief,”
13 but “to the facts that support those grounds.” Nguyen v. Curry, 736 F.3d 1287, 1297 (9th Cir.
14 2013) (emphasis in original).

15 1. Brady Error

16 In claim three of the amended petition, petitioner alleges that after his arrest, the police
17 downloaded the contents of his cell phone to a compact disk. (ECF No. 12 at 178.) Petitioner
18 alleges that despite the fact that the disk would have corroborated petitioner’s testimony at trial
19 that he was texting when the shots were fired, the prosecutor did not provide a copy of the disk to
20 the defense. (Id.) Petitioner argues that the failure of the prosecutor to disclose the disk violated
21 Brady v. Maryland, 373 U.S. 83 (1963). (Id.) Prior to trial, the prosecutor provided only a copy
22 of the inventory of items seized pursuant to petitioner’s arrest, which included a reference to the
23 cell phone data retrieval. (Id.)

24 In the opposition to the pending motion, petitioner argues that the Brady claim relates
25 back to the claim raised in his original petition alleging that trial counsel was ineffective for
26 failing to investigate, preserve and introduce the cell phone evidence including the cell phone
27 records and the actual phones belonging to petitioner, petitioner’s mother and Jennifer Ly. (ECF
28 No. 1 at 69.) In the original petition, petitioner alleged that trial counsel’s investigator recognized

1 the significance of the cell phone evidence. (ECF No. 1 at 70.) Petitioner alleged that the
2 investigator discussed with petitioner the need to retrieve the messages and texts from petitioner’s
3 phone from the night of the shooting. (Id.) Petitioner alleged that neither trial counsel nor his
4 investigator retrieved the messages, the texts, or petitioner’s phone. (Id.) In his declaration
5 submitted in support of the original (and amended) petition, trial counsel states that, “[e]ven
6 though I could have had access to [petitioner’s] cell phone, as well as those of Ms. Ly and Ms.
7 Williams, I did not obtain those phones or undertake an investigation to confirm those text
8 messages and the times they were sent.” (ECF No. 1-2 at 6.)

9 “[C]ourts generally have declined to find that a newly added claim related back when the
10 original claim involved similar issues but was based on actions taken by different people.”
11 Whitehead v. Hedgpeth, 2013 WL 3967341, at *5 (N.D. Cal. July 31, 2013) (gathering cases); see
12 also Schneider v. McDaniel, 674 F.3d 1144, 1151 (9th Cir. 2012) (noting “Schneider’s original
13 theory was based on trial counsel’s alleged failures. His amended theory is based on the trial
14 court’s alleged errors.”).

15 Here, petitioner’s ineffective assistance of counsel and Brady claims involve alleged
16 errors by different actors, i.e., trial counsel and the prosecutor. Additionally, the errors are
17 distinct. In the claim alleging Brady error, petitioner alleges that the prosecutor failed to disclose
18 the disk containing the contents of petitioner’s cell phone, although the prosecutor identified the
19 disk on an inventory of items seized from petitioner. In contrast, petitioner alleges that his trial
20 counsel had knowledge of, and apparently access to, his cell phone, but failed to undertake an
21 investigation to confirm when the text messages were sent. The Brady claim and the ineffective
22 assistance of counsel claim do not arise from same core facts. For these reasons, petitioner’s
23 Brady claim does not relate back to the ineffective assistance of counsel claim raised in the
24 original petition.² Thus, the Brady claim is not timely.

25 ² The Ninth Circuit has held that where a defendant has enough information to be able to
26 ascertain Brady material on his own, the prosecution has not suppressed the evidence. See United
27 States v. Aichele, 941 F.2d 761, 764 (9th Cir. 1991); see also United States v. Bond, 552 F.3d
28 1092, 1096 n. 4 (9th Cir. 2009) (quoting United States v. Dupuy, 760 F.2d 1492, 1502 n. 5 (9th
Cir. 1985)) (suppression cannot occur within the meaning of Brady if the means of obtaining
exculpatory evidence has been provided to the defense). If petitioner’s counsel knew of the

1 2. Ineffective Assistance of Appellate Counsel

2 The amended petition alleges that appellate counsel was ineffective for failing to argue
3 that trial counsel was ineffective for failing to effectively argue that petitioner’s sentence violated
4 the California prohibition on cruel or unusual punishment. The original petition raised a claim
5 alleging that trial counsel was ineffective for failing to effectively argue that petitioner’s sentence
6 violated California’s prohibition on cruel and unusual punishment.

7 In the opposition, petitioner relies on Nguyen v. Curry, 736 F.3d 1287 (9th Cir. 2013), in
8 which the Ninth Circuit held that a claim alleging appellate counsel was ineffective for failing to
9 raise a double jeopardy argument on direct appeal related back to the petitioner’s claim that his
10 rights were violated under the Double Jeopardy Clause, which in turn related back to the original
11 petition and therefore was not barred by the one-year limitation period. 736 F.3d at 1296–97.
12 The court observed that the “time and type” language in Felix refers not to the claims or grounds
13 for relief but “to the facts that support those grounds.” Id. at 1297. The court found that the
14 original double jeopardy claim and the new claim alleging ineffective assistance of appellate
15 counsel were “supported by a common core” of facts that were “simple, straightforward, and
16 uncontroverted,” and “clearly alleged in the original pleading.” Id.

17 While petitioner’s ineffective assistance of appellate and trial counsel claims involve
18 different people, they are based on the same core facts: trial counsel’s alleged failure to
19 effectively argue that petitioner’s sentence violated the California prohibition against cruel or
20 unusual punishment. Based on the Ninth Circuit’s reasoning in Nguyen, the undersigned finds
21 that petitioner’s ineffective assistance of appellate counsel claim relates back to the related
22 ineffective assistance of trial counsel claim. Accordingly, petitioner’s ineffective assistance of
23 appellate counsel claim is timely.

24 3. Cumulative Error

25 Petitioner’s claim alleging cumulative error is based on trial counsel’s alleged ineffective
26 assistance and his Brady claim. (ECF No. 12 at 181.) As discussed above, petitioner’s Brady

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possible exonerating information on petitioner’s phone, and could have had access to the phone,
as alleged in his declaration, then it is unclear how petitioner could succeed on his Brady claim.

1 claim is not timely. Accordingly, to the extent petitioner's cumulative error claim incorporates
2 his timely ineffective assistance of counsel claims, it relates back to the original petition, and is
3 timely. For the reasons discussed above, the cumulative error claim based on Brady error fails to
4 relate to the claims raised in the original petition, and is not timely.

5 4. Actual Innocence

6 In the amended petition, petitioner raises a freestanding actual innocence claim. See Jones
7 v. Taylor, 763 F.3d 1242, 1246-47 (9th Cir. 2014) (Ninth Circuit has assumed a freestanding
8 actual innocence claim is viable in the non-capital context).

9 The undersigned sets forth petitioner's argument in support of his actual innocence claim
10 herein:

11 Crisp has presented sufficient evidence to undermine the
12 prosecution in his case and demonstrate that he is actually innocent
13 of the charges of conviction and sentencing enhancements found
14 true. The evidence indicating Crisp was the shooter was equivocal
15 at best. No one saw who fired the gun from the Mustang. In the
16 immediate aftermath of the shooting, witnesses reported seeing at
17 most only the flash of shots fired in the dark. The forensic evidence
18 admitted at trial also was a draw: the prosecution's expert
19 witnesses were unable to tell who fired the weapon. Only Reyes's
20 testimony at the preliminary examination, which he reiterated at
21 trial, regarding seeing part of an arm extended out the passenger
22 window at the time of the shooting and Brown's trial testimony
23 pointed to Crisp as the shooter.

24 The new evidence presented in this petition eviscerates the
25 probative value of Reyes's testimony and what little credibility
26 there was to begin with in Brown's testimony. There is a well-
27 established body of scientific research regarding the fallibility of
28 eyewitness testimony to the peripheral details of a stressful event
such as a shooting. Observations regarding details such as an arm
out of the window are particularly suspect when offered months
after the shooting and in all likelihood are the result of
reconstructed memory. Dr. Wells stated in his declaration that
Reyes's supposed memory of the arm out the window was in all
likelihood the product of a reconstructed memory and thus, had
little to no probative value.

This leaves only the observations of Tapalla, Salomon, and Meraz,
which did not include an arm extended out the window, thus
supporting the conclusion that the driver, and not the passenger,
fired the weapon. Likewise, the report of firearms expert, Robert
Venkus, whom [trial counsel] never introduced at trial, establishes
the likelihood that Brown fired the weapon out the passenger
window.

1 In addition, Shipman's testimony that Brown admitted to
2 participating in a burglary in which firearms were taken and
3 purchasing a firearm with a co-worker and was generally obsessed
4 with guns provides potent circumstantial evidence that Brown both
5 owned and fired the weapon. This evidence, combined with
6 Shipman's opinion that Brown was a liar, also impeaches Brown's
7 testimony that he had no experience with firearms and thus, that he
8 was not the shooter. Moreover, the numerous instances of
9 ineffective assistance set forth in this petition, occurring at the
10 hands of a trial lawyer who was visibly ill to the point of mental
11 impairment and requiring hospitalization during the trial, vividly
12 demonstrate the likelihood that Crisp is actually innocent.

13 (ECF No. 12 at 187-88.)

14 In the motion to dismiss, respondent argues that petitioner's actual innocence claim does
15 not relate back to the claims raised in the original petition because it involves,

16 the decisions and actions of a separate actor (Petitioner) at a much
17 different time when the crimes were committed before the legal
18 proceedings even began. These differences are significant because,
19 as noted above, Habeas Corpus Rule 2(c) mandates that a "petition
20 must *specify all the grounds for relief* available to the petitioner'
21 and '*state facts* supporting each ground.'" Mayle, 545 U.S. at 656,
22 661. Surely, under this "stringent" standard, facts concerning a
23 different attorney making a different decision at a different stage of
24 the proceedings, as well as facts concerning petitioner's actions at
25 the time the crimes were committed, cannot relate back to the
26 original claims in this matter.

27 (ECF No. 25 at 7.)

28 In the opposition, petitioner argues that respondent has misconstrued his actual innocence
claim. Petitioner argues that his actual innocence claim is based on his petitioner's status as a
person who was wrongly convicted. Petitioner argues that it makes no sense to think of
petitioner's own behavior as the source of the constitutional violation. The undersigned agrees
with petitioner. Respondent's argument that petitioner's actual innocence claim cannot relate
back to any of the claims raised in the original petition because it is based on petitioner's conduct
is not accurate. See Herrera v. Collins, 506 U.S. 390, 400 (1993) ("Claims of actual innocence
based on newly discovered evidence have never been held to state a ground for federal habeas
relief absent an independent constitutional violation occurring in the underlying state criminal
proceeding.").

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1 Petitioner argues that he is actually innocent based on the expert eyewitness and ballistic
2 evidence that trial counsel failed to introduce. Petitioner also argues that the testimony of
3 Shipman, who trial counsel was not able to call as a witness, demonstrates his actual innocence.
4 Thus, petitioner’s actual innocence claim arises from the same core facts as the ineffective
5 assistance of counsel claims raised in the original petition, i.e., counsel failed to call expert
6 witnesses and introduce the testimony of Shipman. Accordingly, petitioner’s actual innocence
7 claims relates back to claims raised in the original petition. Cf. Soler v. U.S., 2010 WL 5173858
8 at *4 (S.D.N.Y. 2010) (affirming order to deny amended habeas petition where new claim of
9 actual innocence “asserts a new ground for relief supported by facts that differ in both time and
10 type from a claim of ineffective assistance of counsel.”) Accordingly, petitioner’s actual
11 innocence claim is timely.

12 C. Miscarriage of Justice

13 Petitioner argues that the court may consider his time barred claim(s) pursuant to the
14 miscarriage of justice exception to the statute of limitations.

15 In order to obtain relief from the statute of limitations, a petitioner claiming actual
16 innocence must establish a miscarriage of justice under the standard announced in Schlup v. Delo,
17 by demonstrating “that it is more likely than not that no reasonable juror would have convicted
18 him in the light of the new evidence.” Lee v. Lampert, 653 F.3d 929, 938 (9th Cir. 2011)
19 (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)). “Actual innocence” demonstrating a
20 miscarriage of justice “means factual innocence, not mere legal insufficiency.” Bousley v. United
21 States, 523 U.S. 614, 623-24 (1998) (citation omitted). To make a credible claim of actual
22 innocence, the petitioner must produce “new reliable evidence—whether it be exculpatory
23 scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not
24 presented at trial.” Schlup, 513 U.S. at 324.

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1 To establish the miscarriage of justice exception, a petitioner must show that in light of
2 all the evidence, including new evidence, “it is more likely than not that no reasonable juror
3 would have found petitioner guilty beyond a reasonable doubt.” Schlup, at 327.

4 In order to determine whether petitioner has met the miscarriage of justice exception, the
5 court must review the entire record, i.e., the new evidence and the trial transcripts.³ At this stage
6 of the proceedings, it makes more sense for the court to defer ruling on whether petitioner has met
7 the miscarriage of justice exception. Consideration of this issue is more appropriate once the
8 merits of the petition are fully briefed and the entire record submitted.

9 Accordingly, respondent’s motion to dismiss petitioner’s Brady claim is denied without
10 prejudice. Respondent may raise any arguments he wishes as to this claim in the answer.

11 Accordingly, IT IS HEREBY ORDERED that the Clerk of the Court is directed to assign
12 a district judge to this case; and

13 IT IS HEREBY RECOMMENDED that respondent’s motion to dismiss (ECF No. 25) be
14 denied for the reasons discussed above; respondent be ordered to file an answer to the petition
15 within thirty days of the adoption of these findings and recommendations.

16 These findings and recommendations are submitted to the United States District Judge
17 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
18 after being served with these findings and recommendations, any party may file written
19 objections with the court and serve a copy on all parties. Such a document should be captioned
20 “Objections to Magistrate Judge’s Findings and Recommendations.” If petitioner files objections,
21 he shall also address whether a certificate of appealability should issue and, if so, why and as to
22 which issues. A certificate of appealability may issue under 28 U.S.C. § 2253 “only if the
23 applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. §
24 2253(c)(3). Any response to the objections shall be served and filed within fourteen days after

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³ The trial transcript is not yet in the court record.

1 service of the objections. The parties are advised that failure to file objections within the
2 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
3 F.2d 1153 (9th Cir. 1991).

4 Dated: August 10, 2017

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6 _____
7 KENDALL J. NEWMAN
8 UNITED STATES MAGISTRATE JUDGE

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