

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CINDY THAO
Petitioner,
v.
DEBORAH K. JOHNSON,
Respondent.

No. 2:16-cv-00380 WBS GGH P

FINDINGS AND RECOMMENDATIONS

Introduction and Summary

Petitioner pled guilty to first degree felony murder in 2007 and was sentenced in that year as well. It is undisputed that her conviction was final for AEDPA purposes on June 8, 2008. The federal petition at issue was filed in February 2016. It would be the rare case in which the AEDPA statute of limitations would not require that the petition be dismissed. Although there are a few twists here to the ordinary AEDPA limitations analysis, including what specific subsection for the commencement of the AEDPA limitations applies, or whether a claim for actual innocence obviates the AEDPA limitations preclusions altogether, this ultimately is not one of those rare cases. Drilling down through the layers of tolling analysis set forth in the Motion to Dismiss, petitioner ultimately asserts that the claims brought in her federal petition demonstrate that she was actually innocent of the first degree murder to which she pled guilty, because the law

1 of California pertinent to those claims changed making her substantively innocent. However, to
2 pass through the actual innocence gateway for AEDPA limitations purposes, petitioner must
3 demonstrate a strong showing of actual innocence. Because she is incorrect on the state law on
4 which she bases her argument, the petition should be dismissed as having been filed beyond any
5 permissible time period.

6 **28 U.S.C. Section 2244(d)(1)(A) Analysis**

7 Most AEDPA limitations issues commence with a discussion of this section (1 year
8 limitation period from date of finality of conviction). Respondent has set forth the entire history
9 of plaintiff's direct and habeas review (9 petitions) in state courts with a thorough review of
10 possible tolling provisions. It serves no purpose to repeat, or simply retype here, that clear,
11 concise, complete and correct analysis. Motion to Dismiss, ECF No. 11 at pp 2-10. Suffice it to
12 say that at the end of the day, petitioner's federal petition was filed over six years past the
13 expiration of the one year limitations period.

14 Moreover, petitioner does not disagree whatsoever with the nuts and bolts of the analysis;
15 she tacitly concedes that on the face of it, the limitations period expired. See Opposition, ECF
16 No. 15. Nor does she argue any reason for equitable tolling (impediment to filing external to
17 petitioner's diligent efforts) except as it inferentially has to do with actual innocence—discussed
18 below. To overcome these problems, she first erroneously asks this court to apply a “cause and
19 prejudice” analysis, appropriate as if the issue here were procedural default of an independent and
20 adequate state law bar, but it is not.¹ There is no cause and prejudice analysis applicable to
21 AEDPA limitations issues except to the extent those concepts have been incorporated into federal
22 equitable tolling law. Moreover, there were no external impediments imposed on plaintiff to

23 ///

24 _____
25 ¹ Petitioner interprets the Motion to Dismiss based on untimeliness as being based upon state law
26 on the timely filing of petitions in state court. However, it is the *federal* limitations statute for the
27 filing of *federal* habeas petitions which is at issue here. Title 28 U.S.C. section 2244. The denial
28 of state petitions based on untimeliness and successiveness under state law plays a role in the
tolling analysis for the federal statute, section 2244(d)(2), i.e., whether such state petitions would
be considered “properly filed” for purposes of federal tolling analysis, but it is not state law which
ultimately governs whether the federal petition was timely filed.

1 filing a federal habeas corpus petition, and she does not argue any; indeed, she filed *nine* habeas
2 petitions in the state courts throughout the years.

3 What are left of petitioner’s possible arguments to avoid the AEDPA limitations
4 expiration are discussed in the next section.

5 ***The Remainder of The AEDPA Limitations Sections and Actual Innocence.***

6 A quick review of the claims in the petition is necessary to discuss the remaining possible
7 bases petitioner may have for a timely petition. The petition, filed February 22, 2016 contains
8 two claims: (1) People v. Chiu, 59 Cal. 4th 155 (2014) (aider and abettor cannot be found guilty
9 of first degree murder under the “natural and probable consequence” theory) must have its
10 holding applied to petitioner’s case final in 2008; (2) People v. Banks, 61 Cal. 4th 788 (2015)
11 (*special circumstance* felony murder may not attach to a defendant in the underlying felony, e.g.,
12 robbery, unless the defendant was a “major participant” in the underlying felony. Petitioner
13 asserts that these cases render her first degree murder conviction invalid. These cases, of course,
14 post-dated petitioner’s conviction herein, and were not claims in petitioner’s direct review or
15 earliest habeas petitions.

16 On the face of it, petitioner might argue that section 2244(d)(1)(C) applies—one year
17 limitations period commences upon constitutional right recognized retroactive to cases on
18 collateral review by the Supreme Court. However, as pointed out by respondent, the “Supreme
19 Court” referenced is the United States Supreme Court and not the supreme court of the individual
20 states.

21 Next, petitioner might argue that section 2244(d)(1)(D) applies which commences the one
22 year limitations period on “the date on which the factual predicate of the claim or claims
23 presented could have been discovered through the exercise of diligence.” If the “factual
24 predicate” were the date of issuance of these fairly recent state court decisions, the petition might
25 be timely. However, the Ninth Circuit has held that the “factual predicate” only applies to the
26 facts of a substantive claim, e.g., date of revelation of Brady violations, not the date a substantive
27 right became legally recognized in another case. Shannon v. Newland, 410 F.3d 1083, 1088-89
28 (9th Cir. 2005). See also Torres v. Johnson, 2015 WL 5025524 (C.D. Cal. 2015).

1 Finally, “actual innocence” is an exception to all section 2244(d) provisions under which a
2 claim would otherwise be barred because of untimeliness. McQuiggin v. Perkins, ___U.S.___, 133
3 S.Ct. 1924 (2013). That is, a credible actual innocence claim is not barred because of
4 untimeliness. And, a change in the law subsequent to one’s conviction rendering the entirety of a
5 conviction, or an aspect of the conviction, non-actionable is a claim of actual innocence. Vosgien
6 v. Persson, 742 F.3d 1131, 1134-35 (9th Cir. 2014). See also Miller v. Arnold, 2016 WL
7 1068381 (C.D. Cal 2016). If a change in California law was in fact applicable to the substance of
8 petitioner’s conviction, her federal petition could not be barred by section 2244.

9 But, neither Chiu nor Banks apply to petitioner’s conviction. Although the abstract of
10 judgment simply provides that petitioner was adjudged guilty of first degree murder, ECF No. 12,
11 respondent has set forth the factual findings of the Superior Court that petitioner pled to-- *non-*
12 *special circumstance* felony murder, and was sentenced thereon.

13 [P]etitioner was not convicted of first degree murder based solely on the natural
14 and probable consequences doctrine. Rather, petitioner pleaded no contest to a
15 charge of first degree felony murder. The record reflects that at the outset of the
16 change of plea hearing held on February 1, 2007, the prosecutor stated that
17 petitioner’s “plea to first degree murder that was committed in the course of
18 robbery is appropriate,” and that due to petitioner’s age and lack of prior criminal
19 record that dismissal of the special circumstance would be appropriate so as to
20 render her eligible for parole. Petitioner’s counsel then informed the court that
21 “it’s the felony murder rule,” that he had “gone over it numerous times” and “had
22 another judge explain the felony murder rule” to petitioner; that he had actually sat
23 down with the jury instructions and “gone over how an attempted robbery would
24 lead to a murder charge with life without possibility of parole”; and that he had
25 read cases to petitioner “as to how the law applies and how it basically came from
26 common law and [he could not] break it in the California system.” The prosecutor
27 then stated the factual basis of the plea, which was that petitioner and her
28 codefendants went to a motel with a plan to commit a robbery, that the
codefendants demanded a wallet from the intended victim, that the victim said he
did not have a wallet, that a codefendant then shot the victim, killing him, that
petitioner had been the driver to and from the motel and had discussed the robbery
plan with the codefendants before coming to the motel; in addition, it was stated
she had given a revolver to a codefendant who used it during the commission of
the attempted robbery. There was no objection to the recitation of the factual basis
of the plea, and petitioner thereafter pleaded no contest to the murder. Clearly,

1 petitioner understood that she was being prosecuted on a felony-murder theory; at
2 no point in time did either counsel, the prosecutor, or the court make mention of
3 the natural and probable consequences doctrine. Therefore, even if Chiu were
4 found to apply retroactively to cases already final, such as petitioner's, petition
5 would not be entitled to any relief based on that decision because the natural and
6 probable consequences doctrine was not the basis for her murder conviction.

7 ECF No. 12, Lodged Doc 14; see also Lodged Doc 19.

8 Findings of fact by the state courts carry a presumption of correctness, even when the
9 factual issue relates to procedural matters (here the murder to which petitioner pled.) Wainwright
10 v. Sykes, 469 U.S. 412, 428-429 (1985). Moreover, although petitioner *alleges* that the natural
11 and probable consequence doctrine was a part of her plea, petitioner does not demonstrate
12 through record evidence this specific basis for her conviction.² Accordingly, actual innocence
13 cannot be a basis herein upon which to find that section 2244(d)(1), the AEDPA limitations
14 statute, does not apply.

14 ***Conclusion***

15 Petitioner's federal petition, filed February 22, 2016 is untimely, and the petition should
16 be dismissed on that basis.

17 These findings and recommendations are submitted to the United States District Judge
18 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days
19 after being served with these findings and recommendations, any party may file written
20 objections with the court and serve a copy on all parties. Such a document should be captioned
21 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
22 shall be served and filed within fourteen days after service of the objections. The parties are

23 ///

24 _____
25 ² Although aiding and abetting can be a concept in felony murder where a co-participant in a
26 robbery or burglary etc. commits the actual killing, see bracketed alternative in CALCRIM 540B,
27 it is not a required basis for conviction on felony murder. People v. Cavitt, 33 Cal 4th 187, 197-
28 199 (2004). In any event, the potential for aiding and abetting in a felony murder conviction is
not based on the aider and abettor committing actions with the natural and probable consequence
of murder, which was, until Chiu, a theory of conviction for aider and abettor first degree murder
unto itself. Felony murder was expressly held outside the ambit of its ruling. Chiu at 166.

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

3 DATED: February 10, 2017

4 /s/ Gregory G. Hollows
5 UNITED STATES MAGISTRATE JUDGE
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28