

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

KENNETH KEITH MATTHEWS,  
Petitioner,  
v.  
RON RACKLEY, Warden,  
Respondent.

No. 2:17-cv-0440 MCE AC P

FINDINGS AND RECOMMENDATIONS

I. Introduction

Petitioner is a state prisoner incarcerated at Folsom State Prison under the authority of the California Department of Corrections and Rehabilitation (CDCR). Petitioner proceeds pro se and in forma pauperis with a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254.

See ECF No. 1. Petitioner challenges his December 2012 robbery conviction on three grounds:

- (1) the trial court erred in finding true a sentencing enhancement for personal use of a firearm;
- (2) petitioner’s trial counsel was ineffective; and
- (3) the prosecutor engaged in misconduct.

Currently pending before the court is respondent’s motion to dismiss this action on the ground that it was commenced beyond the one-year statute of limitations established by the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2244(d). See ECF No. 14.

Respondent also contends that petitioner’s first ground for relief is noncognizable in federal

1 habeas. Petitioner opposes the motion. ECF Nos. 17, 19.<sup>1</sup> Respondent has filed a reply. ECF  
2 No. 18.

3 This matter is before the undersigned United States Magistrate Judge pursuant to 28  
4 U.S.C. § 636(b)(1)(B) and Local Rule 302(c). For the reasons set forth below, the undersigned  
5 recommends that respondent's motion to dismiss this action be granted.

6 II. Chronology

7 The following dates are pertinent to the court's analysis:

8 • **January 27, 2012**: Following his conviction for second degree robbery and a finding  
9 that the alleged sentencing enhancement (personal use of a firearm) was true, petitioner was  
10 sentenced to a determinate state prison term of twelve years. Lodg. Doc. 1 (Abstract of  
11 Judgment, Case No. 10F06839, Sacramento County Superior Court).

12 • **December 6, 2012**: The California Court of Appeal, Third Appellate District, affirmed  
13 the judgment but ordered the trial court to correct the abstract of judgment to reflect the accurate  
14 amount of the restitution fine orally ordered by the trial court and to include the trial court's oral  
15 imposition of a revocation fine suspended unless parole is revoked.<sup>2</sup> Lodg. Doc. 2 (Opinion, Case  
16 No. C070316, California Court of Appeal). Petitioner did not file a petition for review in the  
17 California Supreme Court.

18 ////

19 ////

20 ////

21 ////

---

22 <sup>1</sup> After briefing on respondent's motion was complete, petitioner filed an "addendum." ECF No.  
23 19. Although neither the Local Rules nor the Federal Rules of Civil Procedure authorize the  
24 filing of a surreply as a matter of right, the court finds petitioner's three-page addendum helpful  
25 in construing his four-page opposition, with no prejudice to respondent. Therefore, the court  
26 considers the substance of petitioner's additional filing.

27 <sup>2</sup> The Court of Appeal's ruling indicates that these changes were matters of clerical error and  
28 omission. As such, the amended abstract of judgment did not result in a new judgment. See  
Brumfield v. Cate, 2010 WL 2267504, at \*2, 2010 U.S. Dist. LEXIS 62762, at \*4-5 (N.D. Cal.  
2010) (holding that the correction of a clerical error was not the result of any judicial evaluation  
or change in judgment, and therefore was not and could not have constituted a new final  
judgment).

1 • Petitioner filed nine pro se state post-conviction collateral challenges to the judgment:

2 • **First Action (Sacramento County Superior Court Case No. 13HC00290)**

3 **April 13, 2013**:<sup>3</sup> Petition for writ of habeas corpus filed. Lodg. Doc. 3.

4 **May 23, 2013**: Motion to vacate or correct sentence (sic) filed. Lodg. Doc. 4  
5 (also designated Case No. 13 HC00290).

6 **July 10, 2013**: Petition and motion denied by written order. Lodg. Doc. 5.

7 • **Second Action (Sacramento County Superior Court Case No. 13HC00669)**

8 **September 13, 2013**: Petition for writ of habeas corpus filed. Lodg. Doc. 6.

9 **January 13, 2014**: Petition denied by written order. Lodg. Doc. 7.

10 • **Third Action (California Court of Appeal Case No. C075905)**<sup>4</sup>

11 **March 5, 2014**: Petition for writ of habeas corpus filed. Lodg. Doc. 8

12 **March 27, 2014**: Petition summarily denied. Lodg. Doc. 9.

13 • **Fourth Action (California Supreme Court Case No. S217852)**

14 **April 2, 2014**: Petition for writ of habeas corpus filed. Lodg. Doc. 10.

15 **June 25, 2014**: Petition summarily denied. Lodg. Doc. 11.

16 • **Fifth Action (Sacramento County Superior Court Case No. 10F06839)**

17 **January 15, 2015**: Petition for redesignation of sentence under Proposition 47  
18 filed. Lodg. Doc. 12.

19 **January 22, 2015**: Petition denied “due to ineligibility based on: The current  
20 conviction.” Lodg. Doc. 13.

21 \_\_\_\_\_  
22 <sup>3</sup> Unless otherwise noted, petitioner’s filing dates are based on the prison mailbox rule, pursuant  
23 to which a document is deemed served or filed on the date a prisoner signs the document (or signs  
24 the proof of service, if later) and gives it to prison officials for mailing. See Houston v. Lack, 487  
25 U.S. 266 (1988) (establishing prison mailbox rule); Campbell v. Henry, 614 F.3d 1056, 1059 (9th  
26 Cir. 2010) (applying the mailbox rule to both state and federal filings by prisoners).

27 <sup>4</sup> As noted by respondent, see ECF No. 14 at 3 n.5, the only signature dates in petitioner’s third  
28 petition are copies of signature pages taken from his second petition. The dates provided herein  
reflect those reflected on the Court of Appeal docket, as provided on the California Courts Case  
Information website, <http://appellatecases.courtinfo.ca.gov/search.cfm?dist=3> This court may  
take judicial notice of its own records and the records of other courts. See United States v.  
Howard, 381 F.3d 873, 876 n.1 (9th Cir. 2004); United States v. Wilson, 631 F.2d 118, 119 (9th  
Cir. 1980); see also Fed. R. Evid. 201 (court may take judicial notice of facts that are capable of  
accurate determination by sources whose accuracy cannot reasonably be questioned).

1 • **Sixth Action (Sacramento County Superior Court Case No. 15HC00424)**

2 **July 31, 2015**: Petition for writ of habeas corpus filed. Lodg. Doc. 14.

3 **September 23, 2015**: Petition denied by written order. Lodg. Doc. 15.

4 • **Seventh Action (Sacramento County Superior Court Case No. 16HC00246)**

5 **June 15, 2016**: Petition for writ of habeas corpus filed. Lodg. Doc. 16.

6 **July 29, 2016**: Petition denied by written order. Lodg. Doc. 17.

7 • **Eighth Action (California Court of Appeal Case No. CO83102)**

8 **September 25, 2016**: Petition for writ of habeas corpus filed. Lodg. Doc. 18.

9 **October 7, 2016**: Petition summarily denied. Lodg. Doc. 19.

10 • **Ninth Action (California Supreme Court Case No. S238099)**

11 **October 28, 2016**: Petition for writ of habeas corpus filed. Lodg. Doc. 20.

12 **December 14, 2016**: Petition summarily denied with citations to In re Robbins  
13 (1998) 18 Cal. 4th 770, 780 [petition untimely filed], and In re Miller (1941) 17  
14 Cal. 2d 734, 735 [petition duplicative of prior petition]. Lodg. Doc. 21.

15 • **February 12, 2017**: Petitioner filed the instant federal petition. ECF No. 1.

16 III. Legal Standards

17 A. Motion to Dismiss

18 A respondent's motion to dismiss, after the court has ordered a response, is reviewed  
19 pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District  
20 Courts. See O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990) (citing White v. Lewis, 874  
21 F.2d 599, 602-03 (9th Cir. 1989)). Under Rule 4, this court must summarily dismiss a petition if  
22 it "plainly appears from the petition and any attached exhibits that the petitioner is not entitled to  
23 relief in the district court."

24 B. Statute of Limitations

25 Under AEDPA, "[a] 1-year period of limitation shall apply to an application for a writ of  
26 habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C. §  
27 2244(d)(1). The statute provides four alternate trigger dates for commencement of the limitations  
28 period. Id., § 2244(d)(1)(A)-(D).

1           The limitations period is statutorily tolled during the time in which “a properly filed  
2 application for State post-conviction or other collateral review with respect to the pertinent  
3 judgment or claim is pending . . . .” 28 U.S.C. § 2244(d)(2). A state petition is “properly filed,”  
4 and thus qualifies for statutory tolling, if “its delivery and acceptance are in compliance with the  
5 applicable laws and rules governing filings.” Artuz v. Bennett, 531 U.S. 4, 8 (2000). “An  
6 untimely petition, however, is not ‘properly filed’ pursuant to 28 U.S.C. § 2244(d)(2), and so it  
7 does not toll the statute of limitation.” Banjo v. Ayers, 614 F.3d 964, 968 (9th Cir. 2010) (citing  
8 Pace v. DiGuglielmo, 544 U.S. 408, 410 (2005); Thorson v. Palmer, 479 F.3d 643, 645 (9th Cir.  
9 2007)). “A California court’s determination that a filing was untimely . . . is dispositive.” Banjo  
10 v. Ayers, 614 F.3d 964, 968 (9th Cir. 2010); (citing Carey v. Saffold, 536 U.S. 214, 225-26  
11 (2002)).

12           Within California’s state collateral review system, a properly filed petition is considered  
13 “pending” under Section 2244(d)(2) during its pendency in the reviewing court as well as during  
14 the interval between a lower state court’s decision and the filing of the petition in a higher court,  
15 provided the latter is filed within a “reasonable time.” Carey, 536 U.S. at 216-17; see also Banjo,  
16 614 F.3d at 968.

17           However, there is no statutory tolling for the period between a final state court decision  
18 and the filing of a federal petition. Duncan v. Walker, 533 U.S. 167 (2001). Moreover, state  
19 habeas petitions filed after expiration of the limitations period do not revive the statute of  
20 limitations and have no tolling effect. See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir.  
21 2003); Jimenez v. Rice, 276 F.3d 478, 482 (9th Cir. 2001); Green v. White, 223 F.3d 1001, 1003  
22 (9th Cir. 2000) (petitioner is not entitled to tolling where the limitations period has already run).

23           The limitations period may be equitably tolled if a petitioner establishes “(1) that he has  
24 been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his  
25 way’ and prevented timely filing.” Holland v. Florida, 560 U.S. 631, 649 (2010) (quoting Pace v.  
26 DiGuglielmo, 544 U.S. 408, 418 (2005)). “The high threshold of extraordinary circumstances is  
27 necessary lest the exceptions swallow the rule.” Lakey v. Hickman, 633 F.3d 782 (9th Cir. 2011)  
28 (citations and internal quotation marks omitted). Petitioner bears the burden of proving

1 application of equitable tolling. Banjo, 614 F.3d at 967 (citations omitted).

2 IV. The Parties' Arguments

3 Respondent moves to dismiss on the ground that the federal petition was untimely filed  
4 after expiration of the limitations period set forth in 28 U.S.C. § 2244(d)(1)(A) (which concludes  
5 one year after “the [challenged state court] judgment became final by the conclusion of direct  
6 review or the expiration of the time for seeking such review”). Respondent contends that neither  
7 statutory nor equitable tolling render the petition untimely.

8 Petitioner does not dispute that his petition was untimely filed, but asserts that his  
9 sentencing enhancement was illegally imposed in violation of state statutory and federal due  
10 process requirements, resulting in a fundamental miscarriage of justice that is independently  
11 cognizable on federal habeas.

12 V. Analysis

13 A. Federal Petition is Untimely

14 The instant petition challenges the judgment of the Sacramento County Superior Court  
15 entered January 27, 2012. The judgment was affirmed by the California Court of Appeal on  
16 December 6, 2012, and became final thirty days thereafter. Cal. Rule of Court 8.366. Petitioner  
17 then had ten days, until January 15, 2013, to file a petition for review in the California Supreme  
18 Court. Cal. Rule of Court 8.500. Because petitioner did not seek such review, the Superior Court  
19 judgment became final at the conclusion of the period for seeking review. Accordingly, the  
20 challenged Superior Court judgment became “final” within the meaning of 28 U.S.C. §  
21 2244(d)(1)(A) on January 15, 2013. AEDPA’s statute of limitations under Section 2244(d)(1)(A)  
22 therefore commenced the following day, on January 16, 2013. See Patterson v. Stewart, 251 F.3d  
23 1243, 1246 (9th Cir. 2001) (citing Fed. R. Civ. P. 6(a)). Absent tolling, this limitations period  
24 expired one year later, on January 15, 2014.

25 Even if the court assumes that petitioner is entitled to statutory tolling during the  
26 pendency of all state post-conviction petitions filed while the limitations period would otherwise  
27 have been running, including interval tolling during the course of a “complete round” through the  
28

1 three-tiered state court system,<sup>5</sup> the limitations period expired approximately two years before the  
2 federal petition was filed. The following calculations assume without deciding that petitioner’s  
3 various collateral challenges in state court were “properly filed” within the meaning of Artuz and  
4 progeny.<sup>6</sup>

5 Eighty-seven (87) days elapsed between the commencement of the statute of limitations  
6 on January 16, 2013, and petitioner’s filing of his first state petition for collateral relief on April  
7 13, 2013. Assuming that the limitations period was tolled during the pendency of that petition in  
8 the superior court, tolling ended when the petition was denied on July 10, 2013.

9 Another 64 days of the limitations period elapsed before petitioner filed his second  
10 superior court petition on September 13, 2013. Petitioner is not entitled to tolling for the period  
11 between the denial of his first petition and the filing of his second petition, because interval  
12 tolling applies only to periods between petitions filed at ascending court levels within a single  
13 “round.” See Banjo, 614 F.3d at 968 (“The period between a California lower court’s denial of  
14 review and the filing of an original petition in a higher court is tolled – because it is part of a  
15 single round of habeas relief – so long as the filing is timely under California law.”) (citations  
16 omitted). Assuming that the second superior court petition was nonetheless “properly filed” and  
17 stopped the clock a second time, a total of 151 days of the limitations period had now expired.

18 Assuming that the second superior court petition and ensuing petitions to the California  
19 Court of Appeal and California Supreme Court constituted a single round of habeas review,  
20 petitioner is entitled to continuous tolling from September 13, 2013 until the California Supreme  
21 Court’s denial of relief on June 25, 2014. Tolling for a single round applies both to the pendency  
22 of the discrete proceedings, and to the intervals between proceedings. See Carey (“California’s  
23 [original writ] system functions in ways sufficiently like other state systems of collateral review  
24 to bring intervals between a lower court decision and a filing of a new petition in a higher court  
25

---

26 <sup>5</sup> Carey, 536 U.S. at 220 (quoting O’Sullivan v. Boerckel, 526 U.S. 838, 845 (1999)).

27 <sup>6</sup> The court need not address the potentially complicated questions whether any such petitions  
28 were untimely, successive, or otherwise improperly filed, and therefore without tolling effect,  
because the federal petition is untimely even under the most generous application of statutory  
tolling for which petitioner could plausibly advocate.

1 within the scope of the statutory word ‘pending.’”).

2 The limitations period thus resumed running when the California Supreme Court denied  
3 petitioner’s fourth habeas petition on June 25, 2014. A period of 203 days then passed before the  
4 filing of a fifth petition in the superior court on January 15, 2015. Accordingly, a total of 354  
5 days of the limitations period had elapsed by the time the January 2015 petition was filed. That  
6 petition was denied a week later, on January 22, 2015. Assuming tolling during the week of  
7 pendency, the federal limitations clock then resumed running with eleven days remaining. The  
8 one-year limitations period accordingly expired on February 2, 2015.

9 Petitioner’s subsequently-filed state petitions did not impact the limitations period. See  
10 Ferguson, 321 F.3d at 823 (state habeas petitions filed after expiration of the one-year statute of  
11 limitations have no tolling effect and do not revive the limitations period).

12 The instant federal petition was filed on February 12, 2017, over two years after  
13 expiration of the AEDPA deadline. It is therefore untimely absent equitable tolling.

14 Petitioner does not contend that he entitled to equitable tolling, but asserts that the alleged  
15 sentencing error presented in Claim One resulted in a fundamental miscarriage of justice that is  
16 cognizable on federal habeas notwithstanding expiration of the limitations period. Respondent  
17 counters that petitioner “confuses state law with federal habeas filing requirements.” ECF No. 18  
18 at 2.

19 B. Petitioner’s Claim One Provides No Exception

20 Petitioner’s Claim One alleges that the trial court erred in finding true the “personal use of  
21 a firearm” enhancement set forth in California Penal Code section 12022.53(b), resulting in the  
22 imposition of an additional ten-year sentence. See Lodg. Doc. 1. See also Cal. Penal Code §  
23 12022.53(b) (ten-year sentence enhancement for personal use of a firearm during the commission  
24 of any felony specified in §12022.53(a)); see also id., § 12022.53(a)(4) (robbery (id., § 211) is a  
25 specified felony). Petitioner’s argument before this court is unclear. He argued before the  
26 California Supreme Court that his robbery conviction was neither fairly tried nor proven beyond a  
27 reasonable doubt, and thus failed to meet the specified felony requirement for application of the  
28 § 12022.53(b) enhancement. Petitioner also asserted that imposition of the enhancement set forth



1 in § 12022.53(b) failed to meet the conditions set forth in § 12022.53(e), applicable to criminal  
2 street gang activity. Petitioner asserted that he “was not found guilty of the required 186.22 gang  
3 offense needed in order for 12022.53(b) to be applicable.” See Lodg. Doc. 1. at 8. Petitioner  
4 further asserted that “the unproven 211 second degree robbery charge was a conduit for the gun  
5 enhancement § 12022(a)(1) [authorizing enhancement of only one year for persons armed with a  
6 firearm during the commission of a felony], then was [improperly] changed during the trial to the  
7 enhancement 12022.53(b).” Id.

8 Here petitioner challenges the construction of these enhancement statutes by the state  
9 courts and asserts their alleged failure of proper construction resulted in the denial of his federal  
10 due process rights. However, petitioner’s invocation of federal constitutional rights does not  
11 transform his state law claims into federal claims. See e.g. Middleton v. Cupp, 768 F.2d at 1085  
12 (federal habeas relief is “unavailable for alleged error in the interpretation or application of state  
13 law”); Sturm v. California Adult Authority, 395 F.2d 446, 448 (9th Cir. 1967) (state sentencing is  
14 a matter within the authority of the state and raises no federal question), cert. denied, 395 U.S.  
15 947 (1969). The undersigned finds no cognizable basis upon which to elevate petitioner’s state  
16 law claims to federal constitutional stature. See Richmond v. Lewis, 506 U.S. 40, 50 (1992)  
17 (federal court is required to consider whether state-law error is “so arbitrary or capricious as to  
18 constitute an independent due process or Eighth Amendment violation” (quoting Lewis v.  
19 Jeffers, 497 U.S. 764, 780 (1990).); Christian v. Rhode, 41 F.3d 461, 469 (9th Cir. 1994)  
20 (“Absent a showing of fundamental unfairness, [even] a state court’s misapplication of its own  
21 sentencing laws does not justify federal habeas relief.”). A petitioner may not “transform a state-  
22 law issue into a federal one merely by asserting a violation of due process” or some other  
23 constitutional right. Langford v. Day, 110 F.3d 1380, 1389 (9th Cir. 1996).

24 Moreover, in federal habeas petitions filed after expiration of the statute of limitations, the  
25 “miscarriage of justice” exception is limited to petitioners who can show, based on “new reliable  
26 evidence,” that “a constitutional violation has probably resulted in the conviction of one who is  
27 actually innocent.” Schlup v. Delo, 513 U.S. 298, 324-27 (1995) (quoting Murray v. Carrier,  
28 477 U.S. 478, 496 (1986)); see also Johnson v. Knowles, 541 F.3d 933, 937 (9th Cir. 2008)

1 (“[t]he miscarriage of justice exception is limited to those extraordinary cases where the petitioner  
2 asserts his innocence and establishes that the court cannot have confidence in the contrary finding  
3 of guilt”). Petitioner has not made this showing.

4 For these reasons, petitioner’s Claim One fails to excuse his untimeliness and fails to state  
5 a cognizable federal habeas claim. See 28 U.S.C. § 2254(a) (federal courts may consider  
6 petitions for writ of habeas corpus “only on the ground that [petitioner] is in custody in violation  
7 of the Constitution or laws or treaties of the United States).


8 VI. Conclusion

9 Accordingly, for the reasons explained above, IT IS HEREBY RECOMMENDED that  
10 Respondent’s motion to dismiss, ECF No. 14, be GRANTED.

11 These findings and recommendations are submitted to the United States District Judge  
12 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days  
13 after service of these findings and recommendations, any party may file written objections with  
14 the court and serve a copy on all parties. Such a document should be captioned “Objections to  
15 Magistrate Judge’s Findings and Recommendations.” Any response to the objections shall be  
16 filed and served within seven days after service of the objections. The parties are advised that  
17 failure to file objections within the specified time may waive the right to appeal the District  
18 Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

19 If petitioner files objections, he may also address whether a certificate of appealability  
20 should issue and, if so, why and as to which issues. Pursuant to Rule 11 of the Federal Rules  
21 Governing Section 2254 Cases, this court must issue or deny a certificate of appealability when it  
22 enters a final order adverse to the applicant. A certificate of appealability may issue only “if the  
23 applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. §  
24 2253(c)(2).

25 DATED: December 6, 2017

26   
27 ALLISON CLAIRE  
28 UNITED STATES MAGISTRATE JUDGE