

1 **I. BACKGROUND¹**

2 Petitioner was convicted of first degree murder, possession of a firearm by a felon,
3 and two counts of first degree robbery in concert. Additionally, a number sentencing of
4 enhancements allegations were determined to be true. Petitioner was sentenced on June 25,
5 2008, to an indeterminate prison term of 25 years to life without parole for the murder
6 conviction, and a consecutive 25 years to life for the firearm enhancement. Petitioner was also
7 sentenced to a concurrent 16-year term for one of the robbery convictions and associated firearm
8 enhancement, and a concurrent 2-year term for being a felon in possession of a firearm. The
9 sentence on the other robbery conviction and associated firearm enhancement was stayed. The
10 judgement and conviction were affirmed on direct appeal by the California Court of Appeal on
11 March 18, 2010. The California Supreme Court denied direct review on June 9, 2010.

12 Petitioner then filed the following pro se state convictions actions:

13 First Action

14 Filed on April 13, 2011, in the Sacramento County Superior Court.
15 Denied on June 2, 2011.

16 Second Action

17 Filed on August 25, 2011, in the California Court of Appeal.
18 Denied on September 15, 2011.

19 Third Action

20 Filed on September 28, 2011, in the California Supreme Court.
21 Denied on April 11, 2012.

22 Fourth Action

23 Filed on August 23, 2016, in the California Court of Appeal.
24 Denied on September 8, 2016.

25 Fifth Action

26 Filed on October 17, 2016, in the California Supreme Court.
Denied on February 22, 2017.

///

¹ The court takes judicial notice of the state court records lodged by respondent on September 25, 2017, as well as this court's own records. See Kasey v. Molybdenum Corp. of America, 336 F.2d 560, 563 (9th Cir. 1964); Chandler v. U.S., 378 F.2d 906, 909 (9th Cir. 1967).

1 Petitioner also filed a prior federal habeas petition in this court on August 25, 2011, challenging
2 the same conviction and sentence. See Doughton v. McDonald, E. Dist. Cal. Case No. 2:11-CV-
3 2252-JAM-KJN. The petition was denied on the merits on June 25, 2013, and the Ninth Circuit
4 Court of Appeals affirmed the district court’s judgment on September 30, 2014. Petitioner filed
5 the instant second federal habeas petition on March 27, 2017.

6 7 **II. DISCUSSION**

8 Respondent argues that the current federal habeas petition should be dismissed
9 because: (1) it is second or successive and was filed without first obtaining permission from the
10 Ninth Circuit Court of Appeals; and (2) it was filed beyond the one-year statute of limitations.

11 **A. Second or Successive Petition**

12 Under 28 U.S.C. § 2244(b)(1), “[a] claim presented in a second or successive
13 habeas corpus application . . . that was presented in a prior application shall be dismissed.”
14 Under § 2244(b)(2), “[a] claim presented in a second or successive habeas corpus application . . .
15 that was not presented in a prior application shall be dismissed. . . .” unless one of two
16 circumstances exist. Either the newly raised claim must rely on a new rule of constitutional law,
17 or the factual predicate of the new claim could not have been discovered earlier through the
18 exercise of due diligence and the new claim, if proven, establishes actual innocence. See id.
19 Before a second or successive petition can be filed in the district court, however, the petitioner
20 must first obtain leave of the Court of Appeals. See 28 U.S.C. § 2244(b)(3). In the absence of
21 proper authorization from the Court of Appeals, the district court lacks jurisdiction to consider a
22 second or successive petition and must dismiss it. See Cooper v. Calderon, 274 F.3d 1270 (9th
23 Cir. 2001) (per curiam). A second petition can only be successive of a prior petition which has
24 been decided on the merits. Woods v. Carey, 525 F.3d 886, 888 (9th Cir. 2008). A decision on
25 the merits occurs if the district court either considers and rejects the claims or determines that the
26 claims will not be considered by a federal court. See Howard v. Lewis, 905 F.2d 1318, 1322-23

1 (9th Cir. 1990).

2 In this case, it is clear that the current federal petition is a second or successive
3 petition. Specifically, petitioner's first petition, Doughton v. McDonald, E. Dist. Cal. Case No.
4 2:11-CV-2252-JAM-KJN, was decided on the merits and the current petition challenges the same
5 conviction and sentence addressed in the prior case. Because petitioner has not demonstrated
6 that he obtained permission from the Ninth Circuit to file the instant second petition, it must be
7 dismissed. See Cooper, 274 F.3d 1270.

8 **B. Statute of Limitations**

9 Federal habeas corpus petitions must be filed within one year from the later of:
10 (1) the date the state court judgment became final; (2) the date on which an impediment to filing
11 created by state action is removed; (3) the date on which a constitutional right is newly-
12 recognized and made retroactive on collateral review; or (4) the date on which the factual
13 predicate of the claim could have been discovered through the exercise of due diligence. See 28
14 U.S.C. § 2244(d). Typically, the statute of limitations will begin to run when the state court
15 judgment becomes final by the conclusion of direct review or expiration of the time to seek direct
16 review. See 28 U.S.C. § 2244(d)(1).

17 Where a petition for review by the California Supreme Court is filed and no
18 petition for certiorari is filed in the United States Supreme Court, the one-year limitations period
19 begins running the day after expiration of the 90-day time within which to seek review by the
20 United States Supreme Court. See Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001).

21 Where a petition for writ of certiorari is filed in the United States Supreme Court, the one-year
22 limitations period begins to run the day after certiorari is denied or the Court issued a merits
23 decision. See Wixom v. Washington, 264 F.3d 894, 897 (9th Cir. 2001). Where no petition for
24 review by the California Supreme Court is filed, the conviction becomes final 40 days following
25 the Court of Appeal's decision, and the limitations period begins running the following day. See
26 Smith v. Duncan, 297 F.3d 809 (9th Cir. 2002). If no appeal is filed in the Court of Appeal, the

1 conviction becomes final 60 days after conclusion of proceedings in the state trial court, and the
2 limitations period begins running the following day. If the conviction became final before April
3 24, 1996 – the effective date of the statute of limitations – the one-year period begins to run the
4 day after the effective date, or April 25, 1996. See Miles v. Prunty, 187 F.3d 1104, 1105 (9th
5 Cir. 1999).

6 The limitations period is tolled, however, for the time a properly filed application
7 for post-conviction relief is pending in the state court. See 28 U.S.C. § 2244(d)(2). To be
8 “properly filed,” the application must be authorized by, and in compliance with, state law. See
9 Artuz v. Bennett, 531 U.S. 4 (2000); see also Allen v. Siebert, 128 S.Ct. 2 (2007); Pace v.
10 DiGuglielmo, 544 U.S. 408 (2005) (holding that, regardless of whether there are exceptions to a
11 state’s timeliness bar, time limits for filing a state post-conviction petition are filing conditions
12 and the failure to comply with those time limits precludes a finding that the state petition is
13 properly filed). A state court application for post-conviction relief is “pending” during all the
14 time the petitioner is attempting, through proper use of state court procedures, to present his
15 claims. See Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). It is not, however, considered
16 “pending” after the state post-conviction process is concluded. See Lawrence v. Florida, 549
17 U.S. 327 (2007) (holding that federal habeas petition not tolled for time during which certiorari
18 petition to the Supreme Court was pending). Where the petitioner unreasonably delays between
19 state court applications, however, there is no tolling for that period of time. See Carey v. Saffold,
20 536 U.S. 214 (2002). If the state court does not explicitly deny a post-conviction application as
21 untimely, the federal court must independently determine whether there was undue delay. See id.
22 at 226-27.

23 There is no tolling for the interval of time between post-conviction applications
24 where the petitioner is not moving to the next higher appellate level of review. See Nino, 183
25 F.3d at 1006-07; see also Dils v. Small, 260 F.3d 984, 986 (9th Cir. 2001). There is also no
26 tolling for the period between different sets of post-conviction applications. See Biggs v.

1 Duncan, 339 F.3d 1045 (9th Cir. 2003). Finally, the period between the conclusion of direct
2 review and the filing of a state post-conviction application does not toll the limitations period.
3 See Nino, 1983 F.3d at 1006-07.

4 In this case, petitioner did not file a petition for certiorari in the United States
5 Supreme Court. Therefore, the limitations period began to run the day after the time to do so
6 expired – September 8, 2010. Assuming that petitioner is entitled to tolling for all of the time
7 between the filing of the first state post-conviction action on April 13, 2011, and the denial of the
8 third state post-conviction action on April 11, 2012, the one-year limitations period expired many
9 years before petitioner filed his the instant petition in March 2017. Therefore, the instant second
10 petition should also be dismissed as untimely.

11 Petitioner’s argument that Supreme Court’s decisions in Johnson v. United States,
12 135 S.Ct. 2551 (2015), and Welch v. United States, 136 S.Ct. 1257 (2016), triggered a later
13 commencement date for the one-year limitations period is unpersuasive because neither case
14 newly recognized a constitutional right made retroactive on collateral review under 28 U.S.C.
15 § 2244(d)(1)(C).

16 ///

17 ///

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

1 **III. CONCLUSION**

2 Based on the foregoing, the undersigned recommends that respondent's motion to
3 dismiss (Doc. 9) be granted.

4 These findings and recommendations are submitted to the United States District
5 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days
6 after being served with these findings and recommendations, any party may file written
7 objections with the court. Responses to objections shall be filed within 14 days after service of
8 objections. Failure to file objections within the specified time may waive the right to appeal.
9 See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

10
11 DATED: June 18, 2018

12 
13 **CRAIG M. KELLISON**
14 UNITED STATES MAGISTRATE JUDGE
15
16
17
18
19
20
21
22
23
24
25
26