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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRANDON ROBERT TRAMMEL,  
Petitioner,  
v.  
KEN CLARK,  
Respondent.

No. 2:19-cv-02078-JAM-CKD P

ORDER AND  
FINDINGS AND RECOMMENDATIONS

Petitioner is a state prisoner proceeding pro se in this federal habeas corpus action filed pursuant to 28 U.S.C. § 2254. Pending before the court is respondent’s motion to dismiss petitioner’s federal habeas corpus application on the basis that it is barred by the statute of limitations. ECF No. 13. The motion has been fully briefed. See ECF Nos. 13, 17-19. For the reasons discussed below, the court recommends that the motion to dismiss be granted and petitioner’s application for federal habeas corpus relief be dismissed with prejudice as time barred.

**I. Factual and Procedural History**

The instant federal habeas application challenges petitioner’s conviction for the attempted murder of his former wife and the first-degree murder of her husband, along with various firearm enhancements. ECF No. 14-2 at 1-19 (direct appeal opinion). Petitioner was sentenced in the Trinity County Superior Court on September 25, 2015 to life without parole plus an indeterminate

1 term of 25 years to life and a determinate term of 33 years. ECF No. 14-1 at 1-4 (abstract of  
2 judgment).

3 The California Court of Appeal affirmed petitioner's conviction and sentence on  
4 December 27, 2016. ECF No. 14-2. Petitioner filed a petition for review in the California  
5 Supreme Court on January 23, 2017. ECF No. 14-3. On March 22, 2017, the California Supreme  
6 Court denied the petition for review. ECF No. 14-4.

7 Following direct appeal of his conviction, petitioner filed one complete round of state  
8 habeas review. On August 1, 2018, petitioner filed a state habeas corpus application in the  
9 Trinity County Superior Court.<sup>1</sup> ECF No. 14-5. This habeas petition was denied on October 1,  
10 2018.<sup>2</sup> ECF No. 14-6. Next, petitioner filed a habeas corpus application in the California Court  
11 of Appeal on October 30, 2018. ECF No. 14-7. This habeas corpus petition was denied on  
12 November 26, 2018. ECF No. 14-8. Petitioner's last state habeas corpus application was filed in  
13 the California Supreme Court on December 23, 2018. ECF No. 14-9. This habeas corpus  
14 petition was summarily denied on June 12, 2019. ECF No. 14-10.

15 The instant federal habeas corpus petition was filed on October 4, 2019 raising ineffective  
16 assistance of counsel claims along with a challenge to the sufficiency of the evidence supporting a  
17 finding of implied malice murder. ECF No. 1.

## 18 **II. Motion to Dismiss**

19 In the motion to dismiss, respondent argues that petitioner's federal habeas application  
20 was filed after the one-year statute of limitations expired because none of this state habeas  
21 petitions tolled the limitations period. ECF No. 13 at 3. In his opposition, petitioner requests  
22 equitable tolling on the basis of his actual innocence. ECF No. 17 at 1 (citing Schlup v. Delo, 513  
23 U.S. 298 (1995)). Specifically, petitioner alleges that he was not at the scene of the shootings but  
24 was rather house-sitting at the co-defendant's house. ECF No. 17 at 2. Petitioner's truck that was  
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26 <sup>1</sup> All pro se filing dates have been calculated using the prison mailbox rule. See Houston v. Lack,  
487 U.S. 266 (1988).

27 <sup>2</sup> Respondent indicates that this petition was denied on September 27, 2018, the date the order  
28 was signed by the judge. However, out of an over abundance of caution, the court uses the date  
that the order was filed by the clerk of court which is October 1, 2018. ECF No. 14-6.

1 parked in the driveway of the house provides him an alibi for the entire night of the shootings. Id.  
2 Additionally, petitioner contends that his motive for the shootings was false because he was  
3 winning the custody case for his child. ECF No. 17 at 3. By way of reply, respondent points out  
4 that petitioner does not present any new evidence meeting the Schlup standard of actual  
5 innocence. ECF No. 18 at 1. In an unauthorized sur-reply which the court has read and  
6 considered, petitioner references a statement that his neighbor provided to the police indicating  
7 that petitioner's truck never left the driveway on the night of the shootings. ECF No. 19 at 1.  
8 Petitioner also argues his innocence because he was not on any of the gas station surveillance  
9 footage on the night of the crime. Id.

### 10 **III. Legal Standards**

#### 11 **A. Statute of Limitations**

12 Section 2244(d)(1) of Title 28 of the United States Code contains a one-year statute of  
13 limitations for filing a habeas petition in federal court. The one-year clock commences from  
14 several alternative triggering dates which are described as:

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

17 (B) the date on which the impediment to filing ... is removed, if the  
applicant was prevented from filing by such State action;

18 (C) the date on which the constitutional right asserted was initially  
19 recognized by the Supreme Court ... and made retroactively  
applicable to cases on collateral review; or

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

22 28 U.S.C. § 2244(d)(1).

#### 23 **B. Statutory Tolling**

24 Under the AEDPA, the statute of limitations is tolled during the time that a properly filed  
25 application for state post-conviction or other collateral review is pending in state court. 28 U.S.C.  
26 § 2244(d)(2). A properly filed application is one that complies with the applicable laws and rules  
27 governing filings, including the form of the application and time limitations. Artuz v. Bennett,  
28 531 U.S. 4, 8 (2000). The statute of limitations is not tolled from the time when a direct appeal in

1 state court becomes final to the time when the first state habeas petition is filed because there is  
2 nothing “pending” during that interval. Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999).  
3 Moreover, the tolling provision of § 2244(d)(2) can only pause a clock not yet fully run; it cannot  
4 “revive” the limitations period once it has run (i.e., restart the clock to zero). Thus, a state court  
5 habeas petition filed after the expiration of AEDPA's statute of limitations does not toll the  
6 limitations period under § 2244(d)(2). See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir.  
7 2003); Jiminez v. Rice, 276 F.3d 478, 482 (9th Cir. 2001).

### 8 **C. Equitable Tolling**

9 A court may equitably toll the statute of limitations if petitioner demonstrates: 1) the  
10 existence of an “extraordinary circumstance” that prevented him from timely filing; and, 2) that  
11 notwithstanding such an impediment he was diligently pursuing relief. See Holland v. Florida,  
12 560 U.S. 631, 649 (2010). The Supreme Court has further clarified that the diligence required to  
13 establish entitlement to equitable tolling is not ““maximum feasible diligence”” but rather only  
14 ““reasonable diligence.”” Holland, 560 U.S. at 653 (citations omitted). However, the Ninth  
15 Circuit has cautioned that “the threshold necessary to trigger equitable tolling ... is very high, lest  
16 the exceptions swallow the rule.” Miranda v. Castro, 292 F.3d 1063, 1066 (9th Cir. 2002)  
17 (internal citations and quotations omitted). Additionally, petitioner must demonstrate the causal  
18 relationship between the extraordinary circumstance and the untimely filing. Spitsyn v. Moore,  
19 345 F.3d 796, 799 (9th Cir. 2003).

### 20 **IV. Analysis**

21 In this case, petitioner’s conviction became final, for purposes of calculating the start date  
22 of the one-year statute of limitations, on June 20, 2017 following the expiration of the 90-day  
23 period to seek certiorari review from the United States Supreme Court. See 28 U.S.C. §  
24 2244(d)(1)(A); Velasquez v. Kirkland, 639 F.3d 964, 965 (9th Cir. 2011). The statute of  
25 limitations commenced the next day and ended on June 20, 2018, absent any statutory or  
26 equitable tolling. See Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001).

27 In the instant case, petitioner did not file any state habeas petition until August 1, 2018,  
28 over one month after the statute of limitations had already expired. A state habeas corpus petition

1 filed after the expiration of the statute of limitations does not revive it. See Ferguson v.  
2 Palmateer, 321 F.3d 820, 823 (9th Cir. 2003). Therefore, as respondent points out, petitioner is  
3 not entitled to any statutory tolling while his state habeas corpus petitions were pending in state  
4 court. The instant federal habeas petition was filed over 15 months after the statute of limitations  
5 expired unless petitioner is entitled to equitable tolling.

6 Petitioner's request for equitable tolling is based on his claim of actual innocence. As an  
7 initial matter, the court notes that the presence of petitioner's truck at a different location than the  
8 crime scene does not rise to the level of an alibi. See ECF No. 14-2 at 7 (direct appeal opinion  
9 describing petitioner's statement to co-defendant Wilson that he could not drive his truck to the  
10 victims' house because it would be recognized). The jury obviously credited the co-defendant's  
11 testimony on the reason for not driving petitioner's truck to the victims' house when it convicted  
12 petitioner of the charged offenses. Credibility determinations are afforded great weight and are  
13 not subject to review in federal habeas corpus proceedings. See Jackson v. Virginia, 443 U.S.  
14 307, 326 (1979) (holding that "a federal habeas corpus court faced with a record of historical facts  
15 that supports conflicting inferences must presume—even if it does not affirmatively appear in the  
16 record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must  
17 defer to that resolution."). Further, while petitioner disputes his purported motive for the crimes,  
18 motive is not an element of any of the crimes for which he was convicted. Thus, it does not  
19 provide a legal basis to assert actual innocence that would warrant equitably tolling the statute of  
20 limitations.

21 Moreover, petitioner's bases for arguing actual innocence are not new. Defense counsel  
22 argued at trial that the codefendants committed the crime on their own and then framed  
23 defendant. See ECF No. 14-2 at 15. Petitioner's current assertion of actual innocence falls far  
24 short of the standard required by the United States Supreme Court in Schlup v. Delo, 513 U.S.  
25 298 (1995). Petitioner fails to present any "new reliable evidence-whether it be exculpatory  
26 scientific evidence, trustworthy eyewitness accounts, or critical physical evidence- that was not  
27 presented at trial" to demonstrate his actual innocence. Schlup, 513 U.S. at 324. Accordingly,  
28 petitioner is not entitled to equitable tolling of the statute of limitations based on his assertion of

1 actual innocence.

2 **V. Plain Language Summary for Pro Se Party**

3 The following information is meant to explain this order in plain English and is not  
4 intended as legal advice.

5 After reviewing the motion to dismiss and the arguments made in opposition, the court has  
6 determined that you filed your federal habeas petition too late. As a result, the claims raised in  
7 the habeas petition will not be addressed on the merits. If you disagree with this outcome, you  
8 have 30 days to explain why it is not correct. Label your explanation as “Objections to  
9 Magistrate Judge’s Findings and Recommendations.”

10 Accordingly, IT IS HEREBY ORDERED that the Clerk of Court substitute Ken Clark,  
11 Warden of the California State Prison-Corcoran, as respondent in this matter.<sup>3</sup>

12 IT IS FURTHER RECOMMENDED that:

- 13 1. Respondent’s motion to dismiss (ECF No. 13) be granted.  
14 2. Petitioner’s application for a writ of habeas corpus be dismissed with prejudice as  
15 barred by the statute of limitations.

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 thirty days after  
18 being served with these findings and recommendations, any party may file written objections with  
19 the court and serve a copy on all parties. Such a document should be captioned “Objections to  
20 Magistrate Judge’s Findings and Recommendations.” In his objections petitioner may address  
21 whether a certificate of appealability should issue in the event he files an appeal of the judgment  
22 in this case. See Rule 11, Federal Rules Governing Section 2254 Cases (the district court must  
23 issue or deny a certificate of appealability when it enters a final order adverse to the applicant).  
24 Where, as here, a habeas petition is dismissed on procedural grounds, a certificate of appealability  
25 “should issue if the prisoner can show: (1) ‘that jurists of reason would find it debatable whether  
26 the district court was correct in its procedural ruling;’ and (2) ‘that jurists of reason would find it

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28 <sup>3</sup> The appropriate respondent is substituted in this case pursuant to Rule 25(d) of the Federal  
Rules of Civil Procedure.

1 debatable whether the petition states a valid claim of the denial of a constitutional right.” Morris  
2 v. Woodford, 229 F.3d 775, 780 (9th Cir. 2000) (quoting Slack v. McDaniel, 529 U.S. 473, 484  
3 (2000)). Any response to the objections shall be served and filed within fourteen days after  
4 service of the objections. The parties are advised that failure to file objections within the  
5 specified time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951  
6 F.2d 1153 (9th Cir. 1991).

7 Dated: April 1, 2020

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CAROLYN K. DELANEY  
10 UNITED STATES MAGISTRATE JUDGE

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