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DAVID J. CARPENTER,

NO. C 00-3706 MMC

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Petitioner,

ORDER RE PROCEDURAL
DEFAULT

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v.

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RON DAVIS, Acting Warden of
California State Prison at San Quentin,**DEATH PENALTY CASE**

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Respondent.

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Introduction

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The instant case arises from petitioner's conviction and death sentence for murdering five people in Marin County and raping or attempting to rape three of them. His crimes occurred between October 11, 1980, and November 28, 1980. Due to pre-trial publicity, the case was tried in San Diego County. On November 29, 1999, the California Supreme Court affirmed petitioner's conviction and death sentence. *See People v. Carpenter*, 21 Cal. 4th 1016 (1999).¹ On October 2, 2000, the United States Supreme Court denied a petition for certiorari. *See Carpenter v. California*, 531 U.S. 838 (2000). Prior to affirmance of his conviction and sentence on direct review, petitioner

¹ Petitioner was separately convicted and sentenced to death for, among other things, murdering two people and attempting to murder a third in Santa Cruz County between March and May of 1981. The Santa Cruz County charges, also due to pre-trial publicity, were tried in Los Angeles County. Petitioner's conviction and death sentence based on the Santa Cruz-Los Angeles County case is the subject of a separate federal habeas petition before this Court, *Carpenter v. Woodford*, C 98-2444 MMC, ("*Carpenter I*").

1 address the claim on the basis of the petitioner’s failure to meet a state procedural requirement. *Id.*

2 In the habeas context, the procedural default doctrine furthers the interests of comity and
3 federalism. *Coleman*, 501 U.S. at 730. It helps ensure that the state criminal trial remains the “main
4 event” rather than a “tryout on the road” for a later federal habeas proceeding. *Wainwright v. Sykes*,
5 433 U.S. 72, 90 (1977).

6 To determine whether a claim is defaulted, the federal court must establish whether the
7 procedural rule the state court invoked to bar the claim is both “independent” and “adequate” to
8 preclude federal review. “For a state procedural rule to be “independent,” the state law basis for the
9 decision must not be interwoven with federal law.” *La Crosse v. Kernan*, 244 F.3d 702, 704 (9th
10 Cir. 2001), *citing Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). In 1998, the Supreme Court of
11 California made clear that it would no longer consider federal law when denying a habeas claim as
12 procedurally barred on grounds of untimeliness. *See In re Robbins*, 18 Cal. 4th 770, 814 n.34
13 (1998).

14 For a state procedural rule to be “adequate,” it must be clear, well-established and
15 consistently applied. *Calderon v. Bean*, 96 F.3d 1126, 1129 (9th Cir. 1996). The issue of whether a
16 state procedural rule is adequate to foreclose federal review is itself a federal question. *Douglas v.*
17 *Alabama*, 380 U.S. 415, 422 (1965).

18 Procedural Background

19 This Court previously denied respondent’s motion to dismiss Claims 5, 6, 7.D, 7.E, 7.F, 7.H,
20 7.I, 9, 10, 13, 14, 15, 17, 22, 23, 24, 25, 27, 32, 45.A, 45.B, 45.F, 45.I, 45.J, 45.K, 45.M, and 48 as
21 procedurally defaulted on grounds of untimeliness, under *In re Clark*, 5 Cal. 4th 750 (1993) and *In*
22 *re Robbins*, 18 Cal. 4th 770 (1998). (*See* Docket No. 78.) Additionally, the Court denied
23 respondent’s motion to dismiss Claims 5, 11, 15.B, 15.C, 17, 22, 23, 25, 27, 32, 45.A, 45.B, 45.F,
24 45.I, 45.J and 45.M as procedurally defaulted on the ground that petitioner had failed to raise them
25 on direct appeal, in violation of *In re Dixon*, 41 Cal. 2d 756 (1953). (*See* Docket No. 78.) In
26 particular, the Court held that pursuant to the applicable law at that time, specifically *Bennett v.*
27 *Mueller*, 322 F.3d 573 (9th Cir. 2003), *Fields v. Calderon*, 125 F.3d 757 (9th Cir. 1997), and
28 *Morales v. Calderon*, 85 F.3d 1387 (1996), California’s untimeliness and *Dixon* bars were neither

1 well-established nor consistently applied by the state courts, and thus were inadequate to bar federal
2 review. As noted above, respondent now asks the Court to reconsider that order, and find those
3 claims defaulted due to an intervening change in the law.

4 **Analysis**

5 “California does not employ fixed statutory deadlines to determine the timeliness of a state
6 prisoner’s petition for habeas corpus. Instead, California directs petitioners to file known claims as
7 promptly as circumstances allow.” *Martin*, 131 S. Ct. at 1124 (internal quotation and citation
8 omitted.) Several leading decisions influence the analysis of untimeliness defaults. In 1993, the
9 California Supreme Court decided *Clark*, 5 Cal. 4th 750, clarifying the law regarding untimeliness.
10 Prior to that time, the untimeliness bar was not firmly established or consistently applied, and thus
11 was found to be inadequate to bar federal review. *See Fields*, 125 F.3d at 763-764. In 1998, the
12 California Supreme Court decided *Robbins*, declaring that it would no longer consider federal law
13 when denying a habeas claim as procedurally barred for untimeliness, and thus establishing the
14 independence of California’s untimeliness bar. *See Robbins*, 18 Cal. 4th at 811-12, n.32. Even for
15 defaults occurring after *Clark* and *Robbins*, however, district courts within the Ninth Circuit
16 continued to hold California’s timeliness bar inadequate, based on its discretionary application. *See*,
17 *e.g., Dennis v. Brown*, 361 F. Supp. 2d 1124, 1130-34. (N.D. Cal. 2005).

18 In *Martin*, the United States Supreme Court held that California’s timeliness rule is adequate
19 to bar federal habeas review. *See Martin*, 131 S. Ct. at 1131. Specifically, the Supreme Court held
20 California’s untimeliness bar was “firmly established and regularly followed,” *id.* at 1127, and thus
21 adequate to trigger a procedural bar to federal habeas review, *id.* at 1128-29.

22 **I. Applicability of *Martin***

23 Petitioner concedes that the law upon which this Court earlier relied in denying respondent’s
24 motion to dismiss claims as procedurally defaulted under the timeliness bar is no longer valid after
25 *Martin*. Petitioner argues, however, that his claims that were defaulted under *Dixon* are not barred
26 from federal review. The Court thus turns to that issue.

27 The California Supreme Court held that Claims 5, 11, 15.B, 15.C, 17, 22, 23, 25, 27, 32,
28 45.A, 45.B, 45.F, 45.I, 45.J and 45.M were barred as “pretermitted” under *Dixon*, 41 Cal. 2d at 756,

1 because petitioner failed to raise them on direct appeal.² Earlier, as noted, the California Supreme
2 Court, in *Harris*, had held the *Dixon* bar adequate. *See Harris*, 5 Cal. 4th at 829. Even for defaults
3 occurring after *Harris*, however, district courts within the Ninth Circuit continued to hold
4 California’s *Dixon* bar inadequate, based on its discretionary application. *See, e.g., Dennis*, 361 F.
5 Supp. 2d at 1130-34. Consistent therewith, this Court found the *Dixon* bar was independent, but not
6 adequate, and denied respondent’s motion to dismiss the claims on *Dixon* grounds. In the instant
7 motion, respondent, while acknowledging *Martin* dealt specifically with the adequacy of the
8 untimeliness bar under *Clark/Robbins*, argues its reasoning is applicable to the *Dixon* bar as well.
9 The Court agrees.

10 Although petitioner is correct that the specific issue raised in *Martin* was the adequacy of
11 California’s timeliness rule, the Supreme Court did not explicitly limit its discussion or reasoning to
12 that procedural bar. Rather, the Court’s analysis considered the adequacy of procedural
13 requirements in general, holding “procedural ground[s]” must be “firmly established and regularly
14 followed.” *Martin*, 131 S. Ct. at 1127. In addition, the Supreme Court held that even a
15 “discretionary” state procedural rule “can serve as an adequate ground to bar federal habeas review.”
16 *Id.* at 1128 (internal quotation and citation omitted); *see also id.* at 1130 (noting discretion enables a
17 court “to avoid the harsh results that sometimes attend consistent application of an unyielding rule”).

18 After the Supreme Court’s decision in *Martin*, numerous district courts in the Ninth Circuit
19 have concluded that the *Dixon* bar is adequate under the reasoning of *Martin*, *see, e.g., Richardson v.*
20 *Biter*, 2014 WL 296635, at *7-8 (C.D. Cal. Jan. 28, 2014); *Lee v. Mitchell*, 2012 WL 2194471 at *17
21 (C.D. Cal. May 1, 2012); *Ortiz v. Harrington*, 2013 WL 6387146 at *15 n.10 (C.D. Cal. Dec. 6,
22 2013). This Court is in accord with the reasoning of those district court decisions, and, accordingly,
23 finds the *Dixon* rule is both independent and adequate. Consequently, Claims 5, 11, 15.B, 15.C, 17,
24 22, 23, 25, 27, 32, 45.A, 45.B, 45.F, 45.I, 45.J and 45.M are barred as pretermitted, unless petitioner

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26 ² Under controlling California law, applicability of the *Dixon* bar is determined at the time
27 the direct appeal is filed. Specifically, in order for the *Dixon* bar to apply, a petitioner’s direct
28 appeal must have been filed after 1993, the year in which the California Supreme Court decided *In*
re Harris. *See Harris*, 5 Cal. 4th 813, 829 (1993) (establishing *Dixon* bar as adequate procedural
bar). Here, petitioner filed his opening brief in the California Supreme Court on May 21, 1998, five
years after *Harris*.

1 can later show cause and prejudice for the default.

2 **II. Petitioner’s Additional Arguments**

3 Petitioner argues that, even if this Court finds *Martin* applies to both the timeliness and the
4 *Dixon* bars, “alternative grounds” nonetheless exist that would allow the Court to find his claims are
5 not defaulted. The Court next considers each such argument in turn.

6 **A. Timing of Motion to Reconsider**

7 Petitioner argues that respondent’s motion to reconsider is untimely. As respondent correctly
8 points out however, Civil Local Rule 7-9, pursuant to which respondent brings the instant motion,
9 requires only that a motion for reconsideration be brought “[b]efore the entry of judgment
10 adjudicating all of the claims and the rights and liabilities of all the parties. . . .” *See* Civil L.R. 7-
11 9(a). Respondent’s motion was brought prior to the entry of judgment. Thus, in accordance with
12 this district’s local rules, the motion is appropriate for this Court to consider on the merits, and
13 petitioner points to no circumstances or considerations warranting a ruling to the contrary.

14 **B. California Supreme Court’s Consideration of the Merits of Defaulted Claims**

15 Next, noting that the California Supreme Court frequently considers the merits of claims that
16 it has held to be procedurally defaulted, petitioner argues that the California Supreme Court’s
17 determination to also reach the merits of certain claims renders those procedural defaults
18 “inadequate” to bar federal review.

19 The United States Supreme Court has held that “a state court need not fear reaching the
20 merits of a federal claim . . . as long as the state court explicitly invokes a state procedural bar as a
21 separate basis for decision.” *See Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989); *see also Bennett*,
22 322 F.3d at 580 (holding “[a] state court’s application of a procedural rule is not undermined where,
23 as here, the state court simultaneously rejects the merits of the claim”). Accordingly, petitioner’s
24 argument is without merit.

25 **C. Independence of Timeliness Bar**

26 Lastly, petitioner argues that California’s timeliness bar is not independent of federal law,
27 and thus cannot bar federal review of his claims. This argument likewise is unavailing. The Court
28 previously held that both the untimeliness bar and the *Dixon* bar are independent. (*See* Docket No.

1 78.) Petitioner cites to no authority to the contrary. Rather, Ninth Circuit authority has long held
2 that “because the California timeliness rule is not interwoven with federal law, it is an independent
3 state procedural ground, as expressed in *Clark/Robbins*.” *See Bennett*, 322 F.3d at 581. Moreover,
4 subsequent to this Court’s order finding petitioner’s untimely claims were not procedurally
5 defaulted, the Supreme Court unequivocally has held that California’s timeliness rule is both
6 independent and adequate to bar federal review. *See Martin*, 131 S. Ct. at 1131.³ Consequently, the
7 California Supreme Court’s denial of petitioner’s claims on grounds of untimeliness prohibits
8 federal review of those claims.

9 **D. Defaulted Claims**

10 It is undisputed that numerous claims held to be untimely or pretermitted by the state court
11 were presented in their entirety for the first time in petitioner’s second state habeas petition.
12 Accordingly, those claims are defaulted in their entirety.

13 Petitioner argues, however, that certain claims are not procedurally barred, despite the fact
14 that they were untimely presented in petitioner’s second state habeas petition. According to
15 petitioner, those claims include material that was also presented to the state court on direct appeal or
16 in the first state habeas petition, and to which no default was applied. As this Court held in its order
17 on respondent’s motion to reconsider in *Carpenter I*, the procedural bar applies only to the new
18 portions of the claims presented in the second state habeas petition. Accordingly, the portions of the
19 claims at issue that were procedurally barred in petitioner’s second state habeas petition are
20 defaulted.⁴

21 **E. Cause, Prejudice, and Miscarriage of Justice**

22 Respondent argues that petitioner’s pleadings fail to address cause, prejudice, or the
23 miscarriage of justice to overcome his defaults, and, according to respondent, petitioner’s claims
24 thus must be denied. Petitioner counters that any defaults should be excused because he will be able
25 to establish one or more such exceptions.

26 _____
27 ³ Indeed, even the petitioner in *Martin* did not “dispute that [California’s] time limitation is
an ‘independent’ state ground.” *See Martin*, 131 S. Ct. at 1127.

28 ⁴ Additionally, some of those claims have been denied on the merits.

1 As the determination of whether petitioner has established exceptions to default involves an
2 examination of the merits of petitioner's claims, the Court defers ruling on the former until after it
3 has considered the latter. *See Batchelor v. Cupp*, 693 F.2d 859, 864 (9th Cir. 1982) (finding, where
4 deciding merits of claims proves to be more efficient than adjudicating exceptions to procedural
5 default, court may exercise discretion to do so). The Court will consider at a later date issues of
6 cause, prejudice, and miscarriage of justice with respect to any claims that at such time appear to
7 have merit.

8 **Conclusion**

9 For the foregoing reasons, the Court concludes as follows:

10 1. As to Claims 5, 6, 7.D, 7.E, 7.F, 7.H, 7.I, 9, 10, 13, 14, 15, 17, 22, 23, 24, 25, 27, 32,
11 45.A, 45.B, 45.F, 45.I, 45.J, 45.K, 45.M and 48, any and all portions of said claims presented for the
12 first time in petitioner's second state habeas petition and held to be untimely by the California
13 Supreme Court are defaulted as untimely.

14 2. As to Claims 5, 11, 15.B, 15.C, 17, 22, 23, 25, 27, 32, 45.A, 45.B, 45.F, 45.I, and 45.M,
15 with the exception of any assertions of ineffective assistance of counsel as to Claims 5, 11, 15.B and
16 15.C., any and all portions of said claims presented for the first time in petitioner's second state
17 habeas petition and held to be pretermitted by the California Supreme Court are defaulted as
18 pretermitted.

19 3. Within sixty (60) days of the date of this Order, petitioner and respondent are instructed to
20 meet and confer, and to submit a proposed litigation schedule for the briefing of Group 4 claims.
21 The Court will schedule a case management conference if necessary.

22 **IT IS SO ORDERED.**

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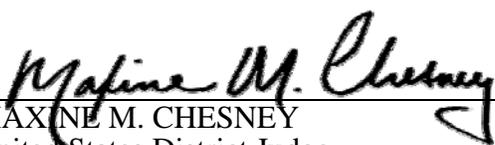
24 DATED: May 8, 2015

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MAXINE M. CHESNEY
United States District Judge