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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL B. NORDLOF,

Petitioner,

v.

KEN CLARK, Warden,

Respondent.

) No. C 07-4899 MMC (PR)

) **ORDER GRANTING MOTION TO**
) **DISMISS CLAIMS 7-27 IN SECOND**
) **AMENDED PETITION AS UNTIMELY;**
) **DIRECTING RESPONDENT TO FILE**
) **ANSWER ADDRESSING REMAINING**
) **CLAIMS; DENYING PETITIONER'S**
) **PENDING MOTIONS**

) **(Docket Nos. 22, 23, 26, 28)**

On September 21, 2007, petitioner, a California prisoner incarcerated at Corcoran State Prison and proceeding pro se, filed the above-titled petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Now pending before the Court is respondent's motion to dismiss the petition as untimely or, alternatively, as unexhausted. Petitioner has opposed the motion, respondent has filed a reply, and petitioner has filed a supplemental opposition in response to the reply. Also pending before the Court are a number of non-dispositive motions filed by petitioner.

BACKGROUND

In 1999, in the Superior Court of Humboldt County ("Superior Court"), petitioner pleaded guilty to assault with a deadly weapon and admitted an enhancement for great bodily injury. As part of the negotiated disposition, petitioner agreed to a seven-year term, with execution of the sentence suspended. On April 21, 1999, the trial court imposed, but suspended execution of, the seven-year term and placed petitioner on probation for five

1 years.

2 On April 1, 2003, a notice of probation violation was filed, based in part on
3 petitioner's involvement in a burglary committed on March 26, 2003. On April 1, 2004, the
4 Humboldt County District Attorney filed an information charging petitioner with a number of
5 felony counts, specifically, burglary with use of a firearm assault with a firearm, felon in
6 possession of a firearm, and vehicle theft with use of a firearm; on June 2, 2004, the
7 information was amended to add prior serious felony and prior strike allegations.

8 On June 7, 2004, a jury found petitioner guilty of being a felon in possession of a
9 firearm, but deadlocked on the remaining counts. The court declared a mistrial, and also
10 found petitioner in violation of his probation based on the charge on which he was convicted.
11 On August 11, 2004, at a retrial of the remaining counts, a jury found petitioner guilty of
12 attempted first degree burglary and vehicle theft, did not find the firearm use allegations, and
13 deadlocked on the assault charge. Thereafter, the trial court found the prior conviction
14 allegations to be true and dismissed the assault charge. On November 10, 2004, the court
15 sentenced petitioner to the previously suspended term of seven years in the earlier case and to
16 nine years consecutive on the new offenses, for a total of sixteen years.

17 Petitioner appealed the convictions obtained in the new case. (Mot. to Dismiss
18 ("MTD") Ex. A.) On August 29, 2006, the California Court of Appeal affirmed the
19 judgment. (MTD Ex. C.) On November 15, 2006, the California Supreme Court denied
20 review. (MTD Ex. E.)

21 On September 21, 2007, petitioner filed the initial petition in the instant action. The
22 petition contained seven claims.

23 After filing the instant petition, petitioner next commenced collateral proceedings in
24 state court. On February 19, 2008, he filed a petition for a writ of habeas corpus in the
25 Superior Court, raising forty claims. (MTD Ex. F.) The petition was denied for procedural
26 reasons on March 4, 2008. (MTD Ex. G.)

27 On May 21, 2008, petitioner filed a petition for a writ of habeas corpus in the
28 California Court of Appeal, arguing the Superior Court should have addressed his claims on

1 the merits. (MTD Ex. H.) That petition was summarily denied on May 23, 2008. (MTD Ex.
2 I.)

3 On June 4, 2008, petitioner filed a petition for review in the California Supreme
4 Court. (MTD Ex. J.) Review was denied on July 16, 2008. (MTD Ex. K.)

5 On April 10, 2008, this Court issued an order to show cause with respect to
6 petitioner's original federal petition. On July 23, 2008, before respondent filed a responsive
7 pleading, petitioner filed a motion to amend his petition, accompanied by a proposed
8 amendment. On August 19, 2008, the Court granted petitioner leave to amend the petition.

9 The first amended petition ("FAP") contained twenty-one new claims for relief, and
10 did not raise the seven claims contained in the original petition. On September 9, 2008,
11 respondent moved to dismiss all of the claims in the FAP as untimely and unexhausted.
12 Petitioner opposed the motion and respondent filed a reply.

13 On April 23, 2009, the Court denied without prejudice respondent's motion to
14 dismiss, finding petitioner had not intended to waive the claims omitted from his original
15 petition. The Court granted petitioner leave to file a second amended petition containing all
16 of the claims petitioner intends to raise in the instant action.

17 On May 21, 2009, petitioner filed his second amended petition ("SAP"). (Docket No.
18 25.) The SAP contains twenty-eight claims for relief.

19 DISCUSSION

20 A. Petitioner's Pending Motions

21 The Court first addresses petitioner's pending motions.

22 1. Motion to File Amended Petition (Docket No. 22)

23 As noted, after petitioner filed his FAP, respondent moved to dismiss the petition as
24 untimely and unexhausted. On April 20, 2009, petitioner, apparently in response to
25 respondent's motion to dismiss, sent to the court a motion to file an amended petition,
26 together with a proposed amended petition. Petitioner's motion, however, was not received
27 by the court until April 27, 2009. In the interim, while the motion was in transit, the Court,
28 on April 23, 2009, issued its order denying respondent's motion to dismiss and directing

1 petitioner to file a second amended petition containing all of the claims he intended to raise
2 in the instant action. As noted, petitioner filed the SAP on May 21, 2009.

3 As the SAP filed on May 21, 2009 supercedes the amended petition petitioner sought
4 to file by way of his April 20, 2009 motion, the motion will be denied as moot.

5 2. Motion for Appointment of Counsel (Docket No. 23)

6 Petitioner moves for appointment of counsel to represent him in this action, on the
7 ground that the issues raised in the petition are complex and petitioner anticipates further
8 discovery will be required to develop the claims.

9 The Sixth Amendment's right to counsel does not apply in habeas actions. Knaubert
10 v. Goldsmith, 791 F.2d 722, 728 (9th Cir.), cert. denied, 479 U.S. 867 (1986). Pursuant to
11 statute, however, a district court is authorized to appoint counsel to represent a habeas
12 petitioner whenever "the court determines that the interests of justice so require and such
13 person is financially unable to obtain representation." See 18 U.S.C. § 3006A(a)(2)(B).

14 Here, petitioner has adequately presented his claims and argued his procedural
15 motions. Moreover, the Court anticipates that once an answer to the petition is filed by
16 respondent, the exhibits lodged in support of the answer will further illuminate the arguments
17 in support of petitioner's claims. Additionally, the Court notes that respondent, together with
18 the instant motion to dismiss, has filed copies of all of petitioner's state appellate and habeas
19 corpus briefs. Consequently, the Court concludes that the interests of justice do not require
20 appointment of counsel in the instant case at this time. Should the circumstances change
21 materially at a later stage of the litigation, the Court will reconsider this decision sua sponte.
22 Accordingly, the request for appointment of counsel will be denied.

23 3. Motion for Extension of Time (Docket No. 28)

24 On August 6, 2009, petitioner moved for an extension of time to file opposition to the
25 instant motion to dismiss. On August 26, 2009, petitioner filed a timely opposition.
26 Accordingly, the motion for extension of time will be denied as moot.

27 B. Respondent's Motion to Dismiss

28 As noted, the SAP contains twenty-eight claims for relief. Claims 1 through 6 were

1 raised in the original petition filed by petitioner on September 21, 2007. Respondent
2 concedes those claims are exhausted and timely. Respondent argues, however, that each of
3 the remaining twenty-two claims in the SAP must be dismissed as untimely, and that twenty
4 of those claims are also subject to dismissal as unexhausted.

5 1. Untimeliness

6 The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) became law
7 on April 24, 1996, and imposed for the first time a statute of limitations on petitions for a
8 writ of habeas corpus filed by state prisoners. Under AEDPA, petitions filed by prisoners
9 challenging non-capital state convictions or sentences must be filed within one year from
10 “the date on which the judgment became final by conclusion of direct review or the
11 expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A).¹ Time during
12 which a properly filed application for state post-conviction or other collateral review is
13 pending is excluded from the one-year time limit. Id. § 2244(d)(2).

14 When reviewing whether a petition has been timely filed under the AEDPA, the court
15 calculates the one-year period in accordance with Rule 6 of the Federal Rules of Civil
16 Procedure, the general rule for computing time in federal courts. See Patterson v. Stewart,
17 251 F.3d 1243, 1246 (9th Cir. 2001). Specifically, under Rule 6, the day of the event that
18 triggers the time period is excluded from the computation, while the last day of the time
19 period is included. Fed. R. Civ. P. 6(a)(1). Here, petitioner’s judgment became final on
20 direct appeal on February 13, 2007, ninety days after the California Supreme Court denied
21 review, and the date on which the time for petitioner to file a petition for a writ of certiorari
22 from the United States Supreme Court expired. Bowen v. Roe, 188 F.3d 1157, 1159 (9th Cir.
23 1999). Applying Rule 6 to the dates herein, the statute began to run on February 14, 2007
24 and, absent tolling, petitioner had until February 14, 2008, to file a timely habeas corpus
25 petition in federal court.

26
27 ¹In rare instances, not presented by the instant petition, the limitations period may run
28 from a date later than the date on which the judgment became final. See 28 U.S.C. §
2244(d)(1)(B)-(D).

1 As noted, respondent concedes that the seven claims raised in petitioner's original
2 petition in this matter, which was filed on September 21, 2007, are timely. Respondent
3 argues, however, that the amended claims first raised in the FAP, filed on July 23, 2008, and
4 then raised again in the SAP, filed on May 21, 2009, are untimely, because the filing of the
5 original petition did not toll the statute of limitations. See Duncan v. Walker, 533 U.S. 167,
6 172 (2001).

7 As discussed above, the FAP contained twenty-one new claims for relief and did not
8 include the seven claims contained in the original petition. After petitioner informed the
9 Court that it was his intent to proceed with all twenty-eight claims for relief, however, the
10 Court granted petitioner leave to file a SAP containing all of his claims. Thus, the SAP filed
11 by petitioner on May 21, 2009 includes all of the claims petitioner seeks to have addressed
12 by way of the instant action. Consequently, while the SAP technically supercedes the FAP,
13 in light of petitioner's pro se status and his unintentional omission of his original claims from
14 the FAP, the Court, in addressing respondent's timeliness argument, will first consider, as
15 respondent suggests, whether those claims in the SAP that were also raised in the FAP were
16 timely when petitioner filed the FAP. If the claims were not timely when the FAP was filed,
17 they clearly were not timely when the SAP was filed.

18 a. Statutory Tolling

19 Pursuant to § 2244(d)(2), the one-year statute of limitations is tolled for the "time
20 during which a properly filed application for State post-conviction or other collateral review
21 with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). The
22 statute of limitations is not tolled, however, during the period between the date on which the
23 relevant final decision under 28 U.S.C. § 2244(d)(1) is issued and the date on which the first
24 state collateral challenge is filed. Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999).
25 Thus, in the instant case, the statute began to run on February 14, 2007, the day after the
26 Supreme Court's denial of review became final, and continued to run for 365 days, i.e., until
27 the day petitioner delivered his state petition to prison authorities for mailing to the state
28

1 court, February 14, 2008.² See Stillman v. LaMarque, 319 F.3d 1199, 1201 (9th Cir. 2003)
2 (holding under “mailbox rule” AEDPA one-year limitation period is tolled under 28 U.S.C. §
3 2244(d)(2) starting on day prisoner delivers state petition to prison authorities for forwarding
4 to court). As the date on which petitioner delivered his state petition to prison authorities for
5 mailing was also the last day of the limitations period, the statute was tolled with only one
6 day remaining for petitioner to file a timely federal habeas corpus petition.

7 Ordinarily, however, under § 2244(d)(2), the one-year limitations period is tolled from
8 the time a California prisoner files his first state habeas petition until the date on which the
9 state Supreme Court rejects his final collateral challenge. Carey v. Saffold, 536 U.S. 214,
10 219-20 (2006). Further, under the California Rules of Court, the denial of a petition for
11 review of an appellate court decision is final on the date of filing. Cal. R. Court
12 8.532(b)(2)(A). Consequently, in the instant case, the limitations period was tolled
13 continuously from February 14, 2008 until July 16, 2008, the date on which the Supreme
14 Court filed its denial of the petition for review. (See MTD Ex. K.).

15 On July 17, 2008, the day after the state Supreme Court’s denial became final, the
16 statute of limitations began to run, and it continued to do so until July 20, 2008, the date on
17 which petitioner signed the proof of service for the FAP and, as evidenced by the notation by
18 prison officials on the back of the envelope that contained the petition, delivered that petition
19 to prison officials for mailing. (See Docket No. 10 at 79, 81.) Accordingly, at the time the
20 FAP was filed, four days not subject to tolling had elapsed. As discussed above, only one of
21 those four days remained available from a prior period of tolling. Consequently, the FAP
22 was filed three days in excess of the 365-day limitations period.

23 Based on the above-described circumstances, the amended claims raised both in the
24 FAP and SAP are subject to dismissal as untimely unless petitioner can show he is entitled to
25 equitable tolling of the limitations period.

26
27 ²Although no proof has been provided with respect to the date petitioner handed his
28 state petition to prison officials for mailing, respondent relies on the date on which petitioner
signed the proof of service for the petition, specifically, February 14, 2008. (MTD Ex. F at
126.) Petitioner does not object to the use of this date.

1 b. Equitable Tolling

2 The United States Supreme Court has “never squarely addressed the question whether
3 equitable tolling is applicable to [the one-year] statute of limitations.” Pace v. DiGuglielmo,
4 544 U.S. 408, 418 n.8 (2005). The Ninth Circuit has held, however, that the one-year
5 limitations period may be equitably tolled. See Calderon v. United States District Court
6 (Beeler), 128 F.3d 1283, 1288 (9th Cir. 1997), overruled in part on other grounds by
7 Calderon v. United States District Court (Kelly), 163 F.3d 530 (9th Cir. 1998) (en banc).

8 Equitable tolling is applicable only “if extraordinary circumstances beyond a
9 prisoner’s control make it impossible to file a petition on time.” Roy v. Lampert, 455 F.3d
10 945, 950 (9th Cir. 2006). Significantly, the prisoner must show that the extraordinary
11 circumstances were the cause of his untimeliness. Spitsyn v. Moore, 345 F.3d 796, 799 (9th
12 Cir. 2003). Where a prisoner fails to show any causal connection between the grounds upon
13 which he asserts a right to equitable tolling and his inability to timely file a federal habeas
14 petition, tolling will be denied. Gaston v. Palmer, 417 F.3d 1030, 1034-35 (9th Cir. 2005).
15 Additionally, the prisoner must show that his untimeliness was caused by an external
16 impediment and not by his own lack of diligence. Bryant v. Arizona Attorney General, 499
17 F.3d 1056, 1061 (9th Cir. 2007). The prisoner bears the burden of showing he is entitled to
18 equitable tolling, and the determination whether such tolling applies is a fact-specific inquiry.
19 Spitsyn, 345 F.3d at 799.

20 Here, petitioner claims he is entitled to equitable tolling on three grounds. First, he
21 asserts the limitations period should be tolled for the time during which he was attempting to
22 obtain copies of his first state habeas petition to file in state court. As noted above, petitioner
23 filed his first state habeas petition on February 14, 2008, the last day of the limitations
24 period. Petitioner claims, however, that he submitted his habeas petition to prison authorities
25 to be photocopied four weeks before expiration of the period of limitations and that he did
26 not receive the copies until just before the limitations period expired. In support of his
27 argument that he is entitled to four weeks of equitable tolling, petitioner states it often takes
28 weeks to get legal papers copied and he had no control over when he would get the copies

1 back. The Court finds the alleged four-week delay petitioner experienced in receiving copies
2 does not constitute the type of extraordinary circumstances justifying equitable tolling. In
3 particular, petitioner does not allege that prison officials engaged in any wrongful conduct.
4 Instead, he simply argues that he is entitled to equitable tolling because prison conditions
5 often occasion delays, a situation of which he concedes he was aware. Unlike a complete
6 denial of access to personal legal papers, “[o]rdinary prison limitations” on a prisoner’s
7 access to the law library and a copier do not constitute extraordinary circumstances or make
8 it impossible for him to file a timely petition. Ramirez v. Yates, 571 F.3d 993, 998 (9th Cir.
9 2009). Further, petitioner has not alleged facts showing he acted diligently, as he does not
10 explain why he could not have prepared and filed his first state habeas petition long before he
11 sought to have the petition copied. Consequently, petitioner is not entitled to equitable
12 tolling based on the four-week delay in receiving copies of his first state habeas petition.
13

14 The second ground asserted by petitioner to justify equitable tolling is based on his
15 contention that after the denial of review of petitioner’s direct appeal by the California
16 Supreme Court on November 15, 2006, it took approximately two months, until January 16,
17 2007, for petitioner to receive his file from appellate counsel. Petitioner’s argument is
18 unavailing; at the time petitioner received his legal file, he still had nearly thirteen months,
19 i.e., until February 14, 2008, to file a timely federal habeas petition. Moreover, petitioner
20 managed to file his original federal habeas petition in timely fashion on September 21, 2007.
21 Accordingly, the Court concludes petitioner’s delayed access to his legal files does not entitle
22 him to equitable tolling herein.

23 Lastly, petitioner supports his request for equitable tolling with his assertion that he
24 should receive “gap tolling” for the time period between the filing of his first state habeas
25 petition on February 19, 2008 and his second state habeas petition on May 21, 2008.
26 Respondent, however, has not argued that petitioner is not entitled to such tolling. Instead,
27 respondent has expressly stated that petitioner is entitled to continuous tolling of the
28 limitations period from the date on which petitioner filed his first state habeas petition until

1 the date on which the California Supreme Court denied review, i.e., July 16, 2008.

2 Consequently, petitioner’s “gap tolling” argument is without merit.

3 Based on the above, the Court concludes petitioner is not entitled to any period of
4 equitable tolling. Accordingly, petitioner’s amended claims must be dismissed as untimely
5 unless petitioner can show those claims relate back to the timely claims first filed in the
6 original petition.

7 c. Relation Back of Amended Claims

8 Amendments made to a habeas petition after AEDPA’s one-year limitations period
9 has run relate back to the date of the original petition when the claim asserted in the amended
10 petition “‘arose out of the conduct, transaction, or occurrence set forth or attempted to be set
11 forth in the original pleading’.” Mayle v. Felix, 545 U.S. 644, 656 (2005) (citing Fed. R.
12 Civ. P. 15(c)(2)). “An amended habeas petition . . . does not relate back (and thereby escape
13 AEDPA’s one-year time limit) when it asserts a new ground for relief supported by facts that
14 differ in both time and type from those the original pleading set forth.” See id. at 650
15 (finding coerced confession claim did not relate back to original petition that raised factually
16 distinct Confrontation Clause claim). In Mayle, the Supreme Court explicitly rejected the
17 proposition that the “same ‘conduct, transaction, or occurrence’ [means the] same ‘trial,
18 conviction, or sentence.’” Id. at 664. Instead, relation back will only be applied when the
19 original and amended petition state claims that are “tied to a common core of operative
20 facts.” Id.; see, e.g., Hebner v. McGrath, 543 F.3d 1133, 1138-39 (9th Cir. 2008) (holding
21 district court properly denied leave to amend petition where original claim challenged
22 admission of evidence at trial and new claim challenged jury instruction concerning such
23 evidence; finding claims were supported by “separate congeries of facts”) (citing Mayle, 545
24 U.S. at 646), cert. denied, 129 S. Ct. 2791 (2009).

25 Respondent argues petitioner’s original and untimely claims are not tied to a common
26 core of operative facts such that the untimely claims relate back to the original petition.
27 Petitioner has not addressed this argument in his opposition. The Court now considers
28 whether the untimely claims relate back to the timely-filed original petition.

1 Petitioner raised the following six claims in both his original federal habeas petition
2 and the SAP, which claims, in the SAP, are designated, respectively, Claim 1 through Claim
3 6: (1) with respect to the charge of vehicle theft, the prosecution suppressed favorable,
4 material evidence that police found a “for sale” sign in the car, which would have supported
5 petitioner’s defense that he was trying to sell the car for his girlfriend; (2) because of the
6 prosecution’s failure to disclose the existence of the “for sale” sign, petitioner was denied
7 effective assistance of counsel; (3) with respect to the charge of possession of a gun, the trial
8 court erred by giving an instruction on suppression of evidence as relevant to consciousness
9 of guilt, as there was no evidence that petitioner had tried to dispose of a weapon; (4) the trial
10 court erred by failing to instruct the jury on (a) trespass as a lesser-related offense of burglary
11 and (b) the doctrine of implied invited public access; (5) the evidence was not sufficient to
12 support a conviction on the lesser-included offense of attempted burglary; and (6) petitioner
13 was denied effective assistance of counsel because (a) counsel was not informed of the
14 existence of the “for sale” sign, (b) counsel failed to object to the instructions on suppression
15 of evidence and attempted burglary, (c) counsel failed to request instructions on trespass and
16 implied invitees, and (d) counsel failed to move for judgment notwithstanding the verdict
17 with respect to attempted burglary.

18 As noted, petitioner, in the SAP, raises twenty-two new claims, designated,
19 respectively, Claim 7 through Claim 28. These additional claims are summarized below.

20 i. Prosecutorial Misconduct Claims

21 In his SAP, petitioner raises eight new claims of prosecutorial misconduct.

22 In Claim 7, as to the charge of possession of a firearm, petitioner alleges that after
23 petitioner had given exculpatory testimony on direct examination at trial, specifically, that a
24 witness had lied to protect the victim from being charged with a crime, the prosecutor
25 engaged in misconduct by cross-examining petitioner about his post-arrest, post Miranda
26 silence. (SAP at 16:14-18:17.)

27 In Claim 8, petitioner alleges, as to the charge of use of a firearm, the prosecutor
28 engaged in misconduct by failing to correct the testimony of an expert witness with respect to

1 the distance from which the gun was fired. (SAP at 18:18-19:13.)

2 In Claim 9, petitioner alleges the prosecutor engaged in misconduct by failing to
3 disclose at the first trial that the victim had used a false social security number. (SAP at
4 19:15-23:21.)

5 In Claim 11, petitioner alleges the prosecutor engaged in misconduct by failing to
6 disclose evidence that the victim had been arrested for alien smuggling. (SAP at 25:10-22.)

7 In Claim 12, petitioner alleges the prosecutor engaged in misconduct by failing to
8 correct false testimony with respect to the victim's name. (SAP at 25:24-26:9,)

9 In Claim 13, petitioner alleges the prosecutor engaged in misconduct by failing to
10 correct false testimony with respect to the reason the victim had obtained false identification.
11 (SAP at 26:11-24.)

12 In Claim 15, petitioner alleges his right to present a defense was violated by the
13 prosecutor's statement, outside of the presence of the jury, that the prosecutor would move to
14 revoke the probation of petitioner's co-defendant, who had pleaded guilty to burglary, based
15 on the co-defendant's refusal to testify truthfully at trial, as required by his plea agreement.
16 (SAP at 28:13-29:11.)

17 In Claim 24, petitioner alleges the prosecutor intentionally misrepresented facts by
18 arguing the victim could not identify petitioner at trial because petitioner's hair had grown,
19 when the prosecutor knew petitioner had not been able to get a haircut. (SAP at 35:2-18.)

20 ii. Ineffective Assistance of Counsel Claims

21 In his SAP, petitioner raises six new claims alleging ineffective assistance of counsel.

22 In Claim 14, petitioner alleges he was denied effective assistance of counsel because
23 his trial attorney failed to file a motion to suppress evidence of an illegal photographic
24 lineup. (SAP at 26:25-28:12.)

25 In Claim 17, petitioner alleges he was denied effective assistance of counsel because
26 his attorney failed to file a motion to introduce evidence concerning ownership of the gun.
27 (SAP at 30:15-31:19.)

28 In Claim 21, petitioner alleges he was denied effective assistance of counsel because

1 his attorney failed to provide a “911 dispatch log” to the jury. (SAP at 33:8-33:19.)

2 In claim 22, petitioner alleges he was denied effective assistance of counsel at
3 sentencing because his attorney failed to obtain the preliminary hearing transcript underlying
4 the prior strike allegations, in order to contest petitioner’s earlier no contest plea. (SAP at
5 33:20-34:14.)

6 In Claim 25, petitioner alleges he was deprived of effective assistance of counsel by
7 reason of his attorney’s failure to object to the errors and/or omissions set forth in Claims 7
8 through 13, and in Claims 15, 16, 18, 20, 23 and 24. (SAP at 35:19-28.)

9 In Claim 26, petitioner alleges he was deprived of effective assistance of counsel by
10 reason of his appellate counsel’s failure to raise Claims “7 through 28” on appeal. (SAP at
11 36:1-14.)

12 iii. Trial Court Error Claims

13 In his SAP, petitioner raises six new claims of error by the trial court.

14 In Claim 10, petitioner alleges the trial court erred by excluding evidence that the
15 victim had used different names and engaged in criminal activity by using a false social
16 security number. (SAP at 23:23-25:9.)

17 In Claim 16, petitioner alleges his right to due process was violated by “judicial
18 misconduct,” based on the trial court’s questioning of petitioner’s co-defendant who had
19 invoked his Fifth Amendment right not to testify. (SAP at 29:12-30:14.)

20 In Claim 18, petitioner alleges the trial court violated his right to due process at
21 sentencing by making a finding that the stolen vehicle was registered to the victim’s brother,
22 and by declining to impose concurrent sentences. (SAP at 31:20-32:7.)

23 In Claim 19, petitioner alleges the trial court violated his right to due process by
24 imposing an upper-term sentence based on facts that were not proved to a jury. (SAP at
25 32:8-21.)

26 In Claim 20, petitioner alleges he was denied a fair trial because, at both trials,
27 “various” instructions were confusing, as evidenced by the jury’s questions, the verdicts
28 reached, and the jury’s failure to reach a verdict on some of the counts. (SAP at 32:22-33:7.)

1 In Claim 23, petitioner alleges the trial court violated his right to due process by
2 failing to properly address petitioner’s motion to substitute counsel. (SAP at 34:15-35:1.)

3 iv. Error in State Court Post-Conviction Review Process

4 In Claim 27, petitioner alleges the Superior Court erred by refusing to address, on
5 procedural grounds, his claim of cumulative error, and the California Court of Appeal and
6 California Supreme Court erred by failing to address his claim of error by the Superior Court.
7 (SAP at 36:16-38:4.)

8 v. Cumulative Error

9 In Claim 28, petitioner alleges the claimed errors, taken together, were prejudicial to
10 his right to a fair trial, even if they did not amount to a due process violation when
11 considered individually. (SAP at 38:6-11.)

12 d. Conclusion

13 Having reviewed the original and amended claims, the Court concludes that
14 petitioner’s Claims 7 through 27 do not relate back to the claims timely filed in the original
15 petition. As noted, Claims 1 through 6 in the original petition allege prosecutorial
16 misconduct and ineffective assistance of counsel based on the prosecution’s non-disclosure
17 of the existence of a “for sale” sign related to the charge of vehicle theft (Claims 1 and 2);
18 instructional error based on the trial court’s having instructed the jury on consciousness of
19 guilt with respect to the charge of possession of a firearm, and having failed to instruct the
20 jury on trespass as a lesser-related offense and the doctrine of implied invited public access
21 with respect to the burglary charge (Claims 3 and 4); insufficiency of the evidence to support
22 the conviction for attempted burglary (Claim 5); and ineffective assistance of counsel based
23 on counsel’s failure to address the above errors (Claim 6). By contrast, Claims 7 through 27,
24 as described above, are based on discrete occurrences that do not share a common core of
25 operative facts with petitioner’s six original claims. Under such circumstances, Claims 7
26 through 27 do not relate back to the original petition, and, accordingly, the Court will grant
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1 respondent's motion to dismiss Claims 7 through 27 as untimely.³

2 The Court finds, however, petitioner's claim of cumulative error, does, in part, relate
3 back to the claims in the original petition. Specifically, to the extent petitioner alleges in
4 Claim 28 that the cumulative effect of the six errors raised in the original petition rises to the
5 level of a due process violation, such claim and the six original claims are tied to a common
6 core of operative facts. Petitioner's cumulative error claim does not, however, relate back to
7 the original petition to the extent such claim is based on any of the untimely claims of error
8 raised in Claims 7 through 27. Accordingly, petitioner may proceed on his cumulative error
9 claim only to the extent such claim is based on the six errors raised in the original petition.⁴

10 2. Actual Innocence

11 Lastly, petitioner, in his opposition, argues that all of his untimely claims should be
12 allowed to proceed under the "fundamental miscarriage of justice" exception applicable to
13 successive, abusive, or procedurally defaulted claims raised in federal habeas petitions. A
14 federal court may hear the merits of successive, abusive, or procedurally defaulted claims
15 where the failure to hear the claims would constitute a "miscarriage of justice." Sawyer v.
16 Whitley, 505 U.S. 333, 339-40 1992). As the Supreme Court explained in Schlup v. Delo,
17 513 U.S. 298 (1995), the exception is limited to habeas petitioners who can show that "a
18 constitutional violation has probably resulted in the conviction of one who is actually
19 innocent." Id. at 327. To date, neither the Supreme Court nor the Ninth Circuit has decided

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21 ³Additionally, Claim 27, in which petitioner alleges a due process violation resulting
22 from the Superior Court's dismissal of his claims on procedural grounds, is not cognizable.
23 Federal habeas corpus relief is unavailable for violations of state law or alleged error in the
24 interpretation or application of state law. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). In
25 particular, such relief is unavailable for alleged error in the state post-conviction review
process. Franzen v. Brinkman, 877 F.2d 26, 26 (9th Cir. 1989), cert. denied, 493 U.S. 1012
(1989). A petitioner may not "transform a state-law issue into a federal one merely by
asserting a violation of due process." Longford v. Day, 110 F.3d 1380, 1389 (9th Cir. 1996).
Accordingly, Claim 27 is subject to dismissal as meritless.

26 ⁴As noted, respondent argues that petitioner's amended claims are not only untimely
27 but also are unexhausted. In light of the Court's finding finds that Claims 7 through 27 are
28 untimely and do not relate back to the original petition, the Court does not reach herein the
issue of exhaustion with respect to those claims. The Court finds, however, that petitioner
fairly presented, and thereby exhausted Claim 28, his cumulative error claim, by way of his
petition for review to the California Supreme Court.

1 whether AEDPA’s statute of limitations is subject to such exception. See Majoy v. Roe, 296
2 F.3d 770, 776 (9th Cir. 2002) (reserving issue of whether actual innocence exception applies
3 to time-barred petitions; remanding to district court to determine whether actual innocence
4 claim established). Here, as set forth below, petitioner has set forth no evidence that would
5 support a claim of actual innocence, and, consequently, this Court likewise will not address
6 the general availability of the exception.

7 In order for barred claims to pass through “Schlup’s gateway,” see id., petitioner must
8 establish his factual innocence of the crime, and not mere legal insufficiency. See Bousley v.
9 United States, 523 U.S. 614, 623 (1998); Jaramillo v. Stewart, 340 F.3d 877, 882-83 (9th Cir.
10 2003). “To be credible, such a claim [of actual innocence] requires [the] petitioner to support
11 his allegations of constitutional error with new reliable evidence — whether it be exculpatory
12 scientific evidence, trustworthy eyewitness accounts, or critical physical evidence — that
13 was not presented at trial.” Schlup, 513 U.S. at 324. It is not enough that the evidence show
14 the existence of reasonable doubt; the petitioner must show “that it is more likely than not
15 that no ‘reasonable juror’ would have convicted him” in light of the new evidence. Id. at
16 329.

17 Here, petitioner asks the Court to consider his claims under the actual innocence
18 exception but does not set forth the reasons why he qualifies for such relief. Although
19 petitioner states that he presented an actual innocence claim in his state habeas petitions, he
20 provides no page references, and the Court, having reviewed the petitions, finds no such
21 claim expressly raised therein. (See MTD Exs. F, H, J.) Further, none of petitioner’s claims
22 go to the question of whether he is factually, rather than legally, innocent of the crimes for
23 which he was convicted. In particular, none of the claims contain allegations of factual
24 innocence based on new reliable evidence that was not presented at the time of trial. Lastly,
25 petitioner has not shown it is more likely than not that no reasonable jury would have found
26 him guilty beyond a reasonable doubt based on any of the claims raised. Accordingly, the
27 Court finds the actual innocence exception is not applicable herein.
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3. Conclusion

In sum, the Court finds Claims 7 through 28 in the SAP are not timely filed and that petitioner is not entitled to equitable tolling of the limitations period with respect thereto. Further, Claims 7 through 27 do not relate back to the timely claims first raised in the original petition, and petitioner is not entitled to have those additional claims considered under the actual innocence exception. Petitioner’s cumulative error claim, Claim 28, however, has been exhausted and relates back to the original petition to the extent it is based on the cumulative effect of the errors raised in petitioner’s six timely filed claims. Accordingly, respondent’s motion to dismiss Claims 7 through 27 in the SAP will be granted and respondent’s motion to dismiss Claim 28 will be granted in part and denied in part.

CONCLUSION

For the reasons stated above, the Court orders as follows:

1. Petitioner’s motions to file an amended petition, for appointment of counsel, and for an extension of time are hereby DENIED. (Docket Nos. 22, 23, 28.)
2. Respondent’s motion to dismiss Claims 7 through 27 in the SAP as untimely is hereby GRANTED; respondent’s motion to dismiss Claim 28 is GRANTED to the extent such claim is based on Claims 7 through 27 and is otherwise DENIED. (Docket No. 26.)
3. Respondent shall file with the Court and serve on petitioner, within **sixty (60)** days of the date this order is filed, an answer conforming in all respects to Rule 5 of the Rules Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be granted based on Claims 1 through 6 and Claim 28 in the SAP. Respondent shall file with the answer and serve on petitioner a copy of all portions of the state trial record that have been transcribed previously and that are relevant to a determination of the issues presented by the petition.

If petitioner wishes to respond to the answer, he shall do so by filing a traverse with the Court and serving it on respondent’s counsel within **thirty (30)** days of the date the answer is filed.

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4. Petitioner is reminded that all communications with the Court must be served on respondent by mailing a true copy of the document to respondent's counsel.


5. It is petitioner's responsibility to prosecute this case. Petitioner must keep the Court and respondent informed of any change of address and must comply with the Court's orders in a timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

6. Upon a showing of good cause, requests for a reasonable extension of time will be granted provided they are filed on or before the deadline they seek to extend.

This order terminates Docket Nos. 22, 23, 26 and 28.

IT IS SO ORDERED.

DATED: March 3, 2010


MAXINE M. CHESNEY
United States District Judge