



1 with a firearm during the commission of the offenses and that he  
2 personally used a firearm. Resp.'s Ex. A, Court Transcript (CT) at  
3 688-90. Petitioner was sentenced to state prison for a total term  
4 of twenty-six years, four months to life. CT at 786.

5 On May 11, 1993, the California Court of Appeal affirmed  
6 the judgment of conviction. Resp.'s Ex. C. In April 1997,  
7 Petitioner filed a petition for a writ of habeas corpus in the  
8 Alameda County Superior Court, asserting claims not relevant to this  
9 federal petition, which was denied on August 25, 1997. Petitioner  
10 filed the same petition in the Court of Appeal, which was summarily  
11 denied on January 8, 1998. The California Supreme Court summarily  
12 denied the petition on May 27, 1998. Resp.'s Ex. D.

13 On November 19, 1999 and December 22, 1999, Petitioner  
14 filed two more habeas petitions in the California Supreme Court  
15 again on grounds not relevant to this petition. Resp.'s Ex. E. On  
16 January 25, 2000, the California Supreme Court summarily denied both  
17 petitions. Resp.'s Ex. F.

18 On April 29, 2009, Petitioner, represented by attorney  
19 A.J. Kutchins, filed a state habeas petition in Alameda County  
20 Superior Court in which one of the claims asserted was the actual  
21 innocence claim he asserts in this federal petition. Resp.'s Ex. G,  
22 June 3, 2010 Petition to California Supreme Court at 13. In an  
23 unpublished written decision, the Superior Court denied the petition  
24 as untimely, stating:

25 Petitioner failed to show justification for the  
26 substantial delay in seeking habeas relief, and the  
27 Petition is therefore untimely. And because Petitioner  
28 has not demonstrated that his claims fall within an  
exception to the untimeliness bar, it is procedurally

1 barred, and is therefore denied as untimely.

2 Ex. G. to June 3, 2010 California Supreme Court petition, In re  
3 Patrick Scott, No. 103500B (Ala. Co. Sup. Ct. Feb. 8, 2010) at 5.

4 Petitioner filed the same petition in the Court of Appeal,  
5 which was denied as untimely on April 29, 2010. Ex. H to June 3,  
6 2010 California Supreme Court petition. The California Supreme  
7 Court denied this petition on February 23, 2011, citing In re  
8 Robbins, 18 Cal. 4th 770, 780 (1998).<sup>1</sup> Resp.'s Exs. G, H.

9 On July 6, 2012, Petitioner filed a pro se habeas petition  
10 in the California Supreme Court, asserting the two claims he asserts  
11 in this federal petition. Resp's Ex. I. On November 20, 2012, the  
12 Supreme Court denied the petition, citing Robbins and In re Clark, 5  
13 Cal. 4th 750 (1993).<sup>2</sup> Resp.'s Ex. J. Petitioner filed the instant  
14 federal petition on January 17, 2013. Doc. #1.

15 II

16 The record does not include a state court opinion that  
17 provides a summary of facts pertaining to Petitioner's trial. The  
18 Court relies on the facts provided by Respondent in his motion to  
19 dismiss and by Petitioner in his June 3, 2010 petition to the  
20 California Supreme Court, which are, for the most part, not in  
21 dispute.

22 On November 20, 1989, Petitioner and three friends--  
23 Talmadge Bates, Dale Hodges and Patrick Weaver--armed themselves  
24 with weapons and went looking for Derlin Hines. They intended to

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25 <sup>1</sup>In re Robbins, 18 Cal 4th 770 (1998) addresses timeliness of  
26 state habeas petitions.

27 <sup>2</sup>In re Clark, 5 Cal. 4th 750 (1993) addresses successive and  
28 delayed petitions.

1 get back at Hines for acts of violence they believed Hines had  
2 committed against themselves and their friends. Petitioner  
3 initially told police that they were "out to get" Hines, but later  
4 told police and testified at trial that they were just going to talk  
5 to him. They took two cars. Petitioner drove a rented gray Toyota,  
6 accompanied by Hodges and Weaver; Bates drove separately in a 1977  
7 gray Pontiac. Hodges was armed with a semi-automatic pump shotgun;  
8 Petitioner had a .357 revolver; Weaver was wearing a bullet-proof  
9 vest. It was alleged that Bates had an AK-47, which was recovered  
10 in the yard where Petitioner was later apprehended.

11 At the intersection of Martin Luther King and 29th Street  
12 in Oakland, Petitioner and his companions saw a Cadillac, which they  
13 believed was one of Hines' cars. They followed the Cadillac. The  
14 three cars entered a tunnel under the freeway. A barrage of gunfire  
15 was heard by the victims. The Cadillac crashed into the side of the  
16 tunnel, the Pontiac, driven by Bates, hit the Cadillac from the  
17 rear, and Petitioner's Toyota crashed into a parked car. The  
18 gunfire continued after the vehicles collided.

19 There were three people in the Cadillac, none of whom were  
20 Hines, and none of whom was armed. All three were hit by multiple  
21 gunshots. Aloma Ewing and Marquis Scott were injured. Sharea  
22 Stafford was killed.

23 Petitioner and his companions fled the scene. Three of  
24 them were apprehended soon after the incident, hiding in back yards  
25 a few blocks away. Hodges eluded pursuit and was not apprehended  
26 until several months later.

27 Along the route taken by Petitioner and his companions,  
28

1 police found a Barretta .380 semi-automatic pistol, a 12-gauge  
2 shotgun and an AK-47 rifle. A .38 caliber special revolver was  
3 found on the floor of the car driven by Bates. The following day,  
4 Petitioner led police to his .357 magnum revolver, which was buried  
5 under some dirt in a planter box not far from the place where he was  
6 arrested. In all, five guns were recovered.

7           Four of the six bullets in the .357 had been fired. The  
8 12-gauge shotgun was loaded and one round had been expended. The  
9 AK-47 rifle was loaded, one bullet was in the chamber and twelve  
10 bullets were in the magazine. An AK-47 rifle's magazine holds  
11 approximately thirty to forty bullets. Based on the number of  
12 bullets found in the rifle and the thirty-eight expended AK-47  
13 bullets found at the scene, either two magazines were used or there  
14 was more than one AK-47. All of the guns, except the automatic  
15 pistol which was jammed and could not be examined, contained live  
16 ammunition.

17           Examination of the bullet evidence found at the scene of  
18 the shooting established that more than forty shots had been fired  
19 by either one or two AK-47's. Approximately a dozen bullets  
20 recovered from the scene were positively identified as having been  
21 fired from the AK-47 rifle found where Petitioner and the others  
22 were apprehended. Several bullet fragments appeared to have been  
23 fired from the same AK-47, but because only fragments were  
24 collected, the examiner did not have the same degree of certainty  
25 about the match. Examination of a bullet fragment recovered from  
26 Ms. Stafford's body suggested it had been fired from an AK-47,  
27 although the evidence was insufficient to establish it came from the  
28

1 rifle found by the police.

2           Prints found at the scene matched those of Petitioner,  
3 Bates and Weaver. A gunshot residue test of Petitioner,  
4 administered after his arrest, revealed the presence of gunshot  
5 residue on his left hand. Petitioner is left-handed. Petitioner  
6 told police that, after he crashed his car, he fired once or twice  
7 at the Cadillac. None of the evidence showed that any of the  
8 injuries sustained by the victims were caused by Petitioner's  
9 revolver.

10           Petitioner and his companions told the police that, as  
11 they entered the tunnel, a large dark sports utility vehicle (SUV),  
12 either a Chevy Blazer or Ford Bronco, followed hard behind them.  
13 While they were in the tunnel, the SUV pulled up alongside their  
14 cars and one of its passengers began firing an automatic weapon.  
15 After they crashed their cars, they got out and began firing their  
16 weapons in an attempt to cover themselves as they ran away. The two  
17 surviving victims provided evidence that an SUV was at the scene.  
18 Another witness saw a "camper/Blazer type vehicle" drive past  
19 Petitioner and his companions as they ran away from the scene and  
20 heard gunshots and saw muzzle flashes coming from the SUV as it  
21 drove off.

22           Petitioner's defense had several prongs. Petitioner  
23 testified that Hines was responsible for a number of acts of  
24 violence directed at him and his friends, and that efforts to  
25 resolve the situation without violence had failed. However, he  
26 testified that, on the night of the shooting, he was going to visit  
27 the mother of his child and his friends accompanied him to ensure  
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1 his safety if he happened to see Hines. Petitioner admitted that he  
2 and his friends were following the Cadillac, thinking that Hines was  
3 in it, but denied that they attacked the people in the Cadillac. He  
4 testified that the attack was carried out by one or more gunmen who  
5 happened upon them as they were tailing the Cadillac, and that they  
6 were the intended targets of those assailants, or were simply caught  
7 in the middle of an attack directed at the Cadillac by those other  
8 parties.

9           On direct and cross-examination, Petitioner admitted that  
10 he met up with more people than just Bates, Weaver and Hodges that  
11 night. He denied that he met them with a specific plan in mind.  
12 However, he was impeached with his prior statement to police that he  
13 had met with people to decide what to do about Hines. He was also  
14 impeached with the fact that he never mentioned to the police that  
15 he was going to see his girlfriend that night. He had told the  
16 police, "Last night, the four of us had the mind to get him  
17 [Hines]." Petitioner was also impeached with his statement to  
18 police that he had fired at the Cadillac that night.

19           In his June 3, 2010 petition to the California Supreme  
20 Court, Petitioner indicated that, in the mid-2000's he "happened  
21 upon" new evidence, including evidence of a ballistics test that  
22 established that the AK-47 found by police was not the gun that  
23 fired the bullet fragments recovered from Ms. Stafford's body. June  
24 3, 2010 Petition to California Supreme Court at 9. With his  
25 petition to the California Supreme Court, Petitioner submitted the  
26 declaration of Roger Patton, the attorney who represented one of  
27 Petitioner's companions, Talmadge Bates. Ex. C to 2010 Petition,  
28

1 Declaration of Roger Patton (Patton Dec.). Mr. Patton declared,

2       Around the time Mr. Bates' trial began (and after Patrick  
3       Scott had been convicted), we received the results of a  
4       ballistics test that I had arranged to be performed on the  
5       gun that bore Mr. Bates' fingerprints. That test showed  
6       conclusively that the AK-47 rifle found at the scene with  
7       Mr. Bates was not the weapon that fired the fatal shots.  
8       On the basis of this new evidence, we reopened plea  
9       negotiations with the prosecutor, Alameda Deputy District  
10      Attorney William Denny. Mr. Denny offered Mr. Bates the  
11      opportunity to plead guilty to voluntary manslaughter.  
12      Mr. Denny made it clear that his willingness to accept  
13      that lesser plea was a direct result of the ballistics  
14      test which, he indicated, had significantly weakened his  
15      case. I have reviewed my (stored) files of the Talmadge  
16      Bates case. Unfortunately, it appears that, during the  
17      intervening years, the files were stripped and the  
18      ballistics test results were discarded.

11 Patton Dec. at 1.

III

12       In this federal petition, Petitioner asserts the following  
13      claims: (1) Petitioner is factually innocent of the charges of  
14      aiding and abetting co-defendant Bates for one count of murder and  
15      two counts of attempted murder by usage of an AK-47 rifle because  
16      new evidence shows that the AK-47 was not the weapon used in the  
17      shooting of the three victims; and (2) the prosecution's failure to  
18      disclose the exculpatory evidence establishing that the AK-47 rifle  
19      was not used in the shooting incident constituted a violation of  
20      Brady v. Maryland, 373 U.S. 83 (1963). Respondent argues that the  
21      petition must be dismissed because it is untimely and equitable  
22      tolling does not apply and because it is procedurally defaulted  
23      based on the fact that it was denied as untimely by the California  
24      state courts. Petitioner argues that his petition is timely because  
25      he is entitled to equitable tolling and that the state procedural  
26      bar does not apply.

A

1  
2 The Antiterrorism and Effective Death Penalty Act of 1996  
3 (AEDPA), which became law on April 24, 1996, imposed for the first  
4 time a statute of limitations on petitions for a writ of habeas  
5 corpus filed by state prisoners. Petitions filed by prisoners  
6 challenging non-capital state convictions or sentences must be filed  
7 within one year of the latest of the date on which: (A) the  
8 judgment became final after the conclusion of direct review or the  
9 time passed for seeking direct review; (B) an impediment to filing  
10 an application created by unconstitutional state action was removed,  
11 if such action prevented the petitioner from filing; (C) the  
12 constitutional right asserted was recognized by the Supreme Court,  
13 if the right was newly recognized by the Supreme Court and made  
14 retroactive to cases on collateral review; or (D) the factual  
15 predicate of the claim could have been discovered through the  
16 exercise of due diligence. 28 U.S.C. § 2244(d)(1). Time during  
17 which a properly filed application for state post-conviction or  
18 other collateral review is pending is excluded from the one-year  
19 time limit. Id. § 2244(d)(2). The one-year period generally will  
20 run from "the date on which the judgment became final by the  
21 conclusion of direct review or the expiration of the time for  
22 seeking such review." 28 U.S.C. § 2244(d)(1)(A).

23 Petitioner concedes that he filed his federal petition  
24 beyond the one-year limitations period provided in § 2244 (d)(1)(A),  
25 but argues that his petition is timely under §§ 2244(d)(1)(B) and  
26 (d)(1)(D).

2 Under § 2244(d)(1)(B), Petitioner argues that a state  
3 impediment was created by the Brady violation because, until 2005,  
4 he had no knowledge of the ballistics test that would establish his  
5 innocence.<sup>3</sup> Because his 2013 federal petition was filed beyond the  
6 one-year limitations period even using 2005 as the date the  
7 limitations period began to run, Petitioner also argues that he is  
8 entitled to equitable tolling after his discovery of the ballistics  
9 test based on the ineffectiveness of counsel he hired who failed to  
10 present Petitioner's Brady claim or raise any federal arguments in  
11 his state habeas petition.

12 Section 2244(d)(1)(B) does not apply under the  
13 circumstances of this case. The few cases applying § 2244(d)(1)(B)  
14 "have dealt almost entirely with the conduct of prison officials who  
15 interfere with inmates' ability to prepare and to file habeas  
16 petitions by denying access to legal materials." Shannon v.  
17 Newland, 410 F.3d 1083, 1087-88 (9th Cir. 2005) (rejecting claim  
18 that unfavorable state appellate opinion was an "impediment" to  
19 petitioner's filing a habeas petition). For example, a petitioner's

20 \_\_\_\_\_  
21 <sup>3</sup>In his petition, Petitioner states that he became aware of the  
22 ballistics test in 2005. Petition at ¶ 41. However, in his  
23 declaration submitted with his petition, Petitioner states, "Between  
24 2007 and 2008, is when I first became aware of the 'new ballistics  
25 evidence' during [attorney] Mr. Kutchins' investigation of my case."  
26 Petition, Ex. H, Scott Dec. at 2. In his reply, Petitioner clarifies  
27 that he first learned of the ballistics test from Mr. Kutchins'  
28 December 30, 2007 letter but, because he did not know when Mr.  
Kutchins discovered the test, in his petition, he used 2005 as the  
date he became aware of the test. Reply at 9, n.1. Because 2005 is  
the date Petitioner uses in his petition, the Court will also use 2005  
as the year in which Petitioner became aware of the ballistics test.  
However, even if Petitioner became aware of the test in 2007, the  
petition would still be untimely.

1 inability to access information about the statute of limitations  
2 deadline may constitute an impediment to the filing of an  
3 application. Whalem/Hunt v. Early, 233 F.3d 1146, 1148 (9th Cir.  
4 2000) (en banc). Furthermore, to delay the commencement of the  
5 limitations period under § 2244(d)(1)(B), the petitioner must show a  
6 causal connection between the unlawful impediment and his failure to  
7 file a timely habeas petition. Bryant v. Arizona Attorney General,  
8 499 F.3d 1056, 1060 (9th Cir. 2007) (where petitioner did not know  
9 about AEDPA's statute of limitations, his lack of access to case law  
10 interpreting the statute of limitations was not impediment under  
11 § 2244(d)(1)(B) because it was petitioner's lack of knowledge of  
12 statute of limitations, and not his lack of access to case law, that  
13 caused him to delay filing); see Randle v. Crawford, 604 F.3d 1047,  
14 1054-55, 1057 (9th Cir. 2010) (finding no impediment to filing  
15 petition under § 2244(d)(1)(B) due to petitioner's state-appointed  
16 counsel's failure to perfect a timely direct appeal or delay in  
17 providing petitioner his legal papers because these actions did not  
18 prevent petitioner from filing a federal petition).

19           Petitioner's argument rests on the fact that the  
20 prosecutor's Brady violation constituted unlawful state action that  
21 impeded his ability to file a habeas petition.<sup>4</sup> Unfortunately for  
22 Petitioner, there is no Brady violation here.

23           The prosecutor's requirement to disclose exculpatory  
24 evidence to a defendant does not continue after the defendant is

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26           <sup>4</sup>Brady established that due process requires a prosecutor to  
27 disclose material exculpatory evidence to the defendant before trial.  
28 District Attorney's Office for Third Judicial Dist. v. Osborne, 557  
U.S. 52, 68 (2009).

1 convicted and the case is closed. District Attorney's Office for  
2 Third Judicial Dist. v. Osborne, 557 U.S. 52, 68 (2009). In  
3 Osborne, the Supreme Court explained:

4 A criminal defendant proved guilty after a fair trial does  
5 not have the same liberty interests as a free man. At  
6 trial, the defendant is presumed innocent and may demand  
7 that the government prove its case beyond a reasonable  
8 doubt. But, '[o]nce a defendant has been afforded a fair  
9 trial and convicted of the offense for which he was  
10 charged, the presumption of innocence disappears.' . . .  
11 Osborne's right to due process is not parallel to a trial  
12 right, but rather must be analyzed in light of the fact  
13 that he has already been found guilty at a fair trial, and  
14 has only a limited interest in postconviction relief.  
15 Brady is the wrong framework.

16 Id. at 69 (citations omitted).

17 It is undisputed that the ballistics test at issue was  
18 conducted after Petitioner's conviction was final and before  
19 September 1995, when Petitioner's former co-defendant entered a  
20 negotiated plea to manslaughter. See Patton Dec. at 1. The  
21 prosecutor could not have committed a Brady violation during  
22 Petitioner's trial by not disclosing the ballistics test to  
23 Petitioner, because the ballistics test did not exist at that time.  
24 After the trial, the prosecutor had no obligation to disclose such  
25 information. Without the Brady violation, Petitioner can point to  
26 no unconstitutional state action that prevented him from filing a  
27 petition. Therefore, § 2244(d)(1)(B) is inapplicable and Petitioner  
28 cannot rely on it to establish that his petition is timely.

2

Petitioner's argument under § 2244(d)(1)(D) also fails.

Under § 2244(d)(1)(D), the one-year limitation period  
starts on the date on which "the factual predicate of the claim or

1 claims presented could have been discovered through the exercise of  
2 due diligence." The time begins "when the prisoner knows (or  
3 through diligence could discover) the important facts, not when the  
4 prisoner recognizes their legal significance.'" Hasan v. Galaza,  
5 254 F.3d 1150, 1154 n.3 (9th Cir. 2001). "Due diligence does not  
6 require the maximum feasible diligence, but it does require  
7 reasonable diligence in the circumstances." Ford v. Gonzalez, 683  
8 F.3d 1230, 1235 (9th Cir. 2012) (internal quotations and citations  
9 omitted).

10 Petitioner again relies on the fact that the Brady  
11 violation prevented him from discovering the factual predicate of  
12 his claim until 2005. As discussed above, there was no Brady  
13 violation here. However, even giving Petitioner the benefit of the  
14 doubt and assuming that he first became aware of the ballistics test  
15 in 2005, his petition is still untimely. Petitioner had one year  
16 from 2005 in which to file the instant petition. Petitioner did not  
17 file the instant petition until 2013. Thus, absent tolling, the  
18 statute of limitations elapsed by the end of 2006.

19 Petitioner is not entitled to statutory tolling because he  
20 did not file a state petition until 2009, years after the statute  
21 expired. See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir.  
22 2003) (state petition filed after expiration of one-year period  
23 established in § 2244 does not reinitiate the limitations period).  
24 Thus, absent equitable tolling, this petition is untimely. As  
25 discussed below, equitable tolling does not apply.

1 two elements: "(1) that he has been pursuing his rights diligently,  
2 and (2) that some extraordinary circumstances stood in his way."  
3 Bryant, 499 F.3d at 1061 (citation omitted); Holland v. Florida, 130  
4 S. Ct. 2549, 2562 (2010). The petitioner bears the burden of  
5 showing that this "extraordinary exclusion" should apply to him.  
6 Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002). The  
7 petitioner also must show that "the extraordinary circumstances were  
8 the cause of his untimeliness and that the extraordinary  
9 circumstances made it impossible to file a petition on time."  
10 Ramirez v. Yates, 571 F.3d 993, 997 (9th Cir. 2009) (internal  
11 quotation marks and citations omitted). Where a prisoner fails to  
12 show "any causal connection" between the grounds upon which he  
13 asserts a right to equitable tolling and his inability to timely  
14 file a federal habeas application, the equitable tolling claim will  
15 be denied. Gaston, 417 F.3d at 1034-35. He must, furthermore, show  
16 that his untimeliness was caused by an external impediment and not  
17 by his own lack of diligence. Bryant, 499 F.3d at 1061 (no  
18 equitable tolling where petitioner was not diligent in that he  
19 failed to seek any state court relief for six years, or to take  
20 advantage of available paralegal assistance).

21           Petitioner argues that extraordinary circumstances were  
22 caused by his habeas counsel's ineffective assistance for failing to  
23 include a federal constitutional claim in his 2009 state habeas  
24 petition, thus causing Petitioner to file a pro se state petition  
25 asserting his Brady claim. Although in some cases, ineffective  
26 assistance of counsel may provide the extraordinary circumstances  
27 necessary to establish equitable tolling, under the circumstances of  
28

1 this case, it does not. See Holland, 130 S. Ct. at 2564 (serious  
2 instances of attorney misconduct may warrant equitable tolling).

3 First, Petitioner does not have a constitutional right to  
4 the assistance of counsel or the effective assistance of counsel for  
5 purposes of a state habeas proceeding. See Pennsylvania v. Finley,  
6 481 U.S. 551, 555 (1987) (right to appointed counsel extends to the  
7 first appeal of right, thus, no right to counsel on discretionary  
8 appeals or collateral attacks upon convictions); Coleman v.  
9 Thompson, 501 U.S. 722, 752 (1991) (precluding claim of ineffective  
10 assistance of counsel where there is no constitutional right to an  
11 attorney). For this reason alone, Petitioner's argument for  
12 equitable tolling lacks merit.

13 Second, even if Petitioner could state such a claim,  
14 counsel's performance was effective. In Mr. Kutchins' November 2011  
15 letter to Petitioner, he stated:

16 I was retained to investigate and then prepare a habeas  
17 petition on whatever ground appeared viable. I looked for  
18 proof of a due process violation under Brady v. Maryland, but  
19 could not find sufficient evidence to proceed on that basis.  
20 So (as we discussed at the time) I went ahead and filed a  
21 petition based on the only ground legally available: 'newly  
22 discovered evidence' of your innocence. The fact that, some  
23 time after you were convicted and sentenced, counsel for your  
24 co-defendants obtained a ballistics test that showed that their  
25 weapons did not fire the fatal shot is not in itself a basis  
26 for a Brady motion. We would need to show—among other  
27 things—that the authorities had that information at some point  
28 when it would have made a difference in your case (meaning,  
generally, before you were convicted). I know of no evidence  
proving that.

24 Respondent's Ex. I, Petitioner's July 6, 2012 pro se petition to  
25 California Supreme Court, Ex. D.

26 Counsel further explained that he did not "federalize" the  
27 actual innocence claim because it is not a claim that is recognized

1 by the federal courts. Id.

2 As discussed previously, under the circumstances of  
3 Petitioner's case, no Brady claim can be established. Therefore,  
4 counsel correctly concluded that the evidence did not support a  
5 Brady claim and cannot be faulted for failing to assert a claim that  
6 has no basis in law. See Juan H. v. Allen, 408 F.3d 1262, 1273 (9th  
7 Cir. 2005) (attorney need not file a motion he knows to be meritless  
8 on facts and the law); Rupe v. Wood, 93 F.3d 1434, 1445 (9th Cir.  
9 1996). Counsel also correctly concluded that a claim of actual  
10 innocence is not recognized by the federal courts. See House v.  
11 Bell, 547 U.S. 518, 555 (2006) (leaving unresolved issue of whether  
12 a freestanding claim of actual innocence exists under federal law).

13 Therefore, Petitioner's argument that his counsel's  
14 ineffectiveness constitutes the extraordinary circumstances  
15 necessary to establish equitable tolling is meritless.

16 4

17 As noted by Respondent, Petitioner may be arguing that he  
18 is entitled to equitable tolling based on actual innocence. This  
19 argument also lacks merit.

20 A claim of actual innocence, if proved, may serve as an  
21 equitable exception to the AEDPA statute of limitations. McQuiggin  
22 v. Perkins, 133 S. Ct. 1924, 1933 (2013). However, this exception  
23 applies to a severely confined category of cases in which new  
24 evidence shows "it is more likely than not that no reasonable juror  
25 would have convicted [the petitioner]." Id. (citing Schlup v. Delo,  
26 513 U.S. 298, 329 (1995)).

27 Petitioner's contention is that he was convicted on an  
28

1 aiding and abetting theory dependent on the jury finding that co-  
2 defendant Bates was responsible for Ms. Stafford's death. He  
3 concludes that the ballistics test showing that the bullet recovered  
4 from Ms. Stafford's body did not match the AK-47 found with Bates  
5 means that Bates did not kill Ms. Stafford, which exonerates  
6 himself.

7           However, Petitioner's theory mischaracterizes the  
8 prosecution's case and the evidence against him. Mr. Kutchins, in  
9 his November 2011 letter to Petitioner, explained that the  
10 ballistics evidence would not have changed the outcome of  
11 Petitioner's case, as follows:

12           Remember that the prosecutor's argument was that the people in  
13 the other vehicle (the SUV) were connected to you and your  
14 friends--so all of you could still have been convicted as  
15 "aiders and abettors" even if the fatal bullet was fired by the  
16 gunman in the SUV. So the new ballistics test did not  
"automatically trigger the dismissal" of the murder charges  
against Bates, and it would not necessarily have resulted in an  
acquittal for you. It might have been helpful to your case, if  
it had been known--but it was not.

17 Respondent's Ex. I, Petitioner's July 6, 2012 pro se petition to  
18 California Supreme Court, Ex. D (emphasis in original).

19           As Respondent points out, Petitioner's theory rests on  
20 three erroneous assumptions: (1) that his liability as an aider and  
21 abettor was based solely on the acts of Bates; (2) that the murder  
22 victim was wounded by a single gun; and (3) that all of the bullets  
23 which wounded the victim were recovered.

24           The jury heard the following evidence regarding the aiding  
25 and abetting charge against Petitioner. Five weapons were recovered  
26 near the area where the police apprehended Petitioner, Hodges and  
27 Weaver or in one of their vehicles. All the weapons had been fired.

1 The victims' Cadillac had gunshot holes in the door consistent with  
2 weapons used by Hodges and Bates. Petitioner told police that he  
3 fired two shots at the victims' Cadillac and was found to have  
4 gunshot residue on his hand. The jury specifically found that  
5 Petitioner was armed and personally used a weapon in the commission  
6 of the offenses. The prosecutor argued that, if there was an SUV at  
7 the scene, the people in it were connected to Petitioner and his  
8 companions because there was evidence that all three vehicles were  
9 involved in the attack on the Cadillac. Thus, Petitioner's  
10 liability as an aider and abettor was not derived or solely  
11 dependent on the actions of Bates.

12 Furthermore, the prosecutor argued that, if there was a  
13 second AK-47 that shot at the victims, it also was connected to  
14 Petitioner and his companions. Therefore, even if the AK-47  
15 connected to Bates could not be connected to the bullet fragment  
16 recovered from Ms. Stafford's body, Petitioner could still be liable  
17 as an aider and abettor of the shooter of the second AK-47.

18 Additionally, the evidence did not support the conclusion  
19 that there was only one murder weapon. The cause of Ms. Stafford's  
20 death was "multiple gunshot wounds." The evidence showed that  
21 several bullet fragments recovered from her body could have been  
22 attributable to any of the guns recovered. Thus, in light of the  
23 fact that most of the bullets which caused Ms. Stafford's wounds  
24 could have been made by any of the guns recovered by the police, a  
25 ballistics test showing that one recovered gun did not match the  
26 weapon that fired the fatal shots, does not extinguish Petitioner's  
27 liability as an aider and abettor or establish his innocence. In  
28

1 short, the ballistics test, even viewed as Petitioner characterizes  
2 it, does not make it more likely than not that no reasonable juror  
3 would have convicted Petitioner of the charged crimes.

4 Thus, Petitioner has not satisfied the standard for  
5 showing actual innocence as enunciated in Schlup and McQuiggin.  
6 Because equitable estoppel does not apply to Petitioner's petition,  
7 it is untimely. Accordingly, Respondent's motion to dismiss the  
8 petition as untimely is granted.

9 B

10 Respondent also argues that the petition is procedurally  
11 defaulted.

12 Generally, a federal court "will not review a question of  
13 federal law decided by a state court if the decision of that court  
14 rests on a state law ground that is independent of the federal  
15 question and adequate to support the judgment." Coleman v.  
16 Thompson, 501 U.S. 722, 729 (1991). Procedural default under  
17 California's timeliness requirement is an independent and adequate  
18 state ground for denying review of a habeas claim. Walker v.  
19 Martin, 131 S. Ct. 1120, 1128 (2011). The California Supreme Court  
20 denied as untimely Petitioner's 2011 and 2012 petitions, in which he  
21 raised the claims presented here. See Resp.'s Exs. H, I.  
22 Consequently, Petitioner's claims are procedurally defaulted.

23 A federal court will only review a claim disposed of on an  
24 independent and adequate state ground if the petitioner shows either  
25 "cause and prejudice" or "miscarriage of justice." McClesky v. Zant,  
26 499 U.S. 467, 494 (1991). Under a "cause and prejudice" analysis,  
27 the petitioner must show (1) cause: that some objective factor

1 impeded efforts to raise the claim at the appropriate proceeding,  
2 and (2) prejudice: that the impediment worked to the petitioner's  
3 actual and substantial disadvantage, with errors of constitutional  
4 dimensions. Id. If the petitioner does not meet the standard for  
5 "cause and prejudice," a federal court may still review the claim if  
6 a "miscarriage of justice" occurred. Sawyer v. Whitley, 505 U.S.  
7 333, 339 (1992). The "miscarriage of justice" exception only  
8 applies if the petitioner claims actual innocence. See Coleman, 501  
9 U.S. at 748.

10 To show cause, Petitioner again relies upon his claims of  
11 ineffective assistance of counsel and a Brady violation. Petition  
12 at 16, 17. As discussed previously, these claims lack merit.  
13 Petitioner also relies on his claim of actual innocence. Petition  
14 at 18. This claim also has been shown to be without merit.

15 Therefore, this Court is precluded from reviewing  
16 Petitioner's claims because he has not shown cause and prejudice, or  
17 a miscarriage of justice, to excuse his procedural default.  
18 Respondent's motion to dismiss based on procedural default is  
19 granted.

20 In his reply, Petitioner also argues that the new evidence  
21 shows that he is serving an "unauthorized sentence" because an aider  
22 and abettor cannot receive a longer sentence than the perpetrator  
23 and AEDPA's statutory limitations do not apply to this claim.  
24 Petitioner provides no authority for this contention nor does the  
25 Court know of any. Therefore, this new claim, raised for the first  
26 time in his reply, is without merit.

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IV

In light of the fact that Respondent's motion to dismiss on the grounds of untimeliness and procedural default is granted, Petitioner's motion for discovery and for appointment of counsel is denied as moot. Doc. #14.

V

For the foregoing reasons, Respondent's motion to dismiss the petition is GRANTED. Doc. #9. Further, a certificate of appealability will not issue because Petitioner has not made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 478 (2000).

A separate judgment shall be entered in favor of Respondent. The Clerk is directed to terminate any pending motions as moot and close the file.

IT IS SO ORDERED.

DATED 10/02/2013

  
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THELTON E. HENDERSON  
United States District Judge