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3 IN THE UNITED STATES DISTRICT COURT
4 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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6 PRINCE F. TSETSE,

No. C 18-1876 WHA (PR)

7 Petitioner,

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS; GRANTING LEAVE TO
FILE EXCESS PAGES; TO SHOW
CAUSE**

8 v.

9 ROBERT NEUSCHMID,

10 Respondent.

(Dkt. Nos. 52, 57)

11 _____/

12 Petitioner, a California prisoner proceeding pro se, filed this habeas petition under 28
13 U.S.C. § 2254 challenging his conviction in state court. The original petition claimed
14 ineffective assistance of counsel, and subsequently petitioner received a stay to exhaust two
15 additional claims of prosecutorial misconduct and actual innocence. He exhausted those two
16 claims in a failed habeas petition to the California Supreme Court, and then he renewed his
17 Second Amended Petition (“SAP”) here, which included his three exhausted claims.

18 Respondent was ordered to filing an answer or a motion to dismiss. He chose to file a motion to
19 dismiss, and petitioner filed an opposition. Respondent was ordered to file a reply brief twice,
20 but he did not do so (ECF Nos. 48 (“[R]espondent *shall* file a . . . reply”), 56 (“[R]espondent
21 *shall* file a reply . . .”) (emphasis added)).

22 Respondent moves to dismiss the two newly-added claims — prosecutorial misconduct
23 and actual innocence — as procedurally defaulted. A federal court will not review questions of
24 federal law decided by a state court if the decision also rests on a state law ground that is
25 independent of the federal question and adequate to support the judgment. *Coleman v.*
26 *Thompson*, 501 U.S. 722, 729-30 (1991). Petitioner exhausted these claims in a habeas petition
27 to the California Supreme Court, which denied the petition summarily with citations to *In re*
28 *Dixon*, 41 Cal. 2d 756, 264 P.2d 513 (Cal. 1953) (to bring a claim in a state habeas corpus

1 action a petitioner must first, if possible, have pursued the claims on direct appeal), and *In re*
2 *Lindley*, 29 Cal. 2d 709 (Cal. 1947) (sufficiency of the evidence claims cannot be raised in a
3 state habeas petition). The *Dixon* and *Lindley* rules are each adequate and independent state
4 procedural rules barring federal habeas review. See *Johnson v. Lee*, 136 S. Ct. 1802, 1803-04
5 (2016) (*Dixon*); *Carter v. Giurbino*, 385 F.3d 1194, 1198 (9th Cir. 2004) (*Lindley*).

6 The California Supreme Court’s citations to *Dixon* and *Lindley* would ordinarily bar
7 federal habeas review of petitioner’s prosecutorial misconduct and actual innocence claims, but
8 petitioner argues — and respondent does not dispute — that two exceptions to the federal
9 procedural default rule apply. The first exception applies when the petitioner demonstrates
10 cause for the default and actual prejudice as a result of the alleged violation of federal law, and
11 the second exception applies if failure to consider the claims will result in a fundamental
12 miscarriage of justice. *Coleman*, 501 U.S. at 750. Petitioner argues that there was cause for his
13 default, namely appellate counsel refused his request to raise his claims of prosecutorial
14 misconduct and actual innocence on direct appeal. See *McClesky v. Zant*, 499 U.S. 467, 493
15 (1991) (ineffective assistance of counsel may constitute cause excusing procedural default). He
16 also argues that prejudice arose from this default insofar as the claims would have succeeded on
17 direct appeal. He further claims that he was actually innocent, which, if true, establishes both
18 actual prejudice and a miscarriage of justice. See *Schlup v. Delo*, 513 U.S. 298, 327 (1995)
19 (setting forth actual innocence exception to procedural default). Respondent has not disputed
20 or addressed these arguments either in a reply brief or in the motion to dismiss. Because
21 respondent does not dispute that these exceptions apply, petitioner’s claims are not dismissed on
22 procedural default grounds.

23 Respondent does correctly argue, however, that actual innocence is not an independent
24 grounds for federal habeas relief. The United States Supreme Court has not recognized a free-
25 standing claim of actual innocence as grounds for federal habeas relief for a non-capital
26 petitioner. See *Herrera v. Collins*, 506 U.S. 390, 400 (1993); *Carriger v. Stewart*, 132 F.3d
27 463, 476 (9th Cir. 1997) (en banc). While actual innocence warrants exemption from
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1 procedural default, petitioner cannot bring the claim as an independent claim for habeas relief.

2 It is hereby ordered as follows:

3 1. The motion to dismiss is **GRANTED IN PART AND DENIED IN PART**. Petitioner's third
4 claim based upon actual innocence is **DISMISSED**. Petitioner's first two claims in the SAP
5 remain.

6 2. Petitioner's motion for leave to file an oversized brief is **GRANTED**.

7 3. Respondent shall file with the court and serve on petitioner, within **sixty-three (63)**
8 **days** of the issuance of this order, an answer conforming in all respects to Rule 5 of the Rules
9 Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be
10 granted based on the two remaining claims in the SAP. In doing so, respondent shall file a new
11 answer with a supporting memorandum that either replaces or supplements the memorandum
12 supporting the original answer. Respondent need not file new copies of previously submitted
13 exhibits.

14 If petitioner wishes to respond to the answer, he shall do so by filing a traverse with the
15 court and serving it on respondent within **twenty-eight days** of the date the answer is filed.
16 Petitioner shall indicate whether the traverse supplements or replaces the previously-filed
17 traverse.

18 IT IS SO ORDERED.

19 Dated: February 5, 2021.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

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