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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

CHARLES BERNARD DAVIS,  
  
Petitioner,  
  
vs.  
  
G. MCDONALD, Warden, et al.,  
  
Respondent.

CASE NO. 10-CV-0359-W (CAB)

**ORDER (1) ADOPTING REPORT  
AND RECOMMENDATION  
[DOC. 16], (2) GRANTING  
MOTION TO DISMISS [DOC. 7],  
(3) DISMISSING THE FIRST  
AMENDED PETITION [DOC. 4]  
WITH PREJUDICE, AND  
(4) DENYING CERTIFICATE OF  
APPEALABILITY**

Petitioner Charles Bernard Davis, a state prisoner proceeding *pro se*, filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254. On February 23, 2010, this Court dismissed the Petition without prejudice.

On April 19, 2010, Petitioner filed a First Amended Petition (“FAP”). On June 3, 2010, Respondent G. McDonald filed a motion to dismiss, which Petitioner opposed. On December 14, 2010, the Honorable Magistrate Judge Cathy Ann Bencivengo issued a Report and Recommendation (“Report”), recommending that this Court grant the motion. On January 31, 2011, Petitioner filed an objection to the Report.

1 The Court decides the matter on the papers submitted and without oral  
2 argument. See Civ. L.R. 7.1(d.1). For the reasons outlined below, the Court **ADOPTS**  
3 the Report [Doc. 16], **GRANTS** the motion to dismiss [Doc. 7], and **DISMISSES** the  
4 First Amended Petition [Doc. 4] **WITH PREJUDICE**.

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6 **I. BACKGROUND**

7 Petitioner did not object to the following factual summary taken from the Report:

8 A jury convicted Petitioner of three counts of second degree murder with a  
9 knife-use enhancement. Petitioner appealed to the California Court of Appeal and  
10 argued that the trial court erred in instructing the jury about his right not to testify as  
11 a defendant, and that his conviction should be reduced because the prosecution did not  
12 meet its burden. The California Court of Appeal affirmed the conviction on August 28,  
13 2008. Petitioner then filed a petition for review in the California Supreme Court, which  
14 was denied on October 22, 2008. Petitioner did not file a writ of certiorari with the  
15 United States Supreme Court.

16 On February 2, 2010, Petitioner commenced this proceeding. On February 24,  
17 2010, this Court dismissed the Petition without prejudice for failing to (1) name the  
18 proper respondent, (2) allege exhaustion of state-court remedies, and (3) use the proper  
19 form.

20 On March 24, 2010, Petitioner filed the FAP. On June 3, 2010, Respondent filed  
21 the motion to dismiss arguing that the FAP was barred by the applicable statute of  
22 limitations and because Petitioner failed to exhaust state remedies. Petitioner filed his  
23 opposition on September 16, 2010.

24 On December 14, 2010, Judge Bencivengo issued the Report recommending that  
25 this Court grant Respondent's motion to dismiss. The Report found that the FAP  
26 should be dismissed as untimely under the applicable statute of limitations (*id.*, 2:11-13),  
27 and because Petitioner failed to exhaust his state-court remedies (*id.*, 7:12-13). On  
28 January 31, 2011, Petitioner filed his objection to the Report.

1 **II. LEGAL STANDARD**

2 The duties of the district court in connection with a magistrate judge's report and  
3 recommendation are set forth in Rule 72(b) of the Federal Rules of Civil Procedure and  
4 28 U.S.C. § 636(b)(1). The district court "must make a de novo determination of those  
5 portions of the report ... to which objection is made," and "may accept, reject, or modify,  
6 in whole or in part, the findings or recommendations made by the magistrate." 28  
7 U.S.C. § 636(b)(1)(C); see also United States v. Remsing, 874 F.2d 614, 617 (9th Cir.  
8 1989); United States v. Raddatz, 447 U.S. 667, 676 (1980).

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10 **III. DISCUSSION**

11 In his objection, Petitioner argues that the FAP is not time barred for the  
12 following three reasons: (1) he timely filed a habeas petition on October, 9 2009, well  
13 within the statute of limitations; (2) Judge Bencivengo incorrectly calculated the statute  
14 of limitations; and (3) this Court previously found his habeas petition was timely. With  
15 respect to the Report's finding that Petitioner failed to exhaust state-court remedies,  
16 Petitioner argues that the claims in his FAP were raised in state court.

17 Having read and considered the FAP, the Report, and Petitioner's objections  
18 thereto, the Court finds the Report presents a well-reasoned analysis of the issues. The  
19 Court, therefore, concludes that the FAP is time barred and that Petitioner failed to  
20 exhaust state-court remedies.

21  
22 **A. Petitioner's filing in October 2009 does not render his FAP timely.**

23 Petitioner appears to argue that the FAP is timely because he filed another federal  
24 habeas petition on October 9, 2009. In support of this argument, Petitioner relies on  
25 the docket report from Civil Case 09-CV-2317. (*See Obj.* [Doc. 19], Ex. B.) This  
26 argument lacks merit for two reasons.

27 First, the filing of a federal habeas corpus petition does not toll the statute of  
28 limitations for future federal habeas relief. Duncan v. Walker, 533 U.S. 167, 172–173

1 (2001). Thus, even if Petitioner filed a federal habeas corpus proceeding on October 9,  
2 2009, it did not toll the statute of limitations for the claims raised in his FAP.

3 Second, Petitioner did not file a habeas corpus petition in Civil Case 09-CV-2317.  
4 On November 5, 2009, Judge John A. Houston dismissed case 09-CV-2317 on the  
5 ground that Petitioner did not file a habeas petition, but instead filed a motion for an  
6 extension of time. (See *Order Dismissing Case Without Prejudice* [Doc. 4], p.1:22 in Case  
7 No. 09cv2317.) Accordingly, Petitioner’s argument is also factually inaccurate. ¶  
8 these reasons, Petitioner’s objection to the Report lacks merit.

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10 **B. The Report correctly calculated the statute of limitations.**

11 Petitioner next appears to argue that the Report incorrectly calculated January  
12 20, 2010 as the date the statute of limitations expired. Petitioner objection lacks merit.

13 On October 22, 2008, the California Supreme Court denied direct review of  
14 Petitioner’s conviction. Because Petitioner did not file a writ of certiorari with the  
15 United States Supreme Court, the statute of limitations began to run 90 days later, on  
16 January 20, 2009. See *Brown v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999).  
17 Accordingly, the Report correctly found that the one-year statute of limitations expired  
18 on January 20, 2010.

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20 **C. This Court’s previous order did not “deem” Petitioner’s FAP timely.**

21 Petitioner also argues that this Court has already “deemed that Petitioner’s First  
22 Amended Petition was timely and not time barred.” (*Obj.*, pp. 1–2.) In support of this  
23 argument, Petitioner appears to rely on this Court’s February 24, 2010 order dismissing  
24 the original Petition.

25 But the February 24, 2010 order dismissed the Petition because Petitioner failed  
26 to (1) name a proper respondent, (2) allege exhaustion of state judicial remedies, and  
27 (3) use the proper form. (*Order (1) Granting Application to Proceed In Forma Pauperis*

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1 and (2) *Dismissing Petition Without Prejudice* [Doc. 3], 4:25–27.) The order did not  
2 address the statute of limitations issue. Accordingly, Petitioner’s argument lacks merit.

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4 **D. Petitioner failed to exhaust state remedies.**

5 Petitioner also objects to the Report’s finding that he failed to exhaust state  
6 remedies: “Because Petitioner alerted California Supreme Court to the fact that he was  
7 claiming a violation of his due process[,] the same claim contained in claim number 1,  
8 2, 3, the claims are exhausted.” (*Obj.*, 5 of 20.) This is the exact argument Petitioner  
9 made in his opposition to Respondent’s motion to dismiss. (*See Opp.*, pp. 3–4.)

10 But as the Report correctly found, the substance of the claims Petitioner raised  
11 in state court differ from the substance of the claims raised in the FAP. While the state-  
12 court claims related to the constitutionality of a jury instruction and whether the  
13 prosecution met its burden of proof, the FAP raised issues relating to ineffective  
14 assistance of counsel, the admissibility of evidence, and prosecutorial misconduct.  
15 Because the issues raised are different, the Court finds Petitioner failed to exhaust his  
16 state-court remedies. *See Gray v. Netherland*, 518 U.S. 152, 163 (1987) (Reaffirming  
17 that “it is not enough to make a general appeal to a constitutional guarantee as broad  
18 as due process to present the ‘substance’ of such a claim to a state court.”).

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20 **IV. CONCLUSION AND ORDER**

21 In light of the foregoing, the Court **ADOPTS** the Report [Doc. 16.], **GRANTS**  
22 Respondent’s motion to dismiss [Doc. 7.] and **DISMISSES** the First Amended Petition  
23 [Doc. 4.] **WITH PREJUDICE**.

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1           Moreover, because reasonable jurists would not find the Court's assessment of the  
2 claims debatable or wrong, the Court **DENIES** a certificate of appealability. See Slack  
3 v. McDaniel, 529 U.S. 473, 484 (2000).

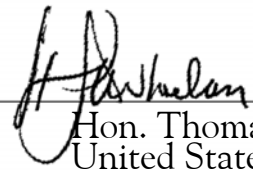
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**IT IS SO ORDERED.**

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DATED: March 7, 2011

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Hon. Thomas J. Whelan  
United States District Judge

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