UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

LUIS TAPIA, Petitioner, v. S. HATTON, Warden, Respondent.	Case No.: 16cv2624-MMA(BLM) **REPORT AND RECOMMENDATION FOR ORDER GRANTING RESPONDENT'S MOTION TO DISMISS** **[ECF No. 10]**

This Report and Recommendation is submitted to United States District Judge Michael M. Anello pursuant to 28 U.S.C. § 636(b) and Civil Local Rules 72.1(d) and HC.2 of the United States District Court for the Southern District of California. On October 16, 2016, Petitioner Luis Tapia, a state prisoner proceeding *pro se* commenced these habeas corpus proceedings pursuant to 28 U.S.C. § 2254. ECF No. 1 ("Pet."). Petitioner challenges his conviction for murder in the second degree with the use of a firearm. Id. at 1-2.

On October 26, 2016, the Court denied Petitioner's motion to proceed *in forma pauperis* [see ECF No. 3], dismissed the Petition without prejudice, and informed Petitioner that he must provide the Court with the $5 filing fee or adequate proof that he could not pay the $5.00 filing fee in order to have the case reopened. ECF No. 4. On November 28, 2016, Petitioner paid the $5 filing fee. ECF No. 5. On December 5, 2016, the Court reopened the case and issued a briefing schedule requiring Respondent to file a motion to dismiss by February 10, 2017, and

Petitioner to file an opposition by March 12, 2017. ECF No. 8. Currently before the Court is Respondent's Motion to Dismiss Petition for Writ of Habeas Corpus because it is a second and successive Petition and because the Petition is untimely. ECF. No. 10 ("MTD"). On March 8, 2017, Petitioner constructively filed an opposition. ECF 12 ("Oppo."). For the reasons set forth below, the Court **RECOMMENDS** that Respondent's motion to dismiss be **GRANTED**.

FACTUAL AND PROCEDURAL BACKGROUND

On June 24, 1982, an information was filed charging Petitioner with one count of murder and with having personally used a firearm. Lodgment 4. The jury found Petitioner guilty and convicted him of second degree murder. Id.; see also Lodgment 1 at 4. The judgment was reversed on appeal for failing to instruct the jury on voluntary manslaughter under a heat of passion theory. Id. Petitioner was retried and on November 29, 1989, the jury again found him guilty of second degree murder and that he did personally use a firearm. Id.; see also Lodgment 2 at 52. On December 22, 1989, Petitioner was sentenced to a total term of seventeen years to life. Lodgment 4 at 1; see also Lodgment 3 at 2.

On January 30, 1990, Petitioner filed a timely notice of appeal to the California Court of Appeal alleging that the court erred by "(1) failing to instruct the jury on the "law of the case" set forth in our prior opinion, (2) refusing to grant a mistrial based on destruction of evidence, and allowing testimony relating to tests performed on the destroyed evidence, (3) admitting a photograph of the victim taken at the scene, (4) admitting the testimony of a witness that Tapia had threatened him at a prior hearing, and (5) denying Tapia' s motion for new trial on the grounds the verdict was against the weight of the evidence." Lodgment 1 at 4. On April 12, 1991, the Court of Appeal, Fourth Appellate District, Division One, affirmed the judgment. Id. There is no indication in the record that Petitioner filed a petition for review in the California Supreme Court. See Lodgments; see also MTD at 7.

On July 9, 2009, the Board of Parole Hearings ("BPH") held a parole consideration hearing and concluded that Petitioner was not suitable for parole. Lodgment 6 at 1. The denial was for five years. Id. Petitioner then filed petitions for writ of habeas corpus challenging the BPH's decision which were denied by the superior court on May 26, 2010 and by the court of appeal

on October 15, 2010. The BPH held another parole consideration hearing on July 1, 2014 and again found that Petitioner was not suitable for parole. Id. The denial was for three years. Id. On August 14, 2015, Petitioner filed a habeas petition in the California Superior Court, County of San Diego, challenging the BPH's July 1, 2014 decision which was denied on September 24, 2015. Id. at 2.

On May 21, 2016, Petitioner filed another habeas petition in the California Superior Court, County of San Diego, contending that he was deprived of due process because he was convicted under an unconstitutionally vague statute and because he was deprived of the legislative intent of Penal Code section 1168(b) which rendered Penal Code Sections 3041(a) and (b) unconstitutionally vague and violated ex post facto laws. Lodgment 5 at 3-4. On June 17, 2016, the California Superior Court denied Petitioner's habeas petition as a successive petition and because Petitioner failed to state a prima facie claim for habeas relief. Lodgment 6.

On July 8, 2016, Petitioner filed another petition for writ of habeas corpus in the California Court of Appeal which raised the same claims as the May 21, 2016 petition. Lodgment 7. On July 12, 2016, the California Court of Appeal denied the petition on the merits finding that Petitioner provided "no documentary evidence that he was convicted under the felony-murder theory of second degree murder" and that without any evidence that Petitioner "was convicted under the theory he now claims is unconstitutional, he fails to state a prima facie case for relief." Lodgment 8. The Court also found that Petitioner had previously raised his ex post facto claims and that "absent a change in the applicable law or the facts, the court will not consider repeated applications for habeas corpus presenting claims previously rejected." Id.

On August 1, 2016, Petitioner filed a petition for writ of habeas corpus in the California Supreme Court seeking the same relief. Lodgment 9. The petition was summarily denied on October 12, 2016. Lodgment 10.

Petitioner constructively filed the instant petition on October 16, 2016. Pet. Petitioner argues that (1) the structure of California's second degree murder statute is unconstitutionally vague under Johnson v. United States, 135 S.Ct. 2551 (2015) and that (2) the BPH and California courts have arbitrarily applied Penal Code Section 3041(b) rendering it void for vagueness under

Johnson. Pet. at 6-7.

SCOPE OF REVIEW

Title 28, United States Code, § 2254(a), sets forth the following scope of review for federal habeas corpus claim:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a) (2006 & Supp. 2016).

DISCUSSION

Respondent contends that the Petition should be dismissed as untimely and as a second and successive petition under 28 U.S.C. §§2244(b) and (d). MTD at 9-16.

I. The AEDPA Statute of Limitations

The AEDPA imposes a one-year statute of limitations on federal petitions for writ of habeas corpus filed by state prisoners. 28 U.S.C. § 2244(d) (2006 & Supp. 2016). Section 2244(d)'s one-year limitations period applies to all habeas petitions filed by persons "in custody pursuant to the judgment of a State court." Id. § 2244(d)(1). The one-year limitation period runs from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Id. § 2244(d)(1)(A)-(D).

For prisoners whose convictions were finalized prior to the enactment of the AEDPA, the statute of limitations began to run on April 25, 1996. Malcom v. Payne, 281 F.3d 951, 955 (9th Cir. 2002) (citing Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001)). Petitioners in those cases had until April 24, 1997, to seek collateral review in federal court, unless they are entitled to a later start date. See id.; Hasan v. Galaza, 254 F.3d 1150, 1153 (9th Cir. 2001).

Petitioner was found guilty of second degree murder on November 29, 1989 and was sentenced on December 22, 1989. MTD at 7; see also Lodgment 2 at 42, 71-72. Petitioner did not appeal his conviction to the California Supreme Court so his judgment became final on May 22, 1991, 40 days after the court of appeal affirmed his conviction and denied his appeal on April 12, 1991. See Waldrip v. Hall, 548 F.3d 729, 735 (9th Cir. 2008); Cal. R. Ct. 8.366(b); Cal. R. Ct. 8.500(e)(1). Since Petitioner's conviction became final prior to the enactment of the AEDPA, the applicable statute of limitations expired on April 24, 1997. See Hasan, 254 F.3d at 1153. The instant action was not filed until October 16, 2016 – more than nineteen years after the statute of limitations expired. Pet. Therefore, the Petition is untimely, unless Petitioner is entitled to a later start date or sufficient tolling.

A. Limitations Period Start Date

Respondent argues that the AEDPA statute of limitations expired on April 24, 1997 and that Petitioner is not entitled to a later start date pursuant to Johnson. MTD at 12. Respondent further maintains that because Petitioner filed his Petition in October 2016, more than nineteen years after the limitations period expired, his Petition is untimely. Id. at 15-16. Petitioner contends that his petition was filed well within the one-year limitations period. Oppo. at 9-22. Petitioner believes that Respondent is miscalculating the time period and argues that the statute of limitations should run from the date of the Johnson decision and not the date of his conviction. Id. at 10-12.

Petitioner states in his opposition that he is not contesting his actual conviction, sentence, or the denial of parole, but rather, the "the constitutionality of the structure of California's second degree murder statute all the way down the line on its face, based on Johnson" and the "constitutionality of the structure of California's PC 3041(b)" in light of Johnson. Oppo. at 10.

Petitioner argues that California's definition of second degree murder and California's PC 3041(b) contain vague residual clauses, which are analogous to the residual clause of the Armed Career Criminal Act ("ACCA"), and that therefore, he was convicted under a vague criminal law that violated his due process rights. Id. at 12-19. Similarly, Petitioner is contesting the structure of California's PC 3041(a)-(b), in light of the Board's and California Court's 30 year arbitrary application, that renders PC 3041(a) superfluous and PC 3041(b) void for vagueness under Johnson. Id. at 7-9; see also Pet. at 7.

In Johnson, 135 S.Ct. 2551, the Supreme Court found the residual clause of the ACCA unconstitutionally vague. ACCA's residual clause defines any crime that "involves conduct that presents a serious potential risk of physical injury to another" as a violent felony. 18 U.S.C. § 924(e)(2)(B). In finding the residual clause violates Due Process rights, the Supreme Court found that the clause "produces more unpredictability and arbitrariness than the Due Process Clause tolerates" and noted its own inability to craft appropriate standards and apply the clause. Johnson, 135 S.Ct. at 2557.

Petitioner was convicted of second degree murder in state court and was not subjected to the ACCA. MTD at 7 (citing Lodgment 6 at 3). Under California law, murder is defined as "the unlawful killing of a human being, or a fetus, with malice aforethought." Cal. Penal Code § 187. California Penal Code § 189 provides that:

> [a]ll murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289, or any murder perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are second degree.

Cal. Penal Code § 189. California's second degree murder statute does not contain the phrase "otherwise involves conduct that presents a serious potential risk of physical injury to another" or comparable language. See Cal. Penal Code § 189. Further, the Supreme Court's decision in

Johnson was very narrowly applied to the ACCA's residual clause and "has absolutely no applicability to the California murder statute under which Petitioner was convicted." Lopez v. Gastelo, 2016 WL 8453921, at *4 (S.D. Cal. Dec. 5, 2016) (finding that Johnson "is sufficiently narrow that it cannot be applied to Petitioner's [California second degree murder conviction] and thus no later start date is applicable"). Accordingly, Johnson does not represent the Supreme Court's recognition of a new rule of constitutional law applicable to California's second degree murder statute and Petitioner is not entitled to a later start date of the AEDPA statute of limitations. See id.; see also Adame v. Hatton, 2017 U.S. Dist. LEXIS 14968, at *8-10 (C.D. Cal. Feb. 1, 2017) ("Petitioner's state prison sentence was not enhanced under the ACCA's residual clause, nor was his conviction based on any state analogue of that federal criminal statute. Thus, Johnson, did not create a new due process right applicable to Petitioner.").

With respect to Section 3041, Petitioner argues that Johnson rendered the statute unconstitutionally vague because in using 3041(b), the BPH "does not look at the actual facts of the case, rather, the Board hypothesizes the facts" to gauge gravity which deprives inmates "of any meaningful advance notice of which felonies would eventually be denominated as too grave, under the PC 3041(b) exception, and which ones would not." Oppo. at 5. Respondent contends that Petitioner could have raised his vagueness challenge to PC 3041 when he was sentenced in 1989, as the section has been in place since 1941 without substantial changes, and therefore, is not entitled to a later start date of the AEDPA statute of limitations for this claim. MTD at 12.

Section 3041's language, upon which parole decisions are based, is not similar to the language in the ACCA's residual clause. Keller v. Hatton, 2017 WL 2771529, at *4 (C.D. Cal. May 19, 2017) (finding that Johnson does not entitle Petitioner to a later start date for his claim that PC 3041 is unconstitutionally vague). Further, as Respondent correctly notes, Petitioner could have raised this challenge before the Supreme Court's ruling in Johnson. MTD at 6; Keller v. Hatton, 2017 WL 2771529, at *5 (C.D. Cal. May 19, 2017). Indeed several district courts have rejected claims challenging California parole regulations, including PC 3041, on vagueness grounds before the Supreme Court decided Johnson. Id.; Fowlie v. Sisto, 2011 WL 476378, at *4 (E.D. Cal. Feb. 4, 2011) (Report and Recommendation) (recommending denial of claim that

PC 3041 is unconstitutionally vague); Winston v. California Bd. Of Prison Terms, 2006 WL 845584, at *3 (E.D. Cal. Mar. 31, 2006); Sariaslan v. Butler, 2004 WL 2203472, at *5 (N.D. Cal. Sept. 28, 2004); Masoner v. California, 2004 WL 1080177, at *1 (C.D. Cal. Jan. 23, 2004). Petitioner is not entitled to a later start date under the AEDPA statute of limitations merely because he "became aware of the void-for-vaguenss doctrine through Johnson's analysis." Adame v. Hatton, 2017 WL 1364223, at *4 (C.D. Cal. Apr. 11, 2017).

For the reasons stated herein, Johnson does not provide the basis for a new constitutional right that Petitioner may assert in this federal habeas action and he is not entitled to a later start date of the AEDPA statute of limitations. As a result, the instant Petition is untimely, unless sufficiently tolled.

B. Petitioner Is Not Entitled to Statutory Tolling

Respondent argues that Petitioner is not entitled to statutory tolling. MTD at 15. Respondent contends that because Petitioner did not file his first state habeas petition until May 2016, "nineteen years after the limitations period expired, [the petitions] do not provide a basis for statutory tolling." Id. Respondent also contends that Petitioner "filed one full round of state habeas petitions unsuccessfully challenging the Board's 2009 denial of parole," but that the filings "do not provide a basis for statutory tolling because they did not challenge the 1989 judgment" and were untimely. Id. n, 2. Finally, Respondent contends that Petitioner's "federal habeas petition challenging the same 2009 parole denial in Tapia v. Grounds, No. C11-5092 CRB (PR), does not provide a basis for statutory tolling for these same reasons, as well as the additional reason that federal filings do not toll the limitations period." Id. Petitioner does not make any arguments that he is entitled to statutory tolling. See Oppo.

The AEDPA tolls its one-year limitations period for the "time during which a properly filed application for State post-conviction or other collateral review . . . is pending." 28 U.S.C. § 2244(d)(2). "The time that an application for state postconviction review is 'pending' includes the period between (1) a lower court's adverse determination, and (2) the prisoner's filing of a notice of appeal, provided that the filing of the notice of appeal is timely under state law." Evans v. Chavis, 546 U.S. 189, 191 (2006) (emphasis in original). State petitions filed after the

expiration of the statute of limitations period have no tolling effect. See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (holding that 28 U.S.C. § 2244(d) does not allow re-initiation of the limitations period where that period ended before petitioner's state petition for postconviction relief was filed).

As previously discussed, the deadline by which Petitioner had to file his federal habeas petition was April 24, 1997. None of Petitioner's state petitions were filed before the expiration of the statute of limitations. See Lodgments 5-10. Since Petitioner's deadline to file his petition was April 24, 1997 and his earliest state petition challenging his second degree murder conviction was filed on May 21, 2016, he is not entitled to statutory tolling. Lodgment 5; see Carey v. Saffold, 536 U.S. 214, 225-26 (2002); Nedds v. Calderon, 678 F.3d 777, 780 (9th Cir. 2012); Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) ("[S]ection 2244(d) does not permit the reinitiation of the limitations period that has ended before the state petition was filed"). The state habeas petitions filed in 2009-2010 and 2015 challenging the parole denials also do not toll the AEDPA statute of limitations because they do not challenge the validity of the 1989 murder conviction and, even if they did, they also were filed years after the statute of limitations expired.

C. Petitioner Is Not Entitled to Equitable Tolling

Respondent argues that Petitioner is not entitled to equitable tolling. MTD at 15-16. In support, Respondent contends that Petitioner has not alleged any grounds entitling him to equitable tolling, and the record in this case does not suggest any reason justifying equitable tolling. Id. Petitioner does not specifically argue that he is entitled to equitable tolling. See Oppo.

The United States Supreme Court has held that the AEDPA's one-year statute of limitations is subject to equitable tolling in appropriate cases. Holland v. Florida, 560 U.S. 631, 645 (2010). While equitable tolling is "unavailable in most cases," Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999), it is appropriate where a habeas petitioner demonstrates two specific elements: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." Holland, 560 U.S. at 649 (citing Pace v. DiGuglielmo, 544 U.S.

408, 418 (2005)). The bar is set high to effectuate "AEDPA's 'statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims.'" Guillory v. Rose, 329 F.3d 1015, 1017 (9th Cir. 2003) (citing Carey, 536 U.S. at 226). Whether a petitioner is entitled to equitable tolling depends on a fact-specific inquiry. Holland, 560 U.S. at 650.

"The diligence required for equitable tolling purposes is 'reasonable diligence' . . . not 'maximum feasible diligence." Id. at 653 (citations omitted). The purpose of requiring the petitioner to show diligence "is to verify that it was the extraordinary circumstance, as opposed to some act of the petitioner's own doing, which caused the failure to timely file." Doe v. Busby, 661 F.3d 1001, 1012–13 (9th Cir. 2011) (citations omitted). To determine whether a petitioner has been diligent, courts consider "the petitioner's overall level of care and caution in light of his or her particular circumstances." Id. at 1013.

Petitioner does not satisfy Holland's diligence and extraordinary circumstances prongs. See Holland, 560 U.S. at 649. Petitioner did not file this petition until October 16, 2016, over nineteen years after his convictions became final and the AEDPA's statute of limitations expired. Pet. Petitioner presents no evidence or argument to establish that he "diligently" pursued his legal claims, and does not allege or make any showing of an extraordinary circumstance outside of his control, which prevented him from timely filing the instant Petition before the AEDPA statute of limitations expired on April 24, 1997.

Because Petitioner has not shown that he diligently pursued his legal interests and that some extraordinary circumstances prevented timely filing, he has not met his burden and is not entitled to equitable tolling. See id.; see also Lopez v. Gastelo, 2016 WL 8453921, at *5 (S.D. Cal. Dec. 5, 2016) (stating that petitioner was not entitled to equitable tolling, where the petitioner argued that his conviction for second degree murder was unconstitutional in light of Johnson, but did not make any "argument that he was pursuing his rights diligently and there [wa]s no indication of an extraordinary circumstance" preventing him from timely filing his federal petition); Dew v. Hatton, 16cv1985-MMA (MDD) (S.D. Cal. Mar. 7, 2017) (finding that petitioner was not entitled to equitable tolling, where the petitioner argued that his second-

degree felony murder conviction was unconstitutional in light of Johnson, but did not provide any evidence or arguments to satisfy the elements required for equitable tolling, and the record did not indicate that the petitioner was entitled to equitable tolling). Accordingly, this Court **RECOMMENDS** that Respondent's Motion to Dismiss the Petition be **GRANTED** on the ground that it is untimely and that Petitioner's Petition for Writ of Habeas Corpus be **DISMISSED** with prejudice.

II. Second and Successive Petition

Respondent contends that the Court lacks jurisdiction over the instant petition because the petition is improperly successive. MTD at 9. Respondent argues that Petitioner's May 6, 2016 federal habeas petition was an attack on both the parole board's denial of parole and his 1989 judgment and sentence and that the claim in Ground Two of the instant petition is "nearly identical" to a claim asserted in his first petition. Id. at 9-10. Petitioner asserts that the instant petition is not successive because it raises issues not addressed in his prior petition. Pet. at 5; Oppo. at 2-3. Petitioner also asserts that he is not challenging "his conviction, sentence or parole denial" as he "is only contesting the structure of the statutes themselves under Johnson v. United States, 135 S.Ct. 2551." Oppo. at 3. Petitioner explains that his first petition alleged that Section 3041(b) was unconstitutionally vague as it applied to his 2014 parole hearing whereas the current challenge is to Section 3041(b) on its face in light of the Supreme Court's new ruling. Id. at 7-9.

A second or successive habeas petition is one that attacks a conviction that was previously attacked in a federal habeas petition and judged on the merits. Johnson v. Marshall, 2010 WL 753363, *2 (S.D. Cal. March 2, 2010). In order to file a successive petition, a petitioner first must obtain authorization from the court of appeals. Id. (citing 28 U.S.C. § 2244(b)(3)). In accordance with AEDPA,

> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (b)(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be

> dismissed unless--
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(1-2). "Permitting a state prisoner to file a second or successive federal habeas corpus petition is not the general rule, it is the exception, and an exception that may be invoked only when the demanding standard set by Congress is met." Jimenez v. Paramo, 2012 WL 6893386, *4 (S.D. Cal. Oct. 16, 2012) (quoting Bible v. Schriro, 651 F.3d 1060, 1063 (9th Cir.2011) (per curiam)). "Where a petitioner has previously filed a § 2254 petition, a federal district court must decide if a subsequent petition is 'second or successive' before it may exercise jurisdiction." Id. (quoting Cooper v. Calderon, 274 F.3d 1270, 1274). "If the court of appeals has not authorized a successive petition, the district court lacks jurisdiction to consider the petition's merits." Id. (citing Cooper, 274 F.3d at 1274).

On April 21, 2016, Petitioner submitted a petition for writ of habeas corpus in the Southern District of California, which was accepted onto the docket on May 6, 2016, purportedly challenging his 1982 second degree murder conviction. See Docket 16cv1111-GPC (WVG) at ECF No. 1 at 1-2; Lodgment 12 at 1-2. In Ground One, Petitioner challenged the constitutionality of the BPH's refusal to set "uniform ISL terms." Id. at 6. In Grounds Two and Three, Petitioner challenged the constitutionality of Penal Code 3041(b) in light of the court's and BPH's "30 year arbitrary application of PC 3041(b)." Id. at 7-8. In Ground Four, Petitioner challenged the constitutionality of Marsy's Law in light of the "30 year arbitrary application of PC 3041(b)." Id. at 9. On May 25, 2016, the petition was transferred to the Northern District of California on the ground that the petition challenged a decision of the Board of Parole and parole challenges are

best heard in the district where the prisoner is confined. ECF No. 3-1. Judge Breyer, Northern District of California, dismissed the petition on September 26, 2016. Lodgment 13. Judge Breyer framed the petition as "challenging the California Board of Parole Hearings' (BPH) continued refusal to grant him parole." Id. at 1. Judge Breyer concluded that Petitioner's due process rights were not violated by the BPH's conduct and that the BPH's alleged "misapplication of state parole laws" did not violate "the Ex Post Facto Clause and [did not] render[] California's parole laws unconstitutional." Id. at 5.

While Respondent is correct that the claims asserted by Petitioner in the first and second petitions are very similar, it is not clear that the two petitions are attacking the same conviction. The judges in both the Southern and Northern Districts of California interpreted the first petition as a challenge to the BPH's denial of parole. On the other hand, the instant petition appears to be a challenge to Petitioner's murder conviction and sentence in light of the Supreme Court's decision in Johnson.

In Hill v. Alaska, 297 F.3d 895, 896 (9th Cir. 2002), the Ninth Circuit held that challenges to parole determinations filed after challenges to a conviction are not improperly successive. The Ninth Circuit later clarified that "challenges to state decisions that affect the execution of sentences (like parole denials and revocation of sentence decisions) can be brought in a later petition 'because such claims were not ripe for adjudication at the conclusion of the prisoner's first federal habeas proceeding.'" Adame, 2017 WL 1364223 at *3 (quoting United States v. Buenrostro, 638 F.3d 720, 725 (9th Cir. 2011)). The Ninth Circuit has not addressed the reverse situation which is relevant to the instant matter where Petitioner first filed petitions challenging his parole determination and then filed a petition challenging his conviction. While at least one district court has opined that this reverse scenario constitutes a second and successive petition[1], it is not clear to this Court that the current petition is successive. The current petition presents

---

[1] See Adame, 2017 WL 1364223, at *4 (finding that "[a]llowing a petitioner to first challenge parole determinations that extend from his underlying conviction, then not deem 'successive' later petitions that finally challenge his underlying conviction, would not serve the AEDPA's purposes of finality in state criminal convictions and 'streamlining federal habeas proceedings.'").

two claims; one of which is extremely similar to a claim presented in the first federal habeas petition. However, the two petitions purport to attack different convictions. While an argument can be made that the instant petition is successive because the claims could have been raised in the first petition, it is not entirely clear. Because the Court believes that the instant petition clearly is untimely, the Court **RECOMMENDS** that Respondent's Motion to Dismiss be **DENIED** on the basis that it is successive, but **GRANTED** on the basis that it is untimely.

CONCLUSION AND RECOMMENDATION

For the foregoing reasons, **IT IS HEREBY RECOMMENDED** that the District Judge issue an order: (1) approving and adopting this Report and Recommendation, (2) finding that the Petition is not timely, and (3) directing that Judgment be entered **GRANTING** Respondent's Motion to Dismiss with prejudice.

IT IS ORDERED that no later than **August 18, 2017** any party to this action may file written objections with the Court and serve a copy on all parties. The document should be captioned "Objections to Report and Recommendation."

IT IS FURTHER ORDERED that any reply to the objections shall be filed with the Court and served on all parties no later than **September 8, 2017**. The parties are advised that failure to file objections within the specified time may waive the right to raise those objections on appeal of the Court's order. See Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998).

IT IS SO ORDERED.

Dated: 7/21/2017

Hon. Barbara L. Major
United States Magistrate Judge