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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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JERRY WHITE,

Petitioner,

v.

HAROLD WICKHAM, et al.,

Respondents.

Case No. 3:04-cv-00412-GMN-VPC

ORDER

This counseled habeas petition comes before the Court on respondents' motion to dismiss (ECF No. 107). Petitioner has opposed (ECF No. 113), and respondents have replied (ECF No. 119).

In this action, petitioner challenges his state court convictions of one count of first-degree murder with use of a deadly weapon, one count of conspiracy to commit robbery, and one count of robbery with use of a deadly weapon. (ECF No. 103). Petitioner asserts a single claim: He is actually innocent. (*Id.*) Respondents move to dismiss the petition on the grounds that it is untimely, that it is procedurally defaulted, and that it does not state a claim upon which relief can be granted.

I. Background

On October 8, 1999, Ramon Navarro was murdered in his Elko home. Petitioner and his friend, Michael Woomer, were arrested and charged with the offense.

When first questioned by police, Woomer claimed that petitioner murdered Navarro. (Ex. 3).¹ He told police that petitioner and Navarro had been engaging in sexual

¹ The exhibits cited in this order are located at ECF Nos. 72 and 99.

1 conduct in the bedroom when petitioner suddenly began beating Navarro with a baseball
2 bat and demanding money. (*Id.*) Petitioner turned himself in and told police that it was
3 Woomer who robbed and killed Navarro while petitioner was passed out in another room.
4 (Ex. 4).

5 Woomer accepted a plea deal and agreed to testify against petitioner. (Ex. 6).
6 Shortly after entering his change of plea, Woomer met with police again. On the second
7 telling, the details of Woomer's story changed. This time, it was Woomer and Navarro
8 who had been engaging in sexual acts. After they stopped and Woomer smoked some
9 marijuana, Woomer became ill and ran to the bathroom to throw up. Woomer emerged
10 from the bathroom to find petitioner beating Navarro with a bat and demanding money.
11 (Ex. 5).

12 At trial, Woomer essentially refused to testify, claiming both that he did not
13 remember anything and acknowledging that he was afraid of what could happen to him
14 in prison if he were labeled a snitch. (Ex. 10 (Tr. 4-46)). Woomer also stated that much
15 of his second statement to the police was fabricated, using information he learned from
16 studying the crime scene evidence. (*Id.* at 34-43). Despite Woomer's refusal to testify,
17 his statement was effectively read into trial twice. (Ex. 11 at 49-80, 110-42).

18 The forensic evidence at trial established that Navarro's blood was on both
19 petitioner's and Woomer's shoes and on Woomer's jacket, which had been found in
20 petitioner's car. (Ex. 9 (Tr. 173)). DNA likely belonging to Woomer was found under
21 Navarro's fingertips. (*Id.* at 178-80, 185).

22 At the conclusion of trial, the jury found petitioner guilty of first-degree murder with
23 use of a deadly weapon, conspiracy to commit robbery, and robbery with use of a deadly
24 weapon. (See Ex. 2). Petitioner was acquitted of conspiracy to commit murder. Petitioner
25 was sentenced to consecutive terms of life in prison without the possibility of parole for
26 the murder and deadly weapon charge and shorter concurrent sentences on the robbery
27 charges. (*Id.*) Woomer, who entered a plea of guilty, was sentenced to a term of life with
28 the possibility of parole after twenty years.

1 Petitioner thereafter pursued his appeal, a state post-conviction petition, and a
2 federal habeas petition in this action. At each stage, petitioner's claims were denied.

3 On September 11, 2009, Woomer wrote and signed a declaration recanting his
4 earlier accusations against petitioner and accepting full and sole responsibility for the
5 murder and robbery of Ramon Navarro. (Ex. 1). Based on the recantation, petitioner on
6 October 14, 2009, filed an application for leave to file a second or successive petition,
7 which the Ninth Circuit Court of Appeals granted. (ECF No. 69). Petitioner thereafter
8 filed his successor petition for writ of habeas corpus in this case. (ECF No. 75).

9 This action was reopened and then stayed pending petitioner's exhaustion of his
10 actual innocence claim in state court. (ECF No. 91). On petitioner's return to state court,
11 he presented his actual innocence claim alongside four other claims. (Ex. 34). The state
12 trial court found the four additional claims procedurally defaulted and denied the actual
13 innocence claim on the merits. (Ex. 49). On appeal, the Nevada Supreme Court affirmed.
14 (Ex. 58).

15 Petitioner returned to federal court and filed an amended successor petition, which
16 is the operative petition in this case. (ECF No. 103). Respondents now move to dismiss
17 the petition primarily on the grounds that no freestanding claim of actual innocence exists.
18 (ECF NO. 107). Respondents additionally argue, however, that the petition is also
19 untimely and procedurally defaulted. (*Id.*)

20 **II. Actual Innocence**

21 The sole claim asserted in the petition is that petitioner is actually innocent of
22 murdering Ramon Navarro. The parties agree that the Supreme Court has not decided
23 whether there is a freestanding claim of actual innocence under federal constitutional law.
24 *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013). Given the open nature of the question,
25 the Court concludes that it is more appropriately addressed in connection with the merits
26 of petitioner's claim. Respondents' motion to dismiss the petition for failure to state a
27 claim will therefore be denied without prejudice to renewing the argument in the answer
28 to the petition.

1 **III. Timeliness**

2 Pursuant to 28 U.S.C. § 2244(d)(1) a one-year statute of limitations applies to
3 petitions filed under § 2254. The limitation period begins to run from the latest of

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5 (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;

6 (B) the date on which the impediment to filing an application created by
7 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;

8 (C) the date on which the constitutional right asserted was initially
9 recognized by the Supreme Court, if the right has been newly recognized
10 by the Supreme Court and made retroactively applicable to cases on
collateral review; or

11 (D) the date on which the factual predicate of the claim or claims presented
could have been discovered through the exercise of due diligence.

12 Respondents argue that the petition in this case is untimely because it was filed
13 more than a year after petitioner's judgment became final. Petitioner argues that the
14 petition is timely pursuant to § 2244(d)(1)(D) because it was filed within one year of
15 Woomer's recantation, which provided the factual predicate for his claim of actual
16 innocence. Respondents argue that the factual predicate of petitioner's claim – that he
17 is innocent and that Woomer committed the crime – has always been known to him and
18 that Woomer's recantation is merely new evidence in support of that old claim.

19 The Court agrees with petitioner that the factual predicate of his claim is Woomer's
20 recantation because the recantation is different in substance from Woomer's prior
21 statements to police and his testimony at trial and no due diligence could have produced
22 the recantation earlier. *See In re McDonald*, 514 F.3d 539, 545 (6th Cir. 2008). *Cf. King*
23 *v. Trujillo*, 638 F.3d 726, 731 (9th Cir. 2011) (recantation was not a new factual predicate
24 because it was essentially the same as the statements presented at trial). Importantly,
25 Woomer's recantation claims that petitioner had no involvement in the murder or robbery.
26 Petitioner filed his successor petition within one year of Woomer's recantation. The
27 instant petition is therefore timely.

28 /

1 **IV. Procedural Default**

2 Respondents argue that petitioner’s claim is procedurally defaulted because the
3 Nevada Supreme Court concluded that it was procedurally barred.

4 A federal court cannot review a petitioner’s claim “if the Nevada Supreme Court
5 denied relief on the basis of ‘independent and adequate state procedural grounds.’”
6 *Koerner v. Grigas*, 328 F.3d 1039, 1046 (9th Cir. 2003). In *Coleman v. Thompson*, the
7 Supreme Court held that a state prisoner who fails to comply with the state’s procedural
8 requirements in presenting his claims is barred from obtaining a writ of habeas corpus in
9 federal court by the adequate and independent state ground doctrine. *Coleman v.*
10 *Thompson*, 501 U.S. 722, 731-32 (1991). A state procedural bar is “adequate” if it is
11 “clear, consistently applied, and well-established at the time of the petitioner’s purported
12 default.” *Calderon v. United States District Court (Bean)*, 96 F.3d 1126, 1129 (9th Cir.
13 1996). A state procedural bar is “independent” if the state court “explicitly invokes the
14 procedural rule as a separate basis for its decision.” *Yang v. Nevada*, 329 F.3d 1069,
15 1074 (9th Cir. 2003). A state court’s decision is not “independent” if the application of the
16 state’s default rule depends on the consideration of federal law. *Park v. California*, 202
17 F.3d 1146, 1152 (9th Cir. 2000).

18 As noted above, the state trial court addressed petitioner’s actual innocence claim
19 on the merits while denying the other claims as procedurally barred. The Nevada
20 Supreme Court concluded that the state court properly denied petitioner’s freestanding
21 actual innocence claim. (Ex. 58 at 4-5) (“[W]e conclude that the district court did not err
22 in denying appellant’s freestanding claim of actual innocence in which he requested a
23 new trial on the basis of newly discovered evidence (Woomer’s recantation of his trial
24 testimony).”). While the conclusion of its order broadly affirmed denial of the petition as
25 “procedurally barred,” (*id.* at 5), the parties did not argue on appeal that the actual
26 innocence claim was procedurally barred, (see Exs. 55 & 56). In light of the trial court’s
27 order, the parties’ briefs, and the Nevada Supreme Court’s finding that the actual
28 innocence claim lacked merit, the Court does not find the court’s ambiguous statement in

1 the conclusion of its order to be a clear and express application of a procedural bar to the
2 actual innocence claim. Petitioner's actual innocence claim is not, therefore, procedurally
3 defaulted.

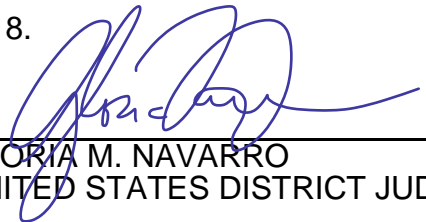
4 **V. Conclusion**

5 In accordance with the foregoing, IT IS THEREFORE ORDERED that
6 respondents' motion to dismiss (ECF No. 107) is DENIED.

7 IT IS FURTHER ORDERED that respondents shall file an answer to the petition
8 within sixty (60) days of date of entry of this order. Petitioner thereafter will have thirty
9 (30) days within which to file a reply.

10 IT IS SO ORDERED.

11 DATED THIS 14 day of June, 2018.

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14 GLORIA M. NAVARRO
15 UNITED STATES DISTRICT JUDGE
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