



system prior to seeking habeas relief in federal court – has been served.

The court agrees with the magistrate judge that because petitioner’s second application is still pending in the state district court, respondent’s motion to dismiss the habeas petition as untimely, pursuant to 28 U.S.C. § 2244(d)(2), should be denied. Admittedly, respondent’s argument that “[g]ranted Petitioner statutory tolling for his second post-conviction application is inequitable because Petitioner’s aim, at the time he completed his second application, was to simply force the district court to rule upon his first application . . . .” Doc. #15, p. 6, has some appeal. The magistrate judge noted that, “[a]s a practical matter, the result reached here is undesirable.” Doc. #14, p. 11. Nonetheless, as the magistrate judge pointed out, “the state district court should have, and could have, readily dispensed with the Second Application . . . [and] [i]ndeed, given the duplicative nature of Petitioner’s state court filings, the state courts could have halted those filings by sanctioning Petitioner.” *Id.* at p. 12. They did not and, as a result, petitioner’s claims are not barred by the statute of limitations.

Petitioner failed to object to the magistrate judge’s Report and Recommendation. He thereby waived his right to challenge the magistrate judge’s recommendation that his request to dismiss the petition so that he could exhaust an actual innocence claim be denied. United States v. One Parcel of Real Property, 73 F.3d 1057, 1059-60 (10th Cir. 1996); *see* 28 U.S.C. §636(b)(1)(C). The court also agrees with the magistrate judge that plaintiff has failed to demonstrate that a dismissal is warranted.

Accordingly, the court **ADOPTS** Magistrate Judge Jones’s Report and

Recommendation. Respondent's motion to dismiss [Doc. # 8] is **DENIED**. Petitioner's request to dismiss this action without prejudice also is **DENIED**. Respondent is directed to respond to the petition within **thirty (30) days** of the date of this order, consistent with the magistrate judge's prior order [Doc. #6].

**IT IS SO ORDERED.**

Dated this 18th day of April, 2016.

  
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JOE HEATON  
CHIEF U.S. DISTRICT JUDGE

