UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 8 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

EDWIN D. MCMILLAN,

Petitioner-Appellant,

v.

RON RACKLEY, Warden,

Respondent-Appellee.

No. 17-55619

D.C. No. 2:15-cv-01488-AG-SP
Central District of California,
Los Angeles

ORDER

Before: CALLAHAN and M. SMITH, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012).

Any pending motions are denied as moot.

DENIED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWIN D. MCMILLAN,

Petitioner-Appellant,

v.

RON RACKLEY, Warden,

Respondent-Appellee.

No. 17-55619

D.C. No. 2:15-cv-01488-AG-SP
Central District of California,
Los Angeles

ORDER

Before: SILVERMAN and IKUTA, Circuit Judges.

The petition for panel rehearing and rehearing en banc (Docket Entry No. 3) is construed as a motion for reconsideration and reconsideration en banc. The motion for reconsideration is denied and the motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EDWIN McMILLAN, Petitioner, v. RONALD RACKLEY, Warden, Respondent.	Case No. CV 15-1488-AG (SP) ORDER DENYING A CERTIFICATE OF APPEALABILITY

Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts reads as follows:

> (a) **Certificate of Appealability.** The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

(b) **Time to Appeal.** Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

Under 28 U.S.C. § 2253(c)(2), a Certificate of Appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." The Supreme Court has held that this standard means a showing that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (internal quotation marks omitted, citation omitted).

Two showings are required "[w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim." *Slack*, 529 U.S. at 484. In addition to showing that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right," the petitioner must also make a showing that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* As the Supreme Court further explained:

> Section 2253 mandates that both showings be made before the court of appeals may entertain the appeal. Each component of the § 2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments.

Id. at 485.

Here, the Court has denied the Petition because it is untimely. After duly

considering petitioner's contentions in his Petition and in his objections to the Report and Recommendation, the Court finds that petitioner has failed to make the requisite showing, or any showing, that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling."

Accordingly, a Certificate of Appealability is denied in this case.

Dated: March 28, 2017

HONORABLE ANDREW J. GUILFORD
UNITED STATES DISTRICT JUDGE

Presented by:

Sheri Pym
United States Magistrate Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EDWIN McMILLAN,

Petitioner,

v.

RONALD RACKLEY,

Respondent.

Case No. CV 15-1488-AG (SP)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Andrew J. Guilford, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.

INTRODUCTION

On February 20, 2015, petitioner Edwin McMillan, a California prisoner proceeding pro se, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 ("Petition"). Petitioner challenges his 1998 convictions in Ventura County Superior Court for kidnapping during a carjacking and second degree robbery. Petitioner additionally challenges his sentence of life with the possibility of parole

plus five years in state prison.

The Petition raises nine grounds for relief: (1) the trial court violated due process when, subsequent to the jury deadlocking on the firearm enhancement and the prosecution dropping that allegation, the court found petitioner used a firearm and pursuant to this finding sentenced petitioner to the maximum number of years and imposed consecutive sentences; (2) the appellate court violated petitioner's right to trial by jury and due process when it displaced the jury's determination and found petitioner guilty of "no less than" kidnapping during a carjacking, the greater offense charged; (3) the prosecution withheld evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); (4) the trial court erred in failing to instruct the jury on lesser included offenses, which effectively prevented the jury from considering petitioner's alternative defense of being in possession of stolen property; (5) the trial court erred in failing to remedy prejudice resulting from jury exposure to a victims' rights rally organized by the presiding judge's wife; (6) the trial court violated due process when it imposed excessive restitution without jurisdiction; (7) upon remand from the appellate court, the trial court erred in denying petitioner's motion for recusal and in failing to consider new information; (8) cumulative errors during petitioner's trial necessitate retrial; and (9) newly discovered evidence demonstrates petitioner's actual innocence.

On January 4, 2016, respondent filed a Motion to Dismiss the Petition ("MTD"), arguing the Petition is untimely under the Antiterrorism and Effective Death Penalty Act ("AEDPA") and contains some unexhausted claims. Petitioner filed an Opposition to respondent's motion on March 24, 2016, arguing: in light of the stipulated release of claims executed as part of a settlement stemming from a dispute triggered by petitioner's prior filed federal habeas petition, respondent is estopped from opposing the instant Petition as untimely or successive; in any event the petition is timely, or alternatively, equitable tolling should apply based on newly discovered evidence previously withheld from petitioner; and although

grounds seven, eight, and nine are unexhausted, the requirement should be excused because it would be a fundamental miscarriage of justice should the court deny review of these claims.

For the reasons discussed below, the court finds the Petition is untimely and the settlement stipulation does not apply to the claims raised in the Petition. Accordingly, the Petition should be dismissed with prejudice.

II.

PROCEEDINGS

A. State Court Proceedings

On April 29, 1998, following a jury trial in Ventura County Superior Court, petitioner was convicted of kidnapping during a carjacking (Cal. Penal Code § 209.5(a)), kidnapping (Cal. Penal Code § 207(a)), carjacking (Cal. Penal Code § 215(a)), and second degree robbery (Cal. Penal Code § 211). Lodg. 1 at 1-8, 11-12. On July 10, 1998, petitioner was sentenced to a total state prison term of life with the possibility of parole plus six years. *Id.* at 9-12.

Petitioner appealed his conviction to the California Court of Appeal. *See* Lodg. 4. On September 15, 1999, the Court of Appeal reversed petitioner's convictions as to the lesser necessarily included offenses of kidnapping and carjacking, ordered restitution modifications, and otherwise affirmed the judgment in all other respects. *Id.* On October 15, 1999, the Court of Appeal modified its opinion by deleting a sentence from the original opinion, and denied respondent's petition for rehearing. Lodg. 5. Petitioner filed a petition for review in the California Supreme Court. Lodg. 6. The Supreme Court denied review on January 13, 2000. Lodg. 7.

On August 16, 1999, petitioner filed a habeas corpus petition in the California Court of Appeal (Lodg. 8), which was denied on August 27, 1999, with citations to *In re Terry*, 4 Cal. 3d 911, 921, 95 Cal. Rptr. 31 (1971), and *In re Waltreus*, 62 Cal. 2d 218, 42 Cal. Rptr. 9 (1965). Lodg. 9). On September 2,

this court in case number CV 03-1857, alleging, inter alia, prison officials retaliated against him by "transpacking" him – that is, making him ready for transfer to another prison, transferring his property to the other prison, but never actually transferring him and thereby separating him from his property, including his legal materials, resulting in his inability to meet deadlines in the prior federal petition case. *See id.* at 2. After years of litigation, the parties settled the dispute by agreeing to a Stipulation and Release of Claims (the "Stipulation"), which they executed on October 25, 2011, and is filed herein as Attachment B to the Petition. The Stipulation, in relevant part, prohibits the Office of the Attorney General of California from opposing petitioner's efforts to revive the claims raised in his prior federal petition on procedural grounds such as timeliness or that it is successive. *See id.* at 6-7. The Stipulation explicitly applies only to the claims previously raised in the prior federal petition. *Id.* at 7.

Petitioner then waited more than a year to take any action toward reviving his claims. He first did so by filing, on March 18, 2013, in case number CV 01-927 – the case in which he filed his prior federal petition – a Motion to Augment Appeal and a Motion for Relief from Judgment. With the motions, petitioner sought relief from the judgment dismissing the prior federal petition, and to augment his prior federal petition with seven additional claims. In a March 27, 2013 order denying the motions, the court concluded petitioner sought to "present seven entirely new claims for relief," there were no extraordinary circumstances preventing petitioner from timely requesting relief from the judgment earlier, the delay of eleven years was unreasonable, relief was not warranted on the merits, and the motions were nothing more than a veiled attempt to file a successive habeas petition without leave from the Ninth Circuit. Docket no. 51 at 4-5 (case no. CV 01-927). The court stated, "it is not the district court that decides whether a second or successive petition meets the[] requirements" necessary to warrant consideration of a successive petition, but rather a petitioner must seek permission from the court

of appeals prior to submitting such a petition. *Id.* at 5.

Petitioner filed amended versions of the motions in case number CV 01-927 on April 11, 2013, this time attaching the Stipulation to one of the motions. On April 24, 2013, the court denied the amended versions of the motions for the reasons stated in its March 27, 2013 order.

On September 17, 2013, petitioner filed an application with the Ninth Circuit Court of Appeals for authorization to file a second or successive petition under 28 U.S.C. § 2254. *See* Ninth Circuit case no. 13-73263. On June 18, 2014, the Ninth Circuit denied the application as unnecessary, and instructed petitioner to file a copy of the Ninth Circuit's Order with any habeas petition challenging his 2001 judgment. Pet., Attach. C. Petitioner did so. *Id.*

Petitioner filed the instant Petition in this court on February 20, 2015.

III.

DISCUSSION

Respondent moves to dismiss the Petition in its entirety, arguing all of the grounds raised are untimely, and grounds six through nine are also unexhausted. For the reasons that follow, the court finds the Petition is untimely. Further, because none of the grounds in the Petition were raised in the prior federal petition, the Stipulation, which would permit previously raised claims to go forward, is inapplicable. As such, the Petition should be dismissed in its entirety as untimely. Because the court finds the Petition untimely, the court does not reach respondent's argument that certain grounds are also unexhausted.

A. The Petition Is Untimely

1. The Limitation Period Under AEDPA

AEDPA mandates that a "1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2244(d)(1); *see also Lawrence v. Florida*, 549 U.S. 327, 329, 127 S. Ct. 1079, 166 L. Ed. 2d 924 (2007); *Mardesich v. Cate*,

668 F.3d 1164, 1171 (9th Cir. 2012). After the one-year limitation period expires, the prisoner's "ability to challenge the lawfulness of [his] incarceration is permanently foreclosed." *Lott v. Mueller*, 304 F.3d 918, 922 (9th Cir. 2002).

To assess whether a petition is timely filed under AEDPA, it is essential to determine when AEDPA's limitation period starts and ends. By statute, AEDPA's limitation period begins to run from the latest of four possible events:

> (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.

28 U.S.C. § 2244(d)(1). Ordinarily, the starting date of the limitation period is the date on which the judgment becomes final after the conclusion of direct review or the expiration of the time allotted for seeking direct review. *See Wixom v. Washington*, 264 F.3d 894, 897 (9th Cir. 2001)

AEDPA may also allow for statutory tolling or equitable tolling. *Jorss v. Gomez*, 311 F.3d 1189, 1192 (9th Cir. 2002). But "a court must first determine whether a petition was untimely under the statute itself before it considers whether equitable [or statutory] tolling should be applied." *Id.*

Here, petitioner was initially sentenced on July 10, 1998, to life with the possibility of parole plus six years in state prison. Lodg. 1 at 9-12. After several appeals, the Superior Court ultimately resentenced petitioner on August 9, 2001 to

a total state prison term of life with the possibility of parole plus five years. Lodg. 2 at 35-36; Lodg. 3 at 3-6. Petitioner again appealed, the California Court of Appeal affirmed, and the California Supreme Court denied review on July 31, 2002. Lodg. 26. Because petitioner did not file a petition for writ of certiorari with the United States Supreme Court, his conviction became final ninety days after the California Supreme Court denied review, when his time to file a certiorari petition expired, or on October 29, 2002. *See Wixom*, 264 F.3d at 897. Thus, absent statutory or equitable tolling, the limitation period expired on October 29, 2003. *See Jorss*, 311 F.3d at 1192.

2. Petitioner Is Entitled to Some Statutory Tolling, But It Is Insufficient to Render the Petition Timely

Statutory tolling is available under AEDPA during the time "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2); *accord Evans v. Chavis*, 546 U.S. 189, 192, 126 S. Ct. 846, 163 L. Ed. 2d 684 (2006); *Patterson v. Stewart*, 251 F.3d 1243, 1247 (9th Cir. 2001). But "in order to qualify for statutory tolling during the time the petitioner is pursuing collateral review in the state courts, the prisoner's state habeas petition must be constructively filed *before*, not after, the expiration of AEDPA's one-year limitations period." *Johnson v. Lewis*, 310 F. Supp. 2d 1121, 1125 (C.D. Cal. 2004) (emphasis in original); *see also Laws v. Lamarque*, 351 F.3d 919, 922 (9th Cir. 2003) (where a petitioner does not file his first state petition until after the eligibility for filing a federal habeas petition has lapsed, "statutory tolling cannot save his claim"). Furthermore, a state habeas petition filed and "denied before [the limitation] period ha[s] started to run [has] no effect on the timeliness of the ultimate federal filing." *Waldrip v. Hall*, 548 F.3d 729, 735 (9th Cir. 2008).

Petitioner here filed numerous state habeas petitions, but several were filed and denied before petitioner's conviction became final on October 29, 2002, or

were filed after the limitations period expired. On October 8, 2002, petitioner filed a habeas petition in the California Supreme Court, before the petitioner's conviction became final. Lodg. 28. Thus, that petition began tolling the limitation period as soon as the conviction became final. The California Supreme Court denied the petition on July 9, 2003. Lodg. 29. Accordingly, the limitation period here did not begin running until July 9, 2003, and expired on July 9, 2004.[1]

Petitioner's next relevant state habeas petition was constructively filed in the California Court of Appeal on August 14, 2004, over a month after the statute of limitations – with the statutory tolling discussed above – expired on July 9, 2004.[2] Lodg. 34. A habeas petition filed after the AEDPA limitation period has expired has no tolling effect. *See Jiminez*, 276 F.3d at 482; *Johnson*, 310 F. Supp. 2d at 1125. Thus, neither his August 2004 petition nor any of his subsequent state habeas petitions – the next of which was not filed until January 2008 – entitle petitioner to any statutory tolling under AEDPA.

Accordingly, absent sufficient equitable tolling, the Petition filed on February 20, 2015 was untimely by more than ten years.

//

//

---

[1] Petitioner filed two other state petitions in October and November 2002, but these were denied before July 2003 and thus did not further toll the limitation period under the statute. *See* Lodg. 30-33.

[2] Dates listed as "constructive" filing dates reflect the constructive filing date under the "mailbox rule." Under the mailbox rule, "a legal document is deemed filed on the date a petitioner delivers it to the prison authorities for filing by mail." *Lott v. Mueller*, 304 F.3d 918, 921 (9th Cir. 2002). Courts generally presume a petition was delivered to prison authorities on the day the petition was signed. *Lewis v. Mitchell*, 173 F. Supp. 2d 1057, 1058 n.1 (C.D. Cal. 2001).

3. Petitioner Is Not Entitled to Equitable Tolling Sufficient to Render the Petition Timely

The United States Supreme Court has decided that "§ 2244(d) is subject to equitable tolling in appropriate cases." *Holland v. Florida*, 560 U.S. 631, 645, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010). Tolling is appropriate when "extraordinary circumstances" beyond a petitioner's control make it impossible to file a petition on time. *Id.* at 649; *see Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002) ("the threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the exceptions swallow the rule") (internal quotation marks and citation omitted). "When external forces, rather than a petitioner's lack of diligence, account for the failure to file a timely claim, equitable tolling of the statute of limitations may be appropriate." *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999).

A petitioner seeking equitable tolling must establish two elements: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005). Petitioner must also establish a "causal connection" between the extraordinary circumstance and his failure to file a timely petition. *See Bryant v. Arizona Att'y Gen.*, 499 F.3d 1056, 1060 (9th Cir. 2007).

Petitioner makes two arguments for equitable tolling in his Opposition. One of these relates to petitioner's claim in ground three, and appears to be that he was unable to file the Petition until he obtained tape recordings that had been withheld. Opp. at 3-6. Petitioner somewhat unclearly indicates he may have received some transcribed taped statements in 2002, received more taped statements in September 2011, and still may not have received all the taped statements he seeks. *Id.* Petitioner acknowledges he was able to file certain petitions despite the loss of transcripts. *Id.* at 5.

Petitioner makes no showing that the absence of tape recordings or

statements prevented him from filing the instant federal Petition. At most, he appears to contend the taped statements would make one or more of his claims stronger. By his own account, he has filed numerous petitions even without the taped statements. Petitioner was able to file the instant Petition in February 2015, and he apparently last received taped statements in September 2011. He offers no explanation for why he waited more than three years after the September 2011 receipt of statements to file the instant Petition. Even assuming petitioner were entitled to equitable tolling for the period up until his receipt of the taped statements in September 2011, that tolling would be insufficient to render the Petition timely. But since there appears to be no causal connection between the missing taped statements and his delay in filing the instant Petition, petitioner is not entitled to equitable tolling due to the missing statements in any event.

Petitioner's second argument that might support equitable tolling is based on the October 25, 2011 Stipulation and Release of Claims that estops respondent from arguing petitioner is procedurally barred from bringing claims to the extent they were originally addressed in petitioner's prior federal petition. *See* Opp. at 2-3; Pet., Attach. B; MTD at 7 n.9 (confirming the accuracy and authenticity of Attachment B). The 2011 Stipulation is governed by the laws of California, but this court retained jurisdiction over the matter to enforce compliance with its terms. *See* Pet, Attach. B ¶¶ 2, 12. The Stipulation was reached after "the Ninth Circuit found sufficient evidence on the record to raise an issue of material fact as to [petitioner's] allegations that [petitioner] had been separated for a period of 15 months from his legal files during the pendency of his [first federal] habeas petition." Pet., Attach. B at 3. Thus, the Stipulation supports the contention that extraordinary circumstances blocked petitioner's ability to fully participate in the prosecution of his prior federal petition. The Stipulation further evidences petitioner's diligence in pursuing his rights up to that point. *See* Pet. Attach. B. at 2-4, 9 (noting the case was initiated on March 14, 2003, lost at summary judgment,

appealed to the Ninth Circuit, resulting in a partial reversal and remand, and finally settled in 2011).

Assuming the Stipulation demonstrates petitioner faced extraordinary circumstances and was diligent up through the execution of the Stipulation on October 25, 2011, however, it would support a finding of equitable tolling only until October 25, 2011. The record reflects that petitioner did not file another habeas petition in either state or federal court after the execution of the Stipulation until he filed the instant Petition in February 2015. His only filings in between were: (1) his motions for relief from the judgment dismissing the prior federal petition and to augment his claims in the prior federal petition, both filed on March 18, 2013; (2) his amended versions of the same motions filed on April 11, 2013; and (3) his September 17, 2013 application to the Ninth Circuit for permission to file a second or successive petition. The first of these was not filed until more than sixteen months after the Stipulation was executed. Thus, even if petitioner is entitled to equitable tolling through October 25, 2011, the statute of limitations still would have expired on October 25, 2012, making the Petition untimely by more than two years.

Accordingly, the Petition is untimely under AEDPA. The remaining question is whether the Stipulation may still operate to save certain of the claims from dismissal.

B. The 2011 Stipulation Is Inapplicable to the Claims in the Petition

As discussed above, under the October 2011 Stipulation, the Attorney General of California agreed:

> not to oppose any effort by [petitioner] to re-file, re-open, or otherwise revive his petition for writ of habeas corpus pertaining to the claims raised in the Habeas Action or any similar effort notwithstanding any prior adjudication, dismissals, relief, rejections, judgment, or the passing of deadlines that may have expired

pertaining to the Habeas Action or a new application or petition for writ of habeas corpus or other similar action, pertaining to the claims previously raised in the Habeas Action (*McMillan v. Giurbino*, USDC C Case No. CV01-0927-ABC(MLG). This shall apply only to the previous claims raised in the dismissed Habeas Action, and [petitioner] shall not attempt to allege any claims that were not raised in the Habeas Action.

Pet., Attach. B ¶ 7.

Under this Stipulation, any ground raised in the instant Petition that was raised in petitioner's prior federal petition may be opposed only on its merits; it may not be dismissed as untimely. Respondent argues all the claims raised in the Petition are new, and therefore the Stipulation is inapplicable. MTD at 8. The court agrees.

Petitioner raised the following six grounds for relief in his prior federal petition:

(1) Ineffective assistance of trial counsel because trial counsel did not present an alibi defense;

(2) Ineffective assistance of trial counsel because trial counsel did not request jury instructions on receiving stolen property or lesser included offenses;

(3) Ineffective assistance of trial counsel because trial counsel stipulated to the conviction of codefendant Joshua Erwin and did not present to the jury additional alleged facts about Erwin and his conviction;

(4) Ineffective assistance of trial counsel because trial counsel did not move to suppress the photo identification of petitioner;

(5) Ineffective assistance of trial counsel because trial counsel did not seek a change of venue or a continuance; and

(6) Trial counsel's ineffective assistance caused petitioner prejudice.

Lodg. 15 at 6-8, Ex. A.

A quick comparison between the claims alleged the prior federal petition and those alleged in the instant Petition reveals no overlap in the claims alleged in grounds one, two, three, six, seven, or eight of the current Petition. Ground one in the instant Petition alleges the trial court erred in considering petitioner's use of a firearm in determining petitioner's sentence after dismissal of a firearm enhancement. Pet at 5.[3] Ground two alleges the appellate court displaced the jury when it found petitioner guilty of "no less than" the greater charge of kidnapping during a carjacking. Pet. at 7. Ground three alleges *Brady* violations by the prosecution. Pet. at 8. Ground six alleges impermissible restitution was imposed by the trial court. Pet. at 12. Ground seven alleges, upon remand for re-sentencing, the sentencing court should have recused itself as biased and failed to consider new mitigating information. Pet. at 13. And ground eight alleges cumulative error. Pet. at 14. These claims have nothing in common with those raised in the prior federal petition, as set forth above.

By contrast, grounds four, five, and nine in the instant Petition do share certain subjects in common with three of the claims in the prior federal petition. In ground four of the Petition, petitioner alleges the trial court erred in failing to instruct the jury sua sponte on the lesser included offenses to kidnapping to facilitate carjacking, which effectively prevented the jury from considering his alternative defense of being in possession of stolen property. Pet. at 10. In ground two of petitioner's prior federal petition, he raised the issue of failure to provide jury instructions on lesser-included offenses, but his claim there was that his trial counsel was ineffective in not requesting such instructions. Lodg. 15 at 6, Ex. A at 3-17 to 3-19.

---

[3] Petition page references correspond to the pages as numbered by the court's electronic case filing system. All other page references, including those referencing attachments to the Petition, refer to a document's internal number.

In ground five of the instant Petition, petitioner alleges the trial court erred in failing to remedy prejudice to petitioner caused by pretrial publicity and a victims' rights rally held the day of jury selection; specifically, petitioner contends the trial court had a duty to sua sponte order a continuance and to disclose his spouse's participation in the rally. Pet. at 11. In ground five of petitioner's prior federal petition, he also raised the issue of prejudice resulting from jury exposure to a victims' rights rally, but his prior claim was that his trial counsel was ineffective in failing to object, seek a change of venue, or seek a continuance of the trial due to pretrial publicity and the rally. Lodg. 15 at 8, Ex. A at 3-20 to 3-22.

In ground nine of the instant Petition, petitioner alleges newly discovered evidence demonstrates his innocence. Pet. at 15. This new evidence consists of a declaration from an alibi witness, and a possible forthcoming declaration from another. Pet., Attachs. D, E. Petitioner contends he gave the names of these alibi witnesses to his trial counsel, but the trial investigator never located them. Pet. at 15. In ground one of petitioner's prior federal petition, he alleged his trial counsel was ineffective for failing to present the testimony of these alibi witnesses at trial. Lodg. 15 at 6, Ex. A at 3-17.

It is thus clear that grounds four, five, and nine in the instant Petition share aspects in common with three of the claims in the prior federal petition. Nonetheless, they are fundamentally different claims.

All of the claims in the prior federal petition were claims of ineffective assistance of counsel, and thus were brought under the Sixth Amendment and concerned whether petitioner's trial counsel's performance fell below an "objective standard of reasonableness" under prevailing professional norms and whether petitioner was prejudiced. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). By contrast, in grounds four and five of the instant Petition, petitioner claims the trial court failed to take certain actions sua sponte, and this failure somehow – petitioner does not clearly say – violated

petitioner's constitutional rights, perhaps his right to due process. Petitioner's claim of actual innocence in ground nine is on shaky ground in any event, as the United States Supreme Court has yet to "resolve[] whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence." *McQuiggin v. Perkins*, __ U.S. __, 133 S. Ct. 1924, 1931, 185 L. Ed. 2d 1019 (2013) (citing *Herrera v. Collins*, 506 U.S. 390, 404-05, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993)). But what is clear is that a claim of actual innocence, by which petitioner would need to prove he is factually innocent of the crime, is different than a claim of ineffective assistance of counsel.

It is established in the exhaustion context that ineffective assistance of counsel claims are considered to be distinct from claims alleging other constitutional violations that formed the basis for the ineffective assistance. For example, where a claim of ineffective assistance for failure to argue a confession was inadmissible was raised in the state courts but a claim that the confession violated the Fifth Amendment was not, the Ninth Circuit found that "although [the] Fifth Amendment claim is related to [the] claim of ineffective assistance," the Fifth Amendment claim was unexhausted. *See Rose v. Palmateer*, 395 F.3d 1108, 1112 (9th Cir. 2005). "While admittedly related, they are distinct claims with separate elements of proof. . . ." *Id.* at 1112 (citing *Kimmelman v. Morrison*, 477 U.S. 365, 374 n.1, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986)). Although the context here is different, it is nonetheless equally clear that claims of trial court error and actual innocence are distinct from claims of ineffective assistance of counsel. As such, none of the claims in the Petition are the same as any of the ineffective assistance claims raised in the prior federal petition. Consequently, the Stipulation – which explicitly states it "shall apply only to the previous claims raised in the dismissed Habeas Action" (Pet., Attach. B ¶ 7) – is inapplicable here.

Petitioner does not dispute in his Opposition that the claims are different; he does not address the point at all. Instead, he simply contends the Stipulation

applies, and argues that dismissal of his claims would "undermine[] the previous decision of the Ninth Circuit." Opp. at 11. A review of the Ninth Circuit's Order and what led to it reveals it would not undermine the Order.

As recounted above, more than a year after the Stipulation was executed, petitioner first sought to revive his habeas case with motions filed in this court, asking the court to grant him relief from the judgment dismissing the prior federal petition, and also asking the court to allow him to add seven additional claims. Most of the claims petitioner sought to add were the same as many of those raised in the instant Petition. *See* docket no. 49 (case no. CV 01-927). Petitioner distinguished the claims from those he had already raised, stating they had been exhausted since he filed the prior federal petition, which had "claims addressing solely Ineffective Assistance of Counsel." *Id.* at 1. In denying petitioner's motions, the court found – as it does here – that petitioner sought "to present seven entirely new claims." Docket no. 51 at 3 (case no. CV 01-927). The court also found petitioner was seeking to file a second or successive habeas petition without permission from the Ninth Circuit. *Id.* at 5. When petitioner thereafter sought permission from the Ninth Circuit to file a successive petition, the Ninth Circuit simply denied the application as unnecessary. *See* Pet., Attach. C. Thus, the Ninth Circuit's order precludes this court from finding the instant Petition barred as impermissibly second or successive, but it does not speak to any other issues, including timeliness of the Petition or whether its claims are covered by the 2011 Stipulation.

In short, the instant Petition is untimely, and none of its claims are protected by the 2011 Stipulation. As such, all of the claims in the Petition should be dismissed as untimely.

IV.

RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Court issue an Order: (1) approving and accepting this Report and Recommendation; (2) granting the Motion to Dismiss (docket no. 24); and (3) directing that Judgment be entered dismissing the Petition with prejudice.

DATED: September 26, 2016

SHERI PYM
United States Magistrate Judge