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MAY 16 2019

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT G. PULLEY,

Petitioner-Appellant,

v.

DANIEL PARAMO, Warden; KAMALA D. HARRIS, Attorney General,

Respondents-Appellees.

No. 19-55508

D.C. No.
3:14-cv-02034-JLS-MDD
Southern District of California,
San Diego

ORDER

Appeal No. 19-55508 is dismissed as duplicative of closed appeal No. 16-56885.

This order served on the district court shall act as and for the mandate of this court for appeal No. 19-55508.

All pending motions in appeal No. 19-55508 are denied.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Corina Orozco
Deputy Clerk
Ninth Circuit Rule 27-7

CO/Pro Se

FILED

JUL 5 2019

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT G. PULLEY, Petitioner-Appellant, v. DANIEL PARAMO, Warden; KAMALA D. HARRIS, Attorney General, Respondents-Appellees.	No. 19-55508 D.C. No. 3:14-cv-02034-JLS-MDD Southern District of California, San Diego ORDER

Before: CLIFTON and FRIEDLAND, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 4) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

MF/Pro Se

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ROBERT G. PULLEY Petitioner, vs. D. PARAMO, Warden, et al., Respondents.	CASE NO. 14-CV-2034 JLS (MDD) **ORDER: (1) OVERRULING PETITIONER'S OBJECTIONS; (2) ADOPTING REPORT AND RECOMMENDATION; (3) DENYING PETITIONER'S MOTION TO STAY; (4) DENYING PETITIONER'S MOTION FOR LEAVE TO AMEND; AND (5) DENYING PETITIONER'S REQUEST FOR DISPOSITION** (ECF Nos. 6, 8, 20, and 39)

Presently before the Court is Petitioner Robert G. Pulley's ("Petitioner") Motion to Stay (ECF No. 6) and Motion for Leave to Amend (ECF No. 8). Also before the Court is Defendant D. Paramo's ("Defendant") Response to Petitioner's Motion to Stay and Motion for Leave to Amend. (ECF No. 12.) In addition, Petitioner has filed a Request for Disposition, (ECF No. 20) as well as a Reply in support of his motion to stay and motion to amend (ECF No. 35). Petitioner has also filed two (proposed) amended petitions. (ECF Nos. 22 and 29). Petitioner did not label these amended petitions as proposed; however, he filed them after filing the instant motion for leave

to amend, after Respondent filed his answer to the pending petition, and without leave of court. Accordingly, "rather than strike the documents from the record, the Court construes both of Petitioner's amended Petitions as 'proposed.'" (Report and Recommendation 6, ECF No. 39.)

Additionally, before the Court are: (1) Magistrate Judge Mitchell D. Dembin's Report and Recommendation ("R&R") advising that the Court deny Petitioner's Motion to Stay, Motion for Leave to Amend, and Request for Disposition (ECF No. 39); and (2) Petitioner's Objections to the R&R (ECF No. 43). Respondent did not file a reply to Petitioner's objections. Having considered the facts and the law, the Court (1) **OVERRULES** Petitioner's Objections, (2) **ADOPTS** the R&R in its entirety, (3) **DENIES** Petitioner's Motion to Stay, (4) **DENIES** Petitioner's Motion for Leave to Amend, and (5) **DENIES** Petitioner's Request for Disposition.

BACKGROUND

Magistrate Judge Dembin's R&R contains a thorough and accurate recitation of the factual and procedural histories underlying the instant motions. (*See* R&R 8–23,[1] ECF No. 39.) This Order incorporates by reference the background as set forth therein.

LEGAL STANDARD

I. Review of Report and Recommendation

Federal Rule of Civil Procedure 72(b) and 28 U.S.C. § 636(b)(1) set forth a district court's duties regarding a magistrate judge's report and recommendation. The district court "shall make a de novo determination of those portions of the report . . . to which objection is made," and "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(c); *see also United States v. Raddatz*, 447 U.S. 667, 673–76 (1980). In the absence of a timely objection, however, "the Court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." Fed.

[1] For ease of reference, all page numbers cited to are the CM/ECF numbers at the top of the page.

R. Civ. P. 72 advisory committee's note (citing *Campbell v. U.S. District Court*, 510 F.2d 196, 206 (9th Cir. 1974)).

II. Motion to Stay

This petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which requires habeas petitioners who wish to challenge their state court convictions or the length of their confinement to exhaust their state judicial remedies prior to filing a federal habeas petition. 28 U.S.C. § 2254(b)–(c); *Granbery v. Greer*, 481 U.S. 129, 134 (1987). In general, to satisfy the exhaustion requirement, a petitioner must "fairly present[] his federal claim to the highest state court with jurisdiction to consider it . . . or . . . demonstrate[] that no state remedy remains available." *Johnson v. Zenon*, 88 F.3d 828, 829 (9th Cir. 1996) (internal quotation marks and citations omitted).

Generally, claims under the AEDPA are subject to a one year statute of limitations; however, the statute of limitations period does not run while a properly filed state habeas corpus petition is pending. 28 U.S.C. § 2244(d); *see Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999); *but see Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (holding that "an application is 'properly filed' when its delivery and acceptance [by the appropriate court officer for placement in the record] are in compliance with the applicable laws and rules governing filings."). The filing of a federal habeas petition, however, does not toll the statute of limitations. *Duncan v. Walker*, 533 U.S. 167, 181–82 (2001).

The Supreme Court has noted that mixed petitions–those with exhausted and unexhausted claims–should be dismissed, but has specifically provided "habeas petitioners with the option of amending their applications to delete unexhausted claims rather than suffering dismissal." *Calderon v. United States Dist. Ct. (Taylor)*, 134 F.3d 981, 986 (1998) (discussing *Rose v. Lundy*, 455 U.S. 509, 520 (1982)). The Ninth Circuit has established two alternative ways for petitioners to seek and obtain a stay of their case to return to state court to exhaust new claims, rather than suffer a dismissal

or have to abandon unexhausted claims. *Rhines v. Weber*, 544 U.S. 269, 278 (2005); *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2003), *overruled on other grounds by Robbin v. Carey*, 481 F.3d 1143 (9th Cir. 2007).

First, if a petition contains exhausted and unexhausted claims, a petitioner may move for a stay pursuant to *Rhines v. Weber*, 544 U.S. at 277–78. Pursuant to *Rhines*, a petitioner must meet three requirements for a stay to be granted: (1) a finding of good cause for petitioner's failure to exhaust all of his claims before filing his habeas action; (2) a finding that the unexhausted claims are potentially meritorious; and (3) no indication that the petitioner engaged in intentionally dilatory tactics. *Rhines*, 544 U.S. at 278. If these conditions are met, then the court should stay the habeas case and hold it in abeyance, leaving the mixed petition in tact while the petitioner returns to state court to present his unexhausted claims. *Id.*

The second method of staying a timely filed federal habeas petition while a petitioner returns to state court to exhaust his unexhausted claims is the "withdrawal and abeyance" process–a three step procedure outlined by the Ninth Circuit in *Kelly v. Small*. 315 F.3d 1063 (9th Cir. 2003); *see also King v. Ryan*, 564 F.3d 1133, 1139–40 (9th Cir. 2009). Unlike the "stay and abeyance" procedure outlined in *Rhines*, a petitioner seeking to use *Kelly's* "withdrawal and abeyance" procedure need not show good cause for his failure to exhaust. *Id.* at 1140. Instead, a petitioner may withdraw any unexhausted claims from his federal habeas petition, return to state court, and exhaust those claims while the federal court holds the exhausted claims in abeyance. *Id.* at 1139–40. Then, petitioner may seek to amend the timely, stayed federal petition to add the newly exhausted claims. *Id.* The newly exhausted claims, however, must either be timely under the statute of limitations or they must "relate back" to the claims that were previously exhausted; that means that the newly exhausted claims must share a "common core of operative facts" with the previously exhausted claims. *Id.* at 1140–41 (quoting *Mayle v. Felix*, 545 U.S. 644, 659 (2005)).

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III. Motion for Leave to Amend

Pursuant to Rule 15(a), a plaintiff may amend his or her complaint once as a matter of course within specified time limits. Fed. R. Civ. P. 15(a)(1). "In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2).

While courts exercise broad discretion in deciding whether to allow amendment, they have generally adopted a liberal policy. *See U.S. for Benefit & Use of Ehmcke Sheet Metal Works v. Wausau Ins. Cos.*, 755 F. Supp. 906, 908 (E.D. Cal. 1991) (citing *Jordan v. Cnty. of L.A.*, 669 F.2d 1311, 1324 (9th Cir.), *rev'd on other grounds*, 459 U.S. 810 (1982)). Accordingly, leave is generally granted unless the court harbors concerns "such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." *Foman v. Davis*, 371 U.S. 178, 182 (1962). The *Foman* factors are not afforded equal weight. *DCD Programs, Ltd. V. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987). For example, "delay, by itself, is insufficient to justify denial of leave to amend." *Id.* Furthermore, "it is the consideration of prejudice to the opposing party that carries the greatest weight." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (citations omitted).

ANALYSIS

I. Summary of the R&R Conclusions

Magistrate Judge Dembin recommends that the Court deny Petitioner's Motion to Stay, Motion for Leave to Amend, and Request for Disposition. The R&R focuses on Petitioner's Motion to Stay, in which Petitioner only requests a *Rhines* stay and abeyance. Magistrate Judge Dembin concludes that Petitioner's Motion to Stay should be denied because amendment of Petitioner's petition would be futile. (*See* R&R 31–61ECF No. 39.)

Petitioner filed his motion to stay pursuant to *Rhines*; however, his petition is not mixed as it contains only fully exhausted claims and, therefore, *Rhines* does not apply. (*Id.* at 28.) Instead, *Kelly*, is the method applicable to Petitioner's case. (*Id.* at 28–29.) Accordingly, Magistrate Judge Dembin recommends that Petitioner's Motion to Stay be construed as one filed pursuant to *Kelly*. (*Id.* at 29.) *Kelly* permits a petitioner to "return to state court and exhaust the unexhausted claims while the federal court holds the fully exhausted claims in abeyance, and then seek to amend the timely, stayed federal petition by adding in the newly exhausted claims." (*Id.* (citing *King*, 564 F.3d at 1139–40).) The newly exhausted claims must be timely pursuant to AEDPA's statute of limitations, or must relate back to the previously exhausted claims. (*Id.* at 29–30.) If the newly exhausted claims are not timely, nor relate back, then amendment will be futile and the motion to stay should be denied. (*Id.* at 30.) Here, Petitioner seeks to stay his federal petition while he returns to state court to exhaust his new claims. (*Id.*) There are no unexhausted claims in Petitioner's petition and, therefore, he need not withdraw any claims. (*Id.*) Magistrate Judge Dembin addresses the new claims relating to the murder conviction (count 1), and the new claims relating to the misdemeanor battery and felony criminal threat convictions (counts 2 and 3) separately.

A. New Claims Relating to the Murder Conviction (Victim: Jimmy Misaalefua)

Petitioner bases his new claims relating to the murder charge on the existence of government documents, specifically public records from the County of San Diego and the City of Oceanside, that show that his garage was attached to his house. (*See id.* at 20.) However, "there was no dispute at trial . . . that the garage was attached to the home by an interior door;" accordingly, these government documents "have no potential to reverse the conviction," and "a stay would be futile." (*Id.* at 31.) Moreover, Petitioner's defense counsel anticipated that the prosecutor may argue that the garage was not part of Petitioner's home and specifically instructed the jury to ask the judge a question if it had any doubt as to whether the garage was considered part of the home. (*Id.* at 32–33.) Further, "[c]ontrary to Petitioner's assertion in this action . . . the

prosecutor never argued during closing that the house was detached from the garage." (*Id.* at 33.) During deliberations the jury sent the judge a note, asking "Is the garage a part of the home?" (*Id.* at 34.) "After consultation with the attorneys, the trial court responded with a note reading: 'An attached garage is part of a residence.'" (*Id.*) Magistrate Judge Dembin concludes that Petitioner's "'new evidence' is merely cumulative of undisputed evidence on an issue that was undisputed at trial," and that, therefore, "the government records, even if timely, have no bearing on [Petitioner's] murder conviction, such that a stay would be futile." (*Id.* at 35.) Magistrate Judge Dembin recommends that the Court find that a stay would be futile on this information alone; however, he goes on to explain why the statute of limitations also makes amendment futile. (*Id.*)

Petitioner's new claims based on the government records are untimely pursuant to the AEDPA's one year statue of limitations because his "conviction became final on September 10, 2013, ninety days after the California Supreme Court denied his petition for review." (*Id.*) Therefore, absent a delay of the date accrual, the AEDPA statute of limitations for filing a claim ran on September 10, 2014. (*See id.* at 36.)

An accrual date may be delayed pursuant to 28 U.S.C. § 2244(d)(1)(D) to "'one year from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." § 2244(d)(1)(d).'" (*Id.* at 36 (quoting *McQuiggin v. Perkins*, 133 S.Ct. 1924, 1932–33 (2013)).) Petitioner invokes this section, as he bases his new claims on alleged newly discovered evidence; however, "Petitioner could have discovered the factual predicate of the claims much earlier through due diligence." (*Id.* at 38.) "Petitioner could have discovered the same 'readily available' information earlier than [when he received the government records]. Petitioner, as owner of the house, knew that his garage was attached to his house. Moreover, witness after witness testified that the house could be entered directly from the garage." (*Id.* at 39.) The information contained in these letters was a matter of public record and readily available; accordingly, "the date of accrual for claims based

on this letter is the date Petitioner's conviction became final." (*Id.* at 39.) Further, even applying this section and affording Petitioner the benefit of the doubt, the one year statute of limitations has passed because Petitioner likely received the government records, at the latest, on December 26, 2013 (the City of Oceanside letter) January 2, 2014 (the County of San Diego's Assessor's Office letter). (*Id.* at 38.) Magistrate Judge Dembin recommends that the Court find that the statute of limitations on Petitioner's new claims based on the government records has expired, even if they are afforded a delayed accrual. (*Id.*)

Magistrate Judge Dembin further assesses whether delayed accrual is warranted for Petitioner's new ineffective assistance of counsel claims. (*Id.* at 40.) Similar to the prior discussion, Petitioner, as the owner of the house, "knew that the garage was attached to the home during the trial." (*Id.*) Therefore, "Petitioner discovered or should have discovered the factual grounds (that his garage was attached to his house and that his attorney had not presented certain legal theories attendant to that fact) for his ineffective assistance of counsel claims relating to Claim 1 by the close of trial." (*Id.* at 40–41.) Therefore, Magistrate Judge Dembin concludes that the one year statute of limitations has run on Petitioner's new ineffective assistance of counsel claims that are based on the government records. (*Id.* at 41.)

Magistrate Judge Dembin further concludes that neither equitable tolling nor statutory tolling apply to Petitioner's case. (*Id.* at 41–46.) Equitable tolling requires a petitioner to show he has been pursuing his rights diligently, and that extraordinary circumstances have stood in his way. (*Id.* at 41 (citing *Holland v. Florida*, 560 U.S. 631, 649 (2010)).) Petitioner has not shown he acted with reasonable diligence in pursuing the government records, nor are there any extraordinary circumstances that prevented Petitioner from timely filing a state court petition with the new claims. (*Id.* at 42–43.) Statutory tolling may be appropriate if a petitioner can show good cause for the delay, such as a bona fide investigation into a claim that warranted delay in filing multiple claims to avoid piecemeal presentation of claims. (*Id.* at 44 (citing *In re*

Robbins, 18 Cal.4th 770, 805–06 (1998)).) Petitioner argues that he was conducting an ongoing investigation into a "claim based on the Justin Pulley affidavit, such that his delay in presenting the government records-based claim is justified by good cause–the avoidance of a piecemeal presentation." (*Id.* at 45.) Petitioner cannot avail himself of such statutory tolling because his operative petition, asserting entirely different, exhausted claims, is pending in federal court, which does not statutorily toll his new claims, and "because AEDPA's statute of limitations was not tolled before it expired." (*Id.* at 45–46.) Additionally, "Petitioner's speculation that the state court may find his state petition timely under *Robbins* is insufficient to meet his burden of showing that his claims are not futile, such that a stay is appropriate." (*Id.* at 46.)

Similarly, Magistrate Judge Dembin concludes that the miscarriage of justice exception to the AEDPA statute of limitations could not apply to Petitioner's situation. (*Id.*) Under this exception, "an untimely first federal habeas petition alleging a gateway to actual innocence claim is not barred if the petitioner shows that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." (*Id.* at 46–47 (citing *McQuiggin*, 133 S.Ct at 1935).) "Petitioner has not demonstrated, and the record shows he cannot demonstrate, that his proposed new claims based on the Oceanside and San Diego certified records show actual innocence." (*Id.* at 47.) The new claims based on the government records do not show strong evidence of innocence because they include "merely additional, cumulative evidence of the fact that the garage was attached to the house, which was well-established by testimony and exhibits, and which was undisputed at trial." (*Id.* at 48.) Petitioner incorrectly believes "that the prosecutor argued that he was not entitled to a defense of home justification because the garage door was detached from the home." (*Id.* at 48–49.) The prosecutor did not make this argument and, therefore, the inclusion of the government records would not have affected the jury's decision. (*Id.* at 49.) Even if these records were the type of exculpatory evidence warranting application of the miscarriage of justice exception, these records are not new because they were readily available at trial. (*Id.*

at 50.) Not only could Petitioner have obtained these records earlier, but also Petitioner himself testified about the relevant information–whether the garage was attached to the house–and various witnesses established the same fact. (*Id.* at 51.) Magistrate Judge Dembin recommends that the Court find that the miscarriage of justice exception does not apply to Petitioner's new claims. (*Id.*)

Finally, Magistrate Judge Dembin addresses the issue of relation back and concludes that Petitioner's new claims do not relate back to the original, exhausted claims. (*Id.*) To relate back, unexhausted claims must be of the same "time and type" as the exhausted claims in a petition that has been stayed. (*Id.* at 52 (citing *Mayle v. Felix*, 545 U.S. 644 (2005)).) Petitioner's proposed new, unexhausted claims do not relate back to the claims in his pending petition; the claims in the current petition focus on the sufficiency of the evidence whereas Petitioner's proposed new claims focus on the conduct of defense counsel, the prosecutor, and the trial court. (*Id.* at 53.) Magistrate Judge Dembin recommends that the Court find that the proposed new claims do not relate back to the claims in Petitioner's current petition. (*Id.* at 54.)

B. New Claims Relating to the Misdemeanor Battery and Felony Criminal Threat Conviction (Victim: Matthew Pulley)

Petitioner bases his new claims related to claims two and three on an affidavit from Justin Pulley, Petitioner's son.[2] (*Id.*) While the affidavit has evidentiary value, the new claims are untimely, do not relate back, and do not fall within the miscarriage of justice exception to the AEDPA statute of limitations. (*Id.*)

Magistrate Judge Dembin applies the same logic to the statute of limitations issue in regard to counts two and three–Petitioner's conviction became final on September 10, 2013 and neither statutory delayed accrual nor delayed accrual for ineffective assistance of counsel claims apply here. (*See id.* at 54–59.) Statutory delayed accrual is inappropriate because there is no indication that Petitioner acted with due diligence either from the time of his trial, or the time he learned Justin Pulley was

[2] Matthew Pulley is also one of Petitioner's sons.

willing to testify, to the date on which he obtained Justin Pulley's affidavit; a span of at least fourteen months. (*Id.* at 54–56.) Petitioner's argument that he did not have his son's contact information is insufficient to warrant application of delayed accrual. (*Id.* at 57.) In regard to Petitioner's new ineffective assistance of counsel claims, Magistrate Judge Dembin concludes that Petitioner should have "discovered the factual predicate for his ineffective assistance claims relating to Justin's eyewitness account by the close of trial, such that the accrual date on those claims would be the date his conviction became final." (*Id.* at 58.) Judge Dembin recommends that the Court find that Petitioner's new claims are not subject to statutory delayed accrual, nor ineffective assistance of counsel delayed accrual. (*Id.*)

Magistrate Judge Dembin further concludes that neither equitable tolling, nor the miscarriage of justice exception, apply to Petitioner's new claims related to counts two and three. Petitioner has not shown that he has pursued Justin Pulley's affidavit with reasonable diligence, nor that any extraordinary circumstances stood in his way such that it was impossible for him to obtain the affidavit earlier. (*Id.* at 58–59). The existence of Justin Pulley's affidavit is also insufficient to warrant application of the miscarriage of justice exception because the testimony contained in the affidavit would not have changed the weight of the evidence at trial such that no reasonable juror would have convicted Petitioner. (*Id.* at 59–60 (citing *McQuiggin*, 133 S.Ct at 1928).) Petitioner admitted, at trial, to hitting Matthew Pulley; therefore, the affidavit only could have swayed the jury in regard to the felony threat count. (*Id.* at 60.) However, "the Justin Pulley affidavit . . . does not rise to the level required to reverse the conviction on the felony threat count," nor is the information contained the affidavit "'new,' in the sense required to find a miscarriage of justice," because the information was "substantially available" to Petitioner at trial. (*Id.* at 60–61.) Magistrate Judge Dembin recommends that the Court find that neither equitable tolling, nor the miscarriage of justice exception, apply to Petitioner's new claims related to counts two and three.

C. Summary and Conclusion of the R&R

In summation, Magistrate Judge Dembin recommends that the Court deny Petitioner's Motion to Stay under *Rhines* because the petition is not mixed, and under *Kelly* "because the government documents are irrelevant, and the proposed new claims are not timely, do not relate back, and the miscarriage of justice exception does not apply." (*Id.* at 61.)

Magistrate Judge Dembin also recommends that the Court deny Petitioner's Motion for Leave to Amend because the motion raises the same legal issues as the Motion to Stay and, thus, the same legal analysis is applicable. (*Id.* at 61–62.) Granting Petitioner's Motion for Leave to Amend would be futile. (*Id.* at 62.)

Magistrate Judge Dembin also recommends that the Court deny Petitioner's Request for Disposition because "[t]he Court has the inherent discretion to manage cases before it, and litigants generally cannot expedite determinations of motions they have filed by filing a reminder motion." (*Id.*)

II. Summary of Petitioner's Objections

Petitioner outlines six objections to Magistrate Judge Dembin's R&R (the objections are labeled one through seven, however there is no objection number three).[3,4] (*See* Objections 22–57, ECF No. 43.) First, Petitioner objects to Magistrate Judge Dembin's finding that the government records and the Justin Pulley affidavit are "not new," and were substantially available at trial, for purposes of applying the miscarriage of justice exception to the AEDPA's statute of limitations. (*Id.* at 22.)

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[3] Petitioner also objects to Magistrate Judge Dembin's decision regarding what facts to include, and not include, in the recitation of the relevant facts. (*See* Objections 11–22, ECF No. 43.) The Court acknowledges Petitioner's concern and has reviewed all of the facts–those contained in Magistrate Judge Dembin's R&R and not–in analyzing the areas of the R&R to which Petitioner has objected.

[4] Petitioner also asserts that Magistrate Judge Dembin misstates Petitioner's proposed claims in the R&R. (Objections 20, ECF No. 43.) Magistrate Judge Dembin simply re-worded Petitioner's new claims and provided additional information about each claim, such as the corresponding constitutional amendment or the name of the code section referenced by Petitioner. (R&R 21–23, ECF No. 39.) The claims are substantively the same and the analysis applies equally regardless of the wording.

Petitioner argues that the government records prove, definitively, that the garage was attached to the house and that, therefore, the altercation occurred in his home, which refutes the prosecutor's statement during closing argument that the incident occurred in Petitioner's garage, not his home.[5] (*Id.* at 24–25.) In regard to the Justin Pulley affidavit, Petitioner contends that the new information provides "that Matthew Pulley was a trespasser resisting a lawful eviction resulting in a lawful ejection." (*Id.* at 25.)

Second, Petitioner objects to Magistrate Judge Dembin's conclusion that the government records about the garage contain evidence that "is not exculpatory but irrelevant and cumulative." (*Id.* at 26.) Petitioner asserts that this evidence was not cumulative because, while there is evidence in the record that the garage was attached to the laundryroom, "there is only scant evidence provided that show[s] or declare[s] that the laundryroom and garage [are] connected to the house." (*Id.* at 27.) Further, Petitioner maintains that the prosecutor made arguments that led the jury to conclude that the garage was not attached to the house. (*Id.* at 27–29.) Petitioner contends that the government records would prove that his actions constituted justifiable homicide, which is not punishable and, therefore, is sufficient to open the actual innocence gateway. (*Id.* at 30–31.)

Third, Petitioner objects to Magistrate Judge Dembin's conclusion that the Justin Pulley affidavit would not have affected the jury's verdict regarding the battery count because Petitioner admitted, at trial, to hitting Matthew Pulley. (*Id.* at 31.) Petitioner argues that the affidavit "provides new evidence that shows Petitioner was justified in the use of force against Matthew," because he was a visitor who refused to leave Petitioner's home. (*Id.* at 31–33.)

Fourth, Petitioner objects to Magistrate Judge Dembin's finding that the information contained in the Justin Pulley affidavit about the threat made by Petitioner to Matthew Pulley would not have changed the jury's verdict. (*Id.* at 34.) Petitioner

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[5] The prosecutor also showed an animated video which tended to suggest that Petitioner's garage was not attached to his home; however, the video has not been lodged with the Court for review. (Objections 24, ECF No. 43.)

makes two arguments–that he did not threaten Matthew Pulley and that, if he did make the statement, it should not be considered a threat because what he said he might do–shoot, stab or kill Matthew Pulley–would have been lawful in light of his refusal to leave Petitioner's home. (*Id.* at 35.)

Fifth, Petitioner objects to Magistrate Judge Dembin's conclusion that Petitioner's Motion to Stay should be denied under *Rhines* because Petitioner has not filed a mixed petition. (*Id.* at 40.)

Sixth, and lastly, Petitioner objects to Magistrate Judge Dembin's recommendation "that the Motion to Stay and Motion for Leave to Amend be denied because Petitioner's new claims are untimely and [are] not entitled to statutory tolling, equitable tolling and do not qualify for the relation back doctrine." (*Id.* at 43.) Petitioner asserts that all of his new claims "are entitled to the Schlup/McQuiggin 'actual innocence' equitable exception to the untimeliness bar and 'cause and prejudice' standard allowing untimely and procedurally defaulted claims to be heard on their merits." (*Id.*) Petitioner argues that the government records support a finding that the prosecutor's showing, during closing argument, of a video that showed Petitioner "'coming out' of his house by entering a detached garage structure" constituted a "fundamental error" at trial, such that he should be granted leave to pursue his new claims in state court. (*Id.* at 45.) The fundamental error alleged is the introduction of false evidence. (*See id.* at 47–48.) Further, Petitioner asserts that because the garage was attached, and because Misaalefua (the decedent) entered the garage unlawfully and threatened to harm Petitioner, the murder should be considered justifiable homicide such that Petitioner is actually innocent. (*See id.* at 48.) Petitioner also argues that the Justin Pulley affidavit exonerates him of battery and criminal threat (*Id.* at 52.) Petitioner contends that his defense counsel failed to interview Justin Pulley and that, had Justin Pulley been interviewed, he would have testified at trial that Matthew Pulley committed "felony robbery involving a threat with a deadly weapon," and that Petitioner's actions constitute "lawful resistance." (*Id.* at 53.) Petitioner states

that his defense counsel's decision not to interview Justin Pulley is fundamental error. (*Id.* at 55.)

Petitioner concludes by arguing that all of his new claims qualify for the miscarriage of justice exception, such that his federal habeas petition should be stayed and he should be afforded the opportunity to return to state court to exhaust his new claims. (*See id.* at 57–58.)

III. Court's Analysis

The Court will review, *de novo*, each part of the R&R to which Petitioner has objected.

A. Objection One

Petitioner's first objection focuses on whether the government records and the Justin Pulley affidavit are new evidence that warrant the application of the miscarriage of justice exception. (Objections 22, ECF No. 43.)

"[A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . or, expiration of the statute of limitations." *McQuiggin*, 133 S.Ct. at 1928. To open the miscarriage of justice exception to the AEDPA's one year statute of limitations, a petitioner must "'persuade[] the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'" *McQuiggin*, 133 S.Ct. at 1928 (quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995)). This "standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do." *Schlup*, 513 U.S. at 329. "[T]he newly presented evidence may indeed call into question the credibility of the witnesses presented at trial. In such a case, the habeas court may have to make some credibility assessments." *Id.* "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence–whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence–that was not presented at trial." *Id.* at 325. Generally, "if a petitioner . . . presents [new]

evidence of innocence so strong that a court cannot have confidence in the outcome of the trial . . . , the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims." *Id.* at 316. To be considered "new," the evidence must not have been "substantially available" at trial. *See McQuiggin*, 133 S.Ct. at 1929, 1935 (suggesting that affidavits obtained by petitioner eleven years after conviction became final were substantially available at trial and, therefore, not new).

Petitioner contends that both the government records showing that his garage was attached to his house and the affidavit of Justin Pulley qualify as new evidence of actual innocence such that he should be permitted to "pass through the gateway" and the Court should consider the merits of his new, unexhausted claims.

Petitioner asserts that had the government records, which prove that "Petitioner's garage is part of his inhabited dwelling house," been presented at trial, then "no reasonable judge or juror would have concluded that the decedent was not shot inside Petitioner's house, nor would they have concluded that the code (§198.5) [,which provides that an individual using deadly force in his residence shall be presumed to have had a reasonable fear of imminent peril or death when force is used against one who "unlawfully and forcibly" entered the residence,] did not apply to Petitioner's garage." (Motion to Stay 7, ECF No. 6.) Petitioner effectively argues that had the Oceanside and San Diego records been presented at trial, then no reasonable juror would have voted to find him guilty beyond a reasonable doubt because a reasonable juror would have concluded that Petitioner was justified in using deadly force against the decedent, who Petitioner alleges was committing a "forcible and atrocious burglary" at the time Petitioner fired the fatal shots at decedent. (*Id.*)

These government records do not warrant application of the miscarriage of justice exception to the AEDPA's statute of limitations for two reasons. First, this is not strong evidence of actual innocence that calls into question the outcome of Petitioner's trial. *See Schlup*, 513 U.S. at 316. At trial Dexter Ena, the decedent's nephew, testified to the fact that Petitioner's garage was attached to his house: "as soon

as we got to the garage, I stopped outside and my uncle went in. [Petitioner] went in the house through the interior door and my uncle stopped at the interior door." (Lod. 11-13 at 49.) Matthew Lau-Young, the decedent's brother-in-law, also testified to this information: "[t]he garage was open. He walked inside the garage and he – I don't know, about maybe five to ten feet from the inside interior door of the garage." (Lod. 11-15 at 55.) Accordingly, the information contained in the government records–that the garage was attached to the house–is not new evidence of actual innocence.[6] The jury considered this information during deliberations and, therefore, it cannot be that this same information warrants application of the miscarriage of justice exception. Second, Petitioner admits that this evidence was "readily available" at trial, such that is does not qualify as "new" evidence. (Motion to Stay 7, ECF No. 6.) Not only has Petitioner admitted this fact, but also these are public records that any of Petitioner's family members could have obtained on his behalf.[7] Moreover, Petitioner, as the homeowner, *knew* the information contained in the records and testified that "the garage is my house." (Lod. 11-15 at 183.) Only new evidence of actual innocence can open the gateway to a miscarriage of justice claim. The government records do not meet this demanding standard.

Petitioner also argues that the Justin Pulley affidavit warrants allowing him to pass through the gateway and pursue his unexhausted claims. Petitioner states that had

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[6] Petitioner contends that the prosecutor, during closing argument, said that Petitioner could not avail himself of the "defense of home" justification for killing the decedent because the garage was not attached to the home. (*See* Motion to Stay 6, ECF No. 6.) The Court acknowledges that the prosecutor did argue that Petitioner could not rely on the "defense of home" justification; however, she did not base her argument on the fact that the garage was not attached. (Lod. 11-18 at 90 (stating that the location of the garage is a red herring, and that Petitioner cannot avail himself of the "defense of home" justification because the Petitioner brought the decedent into the garage where the altercation occurred)). Moreover, the trial court instructed the jury that the closing arguments were not evidence. (Lod. 11-18 at 57.) Similarly, any summary exhibits used by the prosecutor, including the animated videos, were not evidence admitted at trial.

[7] Petitioner argues that his defense counsel failed to investigate and obtain such information for trial; however, Petitioner could have demanded that he obtain the records or could have had another individual obtain them for him if he believed the government records were essential to his defense (as opposed to his testimony, and the testimony of various other witnesses).

Justin Pulley testified at trial, he would have said "that Petitioner made no threats to Matthew Pulley nor made any threats in reference to Matthew at anytime during the events that occurred in front of Petitioner's house. . . . Justin would also have testified that Petitioner demanded Matthew leave Petitioner's house at least two times before the two (Petitioner and Matthew Pulley) began to fight," such that no reasonable juror could have found him guilty, beyond a reasonable doubt, of counts two or three. (*Id.* at 9.)

Like the government records, the Justin Pulley affidavit does not meet the demanding *Schlup* standard. First, The affidavit includes information that Petitioner himself testified about at trial, including that he acted in response to Matthew Pulley's "grabbing" one of Petitioner's golf clubs, which Petitioner believed Matthew could have used to strike Petitioner, and that Petitioner did not threaten to kill Matthew.[8] (Lod. 11-17 at 132, 185.) Further, had Justin Pulley testified, it is possible that the jury could have afforded little or no weight to his testimony, or it could have decided to believe Matthew Pulley, the victim who did testify, over Justin Pulley. This is not the sort of information, therefore, that causes the Court to question the reliability of the trial. *See Schlup*, 513 U.S. at 316. Further, Petitioner admits that Justin Pulley's testimony would have corroborated Petitioner's testimony. (Motion to Stay 8–9, ECF No. 6.) Accordingly, this is not new evidence of actual innocence but rather merely evidence that may have helped bolster Petitioner's defense at trial.

Second, like the government records, Justin Pulley's testimony was substantially available at trial. Petitioner acknowledges that Justin Pulley was "the only eyewitness who was willing, able and available to corroborate Petitioner's claim." (Motion to Stay 8–9, ECF No. 6.) Petitioner has argued that his "defense attorney failed to investigate, interview, call, secure, or subpoena" Justin Pulley, but he could have insisted such

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[8] Petitioner admitted, at trial, to hitting Matthew Pulley. (Lod. 11-17 at 129–32.) However, Petitioner is arguing that Justin Pulley's testimony would have led the jury to conclude that the battery was justified because Matthew Pulley was a trespasser on Petitioner's property. (*See* Motion to Stay 9, ECF No. 6.)

contact have been made. Petitioner knew Justin Pulley was an eyewitness to the events leading to counts two and three, and Justin Pulley was sufficiently available to Petitioner such that this affidavit does not constitute new evidence. The Court also notes that some of the information Petitioner has flagged as the most important, specifically that Matthew Pulley did not live at Petitioner's home and was, therefore, trespassing, and that Petitioner had asked him to leave at least two times, was certainly information about which Petitioner himself could have testified at trial.

For these reasons, the Court concludes that neither the government records nor the Justin Pulley affidavit constitute new evidence and, therefore, the Court overrules Petitioner's first objection.

B. Objection Two

Petitioner's second objection focuses on Magistrate Judge Dembin's conclusion that the information contained in the government records–that his garage was attached to his house–"is not exculpatory, but irrelevant and cumulative." (Objections 26, ECF No. 43.) As explained above, the fact that Petitioner's garage was attached to his home was elicited at trial more than once. (*See* Lod. 11-13 at 49, Lod. 11-15 at 55.) That the prosecutor stated otherwise during closing argument does not negate this information. Moreover, the jury was instructed to only consider the evidence admitted, and not to consider the arguments made by the prosecutor in closing, during its deliberations. (*See* Lod. 11-18 at 57.) The Oceanside and San Diego government records do not offer new evidence of innocence because the evidence contained therein was admitted during the trial. Therefore, these records do contain information that is cumulative of what was presented at trial and what was considered by the jury. Further, the records cannot be considered the type of exculpatory evidence contemplated by *Schlup* because the same information was known to the jury and was insufficient to warrant an acquittal.

Accordingly, the Court overrules Petitioner's second objection.

C. Objection Three

Petitioner's third objection challenges the finding that the information contained

in the Justin Pulley affidavit would not have changed the jury's verdict as to count three for battery because it is not the type of exculpatory evidence imagined in *McQuiggin* and *Schlup*. (Objections 31, ECF No. 43.) Petitioner argues that had Justin Pulley testified at trial to the information contained in his affidavit, the jury would have learned that Matthew Pulley did not live with Petitioner, and that Petitioner had asked Matthew Pulley to leave his residence at least two times, such that Petitioner was justified in hitting Matthew Pulley. (*See* Motion to Stay 9, ECF No. 6.)

New evidence of innocence only permits a habeas petitioner to pass through the gateway and argue the merits of his unexhausted claim if it calls into question the outcome of the trial. *Schlup*, 513 U.S. at 316. The evidence must be that which would have likely led the jury to an acquittal. *See McQuiggin*, 133 S.Ct. at 1928 (quoting *Schlup*, 513 U.S. at 329) ("'[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'"). The information contained in the Justin Pulley affidavit is not that sort of evidence.

First, Petitioner admitted to hitting Matthew Pulley at trial. (Lod. 11-17 at 129–32.) Second, there is no indication from Petitioner, or from the trial transcript, that the jury relied on faulty information that Matthew Pulley lived at Petitioner's house in deciding whether Petitioner should be convicted of battery. In fact, Angela Pulley, Petitioner's wife, responded to the following question at trial: "Did Matthew live with you from the time you moved to Brown Street throughout most of that period of time," which suggests that Matthew Pulley no longer lived with Petitioner. (Lod. 11-14 at 110.) Angela Pulley also testified that "Matthew was visiting for Christmas," which is when the events at the center of this case occurred. (Log. 11-14 at 153.) Further, Matthew Pulley responded to the following questions: "At what point did you move out of the home when you went into the Military?" and "Did you come home from Fort Carson [,Colorado,] to spend time with your family on Brown Street for Christmas?" (Lod. 11-14 at 221.) Third, Petitioner testified to the fact that he had asked Matthew

Pulley to leave his home, thereby implying that Matthew Pulley did not leave at Petitioner's home. (*See* Lod. 11-17 at 132 ("You know what? Just, you know, don't come back.").) The jury had sufficient information to conclude that Matthew Pulley did not live at Petitioner's home without the addition of the information included in Justin Pulley's affidavit; therefore, the jury likely would not have reached a different outcome had it considered that information during deliberations.

Moreover, *McQuiggin* and *Schlup* require that the evidence in question be new for a Court to find that it warrants application of the miscarriage of justice exception, which, theoretically, assumes that the jury's decision would have been different. *See McQuiggin*, 133 S.Ct. at 1929. Even if this evidence were somehow sufficiently exculpatory to have changed the jury's mind, which the Court does not believe it is, this information was readily available to Petitioner, as he could have testified about it at trial.

For these reasons, the Court overrules Petitioner's third objection.

D. Objection Four

Petitioner's fourth objection protests the conclusion that the information contained in the Justin Pulley affidavit would not have changed the jury's verdict as to count two for criminal threats because it is not the type of exculpatory evidence contemplated by *McQuiggin* and *Schlup*. (Objections 34, ECF No. 43.) The same standard outlined in the previous section applies here.

Petitioner stated at trial that he did not threaten to kill Matthew Pulley. (Lod. 11-17 at 185.) Therefore, Justin Pulley could have merely corroborated Petitioner's statements, not offered new information in this respect.[9] Further, there is no indication that the addition of the information contained in the Justin Pulley affidavit would have

[9] Petitioner has also argued, seemingly in the alternative, that any threat he did make toward Matthew Pulley was "a statement of Petitioner's lawful resistance to the felony robbery involving a threat with a deadly weapon [the golf club,] and the action described in the alleged threat, if taken, would have been justifiable under California law." (Objections 35–36, ECF No. 43.) The Court notes that this argument was not presented in Petitioner's Motion to Stay and, therefore, is not taken into account for purposes of the Court's *de novo* review of the issues in the R&R to which Petitioner has objected.

changed the outcome of the trial, or would have precluded the jurors from finding, beyond a reasonable doubt, that Petitioner threatened Matthew Pulley. There is no certainty that the jury would have found Justin Pulley's testimony more credible than Matthew Pulley's, notwithstanding Petitioner's argument to the contrary. (*See* Motion to Stay 9, ECF No. 6.) Petitioner contends that "[b]ecause Matthew Pulley had admitted during trial to being untruthful to police, had admitted during trial to being untruthful to fire fighters, had a motive to keep the incident involving his under age drinking from getting back to his military command, and had a motive (of avoiding criminal prosecution) to continue his untruthfulness in court, there is a reasonable probability that the jury would have given greater credibility to Justin Pulley as a neutral unbias eyewitness." (*Id.*) However, it is entirely possible that the jury would not have found Justin Pulley more credible, as the jurors could have viewed Justin Pulley as biased in favor of his father. A reasonable juror could have chosen to believe Matthew Pulley over Justin Pulley and, therefore, the Court cannot state, with any certainty, that the addition of Justin Pulley's testimony would have affected the jury's decision. Like the information regarding the battery count, Justin Pulley's testimony regarding the threat count does not rise to the level of exculpatory evidence imagined by *McQuiggin* and *Schlup*, and, therefore, does not lead the Court to believe that this information would have changed the jury's decision or the outcome of the trial.

Accordingly, the Court overrules Petitioner's fourth objection.

E. Objection Five

Petitioner's fifth objection relates to Magistrate Judge Dembin's conclusion that Petitioner is not entitled to a "stay and abeyance" pursuant to *Rhines* because he has not filed a mixed petition. (Objections 40, ECF No. 43.)

Rhines v. Weber permits a habeas petitioner who has submitted a mixed petition, one that includes both exhausted and unexhausted claims, to move for a "stay and abeyance." 544 U.S.269, 277-78 (2005). If the stay is granted, the petitioner may return to state court and present his unexhausted claims. *Id.* at 278. If the petitioner has not

filed a mixed petition, then *Rhines* is inapplicable.

In this case, Petitioner's operative habeas petition contains only exhausted claims. (Petition, ECF No. 1.) Accordingly, *Rhines* "stay and abeyance" procedure is irrelevant to Petitioner's case. When there is no mixed petition at issue such that *Rhines* does not apply, district courts apply the *Kelly v. Weber* "withdraw and abeyance" process. 315 F.3d 1063 (9th Cir. 2003), *overruled on other grounds by Robbin v. Carey*, 481 F.3d 1143 (9th Cir. 2007); *see e.g.*, *Broadnax v. Cate*, 2012 WL 5335289, at *5–6 (S.D. Cal. Oct. 26, 2012) ("Since *Rhines*, district courts have continued to apply the *Kelly* procedure to requests to stay fully exhausted petitions, even when the petition was never a mixed petition."). The petition in this case contains only exhausted claims; therefore, the petition is not mixed and *Rhines* is inapplicable. The Court notes that after reaching this conclusion, Magistrate Judge Dembin did not simply end the inquiry; but rather, analyzed whether Petitioner's petition should be stayed pursuant to *Kelly*, the appropriate case under which to analyze Petitioner's claims. As such, the conclusion that Petitioner's Motion to Stay should be denied pursuant to *Rhines* does not prejudice Petitioner.

For the forgoing reasons, the Court overrules Petitioner's fifth objection.

F. Objection Six

Plaintiff's sixth objection challenges the conclusion that his "new claims are untimely and [are] not entitled to statutory tolling, equitable tolling and do not qualify for the relation back doctrine." (Objections 43, ECF No. 43.) Petitioner seems to object to the majority of the R&R here; however, upon closer examination Petitioner simply reiterates his contention that his claims qualify for the miscarriage of justice exception. (*See id.* at 43–57.) Notwithstanding that this objection focuses primarily on the miscarriage of justice exception, out of an abundance of caution, the Court will review, *de novo*, the issues of whether Petitioner's new claims are timely, whether Petitioner is entitled to statutory or equitable tolling, and whether the relation back doctrine

applies here.[10]

(I) Timeliness

Petitioner's conviction became final on September 10, 2013, such that the AEDPA's statute of limitations for filing a claim expired on September 10, 2014. 28 U.S.C. § 2244(d)(1)(A). However, there are two situations in which delayed accrual is warranted, such that the statute of limitations begins to run at a later time.

First, 28 U.S.C. § 2244(d)(1)(D) allows petitioners to file claims one year from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." Here, Petitioner cannot avail himself of such delayed accrual because the newly discovered evidence could have been found much earlier through due diligence. The San Diego County records were sent on December 19, 2013, and the City of Oceanside records were sent on December 12, 2013. (Motion for Leave to Amend Exs. B & C, ECF No. 8 at pp. 44) The Court does not know exactly when Petitioner received these records; however, it is clear that this information was available to Petitioner prior to December 2013. Not only did Petitioner know that his garage was attached to his house, but also multiple witnesses testified about the interior door leading directly from Petitioner's garage into his house at trial. These documents were also public records readily available well before the trial occurred. Thus, Petitioner could have discovered this evidence significantly earlier, even before trial, had he acted with due diligence. Morever, even if the Court were to find that Petitioner acted with due diligence, which it has not, and assuming it took two weeks for the mail to arrive, Petitioner's new claims related to these records would have began to accrue on or about December 26, 2013 (the San Diego County record),

[10] Petitioner's contention that the State withheld exculpatory evidence is confusing. (Objections 47, ECF No. 43.) It is unclear whether Petitioner is accusing the state of withholding exculpatory evidence, which he has not identified, or whether Petitioner considers the unauthenticated video material used during the State's closing argument as the exculpatory evidence. Regardless, this argument was not raised in Petitioner's Motion to Stay or Motion for Leave to Amend; accordingly, the Court will not address this argument in its *de novo* review. Similarly, the Court will not other arguments raised for the first time in Petitioner's Objections.

and January 2, 2014 (the Oceanside City record), more than a year ago.

Similarly, Petitioner could have discovered the information contained in the Justin Pulley affidavit well before October , 2014. Petitioner argues that his defense counsel told him Justin Pulley "refused to be interviewed and refused to testify;" however, Petitioner does not explain any efforts that he, or his other family members made, to reach Justin Pulley in an effort to have him testify on Petitioner's behalf. (Motion for Leave to Amend 7, ECF No.8.) Petitioner asserts that he did not learn until August 2013 that Justin was willing and able to testify; however, all along he knew that Justin Pulley was an eyewitness to the altercation between Petitioner and Matthew Pulley and, therefore, the Court is not convinced that Petitioner acted with due diligence in his pursuit of the information contained in the Justin Pulley Affidavit. (*Id.* at 17.) Moreover, even if the Court accepts that Petitioner did not know Justin Pulley was willing to testify before August 2013, Petitioner's only explanation for why he did not obtain the affidavit until October 1, 2014, fourteen months later, is that he did not have his son's contact information. (*Id.* at 7, 17.) This explanation is insufficient to satisfy the due diligence requirement and warrant application of § 2244(d)(1)(D)'s delayed accrual.

Second, the AEDPA statute of limitations does not begin to run on ineffective assistance of counsel claims until the petitioner discovers, or could have discovered through the exercise of due diligence, facts suggesting that his attorney's performance was unreasonable and that there is a reasonable probability that, but for his attorney's ineffective performance, the outcome of petitioner's case would have been different. *Hasan v. Galaza*, 254 F.3d 1150, 1154 (9th Cir. 2001). In regard to the government records, Petitioner, as a home owner knew, or should have known through the exercise of due diligence, at the time of his trial, that such information was readily available and could have been presented by his attorney. Therefore, Petitioner knew, or should have known, at the time of trial the factual predicate for his ineffective assistance of counsel claim based on defense counsel's failure to present such evidence.

Likewise, Petitioner knew, at trial, that Justin Pulley was an eyewitness to the events leading to the charges against him, and that witnesses who refused to testify could be subpoenaed. (*See* Lod. 11-15 at 42–44 (Matthew Pulley's testimony regarding being subpoenaed to come to California to testify)). Accordingly, Petitioner knew, or should have known, at the time of trial the factual predicate for his ineffective assistance of counsel claim based on defense counsel's failure to procure Justin Pulley as a witness.

Given that the AEDPA statute of limitations has run on Petitioner's new claims, and because neither delayed accrual pursuant to 28 U.S.C. § 2244(d)(1)(D) nor delayed accrual for the ineffective assistance of counsel claims apply to Petitioner's new claims, the Court finds that Petitioner's new claims are untimely.

(ii) Statutory Tolling

The AEDPA's statute of limitations is tolled from the time a petitioner's first state habeas petition is filed until the state collateral review is completed, but is not tolled when no petition is pending (for example, between the conclusion of direct review and the filing of the first collateral challenge). *Thorson v. Palmer*, 479 F.3d 643, 646 (9th Cir. 2007) (citing *Nino v. Galaza*, 183 F.3d 1003, 1006 (1999)). The AEDPA's statute of limitations is not tolled while a federal habeas petition is pending. *Duncan v. Walker*, 533 U.S. 167, 182 (2001). Petitioner's direct review and first state habeas review are concluded, and Petitioner has not filed a state habeas petition related to his new claims.[11] Petitioner's new claims are not statutorily tolled as a result of his pending federal habeas petition. Furthermore, Petitioner cannot now take advantage of statutory tolling by filing a state petition seeking to exhaust his new claims because the AEDPA's statute of limitations has expired. *See Pace v. DiGuglielmo*, 544 U.S. 408, 410 (2005) (holding that an untimely state post-conviction petition is not "properly filed" within the meaning of 28 U.S.C. § 2244(d)(2)). Petitioner argues that the state

[11] If Petitioner filed another state habeas petition after he filed the instant motions with this Court, they were filed well after the AEDPA's one year statute of limitations expired.

court will find his new petition timely per *In re Robbins*, 18 Cal.4th 770 (1998), in which the California Supreme Court explained that California courts may consider a substantially delayed claim on the merits if the petitioner can establish good cause for the delay, presumably such that his proposed future state court petition would statutorily toll his new claims. This assertion is mere speculation and insufficient to overcome the Court's conclusion that granting Petitioner leave to amend his petition would be futile because the statute of limitations has run on his claims.

The Court finds that statutory tolling does not apply to Petitioner's new claims.

(iii) Equitable Tolling

The AEDPA's statute of limitations is equitably tolled when a habeas petitioner shows "(1) that he has been pursing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Holland v. Florida*, 560 U.S. 631, 649–50 (2010) (internal citations omitted). The Ninth Circuit has noted that "equitable tolling will not be available in most cases, as extensions of time will only be granted if 'extraordinary circumstances' beyond a prisoner's control make it impossible to file a petition on time." *Calderon v. U.S. Dist. Court (Beeler)*, 128 F.3d 1283, 1288 (9th Cir. 1997), *overruled on other grounds by Calderon v. United States Dist. Court (Kelly)*, 163 F.3d 530 (9th Cir. 1998).

As explained above, Petitioner did not act with due diligence in respect to obtaining the government records nor the Justin Pulley affidavit. Moreover, Petitioner has not identified any extraordinary circumstances that prevented him from obtaining the documents or affidavit sooner, or from filing a petition with his new claims related to the government documents as early as December 2013 or January 2014, after he received the records.

The Court concludes that equitable tolling does not apply to Petitioner's new claims.

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(iv) Relation Back

The relation back doctrine provides that an amended habeas petition relates back to the date of the operative petition when the new claims in the amended petition "arose out of the conduct, transaction, or occurrence set out–or attempted to be set out–in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). In a habeas case, Federal Rule of Civil Procedure 15(c)(1)(B) must be read in the context of Rule 2(c) of the Habeas Rules (the Rules Governing Section 2254 Cases in the United States District Courts), which requires petitioners to plead their claims with particularity, and in the context of the AEDPA's strict time limits, such that only those claims of the same "time and type" relate back to timely claims in a fully exhausted petition. *Mayle v. Felix*, 545 U.S. 644 (2005); *see also King v. Ryan*, 564 F.3d 1133 (9th Cir. 2009). Claims are not considered of the same time and type "simply because they relate to the same trial, conviction, or sentence as a timely filed claim." *Mayle*, 545 U.S. at 656–57. To determine whether claims are of the same time and type, courts consider whether the petitioner would have had to state the claims separately under Habeas Rule 2(c). *See e.g.*, *Hebner v. McGrath*, 543 F.3d 1133, 1139 (9th Cir. 2008). In *Hebner*, the Ninth Circuit explained that Rule 2(c) "requires a petitioner to 'specify all [available] grounds for relief' and to 'state the facts supporting each ground.'" *Id.* Claims that are supported by "'separate congeries of facts'" generally must be filed separately. *See id.*

Here, Petitioners exhausted, timely claims focus on the sufficiency of the evidence at trial, while his new, unexhausted, untimely claims arise from Petitioner's discovery of government records confirming that his garage was attached to his house and Petitioner's acquisition of the Justin Pulley affidavit and focus on the conduct of his defense counsel, the prosecutor, and the trial court. Similar to the situation in *Hebner*, in which the court found that the admission of evidence at trial and the instructions provided to the jury at the close of evidence constituted two separate occurrences and, therefore separate claims, the Court concludes that Petitioner's claims related to the sufficiency of the evidence and those related to the conduct of defense

counsel, the prosecutor, and the trial court compose separate claims. *Hebner*, 543 F.3d at 1139. Accordingly, Petitioners new, untimely, unexhausted claims do not relate back to his previously filed, timely, exhausted claims.

(v) Actual Innocence

In regard to the actual innocence claim, the Court has already addressed whether the new evidence presented by Petitioner warrants opening the gateway such that the Court will consider Petitioner's new claims on the merits. *See supra* pp. 15–18. Nonetheless, the Court reiterates that Petitioner's post-conviction desire to include additional information in his defense, which was available to him at the time of trial, is not grounds for applying the miscarriage of justice exception. Rather *McQuiggin* and *Schlup* make clear that the gateway is only opened when a habeas petitioner present new evidence of actual innocence, which was not substantially available at trial, to the district court such that the court is no longer confident in the outcome of the trial. *See*, *See McQuiggin*, 133 S.Ct. at 1928–29; *Schlup*, 513 U.S. at 298–325, . The evidence Petitioner now wishes to have the Court consider–the government records and the information contained in the Justin Pulley affidavit–is not that type of evidence. First, all of that information was substantially available to Petitioner at trial. Not only are the government records public documents that could have been obtained for trial, but also Petitioner, as the homeowner, knew all of the information contained therein. The information Justin Pulley would have testified to was also known to Petitioner as he was not only present, but participated in the altercation with Matthew Pulley. Accordingly, any information Justin Pulley would have testified to would merely have corroborated what Petitioner did, or could have, testified to himself. That Petitioner's defense counsel failed to present this evidence, while troublesome, does not automatically transform the government records or the Justin Pulley affidavit into new evidence of actual innocence.

"The meaning of actual innocence . . . does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable

juror would have found the defendant guilty." *Schlup*, 513 U.S. at 329. This evidence does not lead the Court to this conclusion and, thus, does not open the gateway for an actual innocence claim.

Accordingly, the Court overrules Petitioner's sixth objection.

G. Summary of Analysis

The Court concludes that because Petitioners new, unexhausted claims are untimely, do not qualify for statutory or equitable tolling, do not relate back to the claims in the operative petition, and do not warrant application of the miscarriage of justice exception, granting Petitioner's Motion to Stay or Motion for Leave to Amend would be futile. Accordingly, the Court **ADOPTS** Magistrate Judge Dembin's recommendation that the Court **DENY** Petitioner's Motion to Stay, Motion for Leave to Amend, and Request for Disposition.

CONCLUSION

For forgoing reasons, the Court the Court (1) **OVERRULES** Petitioner's Objections, (2) **ADOPTS** the R&R in its entirety, (3) **DENIES** Petitioner's Motion to Stay, (4) **DENIES** Petitioner's Motion for Leave to Amend, and (5) **DENIES** Petitioner's Request for Disposition.

IT IS SO ORDERED.

DATED: September 1, 2015

Janis L. Sammartino
Honorable Janis L. Sammartino
United States District Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ROBERT G. PULLEY, Petitioner, v. D. PARAMO, Warden, et al., Respondents.	Case No.: 14-cv-2034-JLS-MDD **REPORT AND RECOMMENDATION ON PETITIONER'S** **1) MOTION TO STAY;** **2) MOTION FOR LEAVE TO AMEND; AND,** **3) REQUEST FOR DISPOSITION** **[ECF Nos. 6, 8, 20]**

This Report and Recommendation is submitted to United States District Judge Janis L. Sammartino pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rules 72.1(c) and HC.2 of the United States District Court for the Southern District of California. For the reasons set forth herein, the Court **RECOMMENDS** Plaintiff's Motion to Stay be

DENIED, that Plaintiff's Motion for Leave to Amend be **DENIED**, and that Petitioner's "Request for Disposition" be **DENIED**.

I. SUMMARY

In the early morning hours of December 25, 2010, Petitioner hit his adult son Matthew Pulley during an altercation fueled by alcohol. The argument continued in front of the house, and, according to Matthew, Petitioner told him to leave the home and threatened to kill or seriously injure Matthew as Petitioner walked back into the home. Matthew left. A little while later, Matthew called a non-emergency number for a welfare check on his mother. Emergency personnel and police responded to the call. Petitioner had to be restrained while the emergency personnel and police checked on Mrs. Pulley, who was fine.

Afterwards, Petitioner went across the street to apologize for the noise to his neighbor, Jimmy Misaalefua, who was in his garage drinking with family members. For unknown reasons, the men began fighting. Petitioner ran or walked back to his own house, and Misaalefua followed Petitioner across the street and into Petitioner's garage. Petitioner went inside his house, and returned to the garage

moments later with a gun. Petitioner shot Misaalefua, who died within minutes.

Petitioner was charged with the murder of Misaalefua, and also with battery and criminally threatening Matthew Pulley. At trial, Petitioner admitted he killed Misaalefua, but argued the killing was justified because he was acting in defense of self and home. Petitioner also admitted he hit his son, but denied he had threatened his son.

On July 22, 2010, Petitioner was convicted of second degree murder of Misaalefua with findings that Petitioner personally and intentionally discharged a firearm, proximately causing death to a person other than an accomplice during the perpetration of a felony ("Count 1"). (ECF No. 1 at 2:13-20); *see* Cal. Penal Code §§ 187(a), 12022.53(a) and (d), and 12022.5(a). Petitioner was also convicted of misdemeanor battery and felony criminal threat against his son, Matthew ("Counts 2 and 3"). (*Id.* at 2:21-23); *see* Cal. Penal Code §§ 242, 422. Petitioner was sentenced to 40 years to life on September 2, 2011. (*Id.* at 2:34). Petitioner filed a direct appeal, challenging his murder conviction on the grounds that the evidence was insufficient as a matter of law to show he did not act in self-defense, and that his

conviction should be reduced to voluntary manslaughter because he harbored no malice towards Misaalefua. (Lod. 3). On March 22, 2013, Petitioner's conviction was affirmed on direct appeal, and review of that decision was summarily denied on June 12, 2013. (ECF No. 6 at 2:25-26; Lod. 5, 7).

On August 29, 2014, Petitioner, a state prisoner proceeding pro se, filed this Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254. (ECF No. 1). On September 5, 2014, this Court issued a Notice Regarding Possible Failure to Exhaust and One Year Statute of Limitations. (ECF No. 2).

On October 27, 2014, Petitioner filed his Motion to Stay and Motion for Leave to Amend. (ECF Nos. 6, 8). In his motion to stay, Petitioner asserts that good cause exists for granting him a stay under *Rhines v. Weber*, 544 U.S. 269 (2005) to exhaust three new claims, based upon newly discovered evidence not presented at trial, that demonstrates he is entitled to the miscarriage of justice exception enunciated in *Schlup v. Delo*, 513 U.S. 298 (1995). (ECF No. 6 at 2:1-9).

First, Petitioner presents documents from the City of Oceanside and County of San Diego certifying that Petitioner's garage, the location

of the killing, was attached to his house. Petitioner contends that this new evidence that his garage was attached exculpates him from the murder conviction, and raises constitutional issues of ineffective assistance of counsel and due process. Petitioner asserts that the prosecutor erroneously argued at trial that his house was detached and that the justification of defense of home was not applicable, and that Petitioner's attorney failed to rebut, with evidence and legal propositions, the prosecutor's erroneous assertion that the garage was detached.

Second, Petitioner presents an affidavit from his son Justin Pulley as new evidence of Petitioner's innocence of Counts 2 and 3 (battery and criminal threat). The gist of this argument is that Petitioner's trial counsel was ineffective for failing to investigate or present Justin as a witness to the altercation between Petitioner and his other son Matthew, because Justin was available to testify that his father did not hit or threaten Matthew.

In his motion for leave to amend, Petitioner requests that the Court grant him leave to amend his Petition after returning from state

court to add thirteen new claims (all derived from the allegedly new evidence) to be exhausted in state court. (ECF No. 8).

On November 24, 2014, Respondent filed a combined response in opposition to Petitioner's Motion to Stay and Motion for Leave to Amend. (ECF No. 12). Respondent contends the motions should be denied for failure to show good cause and on the grounds that the unexhausted claims are time-barred. (*Id.*). Petitioner filed a motion styled as a "Request for Disposition" of the Motions to Stay and For Leave to Amend on January 7, 2015. (ECF No. 20). Petitioner filed a reply in support of his motion to stay and motion to amend on February 23, 2015. (ECF No. 35).

Petitioner has also filed two (proposed) amended Petitions. (ECF Nos. 22, 29). Although Petitioner filed the amended Petitions without marking them "proposed," both amended Petitions were filed after Petitioner filed his motion for leave to amend and after the Respondent had already filed its answer to the pending Petition, and without leave of court. Consequently, rather than strike the documents from the record, the Court construes both of Petitioner's amended Petitions as "proposed."

As set forth more fully below, the Court **RECOMMENDS DENYING** Petitioner's motion for stay and motion for leave to amend. The "new" evidence is neither new nor exculpatory, and the claims Petitioner proposes are untimely without any applicable tolling or exception.

Contrary to Petitioner's assertion, there was no dispute at trial that his garage was attached to his house. The ample evidence in the record that the garage was attached, and the absence of any argument by the prosecutor to the contrary, render Petitioner's government documents irrelevant and duplicative, and dispenses with the possibility that a jury would have come to a different verdict if these documents were in evidence.

Likewise, the Justin Pulley affidavit would not have changed the jury's verdict with respect to the misdemeanor battery conviction, because Petitioner himself admitted at trial that he hit Matthew Pulley. Although the affidavit does offer evidence that Petitioner did not criminally threaten Matthew Pulley, Petitioner has not shown that this evidence was unavailable at trial or that the jury would have reached a

different result on the criminal threat count if this evidence had been presented.

Furthermore, the statute of limitations on the proposed claims arising from the government documents and the Justin Pulley affidavit have expired, and Petitioner has not shown diligence, the existence of extraordinary circumstances, or that the relation back doctrine applies to any claim. Accordingly, the Court **RECOMMENDS DENYING** Petitioner's motions.

II. FACTUAL BACKGROUND[1]

A. Background facts

Petitioner and Misaalefua had raised their families across the street from one another for years without conflict between the two households. (Lod. 11-14 at 164-166; Lod. 11-16 at 53, 59-60). Both men worked as heavy equipment operators in heavy labor industries. (Lod. 11-8 at 46; Lod. 11-16 at 53). Petitioner's wife has been a triage medical assistant at the same practice for 21 years. (Lod. 11-14 at 176-177).

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[1] This factual background is taken from the March 22, 2013 opinion of the California Court of Appeal, Fourth Appellate District, Division One, with additional relevant facts pulled from the record as noted. (ECF No. 11-22 at 4-10).

Misaalefua's wife works as a court operations clerk at the San Diego Superior Court. (Lod. 11-16 at 3).

Misaalefua was a 44 year old former marine of Samoan heritage, weighing 266 pounds, and standing six feet and a half inch tall. (Lod. 11-8 at 9; Lod. 11-12 at 109, 218). Petitioner was a 47 year old African American man, also a former marine, recovering from surgery for Crohn's disease, weighing approximately 187 pounds and standing approximately five feet and ten inches tall. (Lod. 11-4 at 106, 110; Lod. 11-8 at 9, 11; Lod. 11-12 at 120).

Misaalefua was drinking with family members on Christmas Eve 2010, and was later found to have a blood alcohol level of .18. (Lod. 11-22 (Court of Appeal Opinion) at 10; Lod. 11-12 at 130). Petitioner was also drinking with family members that night, and his blood alcohol level was .19. (Lod. 11-22 (Court of Appeal Opinion) at 10).

B. The December 25, 2010 battery and threat (Counts 2 and 3)

At approximately 12:30 a.m., Sergeant Regalado responded to an anonymous noise complaint about Misaalefua's house. The garage door at the Misaalefua residence was up, and there were fewer than a dozen people in the garage. Regalado spoke with Misaalefua, the host of the

party, told him about the noise complaint, and talked with him about ways that the group could be quieter. Misaalefua was cooperative and apologetic. After talking with Misaalefua, Regalado left.

At 1:53 a.m., Regalado returned to Brown Street in response to a call for police assistance called in by paramedics. The paramedics had arrived in response to what had originally been a call for medical assistance from Petitioner's adult son, Matthew, stating that a woman had fallen and needed medical assistance. When Regalado arrived, he saw four firefighters restraining Petitioner, who was on the ground in front of his residence. The firefighters explained that when they arrived in response to the medical call, Petitioner told them that he had a shotgun in the house. The firefighters asked Petitioner not to go inside until they administered medical aid, but Petitioner ignored them and started to go into the house. At that point, the firefighters felt that it was necessary to restrain Petitioner.

Regalado and other officers completed a safety sweep of the residence. They found Angela Pulley (Petitioner's wife), in bed, covered with blankets. Officers called out to her but got no response. They then tapped on her shoulder and were able to awaken her. Angela acted as if

she had been unaware that the police were there, and told the officers that she was fine and did not need any help.

Matthew explained that he and Petitioner had gotten into a fistfight earlier that evening. Matthew did not want to authorize an arrest of Petitioner, but he did not want to go back into his house. Officers gave Matthew a ride to a nearby restaurant, and Petitioner was released at his residence.

At trial, Matthew testified that his mother had fallen while trying to break up a physical altercation between Matthew and his father. Matthew called the fire department to check on his mother and make sure she was not hurt. According to Matthew, the fight between him and his father had started when Matthew and his father were talking about the Marines (Petitioner served in the Marines for 8 years) and the Army (Matthew was in the Army at the time), and Petitioner "felt disrespected." During the altercation, Petitioner poured a drink on Matthew, and Matthew went outside to cool off. When Petitioner went outside to apologize, Matthew threw Petitioner into the pool. Matthew then went inside and began teasing Petitioner. Petitioner hit Matthew in the face, knocking him down. Matthew then went outside in the

front and challenged Petitioner to fight. When Petitioner walked outside to meet Matthew, Matthew grabbed a golf club and started antagonizing Petitioner. At this point, Petitioner started to walk back into the house, and said that he needed to get away before he shot, stabbed, or killed Matthew. Matthew told the police that Petitioner had made direct threats, saying, "I'm gonna kill him, I'm gonna shoot him and stab him." Matthew said that because he was in the Army he knew that Petitioner was capable of carrying out the threats.

At trial, Matthew testified that he had lied "a lot" to the police to make Petitioner look bad, because Matthew was concerned his supervisors in the army would find out about his underage drinking that night. (Lod. 11-15 at 37, 39, 40). At the time of trial, Matthew was no longer in the Army because he got a DUI in January 2011. (Lod. 11-14 at 159). Witnesses noted that Justin was present during the altercation with Matthew, but Justin did not testify at trial. (Lod. 11-14 at 154, 198). Matthew initially refused to testify, but the prosecutor subpoenaed him to force him to testify. (Lod. 11-15 at 42).

C. The December 25, 2010 murder (Count 1)

Dexter Ena, Misaalefua's adult nephew, was at Misaalefua's house on Christmas Eve for a family gathering. After the emergency personnel and police left Petitioner's house, Petitioner walked over to Misaalefua's house to apologize for the disturbance. Ena saw Petitioner walking toward Misaalefua's house and asked Misaalefua who Petitioner was. Misaalefua responded that Petitioner was a neighbor, and told Ena to go get a beer. Ena walked to the back of the garage to get a beer from a refrigerator. When he returned, he saw Petitioner and Misaalefua walking toward the street. Misaalefua had his arm around Petitioner and it appeared that they were talking in a friendly manner.

Ena walked towards the street. When he got to the end of the driveway, he saw Petitioner fall to the ground. Misaalefua was standing over Petitioner, and Ena assumed that they were fighting. Ena ran to where Misaalefua was standing over Petitioner and asked what was going on. Misaalefua told Ena to "leave it alone." Another of Ena's uncle's, Matt Young, ran over to try to separate Misaalefua and Petitioner.

Petitioner got up from the street and said to Misaalefua, "I thought we were friends." Petitioner then assumed a fighting stance. Young tried to push Misaalefua back, and Ena restrained Petitioner and told him to calm down.[2] Once Misaalefua and Petitioner were separated, Ena let go of Petitioner. Petitioner started walking back to his house. As he was walking toward the house, he looked back at Misaalefua and said, "I got something for you. I got something for you, mother fucker." Misaalefua yelled back something like, "All right, mother fucker. Let's go. Bring it on."

As Petitioner walked toward his house, Misaalefua followed him. Ena attempted to stop Misaalefua, telling him to leave it alone and to let Pulley go. Misaalefua told Ena to "shut up" and continued following Petitioner, who had gone into his garage and then into his house. When Misaalefua walked into Petitioner's garage, Ena, who had been following, stopped just outside the garage. Misaalefua took off his shirt and Ena assumed that he was preparing to fight. Misaalefua waited outside the inner garage door (which led into the Petitioner's house).

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[2] Ena weighed about 280 pounds, and testified that Petitioner did not have the strength to get out of his hold. (Lod. 11-13 at 84).

Ena and Young tried to convince Misaalefua to return to his house with them. Ena then heard Misaalefua say, "What are you going to do with that? Shoot me." Immediately after Misaalefua said that, Ena heard a gunshot. After the gunshot, Misaalefua said, "Is that all you got? Is that all you got?" Petitioner and Misaalefua then started wrestling, and Ena heard more shots. Although Ena and Young testified that they heard three more shots, it seems clear from the ballistics evidence that Petitioner filed a total of two times.

Ena moved through the garage and tried to shield himself behind a car. Young ran up to the left side of a car that was parked in the garage. Misaalefua was fighting with Petitioner over the gun. Young reached the two men before Ena could. When Young got to the men, they all fell down. Young yelled at Petitioner to let go of the gun.

Petitioner was on top of Misaalefua when Ena got to them, and Young was on top of Petitioner, trying to get the gun. Misaalefua said, "Get this mother fucker off of me." Ena told Petitioner to let go of the gun, called him "nigga,"[3] and tried to pull the gun away from Petitioner. As Ena tried to get the gun away, Petitioner bit Ena, and Ena hit

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[3] (Lod. 11-4 at 46 (911 call); Lod. 11-13 at 151 (Ena's testimony)).

Petitioner. At that point, Young and Petitioner both partially fell of Misaalefua. Ena told Misaalefua, "Let's move, let's go." Misaalefua just kept repeating, "Get this guy off of me, get this mother fucker off of me." As Misaalefua spoke, his voice started to fade. Ena kept trying to hit Petitioner to make him let go of the gun. This continued until the police arrived.

Sao Young, Misaalefua's sister-in-law, called 911 at 2:43 a.m., which was only 13 minutes after Sergeant Regalado had cleared the earlier call involving Petitioner and his son. Sao Young reported that someone had been shot, and that her husband, Matt Young, was wrestling with someone who was holding a gun.

Sergeant Regalado returned to Brown Street in response to the call about shots being fired. When Regalado arrived, he saw several people engaged in a struggle inside Petitioner's garage. Misaalefua was on the ground with his eyes closed. A pool of blood was forming around him. Two women were standing over Misaalefua, crying and grabbing at him. Two men were struggling to restrain Petitioner.

Regalado grabbed Petitioner's right arm and Petitioner released a small semi-automatic handgun. As Regalado tried to hold onto

Petitioner's arm, Petitioner stiffened in a manner that made Regalado think that Petitioner was trying to grab the gun. Regalado held Petitioner's arm tighter, picked up the gun, and moved it out of Petitioner's reach. Regalado then handcuffed Petitioner with the assistance of other officers.

Misaalefua subsequently died at the hospital as a result of a gunshot wound to the chest.

III. PETITION

The Petition contains two grounds for relief, both challenging the felony murder conviction. (ECF No. 1 at 6-7, 31-44). First, Petitioner contends that his Fourteenth Amendment due process rights were violated, because there was insufficient evidence to overcome the presumption under Cal. Penal Code § 187(a) that he was acting in defense of his residence when he killed his neighbor in his own garage. (*Id.* at 6, 31-41). Second, Petitioner contends that his due process rights were violated, because there was no evidence of malice, such that his conviction should be reduced from murder to manslaughter. (*Id.* at 7, 41-44). There is no dispute that Petitioner exhausted these two claims.

(*See* Lod. 5, 7). The Petition does not challenge Counts 2 and 3 (his felony criminal threat or misdemeanor battery convictions). (*Id.*).

IV. "NEW CREDIBLE EVIDENCE"

Petitioner identifies the following "newly discovered evidence" in his motion for stay.

A. Justin Pulley Eyewitness Account (re Counts 2 and 3)

The first document is a sworn and notarized affidavit by Petitioner's son, Justin Pulley, dated October 1, 2014. (*Id.* and ECF No. 8 at 20-26). In the affidavit, Justin swears that he witnessed the altercation between his father (Petitioner) and his brother (Matthew). (*Id.*). Justin swears his father did not threaten his brother, and provides other details about the altercation between his father and brother that Petitioner asserts show that he was actually innocent of Counts 2 and 3. (*Id.*). Justin also swears that he was never questioned or interviewed by the police, district attorney, or Petitioner's defense attorney, and that he was always available. (*Id.*). Petitioner explains that he obtained this affidavit on October 8, 2014, and that this evidence was unavailable to him at trial because Petitioner's defense

counsel told him that Justin "refused to be interviewed and refused to testify." (ECF No. 8 at 7).

B. San Diego County Certified Letter (re Count 1)

The second document is a certified letter from the County of San Diego's Assessor's Office dated December 18, 2013. (ECF No. 6 at 4, ECF No. 8 at 27-29). The letter certifies that the garage located at 3989 Brown Street in Oceanside, CA was attached to the residence when built. (ECF No. 8 at 28).

C. Oceanside Certified Property Records (re Count 1)

The third document consists of a letter from the City of Oceanside enclosing the property records for 3989 Brown Street, Oceanside, CA, which show that the garage was attached to the residence when built. (ECF No. 6 at 4; ECF No. 8 at 30-44). The letter is dated December 12, 2013. (ECF No. 8 at 31).

V. NEW UNEXHAUSTED CLAIMS

In his motion to stay this action, Petitioner identifies two ineffective assistance of counsel claims and one due process claim arising from the "newly presented evidence." First, Petitioner contends that his Sixth Amendment right to effective assistance of counsel was

violated when his attorney failed to investigate and present at trial the "readily available" government records that prove Petitioner's garage is attached to his house, even as the prosecutor presented false evidence that the garage was detached in order to attack Petitioner's defense that he had a right to stand his ground against the intruder in his home. (ECF No. 6 at 5-8). Petitioner argues that this new evidence makes it more likely than not that no reasonable jury would have concluded 1) that Petitioner was not entitled to the presumption of reasonable fear afforded to a person standing his ground against an intruder in his home, or 2) that Petitioner acted with malice in refusing to retreat. (*Id.*).

Second, Petitioner contends that his due process rights and his right to effective assistance of counsel were violated when his attorney failed to interview and present at trial Justin Pulley, who Petitioner asserts was the only eyewitness, besides himself and Matthew, to the events that form the basis for the felony criminal threat and misdemeanor battery convictions. (*Id.* at 8-10). Petitioner argues that Justin would have corroborated Petitioner's testimony about the altercation between Petitioner and Matthew. Petitioner focuses on

Matthew's admission during trial that, before he became aware that his father had shot Mr. Misaalefua, he lied to police "a lot" in order to avoid getting in trouble with his supervising officers in the Army for underage drinking. (*Id.*; Lod. 11-15 at 37:16-25, 39:25-40:3). Petitioner contends that no reasonable jury could have convicted him of Counts 2 and 3 based on Matthew's biased testimony, if only the jury heard the testimony of Justin, who Petitioner argues is an unbiased and credible source. (ECF No. 6 at 8-10).

In his motion to amend, Petitioner identifies twelve new claims that he intends to exhaust and then add to his Petition. (ECF No. 8 at 13-15). The two claims in the original Petition are not included among these twelve claims. (*Id.*). The new claims Petitioner proposes are:

1. Sixth Amendment: Ineffective assistance of counsel based on failure to investigate and present to the jury the irrefutable government records showing his garage was attached to his house.

2. Fourteenth Amendment: Due process of law violation based on Prosecutor's introduction of false evidence by showing jury a PowerPoint erroneously depicting Petitioner's garage as a separate detached structure from the house and erroneously depicting Petitioner as exiting his garage with his gun.

3. Sixth Amendment: Ineffective assistance of counsel based on failure to argue that Cal. Penal Code § 198.5 (Home Protection Bill of Rights) does not require intruder to be a stranger, where prosecutor erroneously told jury that § 198.5 only applies if intruder is a stranger.

4. Fourteenth Amendment: Due process of law violation based on failure of court to take corrective action when prosecutor erroneously informed jury that § 198.5 only applies if intruder is a stranger.

5. Sixth Amendment: Ineffective assistance of counsel based on failure to argue for instruction that "a residential garage attached to one's inhabited dwelling house 'is simply one room of several which together compose the dwelling.'"

6. Fourteenth Amendment: Due process of law violation where court failed to instruct the jury that the garage was attached to the house as a matter of law.

7. Sixth Amendment: Ineffective assistance of counsel based on counsel's failure to investigate and argue that court should take judicial notice of legal definition of burglary, and seeking a jury instruction that Mr. Misaalefua was committing "a felony nighttime burglary of an occupied dwelling for the target crime of battery" as a matter of law at the time he was killed in Petitioner's home.

8. Fourteenth Amendment: Due process of law violation where court failed to instruct jury on relevant principles of law and take judicial notice of "criminal laws violated by the decedent," including burglary.

9. Sixth Amendment: Ineffective assistance of counsel based on failure to object and preserve for appellate review the trial court's failure to instruct jury on laws relating to burglary.

10. Fourteenth Amendment: Due process of law violation where court failed to instruct jury on findings of law that entry into an attached garage constitutes burglary and related offenses.

11. Fourteenth Amendment: Due process law violation where trial court failed to submit to jury questions of fact about whether the decedent violated laws against criminal threat, burglary, or battery, and related factual questions.

12. Sixth Amendment: Ineffective assistance of counsel based on failure to investigate or interview material witness (Justin Pulley) who had exculpatory evidence.

(ECF Nos. 8 at 13-15 (motion to amend), 22 and 29 (proposed amended petitions).

In his first and second proposed amended Petitions, Petitioner identifies the twelve claims described in his motion to amend, and adds a thirteenth claim of actual innocence. (ECF Nos. 22, 29). The actual innocence claim asserts that the newly discovered evidence (Justin Pulley's affidavit and certified government records showing the garage is attached to the house) exonerate him on all counts. (*Id.* at 19).

VI. MOTION FOR STAY

A. LEGAL STANDARD

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs this Petition. 28 U.S.C. § 2254. Habeas petitioners who wish to challenge either their state court conviction or the length of their confinement in state prison must first exhaust their state judicial remedies. 28 U.S.C. § 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 134 (1987). Ordinarily, to satisfy the exhaustion requirement, a petitioner must "'fairly present[ ]' his federal claim to the highest state court with jurisdiction to consider it . . . or . . . demonstrate[ ] that no state remedy remains available." *Johnson v. Zenon*, 88 F.3d 828, 829 (9th Cir. 1996) (citing *Picard v. Connor*, 404 U.S. 270, 275 (1971) and *Anderson v. Harless*, 459 U.S. 4, 6 (1982)). AEDPA has two main purposes: (1) to "reduce delays in executing state and federal criminal sentences," and (2) to "streamline federal habeas proceedings by increasing a petitioner's incentive to exhaust all claims in state court." *Wooten v. Kirkland*, 540 F.3d 1019, 1024 (9th Cir. 2008).

Generally, claims under AEDPA are subject to a one year statute of limitations. 28 U.S.C. § 2244(d). The statute of limitations does not

run while a properly filed state habeas corpus petition is pending. 28 U.S.C. § 2244(d)(2); *see Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999); *but see Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (holding that "an application is 'properly filed when its delivery and acceptance [by the appropriate court officer for placement in the record] are in compliance with the applicable laws and rules governing filings."). However, the filing of a federal habeas petition does not toll the statute of limitations. *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001).

In *Rose v. Lundy*, 455 U.S. 509 (1982), the Supreme Court noted that mixed petitions should be dismissed, but "specifically provided habeas petitioners with the option of amending their applications to delete unexhausted claims rather than suffering dismissal." *Calderon v. United States Dist. Ct. (Taylor)*, 134 F.3d 981, 986 (9th Cir. 1998) (discussing *Rose v. Lundy*, 455 U.S. at 520) (emphasis added). The Ninth Circuit has established two alternative procedures for petitioners to seek and obtain a stay to return to state court to exhaust new claims rather than suffer a dismissal or abandon unexhausted claims. *Rhines v. Weber*, 544 U.S. 269, 278 (2005); *Kelly v. Small*, 315 F.3d 1063 (9th

Cir. 2003), *overruled on other grounds by Robbin v. Carey*, 481 F.3d 1143 (9th Cir. 2007).

If the petition contains both exhausted and unexhausted claims, the petitioner may move for a stay pursuant to *Rhines v. Weber*, 544 U.S. at 277-78. Under *Rhines*, Petitioner must meet three pre-conditions for a stay to be granted: (1) a finding of good cause for petitioner's failure to exhaust all his claims before filing his habeas action; (2) a finding that the unexhausted claims are potentially meritorious; and (3) no indication that the petitioner engaged in intentionally dilatory tactics. *Rhines*, 544 U.S. at 278. If all three pre-conditions are met, the court should stay the habeas case and hold it in abeyance, leaving the mixed petition intact while the petitioner returns to state court to present his unexhausted claims. *Id.*

Another method of staying a timely federal petition while a petitioner returns to state court to exhaust unexhausted claims is the "withdrawal and abeyance" procedure - a three step process outlined by the Ninth Circuit in *Kelly*, *supra*, 315 F.3d 1063. *See also King v. Ryan*, 564 F.3d 1133, 1139-40 (9th Cir. 2009). Unlike the *Rhines* "stay and abeyance" procedure, a petitioner seeking to use the *Kelly* procedure

need not show good cause for his failure to exhaust. *Id.* at 1140. Instead, a petitioner may withdraw any unexhausted claims from his federal petition, return to state court and exhaust those claims while the federal court holds the fully exhausted claims in abeyance, then seek to amend the timely, stayed federal petition with the newly exhausted claims. *Id.* at 1139-40. The newly exhausted claims, however, must either themselves be timely under the statute of limitations or they must "relate back" to the claims in the fully-exhausted petition; that is, they must share a "common core of operative facts" with the previously exhausted claims. *Id.* at 1140-41; (quoting *Mayle v. Felix*, 545 U.S. 644, 659 (2005)).

B. ANALYSIS

Currently pending before this Court is Petitioner's request to stay this action and hold his Petition in abeyance while he returns to state court to exhaust additional claims. (ECF No. 6). Plaintiff has only requested and briefed a *Rhines* stay. He has not specifically requested nor briefed a *Kelly* stay.

1. *Rhines* Stay and Abeyance

If the petition contains both exhausted and unexhausted claims, the petitioner may move for a stay pursuant to *Rhines*. *Rhines, supra*, 544 U.S. at 278. The operative Petition, however, contains only fully exhausted claims, so the Petition is not mixed. (ECF No. 1, Lod. 5, 7). *See Rose*, 455 U.S. at 510 (stating that mixed petitions contain both exhausted and unexhausted claims). *Rhines* is not applicable to Petitioner's case. *See, e.g., Broadnax v. Cate*, No. 12CV560-GPC-RBB, 2012 WL 5335289, at *5-6 (S.D. Cal. Oct. 26, 2012); *Sua v. Tilton*, No. 07CV1338-JM BLM, 2010 WL 4569917, at *3 (S.D. Cal. Aug. 4, 2010) *report and recommendation adopted*, No. 07CV1338 JM BLM, 2010 WL 4569885 (S.D. Cal. Nov. 4, 2010); *Sims v. Calipatria State Prison*, No. CV 10–715–DSF (AGR), 2012 U.S. Dist. LEXIS 69931, at *4, 2012 WL 1813113 (C.D. Cal. Feb. 29, 2012) (noting that *Rhines* does not apply to a fully exhausted petition).

Since *Rhines*, district courts have applied the *Kelly* procedure to requests to stay fully exhausted petitions while a petitioner attempts to exhaust additional claims, when, as is the case here, the petition was never a mixed petition. *Id.*; *and see Hughes v. Walker*, No. 2:10–cv–

3024 WBS TJB, 2012 U.S. Dist. LEXIS 11844, at *12–13, 2012 WL 346449 (E.D. Cal. Feb. 1, 2012) (finding *Kelly* is the "relevant procedure" when a petitioner seeks to stay original claims in a fully exhausted petition, while he seeks to exhaust new claims); *Conriquez v. Uribe*, No. 1:09-cv-01003–SKO–HC, 2012 U.S. Dist. LEXIS 607, at *9, 2012 WL 28612 (E.D. Cal. Jan. 4, 2012) (applying *Kelly*); *Knox v. Martel*, No. CIV S–08–0494–MCE–CMKP, 2010 U.S. Dist. LEXIS 30967, at *2, 2010 WL 1267785 (E.D. Cal. Mar. 31, 2010) (citing *Jackson v. Roe*, 425 F.3d 654, 661 (9th Cir. 2005)). Therefore, this Court **RECOMMENDS** that Petitioner's motion to stay and abey under *Rhines* be **DENIED**, but further **RECOMMENDS** that his motion be construed to also request a stay under *Kelly*.

2. *Kelly* Withdrawal and Abeyance

Under *Kelly*, a petitioner may return to state court and exhaust the unexhausted claims while the federal court holds the fully exhausted claims in abeyance, and then seek to amend the timely, stayed federal petition by adding in the newly exhausted claims. *King*, 564 F.3d at 1139-40. The newly exhausted claims, however, must either themselves be timely under AEDPA's statute of limitations or

they must "relate back" to the claims in the fully-exhausted petition. *Id.* at 1140-41.

Petitioner seeks to stay his fully exhausted Petition in order to return to state court to exhaust new claims. (ECF No. 15). Because there is no need to withdraw unexhausted claims from the Petition, the first step of the *Kelly* procedure is already satisfied. Thus, Petitioner has completed the only step in the *Kelly* procedure that must be accomplished prior to the court ruling on his motion for stay.

Nevertheless, the motion to stay under *Kelly* must be denied if amendment would be futile. For instance, if the newly-exhausted claims are not timely or the relation-back doctrine does not apply, the new claims may not be added to the existing petition. *See e.g.*, *Haskins v. Schriro*, 2009 WL 3241836, *3 (D. Ariz. Sept. 30, 2009). If amendment is futile, a stay is inappropriate. *Id.* at *7. Because the allegedly new evidence and the analysis for the proposed new claims relating to the murder conviction (Count 1) are distinct from the new claims relating to Counts 2 and 3, the Court will analyze them separately.

i. New Claims Challenging Murder Conviction

The government records Petitioner newly presents are not relevant to his murder conviction. Because they are not relevant, and have no potential to reverse the conviction, a stay would be futile and it does not matter whether Petitioner was timely in finding and presenting these documents.

The records showing the garage is attached to the house have no value in challenging Petitioner's murder conviction, because there was no dispute at trial that Petitioner owned and inhabited the home at 3989 Brown Street, or that the garage was attached to the home by an interior door. Indeed, every percipient witness, including Misaalefua's family and the police who responded to the scene, confirmed that the garage was attached to the rest of the house by what was referred to as the "interior door" or the "laundry room door." (*See e.g.*, Lod. 11-13 at 213; Lod. 11-14 at 27, 35, 36, 63, 169, 171; Lod. 11-15 at 55, 56, 88, 90; Lod. 11-17 at 138, 139, 183). At one point, after explaining the layout, Petitioner testified "the garage is my house." (Lod. 11-17 at 183:10). The jury was shown a video, made by the police a few hours after the shooting, in which the videographer travelled from the street, up the

driveway, through the garage, through the interior door, into the laundry room, then into the living room, and from there into the other rooms of the house. (Lod. 11-13 at 166-173). The jury was also shown diagrams and pictures that depicted the interior door leading from the garage into the house. (*See, e.g.*, Lod. 11-13 at 176, 179, 208, 209, 210, 211; Lod. 11-14 at 169, 171; Lod. 11-15 at 55, 56, 88, 90; Lod. 11-17 at 138, 139, 183). Although the video, pictures, and diagrams have not been lodged with this Court, they are described in detail by the witnesses in the transcript, and the record shows that each was entered in evidence. (Lod. 11-4 at 24-27 (Superior Court Exhibit List showing when each exhibit was entered in evidence)).

During the closing and rebuttal statements, the prosecutor argued, *inter alia*, that Petitioner had "walked outside the garage," and thus was no longer entitled to invoke the Homeowner's Bill of Rights. (*See, e.g.*, Lod. 11-18 at 94-95, 165-172). The prosecutor also argued that Petitioner could have closed the laundry room door and stayed inside the house or called for help. (Lod. 11-18 at 81). Petitioner's attorney offered rebuttal to both arguments. (*See, e.g.*, Lod. 11-18 at 124-125). Petitioner's attorney anticipated that the prosecutor might

argue that the garage is not part of the home, and argued to the jury that,

> If you have any doubt at all about whether or not the garage includes the word "home" that's in 3477, don't argue among yourselves. Come back and ask the judge, "does the garage—does the home include the garage?" The place where the second-most expensive thing that any of us will ever buy is kept. The place where there is a door to the side yard and a door leading into the habitation. That's what it means.

(Lod. 11-18 at 125-126). Contrary to Petitioner's assertion in this action, and despite defense counsel's anticipation, the prosecutor never argued during closing that the house was detached from the garage.

The jury was given the following pertinent instructions:

> 3475. Right to Eject Trespasser from Real Property
>
> The owner of a home may request that a trespasser leave the home. If the trespasser does not leave within a reasonable time and it would appear to a reasonable person that the trespasser poses a threat to the home or the owner, the owner may use reasonable force to make the trespasser leave.

(Lod. 11-6 at 113 (excerpt of CalCrim 3475)).

> 3477. Presumption that Resident Was Reasonably Afraid of Death or Great Bodily Injury

> The law presumes that the defendant reasonably feared imminent death or great bodily injury to himself or to a member of his family or household, if:
>
> 1. An intruder unlawfully and forcibly entered or was entering the defendant's home;
>
> 2. The defendant knew that an intruder unlawfully and forcibly entered or was entering the defendant's home;
>
> 3. The intruder was not a member of the defendant's household or family;
>
> AND
>
> 4. The defendant used force intended to or likely to cause death or great bodily injury to the intruder inside the home.

(Lod. 11-6 at 112 (excerpt from CalCrim 3477)).

During deliberations, the jurors sent a note, asking "Is the garage a part of the home?" After consultation with the attorneys, the trial court responded with a note reading: "An attached garage is part of a residence." (Lod. 11-8 at 152; *see also* Lod. 11-18 at 197-199 (incomplete transcript of discussion by attorneys with trial court regarding how to answer the jury question)).

Thus, Petitioner's "new evidence" is merely cumulative of undisputed evidence on an issue that was undisputed at trial. The government documents are also not relevant to the prosecutor's argument that Petitioner went outside his garage during the altercation with the victim. Whether the garage is attached or detached simply has no bearing on whether the fight occurred in the garage or on the driveway outside of the garage. Accordingly, the Court **RECOMMENDS** finding that the government records, even if timely, have no bearing on his murder conviction, such that a stay would be futile.

a. Statute of Limitations

Even if there were any potential value in considering the government records, Petitioner's new claims based upon them are untimely, such that a stay would be futile. Respondent argues that AEDPA's one year statute of limitations has expired, rendering the new claims untimely, and rendering a stay futile. There is no dispute that Petitioner's conviction became final on September 10, 2013, ninety days after the California Supreme Court denied his petition for review. (See Lodg. 7); *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999).

Accordingly, Respondent argues, the AEDPA statute of limitations for filing a claim expired on September 10, 2014, and amendment is futile. 28 U.S.C. § 2244(d)(1)(A).

Respondent fails to address whether the date of accrual was delayed by Petitioner's allegedly recent discovery of what he describes as new exculpatory evidence. There are two potentially applicable ways in which the accrual date may be delayed.

b. Delayed Accrual Under § 2244(d)(1)(D)

Petitioner argues that § 2244(d)(1)(D) delays the accrual date for at least one of his claims. Respondent fails to acknowledge that "[i]f the petition alleges newly discovered evidence,... the filing deadline is one year from 'the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.' § 2244(d)(1)(D)." *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1932-1933 (2013) (distinguishing § 2244(d)(1)(D), which sets the date of accrual on which the statute of limitations begins to run on petitions alleging new evidence, from the miscarriage of justice exception to the statute of limitations). Because Petitioner's motion is premised on the assertion that his proposed new claims are based on newly-discovered

evidence, the Court considers whether § 2244(d)(1)(D) applies, and if so, whether the one year statute of limitations accruing on that delayed accrual date has run. The Ninth Circuit has explained that,

> Although section 2244(d)(1)(D)'s due diligence requirement is an objective standard, a court also considers the petitioner's particular circumstances. *See Wood v. Spencer*, 487 F.3d 1, 5 (1st Cir.2007) (holding that due diligence under § 2244(d)(1)(D) is an objective test); *Schlueter*, 384 F.3d at 75 (considering petitioner's physical confinement and familial assistance in determining due diligence); *Moore*, 368 F.3d at 940 (taking into account that prisoners are limited by their physical confinement in determining due diligence); *Easterwood v. Champion*, 213 F.3d 1321, 1323 (10th Cir.2000) (holding that a case is "discoverable" by "due diligence" on the date it becomes accessible in the prison law library, rather than the date of publication); *see also Starns*, 524 F.3d at 619 (holding that a petitioner did not fail to act with due diligence given the state's misleading suggestion). Just as the petitioner's particular circumstances may include impediments to discovering the factual predicate of a claim, they may also include any unique resources at the petitioner's disposal to discover his or her claim. *See, e.g., Schlueter*, 384 F.3d at 75 (considering that a petitioner's parents actively assisted him in evaluating his diligence).

Ford v. Gonzalez, 683 F.3d 1230, 1235-36 (9th Cir. 2012).

The Court finds that application of § 2244(d)(1)(D) to the anticipated claims does not render them timely. Section 2244(d)(1)(D)

applies where the petition alleges newly discovered evidence, and sets accrual on "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." *McQuiggin*, 133 S. Ct. at 1932-1933; § 2244(d)(1)(D). Although Petitioner's allegations invoke this section by alleging his new claims will be based on new evidence, Petitioner could have discovered the factual predicate of the claims much earlier through due diligence.

The certified letter from the County of San Diego's Assessor's Office is dated December 18, 2013, with an envelope stamped December 19, 2013 by the U.S.P.S. (ECF No. 6 at 4, ECF No. 8 at 27-29). Petitioner does not identify the date he actually received the letter. The Court presumes he received the letter within two weeks of the date stamped on the envelope, which would be no later than January 2, 2014. Thus, even if § 2244(d)(1)(D) applies to this evidence, the one year statute of limitations has already passed.

Likewise, the one year statute of limitations has already passed with respect to the letter from the City of Oceanside. (ECF No. 6 at 4; ECF No. 8 at 30-44). The letter is dated December 12, 2013. (ECF No. 8 at 31 and 44). The Court presumes he received the letter within two

weeks of the date stamped on the envelope, which would be no later than December 26, 2013. Thus, even if § 2244(d)(1)(D) applies to this evidence, the one year statute of limitations has already passed.

In addition, Petitioner could have discovered the same "readily available" information earlier than December 2013 and January 2014. Petitioner, as owner of the house, knew that his garage was attached to his house. Moreover, witness after witness testified that the house could be entered directly from the garage. In addition, as shown by the records themselves, the information certified in these documents was a matter of public record for decades before the trial. Petitioner even describes the records as "readily available." Because of this, a certified letter containing this information could have been discovered before or during the trial through the exercise of due diligence, such that the date of accrual for claims based on this letter is the date Petitioner's conviction became final.

Accordingly, the Court **RECOMMENDS** finding that the statute of limitations on Petitioner's new claims based on this evidence has expired, even if they are entitled to a delayed accrual date under § 2244(d)(1)(D).

c. Delayed Accrual Date for Ineffective Assistance of Counsel Claims

Because Petitioner also advances ineffective assistance of counsel claims, the Court considers whether a delayed accrual date applies to those claims. The AEDPA statute of limitations clock does not start to tick on ineffective assistance of counsel claims until the petitioner has discovered (or with the exercise of due diligence could have discovered) facts suggesting both (1) that counsel's performance was unreasonable under prevailing professional standards and (2) that there is a reasonable probability that but for counsel's unprofessional errors, the result would have been different. *Hasan v. Galaza*, 254 F.3d 1150, 1154 (9th Cir. 2001).

Petitioner obtained the certified government documents "irrefutably" establishing that the garage is attached to the house in December 2013. But as owner of the home and percipient witness, Petitioner knew that the garage was attached to the home during the trial. In addition, witnesses and other evidence at trial confirmed that the garage is attached to the house. Accordingly, Petitioner discovered or should have discovered the factual grounds (that his garage was

attached to his house and that his attorney had not presented certain legal theories attendant to that fact) for his ineffective assistance of counsel claims relating to Count 1 by the close of trial. Consequently, the one year AEDPA statute of limitations has run on the ineffective assistance of counsel claims that are based on the certified government documents. The Court **RECOMMENDS** finding that Petitioner's ineffective assistance of counsel claims grounded in the "discovery" of the government documents are not timely even after applying *Hasan*.

d. Equitable Tolling

The Supreme Court has held that the AEDPA statute of limitations is subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631, 649-650 (2010). In *Holland*, the Court recognized equitable tolling of the AEDPA limitations period when the prisoner can show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Id.* at 2562 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); *see also*, *Calderon v. United States Dist. Court (Beeler)*, 128 F.3d 1283, 1288 (9th Cir. 1997), *overruled on other grounds by Calderon v. United States Dist. Court (Kelly)*, 163 F.3d 530, 540 (9th Cir. 1998). However, the Ninth Circuit

in *Beeler* noted that "equitable tolling will not be available in most cases, as extensions of time will only be granted if 'extraordinary circumstances' beyond a prisoner's control make it impossible to file a petition on time." *Id.* (quoting *Alvarez-Machain v. United States*, 107 F.3d 696, 701 (9th Cir. 1996)). The *Beeler* court wrote that district judges must "take seriously Congress's desire to accelerate the federal habeas process" and "only authorize extensions when this high hurdle is surmounted." *Id.* at 1289.

1. Diligence

Petitioner did not show reasonable diligence with respect to the government records-based claims. As owner of the home and as a percipient witness, Petitioner knew that the garage was attached to the house. He does not explain why he did not seek out these documents earlier or demand that his attorney do so. Petitioner was not reasonably diligent in obtaining the government documents.

2. Extraordinary Circumstances

Even if Petitioner had acted with reasonable diligence, no extraordinary circumstances are present. With regard to this second requirement, "[t]he petitioner must show that 'the extraordinary

circumstances were the cause of his untimeliness and that the extraordinary circumstances made it impossible to file a petition on time.'" *Porter v. Ollison*, 620 F.3d 952, 959 (9th Cir. 2010) (quoting *Ramirez v. Yates*, 571 F.3d 993, 997 (9th Cir. 2009); *Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999) (applying equitable tolling where complainant was "completely" mentally incapacitated during the relevant limitations period). "Equitable tolling is typically granted when litigants are unable to file timely [documents] as a result of external circumstances beyond their direct control." *Harris v. Carter*, 515 F.3d 1051, 1055 (9th Cir. 2008).

Here, Petitioner has not shown the existence of any circumstance that made it impossible for him to file a state court petition containing the new claims based on the government documents within the statute of limitations. To the contrary, his papers reveal that he chose to wait until he concluded his investigation of the Justin Pulley evidence, even though that evidence relates to different Counts (Counts 2 and 3) than the government records relate (Count 1). The record does not show the existence of any external circumstance that made it impossible for Petitioner to pursue the claims based on the government records.

Accordingly, this Court **RECOMMENDS** finding that equitable tolling does not apply to Petitioner's proposed new claims.

e. Statutory Tolling

Petitioner anticipates that the California state courts will find his entire petition—including the ones based on the government records—timely under *Robbins*' avoidance of piecemeal claims holding. *In re Robbins*, 18 Cal. 4th 770, 805 (1998). *Robbins* explained that California courts will consider a substantially delayed claim on the merits if the petitioner can demonstrate good cause for the delay. *Id.* (quoting *In re Clark*, 5 Cal. 4th 750, 783 (1993)). *Robbins* provided an example of good cause that Petitioner argues applies in this instance:

> if, for example, a petitioner has investigated and "perfected" i.e., completed written factual and legal argumentation regarding three claims (A, B, and C) but he or she is continuing to conduct a bona fide "ongoing investigation" into another potential claim (D), the petitioner's "delayed" presentation of the former claims in a joint petition containing all four claims may be justified by "good cause" — the avoidance of piecemeal presentation of claims.

Id. at 805-806 (citations omitted). Here, Petitioner contends that he had investigated and perfected his claims based upon the government records, but that he was continuing to conduct a bona fide "ongoing

investigation" into another potential claim based upon the Justin Pulley affidavit, such that his delay in presenting the government records-based claims is justified by good cause—the avoidance of piecemeal presentation.

The AEDPA statute of limitations is tolled from the time the first state habeas petition is filed until state collateral review is concluded, but it is not tolled when no challenge is pending (*e.g.* between the conclusion of direct review and the filing of the first collateral challenge). *Thorson v. Palmer*, 479 F.3d 643, 646 (9th Cir. 2007) (citing *Nino v. Galaza*, 183 F.3d 1003, 1006 (1999)). Here, Petitioner's direct review and his first state habeas review are both concluded. Petitioner has yet to file a state habeas corpus petition related to his new claims. Or, if Petitioner did file his state petition after filing this motion, he did so well after the AEDPA statute of limitations expired. These new claims are not statutorily tolled while his operative Petition asserting entirely different, exhausted causes of action is pending in federal court. *See Duncan v. Walker*, 533 U.S. 167, 182 (2001) (stating that AEDPA's statute of limitations is not tolled "during the pendency of [a] ... federal habeas petition."). Furthermore, Petitioner cannot avail himself of

statutory tolling while he exhausts his additional state claims because AEDPA's statute of limitations was not tolled before it expired. *See Pace v. DiGuglielmo*, 544 U.S. 408, 410 (2005) (holding that untimely state post-conviction petition is not "properly filed" within the meaning of § 2244(d)(2)). Finally, Petitioner's speculation that the state court may find his state petition timely under *Robbins* is insufficient to meet his burden of showing that his claims are not futile, such that a stay is appropriate. Accordingly, this Court **RECOMMENDS** finding that Petitioner has not established that statutory tolling applies to his proposed new claims.

f. Miscarriage of Justice Exception

This Court further **RECOMMENDS** finding that the miscarriage of justice exception to the AEDPA statute of limitations could not apply to the evidence Petitioner presents. In its opposition, Respondent does not address whether the miscarriage of justice exception to the AEDPA statute of limitations could apply to Petitioner's proposed new claims.

If the miscarriage of justice exception did apply, Petitioner's requested stay would not be futile. *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1935 (2013), holds that under the miscarriage of justice exception

to AEDPA's statute of limitations, an untimely first federal habeas petition alleging a gateway actual innocence claim is not barred if the petitioner shows that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. Petitioner has not demonstrated, and the record shows he cannot demonstrate, that his proposed new claims based on the Oceanside and San Diego certified records show actual innocence.

In *McQuiggin*, the Supreme Court cautioned "that tenable actual-innocence gateway pleas are rare: '[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'" *McQuiggin*, 133 S. Ct. at 1928 (quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995)) (brackets in *McQuiggin*). "It is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses; rather the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do." *Schlup*, 513 U.S. at 329. Unlike the sufficiency of the evidence standard of review, "the newly presented evidence may indeed call into

question the credibility of the witnesses presented at trial. In such a case, the habeas court may have to make some credibility assessments." *Id.* "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Id.* at 325.

1. Strong Evidence of Innocence

Here, the proposed new claims do not present "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial." *McQuiggin*, 133 S. Ct. at 1928 (quoting *Schlup,* 513 U.S. at 316). Despite Petitioner's assertions, the certified government documents do not provide evidence that would have caused serious doubts in the minds of the jurors. On the contrary, the documents are merely additional, cumulative evidence of the fact that the garage was attached to the house, which was well-established by testimony and exhibits, and which was undisputed at trial.

Petitioner's new claims are based on the incorrect belief that the prosecutor argued that he was not entitled to a defense of home

justification because the garage was detached from the home. Although the prosecutor did argue Petitioner was not entitled to the justification, she did not base that argument on a claim that the garage was detached. Even if she had, a reasonable juror would have ignored her argument because the jury was instructed that the attorneys' arguments were not evidence. (Lod. 11-18 at 57).

Regardless, the attached nature of the garage was so well established by the evidence that no reasonable juror could have concluded otherwise, and the addition of this cumulative evidence would have had no effect on the deliberations of the jury. The government documents merely present additional support for the rebuttable presumption that he was acting in defense of his home when he killed the victim. Petitioner has not presented evidence that he did not kill Mr. Misaalefua, that an entirely new justification or defense that was unavailable at trial is made available by this evidence, or that the events (timing, positions and movements of Petitioner and Mr. Misaalefua, weapon used, shots fired, etc.) was anything other than what was presented to the jury at trial. Petitioner's government

documents are not the kind of exculpatory evidence showing actual innocence contemplated by *Schlup*.

2. Availability of Evidence at Trial

Regardless, even if the evidence were exculpatory, the government documents are not "new." *See e.g., McQuiggin, supra*, 133 S. Ct. at 1929 (suggesting that three affidavits obtained 11 years after conviction were not "new" because the affiants' eyewitness accounts were "substantially available" at trial). Here, Petitioner himself notes that the San Diego and Oceanside documents were "readily available." (*See* ECF No. 6 at 5:15, 6:15, 6:27, 7:13). The Court is hard-pressed to find any material difference between the "readily available" public records Petitioner presents here, and the "substantially available" eyewitness accounts identified as insufficient to open the miscarriage of justice gateway in *McQuiggin*. Indeed, the government records Petitioner presents, by virtue of their status as public records, must have been easier to obtain than the eyewitness accounts from multiple individuals presented by the Petitioner in *McQuiggin*.

The Court appreciates that the very essence of Petitioner's claim is that the government records were unavailable *to him* because of his

attorney's ineffective assistance. But Petitioner, as the owner of the home, surely knew—without resorting to public records—that his garage was attached to his house. Indeed, he testified at trial "the garage is my house." (Lod. 11-15 at 183). He fails to explain why his attorney did not pursue these claims earlier. Petitioner also offers no explanation for why the certification from the governments matter when all of the witnesses' testimony establish the same fact. Moreover, the actual innocence claim in *McQuiggin* was also raised through an ineffective assistance of counsel claim. *Id.* at 1929. Although the Supreme Court does not squarely address the question, its holding in *McQuiggin* suggests that evidence that was "readily available" at trial to the Petitioner *or* his allegedly ineffective counsel is not sufficiently "new" to open the actual innocence gateway.

Consequently, this Court **RECOMMENDS** finding that the evidence presented by Petitioner is insufficient to open the miscarriage of justice gateway for the new claims.

g. Relation Back Doctrine

This Court further **RECOMMENDS** finding that the relation back doctrine does not apply to the proposed new claims. Rule

15(c)(1)(B) provides that an amended Petition relates back to the date of the operative Petition where the claims in the amended Petition "arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). The Supreme Court has held that Rule 15 must be read in context with the requirement in Rule 2(c) of the Rules Governing Section 2254 Cases in the United States District Courts (the Habeas Rules) that habeas petitioners plead their claims with particularity, and with AEDPA's tight time limit, so as to permit only claims of the same "time and type" to relate back to the timely claims in the fully-exhausted petition that has been stayed. *Mayle v. Felix*, 545 U.S. 644 (2005); *see also King v. Ryan*, 564 F.3d 1133 (9th Cir. 2009). Claims are not of the same time and type "simply because they relate to the same trial, conviction, or sentence as a timely filed claim." *Mayle*, 545 U.S. at 656-657. In determining whether the claims are of the same time and type, courts consider whether the petitioner would have been required to state the claims separately under Habeas Rule 2(c). *See, e.g. Hebner v. McGrath*, 543 F.3d 1133, 1139 (9th Cir. 2008). *Hebner* explained that Habeas Rule 2(c) "requires a petitioner to 'specify all [available] grounds for

relief' and to 'state the facts supporting each ground.'" *Id.* at 1139. *Hebner* held that the petitioner would have been required to state his new claims separately if they had been filed in the same initial petition. *Id.* "Each would have been supported by 'separate congeries of facts,' the first claim focusing on the admission of evidence and the later claim on the instructions given to the jury, suggesting that they were separate occurrences." *Id.*

Here, the unexhausted claims arising from Petitioner's discovery of the government records and challenging Count 1 do not relate back to the claims in the pending Petition. Petitioner's pending timely claims do not focus on the conduct of any person. Rather they focus on the sufficiency of the evidence. In contrast, Petitioner proposes a myriad of claims (ineffective assistance of counsel, prosecutorial misconduct, trial court's plain error) each focusing on the *conduct* of defense counsel, the prosecutor, and the trial court, rather than the *sufficiency of the evidence.* (ECF No. 8 at 13-15). Petitioner would have had to state these new claims separately with "separate congeries of facts" in order to satisfy Habeas Rule 2(c).

Accordingly, this Court **RECOMMENDS** finding that relation back does not apply. Consequently, the proposed new claims are untimely, do not relate back, and do not fall within the miscarriage of justice exception. As a result, and because the government documents have no potential for reversing the murder conviction, this Court **RECOMMENDS** finding that Petitioner's proposed stay would be futile with respect to the new claims based on the government documents.

ii. New Claims Challenging Counts 2 and 3

Unlike the government documents, it does appear that the Justin Pulley affidavit would have had some evidentiary value if it (or Justin's testimony) had been offered at trial. Nevertheless, a stay would be futile as to the claims based on the affidavit because they are untimely, do not relate back, and do not fall within the miscarriage of justice exception to the AEDPA statute of limitations.

a. Statute of Limitations

The bulk of this Court's analysis of the timeliness of the claims based on the government records applies without modification to the claims based on the Justin Pulley affidavit. There is no dispute that Petitioner's conviction became final on September 10, 2013, such that

the one year statute of limitations expired on September 10, 2014 absent delayed accrual or tolling.

b. Statutory Delayed Accrual

Where, as here, the petitioner alleges new evidence, the statute begins to run on "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." § 2244(d)(1)(D). The Justin Pulley affidavit is dated October 1, 2014. (ECF No. 8 at 20-26). Petitioner acknowledges that he and his attorney knew all along that Justin was a witness to the altercation, and concedes that Justin's name was mentioned several times during the course of trial. (*Id.*). Even so, Petitioner asserts that this evidence was unavailable to him at trial, because Petitioner's defense counsel told him that Justin "refused to be interviewed and refused to testify." (ECF No. 8 at 7).

Petitioner does not explain why he or his counsel accepted Justin's "refusal" and why they did not attempt to subpoena him, particularly in light of the fact that the prosecutor had subpoenaed Matthew to testify when he refused. (Lod. 11-15 at 42). Petitioner does not describe any efforts he made himself, or through his wife, mother, or other visitors,

to reach out to Justin before and during the trial. It was not until August 2013, Petitioner asserts, that he learned during a visit from his mother that, contrary to what his attorney had told him, Justin had been available and willing to testify. (*Id.*). Petitioner asserts that he could not act on that "unconfirmed allegation" by his mother, until he received reliable evidence. (*Id.* at 17). The Court is not persuaded that Petitioner was not on notice of his attorney's failure to investigate and present Justin's eyewitness account until August 2013. Petitioner knew at the time of the trial that Justin was an eyewitness, and that the attorneys had the power to subpoena witnesses who refuse to testify. Accordingly, Petitioner should have discovered the factual predicate for his claims relating to the Justin Pulley affidavit by the close of trial, such that the accrual date on those claims would be the date his conviction became final.

Even if the Court were to credit Petitioner's assertion that he was not aware of his attorney's ineffective assistance or of Justin's percipient knowledge until August 2013, Petitioner's scant explanation and minimal efforts to obtain the affidavit over the 14 month period between August 2013 and October 2014 do not show due diligence.

Petitioner asserts that he was unable to obtain Justin's sworn affidavit until October 8, 2014, because Petitioner did not have contact information for his estranged son. (*Id.* at 7 and 17). But Petitioner could have sent a private investigator to find and make contact with Justin. Petitioner contends he had to wait until July 2014, when Justin next contacted his grandmother (Petitioner's mother). (*Id.*). Passively waiting for new evidence is not sufficient. Petitioner fails to show any efforts he made to obtain the affidavit. Accordingly, the Court **RECOMMENDS** finding that § 2244(d)(1)(D) does not delay the accrual date for new claims based upon the Justin Pulley affidavit.

c. Delayed Accrual for Ineffective Assistance of Counsel Claims

The statute of limitations clock does not start to tick on ineffective assistance of counsel claims until the petitioner has discovered (or with the exercise of due diligence could have discovered) facts suggesting both (1) that counsel's performance was unreasonable under prevailing professional standards and (2) that there is a reasonable probability that but for counsel's unprofessional errors, the result would have been different. *Hasan v. Galaza*, 254 F.3d 1150, 1154 (9th Cir. 2001).

Petitioner asserts that he did not know the basis for his ineffective assistance of counsel claims relating to the Justin Pulley affidavit until at least August 2013. But Petitioner knew at the time of the trial that Justin was an eyewitness. Moreover, Matthew testified that he had refused to testify and that the prosecutor had subpoenaed him to force him to appear. Thus, Petitioner knew that the attorneys had the power to subpoena witnesses who refuse to testify. Accordingly, Petitioner should have discovered the factual predicate for his ineffective assistance claims relating to Justin's eyewitness account by the close of trial, such that the accrual date on those claims would be the date his conviction became final. The Court **RECOMMENDS** finding that Petitioner's proposed ineffective assistance of counsel claims are not entitled to delayed accrual.

d. Equitable Tolling

The AEDPA limitations period is equitably tolled when the prisoner can show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Holland, supra*, 560 U.S. at 2562 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). Here, Petitioner has not shown reasonable

diligence in pursuing Justin's eyewitness account. As discussed earlier, Petitioner knew Justin was a witness to the altercation with Matthew, and knew that witnesses who refuse to testify could be subpoenaed. Petitioner also does not show any efforts he took to obtain the affidavit over the 14 month period besides talking to his mother. Moreover, Petitioner has not shown that it was impossible for him to obtain Justin's eyewitness account sooner. Consequently, this Court **RECOMMENDS** finding that the statute of limitations is not equitably tolled for the claims arising from the Justin Pulley affidavit.

e. Miscarriage of Justice Exception

The Justin Pulley affidavit is also insufficient to open the miscarriage of justice gateway. In *McQuiggin*, the Supreme Court cautioned "that tenable actual-innocence gateway pleas are rare: '[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'" *McQuiggin, supra*, 133 S. Ct. at 1928 (quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995)) (brackets in *McQuiggin*).

The Justin Pulley evidence is not the kind of exculpatory evidence contemplated by *McQuiggin* and *Schlup*. The jury could have afforded little or no weight to Justin's statements. Justin would have been viewed as biased in favor of his father. A reasonable juror could have chosen to believe Matthew instead of Justin, because Matthew had already been discharged from the Army by the time of trial, so the ulterior motive that Petitioner relies on to challenge Matthew's credibility was removed by the time of trial.

Moreover, Petitioner himself admitted to hitting Matthew. (Lod. 11-17 at 129-132). Justin Pulley's affidavit only corroborates Petitioner's testimony that he did not threaten Matthew; it does not contradict Matthew or Petitioner's testimony that Petitioner hit Matthew. Therefore, the Justin Pulley affidavit affords no basis for reversing the misdemeanor battery conviction, and does not rise to the level required to reverse the conviction on the felony threat count.

Regardless, even if the evidence were exculpatory, the Justin Pulley evidence is not "new" in the sense required to find a miscarriage of justice. Just like the declarations offered in *McQuiggin*, Justin's eyewitness account was substantially available to Petitioner at trial.

Petitioner knew Justin was a witness to the altercation with Matthew, and he and his attorney both knew that Justin could have been subpoenaed to testify. Because the Justin Pulley affidavit was substantially available to Petitioner at trial, and is not the type of exculpatory evidence required, this Court **RECOMMENDS** finding that the miscarriage of justice exception does not apply to the claims based on the Justin Pulley affidavit.

C. Conclusion re Motion for Stay

This Court **RECOMMENDS** finding that Petitioner's motion for stay be **DENIED** under *Rhines* and *Kelly*. The motion for stay should be denied under *Rhines*, because the Petition is not mixed. The motion for stay should be denied under *Kelly*, because the government documents are irrelevant, and the proposed new claims are not timely, do not relate back, and the miscarriage of justice exception does not apply.

VI. MOTION FOR LEAVE TO AMEND

Petitioner's motion for leave to amend is based upon the same facts and proposed amended petitions as his motion for stay. His motion for leave to amend raises the same legal issues that this Court

analyzed on the motion for stay. The same analysis applies here, and the Court hereby incorporates by reference that analysis and the conclusions drawn. Petitioner's government documents are irrelevant, and his proposed new claims are not timely, do not relate back, and are not entitled to the miscarriage of justice exception to the statute of limitations. Accordingly, the Court **RECOMMENDS** finding that the proposed amendments are futile, and that the motion for leave to amend be **DENIED**.

VII. MOTION REQUESTING DISPOSITION OF OTHER MOTIONS

Petitioner's Motion for Ruling on the motion for stay and motion to amend is **DENIED**. The Court has the inherent discretion to manage cases before it, and litigants generally cannot expedite determinations of motions they have filed by filing a reminder motion. Rather than expedite proceedings, this type of unnecessary motion simply takes the Court's time away from addressing substantive motions.

VIII. CONCLUSION

For the foregoing reasons, **IT IS HEREBY RECOMMENDED** that the District Court issue an Order: (1) Approving and adopting this

Report and Recommendation; (2) Denying Petitioner's motion to stay; (3) Denying Petitioner's motion to amend; and, (4) Denying Petitioner's motion requesting disposition of his motion to stay and motion to amend.

IT IS ORDERED that no later than **May 1, 2015**, any party to this action may file written objections with the Court and serve a copy on the 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 **May 8, 2015**. The parties are advised that failure to file objections with the specified time may waive the right to raise those objections on appeal of the Court's order. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991).

IT IS SO ORDERED.

Date: April 7, 2015

Hon. Mitchell D. Dembin
United States Magistrate Judge