

APPENDIX

A

19-55122

Michael Skinner, #AS-9418
CSP - CENTINELA STATE PRISON
Facility C Yard
P.O. Box 921
Imperial, CA 92251

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JAN 28 2020

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

MICHAEL SKINNER,

Petitioner-Appellant,

v.

RAYMOND MADDEN, Warden,

Respondent-Appellee.

No. 19-55122

D.C. No. 2:16-cv-06968-AB-AS
Central District of California,
Los Angeles

ORDER

Before: FARRIS and MURGUIA, Circuit Judges.

Appellant's motion for reconsideration en banc (Docket Entry No. 6) is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

19-55122

Michael Skinner, #AS-9418
CSP - CENTINELA STATE PRISON
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Respondent-Appellee.

No. 19-55122

D.C. No. 2:16-cv-06968-AB-AS
Central District of California,
Los Angeles

ORDER

Before: FARRIS and McKEOWN, Circuit Judges.

The request for a certificate of appealability is denied because the underlying 28 U.S.C. § 2254 petition fails to state any federal constitutional claims debatable among jurists of reason. *See* 28 U.S.C. § 2253(c)(2)-(3); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (“When ... the district court denies relief on procedural grounds, the petitioner seeking a COA must show both ‘that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.’”) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Any pending motions are denied as moot.

DENIED.

APPENDIX

B.

Michael Skinner AS9418
Centinela State Prison
PO Box 911
Imperial, CA 92251

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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Case Name: Michael Skinner v. Raymond Madden

Case Number: 2:16-cv-06968-AB-AS

Filer:

WARNING: CASE CLOSED on 12/21/2018

Document Number: 69

Docket Text:

**JUDGMENT by Judge Andre Birotte Jr. Pursuant to the Order Accepting Findings,
Conclusions and Recommendations of United States Magistrate Judge [68], IT IS ADJUDGED
that the Petition is denied and dismissed with prejudice. (MD JS-6, Case Terminated).(afe)**

2:16-cv-06968-AB-AS Notice has been electronically mailed to:

Kenneth C Byrne docketinglaawt@doj.ca.gov, lici.garcia@doj.ca.gov, kenneth.byrne@doj.ca.gov
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**2:16-cv-06968-AB-AS Notice has been delivered by First Class U. S. Mail or by other means BY
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Centinela State Prison
PO Box 911
Imperial CA 92251

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Pursuant to the Order Accepting Findings, Conclusions and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED that the Petition is denied and dismissed with prejudice.

12/21/2018

DATED :

John B.

ANDRÉ BIROTE JR.
UNITED STATES DISTRICT JUDGE

Michael Skinner AS9418
Centinela State Prison
PO Box 911
Imperial, CA 92251

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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

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Case Name: Michael Skinner v. Raymond Madden

Case Number: 2:16-cv-06968-AB-AS

Filer:

Document Number: 50

Docket Text:

REPORT AND RECOMMENDATION OF A UNITED STATES MAGISTRATE JUDGE
issued by Magistrate Judge Alka Sagar. Re Petition for Writ of Habeas Corpus (2254) [1]. (See
document for complete details) (afe)

2:16-cv-06968-AB-AS Notice has been electronically mailed to:

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION

MICHAEL SKINNER,) Case No. CV 16-06968-AB (AS)
Petitioner,) **REPORT AND RECOMMENDATION OF A
v.) UNITED STATES MAGISTRATE JUDGE
RAYMOND MADDEN,)
Respondent.)**

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

I. INTRODUCTION

On September 9, 2016, Michael Skinner ("Petitioner"), a California state prisoner proceeding pro se, constructively filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28

1 U.S.C. § 2254 ("Petition"). (Docket Entry No. 1).¹ The Petition asserts
2 the following grounds for federal habeas relief: (1) The prosecutor
3 committed misconduct by commenting on Petitioner's demeanor at trial;
4 (2) Petitioner received ineffective assistance of counsel based on his
5 trial counsel's failure to investigate, call potential witnesses, and
6 produce evidence of third-party culpability; (3) Petitioner received
7 ineffective assistance of counsel based on his trial counsel's failure
8 to object to the impermissibly suggestive line-up procedure; and (4)
9 Petitioner received ineffective assistance of counsel based on his
10 trial counsel's elicitation of prejudicial testimony from a witness
11 about uncharged acts by Petitioner. (Petition at 5-6).

12
13 On the same date, Petitioner filed a Motion for a Stay and
14 Abeyance, requesting that the unexhausted claims of the Petition
15 (Grounds Two through Four) be dismissed and moving for a stay of the
16 action pursuant to Kelly v. Small, 300 F.3d 1159 (9th Cir. 2002).
17 (Docket Entry No. 2).

18
19
20
21¹ The Petition and an attached Proof of Service by Mail were
22 signed on September 9, 2016, the Petition was lodged with the Clerk of
23 the Court on September 15, 2016, and filed with the Clerk of the Court
on September 16, 2016.

24 A habeas petition is constructively filed on the date a
25 prisoner presents his federal habeas petition to prison authorities for
26 forwarding to the Clerk of the Court. Saffold v. Newland, 250 F.3d
1262, 1268 (9th Cir. 2000), vacated on other grounds, 536 U.S. 214
(2002); Huizar v. Carey, 273 F.3d 1220, 1222 (9th Cir. 2001). For the
27 purposes of its analysis, the Court will use September 9, 2016, the
28 date on which the Petition and attached Proof of Service by Mail were
signed, as the filing date.

1 On October 27, 2016, after Respondent filed a non-opposition to
2 Petitioner's Motion for a Stay (Docket Entry No. 9), the Court issued
3 an Order Granting Petitioner's Motion for a Stay pursuant to Kelly,
4 dismissing Petitioner's unexhausted claims (Grounds Two through Four),
5 and staying Petitioner's remaining exhausted claim (Ground One) in
6 order to permit Petitioner to present the unexhausted claims to the
7 California courts. (Docket Entry No. 10 at 1). The Court ordered
8 Petitioner to file a motion to amend the Petition, accompanied by a
9 proposed First Amended Petition that alleges only the currently
10 exhausted claim and the newly exhausted claims, within thirty days of
11 the California Supreme Court's decision on a habeas petition filed by
12 Petitioner. Id. at 2. The Court warned Petitioner that he would be
13 able to amend the Petition to add the newly exhausted claims only if
14 the newly exhausted claims are timely and "relate back" to the
15 exhausted claim in the Petition. Id. (citing King v. Ryan, 564 F.3d
16 1133, 1140-41 (9th Cir. 2009) and Mayle v. Felix, 545 U.S. 655, 664
17 (2005)).

18
19 On December 29, 2017, after the California Supreme Court's
20 November 29, 2017 denial of Petitioner's petition for writ of habeas
21 corpus (see Petitioner's December 21, 2017 Status Report, Exhibit
22 [Docket Entry No. 34]; Respondent's Notice of Lodging ["Lodgment"] No.
23 5), the Court issued a Minute Order lifting the Kelly stay. (Docket
24 Entry No. 35 at 1). The Court reminded Petitioner of the October 27,
25 2016 Order requiring him to file a motion to amend the Petition,
26 accompanied by a proposed First Amended Petition that alleges only the
27 currently exhausted claim and the newly exhausted claims, and warning
28 him that he would be able to amend the Petition to add the newly

1 exhausted claims only if the newly exhausted claims were timely and
2 "related back" to the exhausted claim in the Petition. Id.
3

4 On March 26, 2018, Petitioner filed a Motion to Amend the
5 Petition, which was accompanied by a proposed First Amended Petition
6 for Writ of Habeas Corpus by a Person in State Custody, pursuant to 28
7 U.S.C. § 2254 ("First Amended Petition"). (Docket Entry No. 43). The
8 First Amended Petition, lodged on March 26, 2018,² raises one claim,
9 namely, that Petitioner received ineffective assistance of counsel
10 based on his trial counsel's failure to object to the prosecutor's
11 comments about Petitioner's demeanor at trial and about the reasonable
12 doubt standard. (First Amended Petition at 5, Memorandum at 1-5).³⁴

13
14
15
16

² The Motion to Amend the Petition and the attached Proof of
17 Service by Mail were signed on March 19, 2018. The First Amended
18 Petition and the attached Proof of Service by Mail were signed on
19 February 28, 2018. For purposes of its analysis, the Court will
consider February 28, 2018, the date on which the First Amended
Petition was signed, as the constructive filing date.

20 ³ It is not clear whether Petitioner wants to proceed with the
21 portion of his claim concerning his trial counsel's ineffectiveness for
22 failing to object to the prosecutor's comments about the reasonable
23 doubt standard. (See Docket Entry No. 48 at 6-7). For purposes of its
24 analysis, the Court assumes that Petitioner would like to proceed with
the entire ineffective assistance of counsel claim alleged in the First
Amended Petition.

25 ⁴ In the First Amended Petition, Petitioner, in non-compliance
26 with the Court's Orders (see Docket Entry Nos. 10 at 2, 35 at 1), did
not allege the only previously exhausted claim -- Ground One of the
27 Petition (prosecutorial misconduct by commenting on Petitioner's
demeanor at trial, Petition at 5). For purposes of its analysis, the
28 Court assumes that Petitioner does not want to abandon the exhausted
prosecutorial misconduct claim alleged in the Petition.

1 On April 10, 2018, Respondent filed an Opposition to the Motion to
2 Amend the Petition ("Opposition"), contending that the ineffective
3 assistance of counsel claim in the First Amended Petition is untimely
4 and does not relate back to the exhausted claim in the Petition.
5 (Docket Entry No. 45).

6

7 On April 30, 2018, Petitioner filed a Reply to the Opposition
8 ("Reply"). (Docket Entry No. 48).

9

10 For the reasons stated below, it is recommended that the Motion to
11 Amend be DENIED.

12

13 **II. BACKGROUND**

14

15 On March 3, 2014, a Los Angeles County Superior Court jury found
16 Petitioner guilty of three counts of second degree robbery in violation
17 of California Penal Code ["P.C."] § 211, and also found true the
18 special allegations that Petitioner personally used a firearm in the
19 commission of the robberies (P.C. § 1022.5(a)). (See Lodgment No. 1 at
20 2; Petition at 2). According to Petitioner, the trial court sentenced
21 him to state prison for a total of 20 years. (Petition at 3).⁵

22

23

24

25

26 ⁵ Respondent states that the trial court sentenced Petitioner
27 to state prison for a total of 15 years. (See Opposition at 3).

28 The length of Petitioner's prison sentence is not relevant to
the Court's present analysis.

1 Petitioner appealed his convictions and sentence to the California
2 Court of Appeal,⁶ which, on July 29, 2015, modified the Judgment to
3 reflect additional days of presentence custody credit, and affirmed the
4 Judgment in all other respects. (See Lodgment No. 1). Petitioner then
5 filed a Petition for Review with the California Supreme Court which was
6 summarily denied on October 14, 2015. (See Lodgment Nos. 2-3).

7

8 As noted above, the Petition was constructively filed in this
9 Court on September 9, 2016.

10

11 On September 21, 2017 (after the Court granted Petitioner Motion
12 for a Stay, and dismissed Grounds Two through Four of the Petition),
13 Petitioner constructively filed a habeas petition with the California
14 Supreme Court which was summarily denied on November 29, 2017. (See
15 Lodgment Nos. 4-5; Petitioner's December 21, 2017 Status Report,
16 Exhibit).⁷

17

18 As noted above, see n.1, the First Amended Petition would have
19 been constructively filed on February 28, 2018.

20

21 ⁶ Neither party has provided the Court with a copy of
22 Petitioner's appellate brief(s).

23 ⁷ That habeas petition was signed on September 21, 2017, and
24 filed with the Clerk of the California Supreme Court on September 29,
2017. There is no proof of service attached to that habeas petition.

25 A state habeas petition is constructively filed on the date
26 a prisoner presents it to prison authorities for forwarding. Houston
27 v. Lack, 487 U.S. 266, 273 (1988); Patterson v. Stewart, 251 F.3d 1243,
28 1245 n.2 (9th Cir. 2001); Saffold v. Newland, supra, n.1. For purposes
of its analysis, the Court will consider September 21, 2017, the date
on which that habeas petition was signed, as the filing date.

III. DISCUSSION

A. The Limitations Period

The Antiterrorism and Effective Death Penalty Act ("AEDPA") applies to the Petition because it was filed after the statute's effective date of April 24, 1996. See Lindh v. Murphy, 521 U.S. 320, 322-23 (1997). Under AEDPA, state prisoners must file their federal habeas petitions within one-year of the latest of the following dates:

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review;

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

4
5 28 U.S.C. § 2244(d)(1). "AEDPA's one-year statute of limitations in §
6 2244(d)(1) applies to each claim in a habeas application on an
7 individual basis." Mardesich v. Cate, 668 F.3d 1164, 1171 (9th Cir.
8 2012). The limitations period is tolled when a prisoner properly files
9 an application for state post-conviction review (statutory tolling) and
10 may also be tolled during reasonable periods of time between such state
11 habeas proceedings (gap tolling). 28 U.S.C. § 2244(d)(2); Pace v.
12 DiGuglielmo, 544 U.S. 408, 410 (2005).

13
14 AEDPA's limitations period may also be tolled for equitable
15 reasons "in appropriate cases." Holland v. Florida, 560 U.S. 631, 645
16 (2010). The Ninth Circuit recognizes the availability of equitable
17 tolling of the one-year statute of limitations in situations where
18 extraordinary circumstances beyond a prisoner's control make it
19 impossible to file a petition on time. Spitsyn v. Moore, 345 F.3d 796,
20 799 (9th Cir. 2003). A prisoner must establish that: (1) he has been
21 pursuing his rights diligently; and (2) some extraordinary circumstance
22 caused the delay. Holland, supra, 560 U.S. at 649. This is a highly
23 fact-dependent determination. Spitsyn, supra.

24 //

25 //

26 //

1 B. Petitioner Filed His Petition Within The Limitations Period, But
2 He Did Not Seek to File His First Amended Petition Within the
3 Limitations Period

4 As indicated above, a petitioner ordinarily has one-year from the
5 date that the state court's judgment becomes final to file a federal
6 habeas petition. See 28 U.S.C. § 2244(d)(1). A case becomes final at
7 "the conclusion of direct review or the expiration of the time for
8 seeking such review." 28 U.S.C. § 2244(d)(1)(A); see Calderon v.
9 United States District Court (Beeler), 128 F.3d 1283, 1286 (9th Cir.
10 1997) (A state prisoner with a conviction finalized after April 24, 1996
11 must seek federal habeas relief "within one year of the date his
12 process of direct review came to an end."), overruled in part on other
13 grounds by Calderon v. United States District Court (Kelly), 163 F.3d
14 530 (9th Cir. 1998) (en banc).

15 The California Supreme Court denied Petitioner's Petition for
16 Review on October 14, 2015. Petitioner's conviction became final on
17 January 12, 2016, when Petitioner's time to petition the United States
18 Supreme Court for a writ of certiorari expired.⁸ See Wixom v.
19 Washington, 164 F.3d 894, 897 (9th Cir. 2001); Bowen v. Roe, 188 F.3d
20 1157, 1158-59 (9th Cir. 1999). The AEDPA one-year statute of
21 limitations commenced to run on January 13, 2016. See Patterson v.
22 Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001). Absent the application
23 of an alternate start date under § 2244(d)(1),⁹ or sufficient statutory

24
25 ⁸ Pursuant to United States Supreme Court Rule 13.1, petitioner
26 had 90 days from the date the Order denying his Petition for Review
27 became final to petition the Supreme Court for a writ of certiorari.

28 ⁹ Since Petitioner does not allege the applicability of any
circumstances that would delay the running of the statute of

1 or equitable tolling, the limitations period expired one year later, on
2 January 12, 2017. See Patterson v. Stewart, supra.

3

4 Petitioner is not entitled to any statutory tolling during the
5 pendency of the Petition filed in this Court. See Duncan v Walker, 533
6 U.S. 167, 181-82 (2001) ("We hold that an application for federal habeas
7 corpus review is not an 'application for State post-conviction or other
8 collateral review' within the meaning of 28 U.S.C. § 2244(d)(2).
9 Section 2244(d)(2) therefore did not toll the limitation period during
10 the pendency of respondent's first federal habeas petition.").

11

12 Petitioner also is not entitled to statutory tolling during the
13 pendency of his habeas petition in the California Supreme Court (from
14 September 21, 2017 to November 29, 2017, see Lodgment Nos. 4-5;
15 Petitioner's December 21, 2017 Status Report, Exhibit). This is
16 because a habeas petition filed after the conclusion of the limitations
17 period cannot reinitiate the limitations period. See Ferguson v.
18 Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) ("[S]ection 2244(d) does
19 not permit the reinitiation of the limitations period that has ended
20 before the state petition was filed"); Jiminez v. Rice, 276 F.3d 478,
21 482 (9th Cir. 2001) (filing of state habeas petition "well after the
22 AEDPA statute of limitations ended" does not affect the limitations
23 bar); Webster v. Moore, 199 F.3d 1256, 1259 (11th Cir. 2000) ("[A]
24 state-court petition . . . that is filed following the expiration of

25

26 limitations (see 28 U.S.C. § 2244(d)(1)(B)-(D)), the Court will not
27 address those provisions.

1 the limitations period cannot toll that period because there is no
2 period remaining to be tolled.").

3

4 The Petition filed on September 9, 2016 was timely. However,
5 Petitioner did not seek to file his First Amended Petition until
6 February 28, 2018, more than 13 months after the statute of limitations
7 expired. Therefore, absent grounds for equitable tolling, the First
8 Amended Petition that Petitioner seeks to file is untimely.

9

10 C. Petitioner Is Not Entitled To Equitable Tolling

11

12 The United States Supreme Court has recognized the availability of
13 equitable tolling to the one-year statute of limitations in
14 "extraordinary circumstances," such as those involving "serious
15 instances of attorney misconduct." Holland, supra, 560 U.S. at 649-52.

16

17 The Ninth Circuit recognizes the availability of equitable tolling
18 of the one-year statute of limitations in situations where
19 extraordinary circumstances beyond a prisoner's control make it
20 impossible to file a petition on time. Spitsyn, supra, 345 F.3d at
21 799. The words "extraordinary" and "impossible" suggest the limited
22 availability of this doctrine, and to date the Ninth Circuit has found
23 very few circumstances which warrant equitable tolling.¹⁰ See

24

25 ¹⁰ See e.g., Rudin v. Myles, 781 F.3d 1043, 1056-59 (9th Cir.
26 2015) (equitable tolling warranted where the petitioner's first counsel
27 abandoned the petitioner by making minimal visits to the petitioner and
28 then stopping the visits, blocking the petitioner's phone calls, not
showing an intention at post-conviction hearings to actually represent
the petitioner, and failing to provide the petitioner with reasons for
counsel's delay; and where the state affirmatively misled the

1 Waldron-Ramsey v. Pacholke, 556 F.3d 1008, 1011 (9th Cir. 2009) ("To
2 apply the doctrine in extraordinary circumstances necessarily suggests
3 the doctrine's rarity."). A petitioner must establish that: (1) he has
4 been pursuing his rights diligently; and (2) some extraordinary
5 circumstance caused the delay. Pace, supra, 544 U.S. at 418. This is
6 a highly fact-dependent determination. Spitsyn, supra. Petitioner
7 bears the burden to prove equitable tolling. See Zepeda v. Walker, 581
8 F.3d 1018, 1019 (9th Cir. 2009). Petitioner must show that "'the
9 extraordinary circumstances were the cause of his untimeliness . . .
10 and that the 'extraordinary circumstances ma[de] it impossible to file
11 a petition on time.'" Ramirez v. Yates, 571 F.3d 993, 997 (9th Cir.
12 2009) (citations omitted). Petitioner must show that an "external
13 force" caused the untimeliness, rather than "oversight, miscalculation
14 or negligence." Waldron-Ramsey, supra (citation omitted); see also
15 Holland, 560 U.S. at 651-52.

16
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18

19 petitioner into believing that the state court had excused the
20 petitioner's late filing and that the statute of limitations would be
21 statutorily tolled); Gibbs v. LeGrand, 767 F.3d 879, 886-88 (9th Cir.
22 2014) (equitable tolling warranted where petitioner's counsel abandoned
23 petitioner by failing to notify him of the state supreme court's denial
24 of his appeal of his state post-conviction petition until after the
25 expiration of the statute of limitations, despite petitioner's repeated
26 inquiries); Doe v. Busby, 661 F.3d 1001, 1012-15 (9th Cir.
27 2011) (equitable tolling warranted where petitioner's counsel failed to
28 file federal habeas petition after making numerous promises to timely
file, did not return the petitioner's file until long after the statute
of limitations had run, and petitioner was reasonably diligent in
pursuing his rights); and Bills v. Clark, 628 F.3d 1092, 1098-1101 (9th
Cir. 2010) (equitable tolling may be warranted where mental impairment
so severe that petitioner was unable personally either to understand
the need to timely file or prepare a habeas petition, and that
impairment made it impossible under the totality of the circumstances
to meet the filing deadline despite petitioner's diligence).

1 To the extent that Petitioner contends that he is entitled to
2 equitable tolling based on his lack of understanding of the law (see
3 Reply at 6-7), his contention fails. See Waldron-Ramsey, supra, 556
4 F.3d at 1013 n.4 ("[We] have held that a pro se petitioner's confusion
5 or ignorance of the law is not, itself, a circumstance warranting
6 equitable tolling."); Rasberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir.
7 2006) ("[A] pro se petitioner's lack of legal sophistication is not, by
8 itself, an extraordinary circumstance warranting equitable tolling.");
9 Turner v. Johnson, 177 F.3d 390, 392 (5th Cir. 1999) ("Neither a
10 plaintiff's unfamiliarity with the legal process nor his lack of
11 representation during the applicable filing period merits equitable
12 tolling It is irrelevant whether the unfamiliarity is due to
13 illiteracy or any other reason.").

14
15 Accordingly, the Court finds the First Amended Petition that
16 Petitioner proposes to file to be untimely.

17
18 D. The Ineffective Assistance of Counsel Claim Alleged in the First
19 Amended Petition Does Not Relate Back to the Prosecutorial
Misconduct Claim Alleged in the Petition

20 An amended habeas petition "does not relate back (and thereby
21 escape AEDPA's one-year time limit) when it asserts a new ground for
22 relief supported by facts that differ in both time and type from those
23 the original pleading set forth." Mayle, supra, 545 U.S. at 650. In
24 a habeas context, an amended petition relates back to the original
25 petition "[s]o long as the original and amended petitions state claims
26 that are tied to a common core of operative facts." Id. at 654; see
27 also Ford v. Hubbard, 330 F.3d 1086, 1105 (9th Cir. 2003) (Rule 15(c)
28

1 did not apply to claims which were not set forth in the original
2 pleadings and which were not "newly discovered"), rvsd on other grds
3 sub. nom Pliler v. Ford, 542 U.S. 225 (2004).

4

5 Respondent contends that the ineffective assistance of counsel
6 claim in the First Amended Petition does not "relate back" to the date
7 of the Petition because the ineffective assistance of counsel claim in
8 the First Amended Petition does not share a "common core of operative
9 facts" with the prosecutorial misconduct claim in the Petition. (See
10 Opposition at 6-9).

11

12 The sole claim in the proposed First Amended Petition -- alleging
13 an ineffective assistance of counsel claim based on trial counsel's
14 failure to object to the prosecutor's comments about Petitioner's
15 demeanor at trial and about the reasonable doubt standard (First
16 Amended Petition at 5, Memorandum at 1-5) -- does not relate back to
17 the date of the Petition under Federal Rule of Civil Procedure 15(c)(2)
18 because that claim and the prosecutorial misconduct claim in the
19 Petition (the sole remaining claim) -- alleging the prosecutor
20 committed misconduct by commenting on Petitioner's demeanor at trial
21 (Petition at 5) -- are not "tied to a common core of operative facts."

22

23 Trial counsel's failure to object to the prosecutor's misconduct
24 in commenting about Petitioner's demeanor at trial and the reasonable
25 doubt standard simply does not "share a common core" of facts with the
26 claim (alleged in Ground One of the Petition) that the prosecutor
27 committed misconduct in commenting about Petitioner's demeanor at
28 trial. Indeed, these two claims arise from distinct actions taken by

1 different actors at different points in time, namely, the prosecutor's
2 actions at trial, and the trial counsel's actions at trial. See
3 Schneider v. McDaniel, 674 F.3d 1144, 1151 (9th Cir. 2012) (claim
4 alleging trial court error in denying motion to sever the trial did not
5 relate back to claim that trial counsel failed to file a timely motion
6 to sever the trial; "These two claims do not arise out of a common core
7 of operative facts. . . . The core facts underlying the second theory
8 are different in type from the core facts underlying the first
9 theory."); Hebner v. McGrath, 543 F.3d 1133, 1139 (9th Cir. 2008)
10 (claim involving jury instructions at close of evidence did not relate
11 back to claim involving admission of testimony at trial; "The two
12 claims depend on separate transactions and do not share a common core
13 of operative fact"); Mayle, supra, 545 U.S. at 650; but see Nguyen v.
14 Curry, 736 F.3d 1287, 1297 (9th Cir. 2013) (stating, "[T]he 'time and
15 type' language in *Mayle* refers not to claims, or grounds for relief.
16 Rather, it refers to the facts that support those grounds."); and
17 holding that the claim in the amended petition alleging ineffective
18 assistance of appellate counsel for failure to allege a double jeopardy
19 claim on appeal "relates back" to the claims in the petition alleging
20 cruel and unusual punishment and a double jeopardy violation because
21 the claims "are supported by a common core of facts" which are "simple,
22 straightforward, and uncontroverted") (italics in original).¹¹

23

24 ¹¹ "Several district courts have noted that Schneider and Nguyen
25 appear to be irreconcilable or in tension." Hines v. Ducart, 2017 WL
26 2416374, *9 (C.D. Cal. Mar. 21, 2017). To the extent that Schneider
27 and Nguyen conflict, Schneider controls. See Posey v. Harrington, 2014
WL 1289604, *1 (C.D. Cal. Mar. 31, 2014) ("[W]hen a subsequent three-
judge panel opinion conflicts with the opinion of an earlier three-
judge panel, it is the earlier decision that controls.") (citing Avagyan
v. Holder, 646 F.3d 672, 677 (9th Cir. 2011)); Gonzalez v. Ryan, 2014
WL 4476588, *7 (D. Ariz. Sept. 10, 2014) ("Schneider, therefore, remains

1 Since the ineffective assistance of trial counsel claim alleged in
2 the First Amended Petition does not "relate back" to the date of the
3 Petition, the First Amended Petition is untimely. Therefore,
4 Petitioner's Motion to Amend the Petition should be denied.

5

6 **IV. RECOMMENDATION**

7

8 For the foregoing reasons, IT IS RECOMMENDED that the Court issue
9 an Order: (1) accepting and adopting this Report and Recommendation;
10 and (2) denying Petitioner's Motion to Amend the Petition.

11

12 DATED: May 4, 2018

13

14 /s/
15 ALKA SAGAR
16 UNITED STATES MAGISTRATE JUDGE

17

18 **NOTICE**

19 Reports and Recommendations are not appealable to the Court of
20 Appeals, but may be subject to the right of any party to file
21 objections as provided in the Local Rules Governing the Duties of
22 Magistrate Judges and review by the District Judge whose initials
23 appear in the docket number. No Notice of Appeal pursuant to the
24 Federal Rules of Appellate Procedure should be filed until entry of
25 the judgment of the District Court.

26

27

28 the current legal standard, notwithstanding, the subsequent ruling in
"Nguyễn.").

Michael Skinner AS9418
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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**'ORDER ACCEPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF
UNITED STATES MAGISTRATE JUDGE [63] by Judge Andre Birotte Jr. IT IS ORDERED
that Judgment be entered denying the Petition and dismissing this action with prejudice. (See
Order for complete details) (afe)**

2:16-cv-06968-AB-AS Notice has been electronically mailed to:

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

10 MICHAEL SKINNER,) NO. CV 16-06968-AB (AS)
11 Petitioner,)
12 v.) ORDER ACCEPTING FINDINGS,
13 RAYMOND MADDEN,) CONCLUSIONS AND RECOMMENDATIONS OF
14 Respondent.) UNITED STATES MAGISTRATE JUDGE
15

18 Pursuant to 28 U.S.C. section 636, the Court has reviewed the
19 Petition, all of the records herein and the attached Report and
20 Recommendation of United States Magistrate Judge. After having made a
21 *de novo* determination of the portions of the Report and Recommendation
22 to which objections were directed, the Court concurs with and accepts
23 the findings and conclusions of the Magistrate Judge.

25 **IT IS ORDERED** that Judgment be entered denying the Petition and
26 dismissing this action with prejudice.

1 **IT IS FURTHER ORDERED** that the Clerk serve copies of this Order,
2 the Magistrate Judge's Report and Recommendation and the Judgment herein
3 on counsel for Petitioner and counsel for Respondent.

4

5 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

6

7 DATED: 12/21/2018

8

9

10 
ANDRÉ BIROTTE JR.
UNITED STATES DISTRICT JUDGE