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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>JEREMY THOMAS CLARK,</p> <p style="text-align: center;">Petitioner - Appellant,</p> <p>v.</p> <p>MIKE MARTEL,</p> <p style="text-align: center;">Respondent - Appellee.</p>
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No. 10-16986

D.C. No. 2:08-cv-02949-LKK

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding

Submitted September 27, 2011**

Before: HAWKINS, SILVERMAN, and W. FLETCHER, Circuit Judges.

California state prisoner Jeremy Thomas Clark appeals pro se from the district court’s judgment dismissing his 28 U.S.C. § 2254 habeas petition as untimely. We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Clark contends his petition is not subject to AEDPA's statute of limitations, because he is actually innocent in the sense that the Information, jury charge, and jury verdict forms only permitted a finding of guilt for second degree murder, and therefore he was improperly found guilty of first degree murder. The district court properly dismissed the habeas petition as untimely as it was filed after the one-year statutory limitations period had ended. *See* 28 U.S.C. § 2244(d). Clark presents no new evidence of actual innocence sufficient to excuse his untimely filing. *See Lee v. Lampert*, No. 09-35276, 2011 WL 3275947, at *6 (9th Cir. August 2, 2011). “[A]ctual innocence means factual innocence, not mere legal insufficiency.” *Bousley v. United States*, 523 U.S. 614, 623 (1998) (internal quotation marks omitted).

We construe appellant's additional arguments as a motion to expand the certificate of appealability. So construed, the motion is denied. *See* 9th Cir. R. 22-1(e); *Hiivala v. Wood*, 195 F.3d 1098, 1104-05 (9th Cir. 1999) (per curiam).

AFFIRMED.