



1 Angeles County Superior Court.

2 On February 28, 2019, respondent filed a Motion to Dismiss the Petition,  
3 asserting the claims are barred by the one-year statute of limitations set forth in the  
4 Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), 28 U.S.C.  
5 § 2244(d)(1). For the reasons discussed below, the court finds the Petition is  
6 untimely. As such, the court grants the Motion to Dismiss.

7 **II.**

8 **PROCEEDINGS**

9 On June 8, 2016, petitioner pled nolo contendere to assault upon a peace  
10 officer (Cal. Penal Code § 245(c)) and battery against a peace officer (Cal. Penal  
11 Code § 243(c)(2)), and admitted he inflicted great bodily injury in the commission  
12 of these offenses (Cal. Penal Code § 12022.7(a)). LD 1 at 30-31; LD 4 at 3-4; LD  
13 7. Petitioner also admitted to three prior convictions that qualified as serious  
14 and/or violent felonies and strikes under California’s Three Strikes Law. *See* LD 1  
15 at 31; LD 4 at 4-5. At the September 22, 2016 sentencing hearing, the trial court  
16 struck two of the three strikes and sentenced petitioner to 21 years in prison. LD 1  
17 at 33-34; LD 7.

18 Petitioner did not appeal his conviction or sentence. Petition at 2. Petitioner  
19 apparently tried to file a notice of appeal a few weeks after his sentencing, but it  
20 was not filed because there was no certificate of probable cause. LD 1 at 35.  
21 Petitioner then requested a certificate of probable cause, but the Superior Court  
22 denied that request on November 30, 2016. *Id.*

23 Petitioner constructively filed a habeas petition in the Los Angeles County  
24 Superior Court on July 5, 2017. LD 8. Petitioner presented two sentencing error  
25 claims: (1) petitioner’s sentence was illegally enhanced; and (2) petitioner was  
26 given multiple sentences for a single criminal act. *Id.* On July 31, 2017, the  
27 Superior Court denied the habeas petition. LD 1 at 36-37.



1 judgment of a State court.” 28 U.S.C. § 2244(d)(1); *see also Lawrence v. Florida*,  
2 549 U.S. 327, 329, 127 S. Ct. 1079, 166 L. Ed. 2d 924 (2007); *Mardesich v. Cate*,  
3 668 F.3d 1164, 1171 (9th Cir. 2012). After the one-year limitation period expires,  
4 the prisoner’s “ability to challenge the lawfulness of [his] incarceration is  
5 permanently foreclosed.” *Lott*, 304 F.3d at 922.

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

9 (A) the date on which the judgment became final by the conclusion  
10 of direct review or the expiration of the time for seeking such review;

11 (B) the date on which the impediment to filing an application  
12 created by State action in violation of the Constitution or laws of the  
13 United States is removed, if the applicant was prevented from filing  
14 by such State action;

15 (C) the date on which the constitutional right asserted was initially  
16 recognized by the Supreme Court, if the right has been newly  
17 recognized by the Supreme Court and made retroactively applicable to  
18 cases on collateral review; or

19 (D) the date on which the factual predicate of the claim or claims  
20 presented could have been discovered through the exercise of due  
21 diligence.

22 28 U.S.C. § 2244(d)(1). Ordinarily, the starting date of the limitation period is the  
23 date on which the judgment becomes final after the conclusion of direct review or  
24 the expiration of the time allotted for seeking direct review. *See Wixom v.*  
25 *Washington*, 264 F.3d 894, 897 (9th Cir. 2001).

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

3 Here, petitioner was sentenced on September 22, 2016. LD 7. Because  
4 there was no appeal of the judgment, petitioner’s conviction became final sixty  
5 days later, on November 21, 2016. *See* Cal. R. Ct. 8.308(a); *Mendoza v. Carey*,  
6 449 F.3d 1065, 1067 (9th Cir. 2006) (petitioner did not appeal his conviction,  
7 which became final sixty days after the judgment of conviction).

8 As such, under AEDPA, the limitation period here expired on November 21,  
9 2017. Petitioner did not constructively file the instant Petition until December 7,  
10 2018, over one year later. Consequently, the Petition is untimely absent sufficient  
11 statutory or equitable tolling.

12 **B. Petitioner Is Entitled to Some Statutory Tolling**

13 Statutory tolling is available under AEDPA during the time “a properly filed  
14 application for State post-conviction or other collateral review with respect to the  
15 pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2); *accord Evans v.*  
16 *Chavis*, 546 U.S. 189, 191, 126 S. Ct. 846, 163 L. Ed. 2d 684 (2006); *Patterson v.*  
17 *Stewart*, 251 F.3d 1243, 1247 (9th Cir. 2001). But “in order to qualify for  
18 statutory tolling during the time the petitioner is pursuing collateral review in the  
19 state courts, the prisoner’s state habeas petition must be constructively filed *before*,  
20 not after, the expiration of AEDPA’s one-year limitations period.” *Johnson v.*  
21 *Lewis*, 310 F. Supp. 2d 1121, 1125 (C.D. Cal. 2004).

22 Petitioner constructively filed his first state habeas petition on July 5, 2017,  
23 which was denied on July 31, 2017. LD 1 at 36-37; LD 8. Petitioner is therefore  
24 entitled to 26 days of statutory tolling, between when he constructively filed the  
25 habeas petition and the Los Angeles County Superior Court denied it. This  
26 statutory tolling extends the statute of limitations to December 17, 2017.

27 On September 21, 2017, petitioner constructively filed a motion for  
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1 reconsideration in the Superior Court. LD 9. But rather than simply asking for  
2 reconsideration, petitioner asked the Superior Court to consider a different habeas  
3 petition than the one it initially denied. *Compare* LD 8 and 9. The Superior Court  
4 recognized the habeas petition attached to the motion for reconsideration raised  
5 one identical ground and one different ground. *See* LD 10. It therefore treated the  
6 motion for reconsideration as a new habeas petition, which it denied on October 4,  
7 2017. *Id.* Petitioner is entitled to 13 days of statutory tolling for the period the  
8 second habeas petition was pending, which extends the statute of limitations to  
9 December 30, 2017.

10 Petitioner is not, however, entitled to gap tolling for the interval between the  
11 Superior Court’s denial of his first habeas petition and the filing of his second  
12 habeas petition. Although a petitioner may be entitled to gap tolling for the periods  
13 between petitions during a round of collateral review, it is not available for the  
14 interval between separate rounds of habeas petitions. *See Velasquez v. Kirkland*,  
15 639 F.3d 964, 967 (9th Cir. 2011) (a petitioner may also be entitled to gap tolling  
16 for the periods between petitions provided that the petitions are filed within a  
17 reasonable time); *Biggs v. Duncan*, 339 F.3d 1045, 1048 (9th Cir. 2003) (petitioner  
18 not entitled to gap tolling for the period between two separate rounds of petitions);  
19 *Aranda v. Ducart*, 2017 WL 7371167, at \*4 (C.D. Cal. Oct. 18, 2017) (same).  
20 Thus, a round of collateral review may be considered to include the “intervals  
21 between a *lower* court decision and a filing of a new petition in a *higher* court.”  
22 *See Carey v. Saffold*, 536 U.S. 214, 223, 122 S. Ct. 2134, 153 L. Ed. 2d 260 (2002)  
23 (emphasis added). But here, petitioner’s second habeas petition was filed in the  
24 same court as the first.

25 Were the second petition in fact the motion for consideration it purports to  
26 be, it might fairly be said to be part of the same habeas round as the first petition,  
27 notwithstanding that both were filed in the Superior Court. But the second petition  
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1 was not simply a motion for reconsideration. In *King v. Roe*, the Ninth Circuit  
2 articulated a two-part test to determine whether a second habeas petition  
3 constitutes a second round of petitions. 340 F.3d 821, 823 (9th Cir. 2003),  
4 abrogated on other grounds by *Evans*, 546 U.S. 189. First, the court must  
5 determine whether the subsequent habeas petitions are limited to an elaboration of  
6 the facts relating to the claims raised in the first round of petitions. *Id.* If the  
7 second round is not limited, then it constitutes a new round of petitions and the gap  
8 between the rounds is not tolled. *Id.* If limited, then the petitioner is simply trying  
9 to correct the deficiencies and the petition, or round of petitions, is still pending for  
10 tolling purposes. *Id.* The court must then determine whether the second round of  
11 petitions was untimely, in which case, gap tolling does not apply. *Id.* Here,  
12 petitioner's second habeas petition presented a completely different sentencing  
13 claim. As such, petitioner's second petition in fact initiated a new round of  
14 petitions under the first prong of the test, and therefore petitioner is not entitled to  
15 gap tolling for the interval between the Superior Court's denial of his first habeas  
16 petition and the filing of his second habeas petition. Thus, following the denial of  
17 the second petition, with the statutory tolling discussed above, the statute of  
18 limitations expired on December 30, 2017.

19 Petitioner next constructively filed a habeas petition in the California Court  
20 of Appeal on January 31, 2018, and the Court of Appeal denied it on March 14,  
21 2018.<sup>2</sup> LD 11-12. Petitioner is not entitled to gap tolling for the interval between  
22 the Superior Court's denial on October 4, 2017 and the filing of the habeas petition  
23 in the Court of Appeal. Gap tolling is unavailable if there is too long a delay  
24 before filing the next petition. *See Clark v. Cate*, 581 Fed. Appx. 654, 655 (9th

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26 <sup>2</sup> Although petitioner filed a notice of appeal on December 7, 2017, this notice  
27 neither affected the start date of the limitations period nor entitled petitioner to  
28 statutory tolling. The notice of appeal was untimely because petitioner's  
conviction was already final when he filed it.

1 Cir. 2014) (30-60 days is a benchmark for what constitutes a reasonable time);  
2 *Velasquez*, 639 F.3d at 968 (81-day and 91-day delays were unreasonable without  
3 an adequate explanation for the delays). Here, petitioner filed a habeas petition in  
4 the Court of Appeal 119 days after the Superior Court’s denial of the second  
5 petition. In addition to the unreasonable delay between these petitions, the petition  
6 to the Court of Appeal raised entirely new claims from those raised in both of the  
7 Superior Court petitions, so under the *King* test it cannot be considered part of the  
8 same round of petitions as either petition filed in the Superior Court, and thus gap  
9 tolling is unavailable.

10 Nor is petitioner entitled to statutory tolling during the pendency of the  
11 habeas petition constructively filed in the Court of Appeal on January 31, 2018,  
12 since the limitation period had already expired on December 30, 2017. *See Jiminez*  
13 *v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001) (petitioner not entitled to statutory  
14 tolling for state habeas petition filed “well after the AEDPA statute of limitations  
15 ended”); *see also Laws v. Lamarque*, 351 F.3d 919, 922 (9th Cir. 2003) (where  
16 petitioner does not file his first state petition until after the eligibility for filing a  
17 federal habeas petition has lapsed, “statutory tolling cannot save his claim”). For  
18 the same reason, petitioner is not entitled to statutory tolling for the habeas petition  
19 constructively filed in the California Supreme Court on May 23, 2018.

20 In sum, petitioner is entitled to some statutory tolling, but it only extends the  
21 limitation period to December 30, 2017. Therefore, absent equitable tolling, the  
22 instant Petition filed almost a year later is untimely.

23 **C. Petitioner Is Not Entitled to Equitable Tolling**

24 Petitioner does not expressly argue he is entitled to equitable tolling, but his  
25 first asserted ground for relief is he suffered from a mental illness that rendered  
26 him unable to file a timely appeal or habeas petition. Petition at 5. Petitioner also  
27 asserts his fourth grade education was a reason for his inability to file a timely  
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1 petition. *Id.*

2 The United States Supreme Court has decided that “§ 2244(d) is subject to  
3 equitable tolling in appropriate cases.” *Holland v. Florida*, 560 U.S. 631, 645, 130  
4 S. Ct. 2549, 177 L. Ed. 2d 130 (2010). Tolling is appropriate when “extraordinary  
5 circumstances” beyond a petitioner’s control make it impossible to file a petition  
6 on time. *Id.* at 649; *see Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002)  
7 (“[T]he threshold necessary to trigger equitable tolling [under AEDPA] is very  
8 high, lest the exceptions swallow the rule.”) (citation omitted and brackets in  
9 original). “When external forces, rather than a petitioner’s lack of diligence,  
10 account for the failure to file a timely claim, equitable tolling of the statute of  
11 limitations may be appropriate.” *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir.  
12 1999).

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

19 Petitioner cannot establish either prong. As an initial matter, petitioner fails  
20 to allege facts indicating he has been pursuing his rights diligently. Even assuming  
21 petitioner had been pursuing his rights diligently, he is still not entitled to equitable  
22 tolling because he cannot establish an extraordinary circumstance stood in his way.

23 Petitioner first suggests he is entitled to equitable tolling because he suffered  
24 from a mental illness. Petition at 5. The Ninth Circuit has established a two-part  
25 test a petitioner must meet in order to establish a basis for equitable tolling arising  
26 from a mental illness. *Bills v. Clark*, 628 F.3d 1092, 1099-1100 (9th Cir. 2010).  
27 First, the illness must be shown to be an extraordinary circumstance beyond his  
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1 control, which requires that either the petitioner was unable “rationally or factually  
2 to personally understand the need to timely file,” or was unable “personally to  
3 prepare a habeas petition and effectuate its filing.” *Id.* Second, the petitioner must  
4 show diligence in pursuing claims “to the extent he could understand them, but that  
5 the mental impairment made it impossible to meet the filing deadline under the  
6 totality of the circumstances.” *Id.* at 1100.

7 Here, petitioner’s mental impairment claim fails. Petitioner simply asserts  
8 he could not timely file this Petition because he suffered from a mental illness,  
9 without any specification, and he took psychotropic medication for the fourteen  
10 years prior to his conviction. Petition at 5. But as discussed above, the mere  
11 existence of a mental impairment does not justify equitable tolling. Petitioner has  
12 not provided any medical records to show that he was unable to rationally or  
13 factually understand the need to timely file his habeas petition or to personally  
14 prepare one and effectuate its filing, or that it was impossible for him to meet the  
15 deadline.

16 To the contrary, respondent submitted, under seal, petitioner’s prison  
17 medical records, which indicate that, during the relevant period, petitioner received  
18 mental health services at prison and was classified as requiring the lowest level of  
19 care – Correctional Clinical Case Management System (“CCCMS”).<sup>3</sup> *See* Sealed  
20 Docs. at 13, 31. The records indicate petitioner reported feeling depressed and  
21 having auditory hallucinations, but he had mostly normal mental status  
22 examination findings, including fair or good insight and no cognitive impairments.

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25 <sup>3</sup> Pursuant to the Mental Health Services Delivery System Program Guide  
26 Overview, CCCMS is the lowest of the four levels of mental health care provided  
27 by the California Department of Corrections and Rehabilitation. *See Coleman v.*  
28 *Schwarzenegger*, 922 F. Supp. 2d 882, 903 (E.D. Cal. 2009). Inmates designated  
to CCCMS are able to function in the general prison population and do not require  
a clinically structured therapeutic environment. *See id.* at 903, n.24.

1 *See, e.g., id.* at 15, 17-18, 21, 24, 26. The physicians diagnosed petitioner with  
2 major depression, recurrent and chronic, and treated him with anti-depressants such  
3 as Sertraline and Zoloft at different times. *See, e.g., id.* at 13, 21-22, 39. In July  
4 2017, petitioner requested to discontinue his medications because he was “doing  
5 fine” and already refused medication for two weeks. *Id.* at 15. On July 24, 2018, a  
6 prison psychologist indicated petitioner had been stable off psychotropic  
7 medications for over six months, with no disciplinary write ups. *See id.* at 10-11.

8 Nothing in these records indicate petitioner’s mental illness rendered him  
9 unable to understand the need to timely file or prepare a filing. *Cf., e.g., Forbess v.*  
10 *Franke*, 749 F.3d 837 (9th Cir. 2014) (petitioner’s delusions that he worked  
11 undercover for the FBI and his trial was a sham to lure his ex-wife out of hiding  
12 were so severe they rendered him unable to rationally understand the need to  
13 timely file). Indeed, petitioner was able to file multiple habeas petitions and a  
14 notice of appeal prior to the expiration of the statute of limitations. His ability to  
15 file these documents indicates his mental impairment did not interfere with his  
16 ability to understand the need to timely file or to effectuate such filing. *See Yeh v.*  
17 *Martel*, 751 F.3d 1075, 1078 (9th Cir. 2014) (petitioner’s ability to file state habeas  
18 petitions and seek assistance refute his claim of impairment so debilitating that it  
19 would constitute an extraordinary circumstance).

20 Petitioner’s second argument for equitable tolling – his fourth grade  
21 education caused him to be unable to timely file – also fails. Petitioner provides no  
22 evidence he had little education. Even if there were such evidence, petitioner must  
23 demonstrate that his education level prevented him from filing within the limitation  
24 period, and he has not done so. Ignorance of the law does not justify equitable  
25 tolling. *Raspberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006) (“[A] pro se  
26 petitioner’s lack of legal sophistication is not, by itself, an extraordinary  
27 circumstance warranting equitable tolling.”). Again, petitioner’s education level  
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1 did not prevent him from filing this or other petitions.

2 In sum, even assuming petitioner pursued his rights diligently, petitioner has  
3 failed to show there was an extraordinary circumstance that rendered him unable to  
4 timely file.

5 **D. Petitioner Is Not Entitled to the Actual Innocence Equitable Exception**  
6 **to the Statute of Limitations**

7 In Ground Two, petitioner argues his counsel was ineffective for failure to  
8 investigate eyewitness reports that would have “completely exonerated him.”  
9 Petition at 6. To the extent petitioner is arguing he is excepted from compliance  
10 with the AEDPA limitation period because he is actually innocent, petitioner has  
11 failed to meet his burden to demonstrate his actual innocence.

12 “[A] credible claim of actual innocence constitutes an equitable exception to  
13 AEDPA’s limitations period.” *Lee v. Lampert*, 653 F.3d 929, 932 (9th Cir. 2011).  
14 “[A]ctual innocence, if proved, serves as a gateway through which a [habeas]  
15 petitioner may pass whether the impediment is a procedural bar . . . or . . .  
16 expiration of the statute of limitations.” *McQuiggin v. Perkins*, 569 U.S. 383, 386,  
17 133 S. Ct. 1924, 185 L. Ed. 2d 1019 (2013). But “tenable actual-innocence  
18 gateway pleas are rare.” *Id.*

19 To establish a gateway claim of actual innocence, a petitioner “must show  
20 that in light of all the evidence . . . ‘it is more likely than not that no reasonable  
21 juror would have found petitioner guilty beyond a reasonable doubt.’” *Carriger v.*  
22 *Stewart*, 132 F.3d 463, 478 (9th Cir. 1997) (en banc) (quoting *Schlup v. Delo*, 513  
23 U.S. 298, 327, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)). A petitioner must  
24 establish his factual innocence of the crime, and not mere legal insufficiency. *See*  
25 *Bousley v. U.S.*, 523 U.S. 614, 623, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998).  
26 “To be credible, such a claim [of actual innocence] requires petitioner to support  
27 his allegations of constitutional error with new reliable evidence – whether it be  
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1 exculpatory scientific evidence, trustworthy eyewitness accounts, or critical  
2 physical evidence – that was not presented at trial.” *Schlup*, 513 U.S. at 324.

3 Petitioner has not satisfied the *Schlup* requirements. First, the eyewitness  
4 reports petitioner refers to do not constitute new evidence. Petitioner contends his  
5 trial counsel had possession of the reports. *See* Petition at 6. Second, petitioner  
6 simply makes the conclusory allegation that the reports would exonerate him, but  
7 fails to specify who the eyewitnesses are or the contents of the reports. Bare  
8 allegations of actual innocence are insufficient to meet the *Schlup* standard and  
9 excuse untimeliness. *See, e.g., Landrum v. Swarthout*, 2015 WL 9701296, \*11  
10 (C.D. Cal. Nov. 2, 2015) (“Conclusory allegations of alleged actual innocence are  
11 insufficient.”); *Filipo v. Paramo*, 2014 WL 1999189, \*9 (C.D. Cal. Mar. 18, 2014)  
12 (“Petitioner’s conclusory allegations are insufficient to meet the exacting *Schlup*  
13 actual innocence standard.”). The actual innocence exception to the statute of  
14 limitations consequently does not apply here.


15 Accordingly, the statute of limitations, with statutory tolling, expired on  
16 December 30, 2017. The Petition, constructively filed on December 7, 2018, is  
17 therefore untimely and will be dismissed with prejudice.

18 **IV.**

19 **CONCLUSION**

20 IT IS THEREFORE ORDERED that respondent’s Motion to Dismiss  
21 (docket no. 10) is granted, and Judgment will be entered denying the Petition and  
22 dismissing this action with prejudice.

23  
24 DATED: September 23, 2019

25   
26 \_\_\_\_\_  
27 SHERI PYM  
28 United States Magistrate Judge