

1 ("Petition"). (Dkt. No. 1).¹

2
3 On January 28, 2021, Petitioner constructively filed a First
4 Amended Petition for Writ of Habeas Corpus by a Person in Federal
5 Custody pursuant to 28 U.S.C. § 2241 (Dkt. No. 4),² which the Court
6 construed as a First Amended Petition by a Person in State Custody
7 pursuant to 28 U.S.C. § 2254 ("First Amended Petition") (see Dkt
8 No. 5 at 1-2).

9
10 The First Amended Petition asserts the following claims for
11 federal habeas relief: (1) The trial court lacked jurisdiction to
12 hear or try the case against Petitioner; (2) Petitioner was
13 extradited from Michigan to California based on an unauthorized
14 demand; and (3) Petitioner is not required to exhaust his state
15 remedies on Grounds One and Two of the First Amended Petition

16

17 ¹ The Petition and an attached Proof of Service by Mail
18 were signed on December 29, 2020, and the Petition was filed with
19 the Clerk of the Court on December 31, 2020.

20 A habeas petition is constructively filed on the date a
21 prisoner presents his federal habeas petition to prison authorities
22 for forwarding to the Clerk of the Court. Saffold v. Newland, 250
23 F.3d 1262, 1268 (9th Cir. 2000), vacated on other grounds, 536 U.S.
24 214 (2002); Huizar v. Carey, 273 F.3d 1220, 1222 (9th Cir. 2001).
25 The Court will consider December 29, 2020, the date on which the
26 Petition and the attached Proof of Service by Mail were signed, as
27 the filing date.

28 ² The First Amended Petition and an attached Proof of
Service by Mail were signed on January 28, 2021, and the First
Amended Petition was filed with the Clerk of the Court on February
1, 2021. The Court will consider January 28, 2021, the date on
which the First Amended Petition and the attached Proof of Service
by Mail were signed, as the filing date.

1 because exhaustion would be futile. (First Amended Petition at 3-4
2 [3 pages]).³

3
4 On March 3, 2021, Respondent filed a Motion to Dismiss the
5 First Amended Petition ("Motion to Dismiss") (Dkt. No. 8),
6 contending that the First Amended Petition is time barred. (See
7 Motion to Dismiss at 1, Memorandum of Points and Authorities
8 ["Memorandum"] at 3-5).

9
10 On March 24, 2021, Petitioner filed an Opposition to the
11 Motion to Dismiss ("Opposition"). (Dkt. No. 15).

12
13 On April 5, 2021, the Court issued a Report and
14 Recommendation, recommending that the District Judge grant the
15 Motion to Dismiss, deny the First Amended Petition, and dismiss
16 this action with prejudice. (Dkt. No. 17). On April 23, 2021,
17 Petitioner filed an Objection to the Report and Recommendation
18 ("Objection"). (Dkt. No. 19).

19
20 This Final Report and Recommendation now issues.

21
22 For the reasons stated below, it is recommended that the First
23

24 ³ Since the extradition claim alleged in Ground Two of the
25 First Amended Petition appears to correspond to the sole claim
26 alleged in the Petition, (see Petition at 3-3(a) [2 pages]), the
27 Court will use the constructive filing date of the Petition
28 (December 29, 2020), in its analysis of the statute of limitations.

1 Amended Petition be DENIED and this action be DISMISSED with
2 prejudice.

3
4 **II. BACKGROUND**

5
6 On August 14, 1998, Petitioner was convicted (pursuant to a
7 plea) in Los Angeles County Superior Court, Case Number BA099731,
8 of three counts of first degree murder in violation of California
9 Penal Code ("P.C.") § 187(a) (Counts 1, 3 and 4), one count of
10 attempted murder in violation of P.C. §§ 664/187(a) (Count 5), and
11 one count of second degree robbery in violation of P.C. § 211
12 (Count 2), and admitted the special allegations that he committed
13 multiple murders in violation of P.C. § 190.2(a)(3) and that he
14 committed one of the murders during a robbery in violation of P.C.
15 § 190.2(a)(17). As part of the plea agreement, Petitioner also
16 pleaded guilty to one count of first degree murder in violation of
17 P.C. § 187, in San Bernardino County Superior Court, Case Number
18 FWV16149. (See Respondent's Notice of Lodging ["Lodgment"] No. 1
19 at 1,⁴ No. 3 at 1, No. 5 at 13-17, No. 17 at 34-35; First Amended
20 Petition at 2).

21
22 On August 20, 1998, the trial court in the San Bernardino
23 County Superior Court case sentenced Petitioner, in accordance with
24 the terms of the plea agreement, to state prison for 25 years to
25

26 ⁴ The Court refers to page numbers of lodged documents
27 using the ECF numbering system.

1 life on the first degree murder conviction. (See Lodgment No. 2 at
2 1-4, No. 3 at 2). On October 2, 1998, the trial court in the Los
3 Angeles County Superior Court case sentenced Petitioner, in
4 accordance with the terms of the plea agreement, to state prison
5 for life without the possibility of parole on Counts 1,3 and 4, a
6 concurrent term of 7 years on Count 5, and a concurrent term of 3
7 years on Count 2. (See Lodgment No. 1 at 4-7, No. 17 at 36-38;
8 First Amended Petition at 2).

9
10 Petitioner did not appeal his convictions or sentence to the
11 California Court of Appeal or the California Supreme Court. (See
12 First Amended Petition at 2; <http://appellatecases.courtinfo.ca.gov>
13 [last visited April 5, 2021]).

14
15 State Habeas Petitions

16
17 Petitioner filed the following state habeas petitions:⁵

18
19 On December 7, 2016, Petitioner filed a habeas petition with
20 the Los Angeles County Superior Court, which, on January 27, 2017,
21 denied the petition. (See Lodgment No. 1 at 3, No. 17 at 39-40).
22

23
24 ⁵ Since, as discussed *infra*, Petitioner did not file the
25 habeas petitions within the limitations period, he is not entitled
26 to the benefit of the "mailbox rule" in which a petition is deemed
27 filed at the time it is delivered to prison authorities for
forwarding to the Court. Stillman v. LaMarque, 319 F.3d 1199, 1201
(9th Cir. 2003). Accordingly, the Court will consider the date on
which these petitions were filed as the filing date.

1 On December 8, 2016, Petitioner filed a habeas petition with
2 the San Bernardino County Superior Court, which, on January 10,
3 2017, denied the petition. (See Lodgment No. 4).
4

5 On December 3, 2019, and January 6, 2020, Petitioner filed a
6 second habeas petition and a petition for dismissal pursuant to
7 P.C. § 1385, respectively, with the Los Angeles County Superior
8 Court. (See Lodgment Nos. 5-6). The Los Angeles County Superior
9 Court denied both petitions on January 22, 2020, and January 23,
10 2020. (See Lodgment Nos. 7-8).
11

12 On December 9, 2019 (while Petitioner's second Los Angeles
13 County Superior Court habeas petition was pending), Petitioner
14 filed a second habeas petition with the San Bernardino County
15 Superior Court, which denied the petition on January 31, 2020.
16 (See Lodgment Nos. 9-11).
17

18 On January 7, 2020 (while Petitioner's second habeas petitions
19 were pending in the Los Angeles County Superior Court and the San
20 Bernardino County Superior Court), Petitioner filed a habeas
21 petition with the California Court of Appeal, which denied the
22 petition on January 13, 2020. (See Lodgment Nos. 12-14).
23

24 On January 10, 2020 (while Petitioner's first California Court
25 of Appeal habeas petition was pending), Petitioner filed a second
26 habeas petition with the California Court of Appeal, which denied
27

1 the petition on March 18, 2020. (See Lodgment Nos. 15-16, 18-19).

2
3 On January 17, 2020, January 24, 2020, and February 3, 2020,
4 respectively (while Petitioner's second California Court of Appeal
5 habeas petition was pending), Petitioner filed habeas petitions
6 with the California Supreme Court, (see Lodgment Nos. 21, 23, 25),
7 were denied on April 15, 2020. (See Lodgment No. 20, 22, 24).

8
9 On December 9, 2020, Petitioner filed a third habeas petition
10 with the Los Angeles County Superior Court. (See Lodgment No. 1 at
11 3). According to Respondent, as of March 3, 2021, the Los Angeles
12 County Superior Court had not yet ruled on the petition. (See
13 Motion to Dismiss, Memorandum at 2).

14
15 On January 14, 2021 (after the instant Petition was filed),
16 Petitioner filed a petition for resentencing pursuant to P.C. §
17 1170.95 in the Los Angeles County Superior Court. (See Lodgment
18 No. 1 at 3). According to Respondent, a hearing on the petition
19 for resentencing was scheduled for March 18, 2021. (See Motion to
20 Dismiss, Memorandum at 2).⁶

21
22 As stated above, the Petition was constructively filed on
23 December 29, 2020, and the First Amended Petition was
24

25 ⁶ The status of the petition for resentencing is not
26 material to the Court's analysis of the statute of limitations and
27 the timeliness of the Petition and the First Amended Petition
before the Court.

1 constructively filed on January 28, 2021.

2
3 **III. DISCUSSION**

4
5 **1. The Petition is Time Barred**

6
7 A. The Limitations Period

8
9 The Antiterrorism and Effective Death Penalty Act ("AEDPA")
10 applies to the Petition because it was filed after the statute's
11 effective date of April 24, 1996. See Lindh v. Murphy, 521 U.S.
12 320, 322-23 (1997). Under AEDPA, state prisoners must file their
13 federal habeas petitions within one-year of the latest of the
14 following dates:

- 15
16 (A) the date on which the judgment became final by the
17 conclusion of direct review or the expiration of
the time for seeking such review;
- 18 (B) the date on which the impediment to filing an
19 application created by State action in violation of
the Constitution or laws of the United States is
20 removed, if the applicant was prevented from filing
by such State action;
- 21 (C) the date on which the constitutional right asserted
22 was initially recognized by the Supreme Court, if
the right has been newly recognized by the Supreme
23 Court and made retroactively applicable to cases on
collateral review; or
- 24 (D) the date on which the factual predicate of the
25 claim or claims presented could have been
discovered through the exercise of due diligence.

26 28 U.S.C. § 2244(d) (1). "AEDPA's one-year statute of limitations
27

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

9
10 AEDPA’s limitations period may also be tolled for equitable
11 reasons “in appropriate cases.” Holland v. Florida, 560 U.S. 631,
12 645 (2010). The Ninth Circuit recognizes the availability of
13 equitable tolling of the one-year statute of limitations in
14 situations where “extraordinary circumstances beyond a prisoner’s
15 control make it impossible to file a petition on time.” Spitsyn v.
16 Moore, 345 F.3d 796, 799 (9th Cir. 2003). A prisoner must
17 establish that: (1) he has been pursuing his rights diligently; and
18 (2) some extraordinary circumstance caused the delay. Holland, 560
19 U.S. at 649. This is a highly fact-dependent determination.
20 Spitsyn, 345 F.3d at 799.

21
22 B. Petitioner Did Not File His Petition Within The
23 Limitations Period

24
25 As indicated above, a petitioner ordinarily has one-year from
26 the date that the state court’s judgment becomes final to file a
27 federal habeas petition. See 28 U.S.C. § 2244(d)(1). A case

1 becomes final at "the conclusion of direct review or the expiration
2 of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A).

3
4 Since Petitioner did not appeal his convictions or sentence to
5 the California Court of Appeal or the California Supreme Court,
6 Petitioner was unable to petition the United States Supreme Court
7 for a writ of certiorari. See 28 U.S.C. §§ 1257 and 2101(d); Sup.
8 Ct. R. 13.1. Thus, Petitioner's conviction became final on
9 December 1, 1998, sixty days after he was sentenced in the Los
10 Angeles County Superior Court on October 2, 1998. See Cal. Rules
11 of Court, Rule 8.308(a); former Cal. Rules of Court, Rule 31(a);
12 see also Caspari v. Bohlen, 510 U.S. 383, 390 (1994) ("A state
13 conviction and sentence become final for purposes of retroactivity
14 analysis when the availability of direct appeal to the state courts
15 has been exhausted and the time for filing a petition for a writ of
16 certiorari has elapsed or a timely petition has been finally
17 denied."). Therefore, the AEDPA one-year limitations period began
18 to run on December 2, 1998 and, absent the application of an
19 alternate start date under § 2244(d)(1),⁷ or sufficient statutory
20 or equitable tolling, the limitations period expired one year
21 later, on December 1, 1999. See Patterson v. Stewart, 251 F.3d
22 1243, 1246 (9th Cir. 2001).

23
24
25

⁷ Since Petitioner does not allege the applicability of any
26 circumstances that would delay the running of the statute of
27 limitations (see 28 U.S.C. § 2244(d)(1)(B)-(D)), the Court will not
address those provisions.

1 The instant Petition, constructively filed on December 29,
2 2020, was filed more than twenty-one years after the statute of
3 limitations expired on December 2, 1999. Therefore, absent grounds
4 for statutory or equitable tolling, the First Amended Petition is
5 untimely.

6
7 C. Petitioner Is Not Entitled To Statutory or Equitable
8 Equitable Tolling

9 Petitioner is not entitled to statutory tolling during the
10 pendency of his state habeas and other post-conviction petitions
11 (see Lodgment No. 1 at 3, Nos. 4-16, No. 17 at 39-40, Nos. 18-25).⁸
12 This is because a petition for state post-conviction or other
13 collateral review filed *after* the conclusion of the limitations
14 period cannot reinitiate the limitations period. See Ferguson v.
15 Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (“[S]ection 2244(d)
16 does not permit the reinitiation of the limitations period that has
17 ended before the state petition was filed”); Jiminez v. Rice, 276
18 F.3d 478, 482 (9th Cir. 2001) (filing of state habeas petition “well
19 after the AEDPA statute of limitations ended” does not affect the
20 limitations bar); Webster v. Moore, 199 F.3d 1256, 1259 (11th Cir.
21 2000) (“[A] state-court petition . . . that is filed following the
22 expiration of the limitations period cannot toll that period
23 because there is no period remaining to be tolled.”).

24
25 _____
26 ⁸ In the Objection, Petitioner conclusorily asserts that he
27 is entitled to statutory tolling (see Objection at 1, 6), but he
28 does not provide any argument supporting his assertion.

1 The United States Supreme Court has recognized the
2 availability of equitable tolling to the one-year statute of
3 limitations in "extraordinary circumstances," such as those
4 involving "serious instances of attorney misconduct." Holland, 560
5 U.S. at 649-52. The Ninth Circuit recognizes the availability of
6 equitable tolling of the one-year statute of limitations in
7 situations where extraordinary circumstances beyond a prisoner's
8 control make it impossible to file a petition on time. Spitsyn,
9 345 F.3d at 799. The words "extraordinary" and "impossible"
10 suggest the limited availability of this doctrine and, to date, the
11 Ninth Circuit has found very few circumstances which warrant
12 equitable tolling.⁹ See Waldron-Ramsey v. Pacholke, 556 F.3d 1008,

13
14 ⁹ See e.g., Grant v. Swarthout, 862 F.3d 914, 925-26 (9th
15 Cir. 2017)(equitable tolling warranted where prison officials
16 failed to provide petitioner with a requested prison account
17 certificate, a document the petitioner needed in order to file his
18 habeas petition); Luna v. Kernan, 784 F.3d 640, 646-49 (9th Cir.
19 2015)(equitable tolling warranted where petitioner's counsel
20 voluntarily dismissed petitioner's timely federal habeas petition
21 for no good reason, misled petitioner to believe that a fully
22 exhausted federal habeas petition would be filed "shortly" [without
23 informing petitioner that the statute of limitations was going to
24 run in three weeks]), and misled petitioner to believe - for more
25 than six years - that his federal habeas petition was moving
26 forward toward a hearing on the merits); Rudin v. Myles, 781 F.3d
27 1043, 1056-59 (9th Cir. 2015)(equitable tolling warranted where
28 petitioner's first counsel abandoned petitioner by making minimal
visits to petitioner and then stopping the visits, blocking
petitioner's phone calls, not showing an intention at post-
conviction hearings to actually represent petitioner, and failing
to provide petitioner with reasons for counsel's delay; and where
the state affirmatively misled petitioner into believing that the
state court had excused petitioner's late filing and that the
statute of limitations would be statutorily tolled); Gibbs v.
LeGrand, 767 F.3d 879, 886-88 (9th Cir. 2014)(equitable tolling
warranted where petitioner's counsel abandoned petitioner by
failing to notify him of the state supreme court's denial of his

1 1011 (9th Cir. 2009) ("To apply the doctrine in 'extraordinary
2 circumstances' necessarily suggests the doctrine's rarity."). A
3 petitioner must establish that: (1) he has been pursuing his rights
4 diligently; and (2) some extraordinary circumstance caused the
5 delay. Pace, 544 U.S. at 418. This is a highly fact-dependent
6 determination. Spitsyn, 345 F.3d at 799. Petitioner bears the
7 burden to prove equitable tolling. See Zepeda v. Walker, 581 F.3d
8 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
11 file a petition on time.'" Ramirez v. Yates, 571 F.3d 993, 997 (9th
12 Cir. 2009) (citations omitted). Petitioner must show that an
13 "external force" caused the untimeliness, rather than "oversight,
14 miscalculation or negligence." Waldron-Ramsey, 556 F.3d at 1011
15 (citation omitted); see also Holland, 560 U.S. at 651-52.

16
17 In the Objection, Petitioner contends that he is entitled to
18 equitable tolling based on the conduct of his attorney, Bernard J.

19 _____
20 appeal of his state post-conviction petition until after the
21 expiration of the statute of limitations, despite petitioner's
22 repeated inquiries); Doe v. Busby, 661 F.3d 1001, 1012-15 (9th Cir.
23 2011) (equitable tolling warranted where petitioner's counsel failed
24 to file federal habeas petition after making numerous promises to
25 timely file, did not return petitioner's file until long after the
26 statute of limitations had run, and petitioner was reasonably
27 diligent in pursuing his rights); and Bills v. Clark, 628 F.3d
28 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 Rosen. Petitioner's contention is based on the following: (1) on
2 October 2, 1998, (the date on which the Los Angeles County Superior
3 Court sentenced Petitioner), his counsel prevented him from
4 pursuing an appeal by telling Petitioner, in response to
5 Petitioner's inquiry about filing an appeal, that he not have a
6 right to appeal based on his plea; (2) Petitioner was misled about
7 his ability to appear when, on November 12, 2019, (in response to
8 a letter from Petitioner dated November 7, 2019), his counsel wrote
9 Petitioner a letter stating that he was not able to assist
10 Petitioner by providing an affidavit "pertaining to [a] colloquy of
11 {petitioner's] request for an appeal back in 1998[]" because
12 counsel did not have any colloquy with Petitioner at any time
13 regarding a request for an appeal and there was no appeal "waiver"
14 in the signed plea agreement (Objection, Exhibit "C"); and (3)
15 after October 27, 1998, when Petitioner was extradited to Michigan,
16 (where he remained incarcerated until June 4, 2019), his counsel
17 "abandoned Petitioner by failing to notify him of any appeal
18 deadlines or post-conviction remedies, despite Petitioner's
19 inquiry." (See Objection at 1-4).

20
21 Here, Petitioner has not alleged any egregious or serious
22 acts by his attorney that would entitle him to equitable tolling.
23 See Holland, 560 U.S. at 652 (noting certain facts suggesting that
24 the petitioner's counsel's actions may have amounted to more than
25 simple negligence: "[Counsel] failed to file Holland's federal
26 petition on time despite Holland's many letters that repeatedly
27 emphasized the importance of him doing so. [Counsel] apparently

28

1 did not do the research necessary to find out the proper filing
2 date, despite Holland's letters that went so far as to identify the
3 applicable legal rules. [Counsel] failed to inform Holland in a
4 timely manner about the crucial fact that the Florida Supreme Court
5 had decided his case, again despite Holland's many pleas for that
6 information. And [counsel] failed to communicate with his client
7 over a period of years, despite various pleas from Holland that
8 [counsel] respond to his letters."); Gibbs v. LeGrand, 767 F.3d at
9 886, n.6 (counsel's failure to notify the petitioner of the state
10 supreme court's denial of his appeal of his state post-conviction
11 petition until after the expiration of the statute of limitations,
12 and failure to communicate with the petitioner "over a period of
13 years," despite the petitioner's repeated inquiries, was egregious
14 conduct amounting to abandonment, and therefore constituted an
15 "extraordinary circumstance"); Spitsyn, 345 F.3d at 800 ("We have
16 not applied equitable tolling in non-capital cases where attorney
17 negligence has caused the filing of a petition to be untimely.");
18 Frye v. Hickman, 273 F.3d 1144, 1146 (9th Cir. 2001) ("We conclude
19 that . . . [petitioner's counsel's] negligence in general do[es]
20 not constitute extraordinary circumstances sufficient to warrant
21 equitable tolling.").

22
23 While Petitioner admits he was able to contact his counsel in
24 2011 and obtain his file materials, (see Objection at 4),
25 Petitioner fails to allege why he did not file belated appeal
26 pleadings and/or post-conviction pleadings at an earlier time.
27 Petitioner also fails to allege how his counsel's likely conflict
28

1 with Petitioner's present petition for resentencing (see Objection
2 at 4, Exhibit "E" [letter from Deputy Alternate Public Defender
3 Sara Forrest to Petitioner dated January 27, 2021]) affected
4 Petitioner's ability to file a federal habeas petition. Simply
5 put, Petitioner has failed to show extraordinary circumstances
6 beyond his control that made it impossible for him to file a timely
7 federal habeas petition. See Gaston v. Palmer, 417 F.3d 1030, 1034
8 (9th Cir. 2005) (equitable tolling not available where the
9 petitioner failed to meet burden of showing a "causal connection"
10 between the petitioner's self-representation and his inability to
11 file a timely federal habeas petition).

12
13 Moreover, Petitioner's unsubstantiated contention that he is
14 entitled to equitable tolling based on prison issues (i.e., the
15 Michigan "prison law library failed to provide California law
16 materials and forms and books," and the Michigan prison law library
17 did not have computers until approximately 2010 or 2011, Objection
18 at 2), is unavailing. Petitioner has failed to meet his burden of
19 showing how those circumstances made it impossible for Petitioner
20 to file a timely federal habeas petition. See id.; Pelaya v. Cate,
21 2011 WL 976771, *7 (C.D. Cal. Jan. 18, 2011) ("[E]quitable tolling
22 . . . is not warranted because of the petitioner's allegations of
23 unspecified lockdowns, delays in obtaining relevant legal
24 documents, or an inability to physically access a law library, as
25 prisoners familiar with the routine restrictions of prison life
26 must take such matters into account when calculating when to file
27 a federal petition.").

1 Similarly, any possible claim for equitable tolling based on
2 Petitioner's lack of understanding of the law also fails. See
3 Waldron-Ramsey, 556 F.3d at 1013 n.4 ("[We] have held that a pro se
4 petitioner's confusion or ignorance of the law is not, itself, a
5 circumstance warranting equitable tolling."); Raspberry v. Garcia,
6 448 F.3d 1150, 1154 (9th Cir. 2006) ("[A] pro se petitioner's lack
7 of legal sophistication is not, by itself, an extraordinary
8 circumstance warranting equitable tolling.").

9
10 In an attempt to bypass the statute of limitations hurdle,
11 Petitioner is claiming a "fundamental constitutional error
12 exception," namely, when a trial court lacked jurisdiction over a
13 criminal case. (See Opposition at 2-3). However, Petitioner has
14 failed to cite, and the Court has been unable to locate, any
15 authority supporting such an exception for a state prisoner.

16
17 Because Petitioner has failed to demonstrate that he is
18 entitled to statutory or equitable tolling or that he is actually
19 innocent,¹⁰ the Court must find the First Amended Petition to be

20
21 ¹⁰ A petitioner may claim actual innocence in an attempt to
22 bypass the statute of limitations hurdle. See McQuiggin v.
23 Perkins, 569 U.S. 383, 386 (2013) ("We hold that actual innocence,
24 if proved, serves as a gateway through which a petitioner may pass
25 whether the impediment is a procedural bar, as it was in Schlup and
26 House, or, as in this case, expiration of the statute of
27 limitations."). Under the actual innocence exception to the
28 statute of limitations, a petitioner must show that "in light of
the new evidence, no juror, acting reasonably, would have voted to
find him guilty beyond a reasonable doubt.'" Id. (quoting Schlup
v. Delo, 513 U.S. 298, 329 (1995)); see House v. Bell, 547 U.S.
518, 538 (2006) ("A petitioner's burden at the gateway stage is to
(continued...)

1 untimely.

2
3 **IV. RECOMMENDATION**
4

5 For the foregoing reasons, IT IS RECOMMENDED that the Court
6 issue an Order: (1) approving and accepting this Final Report and
7 Recommendation; (2) granting Respondent's Motion to Dismiss the
8 First Amended Petition; (3) denying the First Amended Petition for
9 Writ of Habeas Corpus; and (4) directing that judgment be entered
10 dismissing this action with prejudice.

11
12 DATED: April 28, 2021

13 _____ /s/
14 ALKA SAGAR
15 UNITED STATES MAGISTRATE JUDGE
16
17
18

19 _____
20 ¹⁰(...continued)
21 demonstrate that more likely than not, in light of the new
22 evidence, no reasonable juror would find him guilty beyond a
23 reasonable doubt-or, to remove the double negative, that more
24 likely than not any reasonable juror would have reasonable
25 doubt."). Here, Petitioner has not shown that the actual innocence
26 exception to the statute of limitations applies to this case. (See
27 Objection at 4-5). Moreover, Petitioner has not even purported to
28 make a showing of actual innocence, supported by new reliable
evidence. See Schlup, 513 U.S. at 324 ("To be credible, [a claim
of actual innocence] 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.").