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8 **UNITED STATES DISTRICT COURT**  
9 **EASTERN DISTRICT OF CALIFORNIA**  
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11 WILBERTO PADILLA,  
12                                      Petitioner,  
13                      v.  
14 JOE LIZARRAGA,  
15                                      Respondent.  
16

No. 2:18-cv-02266-TLN-EFB

**ORDER**

17            Petitioner, a state prisoner proceeding pro se, filed this application for a writ of habeas  
18 corpus pursuant to 28 U.S.C. § 2254. (ECF No. 1.) The matter was referred to a United States  
19 Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

20            On August 6, 2019, the magistrate judge filed findings and recommendations herein  
21 which were served on all parties and which contained notice to all parties that any objections to  
22 the findings and recommendations were to be filed within fourteen days. (ECF No. 27.) On  
23 August 21 and 28, 2019, Petitioner filed Objections to the Findings and Recommendations.<sup>1</sup>  
24 (ECF Nos. 28 & 29.)

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27 <sup>1</sup>            Petitioner's second filing of Objections (ECF No. 29) appears to be nothing more than a  
28 poor photocopy of his Objections filed August 21, 2019 (ECF No. 28) but is otherwise identical  
to the earlier filing. Accordingly, the Court references Petitioner's August 21, 2019 filing (ECF  
No. 28) herein to address Petitioner's objections.

1 This Court reviews de novo those portions of the proposed findings of fact to which  
2 objection has been made. 28 U.S.C. § 636(b)(1); McDonnell Douglas Corp. v. Commodore  
3 Business Machines, 656 F.2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982). As  
4 to any portion of the proposed findings of fact to which no objection has been made, the Court  
5 assumes its correctness and decides the motions on the applicable law. See Orand v. United  
6 States, 602 F.2d 207, 208 (9th Cir. 1979). The magistrate judge's conclusions of law are  
7 reviewed de novo. See Britt v. Simi Valley Unified Sch. Dist., 708 F.2d 452, 454 (9th Cir. 1983).  
8 Having carefully reviewed the entire file, the court finds the findings and recommendations to be  
9 supported by the record and by proper analysis.

#### 10 Petitioner's Objections

11 Petitioner argues his petition should be deemed timely due to delays caused by his lack of  
12 counsel and having to spend time in solitary confinement. (ECF No. 28 at 1.) He also lists  
13 twelve objections (id. at 2–3), each of which the Court has fully evaluated and overrules for the  
14 reasons stated below.

15 Petitioner's first and second objections relate to his unexhausted claims, which Petitioner  
16 contends are still pending before the Sacramento Superior Court. (ECF No. 28 at 2.) These  
17 objections are not relevant to the motion before the Court and are therefore overruled. Similarly,  
18 to the extent Petitioner's second and twelfth objections request a stay of litigation pending the  
19 final outcome of his unexhausted claims, Petitioner's request is denied.

20 Petitioner's third and fourth objections pertain to Petitioner's minority and statutory  
21 tolling, which were properly addressed in the Findings and Recommendations. (See ECF No. 27  
22 at 4.) The Court agrees with the magistrate judge's findings that Petitioner's minority does not  
23 warrant equitable tolling and there are no grounds for statutory tolling and therefore overrules  
24 these objections.

25 Petitioner's fifth, sixth, tenth, and eleventh objections assert various contentions regarding  
26 corruption charges against Respondent and unethical practices by his attorney. (ECF No. 28 at 2–  
27 3.) The Court finds these objections are irrelevant to the motion before the Court and therefore  
28 overrules them.

1           Petitioner’s seventh objection asserts that external forces — specifically, the lack of  
2 counsel, being in “the Hole,”<sup>2</sup> and losing his court documents when he was sent to the Hole —  
3 caused Petitioner’s untimely filing and therefore constitute grounds for equitable tolling. (ECF  
4 No. 28 at 2; see also *id.* at 1.) As the Findings and Recommendations correctly state, the  
5 threshold necessary to trigger equitable tolling is very high. (ECF No. 27 at 3, citing *Waldron-*  
6 *Ramsey v. Pacholke*, 556 F.3d 1008, 1011 (9th Cir. 2009).) Moreover, it is Petitioner’s burden to  
7 establish he pursued his rights diligently, but extraordinary circumstances stood in the way and  
8 prevented timely filing. (*Id.*, citing *Holland v. Florida*, 560 U.S 631, 649 (2010); *Smith v.*  
9 *Duncan*, 297 F.3d 809, 814 (9th Cir. 2002).)

10           Petitioner fails to meet this burden. Indeed, Petitioner provides no facts about the nature  
11 or extent of his purported diligence, nor does he provide any details about the length or timing of  
12 his solitary confinement in order to establish that the confinement amounted to extraordinary  
13 circumstances warranting equitable tolling. To the extent Petitioner claims not having a lawyer  
14 amounts to extraordinary circumstances, the Court finds that Petitioner is not entitled to equitable  
15 tolling. See, e.g., *Baker v. Cal. Dep’t of Corr.*, 484 F. App’x 130, 131 (9th Cir. 2012) (“Low  
16 literacy levels, lack of legal knowledge, and need for some assistance . . . are not extraordinary  
17 circumstances to warrant equitable tolling . . .”); *Raspberry v. Garcia*, 448 F.3d 1150, 1154 (9th  
18 Cir. 2006) (“[A] pro se petitioner’s lack of legal sophistication is not, by itself, an extraordinary  
19 circumstance warranting equitable tolling.”). Finally, although deprivation of legal materials is  
20 the type of external impediment for which courts have granted equitable tolling, Petitioner still  
21 fails to meet his burden of establishing his own diligence and that the hardship caused by lack of  
22 access to his materials was an extraordinary circumstance that caused his late filing. See *Lott v.*  
23 *Mueller*, 304 F.3d 918, 924–25 (9th Cir. 2002). Therefore, the Court finds Petitioner’s lack of  
24 counsel and time in solitary confinement, as asserted in his Objections (ECF No. 28 at 1), do not  
25 constitute extraordinary circumstances warranting equitable tolling and this objection is  
26 overruled.

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27           <sup>2</sup>       The Court notes Petitioner’s reference to “the Hole” alludes to his temporary placement in  
28 solitary confinement.

1 Accordingly, Petitioner's objections provide no grounds that his petition is timely under  
2 the AEDPA, or that any exceptions to the statute of limitations apply.

3 Certificate of Appealability

4 Pursuant to Rule 11(a) of the Federal Rules Governing Section 2254 Cases, the Court has  
5 considered whether to issue a certificate of appealability. Before Petitioner can appeal this  
6 decision, a certificate of appealability must issue. See 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).  
7 Where the petition is denied on the merits, a certificate of appealability may issue under 28  
8 U.S.C. § 2253 "only if the applicant has made a substantial showing of the denial of a  
9 constitutional right." 28 U.S.C. § 2253(c)(2). The Court must either issue a certificate of  
10 appealability indicating which issues satisfy the required showing or must state the reasons why  
11 such a certificate should not issue. See Fed. R. App. P. 22(b). Where the petition is dismissed on  
12 procedural grounds, a certificate of appealability "should issue if the prisoner can show: (1) 'that  
13 jurists of reason would find it debatable whether the district court was correct in its procedural  
14 ruling'; and (2) 'that jurists of reason would find it debatable whether the petition states a valid  
15 claim of the denial of a constitutional right.'" *Morris v. Woodford*, 229 F.3d 775, 780 (9th Cir.  
16 2000) (quoting *Slack v. McDaniel*, 529 U.S. 473, 120 S. Ct. 1595, 1604 (2000)).

17 Petitioner's eighth and ninth objections reference the ruling of *Slack v. McDaniel*, 529  
18 U.S. 473 (2000), and contend Petitioner made a "substantial showing" demonstrating jurors  
19 would disagree with the District Court's ruling of his constitutional claims. (ECF No. 28 at 2–3.)  
20 The Court construes these objections to be a request for the issuance of a certificate of  
21 appealability. Petitioner, however, provides no further legal or factual argument in support of his  
22 contention. Thus, for the reasons set forth in the magistrate judge's Findings and  
23 Recommendations (ECF No. 27), the Court finds that issuance of a certificate of appealability is  
24 not warranted in this case.

25 Accordingly, IT IS HEREBY ORDERED that:

- 26 1. The Findings and Recommendations, filed August 6, 2019 (ECF No. 27), are adopted  
27 in full;
- 28 2. Respondent's Motion to Dismiss, filed December 28, 2018 (ECF No. 14), is

1 GRANTED;

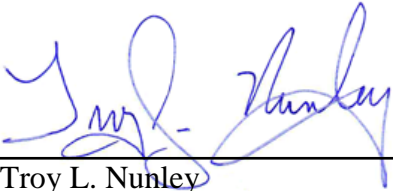
2 3. Petitioner's request for a stay (ECF No. 28) is DENIED;

3 4. The Court declines to issue a certificate of appealability; and

4 5. The Clerk of the Court is directed to close this file.

5 IT IS SO ORDERED.

6 Dated: September 30, 2019

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10 Troy L. Nunley  
11 United States District Judge  
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