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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

10 SALVADOR ZAMUDIO,
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12
13 vs.
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15 MATHEW CATE, Secretary
16
17 Respondent.

CASE NO. 12-CV-703-BEN (MDD)

ORDER:

- (1) ADOPTING REPORT AND RECOMMENDATION;**
(2) OVERRULING OBJECTIONS;
(3) DENYING PETITION;
(4) DENYING CERTIFICATE OF APPEALABILITY.

[Docket No. 39]

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19 On March 21, 2012, Petitioner Salvador Zamudio filed a Petition for Writ of
20 Habeas Corpus. (Docket No. 1). Zamudio seeks relief from convictions in California
21 state court pursuant to 28 U.S.C. § 2254. Before this Court is a Report and
22 Recommendation Following Remand, issued by the Honorable Mitchell D. Dembin.
23 (Docket No. 39). For the reasons stated below, the Report and Recommendation is
24 **ADOPTED** and Petitioner's Objections are **OVERRULED**. The Petition is **DENIED**.

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BACKGROUND

27 On September 4, 2008, Petitioner was convicted of rape with a foreign object,
28 forcible oral copulation, two counts of burglary, robbery, and kidnaping, and was
sentenced to twenty-five years to life, plus fourteen years and eight months. (Docket

1 No. 1-1 at 20-21). On appeal, the California Court of Appeal overturned the kidnaping
2 charge, and several related enhancements. (*Id.* at 21, 49). Petitioner appealed the
3 remaining charges to the California Supreme Court, and his appeal was denied on April
4 20, 2010. (*Id.* at 37). On June 11, 2010, Petitioner was resentenced on the remaining
5 counts to twenty-five years to life, plus five years and four months. (*Id.* at 49).
6 Petitioner filed the instant Petition on March 21, 2012, while his state petition was
7 pending. (Docket No. 1).

8 On August 1, 2012, the Honorable Mitchell D. Dembin issued a Report and
9 Recommendation recommending that Petitioner's motions to stay and for an
10 evidentiary hearing be dismissed, and that the court sua sponte dismiss the Petition as
11 untimely. (Docket No. 18). On March 18, 2013, the Honorable Irma E. Gonzalez
12 adopted in part and declined to adopt in part the Report and Recommendation. (Docket
13 No. 32). Judge Gonzalez remanded the matter to Judge Dembin to order further
14 briefing "regarding the issues of when Petitioner's conviction became final and the
15 applicability of equitable tolling." (*Id.* at 9). On August 28, 2013, this matter was
16 reassigned from Judge Gonzalez to the undersigned. (Docket No. 38). After receiving
17 additional briefing from both Respondent (Docket No. 36) and Petitioner (Docket No.
18 37), Judge Dembin issued a thoughtful and thorough Report and Recommendation
19 Following Remand on April 24, 2014. (Docket No. 39). Petitioner filed an Objection
20 to the Report and Recommendation. (Docket No. 40). No timely reply to the
21 Objection was received by this Court.

22 LEGAL STANDARD

23 A Petition for Habeas Corpus filed pursuant to 28 U.S.C. § 2254 is governed by
24 the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See Lindh v.*
25 *Murphy*, 521 U.S. 320, 327 (1997). Pursuant to AEDPA, all federal habeas petitioners
26 are subject to a one-year statute of limitations. 28 U.S.C. § 2244(d). Under the
27 circumstances of this case, the statute of limitations began to run on "the date on which
28 the judgment became final by the conclusion of direct review or the expiration of the

1 time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A).¹

2 AEDPA’s statute of limitations provision is subject to equitable tolling.
3 *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002). However, equitable tolling
4 is “unavailable in most cases” and is “appropriate only ‘if *extraordinary* circumstances
5 beyond a prisoner’s control make it impossible to file a petition on time.” *Id.*
6 (citations omitted) (emphasis in *Miranda*). The threshold for equitable tolling is “very
7 high.” *Id.* (citation omitted).

8 Where a timely objection to a report and recommendation has been filed, the
9 district court reviews *de novo* those portions of the report or specific proposed findings
10 or recommendations. 28 U.S.C. § 636(b)(1).

11 DISCUSSION

12 I. Timing of Petitioner’s Final Conviction

13 In California, a notice of appeal must be filed within sixty days after rendition
14 of judgment. CAL. RULES OF COURT R. 8.308(a). Absent an appeal, a conviction
15 becomes final after sixty days. *Id.* The notice is deemed timely if delivered to prison
16 officials within the filing period. *In re Jordan*, 4 Cal. 4th 116, 118-19 (1992). As
17 Petitioner was sentenced on June 11, 2010, his conviction became final on August 10,
18 2010 unless he filed a timely appeal. In the Report and Recommendation, the
19 Magistrate Judge carefully considered Petitioner’s claims that he handed a notice of
20 appeal to a prison guard on August 2, 2010. The Report and Recommendation
21 concludes that there is no corroborating, independent evidence in the record to support
22 his claim, and discusses Petitioner’s failure to pursue the matter with any court for
23 more than one year. (R&R at 3-6). Applying the relevant California law, the Report
24 and Recommendation concluded that Petitioner’s conviction became final sixty days
25 after his sentencing. (*Id.* at 6). Petitioner’s conviction therefore became final on
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28 ¹Petitioner does not assert that any of the situations outlined in 28 U.S.C. §
2244(d)(1)(B)-(D) apply.

1 August 10, 2010.²

2 This Court has carefully considered the Objection filed by Petitioner. Petitioner
3 protests that he is unable to prove that he gave an appeal to prison officials, and argues
4 that the prison industry has “very lucrative commercial interests in keeping prisoners
5 incarcerated.” (Obj. at 3). Petitioner also speculates that perhaps something got lost
6 in the mail. (*Id.* at 4). The Report and Recommendation clearly considered Petitioner’s
7 arguments that he did file an appeal. After giving Petitioner an additional opportunity
8 to submit information, the Magistrate Judge concluded that there was no independent
9 evidence in the record to corroborate his claim that he gave the guards an appeal. The
10 Magistrate Judge noted that Petitioner failed to pursue this matter with any court for
11 more than one year. The Magistrate Judge points out that if a non-incarcerated
12 defendant claimed to file a notice of appeal with no record and without following up
13 for over a year, the appeal would be deemed untimely. Petitioner does not point to any
14 misstatements in the discussion of the facts, flaws in reasoning, or legal errors in the
15 Report and Recommendation. Petitioner provides no authority to undermine the Report
16 and Recommendation’s conclusion that the lack of independent evidence and the
17 lengthy delay before asserting to any court that he did file an appeal renders his
18 conviction final sixty days after resentencing. The vague suggestion that something
19 was lost in the mail and general accusations of a possible motive to conceal his appeal
20 do not provide a basis for this Court to conclude that such an appeal was actually filed.

21 Second, Petitioner appears to suggest that he was somehow denied a right to
22 appeal, and appears to attack the performance of counsel. He claims he was left to
23 “fend for himself,” and appears to object to the fact that no one appealed for him. (*Id.*
24 at 2-4). Petitioner makes references to his right to appeal and asks “Is Mr. Zamudio in
25 fact being denied/prevented from having a right to appeal?” (*Id.* at 3). He asks
26 whether it was assumed he would somehow know how to request an appeal. (*Id.*) He
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28 ²The Court notes that the Report and Recommendation incorrectly states the date as August 2, 2010. (R&R at 6). This appears to be a typographical error.

1 also appears to suggest that, “considering his disability,” he was not advised of his right
2 to appeal, and that “Even if he was informed, can it be said he would be able to
3 understand?” (*Id.*) Petitioner also makes reference to his difficulties in reading and
4 writing in English or Spanish, and asks if this affects his rights. (*Id.* at 2). He also
5 suggests, but does not directly state, that he was not afforded opportunity for oral
6 argument before his conviction was affirmed. (*Id.* at 4). It is unclear to this Court
7 whether he refers to the appeals process for his first conviction, or to his resentencing.
8 Such arguments do not prove a claim that he actually filed a timely appeal, and conflict
9 with his representations that he did file a timely appeal. As such, they do not disturb
10 the finality of the conviction.

11 II. Equitable Tolling

12 The Report and Recommendation concluded that Petitioner was not entitled to
13 equitable tolling. In his Objection, Petitioner restates his claims that he should receive
14 equitable tolling due to his language limitations and his status as a sex offender. (*Id.*
15 at 5). Petitioner speaks to the difficulties that one faces in navigating the legal system,
16 especially for a non-English-speaking sex offender who does not have a lot of money.
17 However, Petitioner does not point to any flaws in the reasoning of the Report and
18 Recommendation or raise specific objections. Although Petitioner’s situation may be
19 difficult and he may believe that the law should allow him equitable tolling in his
20 situation, he has not shown that he is entitled to equitable tolling under the law on these
21 grounds.

22 The Court notes that, as stated above, Petitioner argues that he should be allowed
23 to proceed because of problems with his attorney, and suggests that he may not have
24 fully understood his rights with regard to appeal.³ However, in Judge Gonzalez’s Order
25 Adopting in Part and Declining to Adopt in Part Report and Recommendation, the
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27 ³Although Petitioner points to the fact that a judge can request an attorney to
28 certify that he has advised the defendant of his right to appeal, and that an attorney
could have filed a notice on his behalf, he does not argue that this was required.
Rather, he appears to suggest that these measure *should* have been taken.

1 Court concluded that Petitioner's arguments regarding counsel's failure to file a notice
2 of appeal were not a basis for equitable tolling. (Docket No. 32 at 5-6). The Court also
3 determined that equitable tolling should not be granted for the period between August
4 2010 and February 2011. (*Id.* at 6) Nothing before this Court undermines this
5 conclusion. The remand was ordered in response to Petitioner's claims regarding
6 language ability and the impact of his status as a sex offender, and the possibility that
7 this could have entitled him to equitable tolling after the initial six-month period.
8 Furthermore, to the extent Petitioner may have been seeking to assert problems with
9 filing an appeal beyond the alleged error of counsel, he has not properly raised these
10 issues. As noted above, Petitioner's claims also appear to be in tension with his
11 simultaneous claims that he did attempt to timely appeal.

12 After full consideration of Petitioner's arguments, this Court concurs with the
13 Magistrate Judge. Petitioner has not demonstrated that he is entitled to equitable
14 tolling. Accordingly, his petition is untimely.

15 III. Presumptions

16 Petitioner also expresses concern about "presumptions" that are being made.
17 (Obj. at 5-6). He does not point to any specific presumptions, and states that he merely
18 asks for a ruling based on the merits with a signature. (*Id.* at 6). However, out of an
19 abundance of caution, this Court has examined the Report and Recommendation, and
20 does not note any inappropriate presumptions.

21 **CONCLUSION**

22 After full consideration of the Report and Recommendation, Petitioner's
23 Objection, and the record in this matter, this Court **ADOPTS** the Report and
24 Recommendation in full. Petitioner's Objection is **OVERRULED**. The Petition is
25 **DENIED** as untimely and the matter is **DISMISSED**. The Court **DENIES** a certificate
26 of appealability because the issues are not debatable among jurists of reason and there

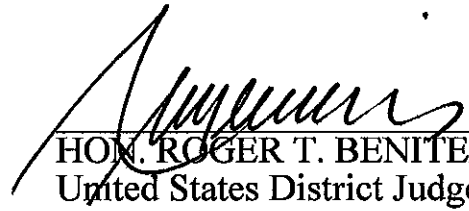
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1 are no questions adequate to deserve encouragement. *See Miller-El v. Cockrell*, 537
2 U.S. 322, 327 (2003). The Clerk of Court shall enter judgment denying the Petition.

3 **IT IS SO ORDERED.**

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5 Dated: June 12, 2014


HON. ROGER T. BENITEZ
United States District Judge

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