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

CLEVELAND R. LOWMAN,
Petitioner,

v.

GARY SWARTHOUT, *et al.*,
Respondents.

Case No. 13-cv-1729-BAS(PCL)

ORDER:

**(1) OVERRULING PETITIONER'S
OBJECTIONS;**

**(2) ADOPTING REPORT AND
RECOMMENDATION;**

**(3) GRANTING RESPONDENTS'
MOTION TO DISMISS; AND**

**(4) DISMISSING PETITION FOR
WRIT OF HABEAS CORPUS
WITHOUT PREJUDICE**

[ECF Nos. 6, 9]

On July 24, 2013, Petitioner Cleveland R. Lowman, a state prisoner who is represented by counsel, filed this Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 seeking relief from his September 2000 convictions in which he pled guilty to: (1) driving under the influence of alcohol or drugs with injury; (2) false imprisonment; and (3) possession of cocaine. A sentence of 43 years to life under the three-strikes law followed. On March 17, 2014, United States Magistrate Judge Peter C. Lewis issued a Report and Recommendation ("report") recommending that this Court: (1) grant

1 Respondents’ motion to dismiss the petition as procedurally barred and dismiss this
2 action without prejudice; and (2) decline issuing a certificate of appealability.
3 Petitioner filed objections to the report.

4 For the following reasons, the Court **OVERRULES** Petitioner’s objections,
5 **APPROVES** and **ADOPTS** the report, **GRANTS** Respondents’ motion to dismiss,
6 dismissing this action without prejudice, and **DECLINES** to issue a certificate of
7 appealability.

8 9 **I. LEGAL STANDARD**

10 The Court reviews *de novo* those portions of the R&R to which objections are
11 made. 28 U.S.C. § 636(b)(1). The Court may “accept, reject, or modify, in whole or
12 in part, the findings or recommendations made by the magistrate judge.” *Id.* But “[t]he
13 statute [28 U.S.C. § 636(b)(1)(c)] makes it clear that the district judge must review the
14 magistrate judge’s findings and recommendations *de novo if objection is made*, but not
15 otherwise.” *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en
16 banc) (emphasis in original); *see also Schmidt v. Johnstone*, 263 F. Supp. 2d 1219,
17 1226 (D. Ariz. 2003) (concluding that where no objections were filed, the district court
18 had no obligation to review the magistrate judge’s report). “Neither the Constitution
19 nor the statute requires a district judge to review, *de novo*, findings and
20 recommendations that the parties themselves accept as correct.” *Reyna-Tapia*, 328
21 F.3d at 1121. This rule of law is well-established in the Ninth Circuit and this district.
22 *See Wang v. Masaitis*, 416 F.3d 992, 1000 n.13 (9th Cir. 2005) (“Of course, *de novo*
23 review of a R & R is only required when an objection is made to the R & R.”); *Nelson*
24 *v. Giurbino*, 395 F. Supp. 2d 946, 949 (S.D. Cal. 2005) (Lorenz, J.) (adopting report
25 in its entirety without review because neither party filed objections to the report despite
26 the opportunity to do so); *see also Nichols v. Logan*, 355 F. Supp. 2d 1155, 1157 (S.D.
27 Cal. 2004) (Benitez, J.).

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1 **II. ANALYSIS¹**

2 The magistrate judge makes three relevant findings in the report: (1) Petitioner
3 satisfied § 2254’s exhaustion requirements; (2) the petition was untimely; and (3)
4 equitable tolling does not apply. He also finds that Petitioner’s conviction was final
5 on March 12, 2001. (Report 8:12–13.) Petitioner does not challenge the magistrate’s
6 exhaustion and untimeliness findings in his objections. His objections focus squarely
7 on the issue of equitable tolling.

8 Equitable tolling has been deemed appropriate in cases arising under § 2244 if
9 the petitioner can show: (1) that he or she has been diligently pursuing his or her rights
10 and (2) that an extraordinary circumstance prevented timely filing. *Holland v. Florida*,
11 560 U.S. 631, 649 (2010); *Ramirez v. Yates*, 571 F.3d 993, 997 (9th Cir. 2009). The
12 petitioner must show that the extraordinary circumstances actually caused the
13 untimeliness. *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). “[A] pro se
14 petitioner’s lack of legal sophistication is not, by itself, an extraordinary circumstance
15 warranting equitable tolling.” *Raspberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir.
16 2006). That includes a petitioner’s inability to correctly calculate the limitations
17 period. *Id.* Consequently, equitable tolling is “unavailable in most cases” and has a
18 “very high” threshold before it can be applied. *Miranda v. Castro*, 292 F.3d 1063,
19 1066 (9th Cir. 2002).

20
21 **A. Diligence and Extraordinary Circumstances**

22 Petitioner asserts that he “has diligently pursued his appeal rights but did so
23 absent effective counsel.” (Pet’r’s Objections 6:10–11.) However, he fails to produce
24 any evidence to support that proposition. Though *Holland* held that the diligence
25 required was “reasonable diligence” and not “maximum feasible diligence,” Petitioner
26 fails to adequately provide support to demonstrate that he meets even the reasonable-

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¹ The Court adopts and incorporates by reference all portions of the report that Petitioner does not object to. That includes the factual background presented in the report.

1 diligence standard. *See Holland*, 560 U.S. at 649. Rather, the record before this Court
2 suggests the opposite.

3 Petitioner’s first state habeas petition was filed on March 7, 2001 and denied
4 December 12, 2001; the second state habeas petition was filed on September 13, 2004
5 and denied September 27, 2005; and the third state habeas petition was filed on May
6 16, 2011 and denied on January 31, 2012. Contrary to Petitioner’s position on this
7 issue, the significant gaps in the time periods between the three aforementioned
8 petitions—totaling three and seven years, respectively—reflect the greater likelihood
9 that he did not pursue his rights diligently. The California Court of Appeals’
10 determination that Petitioner’s third state habeas petition was untimely only further
11 supports this Court’s conclusion that Petitioner was not diligent in pursuing his rights.

12 Furthermore, Petitioner fails to specifically address any “extraordinary
13 circumstances” even though he references the requirement throughout his objections.
14 Consequently, even if Petitioner had successfully demonstrated diligence, he would
15 have failed to satisfy the extraordinary-circumstances requirement for equitable tolling.
16 *See Ramirez*, 571 F.3d at 997. That, in turn, necessarily means that he would have
17 failed to show that the extraordinary circumstances actually caused the untimeliness.
18 *See Spitsyn*, 345 F.3d at 799.

19 Petitioner also argues that the habeas petition is timely because challenges to the
20 length of sentence “are always reviewable despite the passage of time” and “regardless
21 of whether an objection or argument was raised in the trial and/or reviewing court.”
22 (Pet’r’s Objections 6:19–25 (internal quotation marks omitted).) He string cites three
23 cases to support that proposition: *People v. Smith*, 29 Cal. 4th 849, 852 (2002); *People*
24 *v. Scott*, 9 Cal. 4th 331, 354 (1984); and *In re Ricky H.*, 30 Cal. 3d 176, 191 (1991).
25 Petitioner misreads these cases. These cases do not stand for the proposition that a
26 challenge to the length of a sentence may be raised whenever one pleases or beyond the
27 statute of limitations. Rather, these cases hold that challenges to the length of the
28 sentence are preserved on appeal—meaning they are not waived—regardless of

1 whether an objection was made in the lower court. *See Smith*, 24 Cal. 4th at 852; *In re*
2 *Rickey H.*, 30 Cal. 3d at 191; *Scott*, 9 Cal. 4th at 354.

3 In sum, Petitioner fails to demonstrate that he has diligently pursued his rights
4 and that an extraordinary circumstance prevented timely filing of his federal habeas
5 petition. *See Holland*, 560 U.S. at 649; *Ramirez*, 571 F.3d at 997.

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7 **B. Application of *McQuiggin v. Perkins***

8 Petitioner argues that the “miscarriage of justice” exception in *McQuiggin v.*
9 *Perkins*, 133 S. Ct. 1924 (2013), entitles him to equitable tolling. (Pet’r’s Objections
10 9:3–8.) This Court disagrees.

11 *McQuiggin* states, in pertinent part, that:

12 To invoke the miscarriage of justice exception to AEDPA’s
13 statute of limitations . . . a petitioner “must show that it is
14 more likely than not that no reasonable juror would have
15 convicted him in light of the new evidence.” Unexplained
16 delay in presenting new evidence bears on the determination
whether the petitioner has made the requisite showing. . . .
“[A] court may consider how the timing of the submission
and the likely credibility of [a petitioner’s] affiants bear on
the probable reliability of . . . evidence [of actual innocence].

17 *McQuiggin*, 133 S. Ct. at 1926 (citations omitted) (quoting *Schlup v. Delo*, 513 U.S.
18 298, 327, 332 (1995)). Specifically, the United States Supreme Court held that “actual
19 innocence, if proved, serves as a gateway through which a petitioner may pass whether
20 the impediment is a procedural bar . . . [or] expiration of the statute of limitations.” *Id.*
21 at 1928. However, the court cautioned that “tenable actual-innocence gateway pleas
22 are rare: ‘[A] petitioner does not meet the threshold requirement unless he persuades
23 the district court that, *in light of the new evidence*, no juror, acting reasonably, would
24 have voted to find him guilty beyond a reasonable doubt.’” *Id.* (citing *Schlup*, 513 U.S.
25 at 329; *House v. Bell*, 547 U.S. 518, 538 (2006)) (emphasis added). In *McQuiggin*, the
26 defendant asserted actual innocence of the first-degree-murder conviction, and
27 presented newly discovered evidence in the form of three affidavits, each pointing to
28 an alternative alleged perpetrator as the murderer. *Id.* at 1930, 1936.

1 Here, Petitioner claims “actual innocence of a crime alleged in a prior strike”
2 which was the product of another case prosecuted in New York, and not the crime for
3 which he was convicted of in this case. (Pet’r’s Objections 9:3–8.) That distinction
4 already removes this case from the scope of *McQuiggin*.

5 However, even assuming, for the sake of argument, that the circumstances of this
6 case fall within the scope of *McQuiggin*, Petitioner fails to provide new evidence to
7 indicate his actual innocence. He fails to provide or identify new evidence with his
8 petition or opposition to Respondents’ motion to dismiss, and certainly fails to do so
9 with his objections to the report. As a result, an essential threshold requirement to
10 invoke the miscarriage-of-justice exception is not present here—new evidence.
11 Therefore, in failing to present any new evidence, Petitioner fails to satisfy the
12 requirements set forth in *McQuiggin* to entitle him to equitable tolling through the
13 miscarriage-of-justice exception. *See McQuiggin*, 133 S. Ct. at 1926-28.

14 15 **III. CONCLUSION & ORDER**


16 After considering Petitioner’s objections and conducting a *de novo* review, the
17 Court concludes that the magistrate judge’s reasoning in the report is sound.
18 Petitioner’s habeas petition is untimely, is not entitled to equitable tolling, and is not
19 saved by the miscarriage-of-justice exception. In light of the foregoing, the Court
20 **OVERRULES** Petitioner’s objections, **APPROVES** and **ADOPTS** the report in its
21 entirety, **GRANTS** Respondents’ motion to dismiss, and **DISMISSES WITHOUT**
22 **PREJUDICE** the petition.

23 Moreover, a certificate of appealability may issue only if the applicant makes a
24 substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).
25 Under this standard, a petitioner must show that reasonable jurists could debate
26 whether the petition should have been resolved in a different manner or that the issues
27 presented were adequate to deserve encouragement to proceed further. *Miller-El v.*
28 *Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484

1 (2000)). Here, Petitioner has not made the requisite showing. Because reasonable
2 jurists would not find the Court's assessment of the claims in the petition debatable or
3 wrong, the Court **DECLINES** to issue a certificate of appealability. *See Slack*, 529
4 U.S. at 484.

5 **IT IS SO ORDERED.**

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7 **DATED: September 22, 2014**

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9 **Hon. Cynthia Bashant**
10 **United States District Judge**

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