

1 **BACKGROUND**¹

2 On July 25, 2003, the Petitioner pleaded guilty to first-degree murder in violation of
3 California Penal Code Section § 187(a). On September 8, 2003, Petitioner was sentenced
4 by the San Diego County Superior Court to fifty-five years to life. On July 12, 2004, the
5 California Court of Appeals affirmed his conviction and no further direct appeals to the
6 California Supreme Court or United States Supreme Court were made. On April 17, 2009,
7 Petitioner filed a habeas petition in the Superior Court which was eventually denied. On
8 July 20, 2016, Petitioner filed another habeas petition with the Superior Court, which was
9 also denied. Petitioner filed a habeas petition with the California Court of Appeal which
10 was denied on January 9, 2017. The California Supreme Court denied the petition on April
11 12, 2017. Finally, Petitioner filed the operative petition for writ of habeas corpus pursuant
12 to 28 U.S.C. § 2254 with this Court on July 27, 2017. Upon receiving Respondent’s Motion
13 to Dismiss, Judge Dembin submitted a report to this Court, recommending the petition be
14 dismissed as time-barred. Petitioner has filed no objections to the report.

15 **DISCUSSION**

16 **I. Scope of Review**

17 The district court’s role in reviewing a magistrate judge’s report and
18 recommendation is set forth in Title 28, United States Code, § 636(b)(1). Under this statute,
19 the district court “shall make a de novo determination of those portions of the report . . . to
20 which objection is made,” and “may accept, reject, modify, in whole or in part, the findings
21 or recommendations made by the magistrate [judge].” *Id.* It is well-settled, under Rule
22 72(b) of the Federal Rules of Civil Procedure, that a district court may adopt those parts of
23 a magistrate judge’s report to which no specific objection is made, provided they are not
24 clearly erroneous. *Thomas v. Arn*, 474 U.S. 140, 153 (1985).

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27 ¹ The underlying facts set forth in the magistrate judge’s report, to which plaintiff presents no objection,
28 are adopted in toto, and referenced as if fully set forth herein.

1 **II. Analysis**

2 Judge Dembin found that Petitioner’s judgment became final, under AEDPA, on
3 August 21, 2004, forty days after the Court of Appeal entered judgment affirming his
4 conviction. Thus, without the benefit of equitable tolling, Petitioner had no later than
5 August 21, 2005 to file a writ of habeas corpus in federal court. Ultimately, Judge Dembin
6 found the amended habeas petition time-barred under AEDPA because (1) Petitioner is not
7 entitled to a later start date pursuant to the Supreme Court’s holding in Johnson v. United
8 States, 135 S. Ct. 2551 (2015); (2) Petitioner is not entitled to enough statutory tolling to
9 make his petition timely; and (3) Petitioner is not entitled to equitable tolling. The Court
10 received no objections to the magistrate judge’s report, nor did Petitioner request additional
11 time in order to file objections. As such, this Court may adopt the magistrate judge’s
12 findings and conclusions presented in the report as long as they are not clearly erroneous.
13 See Thomas, 474 U.S. at 153. This Court’s careful de novo review of the record reflects
14 the magistrate judge presented a cogent analysis and, thus, finds the magistrate judge’s
15 findings and conclusions are not clearly erroneous.

16 **III. Certificate of Appealability**

17 Rule 11 of the Federal Rules Governing Section 2254 Cases states that “the district
18 court must issue or deny a certificate of appealability when it enters a final order adverse
19 to the applicant.” A certificate of appealability is not issued unless there is “a substantial
20 showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Under this
21 standard, the petitioner must demonstrate that “reasonable jurists could debate whether . .
22 . the petition should have been resolved in a different manner or that the issues presented
23 were ‘adequate to deserve encouragement to proceed further.’ ” Slack v. McDaniel, 529
24 U.S. 473, 475 (2000) (citation omitted). For the reasons set forth in the magistrate judge’s
25 report and recommendation and incorporated by reference herein, the Court finds that this
26 standard has not been met and therefore **DECLINES** to issue a certificate of appealability
27 in this case.

