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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

Mario A. Willis,  
  
Plaintiff,  
  
v.  
  
J. Gastelo,  
  
Defendant.

Case No.: 18-cv-01456-GPC-JLB

**REPORT AND  
RECOMMENDATION FOR ORDER  
GRANTING RESPONDENT’S  
MOTION TO DISMISS PETITION  
FOR WRIT OF HABEAS CORPUS**

**[ECF No. 19]**

This Report and Recommendation is submitted to United States District Judge Gonzalo P. Curiel pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule HC.2 of the United States District Court for the Southern District of California.

**I. INTRODUCTION**

Petitioner Mario A. Willis (“Petitioner”), a state prisoner proceeding pro se, filed a Petition for Writ of Habeas Corpus (“Petition”) pursuant to 28 U.S.C. § 2254 challenging the state court’s denial of a petition to recall his sentence under Cal. Penal Code § 1170.126. (ECF No. 1 at 2.) On July 30, 2018, Respondent J. Gastelo, Warden, (“Respondent”), moved to dismiss the Petition on the ground that the Petition is time-barred by the one-year

1 statute of limitations pursuant to 28 U.S.C. § 2244(d). (ECF No. 19.) On October 17,  
2 2018, Petitioner filed an opposition,<sup>1</sup> arguing that his Petition is not untimely. (ECF No.  
3 23.)

4 After a thorough review of the Petition, the Motion to Dismiss, the Opposition, and  
5 all supporting documents, the Court finds that the Petition is untimely. Accordingly, the  
6 Court **RECOMMENDS** that Respondent’s Motion to Dismiss (ECF No. 19) be  
7 **GRANTED**.

## 8 **II. BACKGROUND**

9 On April 10, 2008, a San Diego Superior Court jury, in case number SDC208339,  
10 convicted Petitioner of possession of a firearm by a felon (Cal. Penal Code § 12021(a)(1)),  
11 possession of a deadly weapon (Cal. Penal Code § 12020(a)(1)), and illegal possession of  
12 ammunition (Cal. Penal Code § 12316(b)(1)). (ECF Nos. 1 at 2; 20-1 at 1.) Petitioner  
13 admitted to prior strike convictions and on June 23, 2008, was sentenced to twenty-five  
14 years to life in prison. (ECF Nos. 1 at 2; 20-1 at 1–2; see ECF No. 20-2 at 10.)

15 On February 13, 2009, Petitioner appealed his sentence to the California Court of  
16 Appeal, raising three claims unrelated to the instant Petition.<sup>2</sup> (ECF Nos. 1 at 2; 20-2 at 1.)  
17 On November 13, 2009, the California Court of Appeal affirmed the judgment of the  
18 superior court. (ECF No. 20-5 at 1–2.) On December 24, 2009, Petitioner filed a petition  
19 for review in the California Supreme Court, which denied the petition without comment on  
20 February 3, 2010. (ECF No. 20-7 at 1.) Petitioner did not file a petition for writ of certiorari  
21 in the United States Supreme Court.

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25 <sup>1</sup> Petitioner captions his opposition as a “traverse.” (ECF No. 23 at 1.)

26 <sup>2</sup> On appeal, Petitioner raised the following three claims: (1) the trial court erred in admitting “other bad  
27 act” evidence of two prior domestic violence incidents involving Petitioner and his wife; (2) the trial was  
28 tainted by ineffective assistance of counsel and prosecutorial misconduct; and (3) Petitioner’s sentence is  
disproportionate to the offense and constitutes cruel and unusual punishment in violation of the Eighth  
Amendment and the California Constitution. (See ECF No. 20-2.)

1 On November 7, 2012, Proposition 36, also known as the Three Strikes Reform Act  
2 of 2012, became effective and modified California’s Three Strikes law as it applies to  
3 certain third-strike indeterminate sentences.<sup>3</sup> See Cal. Penal Code § 1170.126. The  
4 resentencing provisions in the Three Strikes Reform Act of 2012, codified at Cal. Penal  
5 Code § 1170.126, permit petitions to recall sentences only for prisoners whose convictions  
6 are for “a felony or felonies that are not defined as serious and/or violent felonies by  
7 subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.” Id. § 1170.126(b).

8 On March 26, 2013, Petitioner filed a petition to recall his sentence under § 1170.126  
9 in the San Diego County Superior Court. (ECF No. 20-8 at 1.) On December 1, 2014, the  
10 court denied the petition. (ECF No. 20-9 at 1.) That same day, Petitioner filed a notice of  
11 appeal in the San Diego Superior Court. (ECF No. 20-10 at 1.)

12 On April 4, 2016, the California Court of Appeal affirmed the superior court’s denial  
13 of Petitioner’s resentencing petition, finding that Petitioner’s “use of a firearm during the  
14 commission of the third-strike offense disqualified him from relief” under  
15 § 1170.126(e)(2). (ECF No. 20-14 at 1–2, 6.) Petitioner then filed a petition for rehearing  
16 dated April 8, 2016. (ECF No. 20-15.) On April 18, 2016, the appellate court denied the  
17 petition for rehearing without comment. (ECF No. 20-16.)

18 In a petition dated May 3, 2016,<sup>4</sup> Petitioner sought review of the appellate court’s  
19 denial of his resentencing petition from the California Supreme Court. (ECF No. 20-17 at  
20 38.) On June 8, 2016, the California Supreme Court denied review without comment.  
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24 <sup>3</sup> In pertinent part, Proposition 36 created “a post[-]conviction release proceeding whereby a prisoner who  
25 is serving an indeterminate life sentence imposed pursuant to the [T]hree [S]trikes law for a crime that is  
26 not a serious or violent felony and who is not otherwise disqualified, may have his or her sentence recalled  
27 and be sentenced as a second[-]strike offender[,] unless the court determines resentencing would pose an  
unreasonable risk of danger to public safety.” *People v. Yearwood*, 151 Cal. Rptr. 3d 901, 904 (Ct. App.  
28 2013) (citing Cal. Penal Code § 1170.126)).

<sup>4</sup> Respondent states that May 6, 2018, is the date Petitioner sought review from the California Supreme  
Court. (ECF No. 19-1 at 2.)

1 (ECF No. 4-1 at 37.) Petitioner did not file a petition for writ of certiorari in the United  
2 States Supreme Court.

3 On August 30, 2017,<sup>5</sup> Petitioner filed a petition for writ of habeas corpus in the San  
4 Diego Superior Court raising the same challenge. (ECF No. 20-18 at 6–7.) In an order  
5 dated September 18, 2017,<sup>6</sup> the superior court denied Petitioner’s state habeas petition,  
6 finding that it lacked jurisdiction to review the decision of the appellate court. (ECF No.  
7 20-19 at 2.)

8 On April 4, 2018,<sup>7</sup> Petitioner filed the instant Petition in the Central District of  
9 California challenging the superior court’s denial of his resentencing petition under Cal.  
10 Penal Code § 1170.126. (ECF No. 1 at 48.) On June 25, 2018, the case was transferred  
11 from the Central District of California to the Southern District of California. (ECF No. 11  
12 at 2.)

13 On July 30, 2018, Respondent filed a Motion to Dismiss. (ECF No. 19.) Petitioner  
14 filed an opposition on October 17, 2018. (ECF No. 23.) Respondent did not file a reply.

### 15 **III. STANDARD OF REVIEW**

16 Section 2254(a) of Title 28 of the United States Code provides the scope of review  
17 for federal habeas corpus claims:

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21 <sup>5</sup> Under the “mailbox rule,” a pro se prisoner’s filing of a state or federal habeas petition is deemed filed  
22 at the moment the prisoner delivers it to prison authorities for forwarding to the clerk of the court. See  
23 *Miles v. Prunty*, 187 F.3d 1104, 1106 n.2 (9th Cir. 1999); see also *Stillman v. LaMarque*, 319 F.3d 1199,  
24 1201 (9th Cir. 2003). Here, Petitioner signed his state habeas petition on August 30, 2017. (ECF No. 20-  
25 18 at 6.) The Clerk of Court filed the petition on September 8, 2017, thus indicating that the petition was  
26 delivered to prison authorities on or shortly after August 30, 2017. (See *id.* at 1.) For purposes of the  
27 present motion, the Court therefore deems Petitioner’s state habeas petition filed on August 30, 2017.

28 <sup>6</sup> The order was subsequently filed on September 19, 2017. (ECF No. 20-19 at 1.)

<sup>7</sup> The Court again applies the mailbox rule to determine the date the instant Petition was filed. Petitioner  
signed his Petition on “4-5-20,” by which Petitioner most likely meant April 5, 2018, as the date written  
on the back of the envelope in which Petitioner mailed his Petition is April 4, 2018. (ECF No. 1 at 8, 48.)  
The Clerk of Court filed the Petition on April 12, 2018, thus indicating that the Petition was delivered to  
prison authorities on or shortly after April 4, 2018. (ECF No. 1 at 1.) For purposes of the present motion,  
the Court therefore deems the Petition filed on April 4, 2018.

1 The Supreme Court, a Justice thereof, a circuit judge, or a district  
2 court shall entertain an application for a writ of habeas corpus in  
3 [sic] behalf of a person in custody pursuant to the judgment of a  
4 State court only on the ground that he is in custody in violation of  
the Constitution or laws or treaties of the United States.

5 28 U.S.C. § 2254(a).

6 In addition, federal habeas corpus claims filed after April 24, 1996, are subject to  
7 the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”),  
8 codified at 28 U.S.C. § 2254(d). See *Lindh v. Murphy*, 521 U.S. 320, 326–27 (1997)  
9 (holding that federal courts reviewing any habeas petition filed in federal court after the  
10 April 24, 1996 enactment of AEDPA will apply its provisions). Under AEDPA, a  
11 petitioner must overcome a high threshold to obtain relief:

12 An application for a writ of habeas corpus on behalf of a person  
13 in custody pursuant to the judgment of a State court shall not be  
14 granted with respect to any claim that was adjudicated on the  
15 merits in State court proceedings unless the adjudication of the  
16 claim—(1) resulted in a decision that was contrary to, or  
17 involved an unreasonable application of, clearly established  
18 Federal law, as determined by the Supreme Court of the United  
States; or (2) resulted in a decision that was based on an  
unreasonable determination of the facts in light of the evidence  
presented in the State court proceeding.

19 28 U.S.C. § 2254(d)(1)–(2); see also *Harrington v. Richter*, 562 U.S. 86, 100 (2011).

#### 20 **IV. DISCUSSION**

21 Respondent moves to dismiss the Petition on the ground that it is time-barred  
22 pursuant to the one-year statute of limitations set forth in 28 U.S.C. § 2244(d). (ECF No.  
23 19-1 at 3.) Petitioner argues that his petition is not untimely. (ECF No. 23 at 2.)

#### 24 **A. AEDPA’s Statute of Limitations Under 28 U.S.C. § 2244(d)(1)**

##### 25 **1. Legal Standard**

26 AEDPA imposes a one-year statute of limitations on all federal habeas petitions filed  
27 by persons in custody pursuant to the judgment of a state court. 28 U.S.C. § 2244(d)(1).  
28 The limitations period begins to run from the latest of—

1 (A) the date on which the judgment became final by the  
2 conclusion of direct review or the expiration of the time for  
3 seeking such review; (B) the date on which the impediment to  
4 filing an application created by State action in violation of the  
5 Constitution or laws of the United States is removed, if the  
6 applicant was prevented from filing by such State action; (C) the  
7 date on which the constitutional right asserted was initially  
8 recognized by the Supreme Court, if the right has been newly  
9 recognized by the Supreme Court and made retroactively  
10 applicable to cases on collateral review; or (D) the date on which  
11 the factual predicate of the claim or claims presented could have  
12 been discovered through the exercise of due diligence.

13 28 U.S.C. § 2244(d)(1)(A)–(D).

14 Where a petitioner files a federal habeas petition challenging a resentencing decision  
15 under a law like the Three Strikes Reform Act of 2012,<sup>8</sup> district courts in the Ninth Circuit  
16 have reached different conclusions as to whether § 2244(d)(1)(A) or § 2244(d)(1)(D)  
17 provides the trigger for the running of the statute of limitations. For example, the court in  
18 *McKinney v. Montgomery* found that a resentencing petition constitutes a new proceeding  
19 separate from a petitioner’s underlying conviction and sentencing. See No. 2:17–cv–00581  
20 JAM GGH HC, 2018 WL 1605692, at \*5 (E.D. Cal. Apr. 3, 2018). Applying  
21 § 2244(d)(1)(A), the *McKinney* court stated that the limitations period for the petitioner’s  
22 resentencing petition, filed pursuant to Proposition 47, began to run on the date that direct  
23 review of the resentencing petition became final. *Id.* at \*6. In contrast, the court in  
24 *Newman v. Fox* found § 2244(d)(1)(A) inapplicable to a resentencing petition under the  
25 theory that a resentencing petition does not create a new proceeding that alters the

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26 <sup>8</sup> Another proposition that created a post-conviction release proceeding whereby a prisoner may file a  
27 petition to recall his or her sentence under certain circumstances is Proposition 47. Proposition 47, or the  
28 Safe Neighborhoods and Schools Act, went into effect on November 5, 2014, and recategorized some  
nonviolent felonies as misdemeanors. See Cal. Penal Code § 1170.18. If eligible, a person serving a  
sentence for a conviction of a felony that Proposition 47 recategorized as a misdemeanor may file a  
petition for misdemeanor resentencing. See *id.* § 1170.18(a)–(b).

1 underlying judgment or constitutes a new judgment. No. CV 16–5587–DDP (SP), 2017  
2 WL 9534003, at \*5 (C.D. Cal. Sept. 26, 2017). The Newman court instead applied  
3 § 2244(d)(1)(D) to a resentencing petition filed pursuant to Proposition 36, reasoning that  
4 the date petitioner “discover[ed], or could through due diligence have discovered, that his  
5 resentencing petition was denied” by the state court served as the factual predicate that  
6 triggered the running of the statute of limitations.<sup>9</sup> Id. at \*6.

7       Regardless of which subsection of § 2244(d)(1) applies, once a petitioner is notified  
8 that his petition is subject to dismissal based on AEDPA’s one-year limitations period, he  
9 bears the burden of demonstrating that the limitation period is sufficiently tolled under  
10 statutory and/or equitable principles. *Smith v. Duncan*, 297 F.3d 809, 814 (9th Cir. 2002),  
11 overruled on other grounds by *Pace v. Diglielmo*, 544 U.S. 408, 418 (2005).

## 12           **2. Analysis of § 2244(d)(1)**

13       In his Motion to Dismiss, Respondent notes that the case law in this Circuit is  
14 unsettled as to when AEDPA’s one-year statute of limitations begins for cases such as the  
15 instant one, where the petitioner is challenging the denial of his petition for resentencing  
16 under newly enacted legislation and not his original judgment and conviction. (ECF No.  
17 19-1 at 4 & n.2.) Respondent therefore analyzes the Petition’s timeliness under  
18 § 2244(d)(1)(A) because it provides “the most lenient possible start date in calculating the  
19 limitations period” in this case. (Id. at 4–5.) Respondent argues that the Petition is  
20 untimely even under § 2244(d)(1)(A). (Id.)

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23 <sup>9</sup> Further, the court in *Dill v. Perry* analyzed the start of the limitations period for a resentencing petition  
24 filed pursuant to Proposition 36 under both § 2244(d)(1)(A) and § 2244(d)(1)(D), but ultimately declined  
25 to resolve the issue of timeliness because the petitioner’s claim lacked merit. NO. EDCV 15-1945-PA  
26 (KS), 2016 U.S. Dist. LEXIS 107213, at \*12–14 (E.D. Cal. June 29, 2016) (“Assuming . . . that the  
27 limitations clock was not triggered until the California Supreme Court’s final judgment [of the  
28 resentencing petition] on October 15, 2014, then the instant Petition is not untimely. If, however, the  
statute of limitations began to run when Petitioner became eligible to seek resentencing, i.e., May 23,  
2013, when the factual predicate giving rise to the claim occurred, then the Petition arguably may be  
untimely.” (internal citation omitted) (citing *Burton v. Stewart*, 549 U.S. 147 (2007))).

1 In order to determine whether a petition is timely under § 2244(d)(1)(A), the Court  
2 must first determine when the state court judgment “became final by the conclusion of  
3 direct review.” 28 U.S.C. § 2244(d)(1)(A). The period of direct review concludes when  
4 the time within which a petitioner can file a petition for writ of certiorari in the United  
5 States Supreme Court expires. *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999). Under  
6 Supreme Court Rule 13, the time to file a petition for writ of certiorari to review a judgment  
7 entered by a state court of last resort expires ninety days after entry of the judgment. Sup.  
8 Ct. R. 13; see also *Bowen*, 188 F.3d at 1159.

9 The California Supreme Court denied review as to Petitioner’s resentencing petition  
10 on June 8, 2016. (ECF No. 4-1 at 37.) Petitioner did not thereafter file a petition for writ  
11 of certiorari in the United States Supreme Court. Therefore, AEDPA’s limitations period  
12 began to run ninety days later on September 6, 2016,<sup>10</sup> and expired one year later, on  
13 September 6, 2017. Petitioner filed the instant Petition on April 4, 2018, over seven months  
14 after the limitations period expired. (ECF No. 1 at 48.) As a result, the Petition is untimely  
15 under § 2244(d)(1)(A).

16 Respondent fares worse if the limitations period is triggered by § 2244(d)(1)(D). As  
17 previously discussed, the Newman court applied § 2244(d)(1)(D) and found that the  
18 limitations period for the petitioner’s resentencing petition under Proposition 36 began to  
19 run on the date the petitioner “discover[ed], or could through due diligence have  
20 discovered, that his resentencing petition was denied” by the state court. 2017 WL  
21 9534003, at \*6. Following this approach, Petitioner here would have “discovered” that the  
22 state court denied his resentencing petition on December 1, 2014, because the court issued  
23 its ruling and Petitioner filed a notice of appeal on that day. (ECF Nos. 20-9 at 1; 20-10 at  
24 1.) Therefore, the limitations period pursuant to § 2244(d)(1)(D) would begin on  
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27 <sup>10</sup> See Fed. R. Civ. P. 6(a)(1)(A) (“When the period is stated in days . . . exclude the day of the event that  
28 triggers the period[.]”); *Patterson v. Stewart*, 251 F.3d 1243, 1246 (9th Cir. 2001) (noting that the day in  
which the limitations period begins to run should not be counted).



1 December 1, 2014, and end one year later on December 1, 2015. This is far earlier than  
2 the September 6, 2016 start date and the September 6, 2017 end date calculated under  
3 § 2244(d)(1)(A).

4 Neither Respondent nor Petitioner contend that §§ 2244(d)(1)(B) or (C) apply, and  
5 the Court sees no basis for their application. In this case, the Court need not determine if  
6 § 2244(d)(1)(A) or (D) applies because, as addressed below, neither statutory tolling nor  
7 equitable tolling saves this Petition, even using the more generous limitations date arrived  
8 at by the application of § 2244(d)(1)(A).

9 **B. Statutory Tolling Under 28 U.S.C. § 2244(d)(2)**

10 Section 2244(d)(2) provides for statutory tolling during the time when a “properly  
11 filed application for State post-conviction or other collateral review with respect to the  
12 pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2). Thus, the “time when a  
13 qualifying [state habeas] application is pending shall not be counted toward any period of  
14 limitation.” *Id.* AEDPA’s statute of limitations is not tolled, however, “from the time a  
15 final decision is issued on direct state appeal and the time the first state collateral challenge  
16 is filed because there is no case ‘pending’ during that interval.” *Nino v. Galaza*, 183 F.3d  
17 1003, 1006 (9th Cir. 1999), overruled on other grounds by *Carey v. Saffold*, 536 U.S. 214,  
18 225 (2002).

19 Moreover, statutory tolling is not available if the first state habeas petition is filed  
20 after AEDPA’s one-year limitations period has expired. See *Jiminez v. Rice*, 276 F.3d 478,  
21 482 (9th Cir. 2001). In other words, a state petition for post-conviction relief that is filed  
22 after AEDPA’s one-year statute of limitations has expired does not reinitiate the limitations  
23 period. *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003).

24 Here, Petitioner filed a state habeas corpus petition challenging the denial of his  
25 resentencing petition on August 31, 2017, which is six days before AEDPA’s one-year  
26 statute of limitations under § 2244(d)(1)(A) expired on September 6, 2017. (ECF No. 20-  
27 18 at 6.) Thus, because Petitioner filed his state habeas petition before the limitations  
28 period expired, Petitioner would be entitled to statutory tolling under § 2244(d)(2) if the

1 petition was a “properly filed” and “qualifying” petition.<sup>11</sup> 28 U.S.C. § 2244(d)(2). The  
2 Court need not decide whether Petitioner’s state habeas corpus petition constitutes a  
3 “properly filed” or “qualifying” petition under § 2244(d)(2) because, as calculated below,  
4 any tolling Petitioner accrued from filing his state habeas corpus petition would not be  
5 sufficient to render the instant Petition timely.

6 Petitioner filed his state habeas corpus petition on August 31, 2017, and the superior  
7 court denied his petition eighteen days later on September 18, 2017. (ECF Nos. 20-18 at  
8 6; ECF No. 20-19 at 2.) Thus, Petitioner could, at best, be entitled to eighteen days of  
9 statutory tolling.

10 Before Petitioner filed his state habeas corpus petition, six days remained in  
11 AEDPA’s one-year limitations period. Eighteen days of tolling would extend the  
12 limitations date from September 6, 2017, to September 25, 2017.<sup>12</sup> However, Petitioner  
13 filed his Petition more than seven months later on April 4, 2018. (ECF No. 1 at 48.)  
14 Consequently, even if Petitioner is entitled to eighteen days of statutory tolling, the Petition  
15 is barred by AEDPA’s one-year statute of limitations unless equitable tolling applies.

### 16 **C. Equitable Tolling**

17 AEDPA’s one-year statute of limitations is subject to equitable tolling in appropriate  
18 cases. *Holland v. Florida*, 560 U.S. 631, 649 (2010). A “petitioner is entitled to equitable  
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21 <sup>11</sup> The superior court denied Petitioner’s state habeas corpus petition for, inter alia, lack of jurisdiction  
22 (ECF No. 20-19 at 2), which calls into question whether Petitioner’s state habeas corpus petition  
23 constitutes a “properly filed” petition under 28 U.S.C. § 2244(d)(2). See, e.g., *Norton v. Arnold*, No. CV  
24 15–01525–RGK (KES), 2016 WL 1158590, at \*9 (C.D. Cal. Feb. 12, 2016) (“[B]ecause the California  
25 Court of Appeal dismissed the appeal for lack of jurisdiction, Petitioner’s appeal was not properly filed  
26 and did not toll the period of limitation.” (first citing *Pace*, 544 U.S. at 417; and then citing *Ramirez v.*  
*Yates*, 571 F.3d 993, 999 (9th Cir. 2009))); *Dunbar v. Schriber*, No. Civ S 041176GEBPANP, 2005 WL  
27 1366504, at \*2 (E.D. Cal. June 2, 2005) (“The . . . petition for review in the California Supreme Court is  
28 not a basis for tolling because the court returned it unfiled for lack of jurisdiction . . . so the petition was  
not ‘properly filed.’” (citing *Artuz v. Bennet*, 531 U.S. 4, 8 (2000))).

<sup>12</sup> Eighteen days from September 6, 2017, was September 24, 2017. However, September 24, 2017, was  
a Sunday. See Fed. R. Civ. P. 6(a)(1)(C) (“When the period is stated in days . . . include the last day of  
the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the  
end of the next day that is not a Saturday, Sunday, or legal holiday.”).

1 tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some  
2 extraordinary circumstance stood in his way and prevented timely filing.” *Id.* at 649  
3 (internal quotation marks omitted) (quoting *Pace*, 544 U.S. at 418). “The petitioner must  
4 show that ‘the extraordinary circumstances were the cause of his untimeliness and that the  
5 extraordinary circumstances made it impossible to file a petition on time.’” *Porter v.*  
6 *Ollison*, 620 F.3d 952, 959 (9th Cir. 2010) (citing *Ramirez*, 571 F.3d at 997). “[T]he  
7 threshold necessary to trigger equitable tolling [under the AEDPA] is very high, lest the  
8 exceptions swallow the rule.” *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003) (quoting  
9 *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002)).

10 Here, Respondent argues that equitable tolling does not apply because “[Petitioner]  
11 has not alleged any ground which may entitle him to equitable tolling, and nothing in the  
12 record suggests that the failure to timely file this Petition was due to an extraordinary  
13 circumstance beyond his control.” (ECF No. 19-1 at 7.) Petitioner seems to argue in  
14 response that he “was under the belief that . . . AEDPA[’s one-year statute of limitations]  
15 only applied to direct appeal issues and collateral attacks on the [underlying conviction]”  
16 and not to “resentencing issues as a result of newly enacted legislation.” (ECF No. 23 at  
17 2.)

18 The Court agrees with Respondents and finds that Petitioner is not entitled to any  
19 equitable tolling. Although Petitioner is proceeding pro se and may not have known that  
20 the AEDPA applies to a federal habeas petition challenging the denial of his resentencing  
21 petition, his alleged ignorance of the law is not an extraordinary circumstance beyond his  
22 control that warrants equitable tolling. See *Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th  
23 Cir. 2006) (holding that “a pro se petitioner’s lack of legal sophistication is not, by itself,  
24 an extraordinary circumstance warranting equitable tolling”). Petitioner offers no other  
25 cognizable argument for why equitable tolling would apply. Moreover, the Court finds  
26 that the record does not otherwise reflect any extraordinary circumstance beyond  
27 Petitioner’s control that would entitle him to equitable tolling. Therefore, because  
28 Petitioner fails to show that an extraordinary circumstance caused his failure to timely file,

1 and because he does not make an argument as to diligence in pursuing his rights, Petitioner  
2 is not entitled to equitable tolling.

3 **D. Conclusion**

4 Even when calculating AEDPA's one-year statute of limitations pursuant to  
5 § 2244(d)(1)(A), which provides the most lenient possible start date in this case, and  
6 factoring in a possible eighteen days of statutory tolling, the instant Petition is untimely.  
7 Further, Petitioner has not met his burden to prove that he is entitled to equitable tolling.  
8 Thus, Respondent's Motion to Dismiss should be granted.

9 **V. CONCLUSION**


10 For the foregoing reasons, **IT IS HEREBY RECOMMENDED** that the district  
11 court issue an Order: (1) approving and adopting this Report and Recommendation; and  
12 (2) granting Respondent's Motion to Dismiss (ECF No. 19) with prejudice.

13 **IT IS ORDERED** that no later than **January 17, 2019**, any party to this action may  
14 file written objections with the Court and serve a copy on all parties. The document should  
15 be captioned "Objections to Report and Recommendation."

16 **IT IS FURTHER ORDERED** that any reply to any objections shall be filed with  
17 the district court and served on all parties no later than **January 31, 2019**. The parties are  
18 advised that failure to file objections within the specified time may waive the right to raise  
19 those objections on appeal of the Court's order. See *Turner v. Duncan*, 158 F.3d 449, 455  
20 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153, 1156 (9th Cir. 1991).

21 **IT IS SO ORDERED.**

22 Dated: December 27, 2018

23   
24 Hon. Jill L. Burkhardt  
25 United States Magistrate Judge  
26  
27  
28