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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DOMENICO G. DIAZ,

Petitioner,

v.

DEAN BORDERS, Warden

Respondent.

Case No.: 20cv825-BAS-LL

**REPORT AND
RECOMMENDATION FOR ORDER
GRANTING RESPONDENT’S
MOTION TO DISMISS**

[ECF No. 16]

This Report and Recommendation is submitted to United States District Judge Cynthia A. Bashant pursuant to 28 U.S.C. § 636(b) and Civil Local Rules 72.1(d) and HC.2 of the United States District Court for the Southern District of California. Domenico G. Diaz is a state prisoner proceeding pro se and in forma pauperis with a Petition for a Writ of Habeas Corpus filed under 28 U.S.C. § 2254. ECF No. 1 (“Petition” or “Pet.”). Petitioner challenges his San Diego County Superior Court conviction for forcible lewd conduct with a child under the age of fourteen, kidnapping, making a criminal threat, kidnapping for rape, and assault with the intent to commit rape, for which he was sentenced to two consecutive life sentences with a minimum term of fifty-one years to life followed by a third consecutive life term with the possibility of parole. See id. at 1–2; ECF No. 17-1
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1 (Lodgment No. 1) at 1–2; ECF No. 17-11 (Lodgment No. 11) at 1.¹ Petitioner claims the
2 following grounds for relief: (1) ineffective assistance of counsel at trial, (2) “ineffective
3 assistance of counsel at investigation,” (3) admission of perjured testimony at trial,
4 (4) admission of false testimony at trial, (5) judicial misconduct, (6) custodial interrogation
5 in violation of Miranda v. Arizona, 384 U.S. 436 (1966), (7) suppression of exculpatory
6 evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963), (8) actual innocence,
7 (9) admission of evidence in violation of Crawford v. Washington, 541 U.S. 36 (2004),
8 (10) insufficient evidence, (11) “false evidence to convict,” and (12) “Brady violation by
9 investigative agencies.” Pet. at 12, 23–26. Respondent filed a Motion to Dismiss arguing
10 that the Petition is untimely. ECF No. 16-1 (“Motion” or “Mot.”). To date, Petitioner has
11 not filed an opposition.² See Docket. Petitioner also did not file any requests for extensions
12 of time.

13 For the reasons set forth below, the Court **RECOMMENDS** that Respondent’s
14 Motion to Dismiss be **GRANTED**.

15 **I. PROCEDURAL HISTORY**

16 On October 21, 2004, in San Diego County Superior Court case number
17 SCD173703, Petitioner was convicted by a jury of four counts of forcible lewd conduct
18 with a child under the age of fourteen, two counts of kidnapping, one count of making a
19 criminal threat, one count of kidnapping for rape, and one count of assault with the intent
20 to commit rape. ECF No. 17-1 (Lodgment No. 1) at 1–2. On July 22, 2005, Petitioner was
21 sentenced to two consecutive life sentences with a minimum term of fifty-one years to life
22 followed by a third consecutive life term with the possibility of parole, and he was ordered
23 to pay a restitution fine of \$10,000. See id. at 1–3; ECF No. 17-11 (Lodgment No. 11)
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26 ¹ All citations are to the page numbers assigned by the Court’s Electronic Case Filing
27 System.

28 ² Petitioner’s opposition to the motion to dismiss was due on October 14, 2020. ECF
No. 14.

1 at 1. On March 9, 2007, the California Court of Appeal affirmed the judgment in a reasoned
2 opinion, rejecting on the merits Petitioner’s claim that insufficient evidence supported his
3 conviction for one of the counts of forcible lewd conduct with a child under the age of
4 fourteen. ECF No. 17-5 (Lodgment No. 5). On May 16, 2007, the California Supreme
5 Court denied Petitioner’s petition for review without citation of authority. ECF No. 17-7
6 (Lodgment No. 7).

7 On approximately December 6, 2010, Petitioner constructively filed a petition for
8 writ of habeas corpus for the first time in the California Court of Appeal, claiming that the
9 order imposing the restitution fine must be stricken due to insufficient evidence of
10 Petitioner’s ability to pay.³ ECF No. 17-10 (Lodgment No. 10). On January 10, 2011, the
11 California Court of Appeal found the petition was procedurally barred as untimely and
12 successive, and also stated that “[e]ven if we were to entertain the petition on the merits,
13 Diaz still would not be entitled to relief.” ECF No. 17-11 (Lodgment No. 11).

14 On September 21, 2015, Petitioner constructively filed a petition for writ of habeas
15 corpus for the first time in San Diego County Superior Court, asking that his restitution
16 fine be vacated or reduced to \$200 pursuant to his ability to pay. See ECF No. 17-8
17 (Lodgment No. 8). On November 6, 2015, the Superior Court denied the petition in a
18 reasoned opinion. ECF No. 17-9 (Lodgment No. 9).

19 On approximately November 29, 2015, Petitioner constructively filed a petition for
20 writ of habeas corpus for the second time in the California Court of Appeal in case number
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23 ³ “Under the mailbox rule, a prisoner’s pro se habeas petition is ‘deemed filed when he
24 hands it over to prison authorities for mailing to the relevant court.’” Campbell v. Henry,
25 614 F.3d 1056, 1058–59 (9th Cir. 2010) (quoting Huizar v. Carey, 273 F.3d 1220, 1222
26 (9th Cir. 2001)); see also Houston v. Lack, 487 U.S. 266, 276 (1988). “The mailbox rule
27 applies to federal and state petitions alike.” Id. at 1059. The Court uses the approximate
28 date of December 6, 2010 here because the proof of service declaration lists a different
name than Petitioner’s with a date of December 2, 2010. ECF No. 17-10 (Lodgment
No. 10) at 16. However, Petitioner’s signature on his petition and on the attestation of truth
are both dated December 6, 2010. Id. at 15–16.

1 D069402, requesting that his restitution fine be vacated or reduced to \$200 due to his
2 inability to pay the full \$10,000.⁴ ECF No. 17-12 (Lodgment No. 12). The administrative
3 record before the Court does not include the California Court of Appeal’s order on this
4 petition. However, in a January 24, 2018 order issued by the California Court of Appeal on
5 Petitioner’s third habeas petition in that court, the court stated that it had previously
6 “summarily denied” Petitioner’s petition in case number D069402 on December 17, 2015
7 in an unpublished order. ECF No. 17-17 (Lodgment No. 17). This Court also found the
8 appropriate order dated December 17, 2015 in the online database for the California Court
9 of Appeal’s unpublished opinions and takes judicial notice of it. Final Disposition for
10 In re Domenico Diaz on Habeas Corpus Case Number D069402, California Court of
11 Appeal, Fourth Appellate District Division 1, unpublished opinions,
12 <https://www.courts.ca.gov/opinions-nonpub.htm> (select “Case Information Search”
13 hyperlink; select “Fourth Appellate District Div 1” and “search”; enter “D069402” and
14 select “search by case number”; select “Disposition” hyperlink). In the December 17, 2015
15 order, the California Court of Appeal denied Petitioner’s petition, finding that it was
16 procedurally barred for the following reasons: (1) the petition was untimely; (2) “the
17 challenge to the restitution fine could have been raised on appeal but was not”; and
18 (3) “[t]he challenge was rejected in the prior petition for writ of habeas corpus that Diaz
19 filed in this court.” Id.

20 On November 8, 2017, Petitioner constructively filed a petition for writ of habeas
21 corpus for the second time in San Diego County Superior Court, claiming the following
22 grounds for relief: (1) ineffective assistance of counsel at trial, (2) “ineffective assistance
23 of counsel at investigation,” (3) admission of perjured testimony at trial, (4) admission of
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26 ⁴ The Court uses the approximate date of November 29, 2015 here because the proof of
27 service declaration is dated September 12, 2015, but Petitioner’s signature on his petition
28 is dated November 29, 2015. ECF No. 17-12 (Lodgment No. 12) at 6–7. The date of service
must be in error because it logically must be served after the petition is signed.

1 false testimony at trial, (5) judicial misconduct, (6) custodial interrogation in violation of
2 Miranda, (7) suppression of exculpatory evidence in violation of Brady, (8) actual
3 innocence, (9) admission of evidence in violation of Crawford, (10) insufficient evidence,
4 (11) “false evidence to convict,” and (12) “Brady violation by investigative agencies.”
5 ECF No. 17-14 (Lodgment No. 14).⁵ On December 18, 2017, the Superior Court denied
6 the petition in a reasoned opinion. ECF No. 17-15 (Lodgment No. 15).

7 On January 16, 2018, Petitioner constructively filed a petition for writ of habeas
8 corpus for the third time in the California Court of Appeal, claiming the following grounds
9 for relief: (1) ineffective assistance of counsel at trial, (2) “ineffective assistance of counsel
10 at investigation,” (3) admission of perjured testimony at trial, (4) admission of false
11 testimony at trial, (5) judicial misconduct, (6) custodial interrogation in violation of
12 Miranda, (7) suppression of exculpatory evidence in violation of Brady, (8) actual
13 innocence, (9) admission of evidence in violation of Crawford, (10) insufficient evidence,
14 (11) “false evidence to convict,” and (12) “Brady violation by investigative agencies.”
15 ECF No. 17-16 (Lodgment No. 16). On January 24, 2018, the California Court of Appeal
16 found the petition was procedurally barred as (1) untimely because it was filed more than
17 twelve years after Petitioner was sentenced with no explanation for the delay and (2) as
18 successive, but also stated that “[e]ven if Diaz’s petition were not procedurally barred, it
19 would be denied.” ECF No. 17-17 (Lodgment No. 17).

20 On April 3, 2018, Petitioner constructively filed a petition for writ of habeas corpus
21 for the first time in the California Supreme Court, claiming the following grounds for relief:
22 (1) ineffective assistance of counsel at trial, (2) “ineffective assistance of counsel at
23 investigation,” (3) admission of perjured testimony at trial, (4) admission of false testimony
24 at trial, (5) judicial misconduct, (6) custodial interrogation in violation of Miranda,
25 (7) suppression of exculpatory evidence in violation of Brady, (8) actual innocence,
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28 ⁵ The Court notes that ECF No. 17-13 (Lodgment No. 13) and ECF No. 17-14 (Lodgment
No. 14) are identical.

1 (9) admission of evidence in violation of Crawford, (10) insufficient evidence,
2 (11) “false evidence to convict,” and (12) “Brady violation by investigative agencies.”
3 ECF No. 17-18 (Lodgment No. 18). On December 12, 2018, the California Supreme Court
4 denied the petition on several grounds including as untimely pursuant to In re Robbins,
5 18 Cal. 4th 770, 780 (1998). ECF No. 17-19 (Lodgment No. 19).

6 On April 24, 2019, Petitioner constructively filed a federal Petition in this Court,
7 claiming the following grounds for relief: (1) ineffective assistance of counsel at trial, (2)
8 “ineffective assistance of counsel at investigation,” (3) admission of perjured testimony at
9 trial, (4) admission of false testimony at trial, (5) judicial misconduct,
10 (6) custodial interrogation in violation of Miranda, (7) suppression of exculpatory evidence
11 in violation of Brady, (8) actual innocence, (9) admission of evidence in violation of
12 Crawford, (10) insufficient evidence, (11) “false evidence to convict,” and (12) “Brady
13 violation by investigative agencies.” Pet. On September 10, 2020, Respondent filed the
14 instant Motion to Dismiss. Mot. Petitioner did not file an opposition. See Docket.

15 On September 30, 2019, Petitioner constructively filed a petition for writ of habeas
16 corpus for the third time in San Diego County Superior Court, claiming the following
17 grounds for relief: (1) “illegal sentence,” (2) denial of due process, and (3) “misapplication
18 of statute.” ECF No. 17-20 (Lodgment No. 20). On November 21, 2019, the San Diego
19 County Superior Court found the petition to be procedurally barred as untimely, but also
20 denied it on the merits. ECF No. 17-21 (Lodgment No. 21). Additionally, the court found
21 that Petitioner was also reasserting the same claims he raised in his second habeas petition
22 to that court and deemed those procedurally barred as successive. Id. at 12.

23 **II. STANDARD OF REVIEW**

24 Section 2254(a) of Title 28 of the United States Code sets forth the following scope
25 of review for federal habeas corpus claims:

26 The Supreme Court, a Justice thereof, a circuit judge, or a district court shall
27 entertain an application for a writ of habeas corpus in [sic] behalf of a person
28 in custody pursuant to the judgment of a State court only on the ground that

1 he is in custody in violation of the Constitution or laws or treaties of the United
2 States.

3 28 U.S.C. § 2254(a).

4 Federal habeas corpus petitions filed after April 24, 1996, such as this one, are
5 subject to the provisions of the Antiterrorism and Effective Death Penalty Act of 1996
6 (“AEDPA”). See Hurles v. Ryan, 752 F.3d 768, 777 (9th Cir. 2014) (citing
7 Lindh v. Murphy, 521 U.S. 320, 336 (1997)).

8 **III. DISCUSSION**

9 Respondent contends that the Petition should be dismissed as untimely because
10 Petitioner did not file his Petition until April 24, 2019, almost eleven years after AEDPA’s
11 one-year statute of limitations expired. Mot. at 4–7. Respondent argues that Petitioner is
12 not entitled to statutory tolling or equitable tolling, including through claims of actual
13 innocence. Id. at 4–9. Respondent further contends that the Petition should also be denied
14 because its claims are procedurally defaulted. Id. at 7.

15 **A. AEDPA’S STATUTE OF LIMITATIONS**

16 AEDPA imposes a one-year statute of limitations on federal petitions for writ of
17 habeas corpus filed by state prisoners. 28 U.S.C. § 2244(d). Section 2244(d)’s one-year
18 limitations period applies to all habeas petitions filed by persons “in custody pursuant to
19 the judgment of a State court.” 28 U.S.C. § 2244(d)(1). The limitations period runs from
20 the latest of:

21 (A) the date on which the judgment became final by the conclusion of direct
22 review or the expiration of the time for seeking such review;

23 (B) the date on which the impediment to filing an application created by
24 State action in violation of the Constitution or laws of the United States is
25 removed, if the applicant was prevented from filing by such State action;

26 (C) the date on which the constitutional right asserted was initially
27 recognized by the Supreme Court, if the right has been newly recognized by
28 the Supreme Court and made retroactively applicable to cases on collateral
review; or

1
2 (D) the date on which the factual predicate of the claim or claims presented
3 could have been discovered through the exercise of due diligence.

4 Id.

5 When a habeas petitioner seeks discretionary review by the state's highest court but
6 does not file a petition with the United States Supreme Court, the judgment becomes final
7 when the prisoner's time to petition the Supreme Court expires. Gonzalez v. Thaler,
8 565 U.S. 134, 149–50 (2012); Zepeda v. Walker, 581 F.3d 1013, 1016 (9th Cir. 2009).
9 United States Supreme Court Rule 13 provides that a petition for certiorari must be filed
10 within ninety days of the entry of an order denying discretionary review by the state court
11 of last resort. See U.S. Sup. Ct. R. 13; Bowen v. Roe, 188 F.3d 1157, 1158–59
12 (9th Cir. 1999) (limitations period does not begin until after expiration of ninety-day period
13 for seeking certiorari from the United States Supreme Court).

14 Here, the Court finds that Petitioner filed his Petition after the AEDPA one-year
15 statute of limitations had expired. The California Supreme Court denied Petitioner's
16 petition for review on May 16, 2007. ECF No. 17-7 (Lodgment No. 7). Because Petitioner
17 did not file a petition with the United States Supreme Court, the judgment became final
18 ninety days later, on August 14, 2007. See Zepeda v. Walker, 581 F.3d at 1016. Petitioner
19 has not alleged any facts or claims in his Petition to suggest the application of
20 28 U.S.C. § 2244(d)(1)(B), (C), or (D). Therefore, the statute of limitations began to run
21 on August 15, 2007 and expired one year later on August 14, 2008. See 28 U.S.C.
22 § 2244(d)(1); Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001) (holding that
23 Federal Rule of Civil Procedure 6(a) governs the calculation of AEDPA's tolling
24 provisions). The instant Petition was constructively filed on April 24, 2019, a little more
25 than ten years and eight months after the limitations period expired. See Pet. at 53. As a
26 result, the Petition is untimely unless Petitioner can establish that he is entitled to sufficient
27 statutory or equitable tolling of the limitations period. See Ramirez v. Yates, 571 F.3d 993,
28 997–99 (9th Cir. 2009).

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1 **B. STATUTORY TOLLING**

2 The one-year statute of limitations for filing a federal habeas petition pursuant to
3 AEDPA is statutorily tolled while “a properly filed application for State post-conviction or
4 other collateral review with respect to the pertinent judgment or claim is pending.”
5 28 U.S.C. § 2244(d)(2). An application for state post-conviction review is considered
6 “pending” during the interval between the lower state court’s adverse decision and the
7 prisoner’s filing of a notice of appeal in the higher state court, provided that the filing of
8 that notice is timely under state law. Carey v. Saffold, 536 U.S. 214, 222–25 (2002). In
9 California, where habeas decisions are not appealed but may be filed originally in each
10 court, “pending” includes a reasonable time, such as thirty to sixty days, between a decision
11 and a subsequent filing in the higher state court. See Evans v. Chavis, 546 U.S. 189,
12 192–93 (2006); Chaffer v. Prosper, 592 F.3d 1046, 1048 (9th Cir. 2010).

13 However, the statute of limitations is not tolled “from the time a final decision is
14 issued on direct state appeal and the time the first state collateral challenge is filed because
15 there is no case ‘pending’ during that interval.” Nino v. Galaza, 183 F.3d 1003, 1006
16 (9th Cir. 1999), implicitly overruled on other grounds as recognized by Nedds v. Calderon,
17 678 F.3d 777, 781 (9th Cir. 2012). Additionally, the statute of limitations is not tolled after
18 state habeas proceedings are final and before federal habeas proceedings are initiated.
19 Roy v. Lampert, 465 F.3d 964, 968 (9th Cir. 2006).

20 A habeas petition that is untimely under state law is not “properly filed” for the
21 purpose of statutory tolling. Bonner v. Carey, 425 F.3d 1145, 1149 (9th Cir. 2005),
22 amended, 439 F.3d 993 (9th Cir. 2006); see also Pace v. DiGuglielmo, 544 U.S. 408, 414
23 (2005) (“When a postconviction petition is untimely under state law, ‘that [is] the end of
24 the matter’ for purposes of § 2244(d)(2).” (quoting Carey v. Saffold, 536 U.S. at 226)). As
25 such, the time before or during the state court’s consideration of an untimely petition is not
26 statutorily tolled pursuant to AEDPA. Curiel v. Miller, 830 F.3d 864, 868 (9th Cir. 2016)
27 (citing Evans v. Chavis, 546 U.S. at 197).

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1 Here, Petitioner’s untimely state habeas petitions do not warrant statutory tolling. As
2 discussed above, judgment in Petitioner’s case became final on August 14, 2007. Petitioner
3 constructively filed his first petition for writ of habeas corpus in the California Court of
4 Appeal on approximately December 6, 2010. ECF No. 17-10 (Lodgment No. 10) at 15–16.
5 Because there was no case “pending” before the first post-conviction state habeas petition
6 was filed, the time between August 14, 2007 and December 6, 2010—approximately three
7 years and three months— is not subject to statutory tolling.⁶ See Nino v. Galaza, 183 F.3d
8 at 1006. The California Court of Appeal then denied the petition, finding it was
9 procedurally barred as untimely and successive in an order issued on January 10, 2011.
10 ECF No. 17-11 (Lodgment No. 11) at 1. The untimely petition was therefore not “properly
11 filed” and the time between December 6, 2010 and January 10, 2011 was not eligible for
12 statutory tolling. See Curiel v. Miller, 830 F.3d at 868; Bonner v. Carey, 425 F.3d at 1149.

13 Petitioner’s next state habeas petition was constructively filed on September 21,
14 2015 in San Diego Superior Court and denied on November 6, 2015. ECF Nos. 17-8
15 (Lodgment No. 8); 17-9 (Lodgment No. 9). The filing delay of more than four and a half
16 years between the decision by the California Court of Appeal on January 10, 2011 and this
17 next filing was unreasonable and not properly “pending” such that it would qualify for
18 statutory tolling. See Carey v. Saffold, 536 U.S. at 225 (noting that if the delay between
19 filings is unreasonable, then the petition is no longer “pending” for statutory tolling
20 purposes). Petitioner stated that the delay was due to “being a layman of law, inexperienced
21 in law and lack of education.” ECF No. 17-8 (Lodgment No. 8) at 8. This Court finds that
22 Petitioner’s reason for the delay is not adequate to excuse a late filing of almost five years.
23 See Noble v. Adams, 676 F.3d 1180, 1184 (9th Cir. 2012) (finding that a delay of up to
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26 ⁶ The Court notes that because of the substantial delay of approximately three years and
27 three months, even if Petitioner is entitled to statutory tolling from the day that he
28 constructively filed his first habeas petition in state court until the day that the California
Supreme Court denied his sixth state habeas petition, it would not be enough to make his
federal habeas petition timely, unless sufficient equitable tolling applied.

1 several months may be within the range of reasonableness if the explanation for the delay
2 is adequate under California law). Although the San Diego Superior Court did not deny the
3 petition for untimeliness, this Court finds that the lengthy delay makes the petition
4 untimely. See Evans v. Chavis, 546 U.S at 193 (holding that federal courts must undertake
5 the task of determining when a review application in California state court comes too late).
6 Thus, the time between the adverse decision on January 10, 2011 and the adverse decision
7 on November 6, 2015 is not statutorily tolled. See Curiel v. Miller, 830 F.3d at 868.

8 Petitioner’s third state habeas petition was constructively filed on approximately
9 November 29, 2015 in the California Court of Appeal and denied on December 17, 2015
10 for several reasons, including as untimely. ECF No. 17-12 (Lodgment No. 12). Because
11 the filing was deemed untimely, the time between the adverse decision on November 6,
12 2015 and the adverse decision on December 17, 2015 is not statutorily tolled. See
13 Curiel v. Miller, 830 F.3d at 868.

14 Petitioner’s fourth state habeas petition was constructively filed in San Diego
15 County Superior Court on November 8, 2017 and denied on December 18, 2017.
16 ECF Nos. 17-14 (Lodgment No. 14); 17-15 (Lodgment No. 15). The unexplained delay of
17 almost two years between the decision by the California Court of Appeal and this next
18 filing was unreasonable and not properly “pending” such that it would qualify for statutory
19 tolling. See Evans v. Chavis, 546 U.S. at 201 (holding that an unjustified and unexplained
20 six-month filing delay is presumptively unreasonable). Although the San Diego Superior
21 Court did not deny the petition for untimeliness, this Court finds that the unreasonable
22 delay makes the petition untimely. See id. at 193 (holding that federal courts must
23 undertake the task of determining when a review application in California state court comes
24 too late). Thus, the time between the adverse decision on December 17, 2015 and the
25 adverse decision on December 18, 2017 is not statutorily tolled. See Curiel v. Miller,
26 830 F.3d at 868.

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1 Petitioner’s fifth state habeas petition was constructively filed in the California Court
2 of Appeal on January 16, 2018 and denied on January 24, 2018 for several reasons,
3 including as untimely. ECF Nos. 17-16 (Lodgment No. 16); 17-17 (Lodgment No. 17).
4 Because of the untimely filing, the time between the adverse decision on December 18,
5 2017 and the adverse decision on January 24, 2018 is not statutorily tolled. See
6 Curiel v. Miller, 830 F.3d at 868.

7 Petitioner’s sixth state habeas petition was constructively filed in the California
8 Supreme Court on April 3, 2018 and denied on several grounds—including as untimely—
9 on December 12, 2018. ECF Nos. 17-18 (Lodgment No. 18); 17-19 (Lodgment No. 19).
10 Because of the untimely filing, the time between the adverse decision on January 24, 2018
11 and the adverse decision on December 12, 2018 is not statutorily tolled. See
12 Curiel v. Miller, 830 F.3d at 868.

13 Petitioner’s instant federal habeas Petition was constructively filed on April 24,
14 2019. Pet. The time between the adverse state decision on December 12, 2018 and the filing
15 of the federal Petition on April 24, 2019—almost four and a half months—is not statutorily
16 tolled. See Roy v. Lampert, 465 F.3d at 968. Finally, the subsequent constructive filing of
17 Petitioner’s seventh state habeas petition in San Diego County Superior Court on
18 September 30, 2019, which was denied for several reasons on November 21, 2019,
19 including as untimely, does not warrant any statutory tolling. See Curiel v. Miller,
20 830 F.3d at 868; see also Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (holding
21 that state habeas petitions filed after the one-year AEDPA statute of limitations has expired
22 do not revive the statute of limitations and have no tolling effect).

23 For the reasons stated above, the Court finds that Petitioner’s federal habeas Petition,
24 filed over ten years past the expiration of the statute of limitations, is not subject to any
25 statutory tolling. The Petition will be deemed untimely unless Petitioner can establish
26 sufficient equitable tolling. See Ramirez v. Yates, 571 F.3d at 997–99.

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1 C. EQUITABLE TOLLING

2 The United States Supreme Court has held that AEDPA's one-year statute of
3 limitations is subject to equitable tolling in appropriate cases. Holland v. Florida,
4 560 U.S. 631, 645 (2010). A habeas petitioner is entitled to equitable tolling "only if he
5 shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary
6 circumstance stood in his way' and prevented timely filing." Id. at 649 (quoting
7 Pace v. DiGuglielmo, 544 U.S. at 418). The petitioner seeking equitable tolling bears the
8 burden of showing it applies to him. Pace v. DiGuglielmo, 544 U.S. at 418. The bar is set
9 high to effectuate "AEDPA's 'statutory purpose of encouraging prompt filings in federal
10 court in order to protect the federal system from being forced to hear stale claims.'" See
11 Guillory v. Roe, 329 F.3d 1015, 1018 (9th Cir. 2003), as amended on denial of reh'g
12 (June 20, 2003) (citing Carey v. Saffold, 536 U.S. at 226). Whether equitable tolling is
13 warranted depends on a fact-specific inquiry. Frye v. Hickman, 273 F.3d 1144, 1146
14 (9th Cir. 2001) (citation omitted).

15 "The diligence required for equitable tolling purposes is 'reasonable diligence' . . .
16 not 'maximum feasible diligence.'" Holland v. Florida, 560 U.S. at 653 (citations omitted).
17 "The purpose of requiring a habeas petitioner to show diligence is to verify that it was the
18 extraordinary circumstance, as opposed to some act of the petitioner's own doing, which
19 caused the failure to timely file." Doe v. Busby, 661 F.3d 1001, 1012–13 (9th Cir. 2011).

20 The Ninth Circuit has held that "a credible claim of actual innocence constitutes an
21 equitable exception to AEDPA's limitations period, and a petitioner who makes such a
22 showing may pass through the *Schlup* gateway and have his otherwise time-barred claims
23 heard on the merits." Lee v. Lampert, 653 F.3d 929, 932 (9th Cir. 2011). In Schlup v. Delo,
24 513 U.S. 298 (1995), the Supreme Court explained that to be credible, a habeas petitioner
25 claiming actual innocence must support his allegations with new reliable evidence that was
26 not presented at trial. Id. at 324. To qualify as an actual innocence exception to the
27 limitations period in order to prevent a miscarriage of justice, "the petitioner must show
28 that it is more likely than not that no reasonable juror would have convicted him in the light

1 of the new evidence.” Id. at 327; McQuiggin v. Perkins, 569 U.S. 383, 394–95 (2013); Lee
2 v. Lampert, 653 F.3d at 937 (holding “that where an otherwise time-barred habeas
3 petitioner demonstrates that it is more likely than not that no reasonable juror would have
4 found him guilty beyond a reasonable doubt, the petitioner may pass through the *Schlup*
5 gateway and have his constitutional claims heard on the merits”).

6 The Court finds that Petitioner has failed to meet his burden of showing that he is
7 entitled to equitable tolling. Petitioner has not filed an opposition to the Motion. His
8 Petition, filed more than ten years after the statute of limitations expired, also offers no
9 explanation for the delayed filing. The Petition includes recitations of general legal
10 principles regarding equitable tolling. Pet. at 33, 42, 44. It also includes recitations of
11 general legal principles regarding the actual innocence exception to untimely filed habeas
12 corpus petitions. Pet. at 32–44. However, Petitioner offers no explanation of his diligence
13 or extraordinary circumstance beyond his control that caused any of his late habeas petition
14 filings. Petitioner also fails to offer new reliable evidence that was not presented at trial to
15 support his claim of actual innocence. Therefore, the Court finds that equitable tolling is
16 not warranted. See Pace v. DiGuglielmo, 544 U.S. at 418; Heath v. Allison, No. 17cv2226-
17 BAS(RBB), 2018 WL 4282630, at *9 (S.D. Cal. Sept. 6, 2018), report and recommendation
18 adopted, No. 17-CV-2226-BAS-RBB, 2018 WL 4871175 (S.D. Cal. Oct. 9, 2018) (finding
19 that petitioner was not entitled to equitable tolling where he did not oppose respondent’s
20 motion to dismiss and did not allege any facts in his petition for writ of habeas corpus
21 explaining his delayed filing, nor presented new credible evidence that he is actually
22 innocent).

23 Petitioner’s habeas Petition, filed more than ten years and eight months after the
24 statute of limitations expired, is untimely under AEDPA and neither statutory tolling nor
25 equitable tolling apply. And because there is no apparent miscarriage of justice, the
26 untimely Petition should be dismissed.

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1 **D. PROCEDURAL DEFAULT**

2 Respondent contends that all claims in the Petition are not only untimely, but also
3 procedurally defaulted because the state appellate and supreme courts denied Petitioner’s
4 habeas petitions that raised similar claims as those raised in the instant Petition “first and
5 foremost as untimely, pursuant to *In re Sanders*, 21 Cal. 4th at 703, *In re Swain*, 34 Cal.2d
6 at 302, *In re Reno*, 55 Cal. 4th at 460 (*see* Lod. 17), and *In re Robbins*, 18 Cal. 4th at 780
7 (*see* Lod. 19).” Mot. at 7.

8 A federal court is barred from reviewing the merits of a state prisoner’s habeas
9 claims if the last state court rendering judgment clearly and expressly declined to address
10 the claims because the prisoner had failed to meet an independent and adequate state
11 procedural rule. Maples v. Thomas, 565 U.S. 266, 280 (2012) (citing Walker v. Martin,
12 562 U.S. 307, 316 (2011)); Vansickel v. White, 166 F.3d 953, 957 (9th Cir. 1999) (citing
13 Coleman v. Thompson, 501 U.S. 722, 750 (1991), holding modified by Martinez v. Ryan,
14 566 U.S. 1 (2012)).

15 A federal court cannot find procedural default bars its review of a habeas claim when
16 an ambiguous state order addressing multiple claims failed to specify which procedural
17 rule applied to which claims. Washington v. Cambra, 208 F.3d 832, 834 (9th Cir. 2000).
18 “[I]f it is unclear whether the state court dismissed the petition because of a state law
19 procedural default or on the merits of the petitioner’s federal constitutional claims, a federal
20 court may review the merits of the claims presented.” Loveland v. Hatcher, 231 F.3d 640,
21 643 (9th Cir. 2000) (emphasis in original); Siripongs v. Calderon, 35 F.3d 1308, 1317
22 (9th Cir. 1994), as amended on denial of reh’g and reh’g en banc (Oct. 13, 1994) (“Thus,
23 unless the state court makes clear that it is resting its decision denying relief on an
24 independent and adequate state ground, it is presumed that the state denial was based at
25 least in part upon federal grounds, and the petitioner may seek relief in federal court.”).
26 However, federal habeas review is barred if the state court clearly relied independently on
27 the procedural bar for its decision, even if it also alternatively denied the claims on the
28 merits. See Loveland v. Hatcher, 231 F.3d at 643.

1 The procedural default bar will be lifted if the prisoner “can demonstrate cause for
2 the default and actual prejudice as a result of the alleged violation of federal law, or
3 demonstrate that failure to consider the claims will result in a fundamental miscarriage of
4 justice.” Coleman v. Thompson, 501 U.S. at 750.

5 Here, the California Supreme Court denied Petitioner’s habeas petition—which
6 raises the same twelve grounds for relief as in the federal habeas Petition—with citations
7 to In re Robbins, In re Swain, In re Waltreus, In re Dixon, and In re Lindley.
8 ECF No. 17-19 (Lodgment No. 19). The California Supreme Court issued a summary
9 denial as follows:

10 “The petition for writ of habeas corpus is denied. (See In re Robbins (1998)
11 18 Cal. 4th 770, 780 [courts will not entertain habeas corpus claims that are
12 untimely]; In re Swain (1949) 34 Cal.2d 300, 304 [a petition for writ of habeas
13 corpus must allege sufficient facts with particularity].) Individual claims are
14 denied, as applicable. (See In re Waltreus (1965) 62 Cal.2d 218, 225 [courts
15 will not entertain habeas corpus claims that were rejected on appeal]; In re
16 Dixon (1953) 41 Cal.2d 756, 759 [courts will not entertain habeas corpus
claims that could have been, but were not, raised on appeal]; In re Lindley
(1947) 29 Cal.2d 709, 723 [courts will not entertain habeas corpus claims that
attack the sufficiency of the evidence].)

17 Id. The state court citation to In re Robbins means that the petition was rejected as untimely.
18 See Walker v. Martin, 562 U.S. at 312. In re Swain states the following on the pincite page:
19 “We are entitled to and we do require of a convicted defendant that he allege with
20 particularity the facts upon which he would have a final judgment overturned and that he
21 fully disclose his reasons for delaying in the presentation of those facts.” Ex parte Swain,
22 34 Cal. 2d 300, 304 (1949). The Ninth Circuit recognizes the In re Swain citation as the
23 “untimeliness” bar. Washington v. Cambra, 208 F.3d at 833. As such, the untimeliness
24 citations of In re Robbins and In re Swain are independent state grounds adequate to bar
25 habeas corpus relief in federal court. See Walker v. Martin, 562 U.S. at 310–11. However,
26 citations to In re Dixon and In re Waltreus are not bars to federal review. See Washington
27 v. Cambra, 208 F.3d at 834 (“[T]he *Dixon* rule is not independent of federal law and does
28 not preclude federal habeas review where the petitioner asserts the denial of a federal

1 constitutional right.); Calderon v. U.S. Dist. Court for E. Dist. of California, 96 F.3d 1126,
2 1131 (9th Cir. 1996) (finding a Waltreus denial is not a ruling on the merits nor a procedural
3 default and so does not bar federal review). Finally, a citation to In re Lindley is an
4 independent and adequate state procedural bar to federal habeas review. Carter v. Giurbino,
5 385 F.3d 1194, 1198 (9th Cir. 2004).

6 The order appears ambiguous because the California Supreme Court did not state
7 which citation applied to which claim. Any claims that were denied due to In re Dixon and
8 In re Waltreus would not be procedurally defaulted. Although the timeliness citations are
9 a valid procedural default bar, it is unclear if the state court intended the timeliness part of
10 the decision to encompass all of the claims in a separate independent finding or jointly with
11 its other reasons. See Loveland v. Hatcher, 231 F.3d at 643; Calderon v. U.S. Dist. Court
12 for E. Dist. of California, 96 F.3d at 1131. Because the California Supreme Court's order
13 is ambiguous, Petitioner's claims are not procedurally defaulted. See Calderon v. U.S. Dist.
14 Court for E. Dist. of California, 96 F.3d at 1131; Mendiola v. Woodford,
15 No. 09cv1442 MMA(AJB), 2009 WL 10657650, at *3 (S.D. Cal. Sept. 25, 2009), report
16 and recommendation adopted, No. 09CV1442-MMA(AJB), 2010 WL 11469815
17 (S.D. Cal. Mar. 29, 2010), aff'd sub nom. Mendiola v. Hedgpeth, 511 F. App'x 630
18 (9th Cir. 2013).

19 **IV. CONCLUSION AND RECOMMENDATION**

20 For the reasons set forth above, **IT IS HEREBY RECOMMENDED** that the
21 district judge issue an order (1) approving and adopting this Report and Recommendation,
22 (2) finding that the Petition is not timely, and (3) directing that Respondent's Motion to
23 Dismiss be **GRANTED WITH PREJUDICE**.

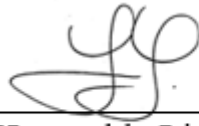
24 **IT IS ORDERED** that on or before **February 4, 2021** any party to this action may
25 file written objections with the Court and serve a copy on all parties. The document should
26 be captioned "Objections to Report and Recommendation."

27 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with
28 the Court and served on all parties on or before **February 18, 2021**. The parties are advised

1 that failure to file objections within the specified time may waive the right to raise those
2 objections on appeal of the Court's order. See Turner v. Duncan, 158 F.3d 449, 455
3 (9th Cir. 1998).

4 **IT IS SO ORDERED.**

5 Dated: January 4, 2021



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7 Honorable Linda Lopez
8 United States Magistrate Judge
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