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5 **UNITED STATES DISTRICT COURT**
6 **SOUTHERN DISTRICT OF CALIFORNIA**
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8 Antwaren ROBERTS,
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10 v.
11 Kathleen ALLISON,
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Petitioner,
Respondent.

Case No.: 22-cv-00251-LL-BGS

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

[ECF No. 9]

Petitioner Antwaren Roberts (“Petitioner”), a state prisoner proceeding *pro se* and *in forma pauperis*, filed a Petition for Writ of Habeas Corpus (“Petition”) pursuant to 28 U.S.C. §2254, challenging his 2014 conviction in San Diego County Superior Court case number SCD252523. (ECF No. 1.)¹ Respondent Kathleen Allison (“Respondent”) moved to dismiss the Petition contending the Petition is untimely. (ECF No. 9.) Petitioner did not file an opposition. (*See* Docket.)

This Report and Recommendation is submitted to United States District Judge Linda Lopez 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. Based on the documents and evidence presented, and for the reasons set forth below, the Court **RECOMMENDS** that Respondent’s Motion to Dismiss (ECF No. 9) be **GRANTED** and that this action be **DISMISSED**.

¹ The Court cites the CM/ECF pagination when referencing the Petition and attached exhibits (ECF No. 1); as well as Respondent’s Motion to Dismiss (ECF No. 9). The Court cites to internal pagination for Lodgments (ECF No. 10 [“Lodg.”]).

1 **I. BACKGROUND**

2 On September 4, 2014, a jury in San Diego County Superior Court case number
3 SCD252523 convicted Petitioner of willful, deliberate, and premeditated attempted murder
4 (count 1), assault with a semi-automatic firearm (count 2), and possession of a firearm by
5 a felon (count 3) pursuant to Cal. Penal Code §§ 664/187, 189, 245(b), 29800(a)(1). (Lodg.
6 1 at 541–43.) The jury found true that all three offenses were committed for the benefit of,
7 at the direction of, or in association with a criminal street gang pursuant to Cal. Penal Code
8 § 186.22(b)(1). (Lodg. 1 at 541–43.) Further, the jury found to be true that Petitioner used
9 a firearm during the attempted murder, proximately causing great bodily injury to another
10 person pursuant to Cal. Penal Code § 12022.53(d), and that he personally used a firearm
11 and personally inflicted great bodily injury during the assault charged in count 2 pursuant
12 to Cal. Penal Code §§ 12022.5(a), 12022.7(a). (Lodg. 1 at 541–42.) Petitioner then
13 admitted five prison prior convictions after trial, pursuant to Cal. Penal Code §§ 667.5(b),
14 668. (Lodg. 1 at 544.) On October 29, 2015, the trial court sentenced Petitioner to an
15 indeterminate term of forty-years to life in prison and a consecutive five-year determinate
16 term. (Lodg. 1 at 559–61.)

17 After he was convicted, Petitioner appealed to the California Court of Appeal raising
18 six grounds for relief. (Lodg. 2.) Respondent then filed a responsive brief and Petitioner
19 filed a reply brief. (Lodg. 3, 4.) The Court of Appeal requested supplemental briefing on
20 April 25, 2017, which Petitioner filed on May 9, 2017 and Respondent filed on May 4,
21 2017. (Lodg. 5, 6.) On July 18, 2017, the Court of Appeal issued an opinion reversing the
22 jury’s findings as to the gang enhancement, affirming the conviction in all other respects,
23 and remanding the matter with instructions. (Lodg. 7.) On July 27, 2017, Respondent filed
24 a petition for rehearing. (Lodg. 8.) On August 3, 2017, the Court of Appeal modified the
25 opinion, with no change in the judgment, and denied Respondent’s petition for rehearing.
26 (Lodg. 9.)

27 Both parties sought review of the state appellate court’s decision, with Petitioner
28 filing his petitioner for review on August 22, 2017 and Respondent filing her petitioner for

1 review on August 25, 2017. (Lodg. 10, 11.) On November 1, 2017, the California Supreme
2 Court denied both petitions and Respondent’s request for an order directing depublication.
3 (Lodg. 12; *see also* ECF No. 1 at 3.) On January 8, 2018, the trial court dismissed the gang
4 enhancements, modified the sentence on the attempted murder count, and resentenced
5 Petitioner to thirty-two years to life plus five years in state prison. (Lodg. 14 at 3.)

6 On March 10, 2021, Petitioner filed a petition for writ of habeas corpus in the San
7 Diego County Superior Court. (Lodg. 13.) On May 7, 2021, the superior court denied the
8 petition. (Lodg. 14; *see also* ECF No. 1-5.) The court found that Petitioner “appealed the
9 judgment and raised, for all intents and purposes, claims and allegations identical to the
10 ones raised in the instant petition” and that “[t]he Court of Appeal reversed the jury’s
11 findings on the gang enhancements and remanded the case to the trial court for
12 resentencing.” (Lodg. 14 at 4; *see also* ECF No. 1-5 at 4.) The court then indicated that
13 “the judgment was otherwise affirmed[,]” making “the gang enhancement claim [] moot
14 because the enhancements were ultimately dismissed.” (*Id.*) The court found that
15 “Petitioner fail[ed] to state a prima facie case for relief” since the “remaining claims have
16 already been raised and resolved on appeal, and Petitioner does not explain why these
17 claims should be reconsidered.” (*Id.*)

18 On July 2, 2021, Petitioner filed a subsequent petition for writ of habeas corpus in
19 the California Court of Appeal. (Lodg. 15.) On July 16, 2021, the Court of Appeal denied
20 the petition and concluded that “[m]ost of the petition is procedurally barred as repetitive
21 of claims that were considered on appeal.” (Lodg. 16 at 2.) The Court of Appeal further
22 found that Petitioner “has identified no jurisdictional error, fundamental constitutional
23 error striking at the heart of the trial process, or a change in the law that would justify
24 reconsideration of these previously rejected claims.” (Lodg. 16 at 3.) As to Petitioner’s
25 ineffective assistance of counsel claim, the Court of Appeal found it was “barred as
26 untimely, because Petitioner delayed more than five years since sentencing to assert it and
27 has provided no explanation to excuse the delay.” (Lodg. 16 at 3.)
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1 On February 22, 2022, Petitioner filed the pending Federal Petition and attached his
2 August 2017 California Supreme Court petition for review as the supporting memorandum
3 of points and authorities. (ECF No. 1.) This Court granted Petitioner’s Motion for Leave
4 to Proceed *In Forma Pauperis* on May 12, 2022 and issued the current order requiring a
5 response to the Petition on May 17, 2022. (ECF Nos. 6, 7.) Respondent filed her Motion
6 to Dismiss the Petition and lodged state court records. (ECF Nos. 9, 10.) Petitioner did
7 not file any opposition to the motion. (*See* ECF No. 4 [setting opposition deadline as
8 August 22, 2019]; *see also* Docket.)

9 **II. LEGAL STANDARD**

10 Rule 4 of the Rules Governing Section 2254 Cases in the United States District
11 Courts expressly permits a district court to dismiss a habeas petition “[i]f it plainly appears
12 from the petition and any attached exhibits that the petitioner is not entitled to relief in the
13 district court[.]” Rules Governing § 2254 Cases, Rule 4, 28 U.S.C. foll. § 2254; *see also*
14 *O’Bremski v. Maass*, 915 F.2d 418, 420 (9th Cir. 1990) (“[R]ule 4 of the Rules Governing
15 Section 2254 in the United States District Courts ‘explicitly allows a district court to
16 dismiss summarily the petition on the merits when no claim for relief is stated.”); *Purdy v.*
17 *Bennett*, 214 F.Supp.2d 348, 353 (S.D.N.Y. 2002) (applying Rule 12(b)(6) standards to
18 motion to dismiss authorized by court pursuant to Rule 4 of the Rules Governing § 2254
19 Cases). The Advisory Committee Notes to Rule 8 also indicates that the court may deny a
20 petition for writ of habeas corpus, either on its own motion under Rule 4, pursuant to the
21 respondent’s motion to dismiss, or after an answer to the petition has been filed.

22 **III. DISCUSSION**

23 Respondent moved to dismiss the Petition as untimely. (ECF No. 9-1.) Respondent
24 asserted that the limitations period in this case started to run on February 16, 2018, which
25 was the day after the expiration of the ninety-day period within which Petitioner could
26 petition for a writ of certiorari. (*Id.* at 4–5.) Further, Respondent argued that the Petition
27 is barred by the one-year statute of limitations under the Antiterrorism and Effective Death
28 Penalty Act of 1996 (“AEDPA”), as no statutory tolling occurred before the limitations

1 period expired and there is no basis for equitable tolling. (*Id.* at 5–8.) As noted above,
2 Petitioner did not file an opposition. (*See* Docket.)

3 **A. The Petition Is Barred by the AEDPA Statute of Limitations**

4 1. AEDPA’s One-Year Statute of Limitations and Commencement of the
5 Limitations Period

6 The instant Petition was filed after April 24, 1996 and is subject to AEDPA, which
7 provides a one-year statute of limitations for filing a habeas corpus petition in federal court.
8 *See Pace v. DiGuglielmo*, 544 U.S. 408, 410 (2005) (citing 28 U.S.C. § 2244(d)(1)). This
9 one-year statute of limitations period begins to run at the latest of:

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

20 28 U.S.C. § 2244(d)(1). Here, subparagraphs (B), (C), and (D) are not applicable to
21 Petitioner. Petitioner has provided no argument or evidence that there were state
22 impediments in violation of the Constitution or laws of the United States that prevented
23 him from seeking further relief, that his claims rely on a new constitutional right, or that
24 the factual predicate for his claim was unknown at the time his conviction became final.
25 Thus, AEDPA’s one-year statute of limitations begins to run on “the date on which
26 judgment became final by the conclusion of direct review or the expiration of the time for
27 seeking such review[.]” 28 U.S.C. § 2244(d)(1)(A). Petitioner had one year from the date
28 his conviction became final to file a petition for writ of habeas corpus in federal court.

1 *Harris v. Carter*, 515 F.3d 1051, 1053 (9th Cir. 2008); *Nava v. Beard*, No. 13-CV-365-H-
2 JMA, 2014 WL 1028532, at *3 (S.D. Cal. Mar. 2014).

3 In this case, however, on January 8, 2018, after remand from the California Court of
4 Appeal, (*see* Lodg. 7), the superior court dismissed the gang enhancements, modified the
5 sentence on the attempted murder count, and resentenced Petitioner to thirty-two years to
6 life plus five years in state prison, (Lodg. 14 at 3). The relevant judgment, for purposes of
7 determining the start of the one-year statute of limitations for filing a habeas petition under
8 28 U.S.C. § 2244(d)(1), is the judgment under which a prisoner is being held. *Marquez v.*
9 *McDaniel*, 729 F. App'x 583, 584 (9th Cir. 2018) (citing *Smith v. Williams*, 871 F.3d 684,
10 688 (9th Cir. 2017)). “Where an amended or corrected judgment is entered, a prisoner is
11 held under that amended or corrected judgment[,]” and “the one-year [statute of
12 limitations] period runs from the date of the amended judgment[.]” *Id.* (citing *Smith*, 871
13 F.3d at 688). Numerous district courts that applied *Smith* have found that the federal one-
14 year limitation period under 28 U.S.C. § 2244(d)(1)(A) started to run after the expiration
15 of the time to file a direct appeal from petitioner’s amended judgment of conviction. *See*
16 *Anderson v. Baca*, Case No. 3:16-cv-00545-MMD-WGC, 2018 WL 1307856, at *2 (D.
17 Nev. Mar. 2018) (finding that the one-year federal limitation period began to run after the
18 expiration of the time period to appeal petitioner’s intervening judgment); *Duda v. Neven*,
19 2:16-cv-01176-JCM-CWH, 2017 WL 4350662, at *2 (D. Nev. Sept. 2017) (finding that
20 the federal one-year limitation period did not begin to run until the expiration of the time
21 period to file a direct appeal from petitioner’s amended judgment of conviction); *Gayler v.*
22 *Neven*, Case No. 2:15-cv-00972-APG-CWH, 2017 WL 4250049, at *2 (D. Nev. Sept.
23 2017) (finding that the federal limitation period did not begin to run until the time period to
24 file a direct appeal expired following the entry of petitioner’s second amended judgment
25 of conviction). In California, when a conviction is not appealed, it becomes final sixty
26 days after sentencing. *See* Cal. R. Ct. 8.308(a) (“[A] notice of appeal and any statement
27 required by Penal Code section 1237.5 must be filed within 60 days after the rendition of
28 the judgment or the making of the order being appealed.”); *Roberts v. Marshall*, 627 F.3d

1 768, 771 (9th Cir. 2010); *McKinney v. Macber*, Case No.: 15-cv-00812-H-RBB, 2015 WL
2 10384654, at *5 (S.D. Cal. Dec. 2015).

3 In this case, Petitioner’s conviction became final on March 9, 2018, sixty days after
4 January 8, 2018, the date when his amended judgment was entered. *See* Cal. R. Ct.
5 8.308(a); *Marquez*, 729 F. App’x at 584; *Smith*, 871 F.3d at 688. The statute of limitations
6 for federal habeas corpus began to run on March 10, 2018, the day after the judgment
7 became final. *See* 28 U.S.C. § 2244(d)(1)(A); *see also Corjasso v. Ayers*, 278 F.3d 874,
8 877 (9th Cir. 2002) (explaining that the one-year statute of limitations under AEDPA
9 begins to run the day after the conviction becomes final). The statute of limitations period
10 would therefore have expired on March 10, 2019. *See Patterson v. Stewart*, 251 F.3d 1243,
11 1245–46 (9th Cir. 2001) (“In computing any period of time prescribed or allowed ... by any
12 applicable statute, the day of the act, event, or default from which the designated period of
13 time begins to run shall not be included.”). The Petitioner constructively filed his federal
14 Petition on February 22, 2022. (*See* ECF No. 1.) Accordingly, IT IS RECOMMENDED
15 that the Court find that Petitioner filed his Petition after AEDPA’s statute of limitations.
16 Therefore, unless Petitioner is entitled to statutory or equitable tolling, his action is barred
17 by AEDPA’s statute of limitations.

18 2. Statutory Tolling

19 a. Legal Standard

20 Section 2244(d)(2) provides for statutory tolling of AEDPA’s one-year limitations
21 period during the time when a “properly filed application for State post-conviction or other
22 collateral review with respect to the pertinent judgment or claim is pending[.]” 28 U.S.C.
23 § 2244(d)(2). Pending for purposes of § 2244(d)(2) “includes the period between (1) a
24 lower court’s adverse determination, and (2) the prisoner’s filing of a notice of appeal,
25 provided that the filing of the notice of appeal is timely under state law.” *Evans v. Chavis*,
26 546 U.S. 189, 191 (2006). “[T]ime limits, no matter their form, are ‘filing’ conditions.”
27 *Pace*, 544 U.S. at 417. Thus, an untimely state habeas petition “must be treated as
28 improperly filed, or as though it never existed, for purposes of [§] 2244.” *Lakey v.*

1 *Hickman*, 633 F.3d 782, 786 (9th Cir. 2011).

2 AEDPA’s statutory tolling provision suspends the one-year statute of limitations
3 period for the amount of time a “properly filed application for State post-conviction or
4 other collateral review” is pending in state court. 28 U.S.C. § 2244(d)(2); *Self v. Roe*, 22
5 F. App’x 817 (9th Cir. 2001); *Nino v. Galaza*, 183 F.3d 1003, 1005 (9th Cir. 1999),
6 *overruled on other grounds by Carey v. Saffold*, 536 U.S. 214 (2002). A petitioner “bears
7 the burden of proving that the statute of limitations was tolled.” *Banjo v. Ayers*, 614 F.3d
8 964, 967 (9th Cir. 2010). State habeas petitions filed after the one-year statute of
9 limitations has expired do not revive the statute of limitations and have no tolling effect.
10 *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003) (“[S]ection 2244(d) does not
11 permit the reinitiation of the limitations period that has ended before the state petition was
12 filed”).

13 b. Analysis

14 Petitioner filed state habeas corpus petitions in the San Diego County Superior Court
15 and the California Court of Appeal. (*See* Lodg. 13, 14, 15, 16.) Petitioner first filed a
16 petition for writ of habeas corpus in the San Diego County Superior Court on March 10,
17 2021, which was denied by the superior court on May 7, 2021. (Lodg. 13, 14; *see also*
18 ECF No. 1-5.) The court found that Petitioner “appealed the judgment and raised, for all
19 intents and purposes, claims and allegations identical to the ones raised in the instant
20 petition[.]” (Lodg. 14 at 4; *see also* ECF No. 1-5 at 4.) The court then indicated that “[t]he
21 Court of Appeal reversed the jury’s findings on the gang enhancements and remanded the
22 case to the trial court for resentencing.” (*Id.*) The court then found that “the judgment was
23 otherwise affirmed[.]” making “the gang enhancement claim [] moot because the
24 enhancements were ultimately dismissed.” (*Id.*) The court stated that “Petitioner fail[ed]
25 to state a prima facie case for relief” since the “remaining claims have already been raised
26 and resolved on appeal, and Petitioner does not explain why these claims should be
27 reconsidered.” (*Id.*)
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1 Petitioner then filed a subsequent petition for writ of habeas corpus in the California
2 Court of Appeal on July 2, 2021, which was denied on July 16, 2021. (Lodg. 15 16.) The
3 Court of Appeal concluded that “[m]ost of the petition is procedurally barred as repetitive
4 of claims that were considered on appeal” and found that Petitioner “has identified no
5 jurisdictional error, fundamental constitutional error striking at the heart of the trial
6 process, or a change in the law that would justify reconsideration of these previously
7 rejected claims.” (Lodg. 16 at 2, 3.) As to Petitioner’s ineffective assistance of counsel
8 claim, the Court of Appeal found it was “barred as untimely, because Petitioner delayed
9 more than five years since sentencing to assert it and has provided no explanation to excuse
10 the delay.” (Lodg. 16 at 3.)

11 However, as indicated above, the one-year statute of limitations period expired on
12 March 10, 2019. *See* Section III(A)(1). Petitioner filed his state habeas corpus petition in
13 the San Diego County Superior Court on March 10, 2021 and the California Court of
14 Appeal on July 2, 2021. Both dates are after the expiration of the one-year statute of
15 limitations period. The filing of Petitioner’s state petitions cannot operate to statutorily toll
16 the statute of limitations period because it expired before an application for collateral
17 review was filed. *See Aparicio v. Baker*, 544 F. App’x 684, 685 (9th Cir. 2013)
18 (“[Petitioner’s] untimely second state petition for postconviction relief did not toll the
19 statute of limitations, because the federal limitations period already had expired.”);
20 *Ferguson*, 321 F.3d at 823 (“[S]ection 2244(d) does not permit the reinitiation of the
21 limitations period that has ended before the state petition was filed”). Accordingly, IT IS
22 RECOMMENDED that the Court find that Petitioner is not entitled to any statutory tolling.
23 Unless Petitioner can establish that he is entitled to equitable tolling, his Petition is
24 untimely.

25 3. Equitable Tolling

26 a. Legal Standard

27 In addition to statutory tolling, AEDPA’s one-year statute of limitations may be
28 subject to equitable tolling in appropriate cases. *Holland v. Florida*, 560 U.S. 631, 645

1 (2010). However, the threshold necessary to trigger equitable tolling is high and, thus, it
2 is not available in most cases. *Bills v. Clark*, 628 F.3d 1092, 1097 (9th Cir. 2010).
3 Petitioner bears a heavy burden to prove an entitlement to equitable tolling, “lest the
4 exceptions swallow the rule.” *Id.* (internal quotation marks omitted). To be entitled to
5 equitable tolling, a habeas petitioner has the burden to establish two elements: (1) “he has
6 been pursuing his rights diligently,” and (2) “some extraordinary circumstance stood in his
7 way.” *Holland*, 560 U.S. at 649 (citing *Pace*, 544 U.S. at 418); *see also Lawrence v.*
8 *Florida*, 549 U.S. 327, 335 (2007) (same). A petitioner bears the burden of establishing
9 both elements, and failure to prove either element disqualifies the petitioner for equitable
10 tolling. *See Pace*, 544 U.S. at 418–19.

11 “The diligence required for equitable tolling purposes is ‘reasonable diligence,’ not
12 ‘maximum feasible diligence.’” *Holland*, 560 U.S. at 653. Nor does the court require
13 “actual impossibility; rather, equitable tolling is appropriate where ‘it would have
14 technically been possible for a prisoner to file a petition, but a prisoner would have likely
15 been unable to do so.’” *Grant v. Swarthout*, 862 F.3d 914, 918 (9th Cir. 2017). However,
16 the failure to file a timely petition must be the result of external forces, not the result of the
17 petitioner’s lack of diligence. *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999); *see*
18 *also Canela v. Allison*, 2022 WL 2188388, at *6 (S.D. Cal. June 2022). In other words, a
19 petitioner must establish that the extraordinary circumstances caused the failure to timely
20 file. *See Gaston v. Palmer*, 417 F.3d 1030, 1034 (9th Cir. 2005). “Determining whether
21 equitable tolling is warranted is a ‘fact-specific inquiry.’” *Spitsyn v. Moore*, 345 F.3d 796,
22 799 (9th Cir. 2003) (quoting *Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir. 2001)).
23 Further, “the burden is on the petitioner to show that the ‘extraordinary circumstances’ he
24 has identified were the proximate cause of his untimeliness, rather than merely a lack of
25 diligence on his part.” *Spitsyn*, 345 F.3d at 799; *Stillman v. LaMarque*, 319 F.3d 1199,
26 1203 (9th Cir. 2003).

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1 b. Analysis

2 In her Motion to Dismiss, Respondent argued that the Petitioner is not entitled to
3 equitable tolling because the reasons that Petitioner provided in his Petition “have been
4 regularly rejected” and Petitioner had “not provided any specific information or evidence
5 to show he is entitled to equitable tolling on any of the bases he request.” (ECF No. 9-1 at
6 6.) Respondent maintained that as to library access, COVID-19 lockdowns did not start
7 until after the statute of limitations had expired and did not include any other
8 documentation that shows that he requested, and was denied, access to the law library prior
9 to the expiration of the statute of limitations. (*Id.* at 6–7.) Respondent also indicated that
10 the Petitioner did not “provide any dates or documentation showing when his personal
11 property was allegedly taken by prison officials or when it was returned to him.” (*Id.* at
12 7.) Respondent argued that the inmate appeal forms attached as exhibits in the Petition
13 were “all dated after the statute of limitations expired, and most were not even delivered to
14 prison authorities for consideration, as shown by the absence of staff responses on several
15 forms.” (*Id.*) Respondent claimed that this shows that the Petitioner “failed to show that
16 he exercised reasonable diligence in requesting access to his legal property.” (*Id.*)

17 Further, Respondent argued that Petitioner “failed to prove that any of the alleged
18 extraordinary circumstances prevented timely filing of his Petition.” (*Id.*) Respondent
19 maintained that the Petitioner “failed to explain how any of the aforementioned grounds
20 for equitable tolling prevented him from filing his Petition on time, especially since he
21 simply attached his California Supreme Court petition that was filed by counsel years
22 earlier in August 2017 as the argument to support his grounds for relief” and that the
23 Petitioner had “provided no evidence to show that he could not have filed his Petition
24 before the statute of limitations expired[.]” (*Id.* at 7–8.)

25 As indicated above, Petitioner has not opposed Respondent’s Motion to Dismiss.
26 (*See* Docket.) In his Petition, Petitioner argued that the he was prevented from filing a
27 timely petition because the “correctional staff [lost] all of [his] legal property and the
28 pandemic lock downs initiated by prison authorities[.]” (ECF No. 1 at 13–14.) Further,

1 Petitioner’s Declaration indicated that he was separated from his legal property and unable
2 to access the law library once he was transferred to the Department of State Hospital
3 (“DSH”). (ECF No. 1-7 at 3.) Petitioner claimed that he later learned that his legal property
4 was lost in transit after having been transferred to different prisons. (*Id.*) Petitioner further
5 stated that “[b]ecause of the pandemic and lockdowns, no one was allowed to use the law
6 library[] [u]ntil a few weeks ago.” (*Id.*) Petitioner stated that “[h]ad Prison staff not lost
7 [his] legal paperwork [he] could have filed [his] federal habeas in a timely manner before
8 the pandemic lockdowns started.” (*Id.*) Petitioner maintained that “once the Pandemic
9 restrictions on movement within the prison began, access to the law library was shut down,
10 making any real attempt to file a timely petition virtually impossible[.]” (*Id.*) Petitioner
11 also indicated that he is “completely [unknowledgeable] of the law and legal processes.
12 But [he] ha[s] been doing any and everything that [he] can [do] to diligently pursue post-
13 conviction relief from my unconstitutional conviction and sentence.” (*Id.* at 2.) Petitioner
14 stated that “[s]ince [he is] indigent and unable to comprehend the law, [he] ha[s] had to
15 depend on the assistance of fellow inmates to correspond on [his] behalf with the courts,
16 and prison administration.” (*Id.*) Petitioner indicated that he found “someone to help [him]
17 prepare to file a federal habeas corpus petition” and “[a]s soon as [he] was able to get some
18 assistance in preparing the writ [he] immediately took action.” (*Id.* at 4.)

19 While equitable tolling is “unavailable in most cases,” *Miles*, 187 F.3d at 1107, it is
20 appropriate where a habeas petitioner demonstrates two specific elements: “(1) that he has
21 been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in
22 his way’ and prevented him from filing.” *Lawrence*, 549 U.S. at 336–37 (quoting *Pace*,
23 544 U.S. at 418.) The Court analyzes each element below.

24 i. Extraordinary Circumstances

25 In demonstrating that some extraordinary circumstance stood in Petitioner’s way and
26 prevented him from timely filing his habeas petition, Petitioner would need to show that
27 the “extraordinary circumstances beyond [the Petitioner’s] control [made] it impossible to
28 file a petition on time” and that the “‘extraordinary circumstances’ were the cause of his

1 untimeliness.” *Spitsyn*, 345 F.3d at 799.

2 As for the alleged loss of Petitioner’s legal materials, Petitioner claimed that he was
3 separated from his personal property during his time at the DSH and that he was later
4 informed that correctional staff had allegedly lost his legal property during transit. (ECF
5 Nos. 1 at 14; 1-7 at 3.) Petitioner claimed that “[h]ad Prison staff not lost [his] legal
6 paperwork [he] could have filed [his] federal habeas in a timely manner[.]” (ECF No. 1-7
7 at 4.)

8 While the Ninth Circuit has held that a complete lack of access to a legal file may
9 constitute an extraordinary circumstance, Petitioner would still need to demonstrate that a
10 complete lack of access to his legal file during his time at the DSH made timely filing his
11 Petition impossible. *See Ramirez v. Yates*, 571 F.3d 993, 998 (9th Cir. 2009) (citing
12 *Espinoza-Matthews v. California*, 432 F.3d 1021, 1027–28 (9th Cir. 2005)) (remanding for
13 the district court to determine whether “(1) the lack of access to his legal file made a timely
14 filing impossible, and (2) Ramirez pursued his rights diligently.”). Despite the conclusory
15 statements in the Petition, Petitioner did not do so.

16 Petitioner did not specifically state what dates he was temporarily relocated to the
17 DSH and various other facilities, how long he was actually without access to his legal
18 materials, or when he gained access to the legal materials that he needed to file his Petition.
19 (See ECF Nos. 1 at 13–14; 1-7 at 1–4); *see Lott v. Mueller*, 304 F.3d 918, 925 (9th Cir.
20 2002) (a “temporary deprivation of an inmate’s legal materials does not, in all cases, rise
21 to a constitutional deprivation.”); *Hartley v. Hall*, 335 F. App’x 686, 687 (9th Cir. 2009)
22 (“there must be a causal link between lateness and the extraordinary circumstances”).
23 However, the Court can infer from the CDCR forms attached to his Petition that Petitioner
24 was allegedly transferred to the DSH on either October 30, 2018 or November 30, 2018.
25 (ECF No. 1-6 at 2, 3, 6, 8.) Thus, according to these dates, there was approximately a
26 three-month to four-month period leading up to Petitioner’s one-year filing deadline where
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1 Petitioner allegedly lacked access to his legal materials.² At the same time, Petitioner had
2 approximately eight to nine months prior to this transfer to the DSH to prepare his habeas
3 corpus petition. Petitioner did not demonstrate how this three-month to four-month period
4 where he allegedly lacked access to his legal materials during his time at DSH made timely
5 filing his Petition impossible, when Petitioner had approximately eight to nine months prior
6 to this transfer to the DSH to work on his Petition. *See Smith v. Davis*, 953 F.3d 582, 599
7 (9th Cir. 2020), cert. denied, 141 S. Ct. 878 (2020) (finding that the Plaintiff “must show
8 that he has been reasonably diligent in pursuing his rights not only while an impediment to
9 filing caused by an extraordinary circumstance existed, but before and after as well, up to
10 the time of filing his claim in federal court. [. . .] it is not enough for a petitioner seeking
11 an exercise of equitable tolling to attempt diligently to remedy his extraordinary
12 circumstances; when free from the extraordinary circumstance, he must also be diligent in
13 actively pursuing his rights.”).

14 Further, Petitioner has not addressed what, if any, effort he expended in conducting
15 legal research, synthesizing the relevant factual records, and drafting his substantive
16 petition within the first eight to nine months of the statute of limitations period. *See id.*
17 Petitioner did not file an opposition, thus failing to respond to Respondent’s arguments and
18 failing to explain the circumstances surrounding the alleged loss of his legal materials.
19 Accordingly, it is recommended that the Court find that Petitioner’s lack of legal property
20 is insufficient to establish the extraordinary circumstances required for entitlement to
21 equitable tolling.

22 Petitioner also claimed that the law library restriction resulting from the COVID-19
23 pandemic was an extraordinary circumstance that impeded his ability to timely file his
24 Petition. Petitioner stated that “[b]ecause of the pandemic and lockdowns, no one was
25 allowed to use the law library[] [u]ntil a few weeks ago.” (ECF No. 1-7 at 3.) Petitioner
26 claimed that “once the Pandemic restrictions on movement within the prison began, access
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28 ² As indicated in Section III(A)(1), the one-year statute of limitations period expired on March 10, 2019.

1 to the law library was shut down, making any real attempt to file a timely petition virtually
2 impossible[.]” (*Id.*)

3 There is scant legal authority analyzing whether the COVID-19 pandemic
4 constitutes an extraordinary circumstance that merits equitable tolling of habeas corpus
5 claims. However, district courts within the Ninth Circuit, including this district court, have
6 begun to address Petitioner’s pandemic-related argument. Importantly, thus far, the courts
7 agree that “general claims of prison lockdowns and lack of access to the prison law library
8 as a result of the COVID-19 pandemic alone are insufficient to amount to extraordinary
9 circumstances” for equitable tolling purposes. *Dragasits v. Covello*, 2022 WL 207730, *7
10 (S.D. Cal. Jan. 2022); *see also Shephard v. Asuncion*, 2021 WL 6496744, at *10 (C.D. Cal.
11 Nov. 2021) (finding petitioner was not entitled to equitable tolling during alleged “total
12 lockdown” due to COVID-19 between March 2020 and August 2020); *Sholes v. Cates*,
13 2021 WL 5567381, at *4 (E.D. Cal. Nov. 2021) (concluding prisoner not entitled to
14 equitable tolling during COVID outbreak which caused the law library to be closed “for
15 months” and thereafter open with only limited access).

16 Further, extraordinary circumstances due to the COVID-19 pandemic may be found
17 only where a petitioner sets forth “fact-specific circumstances related to the pandemic that
18 hindered his ability to timely file a habeas petition.” *Dragasits*, 2022 WL 207730, at *7
19 (citing *Chapman-Sexton v. United States*, 2021 WL 292027 at *3 (S.D. Ohio Jan. 2021);
20 *Pryor v. Erdos*, 2021 WL 4245038, at *9 (N.D. Ohio Sept. 2021)); *see also Rodriguez v.*
21 *Fisher*, 2022 WL 2239347, *9 (S.D. Cal. June 2022) (finding “because Petitioner does not
22 explain why COVID-19 restrictions purportedly placed upon his access to legal materials
23 affected his ability to timely file his federal Petition only, the Court finds he is not entitled
24 to equitable tolling for the period between March of 2020 and July of 2021”); *Canela*, 2022
25 WL 2188388, at *6 (finding meritless petitioner’s conclusory arguments that the COVID-
26 19 pandemic prevented him from timely filing a habeas corpus petition and that
27 incarceration generally impedes conducting legal research for purposes of preparing such
28 petitions).

1 In the instant case, Petitioner has only provided conclusory statements that the
2 COVID-19 pandemic prevented him from timely filing his petition due to the restrictions
3 on the law library usage. But in doing so, Petitioner neglected to articulate any specific
4 facts to meet his burden. In particular, Petitioner emphasized that no one was allowed to
5 use the law library due to the pandemic and the movement restrictions within the prison
6 that followed, which made “any real attempt to file a timely petition virtually impossible[.]”
7 (ECF No. 1-7 at 3.) However, as noted above, Section 2244(d) required Petitioner to file
8 a petition for habeas corpus no later than March 10, 2019. See Section III(A)(1). The
9 COVID-19 Pandemic did not begin until March 2020. See, e.g., *Coleman v. Newsom*, 455
10 F. Supp. 3d 926, 931 (E.D. Cal. 2020) (“Although the current record is unclear as to when
11 [state officials] began planning a response to COVID-19, they started implementing
12 preventive measures [in California prisons] at least as of March 11, 2020, when normal
13 visiting at CDCR institutions was canceled statewide, fact sheets and posters on the
14 pandemic were delivered to the inmate population, and additional hand-sanitizing
15 dispenser stations were ordered.”). Thus, the pandemic began approximately one year after
16 the statute of limitations expired on March 10, 2019 and therefore could not have prevented
17 Petitioner from accessing the law library. Accordingly, it is recommended that the Court
18 find that Petitioner’s alleged lack of law library access during the COVID-19 pandemic is
19 insufficient to establish the extraordinary circumstances required for entitlement to
20 equitable tolling.

21 Assuming that Petitioner did not have law library access after having been
22 transferred to the DSH,³ Courts generally hold that impeded law library access does not
23 qualify as an extraordinary circumstance warranting tolling. See, e.g., *Ramirez*, 571 F.3d
24 at 998 (“Ordinary prison limitations on [petitioner’s] access to the law library and copier[,]
25 quite unlike the denial altogether of access to his personal legal papers[,] were neither
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28 ³ Petitioner was transferred to the DSH when he had three to four months left before the expiration of his
statute of limitations. (See, *supra* at page 13, line 28.)

1 ‘extraordinary’ nor made it ‘impossible’ for him to file his petition in a timely manner.
2 Given even the most common day-to-day security restrictions in prison, concluding
3 otherwise would permit the exception to swallow the rule-according to [petitioner’s]
4 theory, AEDPA’s limitations period would be tolled for the duration of any and every
5 prisoner’s stay in administrative segregation, and likely under a far broader range of
6 circumstances as well.”); *Norwood v. Lockyer*, 390 F. App’x 762, 763 (9th Cir. 2010)
7 (finding that “limited law library access, being moved to different cells, [and] temporary
8 lockdowns” are not “out of the ordinary for prison life [. . .] that would have made it
9 ‘impossible’ to file on time” and thus not a basis for equitable tolling).

10 Petitioner also has not identified what efforts or tasks he was unable to perform as a
11 result of the lack of law library access during his time at the DSH that caused the Petition
12 to be untimely. Petitioner has not explained the duration of when he lacked access to the
13 law library while at the DSH or how any unspecified period during which he lacked access
14 to the law library at the DSH actually precluded him from timely pursuing state and federal
15 habeas relief.⁴ *See Nguyen v. Yates*, No. CV-09-4128-VAP-MAN, 2010 WL 2569246, at
16 *12 (C.D. Cal. Apr. 2010) (finding that the petitioner’s failure to identify efforts unable to
17 perform due to limited law library access and failure to explain how the limited law library
18 access precluded him from timely filing petition were part of the reason to not find
19 equitable tolling), report and recommendation adopted, No. CV-09-4128-VAP-MAN,
20 2010 WL 2572607 (C.D. Cal. June 2010). As such, the Court cannot ascertain from his
21 allegations, even if they are liberally construed and assumed to be true, that any limitations
22 on his law library access caused the delay in filing his state or federal petitions. *Bachmeier*
23 *v. Adams*, No. C07-02924-JF-PR, 2008 WL 4078403, at *2 (N.D. Cal. Aug. 2008).
24 Accordingly, it is recommended that the Court find that Petitioner’s alleged lack of law
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26 ⁴ As Respondent pointed out, Petitioner only completed the §2254 Habeas Petition form and attached his
27 California Supreme Court petition, which was filed by former counsel years earlier in August 2017, as the
28 argument to support his grounds for relief. (*See* ECF Nos. 1; 9-1 at 7–8.) Petitioner did not provide any
addition materials that required legal research that would indicate that he could not have filed his Petition
before the statute of limitations expired. (*See id.*)

1 library access during his time at the DSH is insufficient to establish the extraordinary
2 circumstances required for entitlement to equitable tolling.

3 Additionally, Petitioner maintained in his declaration that he is “completely
4 [unknowledgeable] of the law and legal processes” and that he “ha[s] been doing any and
5 everything that [he] can [do] to diligently pursue post-conviction relief from my
6 unconstitutional conviction and sentence.” (ECF No. 1-7 at 2.) However, “a pro se
7 petitioner’s lack of legal sophistication is not, by itself, an extraordinary circumstance
8 warranting equitable tolling.” *Raspberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir.2006);
9 *see also Ford v. Pliler*, 590 F.3d 782, 789 (9th Cir. 2009) (“[E]quitable tolling requires a
10 petitioner to show that some ‘extraordinary circumstance[] beyond [his] control’ caused
11 his late petition, [. . .], and this standard has never been satisfied by a petitioner’s confusion
12 or ignorance of the law alone.”); *Bartholomew v. Carey*, 308 F. App’x 57, 58 (9th Cir.
13 2009) (“[A] pro se petitioner’s lack of legal sophistication is not, by itself, an extraordinary
14 circumstance warranting equitable tolling.”).

15 Further, Petitioner claimed that he depends on inmate assistance in preparing his
16 court documents and that as soon as he obtain assistance, he “immediately took action.”
17 (ECF No. 1-7.) However, the Ninth Circuit has explained that Petitioner’s reliance on the
18 assistance of other inmates is not in itself an extraordinary circumstance, “given the
19 vicissitudes of prison life.” *See Chaffer v. Prosper*, 592 F.3d 1046, 1049 (9th Cir. 2010)
20 (rejecting petitioner’s argument that delay in filing habeas petition was justified due to
21 petitioner’s “pro se status, a prison library that was missing a handful of reporter volumes,
22 and reliance on helpers who were transferred or too busy to attend to his petitions”); *see*
23 *also Baker v. California Dept. of Corr.*, 484 Fed. Appx. 130, 131 (9th Cir. 2012) (under
24 Ninth Circuit precedent, “[l]ow literacy levels, lack of legal knowledge, and need for some
25 assistance to prepare a habeas petition are not extraordinary circumstances to warrant
26 equitable tolling of an untimely habeas petition”); *Wilson v. Bennett*, 188 F. Supp. 2d 347,
27 353–54 (S.D.N.Y. 2002) (allegations that the petitioner lacked legal knowledge and had to
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1 rely on other prisoners for legal advice and in preparing his papers “cannot justify equitable
2 tolling,” as such circumstances are not “extraordinary”).

3 Accordingly, IT IS RECOMMENDED that the Court find that Petitioner has failed
4 to demonstrate that extraordinary circumstances exist to support his equitable tolling claim.

5 ii. Pursuing his Rights Diligently

6 Even if Petitioner demonstrated that an extraordinary circumstance stood in his way
7 and prevented him from filing, Petitioner would still have to show that he had been
8 pursuing his rights diligently. *See Holland*, 560 U.S. at 649 (“We have previously made
9 clear that a ‘petitioner’ is ‘entitled to equitable tolling’ only if he shows ‘(1) that he has
10 been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in
11 his way’ and prevented timely filing.”); *Pace*, 544 U.S. at 418–19 (finding that the
12 petitioner had the burden of establishing both elements for equitable tolling and that failure
13 to prove either element disqualifies the petitioner for equitable tolling). “The diligence
14 required for equitable tolling is reasonable diligence, not ‘maximum feasible diligence.’”
15 *Bravo v. Neotti*, No. 12CV571-DMS PCL, 2013 WL 3929999, at *4 (S.D. Cal. July 2013)
16 (citing *Holland*, 560 U.S. at 653).

17 Petitioner indicated that he has “been doing any and everything that [he] can [do] to
18 diligently pursue post-conviction relief” and that as “soon as [he] was able to get some
19 assistance in preparing the writ [he] immediately took action.” (ECF No. 1-7 at 2.)
20 However, Petitioner did not set forth any allegations other than his conclusory statements
21 regarding his own diligence and has failed to show that he diligently pursued his rights.
22 *See Rodriguez v. Evans*, No. C-05-4560-JP-PR, 2007 WL 951820, at *6 (N.D. Cal. Mar.
23 2007) (no equitable tolling when petitioner had access to his legal materials two months
24 prior to the expiration of AEDPA’s one-year limitations period and did not allege that he
25 was denied access to his legal materials despite his requests).

26 The CDCR forms provided in his Petition, which Petitioner appears to attach to
27 demonstrate his attempts to locate legal documents and materials, are dated March 28, 2019
28 through January 15, 2020. (ECF No. 1-6 at 1–9.) By that time, the one-year statute of

1 limitations had already expired. In addition, Petitioner had approximately eight to nine
2 months prior to his transfer to the DSH to prepare his habeas corpus petition. Petitioner
3 failed to demonstrate his diligence in pursuing his rights during this time and whether there
4 were any efforts expended in conducting legal research, synthesizing the relevant factual
5 records, and drafting his substantive petition within the first eight to nine months of the
6 statute of limitations period.⁵ *See Smith*, 953 F.3d at 599 (finding that the Plaintiff “must
7 show that he has been reasonably diligent in pursuing his rights not only while an
8 impediment to filing caused by an extraordinary circumstance existed, but before and after
9 as well, up to the time of filing his claim in federal court. [. . .] it is not enough for a
10 petitioner seeking an exercise of equitable tolling to attempt diligently to remedy his
11 extraordinary circumstances; when free from the extraordinary circumstance, he must also
12 be diligent in actively pursuing his rights.”). Petitioner also did not file an opposition, thus
13 failing to explain the circumstances surrounding his diligence in preparing his Petition.

14 Therefore, no basis exists to conclude that Petitioner’s federal petition was delayed
15 despite his diligent efforts to present his claims in state or federal post-conviction
16 proceedings. *Bachmeier*, 2008 WL 4078403, at *2. “Without presenting more specific
17 allegations that demonstrate that the delay in his petition was caused by extraordinary
18 circumstances beyond his control, as well as allegations of his own diligence, Petitioner is
19 not entitled to equitable tolling of the limitations period.” *Id.*

20 Accordingly, IT IS RECOMMENDED that the Court find that Petitioner has failed
21 to demonstrate that he pursued his rights diligently to support his equitable tolling claim.

22 iii. Equitable Tolling Conclusion

23 Petitioner did not oppose Respondent’s Motion to Dismiss and thus failed to address
24 why he should be entitled to equitable tolling given Respondent’s assertion to the contrary.

25
26 ⁵ Petitioner had his legal materials for the eight to nine months prior to his transfer to the DSH. (*See*
27 Section III(A)(3)(b)(i).) However, Petitioner only completed the §2254 Habeas Petition form and attached
28 his California Supreme Court petition, which was filed by former counsel years earlier in August 2017,
as the argument to support his grounds for relief. (*See* ECF No. 1.) Thus, the record shows that Petitioner
could have timely filed his Petition.

1 (See Docket.) When given an opportunity to explain the circumstances surrounding the
2 untimeliness of his Petition, he declined to do so. Accordingly, based on the reasoning
3 detailed above, IT IS RECOMMENDED that the Court find that Petitioner is not entitled
4 to any equitable tolling, since Petitioner has failed to meet his burden of establishing that
5 his failure to timely file the Petition was the result of extraordinary circumstances beyond
6 his control and that he had pursued his rights diligently. See *Espinoza-Matthews*, 432 F.3d
7 at 1026 (petitioner “bears the burden of showing that equitable tolling is appropriate”);
8 *Phuoc Luu v. Beard*, No. 13CV1182-MMA-RBB, 2014 WL 2616878, at *13 (S.D. Cal.
9 June 2014) (finding that petitioner was not entitled to equitable tolling of the statute of
10 limitations, where he did not oppose respondent’s motion to dismiss and did not allege any
11 facts in his petition for writ of habeas corpus explaining his delayed filing of the petition).

12 4. Miscarriage of Justice Exception

13 a. Legal Standard

14 Under the “fundamental miscarriage of justice” exception to the AEDPA limitation
15 period, a habeas petitioner may pursue constitutional claims on the merits “notwithstanding
16 the existence of a procedural bar to relief.” *McQuiggin v. Perkins*, 569 U.S. 383, 392
17 (2013). In rare and extraordinary circumstances, a plea of actual innocence can serve as a
18 gateway through which a petitioner may pass to overcome the one-year statute of
19 limitations applicable to federal habeas petitions under AEDPA. *Id.* at 386; see also *Lee*
20 *v. Lampert*, 653 F.3d 929, 934–37 (9th Cir. 2011) (en banc). To show actual innocence,
21 the petitioner must meet the threshold requirement set forth in *Schlup v. Delo*, 513 U.S.
22 298 (1995). This requires a petitioner to “support his allegations of constitutional error
23 with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy
24 eyewitness accounts, or critical physical evidence—that was not presented at trial.” *Id.* at
25 324. Further, a petitioner must “persuade[] the district court that, in light of the new
26 evidence, no juror, acting reasonably, would have voted to find him guilty beyond a
27 reasonable doubt.” *McQuiggin*, 569 U.S. at 386 (quoting *Schlup*, 513 U.S. at 329 [noting
28 the miscarriage of justice exception only applies to cases in which new evidence shows “it

1 is more likely than not that no reasonable juror would have convicted the petitioner”]).
2 This exacting standard “permits review only in the extraordinary case, but it does not
3 require absolute certainty about the petitioner’s guilt or innocence.” *Larsen v. Soto*, 742
4 F.3d 1083, 1095 (9th Cir. 2013). Critically, “actual innocence,” for purposes of *Schlup*,
5 “means factual innocence, not mere legal insufficiency.” *Bousley v. United States*, 523
6 U.S. 614, 623 (1998).

7 b. Analysis

8 Petitioner did not argue that he was “actually innocent” of the crimes for which he
9 was convicted. (*See* ECF No. 1 [raising claims of witness intimidation at trial, ineffective
10 assistance of counsel, and prosecution’s refusal to timely provide required discovery in
11 violation of due process rights].) Further, Petitioner has not presented new evidence that
12 warrants such a finding. Thus, Petitioner is not entitled to tolling pursuant to the actual
13 innocence exception.

14 5. Conclusion

15 Accordingly, IT IS RECOMMENDED that the Court find that the Petition is not
16 timely under 28 U.S.C. § 2244(d)(1). As discussed above, statutory tolling does not render
17 the Petition timely, as Petitioner’s state habeas petitions were filed after the statute of
18 limitations had expired, and Petitioner has not met the heavy burden to prove he is entitled
19 to equitable tolling. Further, Petitioner did not claim to fall within the miscarriage of justice
20 exception. Thus, the Petition is barred as untimely under AEDPA’s statute of limitations
21 and must be dismissed.

22 **IV. CONCLUSION AND RECOMMENDATION**

23 For the reasons stated above, **IT IS HEREBY RECOMMENDED** the Court issue
24 an Order: (1) approving and adopting this Report and Recommendation; and
25 (2) **GRANTING** Respondent’s Motion to Dismiss the Petition (ECF No. 9); and
26 (3) directing that judgment be entered dismissing the Petition.

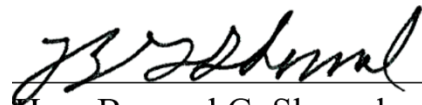
27 **IT IS HEREBY ORDERED** that no later than **October 7, 2022**, any party to this
28 action may file written objections with the Court and serve a copy on all parties. The

1 document should be captioned “Objections to Report and Recommendation.”

2 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with
3 the Court and served on all parties by **October 21, 2022**. The parties are advised that
4 failure to file objections within the specified time may waive the right to raise those
5 objections may waive the right to raise those objections on appeal of the Court's order. *See*
6 *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153,
7 1157 (9th Cir. 1991).

8 **IT IS SO ORDERED.**

9 Dated: September 15, 2022

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11 Hon. Bernard G. Skomal
12 United States Magistrate Judge
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