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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 WENDY H. DOWNS,

12 Petitioner,

13 v.

14 KATHLEEN ALLISON, CDCR  
15 Secretary, et al.,

16 Respondents.

Case No.: 22-cv-2073-MMA-DDL

**REPORT AND  
RECOMMENDATION FOR ORDER  
GRANTING MOTION TO DISMISS**

**[Dkt. No. 6]**

17 This Report and Recommendation is submitted to United States District Judge  
18 Michael M. Anello pursuant to 28 U.S.C. § 636(b) and Civil Local Rules 72.2.d and HC.2  
19 of the United States District Court for the Southern District of California.

20 On December 30, 2022, Petitioner Wendy H. Downs (“Petitioner”), a misdemeanant  
21 on county supervised probation proceeding pro se, filed a Petition for Writ of Habeas  
22 Corpus pursuant to 28 U.S.C. § 2254 (“Petition”) challenging her misdemeanor conviction  
23 for driving under the influence of drugs, with a special allegation of a prior conviction of  
24 driving under the influence within the previous 10 years. Dkt. No. 1. The Petition raises  
25 eight grounds for relief, as follows: (1) Petitioner was denied the right to effective  
26 assistance of counsel guaranteed by the Sixth Amendment due to structural errors in the  
27 indigent defense delivery system; (2) Petitioner was denied the right to effective assistance  
28 of counsel for a jury trial due to trial counsel errors, and her Fifth and Eighth Amendment

1 rights were violated by acts brought about by the prior violation alleged; (3) Petitioner was  
2 denied the right to effective assistance of counsel on appeal due to appellate counsel errors;  
3 (4) Petitioner was denied the right to due process and a fair trial guaranteed by the Sixth  
4 Amendment due to prosecutorial errors, which caused a violation of Petitioner’s Fifth and  
5 Eighth Amendment rights; (5) Petitioner’s constitutional right to an impartial jury  
6 guaranteed by the Sixth Amendment was violated by improper jury bias; (6) Petitioner’s  
7 constitutional right to meaningful access to court and legal resources guaranteed by the  
8 First Amendment has been violated by COVID-19-related closures and restricted access to  
9 the court and legal resources; (7) Petitioner’s Sixth Amendment rights to due process, a  
10 fair trial, effective assistance of trial counsel, effective assistance of appellate counsel, and  
11 an impartial jury were violated by the cumulative errors alleged in grounds 1 through 6 of  
12 the Petition, resulting in violations of Petitioner’s First, Fifth, and Eighth Amendment  
13 rights; and (8) Petitioner was denied the constitutional right to habeas corpus proceedings,  
14 including full and factual development of the claims within the state trial and appellate  
15 court petitions because the San Diego Superior Court stated a prima facie case was  
16 determined for each claim yet did not issue an order to show cause. *See* Dkt. No. 1 at 6-9,  
17 24-27.<sup>1</sup>

18 On March 3, 2023, pursuant to this Court’s order requiring a response to the Petition,  
19 Respondents filed the instant Motion to Dismiss the Petition for Writ of Habeas Corpus  
20 (“Motion to Dismiss”) as untimely and barred under the applicable statute of limitations.  
21 Dkt. No. 6. On March 29, 2023, Petitioner filed a response in opposition (“Opposition”)  
22 to the Motion to Dismiss. Dkt. No. 7. On May 4, 2023, Respondents filed a reply brief  
23 (“Reply”) in further support of their Motion to Dismiss. Dkt. No. 9. For the reasons stated  
24 herein, the Court **RECOMMENDS** that the Motion to Dismiss be **GRANTED**  
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28 <sup>1</sup> All docket references are to the document and page numbers generated by the CM/ECF system.

1 **WITHOUT LEAVE TO AMEND** and that the Petition be **DISMISSED WITH**  
 2 **PREJUDICE.**

3 **I.**

4 **FACTUAL AND PROCEDURAL HISTORY**

5 On January 23, 2019, a California Highway Patrol officer observed Petitioner  
 6 speeding on westbound Interstate 8 in San Diego, California at approximately 110 miles  
 7 per hour and initiated a traffic stop. Dkt. No. 1-2 at 17. After further observing Petitioner’s  
 8 appearance and performing a series of field sobriety tests, the officer arrested Petitioner on  
 9 suspicion of driving under the influence. *Id.* Subsequent blood testing revealed Petitioner  
 10 was under the influence of amphetamine and methamphetamine. *Id.*

11 Criminal proceedings were initiated against Petitioner in the San Diego Superior  
 12 Court (“Superior Court”) (Case No. M256699), and a jury trial ensued. *Id.* at 18. On  
 13 February 6, 2020, a jury found Petitioner guilty of one count of misdemeanor driving under  
 14 the influence, and the court found her guilty of one infraction for speeding at a rate over  
 15 100 miles per hour. *Id.* Petitioner was sentenced to five years’ probation with nine days  
 16 in custody and ordered to pay \$2,635 in fines.<sup>2</sup> *Id.* Petitioner commenced the post-  
 17 conviction appeals process in state court, as follows:

Date	Event	Citation
August 25, 2020	Appellate Counsel William R. Burgener filed an opening brief for direct appeal to the Superior Court’s Appellate Division (“Appellate Division”), seeking independent review of the record for arguable issues pursuant to <i>People v. Wende</i> , 25 Cal. 3d. 436 (1979) (Case No. CA282993).	Dkt. No. 1 at 2; Dkt. No. 1-15 at 148-156.

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26 <sup>2</sup> In her Opposition, Petitioner notes that “all previously stayed programs and fines  
 27 were lifted by the San Diego Superior Court” on April 19, 2021. Dkt. No. 7-1 at 13; *see*  
 28 Dkt. No. 1-9 at 6. The record before the Court reflects that all programs, fines, and fees in  
 Petitioner’s case were stayed as of February 24, 2020. *See* Dkt. No. 1-9 at 1.

Date	Event	Citation
October 2, 2020	Clerk of Court filed Appellate Division's decision affirming Petitioner's conviction.	Dkt. No. 1 at 2; Dkt. No. 1-15 at 137, 140.
November 3, 2020	Clerk of Appellate Division filed remittitur stating the decision had become final.	Dkt. No. 1-15 at 135-136.
April 8, 2022	Petitioner filed a petition for writ of habeas corpus in Superior Court (Case No. HC25602).	Dkt. No. 1 at 3; Dkt. No. 1-17 at 17-88.
June 16, 2022	Superior Court denied petition for writ of habeas corpus.	Dkt. No. 1 at 3; Dkt. No. 1-17 at 150-159.
August 10, 2022	Petitioner filed a petition for writ of habeas corpus in California Court of Appeal (Case No. D080769).	Dkt. No. 1 at 4; Dkt. No. 1-17 at 163-252.
September 13, 2022	California Court of Appeal denied petition for writ of habeas corpus.	Dkt. No. 1 at 4; Dkt. No. 1-17 at 267-269.
September 15, 2022	Petitioner filed a petition for review by California Supreme Court (Case No. S276400).	Dkt. No. 1 at 4; Dkt. No. 1-18 at 17-56.
November 16, 2022	California Supreme Court summarily denied petition for review.	Dkt. No. 1 at 4; Dkt. No. 1-18 at 178.

## II.

### STANDARD OF REVIEW

“[A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that [s]he is in custody in violation of the Constitution or laws or treaties of the United States.” *Reyes v. Allison*, No. 21-cv-00632-MMA (KSC), 2021 WL 5042124, at \*2 (S.D. Cal. Oct. 29, 2021); 28 U.S.C. § 2254(a). Rule 4 of the Rules Governing Section 2254 Cases requires the Court to dismiss a petition for habeas corpus “[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court.” *Reyes*, 2021 WL 5042124, at \*2.

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**III.**

**DISCUSSION**

**A. Timeliness of Petition**

The timeliness of a petition for writ of habeas corpus is governed by the habeas corpus provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which provide as follows:

A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

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

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

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

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

28 U.S.C. § 2244(d)(1). As explained further herein, the Petition is time-barred under Section 2244(d)(1)(A).

In reviewing the timeliness of a habeas petition under Section 2244(d)(1)(A), a court must first determine “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” The California Rules of Court are instrumental to a court’s determination in this regard. Appeals of misdemeanor convictions in the trial court must first be taken to the appellate division of the superior court (“Appellate Division”) from which the appeal is taken. *See* Cal. Pen.

1 Code § 1466. Thereafter, Rules 8.1000–8.1018, govern the transfer of Appellate Division  
2 cases to the California Court of Appeal.<sup>3</sup> Under Rule 8.1002, the Court of Appeal may  
3 order a case to be transferred to it “if it determines that transfer is necessary to secure  
4 uniformity of decision or to settle an important question of law,” and may do so in one of  
5 three ways. First, a party may file an application with the Appellate Division to certify the  
6 case for transfer to the Court of Appeal within 15 days after the Appellate Division’s  
7 decision is sent to the parties by the court clerk. Cal. R. Ct. 8.1002(1); *see* Cal. R. Ct.  
8 8.1005(b)(1)(A). Second, a party may petition the Court of Appeal to transfer a case from  
9 the Appellate Division to the Court of Appeal. Cal. R. Ct. 8.1002(2); *see* Cal. R. Ct. 8.1006.  
10 However, a party must file such petition no later than 15 days after the Appellate Division’s  
11 decision becomes final and may do so “only if an application for certification for transfer  
12 was first filed in the appellate division and denied.” Cal. R. Ct. 8.1006(a)–(b). Finally, the  
13 Court of Appeal may transfer the case on its own motion within 30 days after the Appellate  
14 Division decision is final. Cal. R. Ct. 8.1002(3); *see* Cal. R. Ct. 8.1008(a)(1)(B). If no  
15 action is taken to seek review of an Appellate Division decision, then the decision “is final  
16 30 days after the decision is sent by the court clerk to the parties.” Cal. R. Ct. 8.888(a)(1).

17 *Thomas v. Gonzalez*, No. 19cv1632-H (BLM), 2020 WL 1624406, at \*2 (S.D. Cal.  
18 Apr. 2, 2020), is instructive. In *Thomas*, a state probationer who had been convicted of a  
19 misdemeanor appealed his conviction and sentence to the Appellate Division of the  
20 Superior Court. On May 18, 2018, the Appellate Division issued an order affirming the  
21 conviction.<sup>4</sup> *Id.* The district court recognized that “[w]hen a petitioner fails to seek review  
22 in the state appellate court, however, the conviction is final upon the expiration for doing  
23 so.” *Id.* In other words, at the core of the analysis is the time during which the petitioner—

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26 <sup>3</sup> Unless otherwise specified, all further references herein to “Rules” shall mean the  
California Rules of Court.

27 <sup>4</sup> The *Thomas* court notes that the Appellate Division’s order affirming the conviction  
28 is dated May 17, 2018, but that it was file-stamped on May 18, 2018, which is the relevant  
date from which the court determines the conclusion of direct review.

1 not the Court of Appeal—may act. The district court, referencing Rule 8.1006(b)(1),  
2 determined that the petitioner had 15 days from the Appellate Division’s May 18, 2018,  
3 order to file a petition in the Court of Appeal to transfer his case to that court, but instead  
4 allowed the time to expire without filing a petition. *Id.* at 5-6. The expiration of the 15-  
5 day window resulted in the Appellate Division’s order becoming final on June 4, 2018, and  
6 the one-year limitation period under AEDPA to file a federal habeas petition commenced  
7 the next day on June 5, 2018.<sup>5</sup> *Id.* at 6. Moreover, petitioner’s failure to file a petition for  
8 transfer to the Court of Appeal deprived him of the benefit of the 90-day period to seek  
9 certiorari in the United States Supreme Court, which lacked jurisdiction to review the  
10 Appellate Division’s decision because it can only review “‘judgments of a “state court of  
11 last resort” or of a lower state court if the “state court of last resort” has denied discretionary  
12 review.’” *Id.*, quoting *Gonzalez v. Thaler*, 565 U.S. 134 (2012).

13 The instant case is analogous to *Thomas*. Here, Petitioner initiated direct review of  
14 her conviction in the Appellate Division, and the court clerk filed the decision affirming  
15 the trial court’s judgment on October 2, 2020. Dkt. No. 1-15 at 137. Under Rule  
16 8.1005(b)(1)(A), Petitioner had 15 days—until October 19, 2020—to file an application  
17 requesting that the Appellate Division certify her case for transfer to the Court of Appeal.  
18 The record before this Court does not reflect that Petitioner filed any such application, and  
19 as such, she was not entitled to file a petition for transfer in the Court of Appeal.  
20 Additionally, Petitioner may not reap the benefit of the 90-day period for seeking review  
21 by the United States Supreme Court because Petitioner did not seek direct review by the  
22 California Supreme Court as the “state court of last resort.” *See Gonzalez*, 565 U.S. at 154.

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26 <sup>5</sup> Some deadlines may appear to exceed the number of days specified by the Rules.  
27 Under Rule 1.10(b), “if the last day for the performance of any act that is required by these  
28 rules to be performed within a specific period of time falls on a Saturday, Sunday, or other  
legal holiday, the period is extended to and includes the next day that is not a holiday.”



1 Therefore, under *Thomas*, the time for Petitioner to seek further review of her conviction  
2 expired on October 19, 2020.

3 AEDPA’s statute of limitations begins to run “from the *latest* of” the expiration of  
4 time for seeking direct review or the date on which the Appellate Division’s decision  
5 became final by the conclusion of direct review. 28 U.S.C. § 2244(d)(1) (emphasis added).  
6 The Appellate Division decision became final 30 days after the court clerk sent it to the  
7 parties, and the remittitur informing the parties that the decision had become final was filed  
8 on November 3, 2020.<sup>6</sup> As the latest of the two dates, the statute of limitations began to  
9 run the following day on November 4, 2020. Accordingly, Petitioner had until November  
10 4, 2021, to file a federal habeas petition. However, Petitioner filed the Petition in this Court  
11 on December 30, 2022—more than one year after the limitations period expired. Dkt. No.  
12 1-2. As such, the Petition is time-barred.

13 **B. Tolling of Limitations Period**

14 Petitioner contends that she is entitled to statutory and equitable tolling of AEDPA’s  
15 limitations period. The Court analyzes each argument in turn.

16 **1. Statutory Tolling**

17 AEDPA’s one-year statute of limitations is subject to statutory tolling. “The time  
18 during which a properly filed application for State post-conviction or other collateral  
19 review with respect to the pertinent judgment or claim is pending shall not be counted  
20 toward any period of limitation under this subsection.” 28 U.S.C. § 2244(d)(2). This  
21 provision is inapplicable here because Petitioner did not initiate collateral review until she  
22 filed a petition for writ of habeas corpus in the Superior Court on April 8, 2022—more  
23 than five months after AEDPA’s statute of limitations ran.

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26 <sup>6</sup> To be sure, 30 days after the date on which the Appellate Division decision was sent  
27 to the parties is November 2, 2020. However, the record reflects that the remittitur, which  
28 states “the order or opinion has now become final,” was dated and file-stamped on  
November 3, 2020.



1 Petitioner asserts that she is entitled to statutory tolling because she “had a direct  
2 appeal case ‘pending’ in San Diego Superior Court, Case No. M256699,” from October 2,  
3 2020, when the Appellate Division affirmed her conviction, until April 19, 2021, when the  
4 Superior Court lifted the stay of all programs, fines, and fees. Dkt. No. 7-1 at 20-21.  
5 Petitioner provides no authority for the proposition that a stay of her sentence conditions,  
6 which remained effective after the Appellate Division’s decision became final, renders her  
7 case “pending” within the meaning of AEDPA’s statutory tolling provision. Moreover,  
8 Petitioner conflates the requirement under AEDPA’s statutory tolling provision that an  
9 “application for State post-conviction or other collateral review” be “pending” with the  
10 trial court’s imposition of a stay of her sentence conditions. The stay of Petitioner’s  
11 sentence conditions between October 2, 2020, and April 19, 2021, is neither a pending  
12 direct appeal case, as Petitioner describes it, nor an “application for State post-conviction  
13 or other collateral review.” Petitioner’s post-conviction direct review ended on November  
14 3, 2020, when the Appellate Division decision became final, and she did not seek other  
15 post-conviction or collateral review in state court for the duration of AEDPA’s limitations  
16 period. To the extent Petitioner argues that direct review concluded when the California  
17 Supreme Court denied her petition for review on November 16, 2022, thereby triggering  
18 AEDPA’s limitations period the following day, Petitioner has not provided authority to  
19 support such a finding. *See* Dkt. No. 7-1 at 20. Therefore, statutory tolling under Section  
20 2244(d)(2) is not available here. *See Thomas*, 2020 WL 1624406, at \*7 (holding that  
21 statutory tolling was not available where petitioner made no collateral attacks on his  
22 conviction).

## 23 **2. Equitable Tolling**

24 “Equitable tolling may be available ‘[w]hen external forces, rather than a petitioner’s  
25 lack of diligence, account for the failure to file a timely claim.’” *McMonagle v. Meyer*,  
26 802 F.3d 1093, 1099 (9th Cir. 2015), quoting *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th  
27 Cir. 1999). “The petitioner bears the burden of demonstrating that he or she is entitled to  
28 equitable tolling.” *Stancl v. Clay*, 692 F.3d 948, 953 (9th Cir. 2012), citing *Rasberry v.*

1 *Garcia*, 448 F.3d 1150, 1153 (9th Cir. 2006). Under *Holland v. Florida*, 560 U.S. 631,  
2 649 (2010), a petitioner is entitled to equitable tolling “only if he shows (1) that he has  
3 been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in  
4 his way and prevented timely filing” [internal quotation marks and citations omitted]. See  
5 *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (finding that petitioner did not establish  
6 the requisite diligence and was therefore not entitled to equitable tolling because the claims  
7 asserted in his petition were available to him several years prior to the filing of his state  
8 and federal petitions).

9 Within the chronology of events leading to the filing of the instant Petition,  
10 Petitioner refers to events that occurred prior to and after the Appellate Division’s decision  
11 affirming her conviction on October 2, 2020. Among them, Petitioner discusses access to  
12 public resources, such as the Superior Court and public libraries, during the COVID-19  
13 emergency. According to Petitioner, the Superior Court and San Diego public libraries,  
14 including the San Diego Law Library, closed on or around March 16, 2020, in response to  
15 the rise of COVID-19 cases. See Dkt. No. 7-1 at 10. However, the Superior Court re-  
16 opened for limited in-person services on May 26, 2020, and the libraries re-opened with  
17 limited access by October 2020, and with expanded library access by June 2021. See *id.*  
18 at 10-11, 14.

19 Given the relatively short period of the Superior Court’s closure, Petitioner was not  
20 prejudiced such that she was prevented from diligently pursuing her right to seek timely  
21 collateral review of her conviction. In fact, Petitioner availed herself of the Superior Court  
22 on several occasions throughout the limitations period. For example, on December 3, 2020,  
23 Petitioner sent a letter to the Superior Court to request an appearance before a judge. *Id.*  
24 at 11. On December 21, 2020, Petitioner states she returned to court, where she was told  
25 that the “appeal process closed since Remitter [sic] issued in beginning of November closes  
26 appeal process.” *Id.* at 12. On March 18, 2021, Petitioner states that she wrote a letter to  
27 a judge and brought it with her to a March 22, 2021, court date. *Id.* at 13. Based on the  
28 foregoing, Petitioner’s access to the Court was not significantly impeded by the COVID-

1 19 emergency such that she could not initiate collateral review by filing a habeas petition  
2 in Superior Court.

3         Additionally, Petitioner has not established that the public library’s limited access  
4 affected her ability to timely prepare and submit her habeas petition. Although Petitioner  
5 discusses the re-opening and expansion of the public libraries’ services between April 1,  
6 2021, and August 2, 2021, she does not explain what efforts she made to access library  
7 resources or what, if anything, prohibited her from accessing the libraries during this time.  
8 *See id.* at 13-14.

9         Finally, Petitioner acknowledges that her “due diligence, despite COVID-19  
10 emergency closures, is well documented from November 10, 2021.” *Id.* at 28. Assuming  
11 *arguendo* that this is an accurate representation, it weighs against application of equitable  
12 tolling because it means the record does not reflect that Petitioner acted with due diligence  
13 prior to the expiration of the statute of limitations period. In fact, Petitioner does not  
14 describe what progress she made, if any, in preparing her petition for filing in Superior  
15 Court during the limitations period. Moreover, Petitioner would have been aware of at  
16 least some of the grounds asserted in her petition as early as February 6, 2020, when her  
17 jury trial ended with a conviction. With respect to her claims concerning appellate counsel  
18 and proceedings, Petitioner would have been aware of the facts underlying the claims as  
19 early as August 25, 2020, when the opening brief was filed in the Appellate Division. *See*  
20 *Dkt. No. 1-15 at 149-156.* The Court recognizes that Petitioner is proceeding as a pro se  
21 litigant, but “a pro se petitioner’s lack of legal sophistication is not, by itself, an  
22 extraordinary circumstance warranting equitable tolling.” *Rasberry*, 448 F.3d at 1154. The  
23 Court concludes that Petitioner neither exercised due diligence in pursuing her right to file  
24 a timely petition for writ of habeas corpus, nor was she impeded from doing so by any  
25 “extraordinary circumstance.” Accordingly, Petitioner is not entitled to equitable tolling  
26 of AEDPA’s statute of limitations.

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**IV.**

**CONCLUSION AND RECOMMENDATION**

For the foregoing reasons, **IT HEREBY RECOMMENDED** that the District Court issue an Order:

1. Granting Respondents’ Motion to Dismiss without leave to amend;
2. Dismissing the Petition for Writ of Habeas Corpus with prejudice; and
3. Directing the Clerk of Court to close the case.

**IT IS ORDERED** that no later than **June 6, 2023**, the parties may file written objections to this Report and Recommendation with the Court and shall serve a copy on all parties. The document should be captioned “Objections to Report and Recommendation.” The parties are advised that failure to file objections within the specified time may waive the right to raise those objections on appeal of the Court’s Order.

**IT IS SO ORDERED.**

Dated: May 23, 2023



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Honorable David D. Leshner  
United States Magistrate Judge