



1 A federal court may entertain an untimely claim if a petitioner makes a showing of actual  
2 innocence. *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1928 (2013). To qualify for the equitable  
3 exception to the timeliness bar based on actual innocence, a petitioner “must show that it is more  
4 likely than not that no reasonable juror would have convicted him in the light of the new evidence.”  
5 133 S. Ct. at 1935 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). “[T]he emphasis on ‘actual  
6 innocence’ allows the reviewing tribunal also to consider the probative force of relevant evidence  
7 that was either excluded or unavailable at trial.” *Schlup*, 513 U.S. at 327-28. “[T]he gateway should  
8 open only when a petition presents ‘evidence of innocence so strong that a court cannot have  
9 confidence in the outcome of the trial unless the court is also satisfied that the trial was free of  
10 nonharmless constitutional error.’” *McQuiggin*, 133 S. Ct. at 1936 (quoting *Schlup*, 513 U.S. at  
11 316). “Unexplained delay in presenting new evidence bears on the determination whether the  
12 petitioner has made the requisite showing.” *Id.* at 1935.

13 Nash appears to be arguing that the letters prove the presentence investigation report was  
14 fabricated. This court is unable to discern how that is the case. Moreover, Nash’s conviction was  
15 the result of a guilty plea, which predated the preparation of the report. The Ninth Circuit has  
16 recognized that there is “a potential incongruity between the purpose of the actual innocence gateway  
17 announced in *Schlup* and its application to cases involving guilty (or no contest) pleas.” *Smith v.*  
18 *Baldwin*, 510 F.3d 1127, 1140 n.9 (9<sup>th</sup> Cir. 2007) (en banc). But even assuming that *Schlup* applies  
19 in such situations, the letter from Nash’s former attorney states little more than his opinion or belief  
20 that his former client did not act with wrongful intent in relation to the crime for which she was  
21 convicted. It hardly constitutes new exculpatory evidence.

22 Because petitioner has failed to establish that she may be entitled to equitable tolling and has  
23 not disputed the time calculations set forth in the court’s order to show cause (ECF No. 5), her  
24 petition shall be dismissed as untimely under 28 U.S.C. § 2244(d).

25 IT IS THEREFORE ORDERED that this action is DISMISSED with prejudice as untimely.

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IT IS FURTHER ORDERED that petitioner is denied a certificate of appealability.

IT IS FURTHER ORDERED that the clerk of the court shall enter judgment accordingly.

Dated October 12, 2016.

  
UNITED STATES DISTRICT JUDGE