UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 18 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

RUBEN MORENO HERRERA, Petitioner-Appellant, v. SECRETARY OF CORRECTIONS, Respondent-Appellee.	No. 18-56045 D.C. No. 2:17-cv-05874-CJC-JPR Central District of California, Los Angeles ORDER

Before: CANBY and WARDLAW, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012).

Any pending motions are denied as moot.

DENIED.

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RUBEN HERRERA, Petitioner, v. SECRETARY OF CORRECTIONS, Respondent.	Case No. CV 17-5874-CJC (JPR) **J U D G M E N T**

Pursuant to the Order Accepting Findings and Recommendations of U.S. Magistrate Judge,

IT IS HEREBY ADJUDGED that this action is dismissed with prejudice.

DATED: July 12, 2018

CORMAC J. CARNEY
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RUBEN HERRERA, Petitioner, v. SECRETARY OF CORRECTIONS, Respondent.	Case No. CV 17-5874-CJC (JPR) ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF U.S. MAGISTRATE JUDGE

The Court has reviewed the Petition and First Amended Petition, records on file, and Report and Recommendation of U.S. Magistrate Judge. See 28 U.S.C. § 636. On June 7, 2018, Petitioner filed objections, in which he mostly repeats arguments and attaches exhibits already considered in prior filings.[1] Some attachments, however, appear never to have been submitted to the state court and thus cannot be considered here. (See, e.g.,

[1] On April 9, 2018, the Court received notice from Petitioner that he had recently filed a habeas petition in the state supreme court. See also Cal. App. Cts. Case Info., https://appellatecases.courtinfo.ca.gov/ (search case no. S248049) (filed Apr. 4, 2018; signed Mar. 30, 2018) (last visited July 6, 2018). Because that petition was filed well after the AEDPA limitation period had expired, he is entitled to no statutory (or equitable) tolling for it. See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003).

Objs., pt. 10 at 19 (photograph), 35 (attorney authorization, in Spanish, signed by Petitioner),[2] 40-43 & 45 (correspondence from California Innocence Project));[3] see Cullen v. Pinholster, 563 U.S. 170, 181-82 (2011). Plaintiff's other arguments and evidence were thoroughly addressed and rejected in the R. & R., but some require brief discussion.

Petitioner suggests that the untimeliness of his Petition should be overlooked because he is "actual [sic] innocent" of victim Valeria H.'s "false allegations." (See Objs. at 101.) Her testimony would supposedly have been "discredit[ed]" by such "newly discovered" evidence as the "excluded" testimony of Petitioner's son (see, e.g., id. at 35-36, 40, 78, 82, 97) and pictures showing that she and Petitioner – her father – were "close" (see, e.g., id. at 52-53, 85, 86, 95-96). As discussed in the R. & R., most of this evidence is not actually new. (See R. & R. at 29-39.)

Moreover, the standard for an actual-innocence claim is strict: actual innocence means "factual innocence" as opposed to "mere legal insufficiency," and a petitioner must show that it is

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[2] In his earlier pleadings, Petitioner argued that he deserved tolling because he was "ignoran[t] . . . of the English language." (Opp'n at 46.) The Magistrate Judge rejected the argument because he had regularly demonstrated proficiency in English, given his many handwritten, English-language filings and letters. (R. & R. at 16-19.) In his objections, he admits in passing to having personally written the September 10, 2015 English-language letter to the California Supreme Court. (Objs. at 5.)

[3] The Court uses the pagination generated by its Case Management/Electronic Case Filing system for documents not consecutively paginated.

"more likely than not that no reasonable juror would have convicted him" in light of the "new evidence." See Bousley v. United States, 523 U.S. 614, 623 (1998); Schlup v. Delo, 513 U.S. 298, 321 (1995). Petitioner here claims that his son, an alleged "eyewitness" (Objs. at 35), would contradict Valeria H.'s testimony (id. at 97), but he fails to present a declaration or other evidence indicating how his son's testimony would refute the crimes he was convicted of or show that he was actually innocent. Even if such a declaration had been submitted, Petitioner's failure to present it to the state court would prevent the Court from considering it here. See Pinholster, 563 U.S. at 181-82.

At best, the son's purported proposed testimony – and apparently some family photographs – would have supported Petitioner's "character" and undermined Valeria H.'s (see id. at 35, 40, 52-53 78), but such evidence falls far short of the Schlup standard. See Bibbs v. Pfeiffer, No. CV 15-2365 PA (AFM), 2015 WL 10354777, at *8 (C.D. Cal. Dec. 11, 2015) (dismissing petition as untimely and rejecting actual-innocence claim in part because witness's allegedly "false accusation" was at best impeached by "new evidence," not "refuted"), accepted by 2016 WL 738271 (C.D. Cal. Feb. 23, 2016). Furthermore, Petitioner presents no evidence regarding his trial counsel's strategy for not calling his son to testify; even assuming he was willing and competent to do so, she could have reasonably believed that his testimony, as a minor who loved his dad, would not carry much weight. See Gentry v. Sinclair, 705 F.3d 884, 899-900 (9th Cir. 2013) (as amended) (upholding reasonableness of trial counsel's

failure to obtain witness when petitioner presented no relevant affidavits explaining that decision and it was possible witness would not have been "useful to the defense" or that "counsel [may have been] concerned about opening the door to damaging rebuttal").

In any event, as discussed in the R. & R. (see R. & R. at 34-37), the jury considered substantial evidence discrediting Valeria H. and still convicted Petitioner; he thus fails to show that it is more likely than not that no reasonable juror would have convicted him in light of the "newly discovered" evidence. See Bolin v. Grounds, No. SACV 11-00256 PSG (SS), 2011 WL 1692149, at *9 (C.D. Cal. Apr. 15, 2011) (rejecting actual-innocence claim because petitioner "failed to submit any new evidence demonstrating his factual innocence"; he "merely assert[ed] that his trial was 'contaminated' with false evidence 'manufactured by the prosecution'" (citation omitted)), accepted by 2011 WL 1672033 (C.D. Cal. May 4, 2011).[4]

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[4] Petitioner raises other claims and evidence, all of which were presented in earlier pleadings: his "28" character witnesses (see Objs. at 12, 34, 37, 39), the "false" testimony of Valeria H.'s husband (see id. at 14, 54, 64, 71, 84-85), and the fact that victim Rosa M. was menstruating at the time of the sexual abuse (see id. at 24, 61-63). They, like the claims and evidence discussed above, are conclusory or were already presented at trial. See Newman v. Warden, No. CV 16-04198 BRO (RAO), 2016 WL 7052025, at *1 (C.D. Cal. Dec. 5, 2016) (rejecting actual-innocence claim when petitioner identified two uncalled witnesses but failed to "describe what their testimony would have been had they testified, why the witnesses [were] reliable, or how their testimony would necessarily show that, in light of this new evidence, no reasonable juror would have convicted him"); George v. Allison, No. CV 11-5730-SJO (PLA), 2011 WL 7111912, at *7 (C.D. Cal. Dec. 14, 2011) (rejecting actual-innocence claim when petitioner's arguments "concern[ed] witness testimony and other

Having reviewed de novo those portions of the R. & R. to which Petitioner objects, the Court accepts the Magistrate Judge's findings and recommendations.

IT IS THEREFORE ORDERED that Judgment be entered denying the Petition and FAP as untimely, denying Petitioner's stay motion as moot, and dismissing this action with prejudice.

DATED: July 12, 2018

CORMAC J. CARNEY
U.S. DISTRICT JUDGE

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evidence that was presented to the jury" and "none of the assertions exonerate[d] him or prove[d] that a different individual committed the crimes for which he was convicted"), accepted by 2012 WL 261191 (C.D. Cal. Jan. 27, 2012).

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RUBEN HERRERA, Petitioner, v. SECRETARY OF CORRECTIONS, Respondent.	Case No. CV 17-5874-CJC (JPR) REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Cormac J. Carney, U.S. District Judge, under 28 U.S.C. § 636 and General Order 05-07 of the U.S. District Court for the Central District of California.

PROCEEDINGS

On August 8, 2017, Petitioner filed a motion for stay and abeyance, before he had filed a federal habeas petition. The Court addressed his premature motion on August 11, 2017, advising him that there was "nothing to stay" and that "nothing prevent[ed] him from immediately returning to state court" to exhaust any claims. He was directed to file a habeas petition within 30 days or the Court would deny the motion and

administratively close the case. On August 30, 2017, Petitioner constructively filed a Petition for Writ of Habeas Corpus by a Person in State Custody.[1] On September 28, 2017, Petitioner submitted for filing an "Additional Statement of Facts, and Grounds to Support Petition," which the Court on October 3 ordered filed as his First Amended Petition. On January 11, 2018, Respondent moved to dismiss, arguing that the Petition and FAP were untimely and, as to the FAP, partially unexhausted. On February 16, 2018, Petitioner filed opposition to Respondent's motion to dismiss and again moved for a stay and abeyance.[2] Respondent filed a reply on February 28, 2018.

For the reasons discussed below, the Court recommends that Respondent's motion to dismiss the Petition and FAP be granted, Petitioner's stay motion be denied as moot, and judgment be entered denying the petitions as untimely and dismissing this action with prejudice.

PETITIONER'S CLAIMS

I. Petitioner's trial counsel was ineffective for failing to investigate and prepare a meaningful defense; present

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[1] Absent evidence showing that a petition was given to prison authorities for mailing at some later time, a pro se petitioner's habeas petition is constructively filed on the day it was signed. See Roberts v. Marshall, 627 F.3d 768, 770 n.1 (9th Cir. 2010). Here, Petitioner signed his Petition and its corresponding proof of service on August 30, 2017, and presumably gave it to prison authorities that day. (See FAP at 17 (for nonconsecutively paginated documents, the Court uses the pagination provided by its Case Management/Electronic Case Filing system); Pet. at 12.) The Court therefore deems that to be its constructive filing date.

[2] Petitioner's August 8, 2017 stay motion was deemed moot in the Court's September 19, 2017 Order Requiring Response to Petition.

witnesses, evidence, and Petitioner's own testimony; "confront" a violation of Petitioner's rights under Miranda v. Arizona, 384 U.S. 436 (1966); address exculpatory DNA and "medical forensic scientific" evidence; "exclude" a "psychiatric examination of sexual assault"; and request additional funding "to replace expert witness of child sexual abuse[] accommodation syndrome," all of which cumulatively prejudiced Petitioner. (Pet. at 24-25, 129-154, pt. 2 at 1-11.)

II. Petitioner's appellate counsel was ineffective for failing to raise prosecutorial-misconduct and cumulative-error claims or provide him with "documentation" – apparently his opening brief on appeal – in time for a "second review" before the California Supreme Court. (Id. at 25, pt. 2 at 12-17.)

III. The California Supreme Court erroneously rejected his petition for review as untimely, violating the "mailbox rule." (Id. at 25, pt. 2 at 18-20.)

IV. The prosecutor "knowingly used perjured testimony" to obtain his conviction, violating Napue v. Illinois, 360 U.S. 264 (1959), and Miller v. Pate, 386 U.S. 1 (1967).[3] (FAP, pt. 10 at 2-55, pt. 11 at 1-75.)

BACKGROUND

On July 22, 2014, Petitioner was convicted by a Los Angeles County Superior Court jury of three counts of corporal injury to

[3] Except for the Napue and Miller claims, the FAP mostly repeats or elaborates on the claims in the Petition. The FAP also includes a new argument, that trial counsel violated his rights under the "Compulsory Process Clause of the . . . Sixth and Fourteenth Amendment[s]." (See, e.g., FAP, pt. 10 at 26, 30, 38, 54.)

a "spouse/cohabitant/child's parent," one count of criminal threats, one count of forcible sexual penetration by foreign object, one count of attempted sodomy by use of force, and one count of forcible rape, all against victim Rosa M. (see Lodged Doc. 1, 3 Clerk's Tr. at 626-32), and two counts of lewd act upon a child, three counts of sexual penetration by foreign object, three counts of forcible rape, three counts of sodomy by force, and one count of forcible oral copulation against victim Valeria H. (see id. at 633-44). On August 14, 2014, he was sentenced to state prison for an indeterminate term of 75 years to life and a determinate term of five years and eight months. (See id. at 684, 686-89.)

Petitioner appealed (see Lodged Doc. 2), and on August 3, 2015, the California Court of Appeal affirmed the convictions (see Lodged Doc. 5). In a letter dated August 4, 2015, Petitioner's counsel informed him of the court's decision and stated that in her opinion, "a petition for review in the California Supreme Court would be denied" because his case did not "present an important question of law having widespread applicability" or "conflict with other appellate decisions." (Exs. to Pet., pt. 3 at 37.) She further advised him that he could file a petition for review on his own, which had to be filed "no later than September 11, 2015." (Id. (emphasis in original).) She noted that she was enclosing with the letter a copy of the court of appeal's decision, "a memorandum describing how to file a petition in propria persona," and "copies of the Clerk's and Reporter's transcripts of [his] trial"; she suggested that the opening brief she filed "should also be helpful,"

implying that she had previously sent it to him. (Id.)

On October 1, 2015, Petitioner signed and submitted a pro se petition for review to the state supreme court. (Exs. to Pet., pt. 3 at 1-15.) The court received the petition on October 5, 2015, but returned it "unfiled" that same day. (See Lodged Doc. 6.) The court stated that it had "lost jurisdiction to act on any petition for review on October 2, 2015." (Id.)

Earlier, on January 2, 2015, Petitioner had filed a petition for writ of habeas corpus in the state supreme court, and on March 11 that same year it was summarily denied. (Lodged Docs. 8, 9); see Cal. App. Cts. Case Info., https://appellatecases.courtinfo.ca.gov/ (search case no. S223629) (last visited Apr. 5, 2018). On June 30, 2016, Petitioner constructively filed another habeas petition in the state supreme court (see Lodged Doc. 10 at 6-7);[4] it summarily denied that petition on March 15, 2017 (see Lodged Doc. 11); Cal. App. Cts. Case Info., https://appellatecases.courtinfo.ca.gov/ (search case no. S235637) (last visited Apr. 5, 2018).

[4] The mailbox rule applies to state habeas petitions. Stillman v. LaMarque, 319 F.3d 1199, 1201 (9th Cir. 2003). Petitioner signed his second state habeas petition and its corresponding proof of service on June 30, 2016, and presumably gave it to prison authorities that day. (See Lodged Doc. 10 at 6-7.) Nothing suggests to the contrary. See Roberts v. Marshall, 627 F.3d 768, 770 n.1 (9th Cir. 2010) (absent evidence otherwise, petition is deemed constructively filed on day it is signed).

DISCUSSION

I. The Petitions Are Untimely

A. Applicable Law

The Antiterrorism and Effective Death Penalty Act sets forth a one-year limitation period for filing a federal habeas petition and specifies that the period runs from the latest of the following dates:

> (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).

AEDPA includes a statutory tolling provision that suspends the limitation period for the time during which a properly filed application for postconviction or other collateral review is pending in state court. See § 2244(d)(2); Waldrip v. Hall, 548

F.3d 729, 734 (9th Cir. 2008). In addition to statutory tolling, federal habeas petitions are subject to equitable tolling of the one-year limitation period in appropriate cases. Holland v. Florida, 560 U.S. 631, 645 (2010). Determining whether equitable tolling is warranted is a fact-specific inquiry. Frye v. Hickman, 273 F.3d 1144, 1146 (9th Cir. 2001) (as amended). The petitioner must show that he has been pursuing his rights diligently and that some extraordinary circumstance stood in his way and prevented timely filing. Holland, 560 U.S. at 649.

The Supreme Court has clarified that "reasonable diligence" is required for equitable tolling, not "maximum feasible diligence." Id. at 653 (citation omitted). As to the second prong of the inquiry, courts have recognized several potentially extraordinary circumstances justifying equitable tolling. For instance, lack of access to non-English legal materials or assistance might constitute an extraordinary circumstance. See Mendoza v. Carey, 449 F.3d 1065, 1070 (9th Cir. 2006). And a complete lack of access to legal files may warrant equitable tolling. Ramirez v. Yates, 571 F.3d 993, 998 (9th Cir. 2009). "The petitioner must show that the extraordinary circumstances were the cause of his untimeliness[.]" Porter v. Ollison, 620 F.3d 952, 959 (9th Cir. 2010) (as amended) (citation omitted).

As to both statutory and equitable tolling, a petitioner bears the burden of demonstrating that AEDPA's limitation period was sufficiently tolled. Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005) (equitable tolling); Smith v. Duncan, 297 F.3d 809, 814 (9th Cir. 2002) (as amended) (statutory tolling), abrogation on other grounds recognized by United States v. Davis, 508 F. App'x

606, 609 (9th Cir. 2013).

B. Limitation Period

Petitioner was convicted on July 22, 2014 (Lodged Doc. 1, 3 Clerk's Tr. at 626-44), and the state court of appeal affirmed on August 3, 2015 (Lodged Doc. 5). To appeal the decision, Petitioner was required to file a petition for review in the state supreme court within 40 days. See Cal. Rs. Ct. 8.366(b)(1) ("[A] Court of Appeal decision . . . is final in that court 30 days after filing."), 8.500(e)(1) ("A petition for review must be served and filed within 10 days after the Court of Appeal decision is final in that court."). As discussed below, however, he did not do so. Thus, for purposes of § 2244(d), his judgment became final on September 12, 2015, when his allotted 40 days for seeking review expired. See § 2244(d)(1)(A) (judgment becomes final "by the conclusion of direct review or the expiration of the time for seeking such review"); see also Gonzalez v. Thaler, 565 U.S. 134, 137 (2012) ("[F]or a state prisoner who does not seek review in a State's highest court, the judgment becomes 'final' on the date that the time for seeking such review expires."); Waldrip, 548 F.3d at 735 (noting that petitioner's conviction became final "forty days" after state court of appeal affirmed conviction because petitioner did not seek review in supreme court). Petitioner's arguments to the contrary are unconvincing.

Petitioner contends that the California Supreme Court erred in failing to apply the mailbox rule when it rejected his petition for review, dated October 1, 2015, and that if it had properly filed and adjudicated it his limitation period would not

have started until 90 days after it was denied. (Opp'n at 32-33.) But this Court cannot second-guess a state court's application of its own procedural rules. See Himes v. Thompson, 336 F.3d 848, 852 (9th Cir. 2003) (federal habeas courts are bound by state court's interpretation of its own laws); Ammons v. Walker, No. CV 07-08136 AHM(JC), 2011 WL 844965, at *1 (C.D. Cal. Mar. 3, 2011) (state-court rejection of untimely petition for review "not reviewable" because "[s]tate courts 'are the ultimate expositors of state law'" and thus federal petition was untimely regardless of any state-court error (quoting Mullaney v. Wilbur, 421 U.S. 684, 691 (1975))). Thus, that argument has no bearing on when the AEDPA limitation period began. Whether it warrants equitable tolling is discussed in Section I.D.4.

In both his stay motions, Petitioner argues that he is entitled to an "alternate trigger date" under § 2244(d)(1)(D) because he was "engaged in pro se ongoing investigation(s) that were necessary . . . for him to discover the factual basis of each of his claims." (See Stay. Mot. at 9 (emphasis in original), Aug. 8, 2017; Stay Mot. at 5 (arguing that he "was not able to realistically advance and support [his] ineffective assistance of counsel claims . . . absent the newly discovered evidence, and said new evidence was solely the product of the investigation process"), Feb. 16, 2018.) He contends that he is entitled to a start date of June 30, 2016, or March 15, 2017, when his most recent state habeas petition was filed and denied, respectively. (Stay Mot. at 6, Aug. 8, 2017.) But Petitioner does not explain — in any of his state or federal filings — what "new evidence" his "investigations" uncovered or why those are

the appropriate trigger dates. Indeed, his most recent state habeas petition, which raised the same three grounds as his Petition, provided no response to a question asking him to "[e]xplain any delay in the discovery of the claimed grounds for relief." (Lodged Doc. 10 at 6.) Importantly, Petitioner does not allege when exactly he did or could have learned of the underlying bases of his claims. See § 2244(d)(1)(D); see also Ford v. Gonzalez, 683 F.3d 1230, 1236-37 (9th Cir. 2012); Hasan v. Galaza, 254 F.3d 1150, 1154 n.3 (9th Cir. 2001) (holding that under § 2244(d)(1)(D), relevant question is when petitioner knew, or could have known, facts underlying claim even if he didn't understand their legal significance). He merely indicates that he found "newly discovered evidence" based on a "pro se ongoing" investigation that "did not conclude [until] after [his] state court 'direct appellate review' process[] had ended, and the conviction became final." (Stay Mot. at 4, Aug. 8, 2017.)

Petitioner's vague and conclusory allegations are insufficient. See Easter v. Taylor, __ F. App'x __, No. 16-35814, 2018 WL 1280738, at *1 (9th Cir. Mar. 13, 2018) (holding § 2244(d)(1)(D) inapplicable in part because petitioner "[did] not explain why he was unable, in the exercise of due diligence, to learn of" alleged factual predicate of his claim until after conviction became final); see also Oglesby v. Soto, No. CV 14-8836-ODW (JEM), 2015 WL 4399488, at *5 (C.D. Cal. July 17, 2015) (collecting cases). Moreover, his claims mostly involve the alleged failures of his trial and appellate counsel, the facts of

which were likely known to him at the time.[5] Petitioner, therefore, is not entitled to a later trigger date under § 2244(d)(1)(D). See Wyatt v. Seibel, No. EDCV 16-0983-ODW (JEM), 2017 WL 1100457, at *4 (C.D. Cal. Feb. 10, 2017) (finding "factual predicate" for ineffective-assistance-of-counsel claim "easily discoverable through the exercise of due diligence" because "Petitioner was present at trial . . . and would have been aware of . . . his counsel's allegedly insufficient performance"), accepted by 2017 WL 1086321 (C.D. Cal. Mar. 21, 2017); Acuna v. Ducart, No. CV 14-5664-RGK (RZ), 2015 WL 1809244, at *1 (C.D. Cal. Apr. 14, 2015) (allegations that petitioner's counsel "fail[ed] to present additional evidence regarding [his] speech impediment," "call an expert witness to show the unreliability of the victim's identification of Petitioner," or "move to sever Petitioner's case from that of his co-defendants" were "readily discoverable at the time of Petitioner's trial").

Petitioner does not contend that he is entitled to a later trigger date under § 2244(d)(1)(B) or (C), and the record discloses no basis for applying those provisions. Thus,

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[5] As discussed in Section II, Petitioner's "newly discovered evidence" is not new at all. In his Opposition to the motion to dismiss, he repeatedly references DNA evidence and an allegedly exculpatory letter written by one of the victims in his case as demonstrating his "actual innocence." (See, e.g., Opp'n at 19, 23-28, 40, 52, 57.) But that evidence was presented at trial and considered by the jury. (See, e.g., Reply, Exs. A, B.) Petitioner never explains how or why it is "new." A federal habeas court is prohibited from simply reweighing the evidence, particularly when the Petitioner has not raised a sufficiency-of-the-evidence claim. See Cavazos v. Smith, 565 U.S. 1, 8 n.* (2011) (per curiam) (reweighing of evidence precluded by Jackson v. Virginia, 443 U.S. 307, 324 (1979)).

Petitioner's convictions became final on September 12, 2015, and AEDPA's one-year limitation period began to run on September 13. See Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001) (holding that limitation period begins to run on day following triggering event). Absent tolling of some kind, Petitioner had until September 12, 2016, to file his federal petition. Because the Petition was constructively filed on August 30, 2017, it was ostensibly nearly a year late.

C. Statutory Tolling

Petitioner's first state habeas petition was denied on March 11, 2015, six months before the AEDPA limitation period began. (See Lodged Doc. 9.) He is therefore afforded no statutory tolling for it. See Waldrip, 548 F.3d at 735. Petitioner's second state habeas petition was pending in the state court of appeal from June 30, 2016 (Lodged Doc. 10), to March 15, 2017 (Lodged Doc. 11). As Respondent concedes, Petitioner is entitled to statutory tolling for those 259 days. See Evans v. Chavis, 546 U.S. 189, 191-92 (2006); see also Patterson, 251 F.3d at 1247 (limitation period resumes running day after state court denies habeas petition). Accounting for that time, the AEDPA deadline was extended to May 29, 2017.

Petitioner is not entitled to gap tolling for the time between the denial of his first state habeas petition, on March 11, 2015 (Lodged Doc. 9), and the filing of his second, on June 30, 2016 (Lodged Doc. 10). The petitions were filed in the same court, thereby precluding gap tolling. See Evans, 546 U.S. at 192-93 (defining gap tolling as period of time between lower-state-court decision and filing of petition in higher court);

Carrera v. Gastelo, No. EDCV 17-01222-PA(JDE), 2017 WL 6942650, at *4 (C.D. Cal. Nov. 29, 2017) ("Gap tolling between petitions filed in the same court is unavailable[.]"), accepted by 2018 WL 400751 (C.D. Cal. Jan. 5, 2018). And the second petition was not "limited to an elaboration of the facts" alleged in the first; it raised new claims. (Compare Lodged Doc. 8 at 4 (raising claim that "corrupt state officials violat[ed] [his] rights"), with Lodged Doc. 10 at 9-10 (raising claims of ineffective assistance of trial and appellate counsel and violation of mailbox rule by state supreme court)); see Stancle v. Clay, 692 F.3d 948, 955-56 (9th Cir. 2012) ("[B]ecause [petitioner] did not limit his second petition to an elaboration of the facts and his second petition started a 'new round,' he is not entitled to statutory gap tolling[.]"); Hernandez v. Spearman, 764 F.3d 1071, 1077 (9th Cir. 2014) (petitioner not entitled to gap tolling because second state habeas petition "added 'a new claim'" (quoting Stancle, 692 F.3d at 954)).

Moreover, the 478-day delay between the petitions was substantial. See Waldrip, 548 F.3d at 736 (holding that year between first state habeas petition, which was filed before limitation period, and later petition was "too long" to permit tolling). That period greatly exceeds the 30 to 60 days the Supreme Court has identified as "reasonable" for gap tolling. See Evans, 546 U.S. at 201 (refusing to toll unexplained six-month gap).[6]

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[6] On July 28, 2015, the Ninth Circuit certified two questions to the California Supreme Court: "at what point in time" is a state prisoner's habeas petition "untimely under California law" and

Petitioner also appears to have filed an "Accusation against an Attorney" in the California Supreme Court, which denied it on February 28, 2018. See Cal. App. Cts. Case Info., https://appellatecases.courtinfo.ca.gov/ (search case no. S246621) (last visited Apr. 5, 2018). That filing does not entitle Petitioner to any tolling because it did not raise any "claims" challenging his convictions; rather, it appears to have challenged only the California State Bar's rejection of his request for disciplinary action against his trial counsel. (See Exs. to Pet., pt. 3 at 52 (Petitioner's "accusation," referencing Cal. State Bar inquiry no. 15-15588), pt. 6 at 118-19 (Cal. State Bar. decision regarding inquiry no. 15-15588)); see also Bouche v. Long, No. CV 14-4060-CJC (RNB), 2014 WL 5361443, at *2 (C.D. Cal. Oct. 21, 2014) (recognizing in exhaustion context that petitioner's "Petition for a Verified Accusation" was "not a [state] habeas petition" in part because it was filed and categorized by California Supreme Court as "accusation against an attorney (as opposed to as a habeas petition)").[7]

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whether "a habeas petition [is] untimely filed after an unexplained 66-day delay between the time a California trial court denies the petition and the time the petition is filed in the California Court of Appeal." Robinson v. Lewis, 795 F.3d 926, 928 (9th Cir. 2015). The California Supreme Court has yet to give its answer. See Cal. App. Cts. Case Info., https://appellatecases.courtinfo.ca.gov/ (search case no. S228137) (last visited Apr. 5, 2018). In any event, the 478-day delay here is well beyond what California and federal courts have deemed reasonable. See Robinson, 795 F.3d at 930-31 (collecting cases).

[7] While it is unclear when Petitioner submitted the accusation to the state supreme court (see, e.g., Exs. to Pet., pt. 3 at 43 (Apr. 5, 2017 letter from state supreme court to Petitioner stating that it received his "accusation" and supporting documents but was

Thus, with all available statutory tolling, the AEDPA deadline was extended to May 29, 2017, and the Petition was still more than three months late. Unless Petitioner is entitled to equitable tolling, then, the Petition and FAP are untimely and must be denied.

D. Equitable Tolling

Petitioner claims he is entitled to equitable tolling because he is "ignoran[t] of the law" and "the English language" and because his prison's law library was not "providing [Spanish-language] materials" or "helping [him] a lot." (See, e.g., Opp'n at 46, 48-50.) Petitioner also argues for equitable relief under the mailbox rule, which he claims he was forced to rely on because his appellate lawyer allegedly did not timely provide him with his case file. (See id. at 8-9, 14-15, 32-33; see also Pet., pt. 2 at 19-20.)

1. *Ignorance of the Law*

Pro se status and ignorance of the law are not extraordinary circumstances warranting equitable tolling. See Ford v. Pliler, 590 F.3d 782, 789 (9th Cir. 2009); Rasberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006) ("[A] pro se petitioner's lack of

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"unable to process" them because he had to "first follow the proper filing procedures in the State Bar of California")), it was officially filed on January 23, 2018, see Cal. App. Cts. Case Info., https://appellatecases.courtinfo.ca.gov/ (search case no. S246621) (last visited Apr. 5, 2018). Thus, because the accusation was likely filed after the limitation period had already expired, it could not warrant statutory tolling even were it a proper habeas petition. See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) ("[S]ection 2244(d) does not permit the reinitiation of the limitations period that has ended before the state petition was filed." (citation omitted)).

legal sophistication is not, by itself, an extraordinary circumstance warranting equitable tolling."); see also Gutierrez v. King, No. EDCV 13-1676-TJH (RNB), 2014 WL 879618, at *2 (C.D. Cal. Mar. 5, 2014) (collecting cases). Indeed, Petitioner has demonstrated that despite his alleged "ignorance of the law," he has been able to present his claims to this Court and the state supreme court on multiple occasions and without any apparent assistance. Moreover, to the extent he seeks equitable tolling because he lacked counsel, no such basis for relief exists, as petitioners do not have a constitutional right to counsel in collateral proceedings. See Lawrence v. Florida, 549 U.S. 327, 336-37 (2007) (finding petitioner not entitled to equitable tolling in part because "in the postconviction context . . . prisoners have no constitutional right to counsel"); Goldsmith v. Scribner, 318 F. App'x 465, 466 (9th Cir. 2008) ("[L]ack of counsel is insufficient to trigger equitable tolling.").

2. *Language Barrier and Access to Spanish-Language Materials*

Petitioner relies in part on Mendoza to justify his request for equitable tolling. (See Opp'n at 50.) Mendoza held that "a non-English-speaking petitioner seeking equitable tolling must, at a minimum, demonstrate that during the running of the AEDPA time limitation, he was unable, despite diligent efforts, to procure either legal materials in his own language or translation assistance from an inmate, library personnel, or other source." 449 F.3d at 1070. Apparently in an effort to meet this standard, Petitioner contends that he is ignorant of English (see Opp'n at 46 (claiming that he was taking classes in prison from Sept. 2,

2017, through Feb. 1, 2018, "to learn English"); see also id. at 42 ("I am a Mexican National[] and[] my first language is Spanish[.]")) and that "the prison law library failed to provide [him] Spanish-language books," copies of the law "in Spanish," or "a Spanish-speaking clerk or librarians" (id. at 48).

Petitioner's reliance on Mendoza, however, is misguided. Mendoza further held that "a petitioner who demonstrates proficiency in English . . . would be barred from equitable relief." 449 F.3d at 1070 (citing Cobas v. Burgess, 306 F.3d 441, 444 (6th Cir. 2002)). In Cobas, which the Ninth Circuit found "persuasive," the record "beli[ed] any claim that language difficulties prevented [the petitioner] from filing his petition in a timely manner," as he had "written a detailed letter to his counsel in English" and "had otherwise demonstrated his ability to either communicate in English or communicate with a translator." Id. (first alteration in original) (citing Cobas, 306 F.3d at 444).

By similar measure, Petitioner here has demonstrated proficiency in English. For example, each of his federal filings is handwritten in English, and many are several hundred pages long. (See generally, e.g., Pet.; Exs. to Pet.; FAP; Opp'n; Stay Mot., Aug. 8, 2017; Stay Mot., Feb. 16, 2018.) Nothing indicates that they were authored by someone else, such as a translator or assistant. And his submissions in state court show the same. (See generally, e.g., Lodged Doc. 8 (first state habeas petition); Lodged Doc. 10 (second state habeas petition).) Letters sent between him and his appellate counsel, the state supreme court, and other agencies are in English (see Exs. to

Pet., pt. 3 at 37, 41-43, pt. 4 at 125, 129-30, pt. 6 at 118-19, pt. 12 at 116, 118-20, 123-33, 139, 142-45, 151, 153-58), and nowhere does Petitioner allege that he needed Spanish-language assistance to write or translate them.

Thus, Petitioner has not demonstrated a lack of English-language proficiency, nor has he shown that any such deficiency prevented him from timely filing his Petition. See Mendoza, 449 F.3d at 1070 (citing Cobas, 306 F.3d at 444); Marroquin v. Harman, No. CV 12-8667-DDP (RNB), 2013 WL 6817649, at *7-8 (C.D. Cal. Dec. 20, 2013) (finding that numerous letters and other communications written by petitioner in English "belie[d] any contention by him that . . . his alleged language barrier and/or the lack of Spanish language library materials at the facilities where he was incarcerated constituted an impediment to [his] ability to assert his legal rights"); cf. Aguilar v. Madden, No. 15cv2748 H (BGS), 2016 WL 4574344, at *3 (S.D. Cal. June 14, 2016) (finding that petitioner did not show "lack of English proficiency prevent[ing] him from accessing the courts" because he "ha[d] sufficient command of the English language," "did not need the assistance of a court interpreter" during his trial, and was "able to respond to the Judge in English"), accepted by 2016 WL 4563029 (S.D. Cal. Sept. 1, 2016).[8]

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[8] Though Petitioner used an interpreter during trial (see, e.g., Exs. to Pet., pt. 11 at 233, 280; Lodged Doc. 1 at 671), he has nonetheless demonstrated proficiency in English, as detailed above. Indeed, just a few months after sentencing, Petitioner handwrote in English a letter to the Pasadena superior court "seeking help" and raising some of the same allegations as in his Petition. (See Exs. to Pet., pt. 8 at 131-36); see also Cobas, 306 F.3d at 444 (though petitioner "had an interpreter for his trial,"

Moreover, Petitioner has failed to allege any facts demonstrating that throughout the limitation period he was "diligently pursuing" legal materials "in his own language" or "diligently" seeking "translation assistance." See Garcia v. Yates, 422 F. App'x 584, 585 (9th Cir. 2011) (citing Mendoza, 449 F.3d at 1070); Diaz v. Campbell, 411 F. App'x 975, 976 (9th Cir. 2011) (citing Mendoza, 449 F.3d at 1068-70); see also Aguilar, 2016 WL 4574344, at *4 ("[Petitioner] has provided no evidence to demonstrate that he even attempted and was unable, despite diligent efforts, to obtain legal materials in Spanish and/or a translator during the running of the AEDPA time limitation."). His conclusory allegations are insufficient. See Mendoza v. Legrand, No. 3:10-cv-00545-LRH-WGC, 2013 WL 876014, at *11 n.30 (D. Nev. Mar. 7, 2013) ("The conclusory assertions that petitioner possesses no English language skills in any event fall far short of the showing required under Ninth Circuit precedent to demonstrate that an alleged inability to communicate in English provided a potential basis for equitable tolling.").

3. *Law Library Access*

Petitioner argues that his prison's law library "is closed Saturdays and Sundays" and has "not help[ed] [him] a lot." (Opp'n at 48.) He states that "the people in charge of this law

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his "detailed letter to his appellate attorney in English" and postconviction motions "belie[d] any claim that language difficulties prevented [him] from filing his petition in a timely manner"); see also Torres v. Dexter, 662 F. Supp. 2d 1156, 1161 (C.D. Cal. 2009) (finding it "unclear" that petitioner's "English language skills [were] as limited as he claim[ed]" because even though he used "Spanish-language interpreter at trial," record indicated that he could speak English and was literate).

library were complaining to me about the cop[ie]s of my case" and "the law library is not going to make me again[] any copy of my relevant evidence . . . because I [don't] have any money to pay for those papers or materials." (Id. at 48-50.)

But nothing indicates that these circumstances were extraordinary or prevented Petitioner from submitting a timely petition. See Frye, 273 F.3d at 1146 (lack of access to library materials does not automatically qualify as basis for equitable tolling, and court must conduct fact-specific inquiry); Chaffer v. Prosper, 592 F.3d 1046, 1049 (9th Cir. 2010) (per curiam) (rejecting petitioner's claim to equitable tolling based on "his pro se status, a prison library that was missing a handful of reporter volumes, and reliance on helpers who were transferred or too busy to attend to his petitions" because "these circumstances are hardly extraordinary given the vicissitudes of prison life"). Indeed, Petitioner has been able to submit voluminous documents to the Court despite this alleged obstacle. (See, e.g., Pet. (206 pages); Exs. to Pet. (2,192 pages); FAP (577 pages).) And at least part of the purported interference appears to have occurred after the limitation period had already expired and thus cannot support tolling. (See, e.g., Opp'n at 49 (law library "denying [Petitioner] materials" around Jan. 11, 2018)); see Gaston v. Palmer, 417 F.3d 1030, 1034 (9th Cir. 2005) (equitable tolling warranted with showing of "causal connection" between extraordinary circumstance and "inability to file a federal habeas application"); Rogers v. Filson, No. 3:02-cv-00342-GMN-VPC, 2017 WL 843169, at *8 (D. Nev. Mar. 2, 2017) (no equitable tolling when alleged events "occurred long after the limitations

period . . . expired").

"[N]ormal delays or restrictions on law library access . . . are not considered 'extraordinary' for purposes of establishing equitable tolling." Thao v. Ducart, 707 F. App'x 437, 438 (9th Cir. 2017) (quoting Ramirez, 571 F.3d at 998). Indeed, the prison law library's schedule here appears to have been just that, "normal," and Petitioner does not allege that it was in any way "extraordinary" or that the weekend closures actually prevented him from timely filing his federal habeas petition. See Montiel v. Holland, No. SACV 15-01157-JLS (KS), 2016 WL 3669959, at *7 (C.D. Cal. Mar. 14, 2016) ("Petitioner fails to establish that prison policies prevented him from adequate access to the law library[.]"), accepted by 2016 WL 3660298 (C.D. Cal. July 6, 2016); Davis v. Franco, No. CV 12-2853 DSF(JC), 2013 WL 812714, at *1 (C.D. Cal. Mar. 4, 2013) (allegation that library was "closed most of the time," "even if accepted as true, fail[ed] to demonstrate that the lack of access to the law library proximately caused [petitioner] to fail to file a timely federal Petition"). Petitioner fails to allege a specific period of time when his access to the library was limited, nor has he demonstrated how much tolling he should theoretically receive for it. See Romero v. Yates, No. 1:07-CV-01339 LJO SMS HC, 2008 WL 115185, at *4 (E.D. Cal. Jan. 10, 2008) (finding that petitioner "failed to demonstrate how access to the law library would have allowed him to file his petition earlier" in part because "he fail[ed] to give specific time periods when the library was closed"), accepted by 2008 WL 797559 (E.D. Cal. Mar. 26, 2008); Asencio v. Small, No. CV 09-9328-GAF (E), 2010 WL 1727621, at *5

(C.D. Cal. Mar. 17, 2010) (finding that petitioner failed to justify equitable tolling in part because he generally alleged that his "access to the law library was limited due to his school schedule and the library schedule" but not that such limitations existed during the relevant period), accepted by 2010 WL 1727622 (C.D. Cal. Apr. 23, 2010).

Further, indigence is not "extraordinary," as almost all prisoners face similar economic circumstances. See, e.g., Warsinger v. Swarthout, No. 1:11-cv-00008-JLT HC, 2011 WL 891254, at *4 (E.D. Cal. Mar. 11, 2011) ("Petitioner's indigent status, his limited legal knowledge, and the prison's limitations on law library access are circumstances that are no different than those faced by the vast majority of incarcerated prisoners attempting to file petitions for writ of habeas corpus."). Accordingly, Petitioner's alleged inability to pay for extra copies does not warrant equitable tolling. See Ramirez, 571 F.3d at 998 ("Ordinary prison limitations on [petitioner's] access to the law library and copier . . . were neither 'extraordinary' nor made it 'impossible' for him to file his petition in a timely manner.").[9]

4. *Mailbox Rule*

Petitioner further claims that because the California Supreme Court allegedly erred in rejecting his petition for

[9] Included as an exhibit to the Petition is a March 20, 2017 letter from a prison law librarian stating that the library's copier "did not work properly for a while" and that Petitioner's unspecified "documents" "will be late." (Exs. to Pet., pt. 3 at 50.) The letter's vague indication that the copier was not working "for a while" is insufficient to warrant tolling. Even assuming it did, the Court is without any means to properly calculate the tolled time.

review as untimely, he is entitled to tolling. (See Opp'n at 32-33; see also Pet., pt. 2 at 19-20.) Under the mailbox rule, he argues, he constructively filed his petition for review on October 1, 2015, when he gave it to prison officials for mailing. (See Opp'n at 8-9, 14-15, 32-33; see also Pet., pt. 2 at 19-20.) The state supreme court received the petition on October 5, 2015, and returned it "unfiled" that same day. (See Lodged Doc. 6.) Accordingly, Petitioner reasons, because October 1 was a day before the supreme court lost jurisdiction (see Exs. to Pet., pt. 3 at 17 (letter to Petitioner indicating that court would "lose[] jurisdiction on October 2, 2015")), his petition was timely and the limitation period should have started 90 days later, on January 3, 2016, when his convictions became final (see Opp'n at 32-33). Petitioner's argument is unconvincing, however.

Some federal habeas courts have held that the mailbox rule does not apply to the filing of a petition for review in state court. See, e.g., Trujillo v. Stainer, No. 1:12-cv-00817-LJO-JLT, 2012 WL 3962553, at *5 (E.D. Cal. Sept. 10, 2012) ("[T]he 'mailbox rule' applies to state and federal habeas proceedings, not to the filing of a petition for review in the state court."). Under such reasoning, Petitioner's reliance on the mailbox rule is misplaced as a matter of law and does not afford him equitable relief.

California courts, however, seem to have extended the mailbox rule to similar such documents, at least in some

circumstances.[10] See In re Jordan, 4 Cal. 4th 116, 119, 128-29 (1992) (holding that mailbox rule applies to filing of criminal appeals); see also Silverbrand v. Cnty. of L.A., 46 Cal. 4th 106, 110 (2009) (civil appeals); In re Lambirth, 5 Cal. App. 5th 915, 923 (Ct. App. 2016) (explaining how Silverbrand relied on fact that federal mailbox rule applied to "the filing of any document" and that other state and lower federal courts have applied it to "petitions for postconviction relief, motions, and other filings" (emphasis in original)).

But even assuming the state supreme court should have applied the mailbox rule to his October 1 submissions, he is not entitled to equitable tolling sufficient to render the Petition timely. Petitioner does not dispute that he submitted his petition for review after the September 11, 2015 deadline; rather, he focuses on his constructive filing of it and a motion for relief from default on October 1, 2015, a day before they were due. (See, e.g., Opp'n at 32-33; see also Exs. to Pet., pt. 3 at 17 (state supreme court stating that it would "permit" late

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[10] At least one federal court also appears to have applied the mailbox rule in such circumstances, see Venable v. Small, No. CV 09-1489 GHK (FMO), 2009 WL 3233910, at *2 & n.5 (C.D. Cal. Sept. 30, 2009), albeit in dictum. But that case concerned a petitioner who, unlike here, alleged that his appellate counsel "failed to prepare and file [his] petition for review," and it found that he was entitled to an alternate trigger date under § 2244(d)(1) based on attorney abandonment. See id. at *5. Petitioner does not allege that his appellate counsel was supposed to but did not file his petition for review; he understood that he needed to submit it himself. (See Exs. to Pet., pt. 3 at 37 (Aug. 4, 2015 letter to Petitioner from appellate counsel explaining that he would have to file petition for review on his own).) His claim, unlike in Venable, is based on the California Supreme Court's alleged error in not properly applying the mailbox rule.

petition to be filed for "good cause" shown if "Application for Relief from Default" was filed before it lost jurisdiction on Oct. 2, 2015).) But even if the state supreme court misapplied its own mailbox rule, Petitioner has not presented any evidence or even argued that it would have granted the relief-from-default request, allowed the petition for review to be filed, and considered it on the merits. His mailbox-rule argument rests on sheer speculation. See Rasberry, 448 F.3d at 1153 ("[T]he petitioner bears the burden of showing that equitable tolling is appropriate.").

Indeed, Petitioner's reason for being late – that he didn't receive a copy of his opening brief on appeal from his appellate attorney until September 18, 2015 (see Opp'n at 17-18; see also Exs. to Pet., pt. 3 at 13) – was unlikely to have persuaded the state court that he had good cause for the late filing. Cf. In re Chavez, 30 Cal. 4th 643, 658 (2003) (holding "doctrine of constructive filing of a notice of appeal" inapplicable when defendant's attorney did not "agree to prepare or file" appeal and potential substitute attorney never actually represented defendant). As previously noted, his appellate counsel sent him his case file on August 4, 2015, and told him that he would have to file his own petition for review by September 11, 2015. (Exs. to Pet., pt. 3 at 37.) Despite knowing of the looming deadline, he chose to delay by requesting a copy of his opening brief from her on September 9, 2015 (Exs. to Pet., pt. 12 at 145); she apparently responded a few days later, on September 14, stating that she was attaching to that letter "another" copy of the opening brief and that a "service copy" had already been sent to

him "last November." (Id. at 151.) Indeed, her August 4, 2015 letter to him suggested that he already had the opening brief (see id. at 142 (referencing opening brief and stating that it would "be helpful" to him)), and he does not explain why he waited another month to ask her for a second copy of it.

Thus, Petitioner had no good cause for the late filing. He had the vast majority of his case file as well as the court-of-appeal decision well before the petition-for-review deadline and has not explained why he couldn't have adequately crafted the petition for review from those materials. Cf. Ford, 590 F.3d at 790 (no equitable relief when petitioner cannot show that lack of access to case file caused "untimeliness"); Rojas v. Garcia, No. C 03-4917 RMW (PR), 2008 WL 2625908, at *2 (N.D. Cal. July 3, 2008) ("trial counsel's delay in sending [certain] case files to petitioner did not cause [his] delay" in part because petitioner did not allege that he needed them, given other records he had). Nor was his lawyer at fault. She expressly warned him of the deadline, provided him with guidance on how to file his own petition for review, and timely sent him his case file. He simply lost or never got the copy of his opening brief that had been sent to him earlier, and counsel promptly sent it to him again when he asked for it.

Further still, the state supreme court promptly notified Petitioner that it would not file his petition. (See Lodged Doc. 6.) Thus, even considering the facts in the light most favorable to him, the limitation period would be tolled only until he received that notice, which apparently was October 12, 2015. (See Exs. to Pet., pt. 3 at 23); cf. Ramirez, 571 F.3d at 997-98

(equitable tolling warranted when petitioner receives delayed notice of state-court decision). At that point, he knew his petition for review had not been filed, and he was responsible for knowing the consequent AEDPA timing implications. See Rasberry, 448 F.3d at 1154 (ignorance of or inability to calculate limitation period not "extraordinary circumstance warranting equitable tolling"); Waldron-Ramsey v. Pacholke, 556 F.3d 1008, 1011 (9th Cir. 2009) ("[O]versight, miscalculation or negligence on [the petitioner's] part . . . would preclude the application of equitable tolling." (second alteration in original) (citing Harris v. Carter, 515 F.3d 1051, 1055 (9th Cir. 2008))). If confused, Petitioner could have filed a timely protective petition under Pace, 544 U.S. at 416, but he did not. See Waldron-Ramsey, 556 F.3d at 1013 (denying equitable tolling for petitioner who was confused about statutory tolling after state-court denial because "[h]is alleged belief he was entitled to statutory tolling beyond that date was based on his own assumptions, and a diligent petitioner in that situation would have filed a basic form habeas petition as soon as possible"). Thus, even if the Court tolled the month's time between when his convictions became final, on September 12, 2015, and when he received notice of the petition for review's nonfiling, on October 12, 2015, the Petition would still have been more than two months late.

Because Petitioner is not entitled to sufficient equitable tolling, the Petition is time barred.

II. Actual Innocence

Petitioner's Opposition appears to argue that his Petition's untimeliness should be excused because he is actually innocent. (See, e.g., Opp'n at 24 ("I am innocent."), 29-40.) Under the "fundamental miscarriage of justice" exception to the AEDPA limitation period, a habeas petitioner may pursue constitutional claims on the merits "notwithstanding the existence of a procedural bar to relief." McQuiggin v. Perkins, 569 U.S. 383, 392 (2013). The exception is limited to claims of actual innocence, however, and a petitioner does not qualify if he asserts procedural violations only. Johnson v. Knowles, 541 F.3d 933, 937 (9th Cir. 2008); see Schlup v. Delo, 513 U.S. 298, 321 (1995) (observing that Supreme Court precedent has "explicitly tied the miscarriage of justice exception to the petitioner's innocence"); Herrera v. Collins, 506 U.S. 390, 404 (1993) ("This . . . fundamental miscarriage of justice exception[] is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." (quoting McCleskey v. Zant, 499 U.S. 467, 502 (1991))).

"[A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . or . . . expiration of the statute of limitations." Perkins, 569 U.S. at 386; see also Lee v. Lampert, 653 F.3d 929, 934-37 (9th Cir. 2011) (en banc). A petitioner "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." Perkins, 569 U.S. at 399 (citing Schlup, 513 U.S. at 327); see

also Bousley v. United States, 523 U.S. 614, 623 (1998) (noting in context of collateral review of federal criminal conviction that actual innocence "means factual innocence, not mere legal insufficiency"). To overcome the statute of limitations, the evidence of actual innocence must be "so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." Schlup, 513 U.S. at 316.

"New" evidence is "relevant evidence that was either excluded or unavailable at trial." Id. at 327-28. This evidence must be "reliable." Id. at 324. Evidence that is only newly presented — but not necessarily newly discovered — may nonetheless suffice to overcome AEDPA's limitation period. Griffin v. Johnson, 350 F.3d 956, 962-63 (9th Cir. 2003) (allowing otherwise time-barred claim of actual innocence to proceed based on evidence available, but not introduced, at time of trial). But see Chestang v. Sisto, 522 F. App'x 389, 391 (9th Cir. 2013) (newly acquired witness declaration not sufficiently "new" to support actual-innocence claim because contents were within defendant's knowledge at time of trial and no explanation was given for not introducing it sooner (citation omitted)).

In his Opposition, Petitioner identifies two pieces of "exculpatory" evidence. The first is "DNA evidence" gathered in February 2014. (See Opp'n at 19, 23-28, 40, 52, 57; see also Exs. to Pet., pt. 7 at 26-30 (ex. "G").) It consists of a laboratory report in which various DNA samples from victim Rosa M. were tested against Petitioner. (Exs. to Pet., pt. 7 at 27-28.) Sperm and "male" DNA were "Not Detected" in most of the

samples, and in the others, the presence or absence of male DNA was "Inconclusive." (Id. at 28.)

The second piece of evidence is a letter from victim Rosa M., dated March 9, 2014, and addressed to Petitioner's trial judge. (See Opp'n at 26-27, 52; see also Exs. to Pet., pt. 6 at 79-83 (ex. "B," containing both English and Spanish versions).) In the letter, Rosa M. states that Petitioner did "hit[]" and "verbally" "assault[]" her on November 21 or 22, 2013, but that she "lied" when she told police he "sexually assaulted" her. (Exs. to Pet., pt. 6 at 80; Reply, Ex. B at B046.) She also indicated that victim Valeria H.'s report of "sexual assault" by Petitioner was "not . . . true," as Valeria H. had made up the accusation because she was "mad at [Petitioner] for hitting [Rosa M.] and leaving [her] all beat up." (Exs. to Pet., pt. 6 at 80; Reply, Ex. B at B047.)

Petitioner argues that these documents contradict the "false evidence" upon which his conviction was based. (See Opp'n at 30.) But neither piece of evidence was "new"; they were in fact admitted and discussed at trial. See Schlup, 513 U.S. 327-28; Chestang, 522 F. App'x at 391 ("[A]ctual innocence claims focus on 'new' evidence – i.e., 'relevant evidence that was either excluded or unavailable at trial.'" (quoting Schlup, 513 U.S. at 327-28)).

The criminalist who prepared the lab report at issue testified about his findings. (See Reply, Ex. A.) He confirmed that he had "perform[ed] [a] DNA analysis" (id. at A017 (referencing "D.R. number 13-1616996"); see also Exs. to Pet., pt. 7 at 27 (report indicating "DR #: 13-16-16996")) and

explained in detail the results of that analysis to the jury (Reply, Ex. A at A019-20). Petitioner's counsel objected to his testimony (see, e.g., id. at A020, A023-24) and cross-examined him about how there was "no DNA evidence connecting the defendant to the victim," which the criminalist confirmed (see, e.g., id. at A027-32).

Thus, the DNA evidence identified by Petitioner, obtained before and then presented to the jury at trial, does not qualify as "new" evidence demonstrating Petitioner's actual innocence because the jury considered it and apparently discounted its probative value. See Green v. Williams, No. 3:11-CV-00455-HDM, 2013 WL 4458971, at *2 (D. Nev. Aug. 16, 2013) (finding that evidence that "actually was presented at trial" was not "new evidence that could pass through the actual-innocence gateway"). Even were the evidence in fact new, it would still not establish Petitioner's innocence. See Baker v. Yates, 339 F. App'x 690, 692 (9th Cir. 2009) (postconviction DNA testing "[a]t most" established that rape victim's DNA was not found on petitioner's penile or pubic swabs and did not "directly contradict any of the evidence of [his] guilt presented at trial"); Briggs v. Hatton, No. LA CV 16-8032 JFW (JCG), 2017 WL 5054319, at *4 (C.D. Cal. Sept. 25, 2017) (DNA test results "at best" established that petitioner's DNA was "not conclusively identified in any of the samples following the rape," and "[e]ven if the test results had been provided to the jury, the jury could reasonably have found Petitioner guilty based on the victim's eyewitness account and corroborating testimony from other witnesses"), accepted by 2017 WL 5075817 (C.D. Cal. Nov. 1, 2017).

Similarly, Rosa M.'s letter was presented at trial, and it too fails to constitute "new" evidence of actual innocence. (See Reply, Ex. B. at B044-47.) Rosa M. testified that she gave the letter to Petitioner's trial attorney "before [she] testified in a preliminary hearing in this case." (Id. at B045.) She also gave the attorney a typed English-language translation of the letter, written by her son. (Id.; see also Exs. to Pet., pt. 6 at 80.) At trial, both the letter and the typed translation were marked and entered as an exhibit, "People's 14." (Reply, Ex. B at B045.) Rosa M. testified that she wrote the letter herself and not at Petitioner's request. (Id. at B036.) Petitioner's counsel objected to the prosecution's attempts to read the son's translation to the jury (id. at B038-39, B042), and the trial court ordered that the court interpreter read into evidence her translation of the original letter instead, which the interpreter did (id. at B042, B045-47).

The jury was also presented with evidence of the circumstances surrounding the letter. The state court of appeal summarized that evidence as follows:

> While in jail, [Petitioner] began a campaign to induce Rosa to deny the sexual assaults. Despite a restraining order prohibiting him from contacting her, [Petitioner] called Rosa and wrote letters to her. He called her from jail on April 7, 2014, the day before his preliminary hearing, pleading with Rosa to recant and convince [Valeria H.] to do so as well. He also instructed Rosa to follow the instructions he included in a letter to her. Rosa agreed to defend him and stated

the family would wait for him.

In another call on April 12, 2014, [Petitioner] continued to urge Rosa to follow the instructions included in three letters he had sent to her. He was particularly concerned about the sexual assault charges, pleading with Rosa to "defend" him. He urged her to retract what she said about "the hand and finger" and to say that he did not take off her pants. He accused . . . [Valeria H.] of fabricating the sexual assault charges. He asked Rosa to "[h]elp me out so I can get your daughter off my back, okay?" He urged her to remove the domestic violence restraining order and deny [Valeria H.'s] testimony.

In a third call on April 13, 2014, [Petitioner] apologized "for everything" and asked for Rosa's forgiveness. He told Rosa he loved her more than she loved him. He also instructed her to "tell them that everything is a lie. Just like you were saying, but – in the letters I tell you how, okay?"

As a result of [Petitioner's] efforts, Rosa wrote a letter to the judge, which [her son] translated and typed. The letter was given to defense counsel prior to the preliminary hearing. In it, Rosa recanted her sexual abuse claims, stating [Petitioner] physically abused her on November 21, 2013, but he tripped and fell asleep after he dragged her into the bedroom. She stated that she believed [Valeria H.] made up the sexual abuse because she was angry at what [Petitioner] had done to

her mother. She also recanted her statements regarding the sexual assault at trial.

(Lodged Doc. 5 at 6-7 (footnotes omitted).)

Thus, Rosa M.'s letter recanting her testimony was neither excluded nor unavailable at trial. It was in fact presented to the jury, which ultimately convicted Petitioner of sexually assaulting Rosa M. despite it. See Jones v. Taylor, 763 F.3d 1242, 1250-51 (9th Cir. 2014) (allegedly never-before-raised issues in witness testimony were actually "presented to the jury at trial," but "jury nevertheless voted to convict [petitioner]," undermining "inference that no reasonable juror would have convicted [him] in light of the purportedly new evidence"). Accordingly, Petitioner's actual-innocence claim fails.

Though not raised in the Opposition, Petitioner suggests in the FAP that other evidence not introduced at trial "contradicts" Valeria H.'s testimony. (See FAP, pt. 3 at 16-17.) He alleges that "security videos" at his house "would have proved that Valeria H. wasn't [at] home" when the abuse allegedly occurred on November 20, 2013, "like she said in trial," because she was at the "laundry[]" instead. (Id. at 7.) He further claims, among other things, that Valeria H. also lied when she said she had falsely accused a teacher and someone else of sexual assault because Petitioner had pressured her into doing so; the teacher did in fact sexually molest and kidnap her, Petitioner alleges. (Id. at 17.) But as explained below, the jury considered Valeria H.'s testimony in conjunction with the rest of the evidence presented at trial, including impeachment evidence.

As summarized by the court of appeal, Rosa M. testified that

she and Valeria H. "planned to do laundry at a laundromat" on the night of November 20, 2013, but before they could leave, Petitioner "demanded to know where they were going" and then physically abused Rosa M. before letting her go. (Lodged Doc. 5 at 3.) Rosa M. testified that Valeria H. was present for at least part of when this occurred. (Exs. to Pet., pt. 11 at 16.) Rosa M. further testified that on the following night, Petitioner sexually assaulted her; though Rosa M. recanted that story, Valeria H. substantiated it because she had witnessed portions of the assault throughout the night. (Lodged Doc. 5 at 4-5.) Moreover, as discussed above, Rosa M.'s letter, which stated that Valeria H.'s sexual-assault accusations against Petitioner were fabricated "out of anger," was presented to the jury as well. (See Reply, Ex. B. B045-47.)

Valeria H. also testified that she herself had been abused by Petitioner since 2008, when she started ninth grade. (Lodged Doc. 5 at 7-8.) Petitioner "regularly raped and sexually assaulted [her] either inside the house or inside a trailer parked in the backyard between the time she was 14 years old until she was 16" because "[h]e wanted to be the first one with her." (Id. at 8.) At one point he forced her to have sex with him in the auto body shop he owned at the time (id. at 7), and at another he stabbed her in the hand with his keys "because she and Rosa had taken too long to bring him beer from the store" (id. at 8). Valeria H. ran away after the latter incident to stay with a friend, whose parents took her to the police. (Id.) "Pictures of the wound were taken by the police and the jury was shown those pictures at trial." (Id.) Valeria H. ran away again at

some point to stay with her teacher. (Id.) Petitioner was upset at the teacher "for helping her and forced her to report the teacher had kidnapped her and had touched her." (Id.) He also "forced [Valeria H.] to file a false sexual assault report against an employee who worked at his auto body shop." (Id.)

Valeria H. was cross-examined by Petitioner's counsel regarding her allegedly false accusations against the teacher and body-shop employee. (See, e.g. Exs. to Pet., pt. 11 at 202-03.) She admitted that before trial she "never told" anyone those were false allegations, not even at the preliminary hearing. (Id. at 202.) Only when she was "confronted with [them]" did she "sa[y] for the first time, oh, but my dad made me tell those things." (Id.) She further testified that everything she did and said was "motivated by [her] love for [her] mom," whom she wanted to protect, and she felt like Rosa M. "[couldn't] do that for herself." (Id. at 203; see also id. at 207-08 (stating that she was motivated to testify against Petitioner to "make sure that he doesn't do anything to [her] sister, as well").) She even acknowledged applying for a U-Visa, which Petitioner's counsel theorized was a "motive in this case" because such a visa is "provided to victims of certain types of crimes." (Id. at 64-66, 142.)

Thus, the jury heard evidence potentially discrediting Valeria H.'s testimony and nonetheless convicted Petitioner of the charged physical and sexual abuse, undermining his claim of actual innocence. See Lopez v. Janda, No. EDCV 13-316-GAF (OP), 2013 WL 2898077, at *5 (C.D. Cal. June 11, 2013) (evidence was insufficient to demonstrate actual innocence when "motives and

intent of the victims were sufficiently explored at trial" and "jury heard evidence of Petitioner's arguments with his step-daughter, her potential motives for making the allegations against him, and heard evidence that the victims had recanted their allegations to others – and the jury still voted to convict Petitioner"). Moreover, Petitioner's claims about the content of the supposed security-video footage are not substantiated by any evidence and are insufficient to warrant a finding of actual innocence in light of the evidence presented at trial. See Vigil v. Small, No. CV 09-1657 GAF (CW), 2010 WL 1852498, at *6 (C.D. Cal. Mar. 20, 2010) (petitioner's speculations that "videos may 'reasonably be expected to be exculpatory'" fell "far short of establishing that this is an extraordinary case warranting application of the actual innocence gateway"), accepted by 2010 WL 1852420 (C.D. Cal. May 5, 2010); Proffitt v. Subia, No. CIV S-06-2143 GEB GGH P, 2007 WL 2265590, at *5 (E.D. Cal. Aug. 6, 2007) ("Although a claim of actual innocence might stand as a basis for ignoring the statute of limitations, the basis for [petitioner's] claim remains tenuous and speculative at best and simply not sufficiently supported, even in light of his excessive filings in this action."), accepted by 2007 WL 2901150 (E.D. Cal. Sept. 27, 2007).[11]

[11] Petitioner appears to rely on other evidence presented at trial to show his innocence. (See, e.g., Opp'n at 23 (discussing allegedly exculpatory "photographs" and "forensic medical report" showing "mutual combat" between him and Rosa M.), 27-28 (discussing photographic and forensic-medical evidence that Rosa M. broke plate on his face); Exs. to Pet, pt. 7 at 35-41 (forensic-medical report, titled "sexual assault suspect examination," revealing findings of "abrasion, redness, [and] bruising [on Petitioner]. . . consistent

To the extent Petitioner's allegations of "conspiracy" are intended as further support for his actual-innocence claim (see, e.g., Opp'n at 27, 52-53 (Rosa M. and Valeria H. purportedly conspired to have Petitioner convicted so that they could be granted "legal status" as immigrants and obtain "A-U-VISAS as . . . supposed victims of serious crimes"); see also, e.g., id. at 47 (prosecutor, state judiciary, and Petitioner's counsel were "working together, participating in the aiding and abetting conspiracy"), 54 (prosecutor "protected a third person[] who was implicated" in his charged offenses and used "this sexual predator as a supposed eyewitness of my case[] to deceive the jury in my trial")), such allegations are conclusory, do not demonstrate his innocence, and warrant no relief. See Thomas v. Muniz, No. CV 14-7596-JLS(E), 2015 WL 13237423, at *10 (C.D. Cal. Oct. 29, 2015) ("Petitioner's challenge to the evidence as 'fabricated,' his conclusory allegations of conspiracy between counsel and the trial judge and his vague allegations concerning unidentified allegedly withheld evidence are wholly insufficient."), accepted by 2016 WL 8738095 (C.D. Cal. Mar. 11,

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with defensive injuries he received from the victim"), 42-49 (photographs that showed "scar[s]" and "bruises" on Petitioner, which were included in presentation to jury).) But his arguments here too are insufficient because the jury heard all this evidence and nonetheless convicted him. See Bonilla v. Harman, No. CV 12-10635-JAK (MAN), 2013 WL 6626840, at *7 (C.D. Cal. Dec. 16, 2013) ("Such allegations arguably go to the validity of the evidence actually presented at trial; they do not constitute a statement of new and reliable evidence and do not implicate the actual innocence exception."). The Court cannot simply reweigh the evidence presented to the jury and conclude that it demonstrated that Petitioner was innocent, see Cavazos v. Smith, 565 U.S. 1, 8 n.* (2011) (per curiam), particularly when Petitioner has never raised a sufficiency-of-the-evidence claim.

2016); see also Larsen v. Soto, 742 F.3d 1083, 1095-96 (9th Cir. 2013) (as amended) (Schlup standard for actual innocence is "demanding," requires petitioner to support allegations with "new reliable evidence," and has rarely been satisfied without "dramatic new evidence of innocence"). Thus, Petitioner's claims of actual innocence do not overcome the untimeliness of his Petition.[12]

III. Petitioner's Motion For Stay

A stay for exhaustion purposes is unwarranted if the underlying federal petition is untimely, as here. See Dang v. Sisto, 391 F. App'x 634, 635 n.9 (9th Cir. 2010) (in light of untimely petition, it was unnecessary to "consider whether [petitioner] was entitled to a stay and abeyance order while he sought to exhaust additional claims before the state courts" because "[a] stay would have availed him nothing"); Lozano v. Montgomery, No. CV 16-2384-SJO(E), 2016 WL 6902106, at *10 (C.D. Cal. Aug. 25, 2016) (collecting cases so holding), accepted by 2016 WL 6902469 (C.D. Cal. Nov. 22, 2016). Accordingly, Petitioner's motion for stay should be denied.

IV. Petitioner's Request for an Evidentiary Hearing

Petitioner appears to seek an evidentiary hearing. (Opp'n at 61-63.) A habeas petitioner "should receive an evidentiary hearing when he makes a good-faith allegation that would, if true, entitle him to equitable tolling." Roy v. Lampert, 465

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[12] Because the Petition and FAP are untimely and Petitioner has not demonstrated his actual innocence, the Court need not address Respondent's exhaustion arguments. (See Reply at 9-11 & n.5); Seals v. Jaquez, No. C 10-3707 PJH (PR), 2013 WL 4555227, at *3 n.4 (N.D. Cal. Aug. 27, 2013).

F.3d 964, 969 (9th Cir. 2006) (as amended) (citation and emphasis omitted). But as discussed above, his pro se status, language skills, library access during the limitation period, and rejected petition for review do not constitute extraordinary circumstances warranting equitable tolling even if the Court accepts his allegations as true. Thus, no basis exists for an evidentiary hearing. See Roberts v. Marshall, 627 F.3d 768, 773 (9th Cir. 2010) (no obligation to hold evidentiary hearing when no extraordinary circumstance caused untimely filing of habeas petition); see also Orthel v. Yates, 795 F.3d 935, 939-40 (9th Cir. 2015) (denying equitable tolling without evidentiary hearing based on review of voluminous medical records). Petitioner's unsupported and conclusory claims of actual innocence do not warrant an evidentiary hearing either. See Lyons v. Frigo, No. CV05-4018-PHX-SRB, 2007 WL 2572338, at *17 (D. Ariz. Sept. 4, 2007) (petitioner's "conclusory allegations" were insufficient to justify evidentiary hearing because he "proffer[ed] no new evidence of his actual innocence," offered nothing to "impeach the credibility of the evidence presented against him at trial," and presented nothing, "e.g. no affidavits or sworn statements by witnesses," to support claim that exculpatory evidence was available).

RECOMMENDATION

IT ACCORDINGLY IS RECOMMENDED that the District Judge accept this Report and Recommendation, grant Respondent's motion to dismiss, deny Petitioner's motion to stay as moot, and enter judgment denying the Petition and FAP as untimely and dismissing this action with prejudice.

DATED: April 5, 2018

JEAN ROSENBLUTH
U.S. MAGISTRATE JUDGE

Additional material from this filing is available in the Clerk's Office.