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APPENDIX A

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**FILED
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U.S. COURT OF APPEALS

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

WENDY DOWNS, Petitioner - Appellant, v. KATHLEEN ALLISON and ROB BONTA, Respondents – Appellees.	No. 24-461 D.C. No. 3:22-cv-02073- MMA-DDL Southern District of California, San Diego ORDER
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Before: HURWITZ and KOH, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 7) 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).

APPENDIX B

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

WENDY HEATHER DOWNS, Petitioner,	Case No. 22-cv-2073- MMA (DDL)
v.	ORDER RE: PETITIONER'S OBJECTIONS; [Doc. No. 11]
KATHLEEN ALLISON, Secretary of California Department of Corrections and Rehabilitation, et al., Respondents.	MODIFYING AND ADOPTING REPORT AND RECOMMENDA- TION AS MODIFIED; [Doc. No. 10] GRANTING MOTION TO DISMISS AND DIS- MISSING PETITION WITH PREJUDICE; and [Doc. No. 1] DECLINING TO ISSUE A CERTIFICATE OF APPEALABILITY

On December 30, 2022, Wendy Downs (“Petitioner”), proceeding *pro se*, filed a habeas corpus petition pursuant to 28 U.S.C. § 2254 (the “Petition”). *See* Doc. No. 1. Respondents filed a motion to dismiss the Petition on March 3, 2023, and Petitioner filed an

opposition to the motion on March 29, 2023. *See* Doc. Nos. 6–7. On May 23, 2023, Magistrate Judge David D. Leshner issued a well-reasoned Report and Recommendation (“R&R”), recommending that the Court grant the motion to dismiss the Petition. *See* Doc. No. 10.¹ Petitioner filed objections to the R&R on June 5, 2023. *See* Doc. No. 11. Respondents did not file a reply. Upon due consideration and for the reasons set forth below, the Court **SUSTAINS** Petitioner’s objection to the R&R’s statement regarding her probation, **OVERRULES** Petitioner’s remaining objections, **MODIFIES** the R&R and **ADOPTS** it as modified, **GRANTS** the motion to dismiss the Petition, **DISMISSES** the petition with prejudice, and **DECLINES** to issue a certificate of appealability.

I. FACTUAL AND PROCEDURAL BACKGROUND

Judge Leshner’s R&R includes the relevant factual and procedural background of Petitioner’s case. Doc. No. 10 at 3–4. The R&R states that a California Highway Patrol officer saw Petitioner driving at about 110 miles per hour on highway 8. *Id.* at 3. The officer stopped Petitioner and had her perform some field sobriety tests. *Id.* He then arrested Petitioner on suspicion of driving under the influence. *Id.* A blood test showed Petitioner was under the influence of methamphetamine. *Id.*

Following a trial, Petitioner was convicted of driving under the influence and she admitted suffering a prior conviction for driving under the influence within the preceding ten years. *Id.* The trial judge later found her guilty of an infraction for driving in

¹ All citations to electronically filed documents refer to the pagination assigned by the CM/ECF system.

excess of 100 miles per hour. *Id.* Petitioner was sentenced to nine days in jail and placed on five years of probation. *Id.* She was also assessed a fine and had her driver's license suspended. *Id.*

Petitioner appealed her conviction to the Appellate Division of the San Diego Superior Court, which affirmed her conviction on October 2, 2020. *See* Doc. No. 1 at 2; Doc. No. 10 at 3; Doc. No. 1-15, 137-40, 149-56. The Clerk of the Appellate Division filed the remittitur on November 3, 2020 stating the decision was final. *See* Doc. No. 1-15 at 135-36. Petitioner then filed habeas corpus petitions in the San Diego Superior Court, the California Court of Appeal, and the California Supreme Court. *See* Doc. No. 1 at 3-4; Doc. No. 1-17 at 17-88, 163-252; Doc. No. 1-18 at 17-56. All three courts denied the petitions. *See* Doc. No. 1 at 3-4; Doc. No. 1-17 at 150-59, 267-69; Doc. No. 1-18 at 178.

Petitioner objects to the factual background as recited in the R&R. Doc. No. 11-1 at 12-13. The California Court of Appeal's statement of facts, however, to which this Court must defer under 28 U.S.C. § 2254(e)(1), states as follows:

At trial, a law enforcement officer testified that while working a routine freeway patrol at night, he stopped Downs after observing her driving approximately 110 miles per hour. Based on her appearance and performance on a series of field sobriety tests, the officer arrested Downs on suspicion of driving under the influence. Subsequent blood testing revealed Downs was under the influence of methamphetamine.

Doc. No. 1-8 at 63.

The R&R accurately reflects the facts as recounted by the state appellate court. Petitioner's

objection is therefore **OVERRULED** and the Court **ADOPTS** the R&R's factual and procedural background.

The R&R notes Petitioner's appellate attorney submitted a brief pursuant to *People v. Wende*, 25 Cal.3d 436 (1979). Doc. No. 10 at 3. Petitioner objects to the R&R's omission of a citation to *Anders v. California*, 386 U.S. 738 (1967), which appellate counsel also referred to in his opening brief. Doc. No. 11-1 at 13; Doc. No. 1-15 at 155. Under *Wende*, an attorney may submit an appellate brief notifying the court that he has reviewed the record and has identified no arguable issues for review. *Wende*, 25 Cal. 3d at 441-43. The court must then review the record to determine whether there is any basis upon which to grant relief. *Id.* *Anders* is simply the United States Supreme Court case upon which *Wende* is based. *See Wende*, 25 Cal. 3d at 441-42. Because the addition of a citation to *Anders* is unnecessary and would add nothing to the R&R's analysis, the Court **OVERRULES** this objection.

In the habeas corpus petition she filed in this Court on December 30, 2022, Petitioner argues: (1) her Sixth Amendment right to competent trial and appellate counsel was violated; (2) her due process right to a fair trial was violated when the prosecutor committed errors at trial; (3) her right to an impartial jury was violated by juror bias; (4) her First Amendment right to access the courts was violated by Covid-19 closures; (5) the cumulative effect of all the errors rendered her trial unfair; and (6) she was not provided with a fair habeas corpus proceeding in state court. *See* Doc. No. 1. Judge Leshner concluded the petition is untimely and recommends the Court grant the motion to dismiss and dismiss the petition with

prejudice. *See* Doc. No. 10. Petitioner objects to the R&R on several grounds. *See* Doc. No. 11.²

II. LEGAL STANDARD

A district court has jurisdiction to review a magistrate judge's report and recommendation on dispositive matters. *See* Fed. R. Civ. P. 72(b). Pursuant to Local Rule 72 and 28 U.S.C. § 636(b)(1), the Court must make a *de novo* determination of any part of the magistrate judge's disposition to which a party has properly objected. *See id.*; *see also United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). The Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1); *see also United States v. Remsing*, 874 F.2d 614, 617 (9th Cir. 1989).

III. DISCUSSION

Pursuant to 28 U.S.C. § 2254, a federal court may issue a writ of habeas corpus if a petitioner's state court conviction violates the Constitution or the laws or treaties of the United States. *See* 28 U.S.C. § 2254.

² Petitioner objects to the R&R only citing to Local Rule 72.2.d and requests that the R&R "additionally adhere to Civil Local Rule 72.1.d." Doc. No. 11-1 at 11. Local Rule 72.1.d provides that all cases filed pursuant to 28 U.S.C. § 2254 which do not involve the death penalty are referred to the Magistrate Judge for preparation of an R&R. *See* Civil Local Rule 72.1.d. As Judge Leshner has prepared an R&R in this case, it is clear the provisions of Local Rule 72.1.d have been complied with in this case and therefore Petitioner's objection is **OVERRULED**.

A. Petitioner's Probation Status

Petitioner objects to the R&R's statement that she is on supervised probation, *see* Doc. No. 10 at 1, and states that she is actually on summary probation. Doc. No. 11-1 at 11. According to the transcript of Petitioner's sentencing proceeding, the trial judge sentenced her to summary probation. Doc. 1-15 at 108. Therefore, the Court **SUSTAINS** the objection and **MODIFIES** the R&R to reflect Petitioner was placed on five years of summary probation.

B. Description of Grounds for Relief and Omitted Reference to Doc. No. 8

Petitioner objects to the R&R's description of her grounds for relief because it does not include all the Constitutional amendments she references in her Petition. Doc. No. 11-1 at 11. The Court has reviewed the petition in this case and concludes the R&R accurately summarizes Petitioner's claims even though it may not list every Constitutional provision Petitioner invoked. Moreover, because the R&R does not address the merits of Petitioner's claims, the R&R's statement of grounds for relief has no bearing on the R&R's conclusions. Petitioner also objects to the R&R's failure to mention the Magistrate Judge's April 26, 2023 Order directing Respondent to reply to Petitioner's opposition to the motion to dismiss. Doc. No. 11-1 at 11. It is not clear why Petitioner objects to this omission, but, as with her objection to the R&R's description of the Constitutional basis for her claims, the omission has no effect on Judge Leshner's conclusions. Accordingly, the Court **OVERRULES** these objections.

C. Commencement of the Statute of Limitations

The R&R correctly states that the one year statute of limitations imposed on federal habeas corpus petitions is codified in 28 U.S.C. § 2244(d)(1). Doc. No. 10 at 5. The limitation period begins to run “from the latest of” the following:

- (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).

In Petitioner’s case, subsections (A), (B), and (D) are relevant, as Petitioner does not base her claims on any new constitutional right recognized by the Supreme Court.

Petitioner objects to the R&R’s conclusion that her conviction became final, and the statute of limitations clock pursuant to 28 U.S.C. § 2224(d)(1)(A)

began ticking, on November 4, 2020, the day after the remittitur confirming the Appellate Division of the Superior Court’s decision was filed. Doc. No. 11-1 at 16–17, 20. The Ninth Circuit has stated that a district court must “look to California law to determine when direct review of a California misdemeanor conviction concludes.” *McMonagle v. Meyer*, 802 F.3d 1093, 1095 (9th Cir. 2015). The R&R correctly found that the California Rules of Court provide that after conviction, a defendant must appeal to the Appellate Division of the Superior Court. *Id.* at 1097; Doc. No. 10 at 6. Upon a denial by the Appellate Division, a defendant may next ask the Appellate Division to certify the case to the California Court of Appeal. *McMonagle*, 802 F.3d at 1097; Doc. No. 10 at 6. If the Appellate Division declines to certify the case, the defendant may then ask the California Court of Appeal to accept transfer of the case. *McMonagle*, 802 F.3d at 1097; Doc. No. 10 at 6. The California Court of Appeal may also transfer the case on its own motion. Cal. R. Ct. 8.1002(3); Doc. No. 10 at 6. Direct review of the conviction concludes immediately upon denial of transfer by the California Court of Appeal, and “no further appeal to the California Supreme Court is available.” *McMonagle*, 802 F.3d at 1097; *see* Doc. No. 10 at 6.

Although Petitioner appealed her conviction to the Appellate Division of the Superior Court, there is no evidence she asked the Appellate Division to certify the case to the California Court of Appeal, nor that she asked the California Court of Appeal to accept transfer of the case. Under California Rules of Court 8.888(a)(1) Petitioner’s conviction therefore became final “30 days after the decision is sent by the court clerk to the parties.” Cal. R. Ct. 8.888(a)(1). Accordingly, as the R&R correctly concluded, the decision

affirming the superior court’s judgment was filed on October 2, 2020, and thirty days later, on November 3, 2020, the decision became final.³

Normally, the statute of limitations does not begin to run for a federal habeas petitioner until the ninety-day period for seeking review in the United States Supreme Court has elapsed. *See Bowen v. Roe*, 188 F.3d 1157, 1158–59 (9th Cir. 1999). Here, however, the R&R correctly found Petitioner was not entitled to the ninety days within which she could file a petition for writ of certiorari to the United States Supreme Court because the Appellate Division’s decision was not a judgment of last resort and the Supreme Court would have lacked jurisdiction to hear such a case. *See Gonzalez v. Thaler*, 565 U.S. 134, 154 (2012) (concluding petitioner was not entitled to the ninety-day period within which he could have filed a petition for writ of certiorari with the United States Supreme Court because the petitioner had not sought review from the highest possible state tribunal).

Petitioner also objects to the R&R’s conclusion that the statute of limitations started on November 4, 2020 on three other grounds. First, she appears to argue the conviction did not become final until the stay on the execution of her sentence was lifted, citing California Rules of Court 8.311(a)(1). Doc. No. 11-1 at 16–17. Rule 8.311(a)(1) applies to criminal appeals from the superior court to the California Court of Appeal, not appeals to the Appellate Division of the Superior Court, which operate under separate rules. *See* Rule 8.800(a). Moreover, a stay of execution of

³ The R&R correctly notes that although the decision was sent to the parties on November 2, 2020, the remittitur was file-stamped November 3, 2020, and that is the date the Court will use.

sentence is not part of the direct review process and therefore, contrary to Petitioner's assertion, her case was not ongoing between October 2, 2020 when the Appellate Division affirmed her conviction until April 19, 2021 when the stay was lifted. *See* Doc. No. 11-1 at 16-17.

Second, she argues the closures of the county library and the courts due to the Covid-19 pandemic was a state-created "impediment to filing," which should trigger a later start date for the statute of limitations pursuant to 28 U.S.C. § 2244(d)(1)(B). *Id.* at 17. Section 2244(d)(1)(B) imposes the additional requirement, however, that the impediment be "in violation of the Constitution of the United States or laws of the United States." *Id.* The closures of the county library and the courts do not meet this requirement. Further, "[t]o obtain relief under § 2244(d)(1)(B), the petitioner must show a causal connection between the unlawful impediment and his failure to file a timely habeas petition." *Bryant v. Arizona*, 499 F.3d 1056, 1060 (9th Cir. 2007); *Randle v. Crawford*, 604 F.3d 1047, 1055 (9th Cir. 2010). According to Petitioner, the San Diego County library partially reopened in October of 2020 and expanded access in June of 2021, giving her a minimum of four months and up to eleven months to prepare her federal habeas corpus petition before the statute of limitations expired. See Doc. No. 7-1 at 10-11, 14; Doc. No. 11-1 at 25. As the R&R also noted, the San Diego Superior Court reopened for limited in-person services on May 26, 2020 and Petitioner states she had numerous contacts with the court and appeared at four court dates between November 4, 2020 when the statute of limitations began running and November 4, 2021 when it expired. *See* Doc. No. 10 at 10; Doc. No. 11-1 at 24-25. Therefore, she has not established the

necessary causal relationship between the closures and her failure to file her petition in this Court before the statute of limitations expired.

Third, she contends a different start date should apply pursuant to 28 U.S.C. § 2244(d)(1)(D) because she was not aware of the factual predicate of her ineffective assistance of counsel claims before the statute of limitations expired. Doc. No. 11-1 at 17. Specifically, she objects to the R&R's failure to consider that she did not have access to her case file until December 2, 2021. *Id.* Petitioner raised the following claims in her petition: ineffective assistance of trial counsel, ineffective assistance of appellate counsel, prosecutorial errors at trial, a violation of her right to an impartial jury, a violation of her access to the court system due to Covid-19 restrictions, and a denial of access to state habeas corpus proceedings. *See* Doc. No. at 6-9, 24-65. All of these alleged violations occurred during her trial and appeal, and therefore Petitioner should have been aware, through the exercise of due diligence, of the factual predicate for all of her claims no later than November 3, 2020 when the Appellate Division denied her appeal.

For the foregoing reasons, the Court **OVERRULES** Petitioner's objections to the start date for the statute of limitations under 28 U.S.C. § 2244(d)(1) and **ADOPTS** the R&R's conclusion that the statute of limitations began to run on November 4, 2020.

D. Statutory Tolling

The R&R correctly states that AEDPA's statute of limitations is subject to statutory tolling for the time during which a "properly filed application for State post-conviction or other collateral review with

respect to the pertinent judgment or claim is pending. . . .” Doc. No. 10 at 8 (citing 28 U.S.C. § 2244(d)(2). Petitioner asserts the R&R incorrectly found the stay of her sentence did not qualify as a “properly filed application for State post-conviction or other collateral review” under § 2244(d)(2). Doc. No. 11-1 at 18–21. “Collateral review” is defined as “a form of review that is not part of the direct appeal process.” *Wall v. Kholi*, 562 U.S. 545, 552 (2011). The Ninth Circuit has applied a three factor test to determine whether a proceeding is a “part of the direct appeal process” or is instead a form of collateral review. *Barnham v. Montana*, 996 F.3d 959, 964 (9th Cir. 2021). The first factor to consider is “how the proceeding is characterized under state law.” *Id.* Second, a court should consider the timing of the proceeding; a collateral proceeding “necessarily follows direct review.” *Id.* at 964–65 (quoting *Lopez v. Wilson*, 426 F.3d 339, 351 (6th Cir. 2005)). Third, a court should consider whether the proceeding “takes the place of an appeal in the State’s system.” *Id.* at 965.

In California, a stay of a sentence usually occurs in one of two ways, either as part of the sentencing phase of a criminal proceeding when a state court judge stays a sentence pursuant to Penal Code § 654’s prohibition against multiple punishments, or as appears to be the case here, when a judge agrees to stay the execution of a defendant’s sentence pending an appeal. *See* Doc. No. 1-6 at 89–91. In either case, a stay of sentence is not “part of the direct appeal process,” is not a proceeding that “follows direct review,” nor does it “take[] the place of an appeal in the State’s system.” *Barnham*, 996 F.3d at 964. Because Petitioner’s first collateral review filing was the habeas corpus petition she filed in the

San Diego Superior Court on April 8, 2022, 155 days after the federal statute of limitations had expired, no statutory tolling is available. *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003); *Jimenez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001). Accordingly, Petitioner's objection to the R&R's determination that she is not entitled to any statutory tolling is **OVERRULED**.

E. Equitable Tolling

Petitioner also objects to the R&R's conclusion that she is not entitled to any equitable tolling. Doc. No. 11-1 at 21–28. The R&R correctly states that equitable tolling is available only when “external forces, rather than a petitioner’s lack of diligence, account for the failure to file a timely claim” Doc. No. 10 at 9 (citing *McMonagle*, 802 F.3d at 1099). A petitioner must show both diligence and that “extraordinary circumstances stood in his way and prevented timely filing.” *Id.* at 10 (citing *Holland v. Florida*, 560 U.S. 631, 649 (2010)). Petitioner asserts she is entitled to equitable tolling because her appellate attorney lost her file and did not provide her with the brief he filed or the appellate record, which prevented her from filing a supplemental brief. Doc. No. 11-1 at 15. Although egregious attorney misconduct, such as abandoning or lying to a client can constitute extraordinary circumstances sufficient to warrant equitable tolling, ordinary or “garden variety” negligence, such as missing a filing deadline or poor communication, generally does not. *See, e.g. Holland v. Florida*, 560 U.S. 631, 651–52 (2010). The allegations Petitioner makes regarding her attorney do not rise to the level of “egregious misconduct.”

Petitioner also argues she is entitled to equitable tolling because she did not have sufficient access to a law library or the courts due to Covid-19 restrictions. Doc. No. 11-1 at 23-27. As the R&R correctly points out, lack of access to legal assistance does not constitute an “extraordinary circumstance” sufficient to entitle a petitioner to equitable tolling. See *Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006). In any event, Petitioner’s own documents show the Point Loma library was open Monday and Tuesday 11:30 a.m. to 8 p.m., and Wednesday through Saturday 9:30 a.m. to 6:00 p.m. by July 31, 2021, and the downtown library was open Monday through Thursday, 9 a.m. to 3 p.m., without an appointment by June 15, 2021. Doc. No. 7-2 at 7, 12. Thus, Petitioner had sufficient access to legal materials at least four months before the statute of limitations expired on November 4, 2021. Moreover, as the R&R correctly notes and Petitioner concedes, the San Diego Superior Court reopened for limited services on May 26, 2020, and Petitioner availed herself of court services numerous times between November 4, 2020 and November 4, 2021. Doc. No. 10 at 10; Doc. No. 11-1 at 7-1 at 10-14. Further, as the R&R correctly found, Petitioner has not established the diligence required for equitable tolling because she did not begin the exhaustion process in state court until April 8, 2022 when she filed her first habeas corpus petition, nearly a year and a half after her conviction became final and five months after the statute of limitations had expired. See Doc. No. 1-17 at 17-87. Accordingly, Petitioner’s objection to the R&R’s finding regarding equitable tolling is **OVERRULED**.

IV. CERTIFICATE OF APPEALABILITY

The federal rules governing habeas cases brought by state prisoners require a district court that dismisses or denies a habeas petition to grant or deny a certificate of appealability in its ruling. *See Rule 11(a), Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254.* A certificate of appealability is not issued unless there is “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Under this standard, a petitioner must show that reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). For the reasons set forth in the R&R and incorporated herein, the Court finds that this standard has not been met and therefore **DECLINES** to issue a certificate of appealability.

V. CONCLUSION

For the foregoing reasons, the Court **SUSTAINS** Petitioner’s objection regarding her probation and **MODIFIES** the R&R to state she was sentenced to summary probation. The Court **OVERRULES** Petitioner’s remaining objections, **ADOPTS** Judge Leshner’s R&R as modified, **DENIES** the Petition, and **DECLINES** to issue a certificate of appealability.

IT IS SO ORDERED.

DATED:

January 12, 2024

Michael M. Anello

HON. MICHEAL M. ANELLO
United States District Judge

APPENDIX C

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

WENDY H. DOWNS, Petitioner,	Case No. 22-cv-2073- MMA-DDL
v.	REPORT AND RECOMMENDATION FOR ORDER GRANTING MOTION TO DISMISS [Dkt. No. 6]
KATHLEEN ALLISON, CDCR Secretary, et al., Respondents.	

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

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

effective assistance of counsel for a jury trial due to trial counsel errors, and her Fifth and Eighth Amendment rights were violated by acts brought about by the prior violation alleged; (3) Petitioner was denied the right to effective assistance of counsel on appeal due to appellate counsel errors; (4) Petitioner was denied the right to due process and a fair trial guaranteed by the Sixth Amendment due to prosecutorial errors, which caused a violation of Petitioner's Fifth and Eighth Amendment rights; (5) Petitioner's constitutional right to an impartial jury guaranteed by the Sixth Amendment was violated by improper jury bias; (6) Petitioner's constitutional right to meaningful access to court and legal resources guaranteed by the First Amendment has been violated by COVID-19-related closures and restricted access to the court and legal resources; (7) Petitioner's Sixth Amendment rights to due process, a fair trial, effective assistance of trial counsel, effective assistance of appellate counsel, and an impartial jury were violated by the cumulative errors alleged in grounds 1 through 6 of the Petition, resulting in violations of Petitioner's First, Fifth, and Eighth Amendment rights; and (8) Petitioner was denied the constitutional right to habeas corpus proceedings, including full and factual development of the claims within the state trial and appellate court petitions because the San Diego Superior Court stated a *prima facie* case was determined for each claim yet did not issue an order to show cause. *See* Dkt. No. 1 at 6-9, 24-27.¹

On March 3, 2023, pursuant to this Court's order requiring a response to the Petition, Respondents filed the instant Motion to Dismiss the Petition for

¹ All docket references are to the document and page numbers generated by the CM/ECF system.

Writ of Habeas Corpus (“Motion to Dismiss”) as untimely and barred under the applicable statute of limitations. Dkt. No. 6. On March 29, 2023, Petitioner filed a response in opposition (“Opposition”) to the Motion to Dismiss. Dkt. No. 7. On May 4, 2023, Respondents filed a reply brief (“Reply”) in further support of their Motion to Dismiss. Dkt. No. 9. For the reasons stated herein, the Court **RECOMMENDS** that the Motion to Dismiss be **GRANTED WITHOUT LEAVE TO AMEND** and that the Petition be **DISMISSED WITH PREJUDICE**.

I.

FACTUAL AND PROCEDURAL HISTORY

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

Criminal proceedings were initiated against Petitioner in the San Diego Superior Court (“Superior Court”) (Case No. M256699), and a jury trial ensued. *Id.* at 18. On February 6, 2020, a jury found Petitioner guilty of one count of misdemeanor driving under the influence, and the court found her guilty of one infraction for speeding at a rate over 100 miles per hour. *Id.* Petitioner was sentenced to five years’ probation with nine days in custody and ordered to

pay \$2,635 in fines.² *Id.* Petitioner commenced the postconviction 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.
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.

² In her Opposition, Petitioner notes that “all previously stayed programs and fines were lifted by the San Diego Superior Court” on April 19, 2021. Dkt. No. 7-1 at 13; *see* 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
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.

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. Code § 1466. Thereafter, Rules 8.1000–8.1018, govern the transfer of Appellate Division cases to the California Court of Appeal.³ Under Rule 8.1002, the Court of Appeal may order a case to be transferred to it “if it determines that transfer is necessary to secure uniformity of decision or to settle an important question of law,” and may do so in one of three ways. First, a party may file an application with

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

the Appellate Division to certify the case for transfer to the Court of Appeal within 15 days after the Appellate Division’s decision is sent to the parties by the court clerk. Cal. R. Ct. 8.1002(1); *see* Cal. R. Ct. 8.1005(b)(1)(A). Second, a party may petition the Court of Appeal to transfer a case from the Appellate Division to the Court of Appeal. Cal. R. Ct. 8.1002(2); *see* Cal. R. Ct. 8.1006. However, a party must file such petition no later than 15 days after the Appellate Division’s decision becomes final and may do so “only if an application for certification for transfer was first filed in the appellate division and denied.” Cal. R. Ct. 8.1006(a)–(b). Finally, the Court of Appeal may transfer the case on its own motion within 30 days after the Appellate Division decision is final. Cal. R. Ct. 8.1002(3); *see* Cal. R. Ct. 8.1008(a)(1)(B). If no action is taken to seek review of an Appellate Division decision, then the decision “is final 30 days after the decision is sent by the court clerk to the parties.” Cal. R. Ct. 8.888(a)(1).

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

⁴ The *Thomas* court notes that the Appellate Division’s order affirming the conviction 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.

analysis is the time during which the petitioner—not the Court of Appeal—may act. The district court, referencing Rule 8.1006(b)(1), determined that the petitioner had 15 days from the Appellate Division’s May 18, 2018, order to file a petition in the Court of Appeal to transfer his case to that court, but instead allowed the time to expire without filing a petition. *Id.* at 5-6. The expiration of the 15 day window resulted in the Appellate Division’s order becoming final on June 4, 2018, and the one-year limitation period under AEDPA to file a federal habeas petition commenced the next day on June 5, 2018.⁵ *Id.* at 6. Moreover, petitioner’s failure to file a petition for transfer to the Court of Appeal deprived him of the benefit of the 90-day period to seek certiorari in the United States Supreme Court, which lacked jurisdiction to review the Appellate Division’s decision because it can only review “judgments of a “state court of last resort” or of a lower state court if the “state court of last resort” has denied discretionary review.” *Id.*, quoting *Gonzalez v. Thaler*, 565 U.S. 134 (2012).

The instant case is analogous to *Thomas*. Here, Petitioner initiated direct review of her conviction in the Appellate Division, and the court clerk filed the decision affirming the trial court’s judgment on October 2, 2020. Dkt. No. 1-15 at 137. Under Rule 8.1005(b)(1)(A), Petitioner had 15 days—until October 19, 2020—to file an application requesting that the Appellate Division certify her case for transfer to the Court of Appeal. The record before this Court does not

⁵ Some deadlines may appear to exceed the number of days specified by the Rules. Under Rule 1.10(b), “if the last day for the performance of any act that is required by these 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.”

reflect that Petitioner filed any such application, and as such, she was not entitled to file a petition for transfer in the Court of Appeal. Additionally, Petitioner may not reap the benefit of the 90-day period for seeking review by the United States Supreme Court because Petitioner did not seek direct review by the California Supreme Court as the “state court of last resort.” *See Gonzalez*, 565 U.S. at 154. Therefore, under *Thomas*, the time for Petitioner to seek further review of her conviction expired on October 19, 2020.

AEDPA’s statute of limitations begins to run “from the *latest of*” the expiration of time for seeking direct review or the date on which the Appellate Division’s decision became final by the conclusion of direct review. 28 U.S.C. § 2244(d)(1) (emphasis added). The Appellate Division decision became final 30 days after the court clerk sent it to the parties, and the remittitur informing the parties that the decision had become final was filed on November 3, 2020.⁶ As the latest of the two dates, the statute of limitations began to run the following day on November 4, 2020. Accordingly, Petitioner had until November 4, 2021, to file a federal habeas petition. However, Petitioner filed the Petition in this Court on December 30, 2022—more than one year after the limitations period expired. Dkt. No. 1-2. As such, the Petition is time-barred.

B. Tolling of Limitations Period

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

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

1. Statutory Tolling

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

Petitioner asserts that she is entitled to statutory tolling because she "had a direct appeal case 'pending' in San Diego Superior Court, Case No. M256699," from October 2, 2020, when the Appellate Division affirmed her conviction, until April 19, 2021, when the Superior Court lifted the stay of all programs, fines, and fees. Dkt. No. 7-1 at 20-21. Petitioner provides no authority for the proposition that a stay of her sentence conditions, which remained effective after the Appellate Division's decision became final, renders her case "pending" within the meaning of AEDPA's statutory tolling provision. Moreover, Petitioner conflates the requirement under AEDPA's statutory tolling provision that an "application for State post-conviction or other collateral review" be "pending" with the trial court's imposition of a stay of her sentence conditions. The stay of Petitioner's sentence conditions between October 2, 2020, and April 19, 2021, is neither a pending direct appeal case, as Petitioner describes it, nor an "application for State post-conviction or other collateral review." Petitioner's post-conviction direct review ended on November 3, 2020, when the Appellate Division decision became

final, and she did not seek other post-conviction or collateral review in state court for the duration of AEDPA's limitations period. To the extent Petitioner argues that direct review concluded when the California Supreme Court denied her petition for review on November 16, 2022, thereby triggering AEDPA's limitations period the following day, Petitioner has not provided authority to support such a finding. *See* Dkt. No. 7-1 at 20. Therefore, statutory tolling under Section 2244(d)(2) is not available here. *See Thomas*, 2020 WL 1624406, at *7 (holding that statutory tolling was not available where petitioner made no collateral attacks on his conviction).

2. Equitable Tolling

"Equitable tolling may be available '[w]hen external forces, rather than a petitioner's lack of diligence, account for the failure to file a timely claim.'" *McMonagle v. Meyer*, 802 F.3d 1093, 1099 (9th Cir. 2015), quoting *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999). "The petitioner bears the burden of demonstrating that he or she is entitled to equitable tolling." *Stancle v. Clay*, 692 F.3d 948, 953 (9th Cir. 2012), citing *Rasberry v. Garcia*, 448 F.3d 1150, 1153 (9th Cir. 2006). Under *Holland v. Florida*, 560 U.S. 631, 649 (2010), a petitioner is entitled to equitable tolling "only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing" [internal quotation marks and citations omitted]. *See Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (finding that petitioner did not establish the requisite diligence and was therefore not entitled to equitable tolling because the claims asserted in his petition were available to him several years prior to the filing of his state and federal petitions).

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

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

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

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

traordinary circumstance.” Accordingly, Petitioner is not entitled to equitable tolling of AEDPA’s statute of limitations.

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

David Leshner

Honorable David D. Leshner

United States Magistrate Judge

APPENDIX D

Case 3:22-cv-02073-MMA-DDL Document 1-18 Filed
12/30/22 PageID.1682 Page 178 of 179

SUPREME COURT
FILED
NOV 16 2022
Jorge Navarrete Clerk
Deputy

Court of Appeal, Fourth Appellate District,
Division One - No. D080769

S276400
IN THE SUPREME COURT OF CALIFORNIA
En Banc

In re WENDY DOWNS on Habeas Corpus.

The request for judicial notice is granted.
The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

APPENDIX E

Case 3:22-cv-02073-MMA-DDL Document 1-18 Filed
12/30/22 PageID.1574 Page 70 of 179

Supreme Court of California

JORGE E NAVARRETE EARL WARREN BUILDING
CLERK AND EXECUTIVE 350 McALLISTER STREET
OFFICER SAN FRANCISCO, CA
OF THE SUPREME COURT 94102
 (415) 865-7000

October 17, 2022

Charles C. Ragland
Senior Assistant Attorney General
Office of the Attorney General
600 West Broadway, Suite 1800
San Diego, CA 92101

**Re: S276400 (D080769) - In re Wendy Downs on
Habeas Corpus**

Dear Counsel:

The court has directed that I request an answer to the above referenced matter. The petition is enclosed as an email attachment. The answer is to be served upon petitioner and filed in this court on or before October 25, 2022. The answer must be electronically filed. Petitioner will then have eight (8) days in which to serve and file a reply to the answer.

Your answer should address the following: Whether petitioner has established a *prima facie* case for relief, such that this court should grant the petition for review and transfer the matter to the

Court of Appeal with instructions to issue an order to show cause. (Cal. Rules of Court, rules 8.500(b)(4), 8.528(d).) Please limit your answer to the following issues: (1) whether trial counsel performed deficiently by inadequately advising petitioner regarding petitioner's admission to a prior conviction; (2) whether trial counsel performed deficiently by failing to ensure petitioner's admission was knowing and voluntary; and (3) whether either instance of allegedly deficient performance was prejudicial. (See petn. for review, p. 25; petn. for writ of habeas corpus, pp. 19-20; *id.*, Exh. N, pp. 767-769; see also *Strickland v. Washington* (1984) 466 U.S. 668; *In re Yurko* (1974) 10 Cal.3d 857.) Please address the merits of these contentions as well as any procedural bars that may apply.

Please be advised that the instant petition is a petition for review, and a ruling by the court is due on or before November 14, 2022. This request for an answer should be expedited by your office, and no request for extension of time is contemplated.

Very truly yours,
JORGE E. NAVARRETE
Clerk and Executive Officer of the Supreme Court
/s/ J. Castillo
By: J. Castillo, Senior Deputy Clerk

Enclosures

cc: Wendy Downs, petitioner
Rec.

APPENDIX F

Case 3:22-cv-02073-MMA-DDL Document 1-17 Filed
12/30/22 PageID.1501 Page 267 of 270

Court of Appeal
Fourth Appellate District
FILED ELECTRONICALLY
09/13/2022
Kevin J. Lane, Clerk
By: Alissa Galvez

**COURT OF APPEAL, FOURTH APPELLATE
DISTRICT, DIVISION ONE
STATE OF CALIFORNIA**

In re WENDY DOWNS	D080769
on	(San Diego County
Habeas Corpus.	Super. Ct. Nos. M256699, CA282993 & HC25602)

THE COURT:

The petition for writ of habeas corpus has been read and considered by Justices Huffman, Aaron, and Do.

In 2020, a jury found petitioner Wendy Downs guilty of driving under the influence of a drug and she admitted a prior conviction of the same offense within the past 10 years. Subsequently, the superior court found her guilty of the infraction of driving over 100 miles per hour. The court sentenced her to nine days in jail, imposed a fine, suspended her driving privileges, and placed her on five years of probation.

At trial, a law enforcement officer testified that while working a routine freeway patrol at night, he stopped Downs after observing her driving approxi-

mately 110 miles per hour. Based on her appearance and performance on a series of field sobriety tests, the officer arrested Downs on suspicion of driving under the influence. Subsequent blood testing revealed Downs was under the influence of methamphetamine.

Downs challenged her conviction in an appeal to the superior court appellate division, which affirmed the judgment in full. Thereafter, she unsuccessfully sought habeas corpus relief in the superior court.

In her petition filed in this court, Downs raises several grounds for relief. She raises several challenges to the superior court's order denying her writ petition filed in that court. The superior court's order denying her writ petition is not appealable or otherwise reviewable by this court. (*In re Hochberg* (1970) 2 Cal.3d 870, 876.) The proper procedure when a superior court denies a petition for writ of habeas corpus in a noncapital case is for the petitioner to file a new petition for writ of habeas corpus in the Court of Appeal. (*In re Clark* (1993) 5 Cal.4th 750, 767, fn. 7.) Accordingly, we do not review her objections to the superior court's order.

Some of Downs' claims filed in this court could have been raised on direct appeal but were not. A defendant cannot raise claims via a habeas corpus writ petition that could have been raised on direct appeal. (*In re Dixon* (1953) 41 Cal.2d 756, 759.) Accordingly, to the extent Downs could have raised her claims on direct appeal her claims are procedurally barred.

Downs also alleges that both her trial counsel and appellate counsel were ineffective for a variety of reasons. To establish ineffective assistance of counsel, Downs must demonstrate deficient performance and prejudice under an objective standard of reasonable

probability of an adverse effect on the outcome. (*People v. Waidla* (2000) 22 Cal.4th 690, 718.) Even if we assume that her counsels' performance fell below the standard of care, Downs fails to establish that the absence of the alleged errors would have led to a different result. The evidence of her guilt was overwhelming and undisputed and her claims of deficient performance do not undermine or negate any of that evidence. Her claims do not support a finding that the jury may have reached a different result, or that she would have secured a reversal on appeal, but for the alleged deficient performances.

The petition is denied.

HUFFMAN, Acting P. J.

Copies to: All parties

Case 3:22-cv-02073-MMA-DDL Document 1-17 Filed
12/30/22 PageID.1504 Page 270 of 270

**D080769 - In re WENDY DOWNS on Habeas
Corpus [Trial Court Case No: M256699]**

From Galvez, Alissa
<Alissa.Galvez@jud.ca.gov>

To iappreciateyou@protonmail.com,
sdag.docketing@doj.ca.gov,
DA.Appellate@sdcda.org,
Appeals.Central@SDcourt.ca.gov

Date Tuesday, September 13th, 2022 at 1:56 PM

Hon. Robert F. O'Neill

**Electronic service copy of order.
Please do not reply.**

98.65 KB 1 file attached

D080769 Order 091322.pdf 98.65 KB

APPENDIX G

Case 3:22-cv-02073-MMA-DDL Document 1-17 Filed
12/30/22 PageID.1384 Page 150 of 270

FILED
Clerk of the Superior Court
JUN 16 2022
By: C. Imperial

**THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO**

IN THE MATTER OF THE APPLICATION OF:	HC 25602 M256699
WENDY HEATHER DOWNS, Petitioner.	ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

THIS COURT, HAVING READ THE PETITION FOR WRIT OF HABEAS CORPUS, THE PEOPLE'S INFORMAL RESPONSE, AND THE FILE IN THE ABOVE-CAPTIONED MATTER, FINDS AS FOLLOWS:

I.
INTRODUCTION

On April 8, 2022, Petitioner filed a Petition for Writ of Habeas Corpus ("Petition") wherein she makes the following claims: 1) Her trial counsel was ineffective due to funding and staffing restraints at the San Diego Public Defenders Office, 2) Her trial counsel was ineffective for a variety of reasons including failing to adequately investigate her case

and .secure evidence for her defense, 3) Her appellate counsel was ineffective for a variety of reasons including failing to obtain a jury selection transcript, 4) The San Diego City Attorney failed to adequately preserve and/or disclose exculpatory evidence, 5) The jury was biased against her because one of the prospective jurors stated he knew Petitioner from a previous drug interaction, 6) She was denied meaningful access to the court because of the COVID-19 closures, and 7) As a result of the cumulative errors alleged in grounds 1-6, she was denied due process and a fair trial. Petitioner attached nearly 1000 pages of documents that she claims support her allegations. This court found that Petitioner had made the minimum *prima facie* showing for each claim and ordered the San Diego City Attorney's Office to file an Informal Response stating why this court should not grant relief.

On May 31, 2022, the San Diego City Attorney's Office, representing the People of the State of California through its representative Deputy City Attorney Shelly Webb, filed an Informal Response. In the Informal Response, the People argue that Petitioner is not entitled to relief largely because she has not shown any prejudice to her case.

On June 6, 2022, Petitioner filed a Reply to the People's Informal Response. In the Reply, Petitioner asserts that this matter must proceed to a formal Order to Show Cause why relief should not be granted because this court found a *prima facie* showing for relief in its Order for Informal Response. This court disagrees. The Order for Informal Response was made pursuant to California Rules of Court, Rule 4.573, subd. (a); Rule 4.551, subds. (a)(4)(C) & (b)- though not specifically cited. Following those rules, the People responded as ordered. Petitioner also filed

her Reply within the required time frame. Her Reply contains no substantive arguments. Rather, it repeats her claims that she has made a *prima facie* showing for relief. This court disagrees. Accordingly, this court is now prepared to rule on the Petition.

II. PROCEDURAL HISTORY

Petitioner is currently on informal probation for a period of 5 years after a jury found her guilty of driving under the influence of drugs. Petitioner admitted a prior conviction for driving under the influence after the jury rendered its verdict. Petitioner appealed. On October 2, 2020, the Superior Court Appellate Division issued an opinion affirming the judgment. (*People v. Downs*, CA282993.)

III. FACTS PRESENTED AT TRIAL

California Highway Patrol (CHP) officers observed Petitioner traveling at a high rate of speed on Interstate 8. Officers pace-tracked Petitioner traveling 110 miles per hour and conducted an enforcement stop. On contact, Petitioner exhibited signs and symptoms consistent with being under the influence. Petitioner performed poorly on the field sobriety tests and was arrested for driving under the influence of drugs. A portion of the Mobile Video Audio Recording System (MVARS) from the CHP patrol car was played for the jury.

A sample of Petitioner's blood was taken by a certified phlebotomist. The blood was later tested by a properly certified laboratory. Petitioner's blood tested positive for methamphetamine and its metabolites. A properly qualified toxicologist testified that, in her opinion, Petitioner's driving pattern,

physical appearance, performance on the field sobriety tests, and the level of methamphetamine in her blood, supported the determination that Petitioner was under the influence of methamphetamine for purposes of driving.

After the finding of guilt, the trial court asked Petitioner if she would admit or deny the allegation that she had a prior DUI conviction within the last 10 years. Petitioner admitted the conviction and did not object to her imposed sentence. Petitioner was represented by the San Diego County Public Defender, Deputy Public Defender Michelle Reynoso, during the entire trial.

IV. LEGAL STANDARDS

A. Habeas Corpus Generally

In reviewing a petition for writ of habeas corpus, the court presumes the regularity of proceedings that resulted in a final judgment. (*Ex parte Bell* (1942) 19 Cal.2d 488, 500.) Every petitioner, even one filing in pro per, must set forth a *prima facie* statement of facts that would entitle him to habeas corpus relief. (*In re Bower* (1985) 38 Cal.3d 865, 872; *In re Hochberg* (1970) 2 Cal.3d 870, 875 at fn. 4.) Because a petition for a writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, the petitioner bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them. (*People v. Duvall* (1995) 9 Cal.4th 464, 474.) "For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; *defendant* thus must undertake the burden of overturning them. Society's interest in the finality of criminal proceedings so demands, and due process is not

thereby offended." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260 (italics in original; superseded by statute on other grounds: *see Pen. Code, § 1054.9.*.) Vague or conclusory allegations do not warrant habeas relief. (*People v. Duvall, supra*, 9 Cal.4th at p. 474.) The petition should include copies of "reasonably available documentary evidence in support of claims ..." (*Id.*)

The general rule is that habeas corpus cannot serve as a substitute for an appeal, and that matters that "could have been, but were not, raised on a timely appeal from a judgment of conviction" are not cognizable on habeas corpus in the absence of special circumstances warranting departure from that rule. (*In re Clark* (1993) 5 Cal.4th 750, 765 [quoting *In re Dixon* (1953) 41 Cal.2d 756, 759; *In re Walker* (1974) 10 Cal.3d 764, 773.] In general, habeas corpus cannot serve as a second appeal, and matters that were raised and rejected on appeal are not cognizable on state habeas corpus in the absence of special circumstances. (*In re Huffman* (1986) 42 Cal.3d 552, 554-55; *In re Terry* (1911) 4 Cal.3d 911, 927.)

B. Ineffective Assistance of Counsel

a. Generally

For claims of ineffective assistance of counsel, petitioner's assertions must be corroborated independently by objective evidence. (*In re Alvernaz* (1992) 2 Cal.4th 924, 938.) If petitioner pled guilty through a plea bargain, she may seek habeas corpus relief only if she accepted the plea bargain as the result of incompetent advice from defense counsel, and there is a reasonable probability that but for counsel's ineffective assistance, the defendant would not have not have pleaded guilty and would have

insisted on proceeding to trial. (*Hill v. Lockhart* (1985) 474 U.S. 52, 58-59; *In re Alvernaz, supra*, 2 Cal.4th at pp. 936-938.) Petitioner's unsubstantiated, self-serving statements do not provide a sufficient basis upon which to prove her claims. (*In re Alvernaz, supra*, 2 Cal.4th at 945.)

In order for a convicted defendant to establish that counsel's assistance was so defective as to require reversal of a conviction, the defendant must show: (1) that counsel committed error so serious that her attorney *was* not functioning as the "counsel" guaranteed by the Sixth Amendment, and (2) that the deficient performance prejudiced the defense. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 216.)

A reviewing court must apply the first of these prongs "deferentially" since there is a strong presumption that counsel's conduct falls within the "wide range of reasonable professional assistance." (*Strickland, supra*, 466 U.S. at p. 689; *Ledesma, supra*, 43 Cal.3d at p. 216). The second prong of prejudice must be "affirmatively proved." (*Ledesma, supra*, 43 Cal.3d at p. 217.) To prove prejudice, defendants must establish the "reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would be different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland, supra*, 466 U.S. at p. 694.)

b. Failure to Investigate or Research Law

In evaluating a defendant's showing of incompetence, reviewing courts accord great deference to the *tactical decisions* of trial counsel. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects

of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." (*In re Jackson* (1992) 3 Cal.4th 578, 610; *In re Marquez* (1992) 1 Cal.4th 584,603, citing *Strickland, supra*, 466 U.S. at p. 689.)

"In light of this strategy it was reasonable for counsel to elect not to present evidence regarding mitigating factors which imply guilt but which attempt to excuse that culpable conduct. A strategic decision made by counsel after a reasonable investigation into the alternatives deserves deference by the courts" (*People v. Pennsinger* (1991) 52 Cal.3d 1210, 1280, citing *Funchess v. Wainwright* (11th Cir. 1985) 772 F.2d 683, 689-690, cert. den. 475 U.S. 1031.) The same court has cautioned that a tactical decision not to present mitigating evidence of which counsel is aware enjoys a strong presumption of correctness. There, counsel chose not to present evidence of the defendant's mental illness because it was inconsistent with counsel's guilt phase argument that defendant was a minor participant who tried to withdraw from the crime. Further, the court cautioned that mitigating evidence can have a negative impact on the jury, so "the posture of a given case may well justify, if not require, an effective attorney to refrain from presenting such evidence." (*Smith v. Dugger* (11th Cir. 1988) 840 F.2d 787, 795; see also *Darden v. Wainwright* (1986) 477 U.S. 168, 186 [counsel's reliance on plea for mercy was reasonable, since mitigating evidence might have opened door to damaging rebuttal].) Other cases, while conceding counsel's incompetence, find no prejudice, after undertaking to evaluate the probable effect of the missing evidence on the jury. (*See Smith v. Armantrout* (W.D.Mo.1988) 692 F.Supp. 1079;

Bundy v. Dugger (11th Cir. 1988) 850 F.2d 1402, 1412; *Elledge v. Dugger* (11th Cir. 1987) 823 F.2d 1439, 1447, cert. den. 485 U.S. 1014; *Thompson v. Wainwright* (11th Cir. 1986) 787 F.2d 1447, 1453, cert. den. sub nom. *Thompson v. Dugger*, 481 U.S. 1042.)

"[W]hen the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." (*Ledesma, supra*, 43 Cal.3d at p. 222, citing *Strickland, supra*, 466 U.S. at p. 691.)

c. Appellate Counsel

When claiming ineffectiveness of appellate counsel, Petitioner must show appellate counsel failed to raise crucial issues "which arguably might have resulted in a reversal" on appeal. (*In re Smith* (1970) 3 Cal.3d 192, 202-203; see also, *People v. Rhoden* (1972) 6 Cal.3d 519, 529 and *People v. Lang* (1974) 11 Cal.3d 134, 142.)

C. Evidentiary Issues

Rulings of the trial court on the admission or exclusion of evidence or other procedural matters may not be reviewed by way of habeas corpus. (*In re Winchester* (1960) 53 Cal.2d 528, 532, superseded on other grounds by *People v. Santamaria* (1991) 229 Cal.App.3d 269; see also *Estelle v. McGuire* (1991) 502 U.S. 62, 67 ["[F]ederal habeas corpus relief does not lie for errors of state law."].)

D. Speedy Trial Claim

"Petitioner's claim of denial of a speedy trial is not cognizable on petition for the writ of habeas corpus since it must be made by pretrial motion followed by an application for writ of prohibition or by appeal, or is waived. [citation]" (*In re Yurko* (1974) 10 Cal.3d 857, 867.)

E. Prosecutorial Misconduct

"[Misconduct] implies a dishonest act or an attempt to persuade the court or jury by use of deceptive or reprehensible methods" [citations]. (*People v. Lambert* (1972) 52 Cal.App.3d 905, 908.) Sufficiency of the evidence claims are not cognizable on habeas corpus either. (*In re Lindley* (1947) Cal.2d 709, 723).

V.**DISCUSSION****A. Ineffective Assistance of Counsel****a. Trial Counsel Michelle Reynoso**

Most of Petitioner's claims revolve around her trial counsel's performance both pre-trial and during trial. Petitioner combed the record in attempting to highlight potential errors made that she believes affected the outcome of her case. After review of the record and the People's Informal Response, this court finds no error by trial counsel.

Without restating each claim, this court agrees with the People that the Public Defender's Office funding and staffing levels were not inadequate. Petitioner was assigned two attorneys from that office after her private defense attorney was relieved. Both attorneys met their professional and ethical obligations to act in the best interest of Petitioner.

While Petitioner may not have agreed with the tactical decisions made before and during trial, this court must give great deference to the decisions of licensed and trained attorneys. Also, while the internal case management notes from the assigned attorney are technically hearsay, this court gives weight to the thoughtful recitation of the trial attorney's actions and beliefs regarding the strength of Petitioner's case and the efforts made to secure evidence that could be used in Petitioner's defense. Accordingly, this court finds that trial counsel was not ineffective. To any extent that some of trial counsel's decisions may have differed from more experienced counsel, this court finds that Petitioner has not made a showing that these final decisions prejudiced her case in any way. Thus, the ineffective assistance of trial counsel claim is denied.

b. Appellate Counsel William Burgener

Petitioner also alleges that her appellate counsel was ineffective for failing to argue that trial counsel was ineffective and for failing to raise other evidentiary rulings that Petitioner believes were error. This claim fails for most of the same reasons that Petitioner's trial counsel claims fail. Because this court has found there was no error by trial counsel, here appellate counsel was not ineffective for failing to raise that issue on appeal. Additionally, appellate counsel wrote a brief identifying areas where he believed there may have been error. Appellate counsel advised Petitioner that, if she believed there were additional areas that should be explored or developed, she may write a supplemental brief. Petitioner did no such thing; instead relying on her appellate counsel's brief. Nonetheless, the Superior Court Appellate Division reviewed the *entire* record

and found no errors requiring reversal. At that point, the case was remanded, and Petitioner did not appeal to a court of higher jurisdiction, thereby waiving her right to bring claims of appellate error in a later proceeding. Since this court has found that appellate counsel's performance was more than adequate, Petitioner's ineffective assistance of appellate counsel claim fails.

Petitioner further argues that due to the COVID-19 pandemic, she was prevented from filing her own briefs or doing further research to present appealable issues. Petitioner's claims are without merit. This court was open for business and receiving filings. Petitioner's assigned appellate attorney was able to file his brief and advised Petitioner that she may do the same. The Appellate Division read and considered the briefs, heard argument, and rendered a decision. As such, the court was fully functioning and cannot be blamed for Petitioner's failure to act on advice of counsel.

B. Trial Court Rulings

Petitioner also argues that the trial court erred in admitting certain evidence or by not dismissing the jury panel. She claims that, due to these rulings and her trial counsel's lack of objections, she was not afforded a fair trial. The record suggests otherwise. Additionally, any evidentiary issues should have been addressed on appeal. Since they were not, this court considers them waived and this claim is denied.

C. Prosecutorial Misconduct

Petitioner alleges that the assigned Deputy City Attorney committed prosecutorial misconduct through various statements made in the Opening Statement and Closing Argument. A review of the

record shows the prosecutor's comments were not objectionable and were fair comments on the evidence presented at trial. As such, this claim also fails.

Petitioner also alleges that the prosecutor failed to preserve evidence. However, Petitioner does not allege with specificity what evidence, if any, *actually existed*. Furthermore, Petitioner has not alleged with specificity how, if the evidence did exist, it would have assisted in her defense or otherwise affected the outcome of the case. Thus, this claim also fails.

D. Cumulative Errors

Petitioner alleges that as a result of the cumulative errors claimed in the Petition, she was denied a fair trial. This court has found no errors. To the extent a court of higher jurisdiction might disagree, any error alleged to have occurred would not have changed the outcome of the case. Petitioner was advised of the strength of the case against her, yet still chose to exercise her Constitutional right to go to trial. Petitioner may be unhappy with the result, but this court finds that no reversable error contributed to the jury's verdict or the Appellate Division's review.

VI. DISPOSITION

The Petition is denied. Petitioner is reminded that denials for writ of habeas corpus are not appealable nor subject to reconsideration. A new petition may be filed in the Court of Appeal. However, any repeat filings in this court without a legal justification will be summarily denied.

A copy of this Order shall be served upon Petitioner, Wendy Heather Downs, 1220 Rosecrans Street, No. 198, San Diego, CA 92106, and the San

Diego Office of the City Attorney, Attn: Shelly Webb,
1200 Third Avenue, Suite 700, San Diego, CA 92101.

A courtesy copy of this Order shall also be served on the San Diego Office of the Public Defender, Attn: Michelle Reynoso, 450 "B" Street, Suite 900, San Diego, CA 92101 and Petitioner's appellate attorney Mr. William Burgener, 3990 Old Town Avenue, Suite C105, San Diego, CA 92110.

IT IS SO ORDERED.

Date: 6/16/2022

Robert F. O'Neill

ROBERT F. O'NEILL

JUDGE OF THE SUPERIOR COURT

*[stamp of the
Superior Court of
California, County
of San Diego]*

CLERK'S CERTIFICATE

The foregoing 10 page(s) is
a true and correct copy of
 the original. It is the
entire document.

Clerk of the Superior Court

6-17-22 by *E. Rodriguez*
Date Deputy E. Rodriguez

Case 3:22-cv-02073-MMA-DDL Document 1-17 Filed
12/30/22 PageID.1394 Page 160 of 270

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO	
<input checked="" type="checkbox"/> CENTRAL DIVISION, CENTRAL COURTHOUSE, 1100 UNION ST., SAN DIEGO, CA 92101	
PLAINTIFF(S)/PETITIONER(S) PEOPLE OF THE STATE OF CALIFORNIA	FOR COURT USE ONLY FILED Clerk of the Superior Court JUN 17 2022 By: E. Rodriguez, Deputy
DEFENDANT(S)/ RESPONDENT(S) WENDY HEATHERS DOWNS	JUDGE: HON. ROBERT F. O'NEIL DEPT: 1301
CLERK'S CERTIFICATE OF SERVICE BY MAIL	HC25602 M256699

I, certify that: I am not a party to the above-entitled case; that on the date shown below, I served the following document(s):

ORDER DENYING PETITION FOR WRIT OF
HABEAS CORPUS.

on the parties shown below by placing a true copy in a separate envelope, addressed as shown below; each envelope was then sealed and, with postage thereon fully prepaid, deposited in the United States Postal Service at: San Diego, California.

54a

NAME & ADDRESS

WENDY DOWNS
[ADDRESS REDACTED]

MR. WILLIAM BURGENER
3900 OLD TOWN AVENUE SUITE C105
SAN DIEGO, CA 92110

SAN DIEGO OFFICE OF THE CITY ATTORNEY
ATTN: SHELLY WEBB
1200 THIRD AVENUE SUITE 700
SAN DIEGO, CA 92101

SAN DIEGO OF THE PUBLIC DEFENDER
ATTN: MICHELLE REYNOSO
450 B STREET SUITE 900
SAN DIEGO, CA 92010

CLERK OF THE SUPERIOR COURT

Date: June 17, 2022 Deputy, E. Rodriguez

SDSC CIV-286
(Rev 11-99)

**CLERK'S CERTIFICATE OF
SERVICE BY MAIL**

APPENDIX H

Case 3:22-cv-02073-MMA-DDL Document 1-17 Filed
12/30/22 PageID.1330 Page 96 of 270

FILED

Clerk of the Superior Court
APR 14 2022
By: C. Imperial

**THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO**

IN THE MATTER OF	HC 25602
THE APPLICATION	M256699
OF:	
WENDY DOWNS,	ORDER FOR
Petitioner.	INFORMAL RESPONSE
	TO PETITION FOR
	WRIT OF HABEAS
	CORPUS

THIS COURT, HAVING READ THE PETITION FOR WRIT OF HABEAS CORPUS, THE PEOPLE'S INFORMAL RESPONSE, AND THE FILE IN THE ABOVE-CAPTIONED MATTER, FINDS AS FOLLOWS:

Petitioner is currently on informal probation for a period of 5 years after a jury found her guilty of driving under the influence of drugs. Petitioner admitted a prior conviction for driving under the influence after the jury rendered its verdict. Petitioner appealed. On October 2, 2020, the Superior Court

Appellate Division issued an opinion affirming the judgment. (*People v. Downs*, CA282993.)

On April 8, 2022, Petitioner filed a Petition for Writ of Habeas Corpus ("Petition") wherein she makes the following claims: 1) Her trial counsel was ineffective due to funding and staffing restraints at the San Diego Public Defenders Office, 2) Her trial counsel was ineffective for a variety of reasons including failing to adequately investigate her case and secure evidence for her defense, 3) Her appellate counsel was ineffective for a variety of reasons including failing to obtain a jury selection transcript, 4) The San Diego City Attorney failed to adequately preserve and/or disclose exculpatory evidence, 5) The jury was biased against her because one of the prospective jurors stated he knew Petitioner from a previous drug interaction, 6) She was denied meaningful access to the court because of the COVID-19 closures, and 7) As a result of the cumulative errors alleged in grounds 1-6, she was denied due process and a fair trial. Petitioner attached nearly 1000 pages of documents that she claims support her allegations.

After review, this court finds Petitioner has made the minimum *prima facie* showing for each of her claims. (*People v. Duvall* (1995) 9 Cal.4th 464.) Accordingly, this court issues the following Order for Informal Response.

ORDER:

1. The San Diego Office of the City Attorney (Respondent) is hereby ordered to file an Informal Response stating reasons why this court should not grant the Petition.
2. Respondent is ordered to file a response **within 45 days** of the date of this Order.
3. Respondent shall serve any response on this court and Petitioner.

A copy of this Order shall be served on Petitioner, Wendy Downs [*ADDRESS REDACTED*] and the San Diego Office of the City Attorney, Attn: Appellate Unit, 1200 Third Avenue, San Diego, CA 92101.

A copy of the original Petition shall be made available for the City Attorney but will not be concurrently served due to its length. All other orders not in conflict remain in full force and effect.

IT IS SO ORDERED.

Date: 4/14/2022 Robert F. O'Neill
ROBERT F. O'NEILL
JUDGE OF THE SUPERIOR COURT

*[Stamp of the
Superior Court of
California, County
of San Diego]*

CLERK'S CERTIFICATE
The foregoing 2 page(s) is
a true and correct copy of
 the original. It is the
entire document.

Clerk of the Superior Court
4-20-2022 by L. La Croix
Date Deputy L. La Croix

Case 3:22-cv-02073-MMA-DDL Document 1-17 Filed
12/30/22 PageID.1332 Page 98 of 270

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO		FOR COURT USE ONLY
<input checked="" type="checkbox"/> CENTRAL DIVISION, CENTRAL COURTHOUSE, 1100 UNION ST., SAN DIEGO, CA 92101		FILED Clerk of the Superior Court APR 20 2022 By: L. Lacroix, Clerk
PLAINTIFF(S)/PETITIONER(S) PEOPLE OF THE STATE OF CALIFORNIA		JUDGE: HON. ROBERT F. O'NEILL DEPT: 1301
DEFENDANT(S)/ RESPONDENT(S) WENDY DOWNS		
CLERK'S CERTIFICATE OF SERVICE BY MAIL		HC25602 M256699

I, certify that: I am not a party to the above-entitled case; that on the date shown below, I served the following document(s):

ORDER FOR INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS.

on the parties shown below by placing a true copy in a separate envelope, addressed as shown below; each envelope was then sealed and, with postage thereon fully prepaid, deposited in the United States Postal Service at: San Diego, California.

59a

NAME & ADDRESS

WENDY DOWNS
[ADDRESS REDACTED]

SAN DIEGO OFFICE OF THE CITY ATTORNEY
ATTN: APPELLATE UNIT
1200 THIRD AVENUE
SAN DIEGO, CA 92101

CLERK OF THE SUPERIOR COURT

Date: April 20, 2022 Deputy, L. LACROIX

SDSC CIV-286
(Rev 11-99)

**CLERK'S CERTIFICATE
OF SERVICE BY MAIL**

APPENDIX I

Case 3:22-cv-02073-MMA-DDL Document 1-15 Filed
12/30/22 PageID.1045 Page 135 of 202

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO	
CENTRAL COURTHOUSE, 1100 UNION ST., ROOM 218 SAN DIEGO, CA 92101 (619) 844-2348	
APPELLANT WENDY DOWNS	FOR COURT USE ONLY FILED Clerk of the Superior Court NOV 03 2020 By: M. Danielson, Deputy
RESPONDENT THE PEOPLE	
RECEIPT FOR DOCUMENTS/EXHIBITS (APPELLATE DIVISION)	APPELLANT DIVISION CASE NUMBER CA282993
	TRIAL COURT CASE NUMBER M256699

Received from the Clerk of the Appellate Division:

Other: A copy of the decision by the court and remittituir.

**Sign, date, and return this form to mail stop C-44,
Attn: Appellate Division**

Date: 11/3/20

S. Ochoa

Type or print name

S. Ochoa

Signature

SDSC
APL-003
(Rev. 1/09)

**RECEIPT FOR
DOCUMENTS/EXHIBITS
(APPELLATE DIVISION)**

Cal. Rules
of Court,
rules 8.890

Case 3:22-cv-02073-MMA-DDL Document 1-15 Filed
12/30/22 PageID.1046 Page 136 of 202

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO	
CENTRAL COURTHOUSE, 1100 UNION ST., ROOM 218 SAN DIEGO, CA 92101 (619) 844-2348	FOR COURT USE ONLY
APPELLANT WENDY DOWNS	FILED Clerk of the Superior Court NOV 03 2020 By: M. Danielson, Deputy
RESPONDENT THE PEOPLE	TRIAL COURT CASE NUMBER M256699
REMITTITUR (APPELLATE DIVISION)	APPELLANT DIVISION CASE NUMBER CA282993

I certify the attached is a true and correct copy of the original order or opinion entered in the above-entitled case on October 2, 2020 and the order or opinion has now become final.

Costs are not awarded in this proceeding.

Date: November 3, 2020

*[stamp of the
Superior Court of
California, County
of San Diego]* Clerk of the Superior Court
by M. Danielson, Deputy
M. Danielson

CERTIFICATE OF SERVICE

I certify that I am not a party to the above-entitled cause, that I placed a copy of this form in a sealed envelope addressed to the parties shown with postage prepaid, and deposited it in the United States mail at San Diego, California.

Clerk of the Superior Court

Date: November 3, 2020 by M. Danielson, Deputy
M. Danielson

WILLIAM R. BURGENER, ESQ.
1775 HANCOCK ST. #180
SAN DIEGO, CA 92110

VIA INTER OFFICE MAIL
MARA W. ELLIOT, CITY ATTORNEY
APPELLATE DIVISION
1200 THIRD AVE, SUITE 700
SAN DIEGO, CA 92101

SDSC APL-004 (Rev. 5/11)	REMITTITUR (APPELLATE DIVISION)	Cal. Rules of Court, rules 8.890 & 8.935
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Case 3:22-cv-02073-MMA-DDL Document 1-15 Filed
12/30/22 PageID.1047 Page 137 of 202

FILED
Clerk of the Superior Court
OCT 02 2020
By: S. Ochoa, Deputy

SUPERIOR COURT OF THE STATE OF
CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO
APPELLATE DIVISION

THE PEOPLE OF THE STATE OF, CALIFORNIA, Plaintiff/Respondent, vs. WENDY DOWNS, Defendant/Appellant.	Appellate Division Case No.: CA282993 Trial Court Case No.: M256699
DECISION	

APPEAL from the November 7, 2019 Order
denying appellant's motion to suppress evidence and
motion to quash warrant, and the February 6, 2020
judgment following a jury trial entered by the
Superior Court, San Diego County, Aaron H. Katz,
Judge.

AFFIRMED.

Appellant's counsel filed a brief pursuant to
People v. Wende (1979) 25 Cal.3d 436. Counsel points
to two issues for appellate consideration (see *Anders*
v. State of California (1967) 386 U.S. 738, 744
[counsel's statement either requesting to withdraw

from an appeal or that an appeal is frivolous "must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal"]): 1) Whether officers violated appellant's due process by failing to acquire evidence properly with the MVARS video and; 2) Whether the secondary evidence rule precluded oral testimony about the MVARS recording.

After reviewing the entire record on appeal pursuant to *People v. Wende*, *supra*, and also considering the points raised by counsel, the Appellate Division concludes there are no arguable issues. The judgment of the trial court is unanimously affirmed.

JULIA C. KELETY
Presiding Judge, Appellate Division

JEFFREY B. BARTON
Judge, Appellate Division

DAVID M. RUBIN
Judge, Appellate Division

Case 3:22-cv-02073-MMA-DDL Document 1-15 Filed
12/30/22 PageID.1049 Page 139 of 202

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO		FOR COURT USE ONLY
<input checked="" type="checkbox"/> CENTRAL DIVISION, CENTRAL COURTHOUSE, 1100 UNION ST., SAN DIEGO, CA 92101		FILED Clerk of the Superior Court OCT 02 2020 By: S. Ochoa, Deputy
APPELLANT WENDY DOWNS		
RESPONDENT THE PEOPLE		
REAL PARTY IN INTEREST		SUPERIOR COURT CASE NUMBER M256699
CLERK'S CERTIFICATE OF SERVICE BY MAIL		APPELLANT DIVISION CASE NUMBER CA282993

I certify that I am not a party to the above-entitled cause, and that I placed a copy of the following document(s):

DECISION, dated 10/02/2020

in a sealed envelope addressed to the parties shown with postage prepaid, and deposited it in the United States mail at San Diego, California.

Clerk of the Superior Court

Date: 10/02/2020 by S. Ochoa, Deputy
S. Ochoa

66a

WILLIAM R. BURGENER, ESQ.
1775 HANCOCK ST. #180
SAN DIEGO, CA 92110

VIA INTER OFFICE MAIL
MARA W. ELLIOT, CITY ATTORNEY
APPELLATE DIVISION
1200 THIRD AVE, SUITE 700
SAN DIEGO, CA 92101

SDSC
APL-140
(New 11/09)

**CERTIFICATE OF
SERVICE BY MAIL**

Code Civ. Proc
§ 1013

APPENDIX J

Case: 24-461, 01/24/2025, DktEntry: 13.1, Page 1 of 1

FILED
JAN 24 2025
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

WENDY DOWNS, Petitioner - Appellant, v. KATHLEEN ALLISON and ROB BONTA, Respondents - Appellees.	No. 24-461 D.C. No. 3:22-cv-02073- MMA-DDL Southern District of California, San Diego ORDER
--	---

Before: PAEZ and SUNG, Circuit Judges.

Appellant's motion for an extension of time to file a motion for reconsideration (Docket Entry No. 9) is granted. Appellant's motion for reconsideration (Docket Entry Nos. 10, 11, and 12) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

APPENDIX K

AMENDMENT 1 RELIGIOUS AND POLITICAL FREEDOM.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

USCS Const. Amend. 1

**AMENDMENT 5 CRIMINAL ACTIONS—PROVISIONS
CONCERNING—DUE PROCESS OF LAW AND JUST
COMPENSATION CLAUSES.**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

USCS Const. Amend. 5

AMENDMENT 6 RIGHTS OF THE ACCUSED.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and

to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

USCS Const. Amend. 6

AMENDMENT 8 BAIL—PUNISHMENT.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

USCS Const. Amend. 8

AMENDMENT 14

Sec. 1. [Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 5. [Power to enforce amendment.] The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

USCS Const. Amend. 14

28 U.S.C. § 2244. FINALITY OF DETERMINATION

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme

Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)

- (1) 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.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C.S. § 2244 (LexisNexis, Lexis Advance through Public Law 118-46, approved March 22, 2024, with a gap of Public Law 118-42)

28 U.S.C. § 2253. APPEAL

(a) In a habeas corpus proceeding or a proceeding under section 2255 [28 USCS § 2255] before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention

complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255 [28 USCS § 2255].

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C.S. § 2253 (LexisNexis, Lexis Advance through Public Law 118-46, approved March 22, 2024, with a gap of Public Law 118-42)

28 U.S.C. § 2254. STATE CUSTODY; REMEDIES IN FEDERAL COURTS

(a) The Supreme Court, a Justice thereof, a circuit judge, or 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 he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

- (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
- (3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.
- (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.
- (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
 - (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
 - (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
- (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

28 U.S.C.A. § 2254 (West) (June 25, 1948, c. 646, 62 Stat. 967; Pub.L. 89-711, § 2, Nov. 2, 1966, 80 Stat. 1105; Pub.L. 104-132, Title I, § 104, Apr. 24, 1996, 110 Stat. 1218.) Current through P.L. 119-12.

CALIFORNIA VEHICLE CODE SECTION 22348(b):

(b) A person who drives a vehicle upon a highway at a speed greater than 100 miles per hour is guilty of an infraction punishable, as follows:

(1) Upon a first conviction of a violation of this subdivision, by a fine of not to exceed five hundred dollars (\$500). The court may also suspend the privilege of the person to operate a motor vehicle for a period not to exceed 30 days pursuant to Section 13200.5.

(2) Upon a conviction under this subdivision of an offense that occurred within three years of a prior offense resulting in a conviction of an offense under this subdivision, by a fine of not to exceed seven hundred fifty dollars (\$750). The person's privilege to operate a motor vehicle shall be suspended by the Department of Motor Vehicles pursuant to subdivision (a) of Section 13355.

(3) Upon a conviction under this subdivision of an offense that occurred within five years of two or more prior offenses resulting in convictions of offenses under this subdivision, by a fine of not to exceed one thousand dollars (\$1,000). The person's privilege to operate a motor vehicle shall be suspended by the Department of Motor Vehicles pursuant to subdivision (b) of Section 13355.

Cal. Veh. Code § 22348 (West)

CALIFORNIA VEHICLE CODE SECTION 23152(b):

(b) It is unlawful for a person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.

For purposes of this article and Section 34501.16, percent, by weight, of alcohol in a person's blood is based upon grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath.

In any prosecution under this subdivision, it is a rebuttable presumption that the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.08 percent or more, by weight, of alcohol in

his or her blood at the time of the performance of a chemical test within three hours after the driving.
CA Veh Code § 23152(b) (2022)

CALIFORNIA VEHICLE CODE SECTION 23152(f):

(f) It is unlawful for a person who is under the influence of any drug to drive a vehicle.
CA Veh Code § 23152(f) (2022)

CALIFORNIA VEHICLE CODE SECTION 23540:

(a) If a person is convicted of a violation of Section 23152 and the offense occurred within 10 years of a separate violation of Section 23103, as specified in Section 23103.5, 23152, or 23153, that resulted in a conviction, that person shall be punished by imprisonment in the county jail for not less than 90 days nor more than one year and by a fine of not less than three hundred ninety dollars (\$390) nor more than one thousand dollars (\$1,000). The person's privilege to operate a motor vehicle shall be suspended by the department pursuant to paragraph (3) of subdivision (a) of Section 13352. The court shall require the person to surrender the driver's license to the court in accordance with Section 13550.

(b) Whenever, when considering the circumstances taken as a whole, the court determines that the person punished under this section would present a traffic safety or public safety risk if authorized to operate a motor vehicle during the period of suspension imposed under paragraph (3) of subdivision (a) of Section 13352, the court may disallow the issuance of a restricted driver's license required under Section 13352.5.

(c) This section shall become operative on September 20, 2005.

Cal. Veh. Code § 23540 (West)

CALIFORNIA VEHICLE CODE SECTION 23626:

A conviction of an offense in any state, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or the Dominion of Canada that, if committed in this state, would be a violation of Section 23152 or 23153 of this code, or Section 191.5 of, or subdivision (a) of Section 192.5 of, the Penal Code, is a conviction of Section 23152 or 23153 of this code, or Section 191.5 of, or subdivision (a) of Section 192.5 of, the Penal Code for the purposes of this code.

Cal. Veh. Code § 23626 (West)

**RULES GOVERNING § 2254 CASES, RULE 11,
28 U.S.C.A. FOLL. § 2254**

**RULE 11. CERTIFICATE OF APPEALABILITY; TIME TO
APPEAL**

(a) Certificate of Appealability. The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure

22. A motion to reconsider a denial does not extend the time to appeal.

(b) Time to Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

SECT 2254, Rule 11

**RULE 22. HABEAS CORPUS AND SECTION 2255
PROCEEDINGS**

(a) Application for the Original Writ. An application for a writ of habeas corpus must be made to the appropriate district court. If made to a circuit judge, the application must be transferred to the appropriate district court. If a district court denies an application made or transferred to it, renewal of the application before a circuit judge is not permitted. The applicant may, under 28 U.S.C. § 2253, appeal to the court of appeals from the district court's order denying the application.

(b) Certificate of Appealability.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district clerk must send to the court of appeals the certificate (if any) and the statement described in Rule 11(a) of the Rules Governing Proceedings Under 28 U.S.C. § 2254 or § 2255 (if any), along with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the

certificate, the applicant may request a circuit judge to issue it.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

USCS Fed Rules App Proc R 22

**S.CT. OF APP. 9TH CIR. RULE 22-1, 28 U.S.C.A.
RULE 22-1. CERTIFICATE OF APPEALABILITY (COA)**

(a) **General Procedures.** Appeals from the district court's denial of relief in either a 28 U.S.C. § 2254 or a § 2255 proceeding are governed by the procedures set forth in FRAP 4 and 22(b). A request for a certificate of appealability ("COA") must first be considered by the district court. If the district court grants a COA, that court shall state which issue or issues satisfy the standard set forth in 28 U.S.C. § 2253(c)(2). The court of appeals will not act on a request for a COA if the district court has not ruled first. (Rev. 1/1/04; 12/1/09; 12/1/18)

(b) **District Court Records.** If the district court denies a COA in full in a § 2254 proceeding and the district court record cannot be accessed electronically, the district court clerk shall forward the entire record to the court of appeals. If the district court denies a COA in full in a § 2255 proceeding and the district court record cannot be accessed electronically, the district court clerk shall forward that portion of the record beginning with the filing of the § 2255 motion. (Rev. 1/1/04; 12/1/09)

(c) **Grant in Part or in Full by District Court.** If the district court grants a COA as to any or all issues,

a briefing schedule will be established by the court of appeals at case opening and appellant shall brief only those issues certified or otherwise proceed according to section (e), below. (Rev. 1/1/04; 3/11/04; 12/1/18)

(d) **Denial in Full by District Court.** If the district court denies a COA as to all issues, appellant may file a request for a COA in the court of appeals within 35 days of the filing of a notice of appeal or amended notice of appeal, or the district court's denial of a COA in full, whichever is later. The notice of appeal must be timely filed pursuant to 28 U.S.C. § 2107 and FRAP 4(a), regardless of whether appellant files a request for COA. If appellant does not file a COA request with the court of appeals after the district court denies a COA in full, the court of appeals will deem the notice of appeal to constitute a request for a COA. (Rev. 1/1/04; 12/1/09; 12/1/18)

If appellant files a request for a COA with the court of appeals, appellee may, and in capital cases with no pending execution date shall, file a response to the request for a COA within 35 days from service of the COA request. In capital cases where an execution date is scheduled and no stay is in place, appellee shall file a response as soon as practicable after the date appellant's request is served or, if no request is filed, as soon as practicable after the district court's entry of its order denying a COA. (New 1/1/04; Rev. 12/1/09; 12/1/18)

If, after the district court has denied a COA in full, the court of appeals also denies a COA in full, appellant, pursuant to Circuit Rule 27-10, may file

a motion for reconsideration. (New 1/1/04; Rev. 12/1/18)

When the court of appeals grants a COA in part and denies a COA in part, a briefing schedule will be established and no motion for reconsideration will be entertained. Appellant shall brief only those issues certified or otherwise proceed according to section (e), below. (New 1/1/04; Rev. 12/1/18)

(e) **Briefing Uncertified Issues.** Appellants shall brief only issues certified by the district court or the court of appeals, except that, if an appellant concludes during the course of preparing the opening brief, that an uncertified issue should be discussed in the brief, the appellant shall first brief all certified issues under the heading, "Certified Issues," and then, in the same brief, shall discuss any uncertified issues under the heading, "Uncertified Issues." Uncertified issues raised and designated in this manner will be construed as a motion to expand the COA and will be addressed by the merits panel to such extent as it deems appropriate. Except in the extraordinary case, the Court will not permit a longer brief to accommodate the uncertified issues. (New 1/1/04; Rev. 7/1/16; 12/1/18)

(f) **Response to Uncertified Issues.** Appellee may, but need not, address any uncertified issues in its responsive brief. The Court will afford appellee an opportunity to respond before relief is granted on any previously uncertified issue.

USCS Ct App 9th Cir, Circuit R 22-1

APPENDIX L

CHRONOLOGY OF EVENTS

Prior versions are at District Court Electronic Case Filing (“ECF”) 11-2 at 2 and US Appeal Court for the Ninth Circuit, Appellate Case Management System (ACMS) docket entry (“Dkt”) 7.2 at 17.

Citations are to first page only of ECF or Dkt; multiple pages may follow.

Key:

@court	Pet'r at San Diego Superior Court
App.Con	Appellate Counsel William Burgener
App.Div	Appellate Division of San Diego Superior Court
COA	certificate of appealability
MAU	DMV Mandatory Action Unit
OAC	Office of Assigned Counsel
PD	San Diego Public Defender
PDL	Event taken directly from San Diego Public Defender Attorney Log
Pet'r	Petitioner, Wendy Downs
Pub Lib	Public Library
SDLL	San Diego Law Library
text	all texts are between Pet'r and PD trial counsel Michelle Luna Reynoso, her texts are prefaced by REPLY:
<i>COVID-19 pandemic mandates+ in italics</i>	
HABEAS PROCEEDINGS IN SMALL CAPS	
UNITED STATES SUPREME COURT FILINGS IN ALL CAPS	

DATE/PET'R ACTION	EVENT	CITATION
01.23.2019	Petitioner (“Pet'r”) arrested	ECF 1-5 at 73

DATE/PET'R ACTION	EVENT	CITATION
03.05.2019	Complaint filed	ECF 1-5 at 89
06.20.2009	Motion to Suppress	ECF 1-5 at 91
07.02.2019	Opp to Motion to Suppress	ECF 1-5 at 97
07.16.2019	DMV Order of Set Aside, effective 03.17.2019	ECF 1-16 at 59
09.16.2019	Motion to Quash	ECF 1-6 at 4
11.07.2019	Motion to Quash denied; No more lawyer	ECF 7-2 at 82:2
11.11.2019	ltr left for lawyer	ECF 1-10 at 17
11.15.2019 @court	PD assign; issue w/ DCA Giovanna Longobardo	ECF 1-10 at 18
12.02.2019 PDL	PD(Michelle Grawet) assigned, ask for location of officers prior to arrest	ECF 1-9 at 9
12.15.2019 PDL	PD: no discovery, trial rescheduled	ECF 1-9 at 9
01.11.2020 PDL	meet PD, no MVARS, "we can explain away FSTS...new DCA [may] be more reasonable"	ECF 1-9 at 9
01.13.2020 PDL	DCA James Carraway assigned	ECF 1-9 at 9
01.15.2020 PDL	PD request for MVARS from DCA	ECF 1-9 at 9
01.15.2020 PDL	PD called "not handling case"	ECF 1-9 at 9
01.17.2020 PDL	new PD (Michelle Luna Reynoso) assigned	ECF 1-9 at 9

DATE/PET'R ACTION	EVENT	CITATION
01.23.2020 PDL	“contact...experts... blood results...rather low	ECF 1-9 at 9
01.23.2020 PDL	“supervisor K. Scoggins...confirmed we could use an expert”	ECF 1-9 at 9
01.27.2020 PDL	“toxicologist Okorocho: not enough to prove... avail to testify 2/5 or 2/6”	ECF 1-9 at 10
01.27.2020 PDL	PD email request for MVARS; DCA reply: ready tomorrow am	ECF 1-9 at 11
01.28.2020 PDL call	PD note “client is adamant...MVARS show important info”	ECF 1-9 at 14
01.30.2020	MVARS transcript created, not rec'd yet	ECF 1-5 at 40
02.03.2020 PDL	note from PD attorney log - “met with client”	ECF 1-9 at 14
02.03.2020 meet'g	request location of officers, PD reply “This is not National City”, I can get it for appeal, no time, defense of science	ECF 1-9 at 22
02.06.2020 @court trial	jury trial issue guilty verdict; court sentences Pet'r (M256699)	ECF 1-15 at 88:7, 96:16
02.10.2020 text	check'g in re: appeal...would like to meet ASAP with counsel [get evidence]; REPLY: drafted ...tomorrow I hope...not aty yet	ECF 1-15 at 118; ECF 1-16 at 44

DATE/PET'R ACTION	EVENT	CITATION
02.11.2020 text	[need appeal] paperwork for DMV...as... requested...footage prior to Taylor St...[inform] when filed; REPLY: I will	ECF 1-15 at 119; ECF 1-16 at 45
02.12.2020 text	VM left in Brittany's VM pick-up case material... only avail today.. include transcript; REPLY: appeal drafted..no PD... look into other att'y ...file ready Monday	ECF 1-15 at 120; ECF 1-16 at 46;
02.13.2020 text	REPLY: appeal filed; ...how can I get...5-10 minutes prior to pulling me over...other att'ys [need] evidence; REPLY: get you the discovery I have...you need to file a formal appeal...I can't advise	ECF 1-15 at 123
02.14.2020	appeal filed (CA282993)	ECF 1-6 at 89
02.18.2020 text	file available for pick-up...request for counsel and withholding evid; REPLY: ...simple appeal place holder; visit SDLL	ECF 1-15 at 127
02.19.2020 call	Pet'r called DMV, license suspended	ECF 1-10 at 20

DATE/PET'R ACTION	EVENT	CITATION
02.24.2020 @court call	Order: stay conditions & notify DMV of stay; appear 6-23-20; MAU: need electronic submission from court	ECF 1-9 at 1; ECF 1-10 at 21
02.25.2020 @court	check on electronic notice of stay to DMV	ECF 1-10 at 21
03.02.2020 meet'g	meet w/ App.Con ; Told a further apptment needed	ECF 1-10 at 23
03.03.2020 @court	check on notification to DMV of stay	ECF 1-10 at 22
03.06.2020 @court	Order: notify DMV electronically of stay. PD tells Pet'r no representation	ECF 1-9 at 2; ECF 1-10 at 22,24
03.06.2020 text	REPLY: ct appearances stayed until 6.23.2020	ECF 1-15 at 130
03.11.2020 @court	off calendar, check with business office for stay submitted to DMV	ECF 1-10 at 22,25; ECF 11-2 at 13
03.13.2020 subpoena	subpoena for MVARS, CAD & ARJIS; Vista CHP response to subpoena, no docs	ECF 1-15 at 171; ECF 1-16 at 63
03.16.2020 @court	check if electronic notice of stay sent to DMV	ECF 1-10 at 22
03.16.2020	<i>ct & libraries close due to COVID-19 pandemic</i>	ECF 7-2 at 4
03.17.2020	@DMV "no electronic submission to DMV since 2.19.2020"	ECF 1-10 at 26
03.19.2020	<i>CA Gov: stay at home order issued</i>	ECF 7-2 at 2a

DATE/PET'R ACTION	EVENT	CITATION
05.26.2020	<i>court opens with limited services</i>	
05.26.2020 @court	criminal clerk (outside) states supervisor will call me this week; Appeal desk states once App.Div has case then request expanded appt	ECF 1-10 at 27
05.26.2020	<i>Pub Lib open for contactless pick-up, NO COMPUTER USE</i>	ECF 7-2 at 7
06.04.2020 @court	App.Div. can only assign lawyer for appeal; Criminal dept, all conditions stayed	ECF 1-10 at 28
06.23.2020 @court	Bus. Office, “The court is closed. All hearings have been taken off calendar. My responsibility is to be safe and wait for the court to contact me.’ I will not incur negative repercussions based on my lack of action. I can drive...wait for court”	ECF 1-10 at 29
08.25.2020	App.Con files <i>Wende/Anders</i> brief; calls Pet'r stating brief filed...no arguable issues...you can file supplemental brief [no more counsel]	ECF 1-15 at 149

DATE/PET'R ACTION	EVENT	CITATION
08.26.2020 @court	App.Div states App.Con extension to file brief granted til 9/8, "It's a process, there is nothing I can do personally"; Bus. Office, "court is not open [to see a judge] yet"	ECF 1-10 at 31
10.01.2020	court electronically served ? on 9/30; Pet'r no contact; Review cont'd to 11/6/2020 due to COVID-19	ECF 11-2 at 14
10.02.2020	App.Div Decision: affirmed judgement	ECF 1-15 at 137
10.03.2020	<i>Pub Lib,M-F, 9:30-5:30, 1-hr comp use</i>	ECF 7-2 at 7
10.13.2020	<i>SDLL, M-Th, by appt. 9-1, 1-hr close</i>	ECF 7-2 at 12
11.03.2020	Remittitur filed	ECF 1-15 at 136; APP. 60a
11.06.2020	Order: appear 2-4-21; "Counsel reports no contact with defendant"	ECF 1-9 at 3; ECF 11-2 at 15
11.08.2020 PDL	PD case summary, hearing no contact	ECF 1-9 at 37
11.19.2020	<i>SDLL closes due to COVID-19 increase</i>	ECF 7-2 at 12
11.19.2020 rec'd mail	Pet'r rec'd mail of 11.06 order, 1st mail from court since COVID-19 began	ECF 1-16 at 66

DATE/PET'R ACTION	EVENT	CITATION
11.23.2020 @court	App.Div., next hearing 2/4, this office cannot assist me to see a judge; Bus.Office write a ltr requesting to see a judge	ECF 1-10 at 32
12.03.2020 write ltr, USPS cert	write ltr: request to see judge "Since the COVID shutdown I have been told to wait. I have waited."	ECF 1-10 at 33; ECF 1-16 at 66
12.09.2020	Order in mail: confirm 2-4-21 hearing; mis- understood request to see judge to expand assign'd App.Con apptmnt	ECF 1-9 at 4; ECF 1-16 at 67
12.21.2020 @court	App.Div.: appeal process closed; Bus.Office: need to call PD	ECF 1-10 at 34
12.21.2020 call	call App.Con for file, no file at office, must wait til after holidays	ECF 1-10 at 35
12.28.2020 call	OAC: must wait, judge needs to assign counsel, I "got thrown under the bus"	ECF 1-10 at 36
01.12.2021 call	3 calls for file, App.Con. continues to state office mov'd and file not found	ECF 1-10 at 37
02.01.2021 call	App.Con states file not found; printout picked up (with many errors)	ECF 1-10 at 37

DATE/PET'R ACTION	EVENT	CITATION
02.04.2021 @court	case cont'd, after ct. PD states assigned for further proceedings, trial over but she will look into appeal	ECF 1-10 at 38
02.04.2021 call	OAC: everything on hold, I need a judge to order appeal dept to assign counsel	ECF 1-10 at 42
02.05.2021 email	Pet'r email to PD, stating issues: unable to get on calendar, no counsel, court clerks state I need to wait... "COVID" library hrs limit communication	ECF 1-9 at 24
02.06.2021 email	PD email stating email rec'd; Pet'r email, "How am I to do things...law library closed, I have no counsel"	ECF 1-9 at 23
02.08.2021 call	PD states no PD assigned to my case yet my case is open	ECF 1-10 at 43

DATE/PET'R ACTION	EVENT	CITATION
02.08.2021 email	PD email, "...not represented by an attorney at the [PD] office because your case is in the appeal stage...we are not representing you [on appeal]...sentence stayed while appeal pending."; Pet'r email, "1 hour at public library computers"	ECF 1-9 at 22-23
02.09.2021 email	Pet'r email to PD timeline and court statements, "Before COVID I was coming into court a couple times a week to get put on calendar to see a judge and benefit from PD assistance." Will I be assigned counsel...how do I go about doing anything?"	ECF 1-9 at 25-26
02.10.2021 email	PD email, "Burgener is still your appellate attorney..", sent link for habeas; Pet'r email PD, "Burgener repeatedly told me not assigned for complete appeal..OAC confirmed...I have been told a judge needs to assign me counsel..."	ECF 1-9 at 27-28

DATE/PET'R ACTION	EVENT	CITATION
02.11.2021 email	“what declaration?...did she [trial counsel] lie?”	ECF 1-16 at 30
02.12.2021 email	Pet'r email to PD, “may not be able to check email until Monday”	ECF 1-9 at 31
02.12.2021 subpoena	subpoena CHP, response rec'd dated 02.25 & 02.26.2021	ECF 1-15 at 178; ECF 1-15 at 185
02.16.2021 email	Pet'r email PD to follow-up	ECF 1-9 at 31
02.17.2021 email	Pet'r email PD to follow-up; PD reply: request for phone no.	ECF 1-9 at 30
02.17.2021 rec'd call	CHP calls to clarify subpoena, “...PD [told me] ARJIS would provide location of ...officers”	ECF 1-10 at 44
02.18.2021 @court	Judge orders “Defendant to provide court with a ltr re: complaints of trial counsel at next hearing” appear 3-11-21	ECF 1-9 at 5; ECF 1-10 at 45
02.18.2021 email	Pet'r email to PD, “...conflict of interest...write a ltr without counsel?”	ECF 1-9 at 30
02.19.2021 email	request for info to write ltr	ECF 1-9 at 29
02.24.2021 email	Pet'r to PD re: license suspension	ECF 1-9 at 32

DATE/PET'R ACTION	EVENT	CITATION
03.01.2021 email	PD email, "We can address license susp. with judge on next court date"	ECF 1-9 at 32
03.12.2021 email	Pet'r to PD: request jury interviews; PD reply: info not recorded	ECF 1-9 at 33
03.12.2021 email	request to SDLL for assistance, stmnt that "I used to walk in to the law library, ask at the reference desk re my issue and get shown relevant materials to research...COVID has changed this."	ECF 1-16 at 68
03.13.2021 rec'd email	SDLL responds with attorney referral & potential for 3 day Lexis Acct	ECF 1-16 at 68
03.15.2021 email	Pet'r to PD, "I'll bring ltr to judge...wish for counsel...law library closed...on my own"	ECF 1-9 at 34
03.19.2021 PDL rec'd call	PD explained may be difficult to attend court due to COVID-19	ECF 1-9 at 35
03.22.2021 @court, USPS cert	new PD, Judge "...not Katz..come back" 4-6-21; mail ltr to Judge Katz	ECF 1-10 at 46; ECF 11-2 at 17
04.01.2021	<i>SDLL Re-opens, T-Th, by appt 9-3, 1-hr close</i>	ECF 7-2 at 12

DATE/PET'R ACTION	EVENT	CITATION
04.06.2021 @court	Order: Judge Katz unavailable, cont. to 4-19-2021	ECF 1-10 at 47; ECF 11-2 at 18
04.19.2021 @court	Judge Katz return ltr unread, "no more counsel since...jury trial and appeal for IAC...I say no IAC...he doesn't know", stayed probationary terms lifted	ECF 1-9 at 38; ECF 1-10 at 50
04.26.2021 in custody	court commit, in medical isolation (contraband watch) until 04.30.21	ECF 7-2 at 128
Per Judge Katz at 04.19.2021 hearing, Petitioner working during this time to save money to seek counsel		
05.21.2021 call/email	hospital bills rec'd from ct commit; call & email hospital, doctor billing & sheriff accounting	ECF 1-10 at 51; ECF 1-16 at 80
06.01.2021	<i>SDLL, M-Th, by appt 9-3, 1-hr close</i>	ECF 7-2 at 12
06.14.2021	<i>Pub Lib ends 1-hr comp usage</i>	ECF 7-2 at 6
06.15.2021	<i>SDLL, M-Th 9-3, 1-hr close</i>	ECF 7-2 at 12
07.31.2021	<i>Pub Lib, M&T 11:30-8p, W-Sat 9:30-6p</i>	ECF 7-2 at 7
08.02.2021	<i>SDLL, M-Th 9-3</i>	ECF 7-2 at 12

DATE/PET'R ACTION	EVENT	CITATION
	Petitioner working, saving money, attempting to get counsel for petition for writ of habeas corpus, scanning files, investigating/researching.	
	Petitioner's phone, which was stolen, had pictures, file stamps and downloads. A subpoena for phone records could provide specific dates as evidence of Petitioner's diligence during this time, if necessary	
11.08.2021 @court	request audio transcripts	ECF 1-10 at 53
11.10.2021 email	request MVARS from initial counsel	ECF 7-2 at 31
11.11.2021 email	counsel informs pet'r protective order does not allow for release of video	ECF 7-2 at 30
11.12.2021 @court email	pick-up audio transcript. PD office closed, get Misdemeanor Office Supervisor contact info. Email PD request for file	ECF 1-10 at 53; ECF 7-2 at 45
11.15.2021 @court	return to ct, since all audio not on cd, left and had to return	ECF 1-10 at 53
11.15.2021 @court email	return to ct to get audio files that play, tech burns a new cd; Email PD follow-up for file	ECF 1-10 at 53; ECF 7-2 at 45
11.17.2021 email	email to trial counsel "to determine the validity or absence of tactical reasons for defense counsel's acts or omissions during trial. Reply rec'd 1.11.2022	ECF 1-16 at 98

DATE/PET'R ACTION	EVENT	CITATION
11.22.2021 call/email	follow-up with PD for file after VM	ECF 7-2 at 44
11.29.2021 email	PD reply: transcript available Pet'r request MVARS & complete file	ECF 7-2 at 38-43
11.30.2021 email	coordinate with PD to meet to view MVARS	ECF 7-2 at 36
12.01.2021 email	coordinate with PD to meet to view MVARS	ECF 7-2 at 34-36
12.02.2021 meet'g email	PD office file rec'd, watch MVARS (4) videos with PD; email PD supvr for expert witness info	ECF 7-2 at 33
12.02.2021 write ltr	letter mailed to Appellate Defender's, reply dated 12.22.21, no assist. avail	ECF 1-16 at 102, 104
12.15.2021 email	follow-up with PD re: expert witness	ECF 7-2 at 33
12.16.2021 email	PD reply no other info	ECF 7-2 at 32
12.20.2021 email	contact Loyola Proj for the Innocent to drop-off questionnaire, campus closed	ECF 7-2 at 47
01.06.2022 email	ask initial counsel if MVARS may be shared with expert witness	ECF 7-2 at 71
01.10.2022	<i>SDLL, M-Th, by appt 9-3, 1-hr close</i>	ECF 7-2 at 12
01.11.2022 email	email rec'd from trial counsel that no email declaration forthcoming	ECF 1-16 at 94

DATE/PET'R ACTION	EVENT	CITATION
01.18.2022 write ltr	letter sent to City Attorney for Discovery, no response rec'd	ECF 1-16 at 105
01.18.2022 email	request CAD from initial counsel	ECF 7-2 at 75
01.24.2022 email	initial counsel reply to contact PD	ECF 7-2 at 73-74
01.25.2022 call	contact Police Departments for records	ECF 1-10 at 54
01.27.2022 @court	App.Div. request file	ECF 1-10 at 55
02.10.2022 email	email sent & rec'd from App.Con that no docs exists outside the record	ECF 1-16 at 115
02.22.2022 @court call	App.Div.-exhibits in separate dept, no exhibit request in App.Div. file; call Exhibit Dept, never had pro se request, cannot view exhibits, needs to speak to sprvsrs	ECF 1-10 at 56
02.23.2022 call	called to follow-up for exhibits	ECF 1-10 at 56
02.24.2022 call	called to follow-up for exhibits, VM left; rec'd call, need court order	ECF 1-10 at 56
02.24.2022 write ltr	letter requesting ct order to view exhibits (order filed 3.29.2022)	ECF 1-16 at 107
02.28.2022 email	Pet'r email to PD re: case notes as exhibits in Writ of Habeas Corpus	ECF 7-2 at 76

DATE/PET'R ACTION	EVENT	CITATION
03.14.2022 @court email	“unable to get a copy of file since in legal services”, App.Div. will make copies, yet RT not in file from 11.7.2019, need to email ct reporter, email, transcript rec'd	ECF 1-10 at 57; ECF 7-2 at 78
03.14.2022	<i>SDLL, open M-Th 9-3</i>	ECF 7-2 at 12
03.16.2022	rec'd personal laptop bought 3.11; drop-off w/ tech to set-up	ECF 7-2 at 99
03.20.2022	Pet'r rear license plate stolen	ECF 7-1 at 15
03.29.2022	court order: to access, view & duplicate exhibits	ECF 1-16 at 110
04.08.2022	FILE WRIT OF HABEAS CORPUS IN SAN DIEGO SUPERIOR COURT (HC25602)	ECF 1-17 at 17
04.14.2022	ORDER FOR INFORMAL RESPONSE	ECF 1-17 at 96; APP. 55a
04.19.2022 call/email	unable to make appt to view exhibits	ECF 7-2 at 84
04.26.2022 email	follow-up email sent to view exhibits	ECF 7-2 at 84
05.02.2022 call/email	appt to view exhibits set	ECF 7-2 at 84
05.04.2022 @court	view exhibits	
05.31.2022	INFORMAL RESPONSE TO PETITION	ECF 1-17 at 101

DATE/PET'R ACTION	EVENT	CITATION
06.05.2022	PET'R REPLY TO INFORMAL RESPONSE	ECF 1-17 at 126
06.06.2022	<i>SDLL, open M-F, 9-5 (No Saturdays)</i>	ECF 7-2 at 12
06.16.2022	ORDER DENYING PETITION	ECF 1-17 at 150; APP. 40a
08.10.2022	PETITION FILED IN APPEAL COURT (D080769)	ECF 1-17 at 163
09.13.2022	PETITION DENIED	ECF 1-17 at 267; APP. 36a
09.15.2022	PETITION FOR REVIEW (PFR) IN CA SUPREME CT (S276400)	ECF 1-18 at 17
10.15.2022	Pet'r phone, computer, wallet, ID++ stolen	ECF 7-2 at 88
10.17.2022	ANSWER REQUESTED RE: STIPULATION	ECF 1-18 at 70; APP. 34a
10.25.2022	ANSWER TO PFR	ECF 1-18 at 73
11.01.2022	PET'R REPLY TO ANSWER	ECF 1-18 at 153
11.09.2022	COURT EXTENDS TIME TO REVIEW	ECF 1-18 at 175
11.16.2022	EN BANC SUMMARY DENIAL	ECF 1-18 at 178; APP. 33a
12.21.2022	email from Appellate Defenders (ADI), "let it go"	ECF 7-2 at 85
12.24.2022	Pet'r phone stolen	ECF 7-2 at 122

DATE/PET'R ACTION	EVENT	CITATION
12.30.2022	PETITION FILED IN DISTRICT COURT (22-cv-02073-MMA-DDL)	ECF 1 – 1-19
01.03.2023	MOTION TO FILE ELECTRONICALLY	ECF 2
01.03.2023	ORDER GRANTING FILE ELECTRONICALLY	ECF 3
01.05.2023	ORDER FOR RESPONSE TO PETITION	ECF 4
01.20.2023	NOTICE OF APPEARANCE	ECF 5
02.28.2023	<i>CA State of Emergency ends</i>	ECF 7-2 at 27
03.03.2023	MOTION TO DISMISS	ECF 6
03.14.2023 email	pick-up police report for theft, email Det. Re: Police Rpt incorrect info	ECF 7-2 at 113
03.14.2023 fax	request medical records from court commit	ECF 7-2 at 125
03.25.2023	med rec rec'd from court commit w/ incorrect info	ECF 7-2 at 124
03.29.2023	OPPOSITION TO MOTION TO DISMISS	ECF 7
04.26.2023	ORDER FOR REPLY TO OPP RE EQUITABLE TOLL	ECF 8
05.04.2023	REPLY TO OPP RE EQUITABLE TOLLING	ECF 9
05.23.2023	REPORT & RECOMMEND. TO DISMISS	ECF 10, APP. 18a
06.05.2023	PET'R OBJ TO REPORT & RECOMMENDATION	ECF 11
11.07.2023	Motion to Unseal Voir Dire filed	

DATE/PET'R ACTION	EVENT	CITATION
11.30.2023 @court	arguments heard & Motion to Unseal Records (Jury) denied	
01.12.2024	ORDER GRANTING MOTION TO DISMISS	ECF 12; APP. 3a
01.12.2024	JUDGEMENT	ECF 13
01.25.2024	NOTICE OF APPEAL; (CASE 24-461)	ECF 14; DKT 1
01.26.2024	DOCKETING NOTICE	ECF 15; DKT 2
02.01.2024	MOTION FOR SUBSTITUTION OF APPELLEE/RESPONDENT	DKT 3.1
02.01.2024	MOTION FOR REFUND OF OVERPMT OF FILING FEE	DKT 4.1
02.12.2024	MOTION FOR EXT TIME	DKT 5.1
02.15.2024	ORDER GRANTING TIME	DKT 6.1
04.26.2024	REQUEST FOR COA	DKT 7.1
12.24.2024	ORDER DENYING COA	ECF 16; DKT 13.1, APP. 1a
12.27.2024	MOTION FOR EXT TIME	DKT 9.2
01.06.2025 email	Motion for PACER exemption	DKT 12.1 AT 80
01.07.2025 email	PACER exemption denied by Clerk of Court	DKT 12.1 AT 81
01.09.2025 email	email to Electronic Public Access (EPA) program re no public access to ACMS	DKT 12.1 AT 86

DATE/PET'R ACTION	EVENT	CITATION
01.13.2025 email	email rec'd from clerk, PACER exemption dated 10 January 2025 ONLY for "...researching Ninth Circuit Court of Appeal cases that are not available on the Court's public terminals"	
01.15.2025	MOTION FOR RECONSIDERATION	DKT 10.1
01.16.2025 email	email PACER Svc Ctr, no exemption on account yet	
01.21.2025 email	exemption applied to PACER acct	
01.24.2025	ORDER DENYING MOTION FOR RECONSIDERATION	DKT 13, APP. 67a
02.19.2025	PC 832.7 letters sent for Officer Jose Guzman- Torres (Badge #021600) & Officer A Espitia (Badge #19410)	
02.25.2025	GoFundMe started https://www.gofundme.com/f/petition-for-writ-of-certiorari-legal-filing-expenses	
02.26.2025	"PRS...does not possess responsive records" for Espitia,	
02.26.2025	letters sent for assistance, Alexandra Natapoff (Harvard) & Jenny Roberts (Hofstra)	

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DATE/PET'R ACTION	EVENT	CITATION
02.28.2025	“PRS...does not possess responsive records” for Guzman-Torres,	
03.14.2025	APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR WRIT OF CERTIORARI	
03.18.2025	APPLICATION GRANTED TO EXTEND TIME TO APRIL 23, 2025	
03.19.2025	APPLICATION GRANTED TO EXTEND TIME TO JUNE 23, 2025	

APPENDIX M

GROUNDS FOR RELIEF

GROUND ONE: Petitioner was denied the right to the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution made applicable to the States in the Fourteenth Amendment due to structural errors in the indigent defense delivery system.

DktEntry 7.2 at 17, 25; ECF 1 at 6, 28-31; ECF 1-2 at 2, 24-26; ECF 1-17 at 19, 28-29, 165, 175-179; ECF 1-18 at 26, 35-37.

GROUND TWO: Petitioner was denied the right to the effective assistance of counsel for a jury trial guaranteed by the Sixth Amendment to the United States Constitution made applicable to the States through the Fourteenth Amendment due to trial counsel errors. Petitioner's Fifth and Eighth Amendment rights were violated by acts brought about by the previously mentioned Constitutional violation.

DktEntry 7.2 at 18, 25; ECF 1 at 7, 32-53; ECF 1-2 at 2-3, 26-60; ECF 1-3 at 1-6; ECF 1-17 at 20, 30-62, 166, 180-214; ECF 1-18 at 26-27, 37-45.

GROUND THREE: Petitioner was denied the constitutional right to the effective assistance of counsel on appeal guaranteed by the Sixth Amendment to the U.S. Constitution made applicable to the States through the 14th Amendment due to appellate counsel errors.

DktEntry 7.2 at 19, 26; ECF 1 at 8, 54-57; ECF 1-2 at 3-4; ECF 1-3 at 6-21; ECF 1-17 at 23, 63-68, 170, 215-221; ECF 1-18 at 27, 45-46.

GROUND FOUR: Petitioner was denied the right to due process and a fair trial guaranteed by the 6th Amendment of the U.S. Constitution made applicable to the States in the 14th Amendment due to prosecutorial errors. These errors caused a violation of Petitioner's Fifth and Eighth Amendment rights.

DktEntry 7.2 at 20, 27; ECF 1 at 9, 58-63; ECF 1-2 at 4; ECF 1-3 at 21-44; ECF 1-17 at 24, 69-82, 171, 222-239; ECF 1-18 at 28, 46-52.

GROUND FIVE: Petitioner's constitutional right to an impartial jury guaranteed by the Sixth Amendment and made applicable to the States in the Fourteenth Amendment was violated by improper jury bias.

DktEntry 7.2 at 21, 27; ECF 1 at 24; ECF 1-2 at 4; ECF 1-3 at 44-46; ECF 1-17 at 25, 172, 240; ECF 1-18 at 29, 52-53.

GROUND SIX: Petitioner's constitutional right to meaningful access to court and legal resources guaranteed by the First Amendment of the United States Constitution made applicable to the States in the Fourteenth Amendment has been violated by COVID-19 closures and COVID-19 restricted access to the court and legal resources.

DktEntry 7.2 at 22, 27; ECF 1 at 25, 64-65; ECF 1-2 at 4-5; ECF 1-3 at 46-53; ECF 1-17 at 26, 83-87, 173, 241-246; ECF 1-18 at 28, 53-54.

GROUND SEVEN: Petitioner's constitutional right to due process, a fair trial, effective assistance of trial counsel, effective assistance of appellate counsel and an impartial jury guaranteed by the United States Constitution in the Sixth Amendment, made applicable to the States in the Fourteenth Amendment, were violated by the cumulative errors in the aforementioned grounds 1, 2, 3, 4, 5 and 6 of this Petition for Writ of Habeas Corpus. Petitioner's First, Fifth and Eighth Amendment rights under the United States Constitution were violated by acts brought about by the previously mentioned Constitutional violations.

DktEntry 7.2 at 23, 28; ECF 1 at 26; ECF 1-2 at 5; ECF 1-3 at 53-55; ECF 1-17 at 27, 174, 247; ECF 1-18 at 28, 54-55.

GROUND EIGHT: Petitioner was denied the Constitutional right to habeas corpus procedure including full and factual development of the claims within the Petition for Writ of Habeas Corpus, HC25602 and D080769, since the San Diego Superior Court stated a *prima facie* case was determined for each claim yet did not issue an order to show cause.

DktEntry 7.2 at 24, 28; ECF 1 at 27; ECF 1-2 at 5; ECF 1-3 at 55-56; ECF 1-18 at 26, 34-35.

APPENDIX N

In Re: Application for Exemption from the Electronic Public Access Fees by Wendy Downs

This matter is before the Court upon the request by pro se litigant **Wendy Downs** for exemption from the fees imposed by the Electronic Public Access fee schedule adopted by the Judicial Conference of the United States Courts.

The Court finds that **Wendy Downs**, an individual who is not associated with an educational institution and is not proceeding *in forma pauperis* in her closed appeal before this court, nevertheless falls within the class of users listed in the fee schedule as being eligible for a fee exemption because she is currently unable to conduct research at the Court's public terminals with respect to cases in the Ninth Circuit's Appellate Case Management System (ACMS). Until this Court's public terminals are capable of including ACMS cases, Ms. Downs has demonstrated that her public access to information at those terminals is restricted.

Accordingly, **Ms. Downs** shall be exempt from the payment of fees for access via PACER to the electronic case files maintained in **this** court, to the extent such use is incurred in the course of **researching Ninth Circuit Court of Appeals cases that are not available on the Court's public terminals**. Additionally, the following limitations apply:

- I. this fee exemption applies only to **Ms. Downs**, **PACER account number 735924**, and is valid

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- only for the purposes stated above;
- II. this fee exemption applies only to the electronic case files of **this** court that are available through the PACER system;
- III. by accepting this exemption, **Ms. Downs** agrees not to sell for profit any data obtained as a result of receiving this exemption;
- IV. **Ms. Downs** is prohibited from transferring any data obtained as a result of receiving this exemption;

This exemption may be revoked at the discretion of the Court at any time. A copy of this Order shall be sent to the PACER Service Center.

Dated this 10th day of January, 2025

Molly C. Dwyer
Clerk of Court