

No. **24A 897**

ORIGINAL

IN THE
Supreme Court of the United States

FILED
MAR 14 2025
OFFICE OF THE CLERK
SUPREME COURT, U.S.

WENDY H. DOWNS,

Pro Se Applicant,

v.

ROB BONTA, THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Respondent.

**On Petition For Writ Of Certiorari To The United States
Court of Appeals For The Ninth Circuit**

**APPLICATION TO ASSOCIATE JUSTICE ELENA KAGEN
FOR EXTENSION OF TIME WITHIN WHICH TO FILE A
PETITION FOR WRIT OF CERTIORARI**

WENDY H DOWNS

PRO SE APPLICANT

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RECEIVED
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SUPREME COURT, U.S.

To the Honorable Elena Kagen, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Applicant, Wendy H. Downs, respectfully requests a 60-day extension of time within which to file a petition for writ of certiorari up to and including Monday, June 23, 2025 under Supreme Court Rule 13.5.

The order from which review is sought is *Downs v Allison*, No. 24-461 which was filed on December 24, 2024, see attached Appendix A. Petitioner sought reconsideration which was denied January 25, 2025, see attached Appendix J.

The current deadline for filing a petition for writ of certiorari is April 24, 2025. This application has been filed at least 10 days prior to that date under Supreme Court Rule 13.5.

The jurisdiction of this Court may be invoked under 28 U. S. C. § 1254(1).

REASONS FOR GRANTING THE EXTENSION OF TIME

Applicant respectfully submits that a 60-day extension of the time within which to file a petition for writ of certiorari is necessary and appropriate for the following reasons:

An extension of time will assist with the filing of a well-researched and cogent petition by the *pro se* Applicant. The additional time will allow for Applicant to work while researching, formatting, and complying with this Courts rules.

Applicant works full-time and would like to work available overtime opportunities to save money in order to pay the \$300 docket fee and minimum 45 copies of 6 1/8 x 9 1/4 booklet format without using too much credit. Applicant has been told that a car maintenance service will be at minimum \$3,600.24. The Applicant has asked for the maximum amount of time in order to budget these expenses.

Applicant would like to request assistance from potential amici and would appreciate additional time for their response and consideration.

Applicant submit that the requested extension of time would neither prejudice the Respondent nor result in undue delay in the Court's consideration of the petition, and that good cause exists to grant the requested extension.

CONCLUSION

For the foregoing reasons, Applicant kindly requests that an order be entered extending the time for filing a petition for writ of certiorari to and including June 23, 2025.

Respectfully submitted,

on 14 March 2025 by
Date



Wendy H. Downs

Pro Se Applicant

Email: iappreciateyou@protonmail.com

CERTIFICATE OF SERVICE

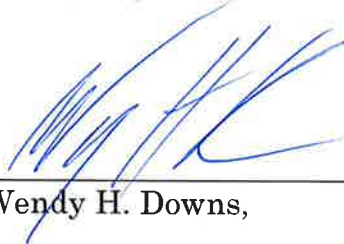
I, Wendy H. Downs, certify that I filed with the Clerk's Office of the United States Supreme Court, via United States Postal Service certified return receipt no. 9589 0710 5270 0045 1911 35, an original and two copies of the enclosed APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR WRIT OF CERTIORARI.

I further certify that on March 14, 2025, as required by Supreme Court Rule 29, I served a copy of the enclosed APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR WRIT OF CERTIORARI by sending via United States Postal Service certified return receipt no. 9589 0710 5270 0045 1911 59 to each party in the proceedings as follows:

Office of the Attorney General
 State of California Department of Justice
 1300 "I" Street
 Sacramento, CA 95814-2919
 (916) 445-9555
Counsel for Respondent

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 14 March 2025 by
 Date


 Wendy H. Downs,
Pro Se Applicant

iappreciateyou@protonmail.com

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

DEC 24 2024

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

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: 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).

Appellant’s motion to refund the filing fee (Docket Entry No. 4) is denied. Appellant’s notice of appeal was filed after the filing fee was increased to \$605 in December 2023.

Appellant’s motion to substitute a party (Docket Entry No. 3) is denied as moot.

DENIED.

APPENDIX B

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

WENDY HEATHER DOWNS,

Petitioner,

v.

KATHLEEN ALLISON, Secretary of

California Department of Corrections

and Rehabilitation, et al.,

Respondents.

Case No. 22-cv-2073-MMA (DDL)

ORDER RE: PETITIONER'S

OBJECTIONS;

[Doc. No. 11]

MODIFYING AND ADOPTING

REPORT AND

RECOMMENDATION AS

MODIFIED;

[Doc. No. 10]

GRANTING MOTION TO DISMISS

AND DISMISSING 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.*

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

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 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.

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-

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**.

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. § 224(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

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.

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 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 postconviction 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

s/ Michael M. Anello

HON. MICHEAL M. ANELLO

United State District Judge

APPENDIX C

Case 3:22-cv-02073-MMA-DDL Document 10 Filed 05/23/23 PageID.1889 Page 1 of

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

WENDY H. DOWNS,

Petitioner,

v.

KATHLEEN ALLISON, CDCR

Secretary, et al.,

Respondents.

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

REPORT AND

RECOMMENDATION FOR ORDER

GRANTING MOTION TO DISMISS

[Dkt. No. 6]

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 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.*

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

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 137, 140.
October 2, 2020	Clerk of Court filed Appellate Division’s decision affirming Petitioner’s conviction.	Dkt. No. 1-15 at 135-136.
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 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

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

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 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

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.

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

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 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.

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."

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.

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

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.

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.” *Stancl 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 “extraordinary 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

s/ David Leshner

Honorable David D. Leshner

United States Magistrate Judge

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

JAN 24 2025

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

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.

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