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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

WAYNE M. MILLER,)	No. CV 07-1461-PHX-MHM (BPV)
Petitioner,)	
vs.)	REPORT AND
CARSON MCWILLIAMS, et al.,)	RECOMMENDATION
Respondents.)	

On July 30, 2007, Petitioner, Wayne M. Miller, an inmate confined in the Arizona State Prisons Complex - Florence, filed a *pro se* Petition for Writ of Habeas Corpus by a Person in State Custody, pursuant to Title 28, U.S.C. § 2254. (Doc. No. 1.)¹ On October 4, 2007, Miller filed an Amended Petition. On October 10, 2007, the Court dismissed the Petition, and on October 24, 2007, the Court dismissed the Amended Petition with leave to amend. Miller filed a Second Amended Petition (Doc. No. 10) on November 28, 2007. The Court called for an answer to the Second Amended Petition. (Doc. No. 13.)

On March 3, 2009, the District Court adopted this Court’s Report and Recommendation that Miller’s “Motion to Enjoin, Es-stop, Remove”(Doc. No. 19) and “Motion to Restore Record” (Doc. No. 20) be denied without prejudice, and

¹ “Doc. No.” refers to documents in this Court’s file.

1 granted Miller's Motion to Consider Exhibits in Totality (Doc. Nos. 34, 36). (Doc.
2 No. 38.)

3 In addition to the habeas petition, Miller's Motions for Order to Show Cause
4 are pending before the Court. (Doc. Nos. 39, 40.)² Respondents have filed a response
5 in opposition thereto (Doc. No. 41), and Petitioner has filed a reply (Doc. No. 42).

6 Pursuant to the Rules of Practice of this Court, this matter was referred to
7 Magistrate Judge Bernardo P. Velasco for a Report and Recommendation.

8 For the reasons discussed below, the Magistrate Judge recommends that the
9 District Court enter an order DISMISSING the Petition in its entirety.

10 **I. FACTUAL AND PROCEDURAL BACKGROUND**

11 A. Trial Court Proceedings

12 On June 25, 1998, Miller was charged by the Grand Jurors of Pinal County,
13 Arizona, with four counts of aggravated assault, in violation of Arizona statutes, all
14 class 3 dangerous felonies. (Answer, Ex. A.)

15 On February 2, 2002, after seven days of trial, Miller was convicted by a jury
16 of one count of aggravated assault. (Answer, Ex. B.) The trial court declared a
17 mistrial as to the other three counts. (*Id.*)

18 On March 5, 2002, the trial court sentenced Miller to an aggravated sentence
19 of 10 years' imprisonment in the Arizona Department of Corrections. (*Id.*, Ex. E.)
20 The State moved to dismiss the remaining counts on March 28, 2002, (Answer, Ex.
21 C), and the trial court granted the motion on April 1, 2002, dismissing the remaining
22 counts without prejudice. (Answer, Ex. D.)

23 B. Appeal

24 Notice of appeal was timely filed on March 20, 2002. (Answer, Ex. G.) Miller
25 raised four issues on appeal. (Answer, Ex. H.) A supplemental argument was filed
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27 ² Duplicate motions were filed.

1 by appellant, raising one additional claim. (Answer, Ex. I.) The Arizona Court of
2 Appeals affirmed Miller's conviction and sentence on direct appeal. (Answer, Ex. J.)

3 Miller filed a petition for review and motion for reconsideration³. (Answer,
4 Ex. K.) On April 15, 2004, the Supreme Court denied review. (Answer, Ex. L.)
5 The mandate issued on July 9, 2004. (Answer, Ex. M.)

6 C. First Petition for Post-Conviction Relief

7 On May 18, 2004, Miller's notice of post-conviction relief was filed. (Answer,
8 Ex. N.) Miller's first petition for post-conviction relief was received on September
9 2, 2004. (Answer, Ex. O.) The trial court noted that the petition for post-conviction
10 relief did not conform to Rule 32.5, exceeding 25 pages in length, that the petition
11 was not filed within 90 days of sentencing, and finally, that most, if not all, of the
12 issues raised were raised on direct appeal and relief was denied by the Court of
13 Appeals. (Answer, Ex. P at 1.) The trial court noted that Miller was proceeding *pro*
14 *se*, and allowed him some leeway, and ordered the petition filed on September 30
15 2004. (*Id*) On February 14, 2005, the trial court dismissed the petition as untimely,
16 and because the issues were precluded. (Answer, Ex. Q.) Alternatively, the trial
17 court found no basis to any of Miller's arguments that he was being detained illegally.
18 (*Id*) On June 23, 2005, Miller filed a petition for review with the Arizona Court of
19 Appeals. (Answer, Ex. R.) Miller also filed that same date an "Appeal of Defendants
20 Habeous [sic] Corpus Petition." (Answer, Ex. S.) The court of appeals denied review
21 on May 12, 2006, citing as its basis for denial Ariz.R.CrimP. 32.9(c)(1) and the strict
22 prohibition on the incorporation of any material other than record documents
23 supporting the petitioner's claims and included in an appendix. (Appendix, Ex. T.)
24 The court of appeals found insufficient Miller's petition for review "which simply
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26 ³ This was one document filed in the court of appeals as both the
27 petition for review to the Arizona Supreme Court, and a motion for
28 reconsideration by the court of appeals.

1 directs this court to ‘see Issues’ and ‘see Facts’ raised in the petition below.” (*Id*) A
2 Petition for reconsideration was filed on June 6, 2006 (Answer, Ex. U), and denied
3 by the court of appeals on June 20, 2006. (Answer, Ex. V.) No petition for review
4 was filed, and the court of appeals issued its mandate on July 25, 2006. (Answer, Ex.
5 W.)

6 D. First Federal Habeas Petition and Amended Petitions

7 Miller filed his first petition for post-conviction relief in District Court on July
8 24, 2007.⁴ (Doc. No. 1.) The second amended petition was filed on November 28,
9 2007, and contains sixty-six (66) claims. (Doc. No. 10.) The District Court listed
10 these claims in the screening order (Doc. No. 13) issued on January 28, 2008, and
11 they will not be re-listed here. Respondents filed an Answer with Exhibits A through
12 W attached on August 5, 2008. (Doc. No. 31.) A Reply, including attached exhibits,
13 was filed by Miller on September 12, 2008. (Doc. No. 32.)

14 **II. DISCUSSION**

15 A. Standard of Review

16 Because Miller filed his petition after April 24, 1996, this case is governed by
17 the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)
18 (“AEDPA”).

19 B. Timeliness

20 A one year period of limitation shall apply to an application for writ of habeas
21 corpus by a person in custody pursuant to the judgment of a State court. 28 U.S.C.
22 § 2244(d)(1).

25 ⁴ Respondents concede that, under the prison mailbox rule, July 24,
26 2007, the date Miller’s petition was given to prison officials to be
27 mailed, is deemed the constructive date of filing. (Doc. No. 31 at
28 4.)

1 The running of this one-year statute of limitations on habeas petitions for state
2 convictions is tolled during any period when "a properly filed application for state
3 post-conviction or other collateral review with respect to the pertinent judgment or
4 claim is pending" in any state court. *See* 28 U.S.C. § 2244(d)(2). Thus, the statute
5 of limitations is tolled during the pendency of a state court action for post-conviction
6 relief. 28 U.S.C. § 2244(d)(2).

7 An application contemplated by section 2244(d)(2) is properly filed "when its
8 delivery and acceptance are in compliance with the applicable laws and rules
9 governing filings. These usually prescribe, for example, the form of the document,
10 the time limits upon its delivery, the court and office in which it must be lodged, and
11 the requisite filing fee." *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (footnote omitted).
12 The United States Supreme Court has held that untimely state post-conviction
13 petitions are not "properly filed" under AEDPA, and do not toll AEDPA's statute of
14 limitations. *Pace v. DiGuglielmo*, 544 U.S. 408 (2005).

15 The Ninth Circuit recognizes that the AEDPA's limitations period may be
16 equitably tolled because it is a statute of limitations, not a jurisdictional bar.⁵
17 *Calderon v. United States Dist. Ct. (Beeler)*, 128 F.3d 1283, 1288 (9th Cir.1997),
18 *overruled, in part, on other grounds by, Calderon v. United States Dist. Ct. (Kelly)*
19 163 F.3d 530, 540 (9th Cir.1998). Tolling is appropriate when "extraordinary
20 circumstances beyond a prisoner's control make it impossible to file a petition on
21 time." *Id.*; *see also, Miranda v. Castro*, 292 F.3d 1063, 1067 (9th Cir.2002)(stating
22 that "the threshold necessary to trigger equitable tolling [under AEDPA] is very high,

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25 ⁵ Although the Court recognizes that Respondents have raised an
26 argument that equitable tolling is no longer available, in view of the
27 Supreme Court's recent decision in *Bowles v. Russell*, 127 S.Ct.
28 2360 (2007), the Court need not resolve that issue because Miller
does not satisfy the requirements for such tolling.

1 lest the exceptions swallow the rule.") (citations omitted); *Spitsyn v. Moore*, 345 F.3d
2 796, 799 (9th Cir.2003). "When external forces, rather than a petitioner's lack of
3 diligence, account for the failure to file a timely claim, equitable tolling of the statute
4 of limitations may be appropriate." *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th
5 Cir.1999). The extraordinary circumstances requirement is a "high hurdle," *see*
6 *Calderon (Beeler)*, 128 F.3d at 1289, and policy considerations counsel against
7 equitable tolling. *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980). A petitioner seeking
8 equitable tolling must establish two elements: "(1) that he has been pursuing his rights
9 diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v.*
10 *DiGuglielmo*, 544 U.S. 408, 418, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005). Petitioner
11 must also establish a "causal connection" between the extraordinary circumstance and
12 his failure to file a timely petition. *Bryant v. Arizona Attorney General*, 499 F.3d
13 1056, 1061 (9th Cir.2007).

14 C. Analysis

15 The Magistrate Judge finds that, pursuant to the AEDPA, the Petition filed in
16 this Court is untimely. Miller had until one year after his conviction and sentence
17 became final to file his federal petition.

18 1. *Limitation Period Under § 2244(d)(1)(A)*

19 Miller's conviction and sentence became final on July 14, 2004, ninety (90)
20 days after the Arizona Supreme Court denied Miller's petition for review of his direct
21 appeal, when the time for filing a writ of certiorari to the United States Supreme Court
22 had expired. *See Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999). Accordingly,
23 Miller was required to file his petition for writ of habeas corpus within one year of the
24 date his convictions became final, *i.e.*, one year from October July 14, 2004, absent
25 statutory tolling.

1 (assuming, without addressing the issue, that the California courts' conclusion
2 regarding timeliness is conclusive as to whether the petition was "properly filed" for
3 purposes of § 2244(d)(2)), *as amended*, 439 F.3d 993 (9th Cir.2006), *cert. denied*, 549
4 U.S. 856 (2006); *Thorson v. Palmer*, 479 F.3d 643, 645 (9th Cir.2007) (same)). In
5 *Ruiz*, the Court concluded that Ruiz's third state habeas petition was not properly filed
6 regardless of whether the state court's decision was treated as conclusive or reviewed
7 under Arizona law. *Id.* at 4.

8 In another unpublished decision, the Ninth Circuit found that the Arizona
9 Court of Appeals incorrectly upheld a trial court's dismissal of a petition as time
10 barred, as, under clearly established Arizona law, a petitioner's Rule 32 Petition was
11 "timely filed" the date it was signed and submitted to prison officials for forwarding
12 to the court. *Romaine v. Woods*, 22 Fed.Appx. 838 (9th Cir. 2001). The Ninth Circuit
13 found that the court of appeals conclusion was contrary to clearly established Arizona
14 law, and is therefore not an independent and adequate state ground precluding federal
15 habeas review of the petitioner's claims.

16 Although the Court believes the better rule is to treat the state courts'
17 determination of untimeliness under Arizona law as conclusive, the Court would
18 conclude that Miller's state habeas petitions were untimely even if the state courts'
19 decisions on untimeliness were reviewed under Arizona law. This is not because this
20 Court finds that the trial court correctly ruled on the timeliness of Miller's petition for
21 post-conviction relief, but, because Miller's petition for review to the court of appeals
22 was not "properly filed" in order to toll the statute of limitations for purposes of filing
23 his federal habeas petition.

24 The Court of Appeals denied review of the trial court's finding that the Rule
25 32 petition was time-barred because his petition for review was not filed in
26 compliance with Arizona Rule of Criminal Procedure 32.9. The Court of Appeals did
27 not consider, therefore, that Miller's petition for post-conviction relief was timely
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1 filed under Arizona’s prison mailbox rule. *See State v. Rosario*, 195 Ariz. 264 (Ariz.
2 App.1999); *Mayer v. State*, 184 Ariz. 242 (1999). Miller asserts, and Respondents
3 do not contest, that his petition for post-conviction relief was due on August 20, 2004,
4 the same day he gave his petition to prison authorities for mailing. (Doc. No. 10 at
5 4,10-1 at 2; Doc. No. 32 at 2, 12, 32-1 at 9, 13,)⁶ This assertion is supported by the
6 actual filing date of the out-of-state petition, received by Pinal County Superior Court
7 on September 2, 2004. Because the petition was properly filed, AEDPA’s one-year
8 statute of limitations would be tolled throughout the time that Miller’s properly filed
9 petition was pending in Arizona state court. *Artuz v. Bennett*, 531 U.S. 4, 8 (2000).

10 When the trial court denied Miller’s petition on February 14, 2005 (Answer,
11 Ex. Q), Miller had thirty days from that date to file a petition for review to the
12 Arizona Court of Appeals. *See Ariz.R.Crim.P.* 32.9 (c). In *Artuz v. Bennett*, the
13 Supreme Court explained that an application is "properly filed" for purposes of §
14 2244(d)(2) when “its delivery and acceptance are in compliance with the applicable
15 laws and rules governing filings. These usually prescribe, for example, the form of
16 the document, the time limits upon its delivery, the court and office in which it must
17 be lodged, and the requisite filing fee.” 531 U.S. 4, 8 (2000) (citations omitted).

18 The court of appeals noted that Arizona law required that a petitioner strictly
19 comply with the provisions of Rule 32.9 or be denied relief. (Answer, Ex. T at 2.)
20 The court of appeals further noted that Rule 32.9(c)(1) expressly forbids incorporation
21 of any material other than record documents supporting the petitioner’s claims and
22 included in an appendix. (*Id.* at 2-3.) The court of appeals found Miller’s petition for
23 review which directed the court to “see Issues” and “see Facts” raised in the petition
24 below as insufficient to comply with Rule 32.9. (*Id.* at 3.)

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26 ⁶ The page numbers this Court uses to refer to Miller’s Amended
27 Petition are the numbers generated by filing in the court’s electronic
28 docket due to the confusing pagination of Miller’s filing.

1 Accordingly, Miller’s petition for review was not properly filed for purposes
2 of 2244(d)(2). Miller had thirty days from the trial court’s denial of his petition for
3 post-conviction on relief, or until March 16, 2005, to properly file a petition for
4 review. Miller’s petition for review was filed on June 23, 2005. (Answer, Ex. R.)
5 It is not clear from the record, but can be assumed since Miller’s petition for review
6 was not denied as untimely, that Miller received an extension of time to file his
7 petition for review. Construing all doubt in Miller’s favor, both as to the timeliness
8 of his petition for post-conviction relief and this Court’s ability to review that State
9 court decision, and as to the timeliness of Miller’s petition for review, Miller’s
10 “properly filed” petition for post-conviction relief was pending in state court until he
11 filed his non-conforming petition for review on June 23, 2005. Miller had one year
12 from that date to file his federal habeas petition. Thus, his federal habeas petition,
13 filed on July 30, 2007, is untimely.

14 3. *Equitable tolling*

15 Miller does not make a sufficient showing that there are “extraordinary
16 circumstances” that caused the untimely filing of his Petition. “A pro se petitioner’s
17 lack of legal sophistication is not, by itself, an extraordinary circumstance warranting
18 equitable tolling.” *Raspberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006). Miller
19 asserts many arguments in his Response that might persuade this Court to recommend
20 equitable tolling for the time period during which his petition for post-conviction
21 relief was pending before the trial court. However, as this Court has already
22 explained, giving the Petitioner the benefit of the doubt and tolling the limitations
23 period while the petition was pending before the trial court does not render the federal
24 habeas petition timely.

25 Miller also suggests that a “defect for form” should not invalidate a habeas
26 corpus petition. (Doc. No. 32 at 6.) Miller further argues that the court of appeals’
27 refusal to review the petition on account of form is a denial of due process and equal
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1 protection “in light of the fact in Arizona there is no error for form” citing A.R.S. 13-
2 4138, which states that “[n]o writ of habeas corpus shall be disobeyed for defect of
3 form.” (*Id.* at 19.) Miller submits that in Arizona there is no error of form of a post-
4 conviction habeas corpus, and that no briefing is necessary or required in the appellate
5 court in review proceedings. (*Id.* at 24-25.)

6 The Supreme Court, in *Artuz v. Bennett*, explained the difference between
7 “filed” and “properly filed” (discussed above) for purposes of § 2244(d)(2). 531 U.S.
8 at 4. An application is “filed,” as that term is commonly understood, when it is
9 delivered to, and accepted by, the appropriate court officer for placement into the
10 official record. *Id.* Although the statute Miller cites does not, on its face, support his
11 premise, (the statute applies to a “writ” of habeas corpus, not an “application for a
12 writ” of habeas corpus) it is irrelevant to the question before this Court. Even if state
13 court rules require that the court clerk “file” a defective petition, the only question this
14 Court is concerned with is when Miller’s state habeas petition was “properly filed,”
15 *i.e.*, when that petition complied with all filing conditions imposed by Arizona law.
16 *See Zepeda v. Walker*, 2009 WL 2883064, 2 (9th Cir.2009). Miller points to no
17 external forces or extraordinary circumstances that prevented him from complying
18 with Ariz.R.Crim.P. 32.9. Accordingly, this Court finds no cause to equitably toll the
19 limitations period.

20 D. Order to Show Cause.

21 Because the Magistrate Judge recommends that the District Court dismiss this
22 petition as untimely, he does not reach the Petitioner's or Respondent’s alternate
23 arguments on procedural default or on the merits of this case. Accordingly the
24 Magistrate Judge recommends that the District Court deny Petitioner’s Motion for
25 Order to Show Cause (Doc. Nos. 39, 40) as moot.

1 **III. RECOMMENDATION**

2 This Court recommends that the District Court, after its independent review of
3 the record, DISMISS this action in its entirety as untimely.

4 This Court recommends that the District Court, after its independent review of
5 the record, deny Petitioner's Motion for Order to Show Cause (Doc. Nos.39, 40⁷) as
6 MOOT.

7 Pursuant to 28 U.S.C. §636(b), any party may serve and file written objections
8 within ten days after being served with a copy of this Report and Recommendation.
9 A party may respond to another party's objections within ten days after being served
10 with a copy thereof. Fed.R.Civ.P. 72(b). If objections are filed the parties should use
11 the following case number: **CIV 07-1461-PHX-MHM.**

12 If objections are not timely filed, then the parties' right to *de novo* review by
13 the District Court may be deemed waived. See *United States v. Reyna-Tapia*, 328
14 F.3d 1114, 1121 (9th Cir) (*en banc*), *cert. denied*, 540 U.S. 900 (2003).

15 DATED this 30th day of September, 2009.

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19 _____
20 Bernardo P. Velasco
21 United States Magistrate Judge
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27 ⁷ Doc. Nos. 39 and 40 appear to be duplicate filings.
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