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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MICHAEL STANLEY GALLEGOS,)
)
 Petitioner,)
)
 v.) CIV 07-02263 PHX MHM (MEA)
)
 DORA SCHRIRO and) REPORT AND RECOMMENDATION
 ARIZONA ATTORNEY GENERAL,)
)
 Respondents.)
 _____)

TO THE HONORABLE MARY H. MURGUIA:

On November 19, 2007, Petitioner filed a *pro se* petition seeking a writ of habeas corpus pursuant to 42 U.S.C. § 2254. Respondents filed an Answer to Petition for Writ of Habeas Corpus ("Answer") (Docket No. 17) on July 11, 2008. Respondents argue the action for habeas relief was not timely filed and that Petitioner procedurally defaulted his claims in the state courts and, therefore, that the petition must be denied and dismissed with prejudice. Petitioner filed a reply to Respondents' answer to his petition on September 12, 2008. See Docket No. 20.

I Procedural History

In 1998 Petitioner was charged with ten crimes, *inter alia*, one count of sexual conduct with a minor and one count of

1 attempted molestation of a child. See Answer, Exh. A & Exh. B.
2 On July 31, 1998, Petitioner entered into a written plea
3 agreement with regard to these charges, providing that he would
4 plead guilty to two counts and that the other eight counts would
5 be dismissed. See id., Exh. B. The plea agreement provided
6 Petitioner would plead guilty to one count of sexual conduct
7 with a minor and one count of attempted child molestation. See
8 id., Exh. B. The plea agreement waived Petitioner's right to a
9 jury trial. Id., Exh. B. The plea agreement states that the
10 sentencing court would impose a sentence within the minimum and
11 maximum range provided for in the plea agreement, noting a
12 presumptive sentence of 10 to 20 years imprisonment and a
13 maximum sentence of 15 to 27 years imprisonment. Id., Exh. B at
14 2.

15 On October 23, 1998, Petitioner was sentenced to an
16 aggravated term of 22 years imprisonment pursuant to his
17 conviction for sexual conduct with a minor and to a consecutive
18 term of lifetime probation pursuant to his conviction for
19 attempted child molestation. Id., Exh. C.

20 Petitioner filed a timely action seeking state post-
21 conviction relief pursuant to Rule 32, Arizona Rules of Criminal
22 Procedure, on November 5, 1998. Id., Exh. D. Petitioner was
23 appointed counsel, who averred to the state court that he could
24 find no meritorious grounds for relief. Id., Exh. E. Although
25 allowed extra time to do so by the state court, Petitioner did
26 not file a pro se brief in this Rule 32 action. Id., Exh. F &
27 Exh. G. The state trial court dismissed the action for
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1 Petitioner's failure to prosecute on September 3, 1999. See
2 id., Exh. G.

3 Petitioner filed another state action for post-
4 conviction relief pursuant to Rule 32 in June of 2005. Id.,
5 Exh. C. Petitioner asserted he was entitled to relief from his
6 sentences based on the United States Supreme Court's decision in
7 Blakely v. Washington. Id., Exh. H. The state trial court
8 dismissed the Rule 32 action on June 30, 2005, concluding the
9 action was not timely filed. Id., Exh. H. The state court
10 concluded Blakely did not apply to Petitioner's case because it
11 was not retroactive to cases on collateral review and,
12 accordingly, that Petitioner's Rule 32 action did not fall
13 within an exception to the state's timeliness rule. Id., Exh.
14 H.

15 Petitioner belatedly sought review of this decision by
16 the Arizona Court of Appeals, which dismissed his petition for
17 review as untimely on January 19, 2006. Id., Exh. J.
18 Petitioner sought review by the Arizona Supreme Court, which
19 declined review on April 12, 2007. See id., Exh. K.

20 In his federal habeas petition Petitioner asserts he is
21 entitled to relief because his right to meaningful access to the
22 courts has been violated. Petitioner states that prison
23 officials are not helping inmates prepare and file legal
24 pleadings with regard to illegal sentences or illegal probation
25 laws. Petitioner also asserts his sentence was improperly
26 aggravated based on facts found by a judge rather than a jury.
27 Petitioner also argues his sentence of lifetime probation

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1 violates his right to due process because it is not authorized
2 by Arizona state statutes.

3 **II Analysis**

4 **Relevant statute of limitations**

5 The Petition for Writ of Habeas Corpus is barred by the
6 applicable statute of limitations as found in the Antiterrorism
7 and Effective Death Penalty Act ("AEDPA").

8 The AEDPA imposed a one-year statute of limitations on
9 state prisoners seeking federal habeas relief from their state
10 convictions. See Lott v. Mueller, 304 F.3d 918, 920 (9th Cir.
11 2002). However, the AEDPA provides that a petitioner is
12 entitled to tolling of the statute of limitations during the
13 pendency of a "properly filed application for state
14 post-conviction or other collateral review with respect to the
15 pertinent judgment or claim." 28 U.S.C. § 2244(d)(2)(2006 &
16 Supp. 2008). See also Artuz v. Bennet, 531 U.S. 4, 8, 121 S.
17 Ct. 361, 363-64 (2000); Harris v. Carter, 515 F.3d 1051, 1053
18 (9th Cir. 2008), petition for cert. filed 77 U.S.L.W. 3058 (July
19 15, 2008) (No. 08-76).

20 Because Petitioner pled guilty and thereby waived his
21 right to a direct appeal, Petitioner's convictions and sentences
22 became final upon the completion of any timely action seeking
23 state post-conviction relief from his convictions and sentences.
24 See Summers v. Schriro, 481 F.3d 710, 711 (9th Cir. 2007)
25 (holding that, in Arizona, the statute of limitations began to
26 run upon "the conclusion of the Rule 32 of-right proceeding and
27 review of that proceeding, or [upon] the expiration of the time

1 state petition that is not filed within the state's required
2 time limit is not "properly filed." Pace v. DiGuglielmo, 544
3 U.S. 408, 413, 125 S. Ct. 1807, 1811-12 (2005).

4 Because Petitioner did not file his federal habeas
5 action within the period specified by the AEDPA, his petition
6 for habeas relief may only be considered if the AEDPA's time
7 limitation may be "equitably" tolled in his case. See Harris,
8 515 F.3d at 1053-54 & n.4; Allen v. Lewis, 255 F.3d 798, 800
9 (9th Cir. 2001). The Ninth Circuit Court of Appeals has
10 determined that equitable tolling of the filing deadline for a
11 federal habeas petition is available only if extraordinary
12 circumstances beyond the petitioner's control make it impossible
13 to file a petition on time. See Harris, 515 F.3d at 1055-56
14 (discussing standard and holding equitable tolling was warranted
15 when the petitioner had relied on prior Circuit Court of Appeals
16 precedent regarding the timely filing of his petition); Malcom
17 v. Payne, 281 F.3d 951, 962 (9th Cir. 2002). Equitable tolling
18 is only appropriate when external forces, rather than a
19 petitioner's lack of diligence, account for the failure to file
20 a timely claim. See Harris, 515 F.3d at 1055 (stating a
21 petitioner's "oversight, miscalculation," or "negligence" would
22 not warrant equitable tolling); Miles v. Prunty, 187 F.3d 1104,
23 1107 (9th Cir. 1999).

24 A federal habeas petitioner seeking equitable tolling
25 must also act with "reasonable" diligence throughout the period
26 he seeks to toll. See e.g., Bryant v. Arizona Attorney Gen.,
27 499 F.3d 1056, 1061 (9th Cir. 2007); Warren v. Garvin, 219 F.3d

1 111, 113 (2d Cir. 2000); Jones v. Morton, 195 F.3d 153, 159 (3d
2 Cir. 1999). It is Petitioner's burden to establish that
3 equitable tolling is warranted in his case. See Bryant, 499
4 F.3d at 1059-60 (holding the petitioner must establish a causal
5 connection between the cause of his delay and the delay itself).

6 In his reply to the answer to his petition, Petitioner
7 asserts the plea agreement was unconstitutional because, as a
8 result, Petitioner was "twice convicted & sentenced to illegally
9 enhanced multiple sentences for same offense committed, on July
10 31, 1998." Docket No. 20 at 2. Petitioner further contends his
11 counsel was unconstitutionally ineffective because counsel
12 "participated in this scheme, to the Petitioner's prejudice."
13 Id. In his reply Petitioner discusses his right to due process
14 of law and the doctrine of procedural default of habeas claims.
15 Petitioner further alleges that the State of Arizona has
16 "constructed a vague, complex, unconstitutional sentencing
17 scheme that is bias[ed] & prejudice[d] towards 'Indigent Sex
18 Offenders.'" Id. at 7. Petitioner also argues that he is
19 entitled to the benefit of the Blakely decision, citing Teague
20 v. Lane. Id. at 8-9. Petitioner further alleges

21 Rule 32 is unconstitutional for the fact that
22 it denies the Petitioner's right for access
23 to the courts by rejecting claims of illegal
24 sentences imposed, allowing the Public
25 Defenders Office to client shop; diluting the
effectiveness of counsel, the probability
exists rather than not for the Attorney
General's office to prosecute selectively &
vindictively....

26 Id. at 10.

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1 at 1815 (concluding that the petitioner was not entitled to
2 equitable tolling because he was not misled or confused about
3 the exhaustion of his state remedies and filing his federal
4 habeas petition). Petitioner has not met his burden of
5 establishing that there were extraordinary circumstances beyond
6 his control which made it impossible for him to file a timely
7 federal habeas petition, or that any state action was the cause
8 for his failure to timely file his federal habeas action. See
9 Shannon v. Newland, 410 F.3d 1083, 1090 (9th Cir. 2005) ("Each
10 of the cases in which equitable tolling has been applied have
11 involved wrongful conduct, either by state officials or,
12 occasionally, by the petitioner's counsel."). Compare Sanchez
13 v. Cambra, 137 Fed. App. 989, 990 (9th Cir. 2005), cert. denied,
14 126 S. Ct. 1333 (2006); Corjasso v. Ayers, 278 F.3d 874, 877-78
15 (9th Cir. 2002).

16 Petitioner does not claim he was misled about the
17 statute of limitations or that Respondents acted to inhibit the
18 filing of his federal habeas petition. A petitioner's *pro se*
19 status, ignorance of the law, lack of representation during the
20 applicable filing period, and temporary incapacity do not
21 constitute extraordinary circumstances justifying equitable
22 tolling. See, e.g., Fisher v. Johnson, 174 F.3d 710, 714-716
23 (5th Cir. 1999); Shoemate v. Norris, 390 F.3d 595, 598 (8th Cir.
24 2004) (holding that petitioner's misunderstanding of state's
25 "rules, statutes, and the time period set forth therein do not
26 justify equitable tolling").

1 In 2006 the United States Supreme Court denied
2 certiorari from a decision of the Seventh Circuit Court of
3 Appeals concluding federal habeas petitioners were not entitled
4 to equitable tolling of the AEDPA's statute of limitations based
5 on a claim of actual innocence, thereby resolving a split among
6 the Circuit Courts of Appeal on this issue. See Araujo v.
7 Chandler, 435 F.3d 678, 680 (2005) (noting the contention that
8 actual innocence is a freestanding exception to the AEDPA's
9 limitations period is "an argument which has caused the courts
10 a good deal of consternation."), cert. denied, 127 S. Ct. 39
11 (2006).¹ See also Lisker v. Knowles, 463 F. Supp. 2d 1008,
12 1032-33 (C.D. Cal. 2006) (delineating the positions adopted by
13 the various Circuit Courts of Appeal).

14 However, the Court has previously determined that a
15 petitioner's claim of actual innocence should be examined to
16 determine if the petitioner has stated a colorable claim which
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18 ¹ Prior to 2006, the Sixth, Seventh, Eighth and Tenth
19 circuits had adopted either a full or restricted actual innocence
20 exception to the limitations period. "We have recently decided that
21 '[p]risoners claiming to be innocent, like those contending that other
22 events spoil the conviction, must meet the statutory requirement of
23 timely action.'" Araujo v. Chandler 435 F.3d 678, 680 (2005), cert.
24 denied, 127 S. Ct. 39 (2006), quoting Escamilla v. Jungwirth, 426 F.3d
25 868, 872 (7th Cir. 2005); Souter v. Jones, 395 F.3d 577 (6th Cir.
26 2005) (holding that "equitable tolling of the one-year limitations
27 period based on a credible showing of actual innocence is
28 appropriate."). The First and Fifth Circuits had rejected or found
irrelevant any claim of actual innocence in consideration of whether
a habeas petition is time-barred, an approach modified by the Second
Circuit. See Whitley v. Senkowski, 317 F.3d 223 (2nd Cir. 2003)
(requiring that the district court determine whether there is, in
fact, a showing of actual innocence); David v. Hall, 318 F.3d 343,
347-48 (1st Cir. 2003) (finding no miscarriage of justice exception
to the AEDPA statute of limitations in case where the petitioner did
not make even a predicate showing of innocence).

1 This recommendation is not an order that is immediately
2 appealable to the Ninth Circuit Court of Appeals. Any notice of
3 appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate
4 Procedure, should not be filed until entry of the district
5 court's judgment.

6 Pursuant to Rule 72(b), Federal Rules of Civil
7 Procedure, the parties shall have ten (10) days from the date of
8 service of a copy of this recommendation within which to file
9 specific written objections with the Court. Thereafter, the
10 parties have ten (10) days within which to file a response to
11 the objections. Failure to timely file objections to any
12 factual or legal determinations of the Magistrate Judge will be
13 considered a waiver of a party's right to de novo appellate
14 consideration of the issues. See United States v. Reyna-Tapia,
15 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). Failure to
16 timely file objections to any factual or legal determinations of
17 the Magistrate Judge will constitute a waiver of a party's right
18 to appellate review of the findings of fact and conclusions of
19 law in an order or judgment entered pursuant to the
20 recommendation of the Magistrate Judge.

21 DATED this 16th day of September, 2008.

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Mark E. Asper
United States Magistrate Judge