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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

THOMAS JOHN BURNS, JR.,)	
)	
Petitioner,)	
)	
v.)	CIV 08-00641 PHX PGR (MEA)
)	
DORA SCHRIRO and)	REPORT AND RECOMMENDATION
ARIZONA ATTORNEY GENERAL,)	
)	
Respondents.)	
_____)	

TO THE HONORABLE PAUL G. ROSENBLATT:

On April 2, 2008, Petitioner filed a *pro se* petition seeking a writ of habeas corpus pursuant to 42 U.S.C. § 2254. Respondents filed a Limited Answer to Petition for Writ of Habeas Corpus ("Answer") (Docket No. 12) on August 6, 2008. Respondents argue the action for habeas relief was not timely filed and, therefore, that the petition must be denied and dismissed with prejudice.

I Procedural History

On July 15, 2003, Petitioner was charged by a complaint in state docket number CR2003-012254 with one count of burglary in the second degree and one count of theft. Answer, Exh. A. The complaint alleged the crimes were both committed on or about June 30, 1996. Id., Exh. A. An information charging the same

1 offenses was filed on July 24, 2003. Id., Exh. B.

2 Petitioner was appointed counsel to represent him in
3 his criminal proceedings. Id., Exh. C. On July 24, 2003,
4 Petitioner signed a written plea agreement in state docket
5 number CR2003-012254. Id., Exh. C. The plea agreement provided
6 Petitioner would plead guilty to one count of burglary and that
7 Petitioner would be sentenced to a term of supervised probation.
8 Id., Exh. C. On July 24, 2003, the state Superior Court
9 accepted Petitioner's guilty plea. Id., Exh. D. On September
10 18, 2003, judgment was entered, the state trial court suspended
11 imposition of Petitioner's sentence, and Petitioner was placed
12 on probation for three years Id., Exh. E.

13 In November of 2003 Petitioner initiated a state action
14 for post-conviction relief. The Notice of Post-Conviction
15 Relief cited Petitioner's conviction in CR2003-012254. See id.,
16 Exh. F. Petitioner was appointed counsel to represent him in
17 this matter. Id., Exh. G. However, the brief filed by counsel
18 on March 23, 2004, did not discuss Petitioner's burglary
19 conviction or reference the docket number of that case. Id.,
20 Exh. G. The brief asserted Petitioner was entitled to post-
21 conviction relief in state docket number CR2003-016472-001DT, a
22 case charging Petitioner had failed to register as a sex
23 offender. Id., Exh. G. The brief filed by counsel dealt only
24 with issues arising from Petitioner's guilty plea to one count
25 of failure to register as a sex offender. Id., Exh. G. On May
26 4, 2004, relief in that matter was granted and Petitioner was
27 awarded an addition 23 days of pre-sentence incarceration in

1 that matter. Id., Exh. H.

2 On November 10, 2005, the state petitioned the Superior
3 Court to revoke Petitioner's probation in his 2003 burglary
4 case. Id., Exh. L. The state alleged Petitioner failed to
5 report to his probation officer and that his probation officer
6 had not known where Petitioner was residing since October 4,
7 2005. Id., Exh. L. Petitioner moved to dismiss arguing, *inter*
8 *alia*, that he was being denied his right to due process. Id.,
9 Exh. M. The motion to dismiss was denied and, on March 8, 2006,
10 Petitioner admitted to the state court that he had violated a
11 term of probation. Id., Exh. BB.

12 Prior to accepting Petitioner's admission, the trial
13 court warned Petitioner that if he admitted a violation of the
14 terms of his probation, his probation could be revoked and that
15 he faced a presumptive term of 3.5 years imprisonment if his
16 probation was revoked. Id., Exh. BB. Nonetheless, Petitioner
17 made the admission. Id., Exh. BB. On April 6, 2006, the state
18 trial court ordered Petitioner's probation be revoked and the
19 state trial court sentenced Petitioner to a term of 3.5 years
20 incarceration, the presumptive term for burglary. Id., Exh. T.

21 Petitioner filed an action for post-conviction relief
22 in the state Superior Court on May 31, 2006. See Docket No. O.
23 Petitioner sought post-conviction relief from the finding that
24 he had violated probation in CR2003-012254 and the resulting
25 prison sentence. Id., Exh. O. Petitioner was appointed counsel
26 to represent him in these proceedings. Id., Exh. P. In his
27 Rule 32 action Petitioner argued the state's delay in

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1 prosecuting the 1996 burglary violated Petitioner's right to due
2 process of law and his Sixth Amendment right to a speedy trial.
3 Id., Exh. Q & Exh. S. Petitioner argued he was entitled to the
4 dismissal of his 2003 conviction. In the alternative,
5 Petitioner asserted he was entitled to additional credit for
6 pre-sentence incarceration with regard to his 3.5 year sentence,
7 based on his confinement for other offenses committed between
8 1996 and 2003. Id., Exh. Q. Petitioner argued his Rule 32
9 action with regard to his 2003 conviction was timely because his
10 Rule 32 counsel in his 2004 sex-offender-registration action was
11 incompetent for failing to raise the "obvious" error with
12 regard to his 2003 conviction. Id., Exh. Q.

13 The state trial court denied relief in Petitioner's
14 Rule 32 action on July 3, 2007, citing Rule 32.6(c), Arizona
15 Rules of Criminal Procedure. Id., Exh. U. The state court
16 reasoned that Petitioner's claims were procedurally barred
17 because the petition was not timely. Id., Exh. U. The state
18 court also concluded Petitioner's speedy trial claim and his due
19 process claim were waived by Petitioner's guilty plea. Id.,
20 Exh. U. Petitioner sought review of this decision by the
21 Arizona Court of Appeals, which denied review on May 9, 2008.
22 Id., Exh. X.

23 Petitioner contends he is entitled to federal habeas
24 relief because his original conviction for burglary, entered
25 seven years after the crime was committed, violated his Sixth
26 Amendment right to a speedy trial. Petitioner also asserts he
27 was denied his right to due process of law during his criminal
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1 proceedings. Petitioner also asserts the sentence of
2 imprisonment imposed as a result of his probation violation
3 should be reduced by 356 days, arguing he is entitled to credit
4 for his pre-sentence incarcerations in other criminal matters.
5 Petitioner further contends he filed a timely state petition for
6 post-conviction relief with regard to the "original judgment of
7 sentence."

8 **II Analysis**

9 **Relevant statute of limitations**

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

13 The AEDPA imposed a one-year statute of limitations on
14 prisoners seeking federal habeas relief from their state
15 convictions. See Lott v. Mueller, 304 F.3d 918, 920 (9th Cir.
16 2002). However, the AEDPA provides that a petitioner is
17 entitled to tolling of the statute of limitations during the
18 pendency of a "properly filed application for state
19 post-conviction or other collateral review with respect to the
20 pertinent judgment or claim." 28 U.S.C. § 2244(d)(2)(2006 &
21 Supp. 2008). See also Artuz v. Bennet, 531 U.S. 4, 8, 121 S.
22 Ct. 361, 363-64 (2000); Harris v. Carter, 515 F.3d 1051, 1053
23 (9th Cir. 2008).

24 Because Petitioner pled guilty and thereby waived his
25 right to a direct appeal, Petitioner's burglary conviction and
26 sentence became final on or about December 18, 2003, ninety days
27 after his sentencing, when the time expired for timely seeking

1 Payton v. Brigano, 256 F.3d 405, 408 (6th Cir. 2001).

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

22 A federal habeas petitioner seeking equitable tolling
23 must also act with "reasonable" diligence throughout the period
24 he seeks to toll. See e.g., Bryant v. Arizona Att'y Gen., 499
25 F.3d 1056, 1061 (9th Cir. 2007); Warren v. Garvin, 219 F.3d 111,
26 113 (2d Cir. 2000); Jones v. Morton, 195 F.3d 153, 159 (3d Cir.
27 1999). It is Petitioner's burden to establish that equitable
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1 tolling is warranted in his case. See Bryant v. Arizona Atty
2 Gen., 499 F.3d 1056, 1059-60 (9th Cir. 2007) (holding the
3 petitioner must establish a causal connection between the cause
4 of his delay and the delay itself).

5 Petitioner has not responded to the answer to his
6 petition within the thirty days specified by the Local Rule for
7 filing such a response. Petitioner has not met his burden of
8 establishing that there were extraordinary circumstances beyond
9 his control which made it impossible for him to file a timely
10 federal habeas petition, or that any state action was the cause
11 for his failure to timely file his federal habeas action. See
12 Pace, 544 U.S. at 419; 125 S. Ct. at 1815 (concluding that the
13 petitioner was not entitled to equitable tolling because he was
14 misled or confused about timing of exhausting his state remedies
15 and filing his federal habeas petition); Shannon v. Newland, 410
16 F.3d 1083, 1090 (9th Cir. 2005) ("Each of the cases in which
17 equitable tolling has been applied have involved wrongful
18 conduct, either by state officials or, occasionally, by the
19 petitioner's counsel."). Compare Sanchez v. Cambra, 137 Fed.
20 App. 989, 990 (9th Cir. 2005), cert. denied, 126 S. Ct. 1333
21 (2006); Corjasso v. Ayers, 278 F.3d 874, 877-78 (9th Cir. 2002).

22 Petitioner does not claim he was misled about the
23 statute of limitations or that Respondents acted to inhibit the
24 filing of his federal habeas petition. A petitioner's *pro se*
25 status, ignorance of the law, lack of representation during the
26 applicable filing period, and temporary incapacity do not
27 constitute extraordinary circumstances justifying equitable
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1 tolling. See, e.g., Fisher v. Johnson, 174 F.3d 710, 714-716
2 (5th Cir. 1999); Shoemate v. Norris, 390 F.3d 595, 598 (8th Cir.
3 2004) (holding that petitioner's misunderstanding of state's
4 "rules, statutes, and the time period set forth therein do not
5 justify equitable tolling").

6 **III Conclusion**

7 Petitioner's petition for a writ of habeas corpus is
8 barred by the statute of limitations applicable to it pursuant
9 to the AEDPA. Petitioner has not shown that the circumstances
10 of his case warrant application of equitable tolling so that
11 this Court may address the merits of his petition for a writ of
12 habeas corpus.

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14 **IT IS THEREFORE RECOMMENDED** that Mr. Burns' Petition
15 for Writ of Habeas Corpus be **denied and dismissed with**
16 **prejudice.**

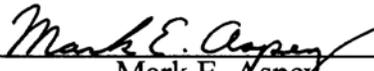
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18 This recommendation is not an order that is immediately
19 appealable to the Ninth Circuit Court of Appeals. Any notice of
20 appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate
21 Procedure, should not be filed until entry of the district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

23 Pursuant to Rule 72(b), Federal Rules of Civil
24 Procedure, the parties shall have ten (10) days from the date of
25 service of a copy of this recommendation within which to file
26 specific written objections with the Court. Thereafter, the
27 parties have ten (10) days within which to file a response to

1 the objections. Pursuant to Rule 7.2, Local Rules of Civil
2 Procedure for the United States District Court for the District
3 of Arizona, objections to the Report and Recommendation may not
4 exceed seventeen (17) pages in length.

5 Failure to timely file objections to any factual or
6 legal determinations of the Magistrate Judge will be considered
7 a waiver of a party's right to de novo appellate consideration
8 of the issues. See United States v. Reyna-Tapia, 328 F.3d 1114,
9 1121 (9th Cir. 2003) (en banc). Failure to timely file
10 objections to any factual or legal determinations of the
11 Magistrate Judge will constitute a waiver of a party's right to
12 appellate review of the findings of fact and conclusions of law
13 in an order or judgment entered pursuant to the recommendation
14 of the Magistrate Judge.

15 DATED this 11th day of September, 2008.

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20 Mark E. Aspey
21 United States Magistrate Judge
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