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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ROSENDO RODRIGUEZ JR.,)	No. CV 08-686-PHX-ROS (BPV)
Petitioner,)	
vs.)	REPORT AND
CHARLES L. RYAN, et al.,)	RECOMMENDATION
Respondents.)	

On April 8, 2008, Petitioner, Rosendo Rodriguez, Jr., an inmate confined in the Arizona State Prison, Lewis Unit, in Buckeye, Arizona, Florence, filed a *pro se* Petition for Writ of Habeas Corpus by a Person in State Custody (“Petition”), pursuant to Title 28, U.S.C. § 2254. (Doc. No. 1.)¹ The District Court dismissed Grounds 3, 7 (in part), and 8, for failure to state a cognizable claim, and called for an answer to the remaining grounds in the Petition. (Doc. No. 3.) On August 1, 2008, Respondents filed an Answer with Exhibits A through TT attached. (Doc. No. 9.) A Reply was filed by Petitioner on September 30, 2008. (Doc. No. 13.)

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

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

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

1 **I. FACTUAL AND PROCEDURAL BACKGROUND**

2 A. Indictment, Trial and Sentencing

3 On July 2, 1996, Rosendo Rodriguez Jr. was indicted by the Grand Jurors of
4 Maricopa County for first degree murder (counts 1 through 3), aggravated assault
5 (counts 4 through 8), and reckless endangerment (counts 9 and 10). (Answer, Ex. A.)

6 The State filed a notice of intention to seek the death penalty, an allegation of three
7 historical priors, and an allegation of dangerous nature of the offense for counts 1
8 through 3. (Answer, Ex. C.) The trial court directed verdicts on the first degree
9 murder charges for lack of premeditation, reducing the charges to second-degree
10 murder,² and dismissed count 8. (Answer, Ex. F at 6.) A jury found Petitioner guilty
11 of all 9 remaining counts, and, on April 28, 2000, the trial court sentenced Petitioner
12 to a combination of consecutive and concurrent aggravated sentences that totaled 78
13 years' imprisonment. (Answer, Ex. D, F.) A motion for a new trial was denied by the
14 trial court. (Answer, Ex. Q, Reporters Transcript ("R.T.") 10/15/99 at 19.)

15 B. Appeal

16 Rodriguez, through counsel, filed an appeal raising two arguments: 1) a new
17 trial was required because Petitioner was forced to use a peremptory strike on a biased
18 juror who the court refused to strike for cause; and 2) there was insufficient evidence
19 to support counts 9 and 10 of the indictment. (Answer, Ex. G.) On May 10, 2001, the
20 Arizona Court of Appeals affirmed Rodriguez's conviction and sentence in an
21 unpublished memorandum decision. (Answer, Ex. H.)

26 ² This uncontested factual assertion is alleged in the Answer, but not
27 found in the supporting exhibits.

1 Rodriguez filed a petition for review. (Answer, Ex. I.) On November 21,
2 2001³, the Arizona Supreme Court denied review. (Answer, Ex. J.) The mandate
3 issued on December 12, 2001. (Answer, Ex. K.)

4 C. First Petition for Post-Conviction Relief

5 On January 18, 2002⁴, Rodriguez filed a notice of post-conviction relief.
6 (Answer, Ex. K.) On February 27, 2002, the trial court appointed counsel to represent
7 Petitioner, and set a briefing schedule for the Rule 32 petition. (Answer, Ex. L.)
8 After Petitioner's first two appointed counsel were withdrawn due to conflicts, the
9 trial court appointed attorney Stephen Johnson to represent Petitioner, and set a July
10 12, 2002 deadline for filing the Rule 32 petition. (Answer, Ex. L.) On June 3, 2002,
11 Petitioner sent a letter to the Clerk of Court requesting contact information for
12 Johnson. (Answer, Ex. M.) On June 17, 2002, Petitioner sent a letter to the trial
13 court, requesting Johnson's contact information. (*Id.*) The trial court responded on
14 June 26, 2002, by providing Petitioner with Johnson's contact information. (*Id.*) The
15 trial ordered counsel to file a petition by August 20, 2002, or appear before the court
16 to show cause why he should not be held in contempt for failure to file a petition on
17 behalf of the Petitioner. (Answer, Ex. O.)

18 Counsel filed a petition on August 29, 2002, arguing that Petitioner was
19 eligible for relief because of abuse of discretion by the trial judge in not awarding
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21 ³Respondents employ the date on which the Arizona Supreme Court dated the
22 document announcing its decision and hence making it a public record, not the earlier
23 date on which the court made its decision. (Answer, n.1) This Court will rely on the
24 same date.

25 ⁴Respondents correctly employ the prison-mailbox rule to calculate the filing
26 date of Petitioner's *pro se* pleadings based on the date that Petitioner signed and
27 delivered the documents to prison authorities for mailing, not the subsequent date that
28 a court accepted the pleadings as filed. *See State v. Rosario*, 195 Ariz. 264, 266 (App.
1999).

1 Petitioner’s motion for new trial or evidentiary hearing on motion for new trial in light
2 of substantial evidence previously presented to the trial court. (Answer, Ex. P.) The
3 petition itself consisted of little argument and relied almost entirely on the
4 incorporation of the previously filed motions for new trial. (*Id.*) Petitioner continued
5 to file motions with the trial court indicating that he had not been in contact with
6 Johnson. (Answer, Ex. R, T, U.) It is apparent from these filings that Petitioner was
7 unaware that a petition for post-conviction relief had been filed by counsel. (*Id.*) On
8 January 31, 2003, the trial court dismissed the post-conviction petition on the ground
9 that “[t]he arguments and claims raised by the defendant through counsel concerning
10 post-verdict proceedings are precluded now as not raised in defendant’s direct
11 appeal.” (Answer, Ex. V.) On February 20, 2003, Rodriguez filed a complaint
12 against Johnson with the State Bar of Arizona. (Answer, Ex. QQ.) On May 27, 2004,
13 Johnson was suspended from the practice of law for a period of six months and one
14 day based on the knowing fabrication of a document for submission with his response
15 to the bar complaint. (*Id.*)

16 D. Second Petition for Post-Conviction Relief

17 On October 18, 2004, Petitioner, through counsel, filed a second petition for
18 post-conviction relief raising claims of ineffective assistance of trial counsel.
19 (Answer, Ex. W.) After the trial court accepted the successive petition, which the
20 trial court found set forth sufficient information concerning a claim of actual
21 innocence pursuant to Ariz.R.Crim.P. 32.1(h) to allow it to proceed (Answer, Ex. X),
22 Petitioner filed a supplement to the petition raising the additional claims of
23 prosecutorial misconduct, sentencing error under *Blakely v. Washington*, 542 U.S. 296
24 (2004), and ineffective assistance of counsel. (Answer, Ex. Y.) The trial court
25 accepted the filing. (*Id.*) On April 6, 2005, the trial court dismissed the second
26 petition, finding that 1) the claims of ineffective assistance of counsel precluded as
27 not raised in the first petition; 2) the *Blakely* claim not well taken as *Blakely* had no
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1 retroactive application to Petitioner's case; and 3) his argument regarding actual
2 innocence not related to the presence of new evidence not presented to and heard by
3 the jury other than some impeachment evidence, and thus failed under Rule 32.1(h),
4 which requires an affirmative, express claim of evidence that shows actual innocence
5 by clear and convincing evidence. (Answer, Ex. BB.) Rodriguez filed a petition for
6 review on May 6, 2005. (Answer, Ex. CC.) The petition for review was denied by
7 the appellate court on March 2, 2006. (Answer, Ex. EE.) Rodriguez petitioned the
8 Arizona Supreme Court for review, and, on July 20, 2006, the petition was denied.
9 (Ex. HH.)

10 E. Third Petition for Post-Conviction Relief

11 On October 12, 2006, Petitioner filed, *pro se*, a third notice of post-conviction
12 relief. (Answer, Ex. II.) The trial court noted that the notice was untimely, and while
13 Petitioner had checked the box claiming he is actually innocent, his claim was based
14 on alleged ineffectiveness of his first Rule 32 attorney. (Answer, Ex. JJ.) Moreover,
15 the trial court found that Petitioner had already been allowed to pursue his claim of
16 actual innocence in his second Rule 32 proceeding. (*Id.*) The trial court ordered the
17 petition dismissed. (*Id.*) Petitioner moved for reconsideration of the dismissal as
18 untimely. (Answer, Ex. KK.) Rodriguez filed a motion to exceed page count, a
19 motion for reconsideration, and a supplement to the motion for reconsideration on
20 March 12, 2007. (Answer, Ex. MM.) The trial court denied the motion for
21 reconsideration on April 4, 2007. (Answer, Ex. NN.)

22 Petitioner filed a petition for review on May 30, 2007. (Answer, Ex. OO.) .
23 (Answer, Ex. EE.) On June 6, 2007, the appellate court denied the petition as
24 untimely. (Answer, Ex. PP.)

25 F. Federal Habeas Petition

26 Rodriguez filed this petition for writ of habeas corpus in District Court on
27 April 8, 2008. (Doc. No. 1.) Petitioner raises 18 grounds for relief.

1 In Ground 1, he alleges that the trial court erred by failing to dismiss a juror for cause.
2 In Ground 2, he alleges that his endangerment convictions are supported by
3 insufficient evidence. In Grounds 3, 7 (in part) and 8, he alleges ineffective assistance
4 of post-conviction counsel. In Grounds 4, 7 (in part), and 9-16, he alleges that he
5 received ineffective assistance of trial and/or appellate counsel. In Grounds 5, 17 and
6 18, he alleges the prosecutor engaged in misconduct. In Ground 6, Petitioner alleges
7 the trial court violated his right to a jury trial by aggravating his sentence based upon
8 facts not found by the jury; made statements that conveyed the court's view that he
9 was guilty of second degree murder in violation of Petitioner's right to the
10 presumption of innocence; and imposed a sentence that exceeded the statutory
11 maximum. The Court previously dismissed Grounds 3, 7 (in part), and 8, for failure
12 to state a cognizable claim. (Doc. No. 3.)

13 **II. DISCUSSION**

14 A. Standard of Review

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

18 B. Timeliness

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

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

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

9 The Ninth Circuit recognizes that the AEDPA's limitations period may be
10 equitably tolled because it is a statute of limitations, not a jurisdictional bar.
11 *Calderon v. United States Dist. Ct. (Beeler)*, 128 F.3d 1283, 1288 (9th Cir. 1997),
12 *overruled, in part, on other grounds by, Calderon v. United States Dist. Ct. (Kelly)*
13 163 F.3d 530, 540 (9th Cir. 1998). Tolling is appropriate when "extraordinary
14 circumstances beyond a prisoner's control make it impossible to file a petition on
15 time." *Id.*; *see also, Miranda v. Castro*, 292 F.3d 1063, 1067 (9th Cir. 2002)(stating
16 that "the threshold necessary to trigger equitable tolling [under AEDPA] is very high,
17 lest the exceptions swallow the rule.") (citations omitted); *Spitsyn v. Moore*, 345 F.3d
18 796, 799 (9th Cir. 2003). "When external forces, rather than a petitioner's lack of
19 diligence, account for the failure to file a timely claim, equitable tolling of the statute
20 of limitations may be appropriate." *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th
21 Cir.1999). The extraordinary circumstances requirement is a "high hurdle," *see*
22 *Calderon (Beeler)*, 128 F.3d at 1289, and policy considerations counsel against
23 equitable tolling. *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980). A petitioner seeking
24 equitable tolling must establish two elements: "(1) that he has been pursuing his rights
25 diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v.*
26 *DiGuglielmo*, 544 U.S. 408, 418 (2005). Petitioner must also establish a "causal
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1 connection" between the extraordinary circumstance and his failure to file a timely
2 petition. *Bryant v. Arizona Attorney General*, 499 F.3d 1056, 1061 (9th Cir. 2007).

3 This Court rejects Respondents argument that equitable tolling of the
4 Congressionally mandated limitations period cannot survive in the face of *Bowles v.*
5 *Russell*, 551 U.S. 2360 (2007). Respondents argue that the United States Supreme
6 Court opinion in *Bowles*, established that the AEDPA limitations period is
7 jurisdictional, and therefore equitable tolling does not apply. This Court disagrees.
8 Prior to *Bowles*, the Supreme Court assumed, without deciding, that equitable tolling
9 is available under 28 U.S.C. § 2244(d). *See Lawrence v. Florida*, ___ U.S. ___, 127
10 S.Ct. 1079, 1085 (2007). The Ninth Circuit continues to apply equitable tolling to the
11 AEDPA's statute of limitations post-*Bowles*. *Harris v. Carter*, 515 F.3d 1051, 1054,
12 n.3 (9th Cir. 2008). Accordingly, this Court rejects Respondents arguments and finds
13 that Petitioner is entitled to equitable tolling.

14 C. Analysis

15 The Magistrate Judge finds that, pursuant to the AEDPA, the Petition filed in
16 this Court is untimely. Rodriguez 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 Petitioner's conviction and sentence became final on February 19, 2003, ninety
20 (90) days after his direct appeal was denied by the Arizona Supreme Court on
21 November 21, 2002, when the time for filing a petition for a writ of certiorari from
22 the United States Supreme Court expired. *See* 28 U.S.C. § 2244(d)(1)(A); *Wixom v.*
23 *Washington*, 264 F.3d 894, 897 (9th Cir. 2001)(Judgment becomes final either by the
24 conclusion of direct review by the highest court, including the United States Supreme
25 Court, or by the expiration of the time to seek such review.). Accordingly, Petitioner
26 was required to file his petition for writ of habeas corpus within 1 year of the date his
27 convictions became final, *i.e.*, one year from April 4, 2004, absent statutory tolling.

1 2. *Statutory Tolling*

2 a. First Petition For Post-Conviction Relief

3 The limitations period was tolled immediately, however, by the pendency of
4 Petitioner’s petition for post conviction relief. *See* 28 U.S.C. § 2244(d)(2). There
5 was no gap between the conclusion of direct review, and Rodriguez’s properly filed
6 notice of petition for post-conviction review. *See Isley v. Arizona Dept. of*
7 *Corrections*, 383 F.3d 1054 (9th Cir. 2004)(State petition is “pending” within the
8 meaning of 28 U.S.C. § 2244(d)(2) when properly filed notice of post-conviction
9 relief is filed.). Thus, the issue is not when direct review became final under §
10 2244(d)(1)(A), rather, this Court must determine how long Rodriguez’s petition for
11 post-conviction relief was “pending” for purposes of tolling the limitations period
12 pursuant to § 2244(d)(2).

13 Statutory tolling continued through the conclusion of the first post-conviction
14 proceeding that concluded on January 31, 2003, the date the trial court denied post-
15 conviction relief. Petitioner did not file his federal habeas until more than five years
16 later.

17 b. Second And Third Petitions for Post-Conviction Relief

18 Petitioner did not file his second petition for post-conviction relief until the
19 tolling period had expired. The second petition was filed 616 days after the trial court
20 denied post-conviction relief. The filing of the second petition or subsequent
21 pleadings could not revive the statute of limitations because it had already lapsed.
22 *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003).

23 Neither did the third petition restart the limitations period. *See id.*
24 Additionally, the third petition was untimely, rendering it not “properly filed” for
25 tolling purposes under § 2244(d)(2). Untimely pleadings summarily dismissed by the
26 state courts are not "properly filed" and do not result in statutory tolling of the 1-year
27 statute of limitations. *See Pace*, 544 U.S. at 417 (holding that "[b]ecause the state
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1 court rejected petitioner's PCR petition as untimely, it was not 'properly filed,' and he
2 was not entitled to statutory tolling under § 2244(d)(2)").

3 c. State-Bar Proceeding

4 Petitioner filed a bar complaint against his post-conviction counsel on February
5 20, 2003, alleging that counsel failed to adequately communicate with him during the
6 representation and that counsel was not diligent in the representation. (Answer, Ex.
7 QQ.) Counsel responded to the bar complaint by submitting a falsified letter that he
8 purportedly sent to Petitioner. (*Id.*) Following the recommendation of the
9 Disciplinary Commission, the bar proceeding concluded on May 27, 2004, when the
10 Arizona Supreme Court suspended counsel for 6 months and 1 day. (*Id.*; Ex. RR.)
11 Because review of a bar complaint is not a judiciary review of the pertinent judgment
12 or claim at issue in this case, it does not toll the limitations period. 28 U.S.C. §
13 2244(d)(1); *Cf. Malcom v. Payne*, 281 F.3d 951, 957-62 (9th Cir. 2002)(holding that
14 a petition for clemency under Washington state law is not an application for “state
15 post-conviction or other collateral review’); *Rodriguez v. Spencer*, 412 F.3d 29, 36 (1st
16 Cir. 2005)(explaining that a *pro se* motion to revive an appeal or appoint counsel for
17 state post-conviction relief does not toll the statute).

18 Petitioner was required to file his petition for writ of habeas corpus within the
19 1-year period of limitations, excluding time where the statute of limitations was
20 properly tolled. See 28 U.S.C. § 2244(d)(1)(A) & (d)(2). Petitioner did not file his
21 federal petition for writ of habeas corpus within the 1-year statute of limitations.
22 Unless there is a basis for equitably tolling the limitations period, Petitioner's habeas
23 petition, filed on April 7, 2008, is untimely. This Court must recommend denial of
24 Petitioner's petition for writ of habeas corpus as untimely filed.

25 3. *Equitable tolling*

26 “A *pro se* petitioner’s lack of legal sophistication is not, by itself, an
27 extraordinary circumstance warranting equitable tolling.” *Raspberry v. Garcia*, 448

1 F.3d 1150, 1154 (9th Cir. 2006). Petitioner asserts, in response to Respondents’
2 contention that his Petition is untimely, that his “failure to file his petition for writ of
3 habeas corpus within one year of the statutory tolling was due to first Rule 32
4 counsel’s performance in not submitting [Petitioner’s] ineffective assistance of
5 counsel and prosecutorial misconduct issues attacking the constitutionality of
6 detention.” (Doc. No. 13, Reply at 15, 20.) Petitioner also asserts that at the time he
7 filed his second petition for post-conviction relief, he was not aware of the status of
8 the first post-conviction proceeding. (*Id.* at 17.) Similarly, Petitioner claims that, as
9 to his third petition for post-conviction relief, he was pursuing his rights diligently,
10 and his lack of knowledge that the state courts had reached a final resolution of his
11 case can provide grounds for equitable tolling. (*Id.* at 18-19.) Petitioner asserts that
12 his first appointed Rule 32 counsel “effectively abandoned” Petitioner and prevented
13 him from filing his habeas petition on time by failing to inform him of ruling in his
14 case. (*Id.* at 19.)

15 Petitioner also raises an argument that constitutional considerations require an
16 actual innocence exception to the AEDPA’s statute of limitations. (*Id.* at 21-22.)
17 Neither the Supreme Court nor the Ninth Circuit, however, has held that a showing
18 of actual innocence may excuse an untimely section 2254 habeas petition. *See Majoy*
19 *v. Roe*, 296 F.3d 770, 776 (9th Cir. 2002) (“the question to be answered is whether
20 surviving the rigors of this gateway has the consequence of overriding AEDPA’s one-
21 year statute of limitation, a legal question not yet decided by this Circuit or the
22 Supreme Court.”); *Perez v. Evans*, 2009 WL 2104853 at *16 (C.D. Cal. 2009); *Jones*
23 *v. Marshall*, 2009 WL 2189892 (C.D. Cal. July 17, 2009). By analogy to the actual
24 innocence exception in the procedural context, to support a claim of actual innocence
25 a petitioner must “support his allegations of constitutional error with new reliable
26 evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness
27 accounts, or critical physical evidence – that was not presented at trial.” *Schlup v.*

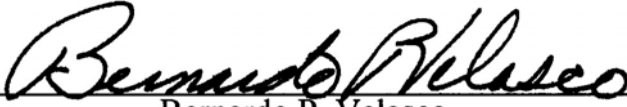
1 *Delo*, 513 U.S. 298, 324 (1995). Applying this same standard in the context of
2 timeliness, it is apparent from a review of the claims raised by Petitioner, including
3 the allegations asserted in Petitioner’s reply, that Petitioner has not offered any new
4 evidence of actual innocence to support his argument. Thus, assuming that
5 establishing “actual innocence” would warrant equitable tolling of the statute of
6 limitations, this Court finds that Petitioner has failed to assert a sufficient factual
7 predicate to demonstrate that he would be entitled to the benefit of this doctrine.

8 The Court does find Petitioner’s arguments that his complete lack of
9 communication with his first Rule 32 counsel impeded his efforts to timely file a
10 habeas petition persuasive. It is clear from the record that counsel did not
11 communicate with Petitioner prior to or after filing his first petition for post-
12 conviction relief. Petitioner’s claim that he was not notified of the disposition of his
13 first state petition by Johnson is credible. The record further indicates that Petitioner
14 acted diligently to pursue his post-conviction claims in state court by obtaining
15 counsel and filing a second petition. Although ordinary attorney negligence will not
16 justify equitable tolling, the Ninth Circuit recognizes sufficiently egregious attorney
17 misconduct may constitute an ‘extraordinary circumstance’ warranting equitable
18 tolling of AEDPA’s statute of limitations. *Spitsyn v. Moore*, 345 F.3d 796, 800 (9th
19 Cir. 2003)(citing *Ford v. Hubbard*, 330 F.1086, 1106 (9th Cir. 2003)); see *Fonseca v.*
20 *Hall*, 486 F.Supp.2d 1119 (C.D. Cal. 2007)(egregious conduct demonstrated by
21 retained counsel’s failure to file habeas corpus petition on petitioner’s behalf and
22 diligence demonstrated by petitioner and families conduct in attempting to ascertain
23 attorney’s progress sufficient to equitably toll the AEDPA’s limitations period.).
24 Furthermore, “a prisoner’s lack of knowledge that the state courts have reached a final
25 resolution of his case can provide grounds for equitable tolling if the prisoner has
26 acted diligently in the matter.” *Ramirez v. Yates*, 571 F.3d 993, 997 (9th Cir.
27 2009)(quoting *Woodward v. Williams*, 263 F.3d 1135, 1143 (10th Cir. 2001).

1 with a copy thereof. Fed.R.Civ.P. 72(b). If objections are filed the parties should use
2 the following case number: **CIV 08-686-PHX-ROS**.

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

6 DATED this 7th day of October, 2009.

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10 _____
11 Bernardo P. Velasco
12 United States Magistrate Judge
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