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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Robert Lloyd Allen,  
Petitioner,  
vs.  
Charles L. Ryan,\* et al.,  
Respondents.

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No. CIV 08-0932-PHX-PGR (DKD)  
**REPORT AND RECOMMENDATION**

TO THE HONORABLE PAUL G. ROSENBLATT, U.S. DISTRICT JUDGE:

Robert Lloyd Allen filed a petition for writ of habeas corpus on May 15, 2008, challenging his convictions in Maricopa County Superior Court for sexual conduct with a minor, attempted child molestation, and attempted sexual conduct with a minor, and a 20-year term of imprisonment, followed by lifetime probation (Doc. #1). He raises four grounds for habeas relief: (1) ineffective assistance of counsel; (2) involuntary guilty plea; (3) double jeopardy violation and prosecutorial misconduct; and (4) excessive bail and cruel and unusual punishment. Respondents contend that the petition is untimely. The Court agrees and recommends that the petition be denied and dismissed with prejudice.

On May 19, 2003, following the entry of a guilty plea on May 13, 2003, Allen moved to withdraw from the plea; the trial court conducted an evidentiary hearing and found no

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\*Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Charles L. Ryan, the Interim Director of the Arizona Department of Corrections, replaces Dora Schriro.

1 manifest injustice which would allow Allen to withdraw from the plea (Doc. #13, Exh B-E).  
2 On September 5, 2003, Allen was sentenced (*Id.*, Exh F). As part of the proceeding, he  
3 signed a Notice of Rights of Review After Conviction and Procedure, indicating receipt of  
4 a copy of the notice explaining his right to seek post-conviction relief and the procedures to  
5 follow in exercising this right, including all applicable deadlines (*Id.*, Exh CC). On October  
6 16, 2003, Allen filed a notice of post-conviction relief (*Id.*, Exh G). On April 14, 2004,  
7 counsel filed a notice indicating that he found no colorable claims, and requested that Allen  
8 be given additional time to file a *pro per* petition. Allen was given until June 3, 2004, to file  
9 a petition (*Id.*, Exh H- J). On June 16, 2004, the trial court dismissed the Rule 32 proceeding  
10 because Allen failed to file a petition (*Id.*, Exh K).

11 On May 24, 2005, Allen filed a notice of post-conviction relief, contending that this  
12 petition was not filed in a timely manner because he “was not aware of the time frame.” He  
13 also alleged that the public defender could not ethically represent him in post-conviction  
14 review because the office had represented him at trial (*Id.*, Exh L). On June 27, 2005, the  
15 trial court dismissed the notice, finding the notice untimely, and that the claims were  
16 precluded because they should have been raised in the first post-conviction proceeding (*Id.*,  
17 Exh M). Allen’s petition for review filed in the Court of Appeals on November 18, 2005 was  
18 dismissed as untimely filed (*Id.*, Exh N, O). Allen filed a third notice of post-conviction  
19 proceedings on January 20, 2006, maintaining that he had been effectively abandoned by  
20 appointed counsel as a result of counsel’s finding no colorable claim (*Id.*, Exh P). Allen also  
21 raised issues of double jeopardy and sentencing errors (*Id.*). On January 30, 2006, the trial  
22 court dismissed the notice, finding it untimely, and that the claims were precluded because  
23 Allen should have raised them in his first post-conviction proceedings (*Id.*, Exh Q).

24 On June 30, 2006, Allen filed a fourth notice of post-conviction relief, and a petition,  
25 alleging ineffective assistance of counsel (*Id.*, Exh R, S). On July 24, 2006, the trial court  
26 dismissed the notice and petition, finding the claims precluded because Allen had failed to  
27 raise them in his first post-conviction proceeding (*Id.*, Exh T). On September 20, 2006,  
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1 Allen filed a petition for review in the court of appeals; on August 8, 2007, the court of  
2 appeal denied review (*Id.*, Exh W, X). On August 21, 2007, he filed a motion in the court  
3 of appeals seeking a stay of the petition for review to further research the issue of whether  
4 Arizona had jurisdiction to file criminal charges against him. On August 28, 2007, the court  
5 of appeals denied the motion (*Id.*, Exh Y, Z). On September 10, 2007, Allen filed a petition  
6 for review in the supreme court; on December 7, 2007, the supreme court denied review (*Id.*,  
7 Exh AA, BB).

8 In order to be timely filed, Allen was required to file his federal petition within one  
9 year of the time his conviction became final “by the conclusion of direct review or the  
10 expiration of the time for seeking such review.” *See* 28 U.S.C. § 2244(d)(1)(A). However,  
11 because Allen pleaded guilty, he waived the right to seek direct review. He was entitled to  
12 bring an “of-right” post-conviction relief proceeding under Rule 32.1 of the Arizona Rules  
13 of Criminal Procedure. “The time during which a properly filed application for post-  
14 conviction or other collateral review with respect to the pertinent judgment or claim is  
15 pending shall not be counted toward any period of limitation.” *See* § 2244(d)(2). In addition,  
16 the one-year limitations period did not begin to run until the conclusion of that proceeding,  
17 the review of that proceeding, “or the expiration of time for seeking such proceeding or  
18 review.” *Summers v. Schriro*, 481 F.3d 710, 711 (9<sup>th</sup> Cir. 2007).

19 Allen’s one-year limitations period began running on July 17, 2004, upon the  
20 expiration of the time allowed under the rules for seeking review of the trial court’s dismissal  
21 of his Rule 32 proceeding. A review of the Maricopa County Superior Court docket  
22 indicates that Allen had no “properly filed application[s] for state post-conviction” relief in  
23 state court during the one-year period between July 17, 2004 and July 17, 2005, when that  
24 period of limitations expired. His notice of post-conviction relief filed May 24, 2005, 314  
25 days after the period of limitations began to run, did not toll the limitations period because  
26 the trial court found the notice untimely. *See Pace v. DiGuglielmo*, 544 U.S. 408, 414, 417  
27 (2005). In addition, the two notices of post-conviction relief filed in 2006 did not have any  
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1 effect on the limitations period that had already lapsed. These later notices were untimely  
2 and therefore not “properly filed.” *See Pace*. In any event they could not “restart” the period  
3 once it had lapsed. *See Ferguson v. Palmateer*, 321 F.3d 820, 823 (9<sup>th</sup> Cir. 2003). Therefore,  
4 his federal petition, filed long after the expiration of the limitations period, is untimely. *See*  
5 § 2244(d)(1)(A).<sup>1</sup>

6 Finally, assuming that federal courts have the authority to create equitable exceptions  
7 to jurisdictional time limitations set by Congress, *see Bowles v. Russell*, 551 U.S. 205 (2007),  
8 Allen is not entitled to equitable tolling. He has not shown extraordinary circumstances  
9 beyond his control which made it impossible or him to timely file: that he diligently pursued  
10 his rights and that some “extraordinary circumstance stood in his way.” *Pace v.*  
11 *DiGuglielmo*, 544 U.S. at 418.

12 **IT IS THEREFORE RECOMMENDED** that Robert Lloyd Allen’s petition for writ  
13 of habeas corpus be **denied** and **dismissed with prejudice** (Doc. #1).

14 This recommendation is not an order that is immediately appealable to the Ninth  
15 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of  
16 Appellate Procedure, should not be filed until entry of the district court’s judgment. The  
17 parties shall have ten days from the date of service of a copy of this recommendation within  
18 which to file specific written objections with the Court. *See*, 28 U.S.C. § 636(b)(1); Rules  
19 72, 6(a), 6(e), Federal Rules of Civil Procedure. Thereafter, the parties have ten days within  
20 which to file a response to the objections. Failure timely to file objections to the Magistrate  
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22 <sup>1</sup>Allen argues in his Reply that sections 2244(d)(1)(B) and (D) control the running of  
23 the limitations period in his case. The Court disagrees. The failure of the State to provide  
24 reference materials on the Anti-Terrorism and Effective Death Penalty Act is not an  
25 “impediment” which prevented Allen from timely filing. In addition, the “inability of  
26 Petitioner to obtain his complete file and information of school records showing [the] victim  
27 was enrolled in school in California on the alleged date of the crime” does not entitle him to  
28 use the date upon which he received the materials as “the date on which the factual predicate  
of the claim or claims presented could have been discovered through the exercise of due  
diligence.”

1 Judge's Report and Recommendation may result in the acceptance of the Report and  
2 Recommendation by the district court without further review. *See United States v. Reyna-*  
3 *Tapia*, 328 F.3d 1114, 1121 (9<sup>th</sup> Cir. 2003). Failure timely to file objections to any factual  
4 determinations of the Magistrate Judge will be considered a waiver of a party's right to  
5 appellate review of the findings of fact in an order or judgment entered pursuant to the  
6 Magistrate Judge's recommendation. *See* Rule 72, Federal Rules of Civil Procedure.

7 DATED this 7<sup>th</sup> day of July, 2009.

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11 David K. Duncan  
12 United States Magistrate Judge  
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