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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BERNARDO MURILLO ARENAS,)	
)	
Petitioner,)	
)	
v.)	CIV 08-02311 PHX PGR (MEA)
)	
CHARLES L. RYAN and)	REPORT AND RECOMMENDATION
ARIZONA ATTORNEY GENERAL,)	
)	
Respondents.)	
_____)	

TO THE HONORABLE PAUL G. ROSENBLATT:

On or about December 18, 2008, 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. 10) on May 8, 2009. Respondents contend the petition must be dismissed because it was not filed within the statute of limitations specified by the Antiterrorism and Effective Death Penalty Act. Petitioner filed a reply ("Reply") in response to the answer to his petition on May 22, 2009. See Docket No. 11.

I Procedural History

A Maricopa County grand jury indictment issued June 30, 1999, charged Petitioner with seven felony counts of sexual conduct with a minor, attempted sexual conduct with a minor, and

1 sexual abuse. See Answer, Exh. A & Exh. D at 1. The charges
2 involved incidents, including anal sex, taking place over
3 several months in 1997 and involved Petitioner's biological
4 daughter, who was approximately eleven years old in 1997. Id.,
5 Exh. A; Reply, Exh. 4.

6 On October 8, 1999, Petitioner entered into a written
7 plea agreement with the state regarding the disposition of these
8 charges. Answer, Exhs. B & Exh. C; Reply, Exh. 3. A plea
9 hearing was conducted on October 8, 1999, at which hearing a
10 translator was present. Answer, Exh. B & Exh. C; Reply, Exh. 3.
11 The trial court informed Petitioner, through the interpreter, of
12 his right to a jury trial on the charges against him and his
13 right to an appeal, and also explained Petitioner was waiving
14 these rights by pleading guilty. Answer, Exh. C & Reply, Exh.
15 3.

16 Through the translator, Petitioner agreed to plead
17 guilty to three of the seven counts of the indictment, i.e.,
18 one count of sexual conduct with a minor under the age of 15 and
19 two counts attempted sexual conduct with a minor under the age
20 of 15. Answer, Exh. B at 1; Exh. C at 2. In return for
21 Petitioner's guilty plea to these charges the state agreed to
22 drop the remaining four charges of the indictment. Id., Exh. B
23 at 1; Exh. C at 3. With regard to sentencing, the written plea
24 agreement provided Petitioner would be sentenced to no less than
25 the 20-year presumptive term of imprisonment on the conviction
26 for sexual conduct with a minor. Id., Exh. B at 1. The plea
27 agreement also provided Petitioner would be sentenced to

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1 lifetime supervised probation pursuant to both of the other two
2 convictions. See id., Exh. B at 1.

3 A presentence report was prepared. Reply, Exh. 4. A
4 sentencing hearing was conducted on December 3, 1999, with the
5 assistance of a translator. After noting both the aggravating
6 circumstance of repeated offenses and the harm to the victim and
7 the mitigating factor that Petitioner had no previous criminal
8 record, the trial court sentenced Petitioner to the 20-year
9 presumptive term pursuant to his conviction for sexual conduct
10 with a minor and to terms of lifetime-probation on the other two
11 counts of conviction. Answer, Exh. E at 13-14; Exh. F at 3-4.
12 At that time, the trial court also notified Petitioner of his
13 right to seek post-conviction relief pursuant to Rule 32,
14 Arizona Rules of Criminal Procedure. Reply, Exh. 5 at 15.

15 Because Petitioner waived his right to a direct appeal
16 of his convictions and sentences in his plea agreement, a state
17 action for post-conviction relief pursuant to Rule 32, Arizona
18 Rules of Criminal Procedure, was Petitioner's first available
19 action "as of right" to challenge his convictions and sentences.
20 Petitioner did not timely file a state action for post-
21 conviction relief pursuant to Rule 32, Arizona Rules of Criminal
22 Procedure.

23 On October 30, 2007, approximately eight years after
24 his convictions and sentences were final, Petitioner filed an
25 action in the Maricopa County Superior Court seeking post-
26 conviction relief pursuant to Rule 32. Answer, Exh. G & Exh. L
27 at 1; Reply, Exh. 7. Petitioner acknowledged this action was

1 untimely, but asserted one of the exceptions to the timeliness
2 rule applied to his case, i.e., that there was newly discovered
3 evidence. Answer, Exh. G. Petitioner also alleged that the
4 failure to timely file the post-conviction action was not his
5 fault and that there had been a significant change in the law,
6 citing Blakely v. Washington. Id., Exh. G at 3. Petitioner
7 further asserted that his plea was not voluntary or
8 intelligently made because the proceeding occurred in English.
9 Additionally, Petitioner maintained he was not informed of his
10 right to a jury determination of the factors used to aggravate
11 his sentence and that he was in fact denied this right.
12 Petitioner also alleged in his Rule 32 action that he was denied
13 his right to the effective assistance of counsel. Id., Exh. G.

14 The state trial court dismissed Petitioner's Rule 32
15 action on December 6, 2007. See Petition, Exh. D. The state
16 trial court found the petition was not timely and that
17 Petitioner had not stated a valid exception to the timeliness
18 rule. Id., Exh. D. The state court also noted that
19 Petitioner's claim pursuant to Blakely did not render the
20 petition timely because Blakely was not to be applied
21 retroactively. Id., Exh. D. Petitioner sought review of this
22 decision by the Arizona Court of Appeals, asserting in his
23 appellate brief that he had been denied his Sixth Amendment
24 right to a jury trial. Answer, Exh. H. The Arizona Court of
25 Appeals summarily denied review in Petitioner's state Rule 32
26 action on October 28, 2008. Petition, Exh. E.

1 129 S. Ct. 397 (2008).

2 Because Petitioner pled guilty and thereby waived his
3 right to a direct appeal, Petitioner's convictions and sentences
4 became final when the time expired for filing his first action
5 for state post-conviction relief pursuant to Rule 32, Arizona
6 Rules of Criminal Procedure. See Summers v. Schriro, 481 F.3d
7 710, 711 (9th Cir. 2007) (holding that, in Arizona, the statute
8 of limitations began to run upon "the conclusion of the Rule 32
9 of-right proceeding and review of that proceeding, or [upon] the
10 expiration of the time for seeking such proceeding or review.").
11 Petitioner was sentenced on December 3, 1999, and he had until
12 March 2, 2000, to file a state Rule 32 action. See Ariz. R.
13 Crim. P. 32.4 (2000). Accordingly, Petitioner had one year from
14 that date, i.e., until March 2, 2001, to file his section 2254
15 petition seeking federal habeas relief. See Bunney v. Mitchell,
16 262 F.3d 973, 974 (9th Cir. 2001).

17 Petitioner did not file a federal habeas petition on or
18 before March 2, 2001. Additionally, Petitioner's action seeking
19 state post-conviction relief, filed in October of 2007, more
20 than six years after the statute of limitations expired, could
21 not and did not restart the already-expired statute of
22 limitations for filing Petitioner's federal habeas action. See
23 Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003), citing
24 Tinker v. Moore, 255 F.3d 1331, 1333 (11th Cir. 2001); Preston
25 v. Gibson, 234 F.3d 1118, 1120 (10th Cir. 2000). A state-court
26 petition that is filed after the expiration of the statute of
27 limitations under the AEDPA does not revive the running of the

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1 limitations period. See Jiminez v. Rice, 276 F.3d 478, 482 (9th
2 Cir. 2001); Fisher v. Gibson, 262 F.3d 1135, 1142-43 (10th Cir.
3 2001); Payton v. Brigano, 256 F.3d 405, 408 (6th Cir. 2001).

4 **Equitable tolling of the statute of limitations**

5 Petitioner is not entitled to the equitable tolling of
6 the statute of limitations. A petitioner seeking equitable
7 tolling must establish two elements: "(1) that he has been
8 pursuing his rights diligently, and (2) that some extraordinary
9 circumstance stood in his way." Pace v. DiGuglielmo, 544 U.S.
10 408, 418, 125 S. Ct. 1807, 1814-15 (2005).

11 The Ninth Circuit Court of Appeals has determined
12 equitable tolling of the filing deadline for a federal habeas
13 petition is available only if extraordinary circumstances beyond
14 the petitioner's control make it impossible to file a petition
15 on time. See Harris, 515 F.3d at 1054-55 & n.4; Gaston v.
16 Palmer, 417 F.3d 1030, 1034 (9th Cir. 2003), modified on other
17 grounds by 447 F.3d 1165 (9th Cir. 2006). Equitable tolling is
18 only appropriate when external forces, rather than a
19 petitioner's lack of diligence, account for the failure to file
20 a timely habeas action. See Miles v. Prunty, 187 F.3d 1104,
21 1107 (9th Cir. 1999).

22 Equitable tolling is to be rarely granted. See, e.g.,
23 Jones v. Hulick, 449 F.3d 784, 789 (7th Cir. 2006); Stead v.
24 Head, 219 F.2d 1298, 1300 (11th Cir. 2000) (holding this remedy
25 is "typically applied sparingly"). The petitioner must
26 establish a causal connection between the alleged roadblock to
27 their timely filing of their federal habeas petition and the

1 actual failure to file the petition on time. See Gaston, 417
2 F.3d at 1034; Lawrence v. Florida, 421 F.3d 1221, 1226-27 (11th
3 Cir. 2005). It is Petitioner's burden to establish that
4 equitable tolling is warranted in his case. Gaston, 417 F.3d at
5 1034.

6 A petitioner's *pro se* status, ignorance of the law, and
7 lack of representation during the applicable filing period do
8 not constitute extraordinary circumstances justifying equitable
9 tolling because such circumstances are not "extraordinary."
10 See, e.g., Rasberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir.
11 2006); Shoemate v. Norris, 390 F.3d 595, 598 (8th Cir. 2004).
12 Additionally, a federal habeas petitioner seeking equitable
13 tolling must also act with "reasonable" diligence "throughout
14 the period he seeks to toll." Warren v. Garvin, 219 F.3d 111,
15 113 (2d Cir. 2000). See also Roy v. Lampert, 465 F.3d 964, 969
16 (9th Cir. 2006); Jones v. Morton, 195 F.3d 153, 159 (3d Cir.
17 1999).

18 The Ninth Circuit Court of Appeals has "rejected a per
19 se rule that a petitioner's language limitations can justify
20 equitable tolling, but [has] recognized that equitable tolling
21 may be justified if language barriers actually prevent timely
22 filing." Mendoza v. Carey, 449 F.3d 1065, 1069-70 (9th Cir.
23 2006). However, "a non-English-speaking petitioner seeking
24 equitable tolling must, at a minimum, demonstrate that during
25 the running of the AEDPA time limitation, he was unable, despite
26 diligent efforts, to procure either legal materials in his own
27 language or translation assistance from an inmate, library

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1 personnel, or other source." Id. at 1070.

2 Petitioner has not met his burden of establishing,
3 pursuant to the standard stated in Mendoza, that he was unable
4 to procure assistance in his own language or that this was the
5 reason for his failure to file a habeas petition within the
6 statute of limitations.

7 In his reply to the answer to his petition, Petitioner
8 contends he did not have notice of the AEDPA's statute of
9 limitations and argues that, accordingly, to assert the statute
10 of limitations denies him of due process of law. See Reply.
11 Additionally, Petitioner alleges tht he received a document
12 regarding his right to file a Rule 32 action, but that his
13 attorney did not "alert" him to the importance of filing such an
14 action. Id. at 4. Petitioner alleges the plea agreement was
15 not voluntary because he was threatened with a sentence of life
16 imprisonment by his attorney if he did not sign the plea
17 agreement. Petitioner also argues that Arizona's rules
18 regarding actions for post-conviction relief violate the
19 Supremacy Clause and that the state's denial of post-conviction
20 relief denied him his right to access the courts. Id. at 2-4.

21 With regard to the timeliness of his habeas petition,
22 Petitioner briefly alleges he did not know his constitutional
23 rights were violated until 2007. Petitioner further asserts he
24 did not waive his right to file a federal habeas petition
25 because he did not have notice of the AEDPA's statute of
26 limitations. Id. at 6. Petitioner also alleges he was
27 prejudiced by the inability to acquire legal materials in the

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1 Spanish language so that he could "better understand" his
2 rights. Id. at 7. Petitioner argues that, because his right to
3 file a habeas petition is a fundamental right, unless he waived
4 this right he must be allowed a hearing on the merits of a
5 petition.

6 Petitioner has not met his burden of establishing that
7 there were extraordinary circumstances beyond his control which
8 made it impossible for him to file a timely federal habeas
9 petition, or that any state action was the "but for" cause for
10 his failure to timely file his federal habeas action. See Brown
11 v. Barrow, 512 F.3d 1304, 1306-07 (11th Cir. 2008) (holding the
12 petitioner has a strong burden to plead specific facts
13 supporting their claim of extraordinary circumstances). See
14 also Pace, 544 U.S. at 418-19, 125 S. Ct. at 1815 (concluding
15 that the petitioner was not entitled to equitable tolling
16 because he was not misled or confused about the exhaustion of
17 his state remedies and filing his federal habeas petition).
18 Petitioner has not met his burden of establishing that there
19 were extraordinary circumstances beyond his control which made
20 it impossible for him to file a timely federal habeas petition.
21 Compare Sanchez v. Cambra, 137 Fed. App. 989, 990 (9th Cir.
22 2005). Additionally, Petitioner did not act with reasonable
23 diligence throughout the time period he seeks to toll. See
24 Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998) (rejecting a
25 claim to equitable tolling where the petitioner "provided no
26 specificity regarding the alleged lack of access and the steps
27 he took to diligently pursue his federal claims"). Compare Roy,

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1 465 F.3d at 969-72.

2 **III Conclusion**

3 Petitioner failed to file his federal habeas action
4 within the time specified by the AEDPA. Petitioner has not
5 established that he is entitled to equitable tolling of the
6 statute of limitations.

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8 **IT IS THEREFORE RECOMMENDED** that Mr. Arenas' Petition
9 for Writ of Habeas Corpus be **denied and dismissed with**
10 **prejudice.**

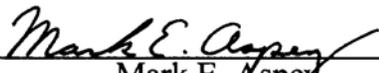
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12 This recommendation is not an order that is immediately
13 appealable to the Ninth Circuit Court of Appeals. Any notice of
14 appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate
15 Procedure, should not be filed until entry of the district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

17 Pursuant to Rule 72(b), Federal Rules of Civil
18 Procedure, the parties shall have ten (10) days from the date of
19 service of a copy of this recommendation within which to file
20 specific written objections with the Court. Thereafter, the
21 parties have ten (10) days within which to file a response to
22 the objections. Pursuant to Rule 7.2, Local Rules of Civil
23 Procedure for the United States District Court for the District
24 of Arizona, objections to the Report and Recommendation may not
25 exceed seventeen (17) pages in length.

26 Failure to timely file objections to any factual or
27 legal determinations of the Magistrate Judge will be considered

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

9 DATED this 28th day of May, 2009.

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14 Mark E. Aspey
15 United States Magistrate Judge
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