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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Ramon Cardoza Desantiago,
Petitioner
-vs-
Charles Ryan, et al.,
Respondents

CV-09-1268-PHX-NVW (JRI)

**REPORT & RECOMMENDATION
On Petition for Writ of Habeas Corpus
Pursuant to 28 U.S.C. § 2254**

I. MATTER UNDER CONSIDERATION

Petitioner, presently incarcerated in the Arizona State Prison Complex at Florence Arizona, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on June 11, 2009 (Doc. 1). On October 30, 2009, Respondents filed their Answer (Doc. 12), asserting a statute of limitations and exhaustion related defenses. Petitioner has not filed a reply.

II. RELEVANT FACTUAL & PROCEDURAL BACKGROUND

A. FACTUAL BACKGROUND AND PROCEEDINGS AT TRIAL

On January 21, 2004, Petitioner entered a plea of guilty to charges of sexual conduct with a minor under 15, and attempted child molestation. (Exhibit A, M.E. 1/21/4) (Exhibits to the Answer, Doc. 12, are referenced herein as “Exhibit ____.”) The trial court accepted the plea, and on March 19, 2004 sentenced Petitioner to 25 years in prison on the sexual conduct count, and suspended sentence and imposed a successive 99 year term of probation on the child molestation count. (Exhibit B, Sentence, 3/18/04.)

Petitioner did not file a direct appeal. (Petition, Doc. 1 at 2-3.)

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1 **D. FIRST POST-CONVICTION PROCEEDING**

2 On May 15, 2007, more than three years after his sentencing, Petitioner filed a
3 Request for Preparation of Post-Conviction Relief Record (Exhibit C). The PCR court denied
4 the request in light of the absence of a pending PCR proceeding. (Exhibit D, M.E. 5/21/07.)

5 On June 27, 2007, Petitioner filed his PCR Notice (Exhibit E), asserting that his
6 untimely filing was caused by counsel’s failure to file an appeal when requested, and arguing
7 that Petitioner was actually innocent. The PCR court rejected Petitioner’s attempt to blame
8 the failure to file a timely PCR notice on counsel, noting Petitioner had signed a notice
9 reflecting that it “was his responsibility to file the notice within the 90-day period.” (Exhibit
10 F, M.E. 7/25/07 at 1.) The PCR court dismissed the Notice as untimely, inasmuch as the
11 claims he asserted could not be raised in an untimely petition under Ariz. R. Crim. P. 32.4.

12 Petitioner then filed a Motion for Rehearing (Exhibit G), arguing a DNA test should
13 have been performed. The PCR Court denied the motion, finding that it failed to raise a valid
14 basis for PCR relief. (Exhibit H, M.E. 9/4/07.)

15 Petitioner then filed a “Motion in Response” and request for evidentiary hearing
16 (Exhibit I), asserting claims of innocence. The PCR Court denied the evidentiary hearing
17 and the motion, finding Petitioner failed to assert a cognizable basis for PCR relief. (Exhibit
18 J, M.E. 12/4/07.)

19 Petitioner then filed a Petition for Review with the Arizona Court of Appeals (Exhibit
20 K) arguing ineffective assistance of counsel in failing to file an appeal and in failing to obtain
21 a DNA test, and asserting that his sentence was improperly enhanced without jury
22 determined facts in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Arizona
23 Court of Appeals summarily denied review. (Exhibit L, Order 10/27/08.)

24 Petitioner then filed a Petition for Review by the Arizona Supreme Court (Exhibit M),
25 which was summarily denied by the Arizona Supreme Court on March 11, 2009 (Exhibit N).

26
27 **C. SECOND POST-CONVICTION PROCEEDING**

28 On October 22, 2008, while his petition of review on his first PCR was pending with

1 the Arizona Court of Appeals, Petitioner filed a second Notice of Post-Conviction Relief
2 (Exhibit O) and Petition for Post-Conviction Relief (Exhibit P), asserting newly discovered
3 facts and his actual innocence. The PCR Court identified the petition as “untimely,”
4 considered the merits of the claims and summarily dismissed the petition. (Exhibit Q, Order
5 12/15/08.)

6 Petitioner has not sought further review.

7

8 **D. PRESENT FEDERAL HABEAS PROCEEDINGS**

9 **Petition** - Petitioner commenced the current case by filing his Petition for Writ of
10 Habeas Corpus pursuant to 28 U.S.C. § 2254 on June 11, 2009 (Doc. 1). Petitioner’s Petition
11 asserts four grounds for relief: (1) ineffective assistance of counsel; (2) denials of due process
12 in denying Petitioner transcripts and in acceptance of his plea; (3) denial of due process in
13 denying him DNA testing; and (4) violations of *Apprendi v. New Jersey*, 530 U.S. 466
14 (2000).

15 Petitioner argues his Petition should be deemed timely because: (a) *Apprendi* is a
16 change in the law; (b) he is actually innocent; and (c) counsel failed to timely file his PCR
17 action. (Petition, Doc. 1 at 11.)

18 **Response** - On October 30, 2009 Respondents filed their Answer (Doc. 12).
19 Respondents argue the petition is barred by the statute of limitations and Petitioner has failed
20 to properly exhaust his state remedies.

21 Petitioner has not replied, and the time to reply has long since run.

22

23 **III. APPLICATION OF LAW TO FACTS**

24 **A. TIMELINESS**

25 **1. One Year Limitations Period**

26 Respondents assert that Petitioner’s Petition is untimely. As part of the
27 Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Congress provided a
28 1-year statute of limitations for all applications for writs of habeas corpus filed pursuant to

1 28 U.S.C. § 2254, challenging convictions and sentences rendered by state courts. 28 U.S.C.
2 § 2244(d). Petitions filed beyond the one year limitations period are barred and must be
3 dismissed. 28 U.S.C. § 2244(d)(1).

4 5 **2. Commencement of Limitations Period**

6 **Conviction Final** - The one-year statute of limitations on habeas petitions generally
7 begins to run on "the date on which the judgment became final by conclusion of direct review
8 or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). For
9 Arizona noncapital pleading defendants, who are not entitled to a direct appeal, the
10 conviction becomes "final" at the conclusion of the first "of-right" post-conviction
11 proceeding under Rule 32. *See Summers v. Schriro*, 481 F.3d 710, 717 (9th Cir. 2007). "To
12 bring an of-right proceeding under Rule 32, a plea-convicted defendant must provide to the
13 Arizona Superior Court, within 90 days of conviction and sentencing in that court, notice of
14 his or her intent to file a Petition for Post-Conviction Review. *Summers*, 481 F.3d at 715
15 (citing Ariz. R.Crim. P. 32.4(a)).

16 Here, Petitioner never filed his "of-right" post-conviction proceeding. He was
17 sentenced on March 19, 2004. . Thus, his time to file an "of-right" petition expired on June
18 17, 2004, 90 days after his sentencing. His first PCR filings occurring in May and June
19 2007 (Exhibits C, PCR Rec. Req. and E, PCR Notice), more than three years afterwards, and
20 did not qualify as a petition of-right.

21 Thus, when his time to file his of-right petition expired, Petitioner's judgement
22 became **final on June 17, 2004**, and his one year began to run thereafter.

23 **Change in the Law** - Petitioner argues that he should be subject to a latter
24 commencement date under §2244(d)(1)(C) because he relies upon the "bright line rule" in
25 *Apprendi* and its related case in *Blakely v. Washington*, 542 U.S. 296 (2004). (Petition, Doc.
26 1 at 11.) While the finality of the conviction is the normal commencement date for the
27 habeas limitations period, the statute does provide an exception for changes in the law.
28 Petitioner's fourth ground for relief asserts a "significant change in the law" based upon the

1 decisions in *Blakely* and *Apprendi*. Section 2244(d)(1)(C) provides that the period can run
2 from "the date on which the constitutional right asserted was initially recognized by the
3 Supreme Court, if the right has been newly recognized by the Supreme Court and made
4 retroactively applicable to cases on collateral review."

5 Here, Petitioner's conviction became final on sentencing on June 17, 2004. This was
6 long after the June 26, 2000 decision in *Apprendi* and before the June 24, 2004 decision in
7 *Blakely*. Because it was long after *Apprendi*, Petitioner's reliance on that case does not affect
8 his limitations period. Because it was before *Blakely*, it could serve to provide a later
9 commencement date, but only if *Blakely* has been "made retroactively applicable to cases on
10 collateral review." 28 U.S.C. § 2244(d)(1)(C).

11 In *Rees v. Hill*, 286 F.3d 1103 (9th Cir. 2002), the Ninth Circuit concluded that
12 *Apprendi* was not retroactively applicable on habeas review, under the retroactivity standards
13 established by *Teague v. Lane*, 489 U.S. 288, 308-310 (1989) (decisions establishing new
14 rules of criminal procedure are not to be applied retroactively on habeas review, absent
15 certain circumstances). Similarly, in *Cook v. U.S.*, 386 F.3d 949, 950 (9th Cir. 2004), the
16 Ninth Circuit drew upon its decision in *Rees* to conclude that *Blakely* was not retroactively
17 applicable on habeas.

18 Therefore, Petitioner cannot rely upon *Blakely* to claim a later commencement date
19 under § 2244(d)(1)(C).

20 21 **3. Normal Expiration of Year**

22 Barring any applicable tolling, Petitioner's limitations period would have commenced
23 running on June 18, 2004 and it would have **expired on June 17, 2005**, one year later.

24 25 **4. Statutory Tolling**

26 The AEDPA provides for tolling of the limitations period when a "properly filed
27 application for State post-conviction or other collateral relief with respect to the pertinent
28 judgment or claim is pending." 28 U.S.C. § 2244(d)(2). The statutory tolling applies during

1 the entire time during which the application is pending, including interludes between various
2 stages of appeal on the application. The “AEDPA statute of limitations is tolled for ‘all of
3 the time during which a state prisoner is attempting, through proper use of state court
4 procedures, to exhaust state court remedies with regard to a particular post-conviction
5 application.’ ” *Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999) (quoting *Barnett v.*
6 *Lemaster*, 167 F.3d 1321, 1323 (10th Cir.1999)). *See also Carey v. Saffold*, 536 U.S. 214,
7 217 (2002).

8 However, once the habeas statute has run, a subsequent post-conviction or collateral
9 relief filing does not reset the running of the one year statute. *Jiminez v. Rice*, 276 F.3d 478,
10 482 (9th Cir. 2001); *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003).

11 Here, Petitioner’s earliest PCR proceeding was commenced at the earliest in May
12 2007, almost two full years after his habeas limitations period expired. Accordingly,
13 Petitioner is not entitled to any statutory tolling.

14

15 **5. Timeliness of Federal Habeas Petition**

16 Petitioner’s federal habeas petition was filed June 11, 2009. (Doc. 1.) By that date,
17 however, Petitioner’s limitations period had been expired for almost 4 years. Thus,
18 Petitioner’s habeas petition was untimely.

19

20 **6. Equitable Tolling**

21 Petitioner asserts that he is entitled to equitable tolling of the limitations period
22 because his counsel failed to timely file his Rule 32 PCR petition.. (Petition, Doc. 1 at 11.)

23 The habeas limitations period in “§ 2244(d) is subject to equitable tolling.” *Holland*
24 *v. Florida*, 560 U.S. ___, 130 S. Ct. 2549, 2562 (2010) However, a petitioner is entitled to
25 equitable tolling “only if he shows ‘(1) that he has been pursuing his rights diligently, and
26 (2) that some extraordinary circumstance stood in his way’ and prevented timely filing.” *Id.*
27 at 2562.

28 To receive equitable tolling, [t]he petitioner must establish two

1 elements: (1) that he has been pursuing his rights diligently, and (2) that
2 some extraordinary circumstances stood in his way. The petitioner must
3 additionally show that the extraordinary circumstances were the cause
of his untimeliness, and that the extraordinary circumstances ma[de] it
impossible to file a petition on time.

4 *Ramirez v. Yates*, 571 F.3d 993, 997 (9th Cir. 2009) (internal citations and quotations
5 omitted). “Indeed, ‘the threshold necessary to trigger equitable tolling [under AEDPA] is
6 very high, lest the exceptions swallow the rule.’ ” *Miranda v. Castro*, 292 F.3d 1063, 1066
7 (9th Cir. 2002) (quoting *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir.).

8 While the standard for establishing entitlement to equitable tolling is high, the
9 standard for an evidentiary hearing on such a claim is not so rigorous. Indeed, a habeas
10 petitioner asserting equitable tolling “should receive an evidentiary hearing when he makes
11 ‘a good-faith allegation that would, if true, entitle him to equitable tolling.’ ” *Roy v.*
12 *Lampert*, 465 F.3d 964, 969 (9th Cir. 2006) (quoting *Laws v. Lamarque*, 351 F.3d 919, 919
13 (9th Cir.2003). Moreover, when evaluating a *pro se* habeas petitioner’s allegations of such
14 extraordinary circumstances, the court must “construe *pro se* habeas filings liberally.” *Id.*
15 (quoting *Allen v. Calderon*, 408 F.3d 1150, 1153 (9th Cir.2005)).

16 Although an attorney's behavior can establish the extraordinary circumstances
17 required for equitable tolling, mere negligence or professional malpractice is insufficient.
18 *Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir.2001). A “garden variety claim of excusable
19 neglect,’ such as a simple ‘miscalculation’ that leads a lawyer to miss a filing deadline does
20 not warrant equitable tolling.’ ” *Holland*, 130 S.Ct. at 2564. Rather, the attorney’s
21 misconduct must rise to the level of extraordinary circumstances. *Id.*

22 Here, even construing his Petition liberally, Petitioner fails to allege extraordinary
23 circumstances which kept him from filing his federal habeas petition on time. Petitioner
24 simply alleges counsel failed to timely file a state petition. However, Petitioner makes no
25 argument that trial counsel’s failings, if any, with regard to his PCR petition kept him from
26 timely filing his habeas petition.

27 Petitioner does not suggest, for example, that for the entire year his federal limitations
28 period was running he was operating under the mistaken belief that the state proceeding was

1 ongoing. At best, in his PCR Notice, he argued to the state court that he called counsel once
2 from jail “to make sure he would file his appeal but with no avail since counsel never ever
3 contacted defendant again.” (Exhibit E, PCR Not. at 3.) Even assuming that occurred,
4 Petitioner fails to proffer anything to show diligence on his own behalf, e.g. following up
5 with counsel, writing counsel, inquiring with the court, attempting to pursue his rights on his
6 own, or even promptly filing his federal petition once he became aware he had no state
7 petition pending.

8 Even if extraordinary circumstances prevent a petitioner from filing for a time,
9 equitable tolling will not apply if he does not continue to diligently pursue filing afterwards.
10 "If the person seeking equitable tolling has not exercised reasonable diligence in attempting
11 to file after the extraordinary circumstances began, the link of causation between the
12 extraordinary circumstances and the failure to file is broken, and the extraordinary
13 circumstances therefore did not prevent timely filing." *Valverde v. Stinson*, 224 F.3d 129,
14 134 (2nd Cir. 2000).

15 Thus, Petitioner’s case is easily distinguished from such cases as *Spitsyn v. Moore*,
16 345 F.3d 796, 801 (9th Cir. 2003) where equitable tolling was allowed because petitioner's
17 habeas counsel was hired almost a year in advance, failed to do anything to prepare the
18 petition or to respond to numerous letters and phone calls, and withheld petitioner's file for
19 over two months after the limitations period expired. And from *Holland, supra*, where the
20 Court discussed the potential for a finding of extraordinary circumstances where counsel
21 misinformed petitioner about the filing deadline, failed to communicate the conclusion of
22 state appeals, and failed to communicate with petitioner at all over a period of years, all
23 despite repeated requests by petitioner. 130 S.Ct. at 2564-2565.

24 In sum, Petitioner fails to proffer facts which would show extraordinary circumstances
25 that made it impossible for him to make a timely federal habeas filing. While Petitioner
26 points to counsel’s purported failure in the state proceedings, he fails to make allegations that
27 connect that failure to his failure to timely file his federal petition, and fails to explain his
28 lack of diligence in filing his federal petition even once he became aware that his PCR

1 petition had not been filed. Under these circumstance, the undersigned finds no basis for
2 equitable tolling.

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4 **7. Actual Innocence**

5 Petitioner argues that his failure to file a timely petition should be excused because
6 he is actually innocent. However, the federal habeas statute of limitations in 28 U.S.C. §
7 2244(d) “does not include an unenumerated actual innocence gateway.” *Lee v. Lampert*, 610
8 F.3d 1125, 1131 (9th Cir. 2010).

9
10 **8. Conclusion**

11 Petitioner’s federal habeas Petition was filed some four years after his limitations
12 period expired and Petitioner fails to show that he is entitled to any statutory tolling or
13 equitable tolling which would render his Petition timely. Therefore, his Petition must be
14 dismissed with prejudice.

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16 **B. EXHAUSTION**

17 Because the undersigned finds Petitioner’s habeas petition plainly barred by the
18 statute of limitations, Defendants’ exhaustion and related defenses are not addressed.

19
20 **IV. CERTIFICATE OF APPEALABILITY**

21 **Ruling Required** - Rule 11(a), Rules Governing Section 2254 Cases, requires that in
22 habeas cases the “district court must issue or deny a certificate of appealability when it enters
23 a final order adverse to the applicant.” Such certificates are required in cases concerning
24 detention arising “out of process issued by a State court”, or in a proceeding under 28 U.S.C.
25 § 2255 attacking a federal criminal judgment or sentence. 28 U.S.C. § 2253(c)(1).

26 Here, the Petition is brought pursuant to 28 U.S.C. § 2254, and challenges detention
27 pursuant to a State court judgment. The recommendations if accepted will result in
28 Petitioner’s Petition being resolved adversely to Petitioner. Accordingly, a decision on a

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VI. EFFECT OF RECOMMENDATION

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

However, pursuant to *Rule 72(b), Federal Rules of Civil Procedure*, the parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. *See also* Rule 8(b), Rules Governing Section 2254 Proceedings. Thereafter, the parties have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any findings or recommendations of the Magistrate Judge will be considered a waiver of a party's right to *de novo* consideration of the issues, *see United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003)(*en banc*), and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the recommendation of the Magistrate Judge, *Robbins v. Carey*, 481 F.3d 1143, 1146-47 (9th Cir. 2007).

DATED: October 7, 2010



JAY R. IRWIN
United States Magistrate Judge

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