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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Roger Dale Casey,

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CIV 11-00155-PHX-NVW (MHB)

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Petitioner,

)

**REPORT AND RECOMMENDATION**

11

vs.

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Charles L. Ryan, et al.,

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Respondents.

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15 TO THE HONORABLE NEIL V. WAKE, UNITED STATES DISTRICT JUDGE:

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Petitioner Roger Dale Casey, who is confined in the Arizona State Prison in Florence,

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Arizona, has filed a *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

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(Doc. 1.) Respondents filed an Answer (Doc. 14), and Petitioner filed a Reply (Doc. 15).

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**BACKGROUND**

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On September 17, 1976, Petitioner was charged by information in the Maricopa

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County Superior Court with one count of escape from a community correctional center in CR

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94403; one count of burglary in the second degree while armed with a gun or deadly weapon,

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one count of assault with intent to commit rape in CR 94424; one count of rape, one count

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of lewd and lascivious acts, and one count of crime against nature in CR 94425; and one

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count of theft of a motor vehicle in CR 94426. (Doc. 14, Exhs. A, D.) Following jury trials,

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Petitioner was convicted as charged in all four cases. (Doc. 14, Exhs. B, C, D.)

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On May 11, 1977, the state court sentenced Petitioner to 4.5 to 5 years' imprisonment

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in CR 94403; 25 years to life on both counts in CR 94424 to run concurrently to each other

1 but consecutively to the sentence in CR 94403; 25 years to life, 9 to 10 years, and 18 to 20  
2 years in CR 94425 to run concurrently to each other but consecutively to the sentences in CR  
3 94424; and 9 to 10 years in CR 94426 to run consecutively to the sentences in the other cause  
4 numbers. (Doc. 14, Exh. D.)

5 Petitioner filed a timely notice of appeal from the convictions and sentences in all four  
6 cases on May 12, 1977. (Doc. 14, Exhs. E, F.) Petitioner, however, moved to dismiss his  
7 appeal, and the Arizona Supreme Court granted his motion on September 6, 1977. (Doc. 14,  
8 Exh. G.)

9 More than 15 years later, on October 8, 1992, Petitioner filed a notice of post-  
10 conviction relief in cause numbers CR 94425 and 94426.<sup>1</sup> (Doc. 14, Exhs. H, I.) On March  
11 15, 1993, Petitioner filed his petition for post-conviction relief arguing that he received  
12 ineffective assistance from his trial counsel in violation of the Sixth Amendment of the  
13 United States Constitution and Article II, Section 24 of the Arizona Constitution because trial  
14 counsel failed to object to the alleged misconduct of the prosecutor during closing argument.  
15 (Doc. 14, Exh. I.) On May 26, 1993, the state court issued a minute entry dismissing  
16 Petitioner's petition. (Doc. 14, Exh. M.) The state court found that Petitioner's claims of  
17 prosecutorial misconduct and ineffective of assistance of counsel were precluded because  
18 they could have been addressed had Petitioner not voluntarily dismissed his direct appeal.  
19 (Doc. 14, Exh. M.) The state court further determined that, even if Petitioner's claims were  
20 not precluded, he had failed to present a material question of law or fact that would entitle  
21 him to relief. (Doc. 14, Exh. M.)

22 On July 8, 1993, Petitioner filed a petition for review in the Arizona Court of Appeals.  
23 (Doc. 14, Exh. N.) In his petition, he argued that the state court incorrectly found that: (1)  
24 preclusion prohibited litigation of his "impermissible comment" issue in post-conviction  
25 relief proceedings by virtue of his voluntary dismissal of his appeal; and (2) the comments

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27 <sup>1</sup> While there appears to be a subsequent notice of post-conviction relief in cause  
28 number CR 94424, (Doc. 14, Exh. J), there is no indication in the record that Petitioner  
pursued this matter.

1 made by the prosecutor during closing argument were not comments directing the jury's  
2 attention to Petitioner's failure to testify at trial. (Doc. 14, Exh. N.) On March 8, 1994, the  
3 Arizona Court of Appeals issued a memorandum decision affirming the state court's  
4 findings. (Doc. 14, Exh. O.) In so doing, the court found that Petitioner had waived his  
5 prosecutorial misconduct claim when he failed to raise it on direct appeal. (Doc. 14, Exh.  
6 O.) The court, however, disagreed that Petitioner had waived his ineffective assistance of  
7 counsel claim and instead concluded that he had failed to present a material question of fact  
8 or law that would entitle him to relief in post-conviction proceedings. (Doc. 14, Exh. O.)

9 Petitioner filed a petition for review in the Arizona Supreme Court raising the same  
10 issues. (Doc. 14, Exh. P.) The Arizona Supreme Court issued an order denying review on  
11 November 1, 1994. (Doc. 14, Exh. P.)

12 Almost 14 years later, on July 22, 2008, Petitioner filed a second petition for post-  
13 conviction relief in cause numbers CR 94403, 94424, 94425, and 94426.<sup>2</sup> (Doc. 14, Exh. Q.)  
14 In his second petition for post-conviction relief, Petitioner argued that: (1) the state court  
15 failed to consider any mitigating facts and, as a result, his sentences were cruel and unusual  
16 in violation of the Eighth Amendment of the United States Constitution; and (2) given the  
17 substantial changes in Arizona's sentencing law over the past 30 years, Petitioner today  
18 would not receive such a harsh and excessive sentence. (Doc. 14, Exh. Q.) The state court  
19 denied the successive petition on February 19, 2009, finding that such relief was precluded  
20 pursuant to Rule 32.2(a)(1) because issues relating to Petitioner's allegedly unjust and  
21 excessive sentences were issues that could have been raised on direct appeal. (Doc. 14, Exh.  
22 R.)

23 On March 19, 2009, Petitioner filed a petition for review in the Arizona Court of  
24 Appeals. (Doc. 14, Exh. S.) In his petition, he argued that the state court incorrectly found  
25 his sentencing claims precluded. (Doc. 14, Exh. S.) He reasoned that he could not have

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27 <sup>2</sup> Although Petitioner's pleading was entitled "Writ of Habeas [sic] Corpus," the state  
28 court construed the pleading as a successive petition for post-conviction relief. (Doc. 14,  
Exhs. Q, R.)

1 raised his claims until the sentencing laws were changed. (Doc. 14, Exh. S.) He further  
2 reasoned that his Eighth Amendment cruel and unusual punishment claim could be raised at  
3 any time as long as the violation of his constitutional right was ongoing. (Doc. 14, Exh. S.)  
4 The Court of Appeals summarily denied review of the petition on April 13, 2010. (Doc. 14,  
5 Exh. T.)

6 Thereafter, Petitioner filed a petition for review in the Arizona Supreme Court raising  
7 the same issues. (Doc. 14, Exh. U.) The Arizona Supreme Court issued an order summarily  
8 denying review on September 30, 2010. (Doc. 14, Exh. U.)

9 On January 24, 2011, Petitioner filed the instant habeas petition alleging the following  
10 grounds for relief: (1) excessive sentence in violation of the Eighth Amendment; and (2)  
11 “substantial changes in Arizona sentencing laws” have rendered Petitioner’s sentence  
12 excessive. (Doc. 1.) Respondents filed an Answer (Doc. 14), and Petitioner filed a Reply  
13 (Doc. 15).

#### 14 **DISCUSSION**

15 In their Answer, Respondents contend that Petitioner’s habeas petition is untimely.  
16 In the alternative, Respondents assert that Petitioner claims are procedurally defaulted.  
17 Respondents request that the habeas petition be denied and dismissed with prejudice.

18 The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) imposes a  
19 statute of limitations on federal petitions for writ of habeas corpus filed by state prisoners.  
20 See 28 U.S.C. § 2244(d)(1). The statute of limitations applies to all federal petitions filed  
21 after the AEDPA’s effective date, April 24, 1996. See Lindh v. Murphy, 521 U.S. 320, 336-  
22 37 (1997). A state prisoner must file a federal petition within one year from “the date on  
23 which the judgment became final by the conclusion of direct review or the expiration of the  
24 time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A); see Lott v. Mueller, 304 F.3d  
25 918, 920 (9<sup>th</sup> Cir. 2002). State prisoners whose convictions became final before the effective  
26 date of the AEDPA are entitled to a one-year grace period, beginning on April 25, 1996, one  
27 day after the AEDPA’s enactment, in which to file their petitions. See Patterson v. Stewart,

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1 251 F.3d 1243, 1246 (9<sup>th</sup> Cir. 2001). The grace period expires on the anniversary of the  
2 AEDPA’s enactment, April 24, 1997. See id.

3 “The time during which a properly filed application for State post-conviction or other  
4 collateral review with respect to the pertinent judgment or claim is pending shall not be  
5 counted toward” the limitations period. 28 U.S.C. § 2244(d)(2); see Lott, 304 F.3d at 921.  
6 A state petition that is not filed, however, within the state’s required time limit is not  
7 “properly filed” and, therefore, the petitioner is not entitled to statutory tolling. See Pace v.  
8 DiGuglielmo, 544 U.S. 408, 413 (2005). “When a post-conviction petition is untimely under  
9 state law, ‘that [is] the end of the matter’ for purposes of § 2244(d)(2).” Id. at 414.

10 In Arizona, post-conviction review is pending once a *notice* of post-conviction relief  
11 is filed even though the petition is not filed until later. See Isley v. Arizona Department of  
12 Corrections, 383 F.3d 1054, 1055-56 (9<sup>th</sup> Cir. 2004). An application for post-conviction  
13 relief is also pending during the intervals between a lower court decision and a review by a  
14 higher court. See Biggs v. Duncan, 339 F.3d 1045, 1048 (9<sup>th</sup> Cir. 2003) (citing Carey v.  
15 Saffold, 536 U.S. 214, 223 (2002)). However, the time between a first and second  
16 application for post-conviction relief is not tolled because no application is “pending” during  
17 that period. See Biggs, 339 F.3d at 1048. Moreover, filing a new petition for post-  
18 conviction relief does not reinstate a limitations period that ended before the new petition  
19 was filed. See Ferguson v. Palmateer, 321 F.3d 820, 823 (9<sup>th</sup> Cir. 2003).

20 The statute of limitations under the AEDPA is also subject to equitable tolling in  
21 appropriate cases. See Holland v. Florida, --- U.S. ----, ----, 130 S.Ct. 2549, 2560, 177  
22 L.Ed.2d 130 (2010). However, for equitable tolling to apply, a petitioner must show ““(1)  
23 that he has been pursuing his rights diligently and (2) that some extraordinary circumstances  
24 stood in his way”” and prevented him from filing a timely petition. Id. at 2562 (quoting Pace,  
25 544 U.S. at 418).

26 The Court’s review of Petitioner’s post-conviction relief proceedings reveals that  
27 Petitioner’s Amended Petition for Writ of Habeas Corpus is untimely. Petitioner filed a  
28 notice of appeal from his convictions and sentences. (Doc. 14, Exhs. E, F.) Petitioner,

1 however, moved to dismiss his appeal, rendering his judgment of conviction and sentence  
2 final on September 6, 1977 – the date the Arizona Supreme Court granted his motion. (Doc.  
3 14, Exh. G.) Because Petitioner’s conviction became final before April 24, 1996, the  
4 effective date of the AEDPA, the statute of limitations for Petitioner to file his federal habeas  
5 petition began to run on April 25, 1996, and expired on April 24, 1997.<sup>3</sup> See Patterson, 251  
6 F.3d at 1256. Therefore, absent any tolling, Petitioner was required to file the instant habeas  
7 petition on or before April 24, 1997. See 28 U.S.C. § 2244(d)(1)(A); Malcom v. Payne, 281  
8 F.3d 951, 955 (9<sup>th</sup> Cir. 2002); Patterson, 251 F.3d at 1245-46.

9 Petitioner’s commencement of his first post-conviction relief proceeding did not toll  
10 the limitations period as it concluded on January 30, 1995 – 90 days after the Arizona  
11 Supreme Court denied review – more than a year before the one-year period under the  
12 AEDPA commenced. See Bowen v. Roe, 188 F.3d 1157, 1158-59 (9<sup>th</sup> Cir. 1999) (ruling that  
13 the period of “direct review” under § 2244(d)(1)(A) includes 90-day period during which  
14 defendant can file petition for writ of certiorari from United States Supreme Court).  
15 Likewise, Petitioner’s commencement of a second post-conviction relief proceeding on July  
16 22, 2008, did not toll the limitations period. Since the second petition for post-conviction  
17 relief was filed after the AEDPA statute of limitations ended, it could not restart the expired  
18 one-year limitations period. See Ferguson, 321 F.3d at 823 (“Like the Eleventh Circuit, we  
19 hold that section 2244(d) does not permit the reinitiation of the [federal one-year] limitations  
20 period that has ended before the state petition was filed.”). In sum, Petitioner filed the instant  
21 habeas petition on January 24, 2011 – 13 years and 9 months after the one-year limitations  
22 period expired on April 24, 1997. The Petition is therefore untimely and should be dismissed  
23 with prejudice, absent any equitable tolling.

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26 <sup>3</sup> Assuming Petitioner could have filed a petition for review from the dismissal of his  
27 direct appeal by the supreme court, his judgment of conviction and sentence would still have  
28 become final on October 6, 1977 – well before the effective date of AEDPA. See  
Ariz.R.Crim.P. (establishing 30-day time limit from the filing of a decision for filing petition  
for review in Arizona Supreme Court).

1 As previously indicated, the AEDPA's statute of limitations is subject to equitable  
2 tolling in appropriate cases. See Holland, 130 S.Ct. at 2560. In Holland, the Court reiterated  
3 its position "that a 'petitioner' is 'entitled to equitable tolling' only if he shows '(1) that he  
4 has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood  
5 in his way' and prevented timely filing." Id. at 2562 (quoting Pace, 544 U.S. at 418). "To  
6 apply the doctrine in 'extraordinary circumstances' necessarily suggests the doctrine's rarity,  
7 and the requirement that extraordinary circumstances 'stood in his way' suggests that an  
8 external force must cause the untimeliness, rather than ... merely 'oversight, miscalculation  
9 or negligence on the petitioner's part, all of which would preclude the application of  
10 equitable tolling.'" Waldron-Ramsey v. Pacholke, 556 F.3d 1008, 1011 (9<sup>th</sup> Cir. 2009)  
11 (citation omitted).

12 Petitioner suggests that his untimeliness should be excused because significant  
13 changes in the sentencing law have occurred that render his sentences cruel and unusual.  
14 Moreover, Petitioner suggests that as long as he is serving a cruel and unusual sentence, he  
15 should be able to challenge that sentence under the Eighth Amendment. Petitioner, however,  
16 does not identify what sentencing laws have changed, whether they apply to his case, and if  
17 applicable, how they render his sentences cruel and unusual. Petitioner, thus, has not  
18 suggested any extraordinary circumstance that would justify equitable tolling, let alone  
19 demonstrated that an external impediment stymied the diligent pursuit of his rights.  
20 Accordingly, Petitioner is not entitled to equitable tolling and his habeas petition is therefore  
21 untimely.

## 22 CONCLUSION

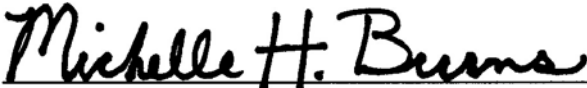
23 Having determined that Petitioner's habeas petition is untimely, the Court will  
24 recommend that Petitioner's Petition for Writ of Habeas Corpus (Doc. 1) be denied and  
25 dismissed with prejudice.

26 **IT IS THEREFORE RECOMMENDED** that Petitioner's Petition for Writ of  
27 Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1) be **DENIED** and **DISMISSED WITH**  
28 **PREJUDICE**;

1           **IT IS FURTHER RECOMMENDED** that a Certificate of Appealability and leave  
2 to proceed *in forma pauperis* on appeal be **DENIED** because the dismissal of the Petition is  
3 justified by a plain procedural bar and jurists of reason would not find the procedural ruling  
4 debatable.

5           This recommendation is not an order that is immediately appealable to the Ninth  
6 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of  
7 Appellate Procedure, should not be filed until entry of the district court's judgment. The  
8 parties shall have fourteen days from the date of service of a copy of this recommendation  
9 within which to file specific written objections with the Court. See 28 U.S.C. § 636(b)(1);  
10 Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen  
11 days within which to file a response to the objections. Failure timely to file objections to the  
12 Magistrate Judge's Report and Recommendation may result in the acceptance of the Report  
13 and Recommendation by the district court without further review. See United States v.  
14 Reyna-Tapia, 328 F.3d 1114, 1121 (9<sup>th</sup> Cir. 2003). Failure timely to file objections to any  
15 factual determinations of the Magistrate Judge will be considered a waiver of a party's right  
16 to appellate review of the findings of fact in an order or judgment entered pursuant to the  
17 Magistrate Judge's recommendation. See Rule 72, Federal Rules of Civil Procedure.

18           DATED this 24th day of August, 2011.

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22           Michelle H. Burns  
23           United States Magistrate Judge  
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