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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8
9 Frank Silva,

10 Petitioner,

11 v.

12 Charles L. Ryan, et al.,

13 Respondents.

No. CV-12-01421-PHX-DGC (DKD)

ORDER

14
15 Petitioner Frank Silva filed a petition for writ of habeas corpus pursuant to 28
16 U.S.C. § 2254, challenging the constitutionality of his sentence. Doc. 1. The petition
17 was referred to Magistrate Judge Duncan, who issued a report and recommendation
18 (“R&R”) in which he recommends that the Court dismiss the petition as untimely.
19 Doc. 20. Petitioner has submitted objections to the R&R. Doc. 23. For the reasons that
20 follow, the Court will adopt the R&R and dismiss the petition with prejudice.

21 **I. Background.**

22 In 1982, following a two-month jury trial in Maricopa County Superior Court,
23 Petitioner was convicted on forty felony counts of sexual assault on fourteen victims. He
24 was sentenced to more than 200 years in prison. Doc. 20 at 1. Petitioner’s conviction
25 and sentences were upheld by the Arizona Court of Appeals in 1986, and a Rule 32
26 petition filed in 1988 was dismissed without prejudice on September 9, 1988. *Id.* at 2.
27 Petitioner filed a second petition for post-conviction relief in April 2008, which was
28 dismissed on January 11, 2010, after the appointment of post-conviction counsel and

1 briefing. *Id.* The Court of Appeals denied review on July 8, 2011, and the Arizona
2 Supreme Court denied review on December 7, 2011. *Id.* This petition was filed on
3 July 2, 2012. *Id.*

4 Judge Duncan found that the petition is subject to the Antiterrorism and Effective
5 Death Penalty Act of 1996 (“AEDPA”), 28 U.S.C. § 2244(d), which provides a one-year
6 statute of limitations for section 2254 petitions filed by state prisoners. Doc. 20 at 2.
7 State prisoners with convictions that became final before the AEDPA’s effective date of
8 April 24, 1996, were allowed a one-year grace period to file their petitions. *Id.*; *see*
9 *Patterson v. Stewart*, 251 F.3d 1243, 1245 (9th Cir. 2001). Accordingly, Judge Duncan
10 concluded that Petitioner was required to file any petition by April 24, 1997. Doc. 20 at
11 2. Judge Duncan also concluded that the limitations period was not tolled, making the
12 petition untimely, and recommended the petition be dismissed with prejudice. *Id.* at 3-4.
13 Judge Duncan further recommended that the Court deny a certificate of appealability. *Id.*
14 at 4.

15 Petitioner contends that Judge Duncan “overlooked” evidence and exhibits that
16 were relevant to the statute of limitations issue. Doc. 23 at 2. Petitioner further contends
17 that the R&R is “confused,” and that it “has no support in the record.” *Id.* at 3-4.

18 **II. Analysis.**

19 The Court must undertake a *de novo* review of those portions of the R&R to which
20 specific objections are made. *See Thomas v. Arn*, 474 U.S. 140, 149 (1985). The Court
21 may accept, reject, or modify, in whole or in part, the findings or recommendations made
22 by the magistrate judge. *See* 28 U.S.C. § 636(b)(1).

23 Petitioner’s objections to the R&R appear to challenge Judge Duncan’s findings
24 on statutory and equitable tolling of the statute of limitations. Doc. 23 at 6. He argues
25 that Judge Duncan “overlooked all the uncontested due diligence and CONST. (sic)
26 impediment facts/evidence and exhibits,” (doc. 23 at 2), and that he did not consider
27 Petitioner’s other claims as a result (*id.*). Petitioner also objects to Judge Duncan’s
28 recommendation that the Court deny a certificate of appealability. *Id.* at 21. The Court

1 finds neither equitable nor statutory tolling appropriate in this case, and agrees that a
2 certificate of appealability should be denied.

3 **A. Equitable Tolling.**

4 The Supreme Court has held that a petitioner “is ‘entitled to equitable tolling’ only
5 if he shows ‘(1) that he has been pursuing his rights diligently, and (2) that some
6 extraordinary circumstance stood in his way’ and prevented timely filing.” *Holland v.*
7 *Florida*, 130 S. Ct. 2549, 2562 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418
8 (2005)). An extraordinary circumstance is one that is “beyond a prisoner’s control,” that
9 “make[s] it impossible to file a petition on time.” *Miles v. Prunty*, 187 F.3d 1104, 1107
10 (9th Cir. 1999). To justify equitable tolling, an extraordinary circumstance must be
11 attributable to “external forces [] rather than a petitioner’s lack of diligence[.]” *Id.*

12 Petitioner contends that the “A.D.O.C. law library did not update the fed. (sic)
13 habeas code and that they did not place the then new SOL AEDPA code in the law
14 libraries until 8-2-97, long after the 4-24-97 grace period had expired[.]” Doc. 23 at 10.
15 The Court need not decide this issue because the Court finds that Petitioner has not been
16 pursuing his rights diligently. Petitioner filed no court documents between September
17 1988 and April 2008. In an attempt to show diligence, Petitioner recounts legal advice he
18 received, legal courses he took, and research he conducted between 1982 and 1993, but
19 he does not explain what steps he took between 1993 and 2008 to pursue his rights. *Id.* at
20 7-10. Fifteen years without court filings cannot be characterized as diligence. The Court
21 concludes that Petitioner has not diligently pursued his rights and therefore is not entitled
22 to equitable tolling of the AEDPA’s limitation period. *See Holland*, 130 S. Ct. at 2562.

23 **B. Statutory Tolling.**

24 To the extent Petitioner also contends that the limitations period was statutorily
25 tolled in this case, Petitioner is incorrect. The AEDPA’s limitation period is tolled while
26 “a properly filed application for State post-conviction or other collateral review with
27 respect to the pertinent judgment or claim is pending[.]” 28 U.S.C. § 2244(d)(2). The
28 Ninth Circuit has construed the term “pending” broadly, holding that the AEDPA’s

1 limitation period is statutorily “tolled for ‘all of the time during which a state prisoner is
2 attempting, through proper use of state court procedures, to exhaust state court remedies
3 with regard to a particular post-conviction [petition].’” *Nino v. Galaza*, 183 F.3d 1003,
4 1005-06 (9th Cir. 1999) (internal citation omitted); *see Jenkins v. Johnson*, 330 F.3d
5 1146, 1149 (9th Cir. 2003). A petitioner, however, “is not entitled to tolling during the
6 gap between the completion of one full round of state collateral review and the
7 commencement of another.” *Delhomme v. Ramirez*, 340 F.3d 817, 820 (9th Cir. 2003)
8 (citing *Biggs v. Duncan*, 339 F.3d 1045, 1048 (9th Cir. 2003)).

9 Petitioner contends that because his most recent state petition was filed in 2008
10 and was pending until the Arizona Supreme Court denied relief in 2011, the limitation
11 period was tolled pursuant to section 2244(d)(2) until that time. Doc. 23 at 16. This
12 argument is incorrect. Petitioner had no application for state post-conviction relief
13 pending between 1988 and 2008, during which time the AEDPA’s one-year grace period
14 came and went. *See Patterson*, 251 F.3d at 1245. The Ninth Circuit has held that
15 “section 2244(d) does not permit the reinitiation of [a] limitations period that has ended
16 before the state petition was filed.” *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir.
17 2003). Thus, Petitioner’s 2008 petition does not alter the calculation of section 2244’s
18 limitation period.

19 Petitioner also argues that “his 1997 grace period was statutorily extended until
20 Jan. 2009, pursuant to 28 U.S.C. 2244(d)(1)(B)(D) (sic).” *Id.* at 6. The cited portions of
21 section 2244(d)(1)(B) and (D) provide that a one-year limitation period applies to the
22 application for a writ of habeas corpus by a state prisoner and that the limitation period
23 runs from the later of “the date on which the impediment to filing an application created
24 by State action in violation of the Constitution or laws of the United States is removed, if
25 the applicant was prevented from filing by such state action,” or “the date on which the
26 factual predicate of the claim or claims presented could have been discovered through the
27 exercise of due diligence.” Petitioner has not presented facts showing the applicability of
28 these statutory provisions, nor any facts that would support the extension of the limitation

1 period past April 24, 1997 on other grounds. The Court accordingly finds that the
2 AEDPA's limitation period was not statutorily tolled and that the petition is untimely.

3 **C. Certificate of Appealability.**

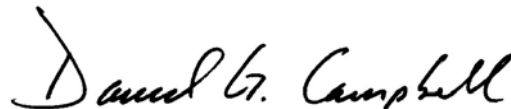
4 A certificate of appealability can be issued only if petitioner has "made a
5 substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).
6 Where the district court's dismissal is based on procedure, a substantial showing requires
7 that "jurists of reason would find it debatable whether the district court was correct in its
8 procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "Where a plain
9 procedural bar is present and the district court is correct to invoke it to dispose of the
10 case, a reasonable jurist could not conclude either that the district court erred in
11 dismissing the petition or that the petitioner should be allowed to proceed further. In
12 such a circumstance, no appeal would be warranted." *Id.*

13 The petition was filed long after the expiration of the applicable limitations period,
14 a fact with which reasonable jurists could not disagree. The certificate of appealability
15 will therefore be denied.

16 **IT IS ORDERED:**

- 17 1. Magistrate Judge Duncan's R&R (Doc. 20) is **accepted**.
- 18 2. The petition for writ of habeas corpus (Doc. 1) is **dismissed** with prejudice.
- 19 3. A certificate of appealability is **denied**.
- 20 4. The Clerk shall **terminate** this action.

21 Dated this 21st day of November, 2013.

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26 David G. Campbell
27 United States District Judge
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