

1 On October 28, 2013, Petitioner filed the instant Petition for Writ of Habeas
2 Corpus raising four claims for relief. (Doc. 1.) Respondents filed a limited answer, in
3 which they argue that the petition should be dismissed because the petition is untimely,
4 and the claims are either not cognizable or procedurally defaulted. (Doc. 15.)

5 **II. Standard of Review**

6 The Court may accept, reject, or modify, in whole or in part, the findings or
7 recommendations made by a magistrate judge in a habeas case. *See* 28 U.S.C. §
8 636(b)(1). The Court must undertake a *de novo* review of those portions of the R&R to
9 which specific objections are made. *See id.*; Fed. R. Civ. P. 72(b)(3); *United States v.*
10 *Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). However, a party is not entitled as of
11 right to *de novo* review of evidence and arguments raised for the first time in an objection
12 to the R&R, and whether the Court considers the new facts and arguments presented is
13 discretionary. *United States v. Howell*, 231 F.3d 615, 621-622 (9th Cir. 2000).

14 **III. Discussion**

15 Having reviewed the objected to recommendations *de novo*, the Court finds that
16 the Magistrate Judge correctly concluded that Petitioner’s claims are time-barred.

17 The writ of habeas corpus affords relief to persons in custody pursuant to the
18 judgment of a State court in violation of the Constitution, laws, or treaties of the United
19 States. 28 U.S.C. §§ 2241(c)(3), 2254(a). Such petitions are governed by the
20 Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”).² 28 U.S.C. § 2244.
21 The AEDPA imposes a 1-year statute of limitations in which “a person in custody
22 pursuant to the judgment of a State court” can file a federal petition for writ of habeas
23 corpus. 28 U.S.C. § 2244(d)(1).

24 **A. Commencement of Limitations Period**

25 Here, the 1-year limitations period began to run when the time for seeking direct
26 review expired. *See* 28 U.S.C. § 2244(d)(1)(A) (the 1-year limitations period runs from

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28 ² The AEDPA applies to federal habeas petitions filed after its effective date, April 24, 1996. *See Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997).

1 the date on which judgment became final by the conclusion of direct review or the
2 expiration of the time for seeking such review). Following a timely direct appeal, the
3 Arizona Court of Appeals issued its decision affirming Petitioner’s convictions on
4 September 24, 2009. Petitioner did not file a petition for review. Therefore, judgment
5 became final on October 24, 2009, when the time for filing a petition for review by the
6 Arizona Supreme Court expired. *See* Ariz. R. Crim. P. 31.19(a) (“Within 30 days after
7 the Court of Appeals issues its decision, any party may file a petition for review with the
8 clerk of the Supreme Court”); *White v. Klitzkie*, 281 F.3d 920, 924, fnt. 4 (9th Cir. 2002)
9 (“it is the decision of the state appellate court, rather than the ministerial act of entry of
10 the mandate, that signals the conclusion of review”). It follows that, absent any tolling,
11 the one-year limitations period would have commenced on October 25, 2009.

12 **B. Statutory Tolling of Limitations Period**

13 Petitioner properly filed a notice of post-conviction relief on October 20, 2009.
14 (Doc. 15-1, Exh. J.) Petitioner’s post-conviction relief proceedings remained pending and
15 statutorily tolled the limitations period until August 1, 2012, when the Superior Court
16 summarily denied his motion for reconsideration of the denial of his post-conviction
17 relief petition. (Doc. 15-1, Exhs. O, Q.) *See* 28 U.S.C. § 2244(d)(2) (one-year limitations
18 period is tolled during the time that a “properly filed application for State post-conviction
19 or other collateral review with respect to the pertinent judgment or claim is pending”).
20 The limitations period therefore began to run the following day on August 2, 2012.

21 Petitioner objects to the R&R on the basis that the limitations period was
22 statutorily tolled pending the Arizona Court of Appeal’s denial of his subsequent petition
23 for review. (Doc. 21 at 4-5.) The Arizona Court of Appeals however, dismissed the
24 appeal as untimely. (Doc. 15-1, Exh. S.) Because Petitioner did not *timely* seek review,
25 no application for post-conviction relief was pending following the Superior Court’s
26 denial on August 1, 2012, and the limitations period began to run again the following day
27 on August 2, 2012. *See Evans v. Chavis*, 546 U.S. 189, 191 (2006) (an application for
28 state post-conviction review is “pending” during the period between a lower court’s

1 adverse determination and the filing of a *timely* appeal); *Robinson v. Lewis*, 795 F.3d 926,
2 928-29 (9th Cir. 2015). Further, Petitioner’s subsequent special action was not an
3 application for state post-conviction or other collateral review within the meaning of 28
4 U.S.C. § 2244(d)(2), and did not toll the limitations period. *See Duncan v. Walker*, 533
5 U.S. 167, 181 (2001). Thus, unless equitable tolling or an exception applies, the one-year
6 limitations period ran until it expired on August 2, 2013.

7 **C. Equitable Tolling of Limitations Period**

8 The Court finds that the Magistrate Judge also correctly found that Petitioner is
9 not entitled to equitable tolling of the limitations period. *See Holland v. Florida*, 560 U.S.
10 631, 649 (2010) (“a petitioner is entitled to equitable tolling only if he shows (1) that he
11 has been pursuing his rights diligently, and (2) that some extraordinary circumstance
12 stood in his way and prevented timely filing” his federal habeas petition (internal
13 quotations omitted)).

14 First, Petitioner objects to the R&R on the basis that he is entitled to equitable
15 tolling because he was pursuing his rights diligently in state court during that time. (Doc.
16 12 at 1.) This argument fails. Petitioner does not show that circumstances existed which
17 prevented him from timely filing a federal habeas petition. He offers nothing to suggest
18 that his failure to timely seek review in state court led to his ultimate failure to timely file
19 a federal habeas petition. *See Randle v. Crawford*, 604 F.3d 1047, 1058 (9th Cir. 2010).
20 Absent an affirmative misstatement of law by a court, delays in court proceedings do not
21 rise to the level of an extraordinary circumstance. *Cf. Ford v. Pliler*, 590 F.3d 782, 788–
22 89 (9th Cir. 2009); *Ortiz v. Stewart*, 149 F.3d 923, 939, 941 (9th Cir. 1998).

23 Second, Petitioner argues that he received ineffective assistance of counsel and is
24 therefore entitled to equitable tolling pursuant to *Martinez v. Ryan*, 132 S. Ct. 1309
25 (2012). The *equitable* rule in *Martinez* “applies only to the issue of cause to excuse the
26 procedural default of an ineffective assistance of ...counsel claim that occurred in a state
27 collateral proceeding” and “has no application to the operation or tolling of the § 2244(d)
28 statute of limitations” for filing federal habeas petitions. *Chavez v. Sec’y, Fla. Dep’t of*

1 *Corr.*, 742 F.3d 940, 943 (11th Cir. 2014) (citing *Arthur v. Thomas*, 739 F.3d 611, 629-
2 631 (11th Cir. 2014)). See *Manning v. Epps*, 688 F.3d 177, 189 (5th Cir. 2012) (*Martinez*
3 does not extend to the statute of limitations period under 28 U.S.C. § 2244(d)(1)(B));
4 *Madueno v. Ryan*, 2014 WL 2094189, at *7 (D. Ariz. May 20, 2014) (“*Martinez* has no
5 application to the statute of limitations in the AEDPA which governs Petitioner’s filing in
6 federal court”).

7 Third, Petitioner argues that he is entitled to equitable tolling due to his inability to
8 timely obtain copies of his legal documents from and make appointments with the prison
9 paralegal. True, in certain circumstances, a lack of access to legal resources or legal
10 records may rise to the type of extraordinary circumstance that warrants equitable tolling.
11 See *Ramirez v. Yates*, 571 F.3d 993, 1001-02 (9th Cir. 2009) (the petitioner “may be
12 entitled to equitable tolling during the period he was without his legal materials if the
13 deprivation of his legal materials made it impossible for him to file a timely § 2254
14 petition in federal court”); *Whalem/Hunt v. Early*, 233 F.3d 1146, 1148 (9th Cir. 2000)
15 (finding that unavailability of a copy of the AEDPA in a prison law library could be
16 grounds for equitable tolling). However, this is not one of those instances. Petitioner does
17 not allege that he was prevented from obtaining his legal files, or that the deprivation of
18 his legal materials impeded his ability to timely file federal habeas petition. Rather, his
19 complaints are generalized, and the fact that Petitioner filed a lengthy special petition in
20 state court during the limitations period (Doc. 15-1 Exh. T) indicates that his access to
21 legal materials or lack of assistance did not prevent him from filing a timely federal
22 habeas petition.

23 Lastly, Petitioner argues that the limitations period should be equitably tolled
24 because mail delivery at the prison has been rerouted and he does not receive his mail on
25 time. (Doc. 21 at 6.) He fails to explain, however, how delayed receipt of mail or
26 notification made it impossible for him to timely file a federal habeas petition prior to the
27 expiration of the limitations period in October 2013. See *Ramirez v. Yates*, 571 F.3d 993,
28 997-98 (9th Cir. 2009).

