

1 objections are framed strictly in terms of the Magistrate Judge’s findings and analysis of
2 equitable tolling, the Court will limit its review accordingly.

3 **II. R & R**

4 In discussing the possibility of equitable tolling, the Magistrate Judge construed
5 Sernas’ Petition as arguing, much like Sernas did in his 2012 Rule 32 State Court
6 proceedings, that *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) and *Melendez-Diaz v.*
7 *Massachusetts*, 5523 U.S. 305 (2009), “are changes in law that entitle him to file an
8 untimely petition under Arizona Rules of Criminal Procedure 32.1(f) and 32.3(b).” (Doc.
9 14 at 4:14-16) (citation omitted). The Magistrate Judge found this argument “unavailing”
10 for two reasons: (1) “*Martinez* does not address the limitations bar in Section 2244(d)(2)
11 and it does not excuse an untimely habeas petition[;]” and (2) “*Melendez-Diaz* has not
12 been made retroactive by the U.S. Supreme Court or the Ninth Circuit.” (*Id.* at 4:17-22)
13 (citations omitted).

14 Continuing, the Magistrate Judge further found that “even if *Melendez-Diaz* had
15 restarted Sernas’ one year clock, this argument still fails.” (*Id.* at 4:22-23). It fails,
16 explained the Magistrate Judge, because *Melendez-Diaz* “was issued on June 25, 2009,”
17 yet “Sernas did not raise this argument until more than three years later in his 2012 Rule
18 32 proceedings, and his alleged ignorance of this case does not entitle him to tolling.”
19 (*Id.* at 4:24-28) (citing *Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006) (“a pro se
20 petitioner’s lack of legal sophistication is not, by itself, an extraordinary circumstance
21 warranting equitable tolling”)).

22 **III. Standard of Review**

23 This Court must “make a de novo determination of those portions of the report or
24 specified proposed findings or recommendations to which” Petitioner is objecting. 28
25 U.S.C. § 636(b)(1)(C); *see also* Fed.R.Civ.P. 72(b)(3) (“The district judge must
26 determine de novo any part of the magistrate judge’s disposition that has been properly
27 objected to.”); *U.S. v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (same). This
28 means that in the present case the Court must consider *de novo* the Magistrate Judge’s
finding and Petitioner’s objections thereto that Petitioner is not entitled to equitable

1 tolling. In undergoing this review, this Court "may accept, reject, or modify, in whole or
2 in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. §
3 636(b)(1)(C); Fed.R.Civ.P. 72(b)(3).

4 **IV. Analysis**

5 Petitioner objects to the R&R's findings and analysis with respect to *Martinez* and
6 *Melendez-Diaz*. Despite what the Magistrate Judge found, Petitioner asserts *Martinez*
7 entitles him to "equitable tolling of any 'untimely' period[.]" (Doc. 17 at 4). Petitioner
8 similarly asserts, again contrary to the Magistrate Judge's finding, that *Melendez-Diaz*
9 entitles him to equitable tolling. (*Id.*). Petitioner has been unsuccessfully making these
10 arguments since at least August 30, 2012 in post-conviction State Court proceedings.
11 (Doc. 9-2 at 9). Petitioner's arguments gain nothing by repetition. This is especially so
12 given that parts of Petitioner's objections discussing *Martinez* and *Melendez-Diaz* are
13 identical to those raised in his Limited Traverse and soundly rejected by the Magistrate
14 Judge in the R&R. *Compare* Doc. 13 (2-3; and 4 at ¶ 1)) *with* Doc. 17 (2-3; 4 at ¶ 1));
15 and at 5 at ¶ (D)). Differently put, Petitioner is not expanding his objections beyond
16 those already soundly rejected in the R&R.

17 As he has done since at least August 30, 2012, Petitioner continues to assert that
18 once he learned of *Melendez-Diaz*, he diligently pursued his rights thereunder. (Doc. 17
19 at 4). Of course, Petitioner's assertion overlooks the Magistrate Judge's conclusion (to
20 which Petitioner did not object) that "*Melendez-Diaz* has not been made retroactive by
21 the U.S. Supreme Court of the Ninth Circuit[.]" (Doc. 14 at 4:21-22) (citing *Meras v.*
22 *Sisto*, 676 F.3d 1184, 1188 (9th Cir. 2012)). Thus, it is simply irrelevant whether
23 Petitioner was diligent in pursuing his rights thereunder. What is more, although
24 Petitioner admittedly is "unsophisticated in the law[]" for a variety of reasons (Doc. 9-2
25 at 9), as the Magistrate Judge also soundly reasoned, without more, that is not "an
26 extraordinary circumstance warranting equitable tolling." *See Rasberry*, 448 F.3d at
27 1154.

28 Having found no merit to Petitioner's objections,

IT IS ORDERED that Magistrate Judge Duncan's Report and Recommendation

1 (Doc.) is **accepted** and **adopted** as the Order of this Court. Petitioner's Objections (Doc.
2 17) are overruled.

3 **IT IS FURTHER ORDERED** that pursuant to Rule 11(a) of the Rules Governing
4 Section 2254 Cases, a Certificate of Appealability and leave to proceed *in forma pauperis*
5 on appeal are denied because dismissal of the Petition is justified by a plain procedural
6 bar and jurists of reason would not find the procedural ruling debatable.

7 **IT IS FINALLY ORDERED** that the Clerk of the Court shall terminate this
8 action and enter judgment accordingly.

9 **Dated** this 16th day of June, 2016.

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Honorable Diane J. Limetew
United States District Judge