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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Efrin Osuna-Chavez,

10 Petitioner,

11 v.

12 Charles L. Ryan, et al.,

13 Respondents.

No. CV-14-00990-PHX-JAT (MEA)

**ORDER**

14  
15 Pending before this Court is Petitioner's Petition for Writ of Habeas Corpus  
16 ("Petition"). The Magistrate Judge issued a Report and Recommendation ("R&R")  
17 recommending that the Petition be denied and dismissed because it is barred by the Anti-  
18 Terrorism and Effective Death Penalty Act's ("AEDPA") statute of limitations. (Doc. 11  
19 at 9). The R&R further recommended that a Certificate of Appealability be denied. (*Id.* at  
20 10).

21 **I. REVIEW OF AN R&R**

22 This Court "may accept, reject, or modify, in whole or in part, the findings or  
23 recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). It is "clear that  
24 the district judge must review the magistrate judge's findings and recommendations de  
25 novo *if objection is made*, but not otherwise." *United States v. Reyna-Tapia*, 328 F.3d  
26 1114, 1121 (9th Cir. 2003) (en banc) (emphasis in original). District courts are not  
27 required to conduct "any review at all . . . of any issue that is not the subject of an  
28 objection." *Thomas v. Arn*, 474 U.S. 140, 149 (1985) (emphasis added); *see also* 28

1 U.S.C. § 636(b)(1) (“the court shall make a *de novo* determination of those portions of  
2 the [report and recommendation] to which objection is made”). In this case, Petitioner  
3 filed Objections to the Report and Recommendation (Doc. 12), and the Court will review  
4 those objections *de novo*.

## 5 **II. FACTUAL AND PROCEDURAL BACKGROUND**

6 The R&R summarized the factual and procedural history and neither party  
7 objected to this history. (Doc. 11 at 1–4). Therefore, the Court adopts that portion of the  
8 R&R in this case. That history is as follows:

9 [A] grand jury indictment returned against Petitioner  
10 and several co-defendants on November 19, 2007, in  
11 Maricopa County Superior Court, charged Petitioner with  
12 three counts of kidnapping, each classified as a class 2  
13 dangerous felony (Counts 1–3); one count of aggravated  
14 assault, alleged as a class 3 dangerous felony (Count 4); three  
15 counts of theft by extortion, each classified as a class 2  
16 dangerous felony (Counts 5–7); one count of smuggling, a  
17 class 4 felony (Count 8); and misconduct involving weapons,  
18 a class 4 felony (Count 9). *See* Answer, Exh. A. The charges  
19 were related to Petitioner’s involvement in operating what is  
20 known as a “drop house” for illegal migrants in the Phoenix,  
21 Arizona, metropolitan area.

22 At the conclusion of a jury trial, Petitioner was found  
23 guilty as charged on Counts 1 through 8. *Id.*, Exh. C at 2-4 &  
24 Exh. B at 6-7. The jury could not reach a unanimous decision  
25 on Count 9, and, as a result, the state dismissed that count  
26 against Petitioner. *Id.*, Exh. B at 7-8. The trial court  
27 subsequently sentenced Petitioner to various consecutive and  
28 concurrent sentences of seven and five years imprisonment,  
comprising an aggregate sentence of twenty-six years  
imprisonment. *Id.*, Exh. D.

Petitioner took a timely direct appeal of his  
convictions and sentences. *Id.*, Exh. E. Petitioner’s appointed  
counsel submitted an *Anders* brief to the court, averring he  
could not find any arguable claim to raise on Petitioner’s  
behalf. *Id.*, Exh. F at 2. Petitioner “was afforded the  
opportunity to file a supplemental brief in propria persona,”  
but did not file such a brief. *Id.*, Exh. F. On March 2, 2010,  
the Arizona Court of Appeals issued a memorandum decision  
affirming Petitioner’s convictions and sentences, while

1 correcting a discrepancy in the record. *Id.*, Exh. F. Petitioner  
2 did not seek review of this decision by the Arizona Supreme  
3 Court. *Id.*, Exh. G.

4 On September 15, 2011, Petitioner docketed a notice  
5 of intent to seek state post-conviction relief pursuant to Rule  
6 32, Arizona Rules of Criminal Procedure. *Id.*, Exh. H. The  
7 state trial court noted that Petitioner's notice was not timely  
8 but, nonetheless, the court appointed counsel to "investigate  
9 the potential claims that may entitle [Petitioner] to post-  
10 conviction relief." *Id.*, Exh. I at 2. Petitioner's appointed post-  
11 conviction counsel reviewed the record and averred to the  
12 court he could not find any colorable claims to raise on  
13 Petitioner's behalf. *Id.*, Exh. J at 1-2. Petitioner filed a pro se  
14 petition in his Rule 32 action, asserting he was denied the  
15 effective assistance of counsel in his trial proceedings. *Id.*,  
16 Exh. K. Petitioner subsequent[ly] sought to amend his Rule  
17 32 pleading, asserting he had failed to include "2 additional  
18 grounds that were omitted along with 2 exhibits." *Id.*, Exh. M  
19 at 1. Petitioner also asserted that he wanted to raise a newly-  
20 discovered-evidence claim under Rule 32.1(e) and that his  
21 failure to timely file his Rule 32 action was not due to his  
22 own error, citing Rule 32.1(f). *Id.*, Exh. M at 2.

23 In a decision entered August 23, 2012, the state trial  
24 court dismissed Petitioner's Rule 32 action as both untimely  
25 and for failing to state a colorable claim for relief. *Id.*, Exh. N.  
26 Petitioner sought review of this decision by the Arizona Court  
27 of Appeals, which granted review and denied relief in a  
28 decision entered December 23, 2013. *Id.*, Exh. P. The  
appellate court concluded that the petition was not timely and,  
as a result, that Petitioner's claims of ineffective assistance of  
counsel were precluded. *Id.*, Exh. P at 3-5. The appellate  
court also concluded that Petitioner had abandoned his claim  
of newly discovered evidence, and further found that a claim  
under Rule 32.1(f) was not cognizable because Petitioner was  
not a "pleading defendant." *Id.*, Exh. P at 4 & n.2.

(Doc. 11 at 1-4).

### III. R&R

As indicated above, on July 10, 2014, the Magistrate Judge issued an R&R recommending that the Petition be denied as barred by the AEDPA's statute of limitations. (*Id.* at 1-9). As explained by the Magistrate Judge, the AEDPA, 28 U.S.C.

1 § 2241(d)(1), provides a one year statute of limitations for state prisoners to file a petition  
2 for writ of habeas corpus in federal court. (*Id.* at 4 (citing *Espinoza Matthews v.*  
3 *California*, 432 F.3d 1021, 1025 (9th Cir. 2005); *Lott v. Mueller*, 304 F.3d 918, 920  
4 (9th Cir. 2002))). That period generally commences on “the date on which the judgment  
5 became final by the conclusion of direct review or the expiration of the time for seeking  
6 such review.” (*Id.* at 4 (quoting 28 U.S.C. § 2244(d)(1)(A))). Examining Petitioner’s  
7 procedural history in state court, the Magistrate Judge concluded that Petitioner’s  
8 conviction became final on April 2, 2010. (*Id.* at 5). That is when Petitioner’s time to  
9 seek review of the Arizona Court of Appeals’ March 2, 2010 decision affirming his  
10 convictions and sentences in his direct appeal expired. (*Id.* at 4–5). The Magistrate Judge  
11 determined that this is when the one-year statute of limitations began to run, thus expiring  
12 on April 2, 2011, absent any statutory tolling. (*Id.* at 5).

13 In regard to statutory tolling, the Magistrate Judge explained that “a petitioner is  
14 entitled to tolling of the statute of limitations during the pendency of a ‘properly-filed  
15 application for state post-conviction or other collateral review with respect to the  
16 pertinent judgment or claim.’” (*Id.* at 4 (quoting 28 U.S.C. §2244(d)(2)). Petitioner’s state  
17 Rule 32 action, however, was filed in September, 2011, after the limitations period for his  
18 federal habeas petitions expired. (*Id.* at 5). The Magistrate Judge concluded that,  
19 accordingly, this action “could not and did not restart the statute of limitations with  
20 regard to Petitioner’s action for federal habeas relief.” (*Id.*).

21 Turning to equitable tolling, the Magistrate Judge explained that a petitioner  
22 seeking equitable tolling of the limitations period “must establish two elements: ‘(1) that  
23 he has been pursuing his rights diligently, and (2) that some extraordinary circumstances  
24 stood in his way.’” (*Id.* (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005))). The  
25 Magistrate Judge determined that Petitioner did not state “an adequate basis for equitable  
26 tolling of the statute of limitations.” (*Id.* at 7). The Magistrate Judge explained that  
27 Petitioner failed the second prong of this test because the circumstances that Petitioner  
28 claims previously impeded his pursuit of his rights are not “‘extraordinary’ circumstances

1 that make it impossible to file a timely habeas petition.” (*Id.* at 8).

2 Finally, regarding a claim of actual innocence, the Magistrate Judge noted that a  
3 credible showing of Petitioner’s actual innocence of the crimes of conviction would  
4 entitle him to an equitable exception to the statute of limitations. (*Id.* (citing *Lee v.*  
5 *Lampert*, 653 F.3d 929, 934 (9th Cir. 2011) (en banc))). To qualify for such an exception,  
6 a “petitioner must show ‘it is more likely than not that no reasonable juror would have  
7 convicted him in light of the new evidence.’” (*Id.* (quoting *Lee*, 653 F.3d at 938)). The  
8 Magistrate Judge found that Petitioner made no showing of actual innocence and is  
9 therefore not entitled to any such exception to the statute of limitations based on an actual  
10 innocence theory. (*Id.*).

11 Based on Petitioner’s failure to file his habeas action within the statute of  
12 limitations and the finding that Petitioner failed to state a sufficient basis for statutory or  
13 equitable tolling of the statute of limitations, the Magistrate Judge determined that he  
14 need not consider the merits of Petitioner’s claims. (*Id.*).

#### 15 **IV. PETITIONER’S OBJECTIONS**

16 Petitioner does not object to the Magistrate Judge’s application of the AEDPA’s  
17 statute of limitations to his procedural history and the Court adopts those  
18 recommendations. Rather, Petitioner objects to the Magistrate Judge’s conclusion that the  
19 AEDPA one-year statute of limitations expired because Petitioner failed to establish that  
20 statutory and equitable tolling should apply. (Doc. 12 at 2, 6).

##### 21 **A. Statutory Tolling**

22 Petitioner argues that he is entitled statutory tolling of the AEDPA statute of  
23 limitations during the time that his notice of intent to seek post-conviction relief and  
24 subsequent Rule 32 petition were pending in state courts. (*Id.* at 6). In support of this  
25 contention, Petitioner puts forth arguments in an attempt to establish that the notice of  
26 intent to seek post-conviction relief was properly filed. (*Id.* at 3–6). For example,  
27 Petitioner argues that his filing of the notice was timely and that both the Arizona  
28 Superior Court and the Arizona Court of Appeals erred in holding to the contrary. (*Id.* at

1 3–6). Petitioner further argues that the Arizona appellate court erred when it ruled that his  
2 claim pursuant to Arizona Rule of Criminal Procedure 32.1(f) was not cognizable  
3 because Petitioner is not a pleading defendant. (*Id.* at 3–4). Petitioner contends that the  
4 Magistrate Judge erroneously “relies” on these state court findings in the R&R. (*Id.* at 3).

5       However, although the R&R does make reference to the state court findings that  
6 Petitioner disputes, it does so only in the context of setting out the factual and procedural  
7 background of the case. (Doc. 11 at 3–4). The Magistrate Judge did not rely on these  
8 findings in determining that Petitioner is not entitled to statutory tolling. (*Id.* at 5). The  
9 Magistrate Judge points out that “Petitioner’s convictions and sentences became final on  
10 April 2, 2010, when the time expired to seek review of the Court of Appeals’ decision  
11 denying relief in Petitioner’s direct appeal.” (*Id.* (citing *Bowen v. Roe*, 188 F.3d 1557,  
12 1159, 1160 (9th Cir. 1999)). “Accordingly, the statute of limitations began to run on April  
13 2, 2010, and expired on April 2, 2011.” (*Id.*). Petitioner did not file his notice of intent to  
14 seek post-conviction relief until September 2011, several months past the expiration of  
15 the statute of limitations. (*Id.*). Therefore, the Magistrate Judge made no determination as  
16 to whether Petitioner’s notice and subsequent petition for post-conviction relief were  
17 properly filed—and thus served as grounds for statutory tolling—because the AEDPA  
18 statute of limitations expired prior to either of those filings. (*Id.*). Even if valid, a state  
19 filing made after the statute of limitations expired cannot restart the statute of limitations  
20 with regard to a petitioner’s action for federal habeas relief. *See, e.g., Pace*, 544 U.S. at  
21 417; *United States v. Buckles*, 647 F.3d 883, 889 (9th Cir. 2011). Accordingly, Petitioner  
22 has not made sufficient allegations to qualify for statutory tolling of the statute of  
23 limitations.

#### 24       **B.     Equitable Tolling**

25       Petitioner also argues that he is entitled to equitable tolling of the AEDPA statute  
26 of limitations and objects to the Magistrate Judge’s finding to the contrary in the R&R.  
27 (Doc. 12 at 2, 6). In support of this objection, Petitioner relies on the same arguments he  
28 puts forth his objection to the Magistrate Judge’s finding that statutory tolling does not

1 apply, including that the state courts' erred in finding his notice of intent to file for post-  
2 conviction relief was untimely. (*Id.* at 3–6). Petitioner further argues that the only reason  
3 that he filed his notice of intent late was that Petitioner's appointed counsel failed to file  
4 it despite his requests for her to do so (*Id.* at 3, 5). Petitioner contends that his counsel's  
5 failure was thus beyond his control and entitles Petitioner to equitable tolling of the  
6 AEDPA statute of limitations. (*Id.* at 3, 5–6).

7 As stated above, in order for Petitioner to qualify for equitable tolling, he must  
8 establish two elements: “(1) that he has been pursuing his rights diligently, and (2) that  
9 some extraordinary circumstances stood in his way.” *Pace*, 544 U.S. at 418. The Supreme  
10 Court has held that there is no right to legal assistance in seeking any type of post-  
11 conviction relief, and, as a result, lack of legal assistance in seeking post-conviction relief  
12 cannot form the basis for equitable tolling. *Lawrence v. Florida*, 127 S. Ct. 1079, 1085  
13 (2007) (“Attorney miscalculation is simply not sufficient to warrant equitable tolling,  
14 particularly in the post[-]conviction context where prisoners have no constitutional right  
15 to counsel.”). Petitioner's counsel's alleged failure thus cannot qualify as the  
16 “extraordinary circumstances” that made it “impossible to file a petition on time.” *Porter*  
17 *v. Ollison*, 620 F.3d 952, 959 (9th Cir. 2010).

18 Furthermore, even if Petitioner's counsel did fail to follow his request to file the  
19 notice, this argument does not explain why well more than a year passed by before  
20 Petitioner filed the notice with the Superior Court. Petitioner filed the notice of intent to  
21 seek post-conviction relief in September 2011, whereas the Court of Appeals issued the  
22 mandate affirming Petitioner's conviction and sentencing issued in April 2010. (Doc. 11  
23 at 2–3). Thus, Petitioner has failed to establish that “he has been pursuing his rights  
24 diligently.” *Pace*, 544 U.S. at 418. As the Magistrate Judge stated in the R&R, “A  
25 petitioner's pro se status, ignorance of the law, and lack of legal representation during the  
26 applicable filing period do not constitute circumstances justifying equitable tolling  
27 because such circumstances are not ‘extraordinary.’” (Doc. 11 at 8 (citing *Chaffer v.*  
28 *Prosper*, 592 F.3d 1046, 1048–49 (9th Cir. 2010); *Waldron-Ramsey v. Pacholke*, 556

1 F.3d 1008, 1011–14 (9th Cir. 2006); *Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir.  
2 2006); *Shoemate v. Norris*, 390 F.3d 595, 598 (8th Cir. 2004)). Thus, Petitioner has not  
3 made sufficient allegations regarding extraordinary circumstances or his diligence to  
4 qualify for equitable tolling of the statute of limitations. Accordingly, Petitioner is not  
5 entitled to equitable tolling based on his trial counsel’s alleged failure to file his notice  
6 for post-conviction relief when he so requested.

7 **V. CONCLUSION**

8 Based on the foregoing,

9 **IT IS ORDERED** that the Report and Recommendation (Doc. 11) is accepted and  
10 adopted; the objections (Doc. 12) are overruled. The petition is denied with prejudice,  
11 and the Clerk of the Court shall enter judgment accordingly.

12 **IT IS FURTHER ORDERED** that Pursuant to Rule 11 of the Rules Governing  
13 Section 2254 Cases, in the event Petitioner files an appeal, the Court denies issuance of a  
14 certificate of appealability, because dismissal of the Petition is based on a plain  
15 procedural bar, and jurists of reason would not find this Court’s procedural ruling  
16 debatable. See *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Further, Petitioner has not  
17 made a substantial showing of the denial of a constitutional right. See 28 U.S.C.  
18 § 2253(c)(2).

19 Dated this 29th day of August, 2014.

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24 James A. Teilborg  
25 Senior United States District Judge  
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