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

9 Nicholas Lew Blackwater,

10 Petitioner,

11 v.

12 Charles L. Ryan, et al.,

13 Respondents.
14

No. CV-14-01533-PHX-JAT

ORDER

15 Pending before this Court is Nicholas Blackwater's ("Petitioner") Petition for Writ
16 of Habeas Corpus ("Petition"). (Doc. 1.) The Magistrate Judge issued a Report and
17 Recommendation ("R&R") recommending that the Petition be denied and dismissed with
18 prejudice because the one year statute of limitations established by the Anti-Terrorism
19 and Effective Death Penalty Act ("AEDPA") has expired. (Doc. 12 at 13.) The R&R
20 further recommended that a Certificate of Appealability be denied. (*Id.*)

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

22 After receiving an R&R, the Court "may accept, reject, or modify, in whole or in
23 part, the findings or recommendations made by the magistrate judge." 28 U.S.C.
24 § 636(b)(1). A district judge "must review the magistrate judge's findings and
25 recommendations de novo *if objection is made.*" *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 R&R and the Court will review Petitioner’s Objections *de novo*.
4 (Doc. 13.)

5 **II. FACTUAL AND PROCEDURAL BACKGROUND**

6 On July 1, 2005, a Maricopa County Grand Jury indicted Petitioner on 14 felony
7 Counts. (Doc. 7-1 at 1-8.) The facts underlying Petitioner’s indictment are as follows: on
8 multiple occasions, Petitioner picked up women in his car, took them to a remote location
9 and raped them, in some instances threatening them with a knife. (*Id.* at 21-24.) These
10 events occurred on June 16, 1997, August 28 or 29, 1997, June 22, 1999, and October 26,
11 2001. (*Id.*) On July 30, 2000, another woman claimed that Petitioner raped her; however,
12 officers had no means of contacting the victim after the initial police report. (Doc. 12 at
13 4.)

14 On February 22, 2006, Petitioner entered a plea agreement. (Doc. 7-1 at 11-16.)
15 He pleaded guilty to: Counts 4, 9, and 14 as charged, sexual assault, class 2 felonies;
16 Count 5 as charged, kidnapping, a class 2 felony; Count 3 as charged, sexual abuse, a
17 class 5 felony; and Count 6 as amended, attempted sexual assault, a class 3 felony. (*Id.*)
18 In exchange, the State agreed to dismiss Counts 1, 2, 7, 8, 10, 11, 12, and 13; the
19 allegations of dangerousness, and not to file charges from the offense on July 30, 2000.
20 (*Id.*) On March 23, 2006, Petitioner was sentenced to an aggravated term of 14 years of
21 imprisonment on Count 4; to an aggravated term of 12.5 years of imprisonment on Count
22 5, to be served consecutively to Count 4; to an aggravated term of 14 years of
23 imprisonment on Count 9, to be served consecutively to Count 5; to an aggravated term
24 of 14 years of imprisonment on Count 14, to be served consecutively to Count 9. (Doc. 7-
25 1 at 40-46.) Petitioner was also placed on lifetime probation for Counts 3 and 6, to
26 commence upon discharge from prison for each separate offense in Counts 4, 5, 9, and 14
27 (*Id.*)

28 On March 23, 2006, Petitioner was sentenced and signed a notice of rights. (Doc.

1 7-1 at 47-49.) The notice of rights explained that by entering into a plea agreement,
2 Petitioner waived his right to appeal, and a notice of post-conviction relief must be filed
3 “within 90 days of the entry of judgment,” otherwise he “may never have another
4 opportunity to have any errors made in [his] case corrected by another court.” (*Id.*)
5 Petitioner claims he is unhappy with his sentence, it was not part of his plea agreement,
6 and he is entitled to post-conviction relief. (Doc. 1 at 6-9.) Petitioner also claims that he
7 asked his attorney to file a notice of post-conviction relief, which his attorney failed to
8 do. (Doc. 13 at 1-3.)

9 On April 6, 2007, 379 days after Petitioner was sentenced, Petitioner filed a notice
10 of post-conviction relief, which was dismissed by the state court as untimely. (Doc. 7-1 at
11 50-54.) On both August 20, 2008, and February 20, 2009, Petitioner filed a request for
12 status of defendant’s post-conviction relief. (Doc. 7-1 at 57-61.) Petitioner was provided
13 with a copy of a minute entry denying his petition for post-conviction relief as untimely.
14 (Doc. 7-1 at 62-63.) On November 16, 2010, Petitioner filed a second petition for post-
15 conviction relief, which was also dismissed by the state court as untimely. (Doc. 7-1 at
16 64-75.) On March 6, 2012, Petitioner filed a third petition for post-conviction relief,
17 which the state court dismissed as untimely as well. (Doc. 7-1 at 86-114.)

18 After all of his petitions for post-conviction relief were denied by the state court,
19 Petitioner filed his Petition for Writ of Habeas Corpus in this Court on July 8, 2014.
20 (Doc. 1.)

21 **III. GOVERNING LAW AND RECOMMENDATION**

22 As stated above, the Magistrate Judge issued an R&R recommending that the
23 Petition be denied and dismissed with prejudice. (Doc. 12.) As explained by the
24 Magistrate Judge, a state prisoner has one year from the time a sentence becomes final to
25 file a petition for writ of habeas corpus in federal court. 28 U.S.C. § 2244(d)(1). Under
26 Arizona Rule of Criminal Procedure 32 (“Rule 32”), a petition for post-conviction relief
27 is a form of direct review for defendants who entered guilty pleas. *Summers v. Schriro*,
28 481 F.3d 710, 711 (9th Cir. 2007). A conviction becomes final under Rule 32 once an

1 “of-right” proceeding is completed; or the time to file a petition for post-conviction relief
2 expires. *Id.* The Magistrate Judge found that Petitioner did not file a petition for post-
3 conviction relief within the ninety day deadline set by Rule 32. (Doc. 12 at 13.)
4 Therefore, Petitioner’s AEDPA statute of limitations began to run when that ninety day
5 period expired. (*Id.*)

6 The Magistrate Judge explained that the statute of limitations is generally tolled
7 after an individual properly files a notice of post-conviction relief. (Doc. 12 at 10.) The
8 time during which a case is pending¹ is not counted against the petitioner’s federal habeas
9 statute of limitations, and the petitioner is entitled to statutory tolling. *See Lott v. Mueller*,
10 304 F.3d 918, 921 (9th Cir. 2002). When a petition for post-conviction relief is not filed
11 within the state court’s time limit, that petition is not considered to be properly filed.
12 *Pace v. DiGuglielmo*, 544 U.S. 408, 413 (2005). If a petition is not properly filed, that
13 petitioner is not entitled to statutory tolling. *Id.*

14 Under Rule 32, once post-conviction relief is concluded, the statute of limitations
15 under the AEDPA begins to run. *Summers*, 481 F.3d at 710. For example, if two
16 petitions for post-conviction relief are denied, the time between those two petitions for
17 post-conviction relief does not toll the statute of limitations since no petition is
18 “pending.” *Biggs v. Duncan*, 339 F.3d 1045, 1048 (9th Cir. 2004). Additionally, the
19 Magistrate Judge noted that filing a new petition for post-conviction relief does not hit a
20 reset button on a statute of limitations that has already run before the new petition was
21 filed. *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003).

22 Alternatively, if a petitioner is able to show that: (1) he or she has been pursuing
23 his or her rights diligently; and, (2) that some extraordinary circumstances prevented the
24 petitioner from timely filing, he or she may be entitled to equitable tolling. *Holland v.*
25 *Florida*, 560 U.S. 631, 645 (2010) (quoting *Pace*, 544 U.S. at 418). The Ninth Circuit
26 Court of Appeals has held that an extraordinary circumstance must be beyond the

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28 ¹ A petition is pending after it is properly filed in state court, but before that court grants or denies the petition. *Chavis v. Lemarque*, 382 F.3d 921, 925 (9th Cir. 2004).

1 Petitioner’s control and make it impossible for the Petitioner to file a petition for post-
2 conviction relief on time. *Alvarez-Machain v. United States*, 107 F.3d 696, 701 (9th Cir.
3 1996).

4 The Magistrate Judge concludes that Petitioner’s Petition is untimely. (Doc. 12
5 at 11.) The ninety day time limit to file for post-conviction relief ran in state court on
6 June 21, 2006 and the AEDPA statute of limitations began to run the next day. (*Id.*)
7 According to the Magistrate Judge, the statute of limitations expired one year later, on
8 June 21, 2007. (*Id.*) Petitioner filed his Petition in this Court on July 8, 2014. (*Id.*) Thus,
9 unless Petitioner is able to show that the statute of limitations should have been tolled, his
10 Petition is more than seven years late. (*Id.*)

11 The Magistrate Judge found that Petitioner is not entitled to statutory or equitable
12 tolling. (*Id.*) The Magistrate Judge found that the untimely notice of post-conviction
13 relief was not properly filed and that it did not prompt statutory tolling to the statute of
14 limitations. (*Id.* at 12.) Additionally, the Magistrate Judge found that Petitioner has not
15 given any valid reason for the untimeliness of his Petition, and that he is not entitled to
16 any equitable tolling. (*Id.* at 13.) The Magistrate Judge concluded that the Petition was
17 filed seven years after the one year statute of limitations period expired. (*Id.* at 11.)

18 **IV. PETITIONER’S OBJECTIONS**

19 Petitioner argues that the State obstructed his right to post-conviction relief by
20 denying him counsel and violating his Sixth Amendment rights. (Doc. 13 at 1-2.) He
21 claims that due to this obstruction, he is entitled to equitable tolling. (*Id.* at 2.) Petitioner
22 further claims that he did not waive his appellate rights. (*Id.* at 3-4.) He claims that
23 because he was denied counsel, he could not have waived his right to appeal. (*Id.*)
24 Lastly, Petitioner claims that his sentence was “28.5 years above the statutory
25 maximum.” (*Id.* at 4.)

26 In addition to the plea agreement, Petitioner signed a notice of rights of review.
27 (Doc. 7-1 at 48.) This notice explained that by signing a plea agreement, he waived his
28 right to appeal, and could only pursue his rights through post-conviction relief. (*Id.*) The

1 notice of rights of review explained in bold letters that Defendant had ninety days from
2 his sentencing to petition for post-conviction relief. (*Id.*) Petitioner signed the document
3 on March 23, 2006. (*Id.*)

4 The Court will review all of Petitioner's Objections to the R&R de novo.

5 **A. STATE OBSTRUCTION**

6 Petitioner claims that he requested his counsel file a notice of post-conviction
7 relief immediately after his sentence, but counsel did not do so. (Doc. 13 at 2.) After
8 waiting one year and not hearing a response, Petitioner filed a notice of post-conviction
9 relief himself on April 6, 2007. (Doc. 7-1 at 50-54.) Petitioner claims that he acted
10 diligently, and his notice of post-conviction relief is not untimely due to the impediment
11 created by the State; specifically that his counsel did not file his notice of post-conviction
12 relief. (Doc. 13 at 3.) Petitioner claims that his state court remedies were not exhausted
13 until recently and thus, the statute of limitations had not passed. (*Id.*) Alternatively,
14 Petitioner claims he is entitled to tolling due to his counsel's failure to file a notice of
15 post-conviction relief. (*Id.* at 2.)

16 Petitioner's attorney was not acting on behalf of the State; thus, his attorney is not
17 a state impediment to Petitioner's ability to file a notice of post-conviction relief.
18 Petitioner's Sixth Amendment rights to counsel were not violated. Petitioner was
19 provided counsel who assisted him in obtaining a plea bargain. Generally, a prisoner
20 does not have a Constitutional right to counsel on collateral review. *Lawrence v. Florida*,
21 549 U.S. 327, 337 (2007). Petitioner did not have a right to have his trial counsel file his
22 petition for post-conviction relief; thus, Petitioner's Sixth Amendment rights were not
23 violated when Petitioner's trial counsel neglected to file a notice of post-conviction
24 relief.²

25 Petitioner cites to a Ninth Circuit Court of Appeals case in which a petition for
26 writ of habeas corpus by an individual who claimed ineffective assistance of counsel was

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28 ² For purposes of this Order, the Court has accepted Petitioner's claim that he asked his trial counsel to file his notice of post-conviction relief as true.

1 reviewed on the merits. *United States v. Sandoval-Lopez*, 409 F.3d 1193, 1196 (9th Cir.
2 2005). In *Sandoval-Lopez*, the petitioner did not file an untimely petition for writ of
3 habeas corpus, which is why his petition was considered on the merits. *Id.* at 1197. In
4 this case, however, Petitioner's Petition was filed over one year after his conviction
5 became final in state court and is barred by the statute of limitations.

6 In his Objections, Petitioner argues that he is entitled to equitable tolling because
7 he has proved that he: (1) has pursued his rights diligently; and, (2) that an extraordinary
8 circumstance stood in his way and prevented him from timely filing. *See Holland*, 560
9 U.S. at 645; (Doc. 13 at 3.) Regardless of whether Petitioner was pursuing his rights
10 diligently, there is no evidence of an extraordinary circumstance beyond Petitioner's
11 control preventing him from filing his Petition earlier. Although Petitioner claims that
12 counsel was asked to file a petition for post-conviction relief and did not, Petitioner has
13 shown nothing that prevented him from filing his petition for post-conviction relief
14 sooner himself. Thus, Petitioner is not entitled to equitable tolling of the statute of
15 limitations for his federal habeas Petition.

16 Even if this Court granted Petitioner equitable tolling and the statute of limitations
17 had not begun to run on the ninetieth day after his sentencing, his Petition for Writ of
18 Habeas Corpus in this Court was still filed late. In other words, if this Court gave
19 Petitioner the benefit of his late notice of post-conviction relief, that notice was denied on
20 April 24, 2007. (Doc. 7-1 at 56.) Thus, on April 24, 2007, Petitioner's statute of
21 limitations to file his Petition for Writ of Habeas Corpus began to run. In that
22 circumstance, the statute of limitations expired on April 24, 2008. Petitioner's Petition
23 was not filed in this Court until July 18, 2014, making it untimely.

24 **B. RIGHT TO APPEAL**

25 Petitioner claims that he never waived his right to appeal in state court. (Doc. 13 at
26 3.) In signing his plea agreement, Petitioner explicitly waived his right to appeal. (Doc.
27 7-1 at 11-16.) Petitioner had a right to trial, but he chose to enter into a plea agreement
28 and waived his right to appeal in the process. (*Id.* at 48.) Petitioner cannot revoke the

1 waiver to which he had agreed. *United States v. Michelson*, 141 F.3d 867, 872 (8th Cir.
2 1998). In order to preserve the value of the waiver in a plea agreement, that waiver must
3 be upheld. *Id.* at 873. If a defendant could retract his or her waiver, a plea agreement
4 would become an empty promise. *Id.* After waiving his right to appeal, Petitioner's only
5 remedy was to file a notice of post-conviction relief within ninety days of his sentencing,
6 which Petitioner failed to do.

7 **C. SENTENCING**

8 Petitioner claims that his sentence was illegal, and that he was sentenced to twenty
9 eight and a half years beyond the maximum sentence allowed. (Doc. 13 at 3.) Petitioner
10 would have had to raise that issue at the time of sentencing or in his notice of post-
11 conviction relief. Petitioner's sentence length does not change the fact that his Petition
12 for Writ of Habeas Corpus must be filed within the one year statute of limitations set
13 forth by the AEDPA. Once Petitioner's ninety days to file a notice for post-conviction
14 relief had passed, on June 21, 2006, Petitioner's conviction was final and Petitioner had
15 one year to Petition for Writ of Habeas Corpus. Therefore, the Court will not reach the
16 merits of this Claim.

17 **V. CONCLUSION**

18 Based on the foregoing,

19 **IT IS ORDERED** that the Report and Recommendation, (Doc. 12), is accepted
20 and adopted and Petitioner's Objections, (Doc. 13), are overruled. Petitioner's Petition
21 for Writ of Habeas Corpus, (Doc. 1), is denied and dismissed with prejudice, and the
22 Clerk of the Court shall enter judgment accordingly.

23 **IT IS FURTHER ORDERED** that the Court denies issuance of a Certificate of
24 Appealability because dismissal of the Petition is based on a plain procedural bar, and
25 jurists of reason would not find this Court's procedural ruling debatable.

26 Dated this 21st day of July, 2015.

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James A. Teilborg
Senior United States District Judge