

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Donald Lee Cook, Jr.,
Petitioner,
v.
Charles L. Ryan, et al.,
Respondents.

No. CV-15-00013-PHX-NVW (JZB)

**REPORT AND
RECOMMENDATION**

TO THE HONORABLE NEIL V. WAKE, UNITED STATES DISTRICT JUDGE:

Petitioner Donald Lee Cook has filed a *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (Doc. 1.)

I. SUMMARY OF CONCLUSION

Petitioner's direct appeal concluded on September 3, 2013 and his conviction became final on October 8, 2013. The trial court dismissed Petitioner's PCR petition on August 13, 2013 and he did not submit a timely petition to the Arizona Court of Appeals. Petitioner's PCR review thus concluded on September 17, 2013, the deadline for a timely petition for review to the Arizona Court of Appeals. Because Petitioner's conviction was final on the later date of October 8, 2013, that is the date starting the one-year limitations period. Petitioner was required to file this Petition by October 8, 2014, but it was not mailed until December 9, 2014. Because there are no grounds for equitable tolling, the Court concludes that Petitioner's claims are untimely. Therefore, the Court will recommend that the Petition be denied and dismissed with prejudice.

1 **II. BACKGROUND**

2 **a. Summary of Investigation of Petitioner’s Crimes**

3 In January 2005, Phoenix Police Detective Jason Milburn was notified by the
4 National Center for Missing & Exploited Children (“NCMEC”) of a complaint from
5 Yahoo. (Doc. 21, Ex. A at 14-17.) Yahoo notified NCMEC that an account holder had
6 uploaded child pornography, and forwarded NCMEC copies of the uploaded pictures.
7 (*Id.* at 17-19.) Detective Milburn subpoenaed the records from Yahoo, and received the
8 Internet Protocol (“IP”) address linked to the uploaded child pornography, as well as
9 information about when the images had been uploaded. (*Id.*) Yahoo also provided
10 Detective Milburn with Petitioner’s address in response to the subpoena. (*Id.* at 20.)
11 Detective Milburn obtained a search warrant for Petitioner’s residence. (*Id.*)

12 On February 9, 2005, Phoenix Police detectives and officers served the search
13 warrant. (*Id.*) Petitioner was not at his apartment during the search. (*Id.* at 26.) Inside
14 Petitioner’s apartment, Detectives found computers, computer equipment, hard drives,
15 and compact disks. (*Id.* at 22–24, 35, 83-84.) Detectives examined 10 to 15 hard drives
16 and hundreds of compact disks. (*Id.* at 89.) Detectives later determined there were at least
17 5,000 sexually exploitive images of minors in Petitioner’s possession. (*Id.* at 90.)

18 Detective Milburn discovered “a picture [on the wall] of a young female” who
19 looked like “a young girl that I believed I recognized from my investigation.” (*Id.* at 25.)
20 Among the newly-found child pornography were several photographs and video files of
21 Petitioner engaging in sexual conduct with the same child victim, who was later
22 identified as Jaymee. (*Id.* at 85-86.) Several of the file names were labeled “Jaymee and
23 Don or Jaymee and Me.” (*Id.* at 92.) Detectives later determined that Petitioner previously
24 lived in a residence where the young girl and her parents resided. (*Id.* at 49-52, 59-60.)
25 “The files contained images showing Appellant engaging in sexual conduct with a young
26 girl (‘the victim’). The victim’s father testified that the girl shown on the video files was
27 his daughter, and she was approximately ten years old at the time of the incident.” *State*

1 v. *Cook*, No. 1 CA-CR 13-0054, 2013 WL 4734036, at *1 (Ariz. Ct. App. Sept. 3, 2013).¹
2 (*See also*, Doc. 21, Ex. A at 63.)

3 When Petitioner returned home that night, Detective Wilburn arrested him, read
4 him his Miranda rights, and questioned him. (*Id.* at 26-29.) During questioning,
5 Detective Wilburn showed Petitioner a “cropped” version of the original child
6 pornography photo sent from Yahoo, which only showed the face of the child. (*Id.* at 29-
7 30.) Petitioner admitted that he knew her and said “she’s just like a really good family
8 friend.” (*Id.* at 30.) Petitioner admitted he placed Jaymee’s photograph on his Yahoo
9 page. (*Id.* at 32.)

10 Detective Guzman subsequently conducted a full forensic examination of
11 Petitioner’s computers and equipment over the next several months. (*Id.* at 88-101.)
12 Detective Guzman found an image on CD’s and a hard drive titled, “IMG11.JPG,” which
13 was the same image sent to law enforcement by NCMEC. (*Id.* at 96-97.) Two videos
14 (“Video2.AVI” and “Video3.AVI”) showed Petitioner’s sexual conduct with Jaymee. (*Id.*
15 at 97–107.) The title for the “Video3.AVI” file had been changed to “JaymeeAtNine
16 Years Old” or “JaymeeNine-Year-Old Daughter.” (*Id.* at 98.) Ultimately, the evidence
17 found by Detective Guzman formed the bases for the criminal counts charged against
18 Petitioner.

19 **b. Charges, Convictions, and Sentencing of Petitioner**

20 Between February and August 2005, Petitioner was charged in Maricopa County
21 Superior Court by three separate indictments stemming from the above facts. The first
22 indictment alleged seven counts of sexual exploitation of a minor, class 2 felonies and
23 dangerous crimes against children (CR 2005–032990). (Doc. 21, Ex. C.) The second
24 indictment alleged one count of sexual exploitation of a minor (CR 2005–104441). (Doc.
25 21, Ex. D.) On September 5, 2006, the trial court granted the State’s motion to
26 consolidate the first and second cases for trial (CR 2005–032990 & CR 2005–104441,

27
28 ¹ The facts as recited by the Arizona Court of Appeals are presumed true for purposes of this court's review under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). *See* 28 U.S.C. § 2254(e)(1).

1 respectively). (Doc. 21, Ex. F.) The third indictment alleged two counts of sexual
2 conduct with a minor and molestation of a child, all class 2 felonies and dangerous crimes
3 against children (CR 2005–033017). (Doc. 21, Ex. E.) The trial for the third indictment
4 followed the consolidated trial.

5 In August 2006, and prior to both trials, Petitioner requested to represent himself.
6 *State v. Cook*, No. 1 CA-CR 09-0801, 2011 WL 3211052, at *2 (Ariz. Ct. App. July 28,
7 2011). The request was granted, and advisory counsel was also appointed. (*Id.*)

8 On February 20, 2008, at the first trial, the jury convicted Petitioner of all eight
9 counts (in total from both cause numbers). (Doc. 21, Ex. G.) These convictions are the
10 subject of Petitioner’s related Petition in 14-CV-02395-NVW (JZB).

11 On September 11, 2009, the trial court terminated Petitioner’s self-representation
12 due to delays in trial proceedings. The court “converted” advisory counsel to trial
13 counsel. *Cook*, 2011 WL 3211052, at *3.

14 A second trial began in September, 2009. *State v. Cook*, No. 1 CA-CR 09-0804,
15 2011 WL 4795374, at *1 (Ariz. Ct. App. Oct. 11, 2011). Petitioner was found guilty in
16 the second trial (third indictment) (CR2005–033017) of two counts of sexual conduct
17 with a minor. *Cook*, 2011 WL 4795374, at *1.²

18 On October 23, 2009, the trial court sentenced Petitioner for all three cases. The
19 consolidated trial had eight counts of sexual exploitation of a minor. Petitioner was
20 sentenced to the presumptive term of 17 years for each count, all to run consecutively.
21 (*Id.*) As to the second trial, for two counts of sexual misconduct with a minor, Petitioner
22 was sentenced to life without the possibility of parole until Petitioner served 35 years, to
23 run consecutively to each other and consecutively to the sentences imposed from the first
24 trial. (*Id.*)

25 **c. Petitioner’s Direct Appeal, Retrial, and Sentencing**

26 On October 11, 2011, the Arizona Court of Appeals vacated Petitioner’s sentences
27 from the first trial. *Cook*, 2011 WL 4795374, at *2. The court of appeals found that the

28 ² The government previously dismissed the child molestation count. *Cook*, 2011
WL 3211052, at *1.

1 trial court erred in terminating [Petitioner’s] self-representation before it sentenced him.
2 (*Id.*) Because Petitioner represented himself during his first trial, the court of appeals
3 affirmed those convictions. (*Id.*) On remand, the trial court again found that the
4 presumptive sentences were “appropriate” for each of the crimes. *State v. Cook*, No. 1
5 CA-CR 12-0073, 2012 WL 3100553, at *1 (Ariz. Ct. App. July 31, 2012). The
6 presumptive term was 17 years for each offense, to run consecutively to each count and
7 consecutively to the sentences imposed in the other criminal cause number. (*Id.*)

8 The order terminating self-representation also preceded Petitioner’s second trial on
9 charges of sexual exploitation of a minor, which are the subject of the instant Petition.
10 On July 28, 2011, in a separate opinion, these convictions and sentences were vacated
11 and remanded for a new trial. *Cook*, 2011 WL 3211052, at *1. On December 12, 2012,
12 retrial commenced. Petitioner was again convicted of these charges, and resentenced to
13 consecutive terms of lifetime imprisonment without the possibility of parole for 35 years.
14 *State v. Cook*, No. 1 CA-CR 03-0054, 2013 WL 4734036, at *1-2 (Ariz. Ct. App. Sept. 3,
15 2013). Petitioner was provided the form titled, “Notice of Rights of Review After
16 Conviction and Procedure,” which explained his rights to a direct appeal and to post-
17 conviction relief in both matters. (Doc. 21, Ex. N.) These convictions are the subject of
18 the instant Petition.

19 **d. Petitioner’s Second Direct Appeal**

20 On January 18, 2013, Petitioner appealed the retrial and sentences for the
21 convictions of sexual misconduct with a minor. (Doc. 21, Ex. O.) Petitioner’s counsel
22 filed a brief with no arguable issues in compliance with *Anders v. California*, 386 U.S.
23 738 (1967), and *State v. Leon*, 451 P.2d 878 (Ariz. 1969). (Doc. 21, Ex. P.) On July 8,
24 2013, Petitioner’s counsel filed Petitioner’s supplemental *pro se* brief, alleging
25 ineffective assistance of counsel and the state’s failure to preserve exculpatory evidence.
26 (Doc. 21, Ex. Q.) On September 3, 2013, the court of appeals affirmed Petitioner’s
27 convictions and sentences. (Doc. 21, Ex. R.) The court stated it “reviewed the entire
28 record for reversible error and find none.” (*Id.* at 7.) Petitioner had 35 days to properly
file an appeal to the Arizona Supreme Court, but Petitioner did not file one. (Doc. 21, Ex.

1 S.) Petitioner’s convictions and sentences became final on October 8, 2013.

2 **e. Petitioner’s Post-Conviction Relief Proceedings**

3 On January 26, 2012, before his retrial commenced, Petitioner filed a pro se PCR
4 Notice. (Doc. 21, Ex. X.)³ On February 6th, the trial court again appointed counsel for
5 Petitioner, and set filing deadlines. (Doc. 21, Ex. Y.) On June 11, 2012, the trial court
6 granted counsel’s request to dismiss the PCR petition because the retrial was pending.
7 (Doc. 21, Ex. AA.)⁴

8 On November 26, 2012, Petitioner’s counsel filed a Notice of Completion of PCR
9 Review, stating she had “corresponded with petitioner, conferred with former trial
10 counsel, relatives of Petitioner and reviewed all relevant transcripts, record and appellate
11 memorandum decision,” and found no “colorable issue to submit to the court pursuant to
12 Rule 32.” (Doc. 21, Ex. FF.)

13 On December 17, 2012, while his retrial was underway in this case (CR2005–
14 033017), Petitioner filed a *pro se* PCR petition, challenging all three criminal cases, and
15 raising 68 issues without citations to law or the record. (Doc. 21, Ex. GG.) Petitioner filed
16 another copy of the same PCR petition on December 24th. (Doc. 21, Ex. HH.) On March
17 15, 2013, the State responded to the petition, and argued the petition should be summarily
18 dismissed because it lacked any argument, citation, or legal authority. (Doc. 21, Ex. II at
19 8.)

20 On August 13, 2013, the trial court dismissed Petitioner’s PCR petition. (Doc. 21,
21 Ex. JJ.) The court first found that Petitioner’s PCR petition was timely with respect to the
22 first trial (CR2005–104441 and CR2005–032990), but “premature” with respect to this

23
24 ³ Petitioner had filed a previous PCR that was dismissed because his counsel
25 alleged Petitioner had three direct appeals pending before the court of appeals. (Doc. 21,
26 Ex. V.) The trial court dismissed the previous PCR petition without prejudice. (Doc. 21,
27 Ex. W.)

28 ⁴ Petitioner subsequently filed *pro se* motions for reconsideration, to stay the trial,
and to supplement a Rule 32 petition. (Doc. 21 Exs, BB, CC.) Because Petitioner was
represented by counsel, the trial court ruled that it could not “accept any pro se filings or
communications from him,” and noted that it could not “read the majority of the
document.” (Doc. 21, Ex. EE.) The court took “no action.” (*Id.*)

1 case (CR 2005–033017) because his appeal was still pending. (*Id.* at 2.)⁵ The court
2 declined to address those arguments related to CR 2005–033017. The court dismissed the
3 remaining counts as either precluded or not colorable. (*Id.*)

4 Petitioner had 35 days to file a petition for review to the Arizona Court of Appeals
5 regarding the dismissal of his PCR petition. The petition was due on or before September
6 17, 2013,⁶ however Petitioner did not file until October 16, 2013. (Doc. 21, Ex. LL.)
7 Petitioner attached his PCR petition as an exhibit. (Doc. 21, Ex. KK.) Petitioner’s
8 petition for review included all three criminal cases. On October 28, 2013, the court of
9 appeals dismissed the petition for review as untimely as it was “not filed within 30 days
10 of the trial court’s final decision.”⁷ (Doc. 21, Ex. LL.) The court noted that the “trial
11 court may ‘after being presented with proper evidence, allow a late filing,’ if it finds that
12 petitioner was not responsible for the untimely filing.” (*Id.*) There is no record before
13 the Court that Petitioner subsequently filed a petition or presented evidence to allow for a
14 late filing.

15 **f. Petitioner’s Federal Habeas Petition**

16 On December 9, 2014, Petitioner mailed his Petition. (Doc. 1 at 68.) On January 2,
17 2015, the instant Habeas Petition was filed, raising 61 grounds for relief.⁸ (Doc. 1.) On
18 June 19, 2015, Respondents filed a Limited Answer to the Petition. (Doc. 21.) On June
19 25, 2015, Petitioner filed a Reply. (Doc. 22.)

20 **III. THE PETITION IS UNTIMELY.**

21 The writ of habeas corpus affords relief to persons in custody pursuant to the

23 ⁵ The Court of Appeals issued its opinion in CR 2005–033017 on September 3,
24 2013.

25 ⁶ This Court assumes Petitioner is entitled to five additional days pursuant to Ariz.
R. Crim. P. 1.3 (expanding time limits by five days after service by mail).

26 ⁷ The trial court dismissal is dated August 9, 2013, but it was electronically filed
27 on August 13, 2013. (Doc. 21, Ex. JJ.) The Arizona Court of Appeals relied on the
August 13, 2013 date. (Doc. 21, Ex. LL.)

28 ⁸ The Petition lists 62 Grounds, but Petitioner did not submit a Ground 58. (Doc
1.)

1 judgment of a state court in violation of the Constitution, laws, or treaties of the United
2 States. 28 U.S.C. §§ 2241(c)(3), 2254(a). Petitions for Habeas Corpus are governed by
3 the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). 28 U.S.C. § 2244.

4 **a. Time Calculation**

5 The AEDPA imposes a one-year limitation period, which begins to run “from the
6 latest of . . . the date on which the judgment became final by the conclusion of direct
7 review or the expiration of the time for seeking such review.” 28 U.S.C. §
8 2244(d)(1)(A).

9 Here, the Arizona Court of Appeals affirmed Petitioner’s convictions and
10 sentences on September 3, 2013. (Doc. 21, Ex. R.) Petitioner then had 35 days to file a
11 petition for discretionary review with the Arizona Supreme Court. *See* Ariz. R. Crim. P.
12 31.19(a) (“Within 30 days after the Court of Appeals issues its decision, any party may
13 file a petition for review with the clerk of the Supreme Court”); Ariz. R. Crim. P.
14 1.3 (expanding time limits by five days after service by mail); *State v. Rabun*, 162 Ariz.
15 261, 782 P.2d 737 (1989). Because Petitioner did not file a petition for review, the
16 judgment became final on October 8, 2013. *See Gonzalez v. Thaler*, 132 S. Ct. 641, 656
17 (2012) (“[W]ith respect to a state prisoner who does not seek review in a State’s highest
18 court, the judgment becomes ‘final’ under § 2244(d)(1)(A) when the time for seeking
19 such review expires”).

20 This Petition was due on October 8, 2014, absent statutory or equitable tolling.

21 **b. Statutory Tolling**

22 The AEDPA provides for tolling of the limitations period when a “properly filed
23 application for State post-conviction or other collateral relief with respect to the pertinent
24 judgment or claim is pending.” 28 U.S.C. § 2244(d)(2). In Arizona, post-conviction
25 review is pending once a notice of post-conviction relief is filed. *See Isley v. Arizona*
26 *Dep’t of Corr.*, 383 F.3d 1054, 1056 (9th Cir. 2004). *See also* Ariz. R. Crim. P. 32.4(a)
27 (“A proceeding is commenced by timely filing a notice of post-conviction relief with the
28 court in which the conviction occurred.”).

1 On December 17, 2012, while his retrial was underway in this case (CR2005–
2 033017), Petitioner filed a *pro se* PCR petition, challenging all three criminal cases, and
3 raising 68 issues without citations to law or the record. (Doc. 21, Ex. GG.) On August 13,
4 2013, the trial court filed its order dismissing Petitioner’s PCR petition. (Doc. 21, Ex. JJ.)
5 Petitioner had 35 days to file a timely petition for review in the Arizona Court of
6 Appeals, or until September 17, 2013, but he failed to do so. (Doc. 21, Ex. LL.) The
7 one-year deadline to file a federal habeas will be tolled while “a properly filed application
8 for State post-conviction . . . review . . . is pending.” 28 U.S.C. § 2244(d)(2).

9 The statute of limitations was not tolled by Petitioner’s October 16, 2013 “Appeal
10 of Post-Conviction Relief.” (Doc. 21, Ex. LL.) This filing was not a “properly filed”
11 state action for post-conviction relief because it was untimely. *See Pace v. DiGuglielmo*,
12 544 U.S. 408, 417 (2005) (“[W]e hold that time limits, no matter their form, are ‘filing’
13 conditions. Because the state court rejected petitioner’s PCRA petition as untimely, it was
14 not ‘properly filed,’ and he is not entitled to statutory tolling under § 2244(d)(2).”). Once
15 the AEDPA limitations period expires, a subsequently filed state post-conviction
16 proceeding cannot restart the statute of limitations. *Ferguson v. Palmateer*, 321 F.3d
17 820, 823 (9th Cir. 2003) (holding that § 2244(d) “does not permit the reinitiation of the
18 limitations period that has ended before the state petition was filed”).

19 Here, Petitioner’s PCR review concluded on September 17, 2013, the deadline for
20 a petition for review to the Arizona Court of Appeals. Because Petitioner’s appeal was
21 final on the later date of October 8, 2013, that is the date starting the one-year limitations
22 period. Petitioner was required to file this Petition by October 8, 2014.

23 **c. Equitable Tolling**

24 “A petitioner who seeks equitable tolling of AEDPA’s 1–year filing deadline must
25 show that (1) some ‘extraordinary circumstance’ prevented him from filing on time, and
26 (2) he has diligently pursued his rights.” *Holland v. Florida*, 560 U.S. 631, 649, 130
27 S.Ct. 2549, 177 L.Ed.2d 130 (2010).” *Luna v. Kernan*, 784 F.3d 640, 646 (9th Cir.
28 2015). The petitioner bears the burden of showing that equitable tolling should apply.

1 *Espinoza-Matthews v. California*, 432 F.3d 1021, 1026 (9th Cir. 2005). Equitable tolling
2 is only appropriate when external forces, rather than a petitioner’s lack of diligence,
3 account for the failure to file a timely habeas action. *Chaffer v. Prosper*, 592 F.3d 1046,
4 1048–49 (9th Cir. 2010). Equitable tolling is to be rarely granted. *See, e.g., Waldron–*
5 *Ramsey v. Pacholke*, 556 F.3d 1008, 1011 (9th Cir. 2009). Petitioner must show that “the
6 extraordinary circumstances were the cause of his untimeliness and that the extraordinary
7 circumstances made it impossible to file a petition on time.” *Porter v. Ollison*, 620 F.3d
8 952, 959 (9th Cir. 2010). “Indeed, ‘the threshold necessary to trigger equitable tolling
9 [under AEDPA] is very high, lest the exceptions swallow the rule.’” *Miranda v. Castro*,
10 292 F.3d 1063, 1066 (9th Cir. 2002) (quoting *Marcello*, 212 F.3d at 1010).

11 Here, Petitioner asserts equitable tolling should be granted because he “was never
12 informed of [his] constitutional right to habeas corpus and therefore was not informed of
13 the requirement or deadlines until [he] was informed by the Honorable Neil V. Wake in
14 an Order to a motion [he] had filed for petition for Rule 32 PCR.”⁹ (Doc. 1 at 68.) In his
15 Reply, Petitioner asserts that (1) he “does not have access to these records at this time to
16 confirm or deny these claims” (of untimeliness and procedural default), and (2) “it was
17 beyond his control as Petitioner was never notified of his rights to a writ of habeas corpus
18 . . . and therefore could not have knowledge of requirement and procedures and
19 deadlines.” (Doc. 22 at 2.)

20 **i. Petitioner had access to records**

21 Petitioner asserts that he “does not have access to these records at this time to
22 confirm or deny these claims” of untimeliness and procedural default. (Doc. 22 at 2.)
23 Although Petitioner is not claiming a lack of access to his files during the one-year filing
24 period, the Court nonetheless considers this issue. The Court is mindful that the grounds
25 for equitable tolling under § 2244(d) are highly fact-dependent and considered on a case-
26 by-case basis. *See Holland v. Florida*, 560 U.S. 631 (2010); *Laws v. Lamarque*, 351 F.3d
27 919, 922 (9th Cir. 2003). The information contained in this Petition was available to the

28

⁹ *See Cook v. State*, 14-CV-00560-NVW-LOA, at Doc. 8 (April 15, 2014).

1 Petitioner in 2013 and 2014. Importantly, on October 16, 2013, Petitioner filed a *pro se*
2 appeal, which attached the 68 grounds for relief he previously filed in trial court. (Doc.
3 21, Ex. KK.) That appeal was filed within the one-year deadline for filing this Petition.
4 *See Gaston v. Palmer*, 417 F.3d 1030, 1035 (9th Cir. 2005) (affirming conclusion that
5 “[b]ecause [Gaston] was capable of preparing and filing state court petitions [during the
6 limitations period], it appears that he was capable of preparing and filing a [federal]
7 petition during the [same time]”). Petitioner was certainly aware of the nature of his
8 claims and was able to file a Petition. *See Waldron–Ramsey*, 556 F.3d at 1014 (stating
9 that petitioner “could have prepared a basic form habeas petition and filed it to satisfy the
10 AEDPA deadline”); *United States v. Battles*, 362 F.3d 1195, 1198 (9th Cir. 2004) (even
11 without access to his case file, petitioner must “at least consult his own memory of the
12 trial proceedings”). Petitioner had sufficient memory and documents to file a “basic form
13 habeas petition” within the deadline. Petitioner has not satisfied his burden of showing
14 that equitable tolling should apply because of a lack of access to documents.

15 **ii. Petitioner’s *pro se* status and ignorance of the law**

16 Petitioner asserts “it was beyond his control as Petitioner was never notified of his
17 rights to a writ of habeas corpus . . . and therefore could not have knowledge of
18 requirement and procedures and deadlines.” (Doc. 22 at 2.) Almost six months prior to
19 the deadline, this Court advised Petitioner of the right to habeas review. On March 19,
20 2014, Petitioner filed “a *pro se* ‘Motion to Request Extension of Time to File Post
21 Conviction Relief Review and to Request Appointment of Appellate Counsel.’” *See Cook*
22 *v. State*, 14-CV-00560-NVW-LOA, at Doc. 1 (March 19, 2014). On April 15, 2014, the
23 Court advised Petitioner that to “the extent Petitioner intends to seek habeas corpus relief
24 under 28 U.S.C. § 2254, he must file a Petition Under 28 U.S.C. § 2254 for a Writ of
25 Habeas Corpus by a Person in State Custody in a **new case.**” *Cook v. State*, 14-CV-
26 00560-NVW-LOA, at Doc. 8 (April 15, 2014) (emphasis in original). Petitioner attached
27 this Order to his Petition. (Doc. 1, Ex. H.) The Petition was not due until October 8, 2014.

28 Petitioner’s lack of knowledge of the habeas deadline does not warrant equitable

1 tolling. A petitioner’s *pro se* status, ignorance of the law, and lack of representation
2 during the applicable filing period do not constitute circumstances justifying equitable
3 tolling because such circumstances are not “extraordinary.” *See Waldron–Ramsey*, 556
4 F.3d at 1013 n.4 (“a *pro se* petitioner’s confusion or ignorance of the law is not, itself, a
5 circumstance warranting equitable tolling”), cert. denied, 558 U.S. 897 (2009); *Rasberry*
6 *v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006) (“[A] *pro se* petitioner’s lack of legal
7 sophistication is not, by itself, an extraordinary circumstance warranting equitable
8 tolling.”); *Johnson v. United States*, 544 U.S. 295, 311 (2005) (“[W]e have never
9 accepted *pro se* representation alone or procedural ignorance as an excuse for prolonged
10 inattention when a statute’s clear policy calls for promptness.”). The Arizona Court of
11 Appeals also advised Petitioner to submit grounds to justify his late filing of his petition
12 for review of the PCR dismissal. (Doc. 21, Ex. LL.) Petitioner did not supply grounds to
13 request equitable tolling for that late filing.

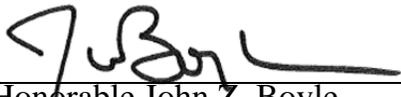
14 The Petition is untimely because it was not filed within the deadline established by
15 28 U.S.C. § 2244(d)(1). Absent equitable tolling or other exception, the Petition will be
16 dismissed with prejudice, regardless of the margin of untimeliness. *See United States v.*
17 *Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000) (federal habeas petition submitted one day
18 late was properly dismissed as untimely under AEDPA, noting that a “missed” deadline
19 “is not grounds for equitable tolling”); *Hartz v. United States*, 419 Fed. Appx. 782, 783
20 (9th Cir. 2011) (unpublished) (affirming dismissal of federal habeas petition where
21 petitioner “simply missed the statute of limitations deadline by one day”); *Lookingbill v.*
22 *Cockrell*, 293 F.3d 256, 265 (5th Cir. 2002) (“[w]e consistently have denied tolling even
23 where the petition was only a few days late”); *United States v. Locke*, 471 U.S. 84, 100–
24 01 (1985) (“If 1-day late filings are acceptable, 10-day late filings might be equally
25 acceptable, and so on in a cascade of exceptions that would engulf the rule erected by the
26 filing deadline . . . A filing deadline cannot be complied with, substantially or otherwise,
27 by filing late—even by one day.”).

28

1 This recommendation is not an order that is immediately appealable to the Ninth
2 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of
3 Appellate Procedure, should not be filed until entry of the district court's judgment. The
4 parties shall have 14 days from the date of service of a copy of this Report and
5 Recommendation within which to file specific written objections with the Court. *See* 28
6 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(b) and 72. Thereafter, the parties have 14 days
7 within which to file a response to the objections.

8 Failure to timely file objections to the Magistrate Judge's Report and
9 Recommendation may result in the acceptance of the Report and Recommendation by the
10 district court without further review. *See United States v. Reyna-Tapia*, 328 F.3d 1114,
11 1121 (9th Cir. 2003). Failure to timely file objections to any factual determinations of the
12 Magistrate Judge will be considered a waiver of a party's right to appellate review of the
13 findings of fact in an order of judgment entered pursuant to the Magistrate Judge's Report
14 and Recommendation. *See* Fed. R. Civ. P. 72.

15 Dated this 8th day of December, 2015.

16
17
18 
19 _____
20 Honorable John Z. Boyle
21 United States Magistrate Judge
22
23
24
25
26
27
28