



1 dismissed on May 9, 2012. (Doc. 21-1, Exh. Z.) Petitioner did not seek review of the  
2 dismissal by the Arizona Court of Appeals, but instead initiated a sequence of post-  
3 conviction proceedings. Each was dismissed as untimely under Arizona law. (Docs. 21-2  
4 and 21-3.)

5 On May 26, 2015, Petitioner filed his federal habeas petition (Doc. 1) raising four  
6 grounds for relief. Respondents filed an answer (Doc. 21), arguing that the petition  
7 should be dismissed as untimely, and alternatively, that Petitioner's claims are  
8 procedurally defaulted and barred from federal habeas corpus review.

## 9 **II. Standard of Review**

10 A district judge "may accept, reject, or modify, in whole or in part, the findings or  
11 recommendations made by the magistrate judge." 28 U.S.C. § 636(b). When a party files  
12 a timely objection to an R&R, the district judge reviews *de novo* those portions of the  
13 R&R that have been "properly objected to." Fed. R. Civ. P. 72(b). A proper objection  
14 requires specific written objections to the findings and recommendations in the R&R. *See*  
15 *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003); 28 U.S.C. §  
16 636(b)(1). It follows that the Court need not conduct any review of portions to which no  
17 specific objection has been made. *See Reyna-Tapia*, 328 F.3d at 1121; *see also Thomas v.*  
18 *Arn*, 474 U.S. 140, 149 (1985) (discussing the inherent purpose of limited review is  
19 judicial economy). Further, a petitioner is not entitled as of right to *de novo* review of  
20 evidence or arguments which are raised for the first time in an objection to the R&R, and  
21 the Court's decision to consider them is discretionary. *United States v. Howell*, 231 F.3d  
22 615, 621-622 (9th Cir. 2000).

## 23 **III. Discussion**

24 Having reviewed the objected to recommendations *de novo*, the Court agrees and  
25 accepts the Magistrate Judge's finding that Petitioner's claims are time-barred.<sup>2</sup>

26 <sup>2</sup> The writ of habeas corpus affords relief to persons in custody pursuant to the  
27 judgment of a State court in violation of the Constitution, laws, or treaties of the United  
28 States. 28 U.S.C. §§ 2241(c)(3), 2254(a), 2244(d)(1). The Antiterrorism and Effective  
Death Penalty Act of 1996 ("AEDPA"), which applies to federal habeas petitions filed  
after its effective date, April 24, 1996, imposes a 1-year statute of limitations in which "a

1           **A. Commencement of Limitations Period**

2           The R&R finds that Petitioner’s conviction became final upon the expiration of the  
3 time for seeking review by the Arizona Court of Appeals of the denial of his Rule 32 of-  
4 right petition for post-conviction relief on June 13, 2012. *See* Ariz. R. Crim. P. 32.4(a),  
5 32.9(c); *Summers v. Schriro*, 481 F.3d 710, 714-15 (9th Cir. 2007) (“Rule 32 of-right  
6 proceedings is a form of direct review” and thus “AEDPA’s one-year statute of  
7 limitations does not begin to run until the conclusion of the Rule 32 of-right  
8 proceedings and review of that proceeding, or until the expiration of the time for  
9 seeing such proceeding or review”); *Gonzalez v. Thaler*, 132 S. Ct. 641, 656 (2012).  
10 The one-year limitations period therefore commenced the next day, June 14, 2012, and  
11 absent any tolling, it expired on June 13, 2013.

12           Petitioner objects on the basis that the limitations period has not yet begun.<sup>3</sup> (Doc.  
13 30 at 2-3.) He contends that the state court erred in dismissing his of-right proceeding  
14 because it failed to consider his certified April 9, 2012 petition (Doc. 21-1, Exh. X), and  
15 therefore, his of-right proceeding should be treated as though it is still pending. As a  
16 result, the period of direct review has not yet concluded, and his habeas petition is timely.

17           This objection is without merit. Whether the state court correctly dismissed the  
18 proceeding does not bear on whether and when it was, in fact, dismissed for purposes of  
19 the limitations period. Petitioner does not dispute that the state court expressly dismissed  
20 the of-right proceeding on May 9, 2012, or that he did not appeal that ruling. Even if  
21 Petitioner’s allegation that the state court mistakenly failed to consider his April 2012  
22 petition and erred when it dismissed his of-right proceeding is taken as true, this Court  
23 may not correct that error on habeas review. *See Ortiz v. Stewart*, 149 F.3d 923, 939, 941

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25 person in custody pursuant to the judgment of a State court” can file a federal petition for  
writ of habeas corpus. 28 U.S.C. § 2244(d)(1); *Lindh v. Murphy*, 521 U.S. 320, 326-27  
(1997).

26<sup>3</sup> Although the R&R made no finding as to exhaustion, in his objections, Petitioner  
27 interchangeably disputes whether his habeas petition is time-barred with whether he  
28 procedurally exhausted his federal habeas claims in state court. Petitioner’s contention  
that he exhausted his state court remedies does not establish that his petition is timely,  
and those objections are rejected.

1 (9th Cir. 1998) (“federal habeas relief is not available to redress alleged procedural errors  
2 in state post-conviction proceedings.”).

3 **B. Statutory Tolling of Limitations Period<sup>4</sup>**

4 Petitioner next objects that the R&R erred in finding that he is not entitled to  
5 statutory tolling of the limitations. He contends that the period should have been tolled  
6 beginning the date on which he “properly filed” his of-right petition - April 9, 2012.  
7 (Doc. 30 at 4.) This objection is also without merit.

8 As previously addressed, “Arizona’s Rule 32 of-right proceeding for plea-  
9 convicted defendants is a form of direct review within the meaning of 28 U.S.C. §  
10 2244(d)(1)(A),” *Summers*, 481 F.3d at 716-17, as opposed to post-conviction review  
11 under § 2244(d)(2). Nevertheless, were the Court to treat the petition as an application  
12 under § 2244(d)(2), Petitioner would not be saved by statutory tolling. Because Petitioner  
13 did not seek review by the appellate court, no application for post-conviction review was  
14 *pending* following the state court’s denial on May 9, 2012, and the limitations period  
15 would have begun the following day. *See Evans v. Chavis*, 546 U.S. 189, 191 (2006) (an  
16 application for state post-conviction review is “pending” during the period between a  
17 lower court’s adverse determination and the filing of a *timely* appeal); *Robinson v. Lewis*,  
18 795 F.3d 926, 928-29 (9th Cir. 2015); *Stewart v. Cate*, 757 F.3d 929, 935 (9th Cir. 2014).

19 Petitioner’s subsequent applications, including the July 22, 2012 amended  
20 petition,<sup>5</sup> were found to be untimely. Therefore, those applications were not “properly  
21 filed” and also did not statutorily toll the limitations period under 28 U.S.C. § 2244(d)(2).

22 <sup>4</sup> Pursuant to the AEDPA, the one-year limitations period is statutorily tolled during  
23 the time that a “properly filed application for State post-conviction or other collateral  
24 review with respect to the pertinent judgment or claim is pending.” 28 U.S.C. §  
25 2244(d)(2).

26 <sup>5</sup> Petitioner signed an “Amended Petition for Reversal and New Trial” on July 22,  
27 2012, which was filed with the Superior Court on September 13, 2012. (Doc. 21-2 at 22-  
28 Exh. EE.) Therein, Petitioner asked that 5 of the “7 avenues for post-conviction relief:  
appeal, federal habeas corpus, Arizona habeas corpus, writ of coram nobis, motion for  
new trial, motion to modify or vacate judgment, and delayed appeal” be consolidated  
“into a single comprehensive remedy.” (Doc. 21-2 at 31, Exh. EE.) The filing was  
construed as a third Rule 32 post-conviction relief petition and denied as untimely. (Doc.  
21-2, Exh. FF.)

1 *See Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005) (“Because the state court rejected  
2 petitioner’s PCRA petition as untimely, it was not ‘properly filed,’ and he is not entitled  
3 to statutory tolling under § 2244(d)(2)”). To the extent Petitioner initiated post-conviction  
4 actions after June 13, 2013, those actions also could not toll or restart the limitations  
5 period which had already expired. *See Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th  
6 Cir. 2003) (holding that “section 2244(d) does not permit the re-initiation of the  
7 limitations period that has ended before the state petition was filed.”).

### 8 **C. Equitable Tolling of Limitations Period<sup>6</sup>**

9 Petitioner next objects that the R&R also wrongly found that he is not entitled to  
10 equitable tolling of the limitations period.

11 First, he argues that he is entitled to equitable tolling because the state court erred  
12 in dismissing the of-right post-conviction proceeding. He does not explain however, how  
13 that error prevented him from filing a federal habeas petition during the limitations  
14 period. Instead, Petitioner’s fervent litigation in state court suggests the contrary. *See*  
15 *Gaston v. Palmer*, 417 F.3d 1030, 1034-35 (9th Cir. 2006) (stating that a petitioner’s  
16 ability to file documents in state court shows the petitioner could have filed a federal  
17 habeas petition).

18 To the extent that Petitioner was pursuing the path he believed was necessary to  
19 exhaust his claims in state court, he does not explain how that pursuit precluded him  
20 “from preparing and filing a habeas petition at any time.” *Shannon v. Newland*, 410 F.3d  
21 1083, 1090 (9th Cir. 2005). Rather, if diligent, “he could have prepared a basic form  
22 habeas petition and filed it to satisfy the AEDPA deadline.” *Waldron-Ramsey v.*  
23 *Pacholke*, 556 F.3d 1008, 1014 (9th Cir. 2009). *See also Pace*, 544 U.S. at 416 (“A  
24 prisoner seeking state postconviction relief might avoid this predicament... by filing a  
25 ‘protective’ petition in federal court and asking the federal court to stay and obey the

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27 <sup>6</sup> The one-year limitations period may be equitably tolled only if “he shows (1) that  
28 he has been pursuing his rights diligently, and (2) that some extraordinary circumstance  
stood in his way and prevented timely filing” his federal habeas petition. *Holland v.*  
*Florida*, 560 U.S. 631, 649 (2010) (internal quotations omitted).

1 federal habeas proceedings until state remedies are exhausted”) (citing *Rhines v. Weber*,  
2 544 U.S. 269, 278 (2005)). Any alleged ignorance of the statute of limitations or “lack of  
3 legal sophistication is not, by itself, an extraordinary circumstance warranting equitable  
4 tolling.” *Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006). *See also Robinson v.*  
5 *Kramer*, 588 F.3d 1212, 1216 (9th Cir. 2009) (citing *Felder v. Johnson*, 204 F.3d 168  
6 (5th Cir. 2000)).

7 Second, Petitioner argues for the first time in his objection that his mental  
8 impairments constitute an extraordinary circumstance beyond his control that caused the  
9 untimeliness of federal habeas petition. Petitioner asserts that he suffers from mental  
10 health issues that have gone untreated with medication since May 2011. (Doc. 31 at 2.)  
11 This argument is also unavailing; the record shows that during the limitations period,  
12 Petitioner had the ability to understand the need to timely file, to prepare a federal habeas  
13 petition, and to effectuate its filing. *See Orthel v. Yates*, 795 F.3d 935, 938 (9th Cir. 2015)  
14 (“A petitioner seeking equitable tolling on the grounds of mental incompetence must  
15 show extraordinary circumstances, such as an inability to rationally or factually  
16 personally understand the need to timely file, or a mental state rendering an inability  
17 personally to prepare a habeas petition and effectuate its filing.”); *Bills v. Clark*, 628 F.3d  
18 1092, 1099-00 (9th Cir. 2010) (setting forth two-part test); *Roberts v. Marshall*, 627 F.3d  
19 768, 773 (9th Cir. 2010).

20 Between June 2012 and June 2013, Petitioner instituted six post-conviction relief  
21 proceedings in state court. (Docs. 21-2 and 21-3, Exhs. BB-EEE.) In his filings, Petitioner  
22 raised claims challenging, among other things, that his guilty plea was involuntary, that  
23 the trial court deprived him of his choice of counsel, that there was an irreconcilable  
24 conflict with counsel that violated his constitutional rights, that he was denied legal  
25 representation in his prior post-conviction proceedings, and that there was a significant  
26 change in the law that would probably affect the outcome of his case. He also asserted that  
27 the trial court had erred in disregarding his April 2012 petition, which he claimed was  
28 timely and met the Rule 32 certification requirement. (Doc. 21-2 at 22-23.)

1           Petitioner’s extensive filings reflect that his mental condition did not preclude him  
2 from litigating and filing a federal habeas petition during the limitations period. *See*  
3 *Gaston v. Palmer*, 417 F.3d 1030, 1035 (9th Cir. 2005) (“Because [petitioner] was  
4 capable of preparing and filing state court petitions [during the limitations period], it  
5 appears that he was capable of preparing and filing a [federal] petition during the time in  
6 between those dates”), *modified on other grounds*, 447 F.3d 1165 (9th Cir. 2006); *see*  
7 *also Laws v. Lamarque*, 351 F.3d 919, 923 (9th Cir. 2003) (“Of course, a petitioner’s  
8 statement [of mental illness], even if sworn, need not convince a court that equitable  
9 tolling is justified should countervailing evidence be introduced.”). Therefore, Petitioner  
10 is not entitled to equitable tolling and his petition is time-barred.

11           **D. Certificate of Appealability**

12           Petitioner objects to the R&R on the basis that he is entitled to a certificate of  
13 appealability. This objection is also without merit. Here, a plain procedural bar is  
14 present – his petition is barred by the statute of limitations. Petitioner did not file his  
15 federal habeas petition until May 26, 2015, almost two years after the statute of  
16 limitations had expired. He is not entitled to statutory tolling, equitable tolling, or an  
17 exception.<sup>7</sup> The Court finds no basis to conclude that jurists of reason would find this  
18 procedural ruling debatable or that Petitioner should be allowed to proceed further.  
19 *See Murray v. Schriro*, 745 F.3d 984, 1002 (9th Cir. 2014); *Slack v. McDaniel*, 529  
20 U.S. 473, 484 (2000).

21           **E. Additional Objections**

22           Prior to the issuance of the R&R, Petitioner filed separate motions for relief from  
23 judgment (Doc. 17), to unseal the Rule 11 expert evaluations (Doc. 18), for  
24 reconsideration of the Magistrate Judge’s order denying his request for the appointment

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26 <sup>7</sup> While Petitioner challenges the fairness of the system, he does not assert an actual-  
27 innocence gateway claim for purposes of an exception to AEDPA’s limitations period.  
28 *See McQuiggin v. Perkins*, 569 U.S. \_\_\_, 133 S. Ct. 1924, 1928 (2013) (also referred to as  
a “fundamental miscarriage of justice exception”) (adopting *Schlup v. Delo*, 513 U.S.  
298, 314-15 (1995)).

1 of counsel (Doc. 26), and for an evidentiary hearing (Doc. 26 at 2). In the R&R, the  
2 Magistrate Judge denied the motion for reconsideration and evidentiary hearing, and  
3 recommended that this Court deny the remaining motions. (Doc. 28 at 20.)

4 While Petitioner has objected to this portion of the R&R (Doc. 30 at 1), he does so  
5 only summarily and does not offer any specific objection as required by Rule 72 of the  
6 Federal Rules of Civil Procedure. These objections are therefore overruled.

#### 7 **IV. Evidentiary Hearing and Discovery**

8 Petitioner's demands for an evidentiary hearing and further factual development  
9 (Docs. 31 at 3; 37) will be denied. Petitioner has not advanced an "allegation that would,  
10 if true, entitle him to equitable tolling." *Laws*, 351 F.3d at 921; *Stewart v. Cate*, 757 F.3d  
11 929, 942 (9th Cir. 2014) (evidentiary development is not required where, even if the  
12 evidence is fully credited, it would not entitle him to relief). As to his claim allegations of  
13 mental impairment, for the reasons addressed above, the record is sufficiently developed  
14 such that it is clear that Petitioner's mental impairment was not so severe as to cause the  
15 untimely filing of his habeas petition. *See Roberts*, 627 F.3d at 773 ("Where the record is  
16 amply developed, and where it indicates that the petitioner's mental incompetence was  
17 not so severe as to cause the untimely filing of his habeas petition, a district court is not  
18 obligated to hold evidentiary hearings to further develop the factual record,  
19 notwithstanding a petitioner's allegations of mental incompetence."). Further evidentiary  
20 development is not warranted.

#### 21 **V. Motion to Appoint Counsel**

22 Lastly, Petitioner has moved this Court to appoint counsel (Doc. 36).<sup>8</sup> The Court  
23 may appoint counsel in § 2254 proceedings when "the interests of justice so require" and  
24 the petitioner is "financially unable to obtain representation." 18 U.S.C. §  
25 3006A(a)(2)(B); *see also* 28 U.S.C. § 2254(h) (stating that a "court may appoint counsel

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26 <sup>8</sup> Petitioner additionally filed a motion for emergency evidentiary hearing and  
27 discovery request (Doc. 32), motion for judgment (Doc. 33), motion to add parties (Doc.  
28 34), and motion for leave (Doc. 35). In a subsequent filing, Petitioner requests to "strike  
all motions filed by me with the exception of the objections." (Doc. 36 at 2.) Pursuant to  
this request, the Court will deem these motions as withdrawn.

1 for an applicant who is or becomes financially unable to afford counsel.”) *Weygandt v.*  
2 *Look*, 718 F.2d 952, 954 (9th Cir. 1983) (in deciding whether to appoint counsel, the  
3 court evaluates: (1) the likelihood of success on the merits and (2) the ability of the  
4 petitioner to articulate his claims in light of their complexity). Here, the Court finds the  
5 interests of justice do not require the appointment of counsel because Petitioner has  
6 “thoroughly presented his issues in the habeas petition.” *See Bashor v. Risley*, 730 F.2d  
7 1228, 1234 (9th Cir. 1984). Therefore, the motion will be denied.

## 8 **VI. Conclusion**

9 Having reviewed the record as a whole, and finding none of Petitioner’s objections  
10 have merit, the R&R will be adopted in full. For the reasons addressed above, the Court  
11 finds that the petition is barred by the statute of limitations, and no further proceedings  
12 are warranted to reach this determination. Accordingly,

### 13 **IT IS ORDERED:**

14 1. That Petitioner’s motion to appoint counsel and strike (Doc. 36) is **denied**  
15 **in part** and **granted in part**. The motion is **denied** with respect to the request for  
16 appointment of counsel, and **granted** with respect to his request to strike his previously  
17 filed motions;

18 2. That Petitioner’s motions for an evidentiary hearing, for discovery, for  
19 judgment, to add parties, and for leave (Docs. 32, 33, 34, 35) are therefore deemed as  
20 **withdrawn**;

21 3. That Plaintiff’s Motion for Scheduling Hearing (Doc. 37) is **denied**;

22 4. That Magistrate Judge Bade’s Report and Recommendation (Doc. 28) is  
23 **accepted** and **adopted** by the Court;

24 5. That Petitioner’s motions for relief from judgment (Doc. 17) and to unseal  
25 the record (Doc. 18) are **denied**;

26 6. That the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254  
27 (Doc. 1) is **denied** and this action is **dismissed with prejudice**;

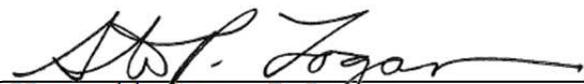
28 7. That a certificate of appealability and leave to proceed *in forma pauperis* on

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appeal are **denied** because the dismissal of the Petition is justified by a plain procedural bar and jurists of reason would not find the procedural ruling debatable; and

8. That the Clerk of Court shall **terminate** this action.

Dated this 19th day of September, 2016.

  
\_\_\_\_\_  
Honorable Steven P. Logan  
United States District Judge