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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Christopher Walton Hopton,

10 Petitioner,

11 v.

12 Charles L. Ryan, et al.,

13 Respondents.
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No. CV-16-00442-PHX-GMS

ORDER

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16 Petitioner Christopher Hopton filed a pro se Petition for Writ of Habeas Corpus
17 pursuant to 28 U.S.C. § 2254 on February 16, 2016. (Doc. 1.) The Court subsequently
18 assigned the matter to Magistrate Judge James F. Metcalf for consideration. (Doc. 3.)
19 The Petitioner also moved for an evidentiary hearing as well as the appointment of
20 counsel while his habeas corpus petition was pending. (Docs. 19, 20.) On September 1,
21 2016, Judge Metcalf issued a report and recommendation (“R&R”) that the Court dismiss
22 the habeas corpus petition as untimely, and to further deny the requested relief for the
23 Petitioner’s failure to exhaust and procedural default. (Doc. 30.) Petitioner filed pro se
24 objections to the R&R. (Doc. 36.) For the following reasons, the Court will overrule the
25 Petitioner’s objections and adopt the Magistrate Judge’s recommendations.

26 **BACKGROUND**

27 Petitioner was indicted in Maricopa County Superior Court for one count of
28 attempted sexual conduct with a minor and one count of sexual conduct with a minor on

1 November 3, 2011.¹ (Doc. 16, Ex. A at 3.) He subsequently entered a plea agreement,
2 wherein he pleaded guilty to both counts as alleged in his indictment. (Doc. 16, Ex. B at
3 3.) On March 25, 2010, the Petitioner was sentenced to ten years imprisonment to be
4 followed by a lifetime of probation. (Doc. 16, Ex. C at 3.) The Petitioner signed a
5 “Notice of Rights” at sentencing. (Doc. 16, Ex. I at 2.) This document noted two things;
6 first, the Petitioner did not have a right to a direct appeal and second, that the Petitioner
7 had ninety (90) days to file a Notice of Post-Conviction Relief. (*Id.*)

8 Petitioner did not file a Notice of Post-Conviction Relief until more than a year
9 later on April 27, 2012. (Doc. 16, Ex. C at 1.) He also filed a motion to vacate his
10 conviction, a motion to file a delayed appeal, and a Petition for Post-Conviction Relief
11 (PCR) at the same time. (Doc. 29, Ex. 05; Doc. 16 at Ex. F.) Each of these was denied
12 on July 2, 2012. (Doc. 16, Ex. G.) The PCR Court found that 1) the Petitioner’s Notice
13 of Post-Conviction Relief was untimely, (Doc. 16, Ex. G at 3.), 2) the claims within the
14 PCR were without merit, (*Id.*), 3) the motion to vacate the Petitioner’s conviction was
15 untimely as well, (*Id.*), and 4) the motion to file a delayed appeal was improper because
16 as a pleading defendant, the Petitioner was “not entitled to pursue a delayed notice of
17 appeal.” (Doc. 16, Ex. G at 4.)

18 The Court of Appeals affirmed the findings of the PCR Court due to the
19 untimeliness of Petitioner’s filings without considering the substantive merits of his
20 claims. (Doc. 28, Ex. G at 42.) A subsequent motion for reconsideration was denied on
21 May 7, 2014. (Doc. 28, Ex. F.) The Petitioner then sought review by the Arizona
22 Supreme Court, where his first petition was rejected for failing to comply with the page
23 limit. (Doc. 28, Ex. E at 1.) His second, revised petition was also denied on February 10,
24 2015. (Doc. 28, Ex. B.)

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26 ¹ Petitioner objected to several aspects of the relevant factual and procedural
27 background as outlined by Judge Metcalf, which will be discussed below. Therefore, this
28 Court conducted a de novo review of the proceedings below to ensure that they aligned
with Judge Metcalf’s description. Upon review, the Court agrees with Judge Metcalf’s
characterization of these proceedings, but will also relate a brief summary of the relevant
facts here.

1 habeas petition.³ However, this does not constitute an error on the Magistrate Judge’s
2 part, as the Petition is ultimately barred by the statute of limitations of the Antiterrorism
3 and Effective Death Penalty Act of 1996 (“AEDPA”). 28 U.S.C. § 2244(d)(1).
4 Therefore, the Magistrate Judge was not obligated to delve into the foundation of the
5 merits of the Petitioner’s substantive claims, particularly in the background section of his
6 R&R.⁴ See *Ford v. Gonzalez*, 683 F.3d 1230, 1238 (9th Cir. 2012) (“The narrow issue
7 before us is whether Ford’s habeas claims are time-barred. Under AEDPA, this is a
8 threshold question that we must decide *before* we reach the merits of a habeas petitioner’s
9 claims.”). Nevertheless, this Court conducted its own review of the record and finds the
10 factual and procedural background as described by the Magistrate Judge to be an accurate
11 recounting of the events leading up to the current Petition for Writ of Habeas Corpus,
12 (Doc. 1).

13 **B. Petitioner’s Writ of Habeas Corpus is Untimely and No Tolling Applies**

14 AEDPA imposes a one-year statute of limitations for all petitions for writs of
15 habeas corpus challenging state court convictions and sentences under 28 U.S.C. § 2254.
16 28 U.S.C. § 2244(d)(1). The statute of limitations generally begins to run on “the date on
17 which the judgment became final by the conclusion of direct review or the expiration of
18 the time for seeking such review.” *Id.* However, in the alternative, the statute of
19 limitations may begin to run on “the date on which the factual predicate of the claim or
20 claims presented could have been discovered through the exercise of due diligence.” 28
21 U.S.C. § 2244(d)(1)(D). The statute of limitations should always begin to run on the later
22 of these dates. *Id.*

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25 ³ The Petitioner also seemingly objects to the magistrate judge’s characterization
26 of his state post-conviction relief filings. (Doc. 36 at 11.)

27 ⁴ Furthermore, the magistrate judge did address the factual foundation of the
28 Petitioner’s claims as they related to possible tolling of AEDPA’s statute of limitations
later on in his R&R. (Doc. 30 at 10–24.) Thus, the Petitioner’s objections regarding the
magistrate judge’s interpretation of the factual and procedural background of the R&R
are without merit.

1 The Petitioner objects to the Magistrate Judge’s finding that 28 U.S.C.
2 § 2244(d)(1)(D) does not apply to all of the claims in this case. (Doc. 30 at 13.) His
3 objections center on 1) the Magistrate’s alleged failure to review the substance of his
4 claims, 2) the Magistrate’s focus on his actions rather than those of his counsel, and 3)
5 the fact that he was unaware of the factual predicate for his claims until he received
6 evidentiary records from his former counsel. (Doc. 36 at 67, 74, 75.) The Petitioner
7 asserts that he could not discover the factual predicate for his claims until he received the
8 delivery of the entirety of the evidentiary record, in March of 2012, and thus the statute of
9 limitations period should not have commenced until that date. (Doc. 36 at 73.) The
10 current Petition was not filed until February of 2016. (Doc. 1.) Even assuming that the
11 Petitioner is correct, his Petition is still untimely by almost three years. Because the
12 Petition is untimely regardless of when the statute of limitation commences, the Court
13 overrules the Petitioner’s objections as irrelevant.

14 **1. No Statutory Tolling Applies**

15 The Petitioner does not object to the Magistrate Judge’s finding that statutory
16 tolling does not apply in this case, (Doc. 36 at 80). Therefore, having reviewed the
17 Magistrate Judge’s findings and finding them well-taken, the Court adopts the Magistrate
18 Judge’s finding that statutory tolling does not apply.

19 **2. No Equitable Tolling Applies**

20 The Petitioner objects to the Magistrate Judge’s finding that equitable tolling does
21 not apply in this circumstance. “To receive equitable tolling, ‘[t]he petitioner must
22 establish two elements: (1) that he has been pursuing his rights diligently, and (2) that
23 some extraordinary circumstances stood in his way.’” *Ramirez v. Yates*, 571 F.3d 993,
24 997 (9th Cir. 2009) (quoting *Rasberry v. Garcia*, 448 F.3d 1150, 1153 (9th Cir. 2006)).
25 The Petitioner objects because he believes that 1) he established that he diligently
26 pursued his rights and 2) his attorneys’ delay in sending him his case file and other
27 evidentiary records established an extraordinary circumstance. For the following reasons,
28 these objections are overruled.

1 The Petitioner waited until sixteen days prior to the expiration of his time to file
2 his Notice of Post-Conviction Relief to contact his attorneys and request his case file.
3 His attorneys may have ignored his request for several months, but the Petitioner did not
4 even attempt to follow up with his attorneys for more than three months.⁵ Upon
5 receiving the bulk of his file from his attorneys, the Petitioner proceeded to sit on his
6 claims for another year and half before filing his state court petition. His pursuit of his
7 untimely state petition led him to file his federal petition at least three years late, if not
8 more. Even if the Petitioner attempted to argue that this delay was caused by his desire to
9 exhaust his state law claims, he could have avoided this situation by “filing a ‘protective’
10 habeas petition in federal court and asking the federal court to stay and abey the federal
11 habeas petition until state remedies are exhausted.” *Pace v. DiGugliemo*, 544 U.S. 408,
12 417 (2005). Thus, it cannot be said that the Petitioner acted with reasonable diligence in
13 pursuing his claims. Where a petitioner fails to exercise reasonable diligence while
14 facing extraordinary circumstances, “the link of causation between the extraordinary
15 circumstances and the failure to file is broken, and the extraordinary circumstances did
16 not prevent the untimely filing.” *Valverde v. Stinson*, 224 F.3d 129, 134 (2d Cir. 2000).

17 The Petitioner also objects on the basis that his attorneys’ delay in responding to
18 him constituted an extraordinary circumstance that justified the imposition of equitable
19 tolling. Some instances of attorney misconduct can establish extraordinary
20 circumstances, such as when an attorney ignores his client’s repeated requests for
21 information for years, or when an attorney who was hired to file a habeas petition on
22 behalf of a prisoner wholly fails to do so and suppresses his file. *See Holland v. Florida*,
23 560 U.S. 631 (2010); *Spitsyn v. Moore*, 345 F.3d 796 (9th Cir. 2003). Such is not the
24 case here. The Petitioner continuously repeats and reemphasizes that he believes that his
25 attorneys conduct did not comply with their obligations under the professional rules of

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27 ⁵ Petitioner correctly noted that his delay between his initial contact with his
28 attorneys and his follow up was three months, not six months as the magistrate judge
indicated. (Doc. 36 at 71.) However, this miscalculation does not alter the soundness of
the magistrate judge’s underlying logic; a diligent prisoner would not allow months to go
by without any word from his attorney before attempting to follow up.

1 responsibility throughout this period of time. (Doc. 36 at 91.) Even assuming that this is
2 true, “a ‘garden variety claim’ of attorney negligence” is insufficient to establish an
3 extraordinary circumstance. *Holland*, 560 U.S. at 652. It is also unclear whether the
4 Petitioner’s attorneys represented the Petitioner at the time of this alleged misconduct, as
5 their representation apparently ended upon the entry of his plea agreement. (Doc. 16, Ex.
6 F at 124.) Furthermore, in the absence of a showing of reasonable diligence, the conduct
7 of the Petitioner’s attorneys is insufficient to establish a need for equitable tolling.
8 Therefore, the Petitioner’s objections are overruled and the Magistrate Judge’s findings
9 regarding equitable tolling are adopted.

10 **3. Petitioner Did Not Assert Actual Innocence**

11 Petitioner also objects to the Magistrate Judge’s finding that he did not make a
12 claim of actual innocence. (Doc. 36 at 109.) To establish a claim of actual innocence, the
13 Petitioner needs to show that “it is more likely than not that no reasonable juror would
14 have convicted him in light of the new evidence.” *McQuiggin v. Perkins*, 133 S. Ct.
15 1924, 1935 (2013). This is a rare exception to AEDPA’s statute of limitations, and it
16 should be invoked “only when a petition presents evidence of innocence so strong that a
17 court cannot have confidence in the outcome of the trial unless the court is also satisfied
18 that the trial was free of nonharmless constitutional error.” *Id.* (internal quotation and
19 citation omitted). As one of the Petitioner’s grounds for relief is a challenge to the
20 validity of his guilty plea, he is entitled to seek an actual innocence claim. *See Bousley v.*
21 *United States*, 523 U.S. 614, 622 (1998). However, the Petitioner did not make an actual
22 innocence claim at any point in his 200-page Petition for Writ of Habeas Corpus. (Doc.
23 1.) The Petitioner acknowledges in his objections that he did not raise such an argument
24 in his original petition, but objects on the basis that the Magistrate Judge should have
25 “liberally construed” his other claims to include a claim of actual innocence. (Doc. 36 at
26 109.) While the Magistrate Judge was obligated to and did construe the Petitioner’s
27 claims liberally due to his pro se status, he is not required to advance new legal
28 arguments on behalf of the Petitioner and he appropriately avoided doing so in his R&R.

1 Furthermore, district courts are not required to address new arguments raised in
2 objections to a magistrate judge's report. *See United States v. Howell*, 231 F.3d 615, 621–
3 22 (9th Cir. 2000). To the extent that the Petitioner objects to the Magistrate Judge's
4 refusal to create an actual innocence claim on his behalf, his objections are overruled.

5 The Court adopts the R&R's finding that equitable tolling does not apply in this
6 case. Even assuming that the statute of limitations did not begin to run until the Petitioner
7 obtained his entire case file as well as the evidentiary recordings, this Petition is almost
8 three years late. Therefore, the Court adopts the Magistrate Judge's finding that the
9 Petition should be dismissed with prejudice.⁶ (Doc. 30 at 24.)

10 As the Petition is dismissed with prejudice due to its untimeliness, the Court also
11 adopts the Magistrate Judge's finding that the Motions for an Evidentiary Hearing and
12 Appointment of Counsel are moot. (Docs. 20, 19.) Petitioner also lists objections to the
13 Magistrate Judge's findings as to exhaustion, procedural default and procedural bar.

14 Again, the facts of this case set forth the applicability of each of these doctrines as set
15 forth by the Magistrate Judge in his R&R. While Petitioner repeats his general objections
16 to the Magistrate Judge's determination that the substantive merits of his claims cannot
17 be reached due to his failure to comply with the requirements of AEDPA, the Petitioner
18 fails to establish any factual predicate required as an exception to any of these doctrines.

19 **IT IS THEREFORE ORDERED** that Magistrate Judge James F. Metcalf's
20 Report and Recommendation, (Doc. 30), is **ADOPTED IN FULL**.

21 **IT IS FURTHER ORDERED** that Christopher Walton Hopton's Writ for
22 Petition of Habeas Corpus, (Doc. 1), is **DISMISSED WITH PREJUDICE**. The Clerk of
23 Court is directed to terminate this action and enter judgment accordingly.

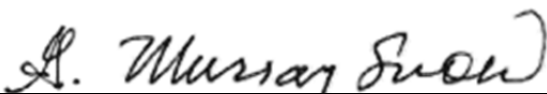
24 **IT IS FURTHER ORDERED** that pursuant to Rule 11(a) of the Rules Governing
25 Section 2254 Cases, in the event Petitioner files an appeal, the Court declines to issue a
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28 ⁶ The Magistrate Judge goes on to find that the Petitioner's claims are procedurally defaulted or barred. (Doc. 30.) The Court does not reach these issues or adopt these findings, as it finds that the timeliness issue is determinative.

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certificate of appealability because reasonable jurists would not find the Court's procedural ruling debatable. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Dated this 2nd day of June, 2017.



Honorable G. Murray Snow
United States District Judge