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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Edward Lee Jones, Jr.,

Petitioner,

v.

Charles L. Ryan, et al.,

Respondents.

No. CV-16-02051-PHX-DJH

ORDER

15 This matter is before the Court on Petitioner's Petition for Writ of Habeas Corpus
16 pursuant to 28 U.S.C. § 2254 (Doc. 1) filed on June 23, 2016 and the Report and
17 Recommendation ("R&R") issued by United States Magistrate Judge John Z. Boyle
18 (Doc. 27) on December 16, 2016. Petitioner filed an Objection to the R&R ("Objection")
19 (Doc. 28) and a supporting Memorandum of Law (Doc. 29) on January 5, 2017. Also
20 pending are Petitioner's Motion for Evidentiary Hearing and Request for Appointment of
21 Counsel (Doc. 12) and Motion Requesting Respondents Furnish Transcripts and Exhibits
22 (Doc. 24).

23 As this Court determined in the Screening Order (Doc. 7), Petitioner raised six
24 grounds for relief in the Petition. (Doc. 7 at 2). After a thorough analysis, Judge Boyle
25 determined that the Petition was filed after the statute of limitations period expired, that
26 Petitioner is not entitled to equitable tolling, and that Petitioner has not demonstrated
27 actual innocence. (Doc. 27). Accordingly, Judge Boyle recommends the Petition be
28 denied and dismissed with prejudice. (Doc. 27 at 11). Judge Boyle further recommends

1 that Petitioner's other two pending motions be denied. (*Id.*).

2 **I. Petitioner’s Objection**

3 Rule 7.2(e)(3) of the Rules of Practice of the United States District Court for the
4 District of Arizona (“Local Rules”) provides that “[u]nless otherwise permitted by the
5 Court, an objection to a Report and Recommendation issued by a Magistrate Judge shall
6 not exceed ten (10) pages.” Petitioner’s handwritten Objection to the R&R (Doc. 28) is
7 32 pages long and the supporting Memorandum of Law (Doc. 29) is an additional six
8 pages with 92 pages of attachments. Petitioner did not seek permission from the Court to
9 exceed the page limit set forth in the Local Rules. Based on Petitioner’s failure to
10 comply with the page limitation in LRCiv 7.2(e)(3), the Court will not consider
11 Petitioner’s Objection or Memorandum of Law. Moreover, even if the Court were to
12 consider his Objection, Petitioner fails therein to clearly identify his specific objections to
13 the R&R.

14 **II. Analysis**

15 **A. Standard of Review**

16 The district judge "shall make a de novo determination of those portions of the
17 report or specified proposed findings or recommendations to which objection is made."
18 28 U.S.C. § 636(b)(1)(C); *see also* Fed.R.Civ.P. 72(b)(3) (“The district judge must
19 determine de novo any part of the magistrate judge’s disposition that has been properly
20 objected to.”); *U.S. v. Reyna-Tapia*, 328 F.3d 1114, 1121 (same). The judge "may
21 accept, reject, or modify, in whole or in part, the findings or recommendations made by
22 the magistrate judge.” 28 U.S.C. § 636(b)(1)(C); Fed.R.Civ.P. 72(b)(3).

23 **B. Timeliness**

24 Although the Court here has not considered Petitioner’s Objection, in an
25 abundance of caution, it has performed its own limited review of the R&R. In doing so,
26 the Court agrees with the Magistrate Judge and finds that the Petition was filed after the
27 statute of limitations period expired.

28 The Antiterrorism and Effective Death Penalty Act of 1996 imposes a statute of

1 limitations on federal petitions for writ of habeas corpus filed by state prisoners. *See* 28
2 U.S.C. § 2244(d)(1). The statute provides in pertinent part:

3 A 1-year period of limitation shall apply to an
4 application for a writ of habeas corpus by a person in custody
pursuant to the judgment of a State court. The limitation
5 period shall run from the latest of—

6 (A) the date on which the judgment became
7 final by the conclusion of direct review or the expiration of
the time for seeking such review;

8 An “of-right” petition for post-conviction review under Arizona Rule of Criminal
9 Procedure 32, which is available to criminal defendants who plead guilty, is a form of
10 “direct review” within the meaning of 28 U.S.C. § 2244(d)(1)(A). *Summers v. Schriro*,
11 481 F.3d 710, 711 (9th Cir. 2007). Therefore, in plea agreement cases, the judgment of
12 conviction becomes final upon “the conclusion of the Rule 32 of-right proceeding and
13 review of that proceeding or [upon] the expiration of the time for seeking such
14 proceeding or review.” *Id.*

15 Additionally, “[t]he time during which a properly filed application for State post-
16 conviction or other collateral review with respect to the pertinent judgment or claim is
17 pending shall not be counted toward” the limitations period. 28 U.S.C. § 2244(d)(2); *Lott*
18 *v. Mueller*, 304 F.3d 918, 921 (9th Cir. 2002). An application for post-conviction relief
19 remains “pending” for purposes of the tolling provision in § 2244(d)(2) until it achieves
20 final resolution through the State’s post-conviction procedure. *Carey v. Saffold*, 536 U.S.
21 214, 219-220 (2002). A post-conviction petition is “clearly pending after it is filed with a
22 state court, but before that court grants or denies the petition.” *Chavis v. Lemarque*, 382
23 F.3d 921, 925 (9th Cir. 2004). In Arizona, post-conviction review is pending once a
24 notice of post-conviction relief is filed even though the petition itself may not be filed
25 until later. *Isley v. Arizona Department of Corrections*, 383 F.3d 1054, 1056 (9th Cir.
26 2004) (“[W]e hold that Isley’s state petition was “pending” within the meaning of 28
27 U.S.C. § 2244(d)(2) and he was entitled to tolling from the date when the Notice was
28 filed. The district court erred in dismissing his petition as untimely.”). Filing a new

1 petition for post-conviction relief, however, does not reinitiate a limitations period that
2 ended before the new petition was filed. *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th
3 Cir. 2003).

4 Here, after Petitioner was sentenced on November 24, 2008, he filed a timely
5 notice of post-conviction relief on November 30, 2008. *See* Ariz.R.Crim.P. 32.4(a)
6 (providing that a petitioner has ninety days from the entry of judgment and sentence to
7 file an “of-right” petition for post-conviction relief). Petitioner subsequently filed a *pro*
8 *se* petition for post-conviction relief on March 17, 2010. The trial court then denied the
9 petition on August 12, 2010. Petitioner then had thirty days to seek review of the trial
10 court’s decision, which he did by filing a petition for review in the Arizona Court of
11 Appeals on September 24, 2010. *See* Ariz.R.Crim.P. 32.9(c) (providing that a petitioner
12 has thirty days from the trial court’s decision to file a petition for review). He filed a
13 second petition for review on December 8, 2010. The Arizona Court of Appeals denied
14 review on September 20, 2012. After Petitioner sought review in the Arizona Supreme
15 Court on October 23, 2012, the Court denied his request on February 15, 2013.

16 Thus, the judgment of conviction became final 90 days later on May 16, 2013,
17 which is when the period for filing a petition for writ of certiorari to the United States
18 Supreme Court expired. *See Summers*, 481 F.3d at 711 (holding that a judgment of
19 conviction pursuant to a guilty plea becomes “final” for purposes of § 2244(d)(1)(A)
20 upon the conclusion of a Rule 32 of-right proceeding and review of that proceeding or
21 upon the expiration of the time for seeking such proceeding or review). The limitations
22 period ran uninterrupted until it expired one year later on May 16, 2014. Petitioner filed
23 his habeas petition on June 23, 2016, more than two years after the limitations period
24 expired. The Petition is, therefore, untimely.

25 Petitioner’s second and third notices of post-conviction relief, filed on August 28,
26 2012 and October 17, 2012, respectively, did not statutorily toll the limitations period
27 because they were not “properly filed.” *See Pace v. DiGuglielmo*, 544 U.S. 408, 414
28 (2005) (holding that an untimely state post-conviction petition is not “properly filed” for

1 purposes of the AEDPA statutory tolling provision). The trial court dismissed
2 Petitioner’s second notice of post-conviction relief as untimely on October 2, 2012.
3 Petitioner did not seek further review. The trial court dismissed Petitioner’s third notice
4 as untimely on November 13, 2012. Petitioner’s requests for review of the dismissal of
5 his third notice were denied. Thus, upon conducting its own limited review, the Court
6 reaches the same conclusion as the Magistrate Judge and finds the Petition is untimely.

7 **C. Equitable Tolling**

8 Additionally, like the Magistrate Judge, the Court finds Petitioner is not entitled to
9 equitable tolling here. The limitations period set forth in 28 U.S.C. § 2244(d) is subject
10 to equitable tolling where a petitioner shows he has been pursuing his rights diligently
11 and that extraordinary circumstances prevented him from filing a timely petition.
12 *Holland v. Florida*, 560 U.S. 631, 649 (2010). Equitable tolling is applied sparingly, as
13 reflected by the “extraordinary circumstances” requirement. *Waldron-Ramsey v.*
14 *Pacholke*, 556 F.3d 1008, 1011 (9th Cir. 2009). Equitable tolling is unavailable in most
15 cases. *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002) (stating that “the threshold
16 necessary to trigger equitable tolling [under AEDPA] is very high, lest the exceptions
17 swallow the rule.”) (citation omitted). An “external force must cause the untimeliness,
18 rather than, as we have said, merely ‘oversight, miscalculation or negligence on [the
19 petitioner’s] part.’” *Waldron-Ramsey*, 556 F.3d at 1011 (quoting *Harris v. Carter*, 515
20 F.3d 1051, 1055 (9th Cir. 2008)). A petitioner seeking equitable tolling bears the burden
21 of demonstrating it is warranted in his habeas case. *Doe v. Busby*, 661 F.3d 1001, 1011
22 (9th Cir. 2011) (citing, *inter alia*, *Holland*, 130 S.Ct. at 2562).

23 Petitioner has not shown that extraordinary circumstances prevented him from
24 filing a timely petition. The reasons he identifies, including denial of his request for
25 appointment of counsel and insufficient legal resources at the prison, among others, are
26 insufficient to demonstrate entitlement to equitable tolling here.

27 **D. Other Motions**

28 Finally, the Court agrees with the Magistrate Judge that an evidentiary hearing is
not warranted here where the state court record clearly demonstrates that Petitioner’s

1 habeas petition is untimely. Moreover, in light of the Court's determination on the
2 habeas petition, the Court finds no basis to grant the motion for Respondents to furnish
3 transcripts.

4 **III. Conclusion**

5 Based on the foregoing,

6 **IT IS ORDERED** that Magistrate Judge Boyle's R&R (Doc. 27) is **accepted** and
7 **adopted**.

8 **IT IS FURTHER ORDERED** that the Petition for Writ of Habeas Corpus
9 pursuant to 28 U.S.C. § 2254 (Doc. 1) is **denied** and **dismissed with prejudice**.

10 **IT IS FURTHER ORDERED** that pursuant to Rule 11(a) of the Rules Governing
11 Section 2254 Cases, a Certificate of Appealability and leave to proceed *in forma pauperis*
12 on appeal are **denied** because dismissal of the Petition is justified by a plain procedural
13 bar and jurists of reason would not find the procedural ruling debatable.

14 **IT IS FURTHER ORDERED** that Petitioner's Motion for Evidentiary Hearing
15 and Request for Appointment of Counsel (Doc. 12) and Motion Requesting Respondents
16 Furnish Transcripts and Exhibits (Doc. 24) are **denied**.

17 **IT IS FINALLY ORDERED** that the Clerk of Court shall terminate this action
18 and enter judgment accordingly.

19 **Dated** this 13th day of February, 2017.

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Honorable Diane J. Humetewa
United States District Judge