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

9 Bradley William Kennedy,

10 Petitioner,

11 v.

12 Gerald Thompson, et al.,

13 Respondents.
14

No. CV-17-04300-PHX-GMS

AMENDED ORDER

15 Pending before the court is Petitioner Bradley William Kennedy's Amended
16 Petition for a Writ of Habeas Corpus. (Doc. 6). Magistrate Judge Eileen S. Willett's Report
17 and Recommendation ("R&R"), (Doc. 14), recommends that Kennedy's petition be
18 dismissed and that no certificate of appealability be granted. Kennedy timely filed
19 Objections. (Doc. 15). The Attorney General of the State of Arizona filed a Response to
20 the Objections. (Doc. 16). Kennedy's Petition is untimely and is therefore dismissed with
21 prejudice.

22 **BACKGROUND**

23 Because no party has objected to the factual and procedural background as set forth
24 in the R&R, the Court adopts the background as an accurate account.

25 **DISCUSSION**

26 In his petition, Kennedy asserts several grounds for habeas relief. (Doc. 1).
27 However, the initial inquiry is whether Kennedy's petition is timely under the Anti-
28 Terrorism and Effective Death Penalty Act ("AEDPA"). The R&R correctly concludes

1 that Kennedy’s petition is untimely and should therefore be dismissed with prejudice.

2 **I. Legal Standards**

3 This court “may accept, reject, or modify, in whole or in part, the findings or
4 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). “[T]he district
5 judge must review the magistrate judge’s findings and recommendations *de novo if*
6 *objection is made*, but not otherwise. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121
7 (9th Cir. 2003) (*en banc*) (emphasis in original). District courts are not required to conduct
8 “any review at all . . . of any issue that is not the subject of an objection.” *Thomas v. Arn*,
9 474 U.S. 140, 149 (1985).

10 **II. Analysis**

11 AEPDA established a strict statute of limitations for the filing of federal habeas
12 petitions. Such a petition must be filed within one year of the latest of four circumstances.
13 *See* 28 U.S.C. § 2244(d)(1). The relevant period for this case is “the date on which the
14 judgment became final by the conclusion of direct review or the expiration of the time for
15 seeking such review.” *Id.* (d)(1)(a). The one-year period, however, is often subject to
16 tolling. AEDPA tolls the limitations period during the “time during which a properly filed
17 application for State post-conviction relief or other collateral review with respect to the
18 pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2). AEDPA’s statute of
19 limitations is also subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631, 645
20 (2010). But equitable tolling is not frequently available. To qualify, a petitioner must
21 establish that (1) he has been pursuing his rights diligently and (2) extraordinary
22 circumstances prevented him from filing their habeas petition on time. *Pace v.*
23 *DiGuglielmo*, 544 U.S. 408, 418 (2005).

24 The parties do not contest that Kennedy’s limitations period began running on June
25 6, 2013. Kennedy, however, contends that his limitations period should be equitably tolled.
26 Because he fails to demonstrate that extraordinary circumstances prevented him from filing
27 his petition before the expiration of AEDPA’s limitations period, his petition is untimely
28 and should be dismissed with prejudice.

1 **A. Equitable Tolling**

2 Kennedy objects to the R&R’s conclusion that equitable tolling does not apply.
3 Kennedy contends that it should apply such that the limitations period did not end until
4 February 15, 2017. Kennedy bears the burden of establishing that equitable tolling is
5 warranted. *Pace*, 544 U.S. at 418; *Rasberry v. Garcia*, 448 F.3d 1150, 1153 (9th Cir.
6 2006).

7 To establish that equitable tolling applies, Kennedy must demonstrate that
8 extraordinary circumstances were the proximate cause of his untimeliness. *Spitsyn v.*
9 *Moore*, 345 F.3d 796, 799 (9th Cir. 2003). In his objections to the R&R, Kennedy asserts
10 the “extraordinary circumstance” of “ineffective assistance of counsel during his state post-
11 conviction proceeding.” (Doc. 15 at 2). But Kennedy fails to explain why this alleged
12 ineffectiveness of PCR counsel prevented him from filing his federal habeas petition within
13 the required time. He therefore does not “show a causal connection between the unlawful
14 impediment and his failure to file a timely habeas petition.” *Bryant v. Arizona Attorney*
15 *General*, 499 F.3d 1056, 1060–61 (9th Cir. 2007).

16 Further, *Martinez v. Ryan*, 566 U.S. 1 (2012), does not apply here. *Martinez*
17 recognized a narrow set of circumstances in which the procedural default of a claim of
18 ineffective assistance of trial counsel can be excused because of the ineffectiveness of
19 counsel in PCR proceedings. *Cook v. Ryan*, 688 F.3d 598, 607 (9th Cir. 2012). *See also*
20 *Davila v. Davis*, ___ U.S. ___, 137 S. Ct. 2058, 2062–63 (2017) (stating that *Martinez*
21 applies “in a single context—where the State effectively requires a defendant to bring [an
22 ineffective-assistance-of-trial counsel] claim in state postconviction proceedings rather
23 than on direct appeal.”). But that is not the situation here. *Martinez* does not apply to
24 tolling the limitations of § 2244(d). *See Lambrix v. Sec’y, Florida Dept. of Corr.*, 756 F.3d
25 1246, 1249 (11th Cir. 2014) (“the equitable rule in *Martinez* applies only to the issue of
26 cause to excuse the procedural default of an ineffective assistance of trial counsel claim
27 that occurred in a state collateral proceeding and has no application to the operation or
28 tolling of the § 2244(d) state of limitations for filing a § 2254 petition”); *Madueno v. Ryan*,

1 No. CV-13-01382-PHX-SRB, 2014 WL 2094189, at *7 (D. Ariz. May 20, 2014)
2 (“*Martinez* has no application to the statute of limitations in the AEDPA which governs
3 Petitioner's filing in federal court.”).

4 “[T]he threshold necessary to trigger equitable tolling under AEDPA is very high.”
5 *Bills v. Clark*, 628 F.3d 1092, 1097 (9th Cir. 2010) (alterations omitted). Kennedy has
6 failed to establish that extraordinary circumstances prevented him from timely filing his
7 habeas petition. *Pace*, 544 U.S. at 418. He has failed therefore to demonstrate that the
8 limitations period in § 2244(d) should be tolled because of equitable concerns.

9 **B. Actual Innocence**

10 Kennedy objects to the R&R’s observation that Kennedy “ma[de] no claim that the
11 Court should apply the “actual innocence gateway” to excuse the timeliness of this
12 proceeding.” (Doc. 14 at 6). In *McQuiggin v. Perkins*, the Supreme Court held that an
13 actual innocence claim may serve as a “gateway” to overcome a statute of limitations bar
14 to a habeas claim. 569 U.S. 383, 386 (2013). To access this gateway, however, a petitioner
15 must “persuade[] the district court that, in light of the new evidence, no juror, acting
16 reasonably, would have voted to find him guilty beyond a reasonable doubt.” *Id.*
17 Kennedy’s petition presents no new evidence that would prevent a reasonable juror from
18 finding him guilty beyond a reasonable doubt. Thus, even assuming that Kennedy did
19 bring an actual innocence claim in his petition (which is far from clear), the claim would
20 fail and does not therefore allow Kennedy to avoid the limitations period of § 2244(d).

21 **C. Certificate of Appealability**

22 A certificate of appealability should issue “when the prisoner shows . . . that jurists
23 of reason would find it debatable whether the petition states a valid claim of the denial of
24 a constitutional right and that jurists of reason would find it debatable whether the district
25 court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).
26 Jurists of reason would not find it debatable whether Kennedy’s petition states valid claims
27 of the denial of his constitutional rights, nor would they debate whether Kennedy’s claims
28 were untimely under § 2244(d). If Kennedy appeals this ruling, the Court declines to issue

1 a certificate of appealability.

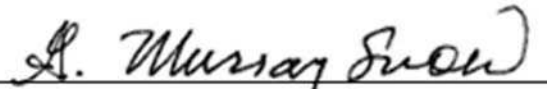
2 **CONCLUSION**

3 **IT IS THEREFORE ORDERED** that the Report and Recommendation of
4 Magistrate Judge Willett (Doc. 14) is adopted.

5 **IT IS FURTHER ORDERED** that Petitioner Bradley William Kennedy's
6 Amended Petition for a Writ of Habeas Corpus (Doc. 6) is **DENIED** and **DISMISSED**
7 **WITH PREJUDICE.**

8 **IT IS FURTHER ORDERED** directing the Clerk of Court to terminate this action
9 and enter judgment accordingly.

10 Dated this 8th day of March, 2019.

11 
12 _____
13 G. Murray Snow
14 Chief United States District Judge