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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Johnathan Ian Burns,  
10 Petitioner,

11 v.

12 David Shinn, et al.,  
13 Respondents.  
14

No. CV-21-1173-PHX-SPL  
DEATH PENALTY CASE  
**ORDER**

15 Before the Court is Petitioner Johnathan Ian Burns's motion to have the Court  
16 prospectively equitably toll the statute of limitations governing his habeas petition for 90  
17 days (Doc. 16 at 1–10), *see* Antiterrorism and Effective Death Penalty Act of 1996  
18 (AEDPA), 28 U.S.C. § 2244(d)(1)(A), or, alternatively, modify the briefing schedule so  
19 that Burns may file an amended petition within 90 days after the un-tolled statute of  
20 limitations runs (*id.* at 2, 7–8, 10; Doc. 10 at 2). The motion is fully briefed. (Docs. 19, 21.)  
21 For the following reasons, the Court denies Burns's tolling request and grants his  
22 modification request.

23 **A. Background**

24 The Court has ordered Burns to petition for a writ of habeas corpus by June 20,  
25 2022. (Doc. 10.) Both parties agree that this deadline is when the one-year statute of  
26 limitations under the AEDPA will run. (Doc. 9 at 1.) Burns now asks the Court to either  
27 prospectively equitably toll the deadline for 90 days, up through September 18, 2022, or  
28 let him file an amended petition within 90 days of the June 20, 2022, deadline. (Doc. 16.)

1 Respondents oppose his tolling request but do not oppose his modification request. (Doc.  
2 19.) In doing so, Respondents seek to “reserve the right to challenge any claim-specific”  
3 equitable-tolling requests as well as any “untimely new claims and arguments that do not  
4 relate back to claims and arguments in the initial, timely petition.” (*Id.* at 5.)

5 **B. Analysis**

6 The Court may equitably toll the AEDPA’s statute of limitations if a petitioner  
7 shows “‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary  
8 circumstance stood in his way’ and prevented [the petition’s] timely filing.” *Holland v.*  
9 *Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418  
10 (2005)). This test is “highly fact-dependent.” *Whalem/Hunt v. Early*, 233 F.3d 1146, 1148  
11 (9th Cir. 2000).

12 Burns argues that the Court can grant such tolling under *Calderon v. U.S. Dist.*  
13 *Court for the Cent. Dist. of California (Beeler)*, 128 F.3d 1283, 1289 (9th Cir. 1997),  
14 *overruled on other grounds by* 163 F.3d 530 (9th Cir. 1998) (en banc), and asserts that he  
15 has been diligently pursuing his rights but that an extraordinary circumstance, the COVID-  
16 19 pandemic, has stood in his way and will prevent him from timely filing his petition  
17 (Doc. 16 at 2–7). Specifically, he avows that his defense team could not travel to interview  
18 witnesses for three months, from December 2021 through February 2022, due to the  
19 pandemic. (*Id.* at 3.) Although he avows that his defense team has “been contending” with  
20 the pandemic since counsel’s appointment, he seeks relief from those three months. (*Id.* at  
21 2, 7; Doc. 21 at 5.)

22 Citing the declarations of an attorney on the team (*see* Doc. 16-1; Doc. 21-1), Burns  
23 states that upon counsel’s appointment, the team (based in California) traveled to Arizona  
24 many times in the summer and fall of 2021 (*id.* at 4; Doc. 16 at 3). But due to a spike in  
25 COVID-19 cases, his team could not travel to interview witnesses from December 2021  
26 through February 2022. (Doc. 16 at 3; Doc. 16-1 at 6; Doc. 21 at 5.) Still, in those months,  
27 the team kept requesting, amassing, and reading various records; retaining and consulting  
28 with experts; speaking with Burns on the phone; spotting issues to investigate; and

1 researching claims. (Doc. 16 at 3–4, 7; Doc. 16-1 at 6–7.) At the end of February 2022, as  
2 COVID-19 cases declined, the team again felt safe traveling and thus resumed doing so.  
3 (Doc. 16 at 4; Doc. 16-1 at 6.) They traveled to Arizona and other states many times to  
4 interview witnesses. (Doc. 16 at 4; Doc. 16-1 at 6–8.)

5 Burns avers that his team has “identified over 100 witnesses” (former members of  
6 Burns’s defense team, among others) who live in and outside Arizona whom they need to  
7 interview. (Doc. 16 at 4; Doc. 16-1 at 7–8.) They have retained experts and have garnered  
8 and given the experts relevant records. (Doc. 16 at 4; Doc. 16-1 at 9.) Also, the Court has  
9 granted Burns’s stipulation for an order permitting an expert to visit Burns in person. (Doc.  
10 16 at 4; Doc. 16-1 at 9; Docs. 18 and 20.) The expert will contact Burns on May 13, 2022.  
11 (Doc. 20 at 2.) Burns’s attorney also described the team’s efforts to retrieve pertinent  
12 documents and declared that they have begun drafting claims in a habeas petition. (Doc.  
13 16-1; Doc. 21-1.) In sum, Burns argues that “[d]espite [their] best efforts,” his team will be  
14 unable to interview all of their identified witnesses, complete their “necessary  
15 investigation,” or “file a complete petition by” June 20, 2022. (Doc. 16 at 1, 4, 7; Doc. 21  
16 at 5.)

17 Burns points out that the Court has found the pandemic to be an extraordinary  
18 circumstance that has stood in the way of timely filed petitions. *See, e.g., Payne v. Shinn*,  
19 No. CV-20-0459-TUC-JAS, 2021 WL 3511136, at \*3 (D. Ariz. Aug. 10, 2021) (explaining  
20 that the pandemic has blocked counsel from gaining records and interviewing relevant  
21 witnesses). Yet Respondents assert that even assuming that the pandemic is such a  
22 circumstance, until Burns files his petition, he cannot fully show reasonable diligence or  
23 that the pandemic prevented him from timely filing the petition. (Doc. 19 at 2–5.)

24 Equitable tolling is generally applied retrospectively, *e.g., Carter v. Bradshaw*, 644  
25 F.3d 329, 335 (6th Cir. 2011) (citing cases), *reversed on a different ground in Ryan v.*  
26 *Gonzales*, 568 U.S. 57 (2013), though the Supreme Court has not passed on whether it may  
27 apply such tolling before the filing of the petition.

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1           On the one hand, some courts have held that they lack jurisdiction to consider the  
2 petition’s timeliness until it is filed. *See, e.g., United States v. McFarland*, 125 Fed. App’x  
3 573, at \*1 (5th Cir. Apr. 6, 2005) (finding opinion on timeliness advisory, as no case or  
4 controversy will arise until petition is filed); *see also Archanian v. Gittere*, No. 319-CCV-  
5 00177APG-CLB, 2019 WL 6499113, at \*2–3 (D. Nev. Dec. 3, 2019) (denying motion for  
6 equitable tolling as premature without prejudice when the motion is in response to  
7 respondents’ limitations defense); *Knutson v. McNurlin*, No. CV 15-2807 (DSD/BRT),  
8 2015 WL 9224180, at \*1 (D. Minn. Nov. 23, 2015) *report and recommendation adopted*  
9 *in* 2015 WL 9165885 (D. Minn. Dec. 16, 2015) (denying motion for equitable tolling as  
10 premature because, until the petitioner files the petition, the court “cannot determine  
11 whether he has diligently pursued his rights throughout the entire period preceding the  
12 filing of his petition and was prevented from timely filing due to extraordinary  
13 circumstances beyond his control”); *Gray v. Quarterman*, No. 3:08-CV-2068-D, 2008 WL  
14 5385010, at \*1 (N.D. Tex. Dec. 23, 2008) (stating that “[f]ederal courts do not sit to decide  
15 hypothetical issues or to give advisory opinions about issues as to which there are not  
16 adverse parties before [them]”) (second alteration in original) (internal quotations omitted);  
17 *but see Hargrove v. Brigano*, 300 F.3d 717, 720–21 (6th Cir. 2002) (affirming district  
18 court’s use of prospective equitable tolling in § 2254 cases when tolling achieved the same  
19 result as a stay).

20           On the other hand, prospective equitable tolling has occurred in this Circuit. *See,*  
21 *e.g., Beeler*, 128 F.3d at 1289 (upholding tolling due to a late change in counsel); *Calderon*  
22 *v. U.S. Dist. Court for the Cent. Dist. of California (Kelly V)*, 163 F.3d 530, 541 (9th Cir.  
23 1998), *abrogated on other grounds by Woodford v. Garceau*, 538 U.S. 202 (2003) (holding  
24 that a prisoner’s incompetence justifies equitable tolling “until a reasonable period after  
25 the district court makes a competency determination”); *Williams v. Chappell*, No. 1:12-  
26 CV-01344 LJO, 2013 WL 3863942, at \*4–5 (E.D. Cal. July 24, 2013) (citing cases granting  
27 such tolling).

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1           Since *Beeler*, prospective equitable tolling has been used to extend the limitations  
2 period in a “stop-clock” fashion, for the duration of time between a capital habeas  
3 petitioner’s request for the appointment of counsel and the date counsel is appointed.<sup>1</sup> *See*  
4 *Bunyard v. Davis*, No. 2:15-cv-01790 WBS AC DP, 2016 WL 128429, at \*2–3 n.3 (E.D.  
5 Cal. Jan. 12, 2016) (“Pre-petition equitable tolling in capital cases is widely accepted in  
6 this circuit.”); *Williams*, 2013 WL 3863942, at \*5 (“The Court is well aware that granting  
7 equitable tolling during the time capital petitioners await appointment of counsel is widely  
8 practiced and sanctioned by the appellate courts.”).

9           Burns relies on *Beeler* but concedes that this Court has denied prospective equitable  
10 tolling since the Ninth Circuit’s more recent holding in *Smith v. Davis*, 953 F.3d 582, 599  
11 (9th Cir. 2020), *cert. denied in* No. 20-5366, 2020 WL 6829092 (U.S. Nov. 23, 2020).  
12 (Doc. 16 at 5–6.) *See, e.g., Payne*, 2021 WL 3511136, at \*3–7.

13           *Smith* calls into question Burns’s reliance on *Beeler* and the practice of prospective  
14 tolling. Smith petitioned for a writ of habeas corpus more than two months after the  
15 AEDPA’s statute of limitations had run. *Smith*, 953 F.3d at 585–86. He argued that he  
16 should receive equitable tolling because his counsel had not informed him of his  
17 unsuccessful state-court appeal and had not given him the state-court record. *Id.* After  
18 Smith learned of his unsuccessful appeal and obtained the record, he still had 10 months to  
19 file the petition before the statute of limitations ran. *Id.* But he did not do so until 66 days  
20 after it had run. *Id.*

21           The Ninth Circuit held that Smith was not entitled to equitable tolling. *Id.* at 602. It  
22 held that a petitioner “must show that he has been reasonably diligent in pursuing his rights  
23 not only while an impediment to filing caused by an extraordinary circumstance existed,  
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25           <sup>1</sup> “Stop-clock” tolling is the granting of a motion for equitable tolling to extend the  
26 limitations period for the exact duration of the impediment. For instance, if counsel is not  
27 appointed for 60 days after the initiation of habeas proceedings, a court that performs stop-  
28 clock tolling would extend the limitations period for 60 days regardless of any showing of  
diligence after counsel is appointed or counsel’s ability to nonetheless file a timely petition  
in the absence of tolling.

1 but before and after as well, *up to the time of filing his claim in federal court.*” *Id.* at 598–  
2 99 (emphasis added). Applying this framework, the court found that Smith had not been  
3 diligent between the time he obtained his records and the time he filed his petition. *Id.* at  
4 601.

5 The Ninth Circuit explicitly rejected the argument raised by Smith that Congress  
6 established a one-year-statute of limitations with the intent to provide petitioners with 365  
7 impediment-free days to draft and file a petition. *Id.* at 591–92; *accord Kayer v. Schriro*,  
8 No. CR-07-2120-PHX-DGC, 2007 WL 4150213, at \*2–3 (D. Ariz. Nov. 19, 2007)  
9 (rejecting argument that AEDPA provides petitioners with a full year to prepare a habeas  
10 petition and finding petitioner’s request for equitable tolling filed before the expiration of  
11 the statute of limitations premature).

12 This Court assumes that Burns has been reasonably diligent in pursuing his rights  
13 since the appointment of counsel and that the pandemic has been an extraordinary  
14 circumstance that stood in the way of timely filing his petition for virtually three months.  
15 Even so—in accordance with *Smith*—the Court cannot assess Burns’s diligence up to the  
16 time of filing the petition because he has not filed it. *See* 953 F.3d at 591–93 n.3 (second  
17 alteration added) (noting that the language, “*has been pursuing his rights diligently*”  
18 indicates that “a petitioner [needs] to show his diligence continued up through the point of  
19 filing his habeas petition in federal court” and that this requirement protects the rights of  
20 all parties).

21 Burns nonetheless points out that two districts in our Circuit (the Eastern District of  
22 California and the District of Nevada) have rejected the notion that *Smith* bars prospective  
23 equitable tolling and thus have applied such tolling based on the COVID-19 pandemic.  
24 (Doc. 16 at 6–7.)

25 In *Brown v. Davis*, the Eastern District of California found petitioner entitled to  
26 prospective equitable tolling due to the impact of the COVID-19 pandemic. 482 F.Supp.3d  
27 1049, 1060 (E.D. Cal. 2020). The court disagreed with respondents that *Smith*, in essence,  
28 had removed such tolling from “all cases.” *Id.* at 1056. The court noted that the Supreme

1 Court had not barred such tolling and that the Ninth Circuit had allowed it since *Beeler*. *Id.*  
2 at 1056–57 (citing cases). In fact, the court stressed that *Smith* did not even discuss  
3 prospective equitable tolling, as Smith had filed his federal petition two months after the  
4 statute of limitations had run. *Id.* at 1057 (citing *Smith*, 953 F.3d at 587). The court reasoned  
5 that the Ninth Circuit had only “rejected [Smith]’s retrospective ‘stop-clock’ argument”  
6 because he “had simply failed to show” diligence “before, during, and after he had obtained  
7 the state court record.” *Id.* (citing *Smith*, 953 F.3d at 601–02).

8 Thus, even though Brown had not filed his petition, the court determined that *Smith*  
9 did “not prohibit prospective equitable tolling . . . where petitioner’s counsel has both  
10 demonstrated and committed to the continued exercise of due diligence.” *Id.* Though the  
11 court acknowledged that “some conceivable tension between the decisions in *Beeler* and  
12 *Smith*” may exist, this alone would not suffice to conclude that *Smith* “implicitly overruled”  
13 *Beeler*. *Id.* at 1058 (citing *Aleman Gonzalez v. Barr*, 955 F.3d 762, 768–69 (9th Cir. 2020),  
14 *cert. granted in Garland v. Gonzalez*, 142 S. Ct. 919 (Mem) (Aug. 23 2021); *United States*  
15 *v. Walker*, 953 F.3d 577, 581 (9th Cir. 2020)).

16 The District of Nevada also granted prospective equitable tolling based on the  
17 pandemic in *Mullner v. Williams*, No. 2:20-cv-00535-JAD-BNW, 2020 WL 6435751, at  
18 \*2 (D. Nev. Nov. 2, 2020). The court recognized that such tolling departed “from the usual  
19 practice” and that “[b]y its nature, equitable tolling is a retrospective equitable remedy.”  
20 *Id.* at \*1. The court also noted that in the event of “a short deadline,” the Federal Public  
21 Defender would usually quickly file a timely petition, “effectively a rough draft based upon  
22 a brief initial investigation, to which later amended petitions can relate back.” *Id.* The court,  
23 however, found this practice unnecessary based on the record:

24 The extraordinary circumstance of the COVID-19 pandemic is ongoing, and  
25 the court agrees that it prevents Mullner from filing a timely amended  
26 petition. This is because if the court were to deny prospective equitable  
27 tolling but give Mullner additional time to file an amended petition because  
28 of the challenges he faces, then the court can say with certainty that it would  
find equitable tolling to be warranted once he files the amended petition.  
Thus, the court will simply grant equitable tolling now. . . .

1 *Id.* at \*4.

2 This Court, however, is bound by the holdings in *Beeler* and *Smith*. The Ninth  
3 Circuit in *Beeler* did not directly address whether prospective tolling was permissible;  
4 rather, the court assessed whether the statute of limitations was subject to equitable tolling  
5 or was an inflexible limitation on federal court jurisdiction. *See* 128 F.3d at 1285. Having  
6 decided that the statute of limitations could be tolled, the Ninth Circuit affirmed the district  
7 court’s decision to allow *Beeler* more time to file his petition after his first attorney  
8 withdrew from representation. *Id.* at 1289. But it is not evident from the opinion that the  
9 district court’s decision to toll in that particular context—in contrast to its legal authority  
10 to toll—was even at issue on appeal. *See Beeler*, 128 F.3d 1283.

11 The Court has concerns that, in light of *Smith*, granting *Burns*’s request for  
12 prospective equitable tolling may negatively impact some of his claims. *See Mardesich v.*  
13 *Cate*, 668 F.3d 1164, 1171 (9th Cir. 2012) (“AEDPA’s one-year statute of limitations in §  
14 2244(d)(1) applies to each claim in a habeas application on an individual basis.”). A blanket  
15 authorization of equitable tolling for a pre-determined period of time, if later determined  
16 to have been granted in error, could result in the loss of some of *Burns*’s claims. The Court  
17 shares the opinion of Judge Edmund A. Sargus, Jr., of the Southern District of Ohio: “The  
18 novelty of the issue presented herein militates in favor of taking the more cautious approach  
19 for which the Court has opted.” *Pickens v. Shoop*, No. 19-cv-558, 2020 WL 3128536, at  
20 \*3 (S.D. Ohio June 12, 2020).

21 To conclude, neither the Supreme Court nor the Ninth Circuit has directly addressed  
22 the availability of prospective equitable tolling of federal habeas petitions. *Beeler* simply  
23 stands for the proposition that the AEDPA is subject to equitable tolling. The Ninth Circuit  
24 in *Smith*, however, has instructed this Court to examine a petitioner’s diligence “up to the  
25 time of filing his claim in federal court.” *Smith*, 953 F.3d at 598–99. This the Court cannot  
26 do until a petition is filed. Thus, the request for prospective equitable tolling is denied as  
27 premature.

28 Instead, the Court will adopt the approach taken in *Pickens*, and grant *Burns*’s



1 request to file an amended petition by September 18, 2022, to protect the interests and  
2 rights of both parties.

3 Respondents have consented to the filing of an amended petition 90 days after the  
4 petition is filed. (Doc. 19.)


5 Accordingly,

6 **IT IS ORDERED denying** Burns's motion for equitable tolling (Doc. 16) **without**  
7 **prejudice.**

8 **IT FURTHER ORDERED:**

- 9 1. The deadline for filing the initial habeas petition remains **June 20, 2022.**  
10 2. The deadline for filing an amended habeas petition is **September 18, 2022.**  
11 3. The parties shall confer and submit a joint proposal for the remaining deadlines  
12 no later than **May 19, 2022.**

13 Dated this 16th day of May, 2022.

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15   
16 Honorable Steven P. Logan  
17 United States District Judge  
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