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7 **IN THE UNITED STATES DISTRICT COURT**  
8 **FOR THE DISTRICT OF ARIZONA**  
9

10 Everett Chee Laughing,  
11                                      Petitioner/Movant/Defendant,  
12 v.  
13 United States of America,  
14                                      Respondent/Plaintiff.  
15

No. CV-16-08141-PCT-JAT  
CR-10-8074-PCT-JAT

**ORDER**

16           Pending before the Court is Petitioner's *pro se* motion under 28 U.S.C. § 2255 to  
17 vacate, set aside, or correct sentence. (Doc. 1.) This case was referred to a Magistrate  
18 Judge, who issued a Report and Recommendation (Doc. 8) recommending that this Court  
19 find that the Motion in this case is barred by the statute of limitations, and is not subject  
20 to equitable tolling pursuant to § 2255. The Magistrate Judge further recommends that an  
21 evidentiary hearing is not warranted regarding Petitioner's claims. (Doc. 8.)

22           In reviewing a Report and Recommendation ("R&R"), this Court must conduct a  
23 *de novo* review of any portion of the R&R to which either party objects. *United States v.*  
24 *Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). Although Petitioner does  
25 not raise any cognizable objections in his filed Objection (Doc. 9), the Court will review  
26 the motion *de novo*.<sup>1</sup>

27 \_\_\_\_\_  
28 <sup>1</sup> Petitioner objects to the R&R for not addressing Ground Two of his Motion (Doc. 1), however Count Two was dismissed by Order of the Court. (Doc 3 at 2.)

1 On April 13, 2010, an Indictment charged Movant  
2 with Aggravated Sexual Abuse (Count One), Kidnapping  
3 (Count Two), and Assault Resulting in Serious Bodily Injury  
4 (Count Three). (CR Doc. 1.)<sup>[2]</sup> On February 9, 2011, Movant  
5 pleaded guilty to Count Three pursuant to a plea agreement.  
6 (CR Doc. 35.) . . . .

7 . . . .

8 On September 1, 2011, the Court sentenced Movant to  
9 120 months imprisonment and three years of supervised  
10 release. (CR Doc. 49 at 1.)

11 On September 12 and 13, 2011, Movant and his  
12 attorney filed a Notice of Appeal. (CR Docs. 51, 52.) On  
13 March 6, 2013, the Ninth Circuit Court of Appeals granted  
14 Movant’s motion to voluntarily dismiss his appeal. (CR Doc.  
15 65.) The Order also stated the Order acted as “the mandate of  
16 this court.” (*Id.*)

17 On April 16, 2014, Movant filed a Motion for  
18 Clarification. (CR Doc. 67.) . . . . On May 16, 2014, the Court  
19 denied the Motion. (CR Doc. 68.)

20 On June 23, 2016, Movant [moved] to Vacate, Set  
21 Aside, or Correct Sentence. (Doc. 1.)

22 . . . .

23 On October 5, 2016, Respondent filed a Response.  
24 (Doc. 5.) Movant did not file a reply.

25 On November 23, 2016, Movant also filed a “Notice of  
26 Intent/Notice of Interest.” (Doc. 6.) Movant asserts the Court  
27 charged him “unlawfully because my original crime was not  
28 against the UNITED STATES OF AMERICA, but was  
committed on the reservation.” (*Id.* at 1.) He asserts the  
indictment was insufficient, the Court lacks jurisdiction, and  
his tribe has “inherent sovereign immunity.” (*Id.*)

(Doc. 8 at 2-3.)

The Antiterrorism and Effective Death Penalty Act (“AEDPA”) provides a one-year statute of limitations for defendants to file habeas petitions, starting when their convictions become final. 28 U.S.C. § 2244(d) (2006). “[F]or federal criminal defendants

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<sup>[2]</sup> Citations to “CR Doc.” are to the docket in the underlying criminal case, CR 10-8074-PCT-JAT.

1 who do not file a petition for certiorari with this Court on direct review, § 2255's one-  
2 year limitation period starts to run when the time for seeking such review expires." *Clay*  
3 *v. United States*, 537 U.S. 522, 532 (2003). The Seventh Circuit Court has held that a  
4 movant under § 2255 was entitled to a 90-day window to petition for certiorari after his  
5 appeal was dismissed. *Latham v. United States*, 527 F.3d 651, 653 (7th Cir. 2008).

6 In this case, Petitioner's motion to voluntarily dismiss his appeal was granted by  
7 the Ninth Circuit Court of Appeals on March 6, 2013. If the Petitioner's clock began  
8 running 90 days after his appeal was dismissed, his conviction would have been final on  
9 June 5, 2013. Therefore, the § 2255 motion was due on June 5, 2014, but it was filed June  
10 23, 2016. Accordingly, it was filed more than one year after the statute of limitations  
11 expired and may be dismissed.

12 Equitable tolling is available when a movant has diligently pursued his rights and  
13 extraordinary circumstances exist, which prevented timely filing. *United States v.*  
14 *Aguirre-Ganceda*, 592 F.3d 1043, 1045 (9th Cir. 2010) (citing *Pace v. DiGuglielmo*, 544  
15 U.S. 408, 418 (2005)). Here, again, the conviction became final in June 2013 and this  
16 Motion was not filed until June 2016. Petitioner claims ignorance of the law as reason for  
17 the untimeliness of the § 2255 motion. (Doc. 1 at 10.) Petitioner identified that the  
18 Supreme Court has "never accepted pro se representation alone or procedural ignorance  
19 as an excuse for prolonged inattention when a statute's clear policy calls for promptness."  
20 *Johnson v. United States*, 544 U.S. 295, 311 (2005). (Doc. 9 at 3-4.) While Petitioner  
21 acknowledges, yet disagrees with Supreme Court precedent, this Court is nonetheless  
22 bound by it. The Court agrees with the R&R that Petitioner has presented no evidence  
23 that extraordinary circumstances stood in his way from 2014 (when the statute of  
24 limitations expired) to 2016 (when Petitioner took action on his case). Accordingly,  
25 having considered equitable tolling, the Court continues to find the Motion untimely.

26 An evidentiary hearing should be granted when a Movant "makes 'a good-faith  
27 allegation that would, if true, entitle him to equitable tolling.'" *Roy v. Lampert*, 465 F.3d  
28 964, 969 (9th Cir. 2006) (quoting *Laws v. Lamarque*, 351 F.3d 919, 921 (9th Cir. 2003)).

1 Petitioner objects the R&R's conclusion that an evidentiary hearing is not warranted,  
2 albeit acknowledging his failure to make a showing that would warrant tolling. (Doc. 9 at  
3 5.) Petitioner relies on his inability to express himself on paper as reason for the  
4 evidentiary hearing regarding equitable tolling. (Doc. 9 at 6.) Since no good-faith  
5 allegation is made that would entitle Petitioner to equitable tolling, this Court continues  
6 to find the motion untimely, and agrees with the R&R that no evidentiary hearing is  
7 necessary.

8 Based on the foregoing,

9 **IT IS ORDERED** that the Report and Recommendation (Doc. 8) is accepted and  
10 adopted; Petitioner's objections (Doc. 9) are overruled; Petitioner's motion to vacate, set  
11 aside, or correct sentence (Doc. 1) is denied and dismissed with prejudice; and the Clerk  
12 of the Court shall enter judgment accordingly.

13 **IT IS FURTHER ORDERED** that pursuant to Rule 11 of the Rules Governing  
14 Section 2255 Proceedings, in the event Petitioner files an appeal, the Court denies  
15 issuance of a certificate of appealability, because dismissal of the motion is based on a  
16 plain procedural bar, and jurists of reason would not find this Court's procedural ruling  
17 debatable. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

18 Dated this 5th day of June, 2017.

