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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Jerry Dean McCoy,

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No. CIV 10-052-TUC-RCC (GEE)

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Petitioner,

)

**REPORT AND  
RECOMMENDATION**

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vs.

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Charles L. Ryan; et al.,

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Respondents.

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On January 25, 2010, Jerry Dean McCoy, an inmate confined in the Arizona State Prison Complex-Manzanita in Tucson, Arizona, filed a Petition for Writ of Habeas Corpus pursuant to Title 28, United States Code, Section 2254. [doc. #1] Before the court are the petition and the respondents' answer.

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Pursuant to the Rules of Practice of this court, this matter was referred to Magistrate Judge Edmonds for report and recommendation.

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The Magistrate Judge recommends the District Court, after its independent review of the record, enter an order dismissing the petition. It is time-barred.

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Summary of the Case

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McCoy was convicted after a bench trial of "three counts of kidnapping, three counts of aggravated assault with a deadly weapon or dangerous instrument, and one count each of burglary, aggravated robbery, and armed robbery." (Respondents' answer, Exhibit A, p. 2.)

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1 The trial court sentenced McCoy to “concurrent terms of imprisonment on all counts, the  
2 longest of which was twenty-one years.” *Id.*

3 McCoy filed a timely notice of direct appeal arguing the trial court violated his right to  
4 a speedy trial pursuant to Ariz.R.Crim.P. 8. (Respondents’ answer, p. 2.) The court of appeals  
5 affirmed his convictions and sentences on March 30, 2007. *Id.*

6 On April 27, 2007, McCoy filed timely notice of post-conviction relief. *Id.* He argued  
7 in his petition that trial counsel was ineffective for (a) failing to challenge the pretrial  
8 identifications and (b) failing to cross-examine two witnesses as to possible government  
9 inducements to secure their testimony. *Id.*, pp. 2-3. The trial court denied the petition on  
10 December 10, 2007. (Respondents’ answer, Exhibit G.) On October 23, 2008, the court of  
11 appeals granted review but denied relief. *Id.*, p. 3. McCoy did not appeal to the Arizona  
12 Supreme Court. *Id.*

13 On January 25, 2010, McCoy filed<sup>1</sup> the instant Petition for Writ of Habeas Corpus  
14 pursuant to Title 28, United States Code, Section 2254. [doc. #1] He raises the following  
15 claims: (1) counsel was ineffective for (a) failing to request a *Dessureault* hearing (to challenge  
16 the out of court identification) and (b) failing to cross-examine the government’s witnesses  
17 concerning promises and incentives made by the government, and (2) his speedy trial rights  
18 were violated. *Id.*

19 The respondents filed an answer arguing, among other things, that the petition is time-  
20 barred. McCoy did not file a reply.

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22 Discussion

23 The writ of habeas corpus affords relief to persons in custody in violation of the  
24 Constitution or laws or treaties of the United States. 28 U.S.C. § 2241. A one-year limitation

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26 <sup>1</sup> On January 25, 2010, the petition was filed with the district court. Under the prison mailbox  
27 rule, the court may consider a petition filed when a pro se prisoner delivers it to prison authorities for  
28 forwarding. *See Houston v. Lack*, 487 U.S. 266, 268, 108 S.Ct. 2379, 2381 (1988); *Huizar v. Carey*,  
273 F.3d 1220, 1223 (9<sup>th</sup> Cir. 2001). Unfortunately, McCoy did not indicate on his petition when it was  
so delivered. (Petition.)

1 period applies to persons in custody pursuant to a state court judgment. 28 U.S.C. § 2244(d).

2 The statute reads in pertinent part as follows:

- 3 (1) A 1-year period of limitation shall apply to an application for a writ of  
4 habeas corpus by a person in custody pursuant to the judgment of a State  
5 court. The limitation period shall run from the latest of--  
6 (A) the date on which the judgment became final by the conclusion of  
7 direct review or the expiration of the time for seeking such review;  
8 (B) the date on which the impediment to filing an application created  
9 by State action in violation of the Constitution or laws of the  
10 United States is removed, if the applicant was prevented from filing  
11 by such State action;  
12 (C) the date on which the constitutional right asserted was initially  
13 recognized by the Supreme Court, if the right has been newly  
14 recognized by the Supreme Court and made retroactively  
15 applicable to cases on collateral review; or  
16 (D) the date on which the factual predicate of the claim or claims  
17 presented could have been discovered through the exercise of due  
18 diligence.
- 19 (2) The time during which a properly filed application for State  
20 post-conviction or other collateral review with respect to the pertinent  
21 judgment or claim is pending shall not be counted toward any period of  
22 limitation under this subsection.

23 28 U.S.C. § 2244(d).

24 The limitation period for all of McCoy's claims was triggered on "the date on which the  
25 judgment became final by the conclusion of direct review or the expiration of the time for  
26 seeking such review." 28 U.S.C. § 2244(d)(1)(A). McCoy's direct appeal was denied on  
27 March 30, 2007. He had 30 days to file a petition for review with the Arizona Supreme Court.  
28 Ariz.R.Crim.P. 31.19(a). His judgment became final when he failed to do so.

The limitation period did not immediately commence, however, because McCoy's post-  
conviction relief proceeding was pending at that time. *See* 28 U.S.C. § 2244(d)(2). This  
proceeding tolled the limitation statute until October 23, 2008, when the court of appeals issued  
it decision granting review but denying relief. The limitation period began running the next day  
and ended one year later on October 23, 2009. The instant petition was filed on January 25,  
2010. It is time-barred.

1 McCoy did not file a reply to the respondents' answer and did not offer a formal  
2 argument as to why he might be eligible for equitable tolling of the limitation statute. In his  
3 petition, however, he explained that he "has been having a battle with cancer, and has been in  
4 and out of the hospital for the past year for one reason or another." (Petition, p. 11.) He further  
5 states he has limited access to legal material or legal expertise. McCoy's showing is insufficient  
6 to justify equitable tolling of the limitation period.

7 "[A] petitioner is entitled to equitable tolling only if he shows (1) that he has been  
8 pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and  
9 prevented timely filing." *Holland v. Florida*, \_\_\_ S.Ct. \_\_\_, 2010 WL 2346549. "Equitable  
10 tolling is justified in few cases. . . ." *Spitsyn v. Moore*, 345 F.3d 796, 799 (9<sup>th</sup> Cir. 2003).  
11 "Indeed, the threshold necessary to trigger equitable tolling . . . is very high, lest the exceptions  
12 swallow the rule." *Id.* "[The petitioner] bears the burden of showing that this extraordinary  
13 exclusion should apply to him." *Id.*

14 McCoy alleges generally that his poor health, lack of legal acumen, and limited access  
15 to legal resources delayed the filing of his petition. His arguments, however, are completely  
16 conclusionary and lack the specificity necessary to prove he is entitled to equitable tolling.

17 For example, he does not provide the court with specifics about his illness or the dates  
18 of his alleged hospitalization. He therefore cannot prove he has been pursuing his rights  
19 diligently and his illness is an extraordinary circumstance that prevented him from filing a  
20 timely petition.

21 The claims advanced by McCoy in his petition are the same claims he brought in his  
22 direct appeal and in his post-conviction relief petition. They are not particularly numerous or  
23 complex. Accordingly, it is difficult to see how McCoy's limited access to legal resources  
24 would have prevented him from filing his petition within the limitation period. The court  
25 concludes McCoy is not entitled to equitable tolling. *See, e.g., Chaffer v. Prosper*, 592 F.3d  
26 1046, 1049 (9<sup>th</sup> Cir. 2010) (Equitable tolling was not warranted where the petitioner alleged he  
27 was pro se, "he lacked access to his files for 46 days," his prison library "was missing a handful  
28 of reporter volumes," and he relied on "helpers who were transferred or too busy to attend to

1 his petitions.”); *U.S. v. Van Poyck*, 980 F.Supp. 1108, 1111 (C.D.Cal. 1997) (Equitable tolling  
2 was not warranted where the petitioner alleged “all of his state transcripts were destroyed, that  
3 . . . he does not speak or understand English well nor does he understand the law, and that his  
4 prison has been in “lockdown” status that has prevented him from using the prison law  
5 library.”); *but see Espinoza-Matthews v. California*, 432 F.3d 1021, 1028 (9<sup>th</sup> Cir. 2005)  
6 (Equitable tolling was warranted where prison transfer deprived the petitioner of his legal  
7 papers for 11 months leaving him only one month to prepare his petition.).

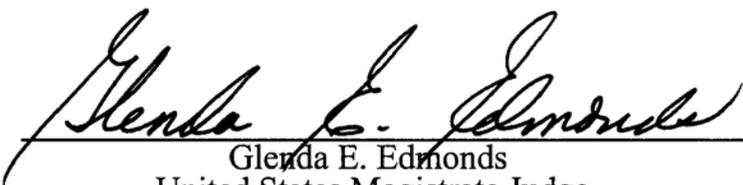
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9 RECOMMENDATION

10 The Magistrate Judge recommends that the District Court, after its independent review  
11 of the record, enter an order DISMISSING the Petition for Writ of Habeas Corpus. [doc. #1]  
12 It is time-barred.

13 Pursuant to 28 U.S.C. §636 (b), any party may serve and file written objections within  
14 14 days of being served with a copy of this report and recommendation. If objections are not  
15 timely filed, they may be deemed waived.

16 The Clerk is directed to send a copy of this report and recommendation to the petitioner  
17 and the respondents.

18 DATED this 9<sup>th</sup> day of July, 2010.

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23 Glenda E. Edmonds  
24 United States Magistrate Judge  
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