

1
2
3
4
5 **UNITED STATES DISTRICT COURT**
6 **DISTRICT OF ARIZONA**
7

8 Guadalupe Gonzales, Jr.,)
9 Petitioner,) CV-12-441-TUC-DCB
10 v.)
11 Charles Ryan, et al.,) **ORDER**
12 Respondents.)
13 _____)

14 This matter was referred to the United States Magistrate Judge
15 pursuant to 28 U.S.C. §636(b)(1)(B) and the local rules of practice of
16 this Court for a Report and Recommendation (R&R) on Petitioner's Petition
17 for Writ of Habeas Corpus (Petition), 28 U.S.C. §2254. Before the Court
18 are a Report and Recommendation and Petitioner's Objections. The
19 Magistrate Judge recommends that the Court dismiss the Petition as
20 untimely filed with no statutory or equitable tolling and dismiss the
21 action.

22 **STANDARD OF REVIEW**

23 When objection is made to the findings and recommendation of a
24 magistrate judge, the district court must conduct a de novo review.
25 *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003).

26 **DISCUSSION**

27 In a nutshell, Petitioner was convicted by a jury of two counts of
28 second degree murder, four counts of endangerment and four counts related

1 to driving under the influence and was sentenced to serve consecutive
2 mitigated 10-year sentences. The convictions and sentences were upheld
3 on appeal and review was denied by the Arizona Supreme Court on September
4 8, 2010. Then,

5 On October 7, 2010, Gonzales filed a timely notice for post-
6 conviction relief ("PCR"). *Id.*, Ex. C. However, in a ruling
7 dated June 3, 2011, the trial noted that Gonzales had failed
8 to file a memorandum in support of his PCR petition and,
9 after having granted several previous motions to extend,
10 refused to grant an additional extension and dismissed the
11 petition. *Id.*, Ex. D. Gonzales appealed the dismissal.
12 *Id.*, Ex. E. On July 18, 2011, the Court of Appeals issued
13 an order finding that Gonzales' petition for review was not
14 in compliance with Rule 32.9, Ariz.R.Crim.P., and ordered
15 Gonzales to file a petition conforming to the rule by August
16 17, 2011. *Id.*, Ex. F. On December 2, 2011, Gonzales filed
17 a petition claiming that the dismissal of his petition was
18 reversible error and that his trial counsel had been
19 ineffective by failing to present expert testimony that the
20 oxycodone in the victim driver's bloodstream affected her
21 driving ability. *Id.*, Ex. G. On December 16, 2011, the Court
22 of Appeals dismissed the petition because there had been "no
23 compliance with this Court's order dated July 18, 2011."
24 *Id.*, Ex. J. Gonzales claims he appealed the dismissal to the
25 Arizona Supreme Court. *Petition*, p. 5.

26 [T]he petition now before the Court, ... was filed on June
27 8, 2012[.]

28 (R&R at 3.) The one-year limitations period began to run on June 3,
2011, and expired before the Petition was filed in the instant matter on
June 8, 2012.

In his Objection, Petitioner admits that his Petition was mailed
three days late, but claims that this was due to limited access and time
to complete legal research. The R&R recommends dismissal of the Petition
as untimely filed, reasoning that the Petitioner has not satisfied the
heavy burden he is required to meet to establish a basis for equitable
tolling. This Court agrees.

1 Based on the foregoing, the Court will adopt the Report and
2 Recommendation in its entirety.

3 Accordingly, after conducting a de novo review of the record,
4 **IT IS ORDERED** that the Court **ADOPTS** the Report and Recommendation
5 (Doc. 12) in its entirety. The Objections (Doc. 18) are **OVERRULED**.

6 **IT IS FURTHER ORDERED** that the Petition for Writ of Habeas Corpus
7 (Doc. 1) is **DENIED** and the action is dismissed. A Final Judgment shall
8 enter separately and the action will be closed.

9 **IT IS FURTHER ORDERED** that, after consideration, the Court declines
10 to issue a Certificate of Appealability.

11 DATED this 10th day of February, 2014.

12
13
14 
15 David C. Bury
16 United States District Judge
17
18
19
20
21
22
23
24
25
26
27
28