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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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9 Luis Enrique Ortega,

No. CV-14-00356-TUC-EJM

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Petitioner,

ORDER

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v.

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Charles Ryan, et al.,

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Respondents.

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Petitioner Luis Enrique Ortega filed a pro se Petition for a Writ of Habeas Corpus (“PWHC”) pursuant to 28 U.S.C. § 2254 on November 29, 2013.¹ (Doc. 1). Petitioner raises four grounds for relief: (1) double jeopardy; (2) ineffective assistance of trial counsel; (3) ineffective assistance of Rule 32 counsel; and (4) due process and equal protection violations. Respondents filed an Answer contending that the PWHC is untimely, and further that all of Petitioner’s claims are procedurally defaulted or otherwise not cognizable on habeas review. The Court concludes that Petitioner’s PWHC is untimely, and that Petitioner has not shown that he is entitled to equitable tolling. Accordingly, the petition will be denied.

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I. FACTUAL AND PROCEDURAL BACKGROUND

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A. Trial, Sentencing, and Appeal

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On November 5, 2007, a Pima County Superior Court jury found Petitioner guilty

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¹ Although the Petition was docketed by the Clerk on January 10, 2014, the Court assumes that Petitioner deposited his PWHC in the prison mailing system on November 29, 2013, as indicated by Petitioner’s signature on his Petition. (Doc. 1 at 11).

1 of two counts of sexual abuse of a minor under 15, two counts of molestation of a child,
2 two counts of sexual conduct with a minor under 15, and two counts of threatening or
3 intimidating. (Doc. 9 Ex. C). Petitioner was sentenced to a combination of concurrent and
4 consecutive presumptive prison terms for a total of 57 years. (Doc. 9 Ex. D).

5 The Arizona Court of Appeals (“COA”) summarized the facts of the case as
6 follows:

7 On August 20, 2006, thirteen-year old C.Q. was visiting her
8 mother in Tucson. That morning she was sleeping on a couch,
9 when she was awakened by Ortega touching her arms,
10 buttocks, and legs and trying to turn her over. She asked
11 Ortega what he was doing, and although he stopped touching
12 her, he did not answer. A few days later, on August 25, while
13 C.Q. was sleeping, Ortega turned her “face up” and began
14 touching her breasts and vagina over her clothes. Afterwards,
15 Ortega told her not to tell anyone what happened. C.Q.
16 returned home to Mexico the following day.

17 C.Q. next visited her mother in December 2006. On the 22nd
18 or 23rd, Ortega took C.Q. to an abandoned trailer where he
19 forcibly removed her clothes, touched her breasts, back, and
20 legs, and had sexual intercourse with her. She did not tell her
21 mother what had happened because Ortega had told both her
22 and her brother F.Q. that he would either kill their mother or
23 hurt them if they said anything.

24 On subsequent visits in February and March or April of 2007,
25 Ortega engaged in similar acts with C.Q. and each time he
26 threatened to harm her mother if C.Q. told her what he had
27 done. On April 9, C.Q.’s mother was lying on the couch when
28 she saw Ortega touch C.Q.’s buttocks over her pajamas.
Shortly thereafter, she heard him walk into C.Q.’s bedroom.
She screamed at him, and the two argued about what she had
seen. When the mother called the police, Ortega put his
clothes in his car and left the house.

(Doc. 9 Ex. J).

23 Following his conviction, Petitioner sought review in the Arizona COA.
24 Appointed counsel filed an opening brief raising two issues on appeal: (1) multiplicitous
25 indictment/double jeopardy, arguing that counts three and four are lesser included
26 offenses of count five, and (2) that the state exerted improper influence over F.Q.’s
27 testimony, making his testimony unreliable. (Doc. 9 Ex. E). Petitioner later withdrew his
28 argument that count three was a lesser included offense of count five, but continued to

1 argue that counts four and five were multiplicitous. (Doc. 9 Exs. G, H). On October 14,
2 2008, the COA issued its decision vacating Petitioner’s conviction and sentence on count
3 four of the indictment, and affirming Petitioner’s conviction and sentence on the
4 remaining counts. (Doc. 9 Ex. J).

5 **B. First Petition for Post-Conviction Relief**

6 On May 8, 2009, Petitioner initiated proceedings in Pima County Superior Court
7 for post-conviction relief (“PCR”). (Doc. 9 Ex. M). Appointed counsel filed the Rule 32
8 Petition on September 24, 2009, raising two claims of ineffective assistance of trial
9 counsel. (Doc. 9 Ex. O). Petitioner alleged that trial counsel was ineffective for failing to
10 interview the state’s expert witness and was further ineffective for failing to conduct any
11 pretrial interviews. *Id.*

12 The trial court denied PCR on December 7, 2009. (Doc. 9 Ex. R). Petitioner filed a
13 petition for review with the Arizona COA, and on April 27, 2010 the COA issued its
14 decision granting review and denying relief. (Doc. 9 Ex. S). Petitioner did not file a
15 petition for review in the Arizona Supreme Court. (Doc. 9 Ex. T).

16 **C. Second Petition for Post-Conviction Relief**

17 On August 20, 2010, Petitioner filed a second notice of PCR in Pima County
18 Superior Court. (Doc. 9 Ex. U). Petitioner’s notice stated that he was alleging a claim
19 pursuant to Ariz. R. Crim. P. 32.1 (d), (e), (f), (g) or (h), specifically: newly discovered
20 material facts, that his failure to timely file a notice of PCR was not his fault, a significant
21 change in the law, and actual innocence. *Id.* In support of his claim, Petitioner stated that
22 the trial court lacked subject matter jurisdiction to impose his sentence, that facts existed
23 that established by clear and convincing evidence that he was actually innocent, and that
24 he was also raising a claim of fundamental miscarriage of justice. *Id.*

25 Appointed counsel filed a Rule 32 Petition on January 4, 2012.² (Doc. 9 Ex. V).
26 Petitioner cited Ariz. R. Crim. P. 32.1(h) and argued that claims brought in successive

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28 ² While the petition is date-stamped January 4, 2012, it was signed by counsel on
December 30, 2011. This discrepancy is not material to the Court’s decision in this
matter.

1 PCR petitions are not precluded if the defendant demonstrates by clear and convincing
2 evidence that no reasonable juror would have found the defendant guilty beyond a
3 reasonable doubt. *Id.* Petitioner specifically argued that his conviction on count nine of
4 the indictment should be vacated because there was no evidence that Petitioner threatened
5 F.Q. on the date stated in the indictment. *Id.*

6 On September 11, 2012, the trial court issued its order summarily dismissing the
7 second PCR petition. (Doc. 9 Ex. X). The court noted that:

8 [E]ven though Petitions based on Rule 32.1(h) are exempt
9 from preclusion, when a claim is raised under Rule 32.1(h)
10 in a successive or untimely post-conviction relief
11 proceeding, some other requirements must be met:

12 the notice of post-conviction relief must set forth the
13 substance of the specific exception and the reasons for not
14 raising the claim in the previous petition or in a timely
15 manner. If the specific exception and meritorious reasons
16 do not appear substantiating the claim and indicating why
17 the claim was not stated in the previous petition or in a
18 timely manner, the notice shall be summarily dismissed.

19 *Id.* The Court concluded that: “Here, the defendant failed to set forth the substance of
20 the specific exception, and the reasons for failing to raise this claim in his previous
21 Petition. As such, the Petition for Post-Conviction relief is summarily dismissed.” *Id.*

22 Petitioner filed a petition for review with the Arizona COA on January 10, 2013.
23 (Doc. 9 Ex. Y). On July 2, 2013, the COA issued its order granting review and denying
24 relief. (Doc. 9 Ex. Z). Petitioner then filed a petition for review with the Arizona
25 Supreme Court, which denied review. (Doc. 9 Ex. AA).

26 **D. Habeas Petition**

27 Petitioner deposited his PWHC in the prison mailing system on November 29,
28 2013. (Doc. 1). In Ground One, Petitioner claims that he was subject to double jeopardy
because there were multiple counts in the duplicitous indictment that resulted in multiple
sentences, and that the trial court lacked jurisdiction to impose illegal sentences. In
Ground Two, Petitioner alleges his trial counsel was ineffective for failing to object to the
illegal sentences, failing to present mitigating evidence, allowing the use of Petitioner’s

1 prior felony convictions, and performing an inadequate investigation. In Ground Three,
2 Petitioner alleges his Rule 32 counsel was ineffective because counsel made little effort
3 to communicate with Petitioner and ignored correspondence from Petitioner. In Ground
4 Four, Petitioner alleges his due process and equal protection rights were violated because
5 he was placed in double jeopardy and was charged for a single offense in multiple counts.

6 Respondents contend that the PWHC is untimely and that Petitioner has not shown
7 that he is entitled to equitable tolling. (Doc. 9). Respondents further contend that Grounds
8 One and Three of the Petition are not cognizable on federal habeas review, and that
9 Grounds Two and Four of the Petition are unexhausted and procedurally defaulted and
10 that Petitioner has not shown cause and prejudice or a fundamental miscarriage of justice
11 to excuse his default. Respondents thus conclude that the PWHC is not properly before
12 this Court for review.

13 **II. STATUTE OF LIMITATIONS**

14 **A. Timeliness**

15 As a threshold matter, the Court must consider whether Petitioner’s PWHC is
16 barred by the statute of limitation. *See White v. Klizkie*, 281 F.3d 920, 921–22 (9th Cir.
17 2002). The writ of habeas corpus affords relief to persons in custody pursuant to the
18 judgment of a state court in violation of the Constitution, laws, or treaties of the United
19 States. 28 U.S.C. §§ 2241(c)(3), 2254(a). Petitions for habeas corpus are governed by the
20 Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). 28 U.S.C. § 2244.
21 The AEDPA mandates that a one-year statute of limitations applies to applications for a
22 writ of habeas corpus by a person in state custody. 28 U.S.C. § 2244(d)(1). Section
23 2244(d)(1) provides that the limitations period shall run from the latest of:

24 (A) the date on which the judgment became final by the
25 conclusion of direct review or the expiration of the time for
seeking such review;

26 (B) the date on which the impediment to filing an application
27 created by State action in violation of the Constitution or laws
of the United States is removed, if the applicant was
prevented from filing by such State action;

28 (C) the date on which the constitutional right asserted was

1 initially recognized by the Supreme Court, if the right has
2 been newly recognized by the Supreme Court and made
retroactively applicable to cases on collateral review; or

3 (D) the date on which the factual predicate of the claim or
4 claims presented could have been discovered through the
exercise of due diligence.

5 28 U.S.C. § 2244(d)(1); *Shannon v. Newland*, 410 F.3d 1083 (9th Cir. 2005).

6 The other subsections being inapplicable here, Petitioner must have filed his
7 habeas petition within one year from “the date on which the judgment became final by
8 the conclusion of direct review or the expiration of the time for seeking such review.” 28
9 U.S.C. § 2244(d)(1)(A); *see also McQuiggin v. Perkins*, ___ U.S. ___, 133 S.Ct. 1924,
10 1929, 185 L.Ed.2d 1019 (2013). The Ninth Circuit has held that when an Arizona
11 defendant does not file a petition for review in the Arizona Supreme Court on direct
12 review, his “direct appeal was final. . . [on] the date that he allowed his time for seeking
13 review in the [Arizona] Supreme Court to expire.” *Hemmerle v. Schriro*, 495 F.3d 1069,
14 1073–74 (9th Cir. 2007) (holding that conclusion of proceeding on direct review under §
15 2244(d)(1)(A) occurred on the date that petitioner’s ability to seek review in the Arizona
16 Supreme Court elapsed and not when the mandate issued); *Gonzalez v. Thaler*, ___ U.S.
17 ___, 132 S.Ct. 641, 656 (2012) (For “a state prisoner who does not seek review in a State’s
18 highest court, the judgment becomes ‘final’ under § 2244(d)(1)(A) when the time for
19 seeking such review expires.”). In addition, “the period of ‘direct review’ in 28 U.S.C. §
20 2244(d)(1)(A) includes the period within which a petitioner can file a petition for a writ
21 of certiorari from the United States Supreme Court, whether or not the petitioner actually
22 files such a petition.” *Bowen v. Roe*, 188 F.3d 1157, 1158–59 (9th Cir. 1999).

23 Here, Petitioner was sentenced on December 10, 2007 and timely filed a direct
24 appeal. On October 14, 2008 the Arizona COA vacated Petitioner’s conviction and
25 sentence on count four of the indictment and affirmed Petitioner’s conviction and
26 sentence on the remaining counts.³ (Doc. 9 Ex. J). Petitioner had 30 days from that date
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28 ³ Respondents incorrectly state that Petitioner’s direct appeal concluded on
October 4, 2008. (Doc. 9 at 4). However, the court’s decision is dated October 14, 2009.

1 to seek review in the Arizona Supreme Court. *See* Ariz. R. Crim. P. 31.19(a). Petitioner
2 was granted an extension to seek review until January 12, 2009, but did not file a petition
3 with the Arizona Supreme Court. (Doc. 9 Ex. K). However, the State did file a petition
4 for review, which the Supreme Court denied on April 20, 2009. (Doc. 9 Ex. BB). Thus,
5 Petitioner had 90 days from that date to seek a writ of certiorari in the United States
6 Supreme Court. *See Bowen*, 188 F.3d at 1159. Because no petition for certiorari was filed
7 in the United States Supreme Court, Petitioner’s judgment became final on July 20, 2009⁴
8 within the meaning of 28 U.S.C. § 2244(d)(1)(A). Thus, absent any tolling, the one-year
9 limitations period would have commenced on July 21, 2009 and expired on July 21,
10 2010. *See Bowen*, 188 F.3d at 1159 (“when a petitioner fails to seek a writ of certiorari
11 from the United States Supreme Court, the AEDPA’s one-year limitations period begins
12 to run on the date the ninety-day period defined by Supreme Court Rule 13 expires.”).

13 **B. Statutory Tolling**

14 The one-year limitation period under AEDPA is statutorily tolled during the time
15 in “which a properly filed application for State post-conviction or other collateral review
16 with respect to the pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2); *see*
17 *also Lott v. Mueller*, 304 F.3d 918, 921 (9th Cir. 2002). An application for State post-
18 conviction relief is “‘properly filed’ when its delivery and acceptance are in compliance
19 with the applicable laws and rules governing filings.” *Artuz v. Bennett*, 531 U.S. 4, 8
20 (2000). Moreover, if a state court rejects a petitioner’s PCR petition as untimely, it cannot
21 be “properly filed” and the petitioner is not entitled to statutory tolling. *Pace v.*
22 *DiGuglielmo*, 544 U.S. 408, 418 (2005).

23 In Arizona, post-conviction review is pending once a notice of post-conviction
24 relief is filed, even though the petition is not filed until later. *Isley v. Arizona Department*
25 *of Corrections*, 383 F.3d 1054, 1056 (9th Cir. 2004); *see also* Ariz. R. Crim. P. 32.4(a)

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See Doc. 9 Ex. J.

28 ⁴ The 90-day period ended on Sunday, July 19, 2009. The next court day was
Monday, July 20, 2009. *See* Ariz. R. Crim. P. 1.3(a) (tolling deadlines to the next
business day if the last day of the deadline falls on a Saturday, Sunday, or legal holiday).

1 (“A proceeding is commenced by timely filing a notice of post-conviction relief with the
2 court in which the conviction occurred.”). An application for state post-conviction relief
3 remains pending until it has achieved final resolution through the state’s post-conviction
4 procedure. *Carey v. Saffold*, 536 U.S. 214, 220 (2002). State law determines the
5 conclusion of collateral review and thus, state law also determines the conclusion of
6 statutory tolling under the AEDPA. *See Hemmerle*, 495 F.3d at 1077. “[W]hen the
7 Arizona Court of Appeals grants review of the trial court’s decision on a petition for post-
8 conviction relief but denies relief, and the petitioner does not seek further review, the
9 post-conviction proceeding is pending until the date the appellate court issues its
10 mandate.” *Wells v. Ryan*, 2015 WL 9918159, at *9 (D. Ariz. Aug. 13, 2015), *report and*
11 *recommendation adopted by* 2016 WL 319529 (D. Ariz. Jan. 27, 2016) (collecting cases
12 and citing Ariz. R. Crim. P. 31.23 and 32.9(g)); *Ramon v. Ryan*, 2010 WL 3564819, *6
13 (D. Ariz. July 23, 2010) (same).

14 Here, Petitioner timely filed his first notice of PCR on May 8, 2009. This PCR
15 notice was properly filed and therefore tolled AEDPA’s one-year statute of limitations.
16 On April 27, 2010, the Arizona COA granted review but denied relief. Petitioner did not
17 petition the Arizona Supreme Court for review. Thus, Petitioner’s properly filed PCR
18 application remained pending until the Arizona COA issued the mandate concluding its
19 review of that petition on September 13, 2010. (Doc. 9 Ex. T). *See Wells*, 2015 WL
20 9918159 at *9; *Celaya v. Stewart*, 691 F.Supp.2d 1046, 1055, 1074–1075 (D. Ariz.
21 2010), *aff’d* 497 Fed.Appx. 744 (9th Cir. 2012); *Ramon*, 2010 WL 3564819, at *6.
22 Petitioner had one year from that date to file his federal habeas petition. Accordingly,
23 absent equitable tolling, the statute of limitations expired on September 13, 2011, making
24 Petitioner’s November 29, 2013 PWHC untimely.

25 Unlike the 2009 notice, Petitioner’s second notice of PCR, filed on August 20,
26 2010, was not “properly filed,” and did not statutorily toll the one-year limitations period.
27 “[A]n application is ‘properly filed’ when its delivery and acceptance are in compliance
28 with the applicable laws and rules governing filings,” including “the time limits upon its

1 delivery . . .” *Artuz*, 531 U.S. at 8. If a petitioner files an application after the generally
2 applicable state time limit, the application may nonetheless be considered “properly
3 filed” if it fits within any exception to that limit. *Pace*, 544 U.S. at 413; *see also*
4 *Hemmerle*, 495 F.3d at 1074 (“[W]here notice is filed in conformity with the pertinent
5 Arizona statutory provisions and contains a specific prayer for relief . . . , ‘it is sufficient
6 to toll the AEDPA statute of limitations.’”) (quoting *Isley*, 383 F.3d at 1056). “When a
7 post-conviction petition is untimely under state law, that is the end of the matter for
8 purposes of § 2244(d)(2).” *Pace*, 544 U.S. at 414 (internal brackets and quotation marks
9 omitted).

10 In Arizona, notices for PCR (other than in “of-right” or capital proceedings) “must
11 be filed within ninety days after the entry of judgment and sentence or within thirty days
12 after the issuance of the order and mandate in the direct appeal, whichever is the later.”
13 Ariz. R. Crim. P. 32.4(a). In the event that a notice is not timely filed, Rule 32.2(b) of the
14 Arizona Rules of Criminal Procedure sets forth conditions for filing, which if met,
15 exclude the claims contained in the untimely notice from preclusion. *See Pace*, 544 U.S.
16 at 413–14 (comparing conditions of filing with conditions of relief). This rule may permit
17 an untimely or successive petition if a petitioner can establish that (1) he “is being held in
18 custody after the sentence imposed has expired,” (2) “[n]ewly discovered material facts
19 probably exist and such facts probably would have changed the verdict or sentence,” (3)
20 his “failure to file a notice of post-conviction relief of-right or notice of appeal within the
21 prescribed time was without fault on the defendant’s part,” (4) “[t]here has been a
22 significant change in the law that if determined to apply to defendant’s case would
23 probably overturn the defendant’s conviction or sentence,” or (5) “[t]he defendant
24 demonstrates by clear and convincing evidence that the facts underlying the claim would
25 be sufficient to establish that no reasonable fact-finder would have found defendant guilty
26 of the underlying offense beyond a reasonable doubt.” Ariz. R. Crim. P. 32.1(d–h).
27 “[T]he notice of post-conviction relief must set forth the substance of the specific
28 exception and the reasons for not raising the claim in the previous petition or in a timely

1 manner.” Ariz. R. Crim. P. 32.2(b).

2 In the instant case, Petitioner’s second notice for PCR was untimely filed.
3 Petitioner filed his second notice more than two years and eight months after sentencing,
4 well beyond the 90–day limitation period. Likewise, the notice was filed more than one
5 year and three months after the direct appeal mandate, well beyond the 30–day limitation
6 period. Furthermore, the record does not suggest that Petitioner complied with Rule
7 32.2(b) when he submitted his untimely notice. Petitioner merely stated that he was
8 raising subject matter jurisdiction and a claim of fundamental miscarriage of justice, and
9 although he asserted that “facts exist which establish by clear and convincing evidence
10 that the defendant is actually innocent,” Petitioner failed to cite any specific facts or
11 evidence to support his untimely filing. (Doc. 9 Ex. U). Nor did Petitioner explain why he
12 was not at fault for failing to timely file a notice of PCR, what newly discovered facts, if
13 any, would have changed the verdict, or what significant change in law had occurred that
14 would have overturned his conviction or sentence. Therefore, under state law, the second
15 notice for post-conviction relief was untimely and was not “properly filed” for purposes
16 of 28 U.S.C. § 2244(d)(2), and the time period during which Petitioner pursued his
17 untimely petition through the state courts it not subject to statutory tolling. *See Pace*, 544
18 U.S. at 414.⁵

19 This conclusion is further supported by the trial court’s ruling summarily
20 dismissing the second PCR petition. (Doc. 9 Ex. X). The court concluded that Petitioner

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22 ⁵ The Ninth Circuit “employ[s] a two-part test to determine whether the period
23 between the denial of one petition and the filing of a second petition should be tolled.
24 First, we ask whether the petitioner’s subsequent petitions are limited to an elaboration of
25 the facts relating to the claims in the first petition. If the petitions are not related, then the
26 subsequent petition constitutes a new round of collateral attack, and the time between
27 them is not tolled. If the successive petition was attempting to correct deficiencies of a
28 prior petition, however, then the prisoner is still making proper use of state court
procedures, and habeas review is still pending. Second, if the successive petition was not
timely filed, the period between the petitions is not tolled.” *Banjo v. Ayers*, 614 F.3d 964,
968–69 (9th Cir. 2010) (internal quotations and citations omitted) (noting that because
the court concluded the petition was untimely under the second prong of *King*, the court
“need not determine whether the petition was a continuation of the first or the start of a
second round.”).

1 “failed to set forth the substance of the specific exception [under Rule 32.1(h)], and the
2 reasons for failing to raise this claim in his previous Petition. As such, the Petition for
3 Post-Conviction relief is summarily dismissed.” *Id.* In so doing, the court necessarily
4 found that the notice was untimely because Petitioner’s claims did not satisfy any
5 exception to the time limit for filing. *See* Ariz. R. Crim. P. 32.2(b) (“If the specific
6 exception and meritorious reasons do not appear substantiating the claim and indicating
7 why the claim was not stated in the previous petition or in a timely manner, the notice
8 shall be summarily dismissed.”). Accordingly, because the second notice was filed after
9 the time limit, and did not fit within any exceptions to that limit, it was not “properly
10 filed” and does not toll the limitations period under § 2244(d)(2). *See Pace*, 544 U.S. at
11 414, 417 (“it must be the case that a petition that cannot even be initiated or considered
12 due to the failure to include a timely claim is not ‘properly filed.’”); *Trigueros v. Adams*,
13 658 F.3d 983, 988 (9th Cir. 2011) (“An untimely state petition is not ‘properly filed’ and
14 does not trigger statutory tolling under AEDPA.”); *see also Biggs v. Duncan*, 339 F.3d
15 1045, 1048 (9th Cir. 2003) (the time between different rounds of collateral review is not
16 tolled because no application is “pending” during that period).

17 **C. Equitable Tolling**

18 In certain limited circumstances, AEDPA’s one-year filing deadline may be
19 equitably tolled. *Holland v. Florida*, 130 S.Ct. 2549, 2560 (2010). A petitioner is entitled
20 to equitable tolling if he can demonstrate that ““(1) that he has been pursuing his rights
21 diligently and (2) that some extraordinary circumstances stood in his way”” to prevent
22 him from timely filing a petition. *Holland v. Florida*, 130 S.Ct. at 2562 (quoting *Pace*,
23 544 U.S. at 418); *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir.1999) (generally,
24 equitable tolling may be applied only when “extraordinary circumstances beyond a
25 prisoner’s control make it impossible to file a petition on time.”). Further, a petitioner
26 must establish a “causal connection” between the extraordinary circumstance and his
27 failure to file a timely petition. *See Bryant v. Arizona Attorney General*, 499 F.3d 1056,
28 1060 (9th Cir. 2007). “[T]he threshold necessary to trigger equitable tolling [under

1 AEDPA] is very high, lest the exceptions swallow the rule.” *Spitsyn v. Moore*, 345 F.3d
2 796, 799 (9th Cir. 2003) (quoting *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir.
3 2002)).

4 Here, Petitioner has failed to meet his burden. The record before this Court is
5 devoid of any evidence to demonstrate that Petitioner is entitled to equitable tolling.
6 While Petitioner asserts that AEDPA’s statute of limitations is tolled while a petitioner is
7 pursuing Rule 32 relief and claims that he timely filed all notices of PCR, as the Court
8 explained above, Petitioner’s second notice of PCR was not timely filed and did not toll
9 the statute of limitations. Further, Petitioner does not demonstrate any extraordinary
10 circumstances that prevented him from timely filing his federal habeas petition. Petitioner
11 alleges that ineffective assistance of trial counsel and Rule 32 counsel created an
12 extraordinary set of circumstances that resulted in a failure to properly identify, assemble,
13 and submit claims on direct appeal and PCR, and contends that this excuses any delay in
14 filing the PWHC and absolves Petitioner of any fault for the untimely filing. (Doc. 13).
15 However, while Petitioner alleges he is entitled to equitable tolling because he cannot be
16 held responsible for counsel’s failure to protect his constitutional rights, this does not
17 explain why Petitioner failed to timely file his PWHC. And, in any event, Petitioner’s pro
18 se status, indigence, limited legal resources, ignorance of the law, or lack of
19 representation during the applicable filing period do not constitute extraordinary
20 circumstances justifying equitable tolling. *See, e.g., Rasberry v. Garcia*, 448 F.3d 1150,
21 1154 (9th Cir. 2006); *see also Ford v. Pfler*, 590 F.3d 782, 789 (9th Cir. 2009) (“A
22 petitioner’s misunderstanding of accurate information cannot merit relief, as equitable
23 tolling requires a petitioner to show that some extraordinary circumstance[] beyond [his]
24 control caused his late petition, and this standard has never been satisfied by a
25 petitioner’s confusion or ignorance of the law alone.”) (internal quotations and citation
26 omitted) (citing *Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1011 (9th Cir. 2009) (“To
27 apply the doctrine in extraordinary circumstances necessarily suggests the doctrine’s
28 rarity, and the requirement that extraordinary circumstances stood in his way suggests

1 that an external force must cause the untimeliness, rather than . . . merely oversight,
2 miscalculation or negligence on the petitioner's part") (internal quotation marks and
3 brackets omitted)).

4 Accordingly, the Court finds that Petitioner is not entitled to equitable tolling and
5 the PWHC is untimely.

6 **III. CONCLUSION**

7 In sum, the statute of limitations began to run on September 13, 2010 and ran
8 uninterrupted until September 13, 2011. Petitioner did not file his federal habeas petition
9 until November 29, 2013, approximately two years and two months after the limitations
10 period expired. Therefore, based on the above analysis, the Court finds that Petitioner's
11 PWHC is barred by the statute of limitations. Accordingly,

12 **IT IS HEREBY ORDERED** that the Petition (Doc. 1) is denied and dismissed
13 with prejudice. The Clerk shall enter judgment accordingly.

14 **IT IS FURTHER ORDERED** denying a Certificate of Appealability and leave to
15 proceed in forma pauperis on appeal because the dismissal of the Petition is justified by a
16 plain procedural bar and jurists of reason would not find the procedural ruling debatable.

17 Dated this 17th day of November, 2016.

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21 Eric J. Markovich
22 United States Magistrate Judge
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