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

9 Clarence E Rhodes, Jr.,
10 Petitioner,

11 v.

12 Charles Ryan, et al.,
13 Respondents.
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No. CV-14-02053-TUC-JGZ (EJM)

**REPORT AND
RECOMMENDATION**

15 Petitioner Clarence E. Rhodes, Jr., filed a pro se Petition for a Writ of Habeas
16 Corpus (“PWHC”) pursuant to 28 U.S.C. § 2254 on June 24, 2014.¹ (Doc. 7). Petitioner
17 raises three grounds for relief: (1) the trial court unconstitutionally sentenced him to
18 multiple sentences for committing a single act in violation of his due process rights and
19 his right to be free from cruel and unusual punishment; (2) he was denied effective
20 assistance of counsel in violation of his Sixth Amendment rights because his appellate
21 counsel failed to advise him where to appeal and failed to appeal meritorious issues in
22 Petitioner’s case; and (3) his Eighth Amendment rights and the provisions of the Double
23 Jeopardy Clause were violated when his sentences were set “for servitude” on November
24 6, 2006, but he is not serving them concurrently. Respondents filed an Answer
25 contending that the PWHC is untimely, and further that all of Petitioner’s claims are

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27 ¹ Although the Petition was docketed by the Clerk on July 2, 2014, the Court
28 assumes that Petitioner deposited his PWHC in the prison mailing system on June 24,
2014, as indicated by Petitioner’s signature on his Petition. (Doc. 7 at 11). This
discrepancy is not material to the Court’s decision in this matter.

1 procedurally defaulted. (Doc. 16).

2 Pursuant to Rules 72.1 and 72.2 of the Local Rules of Civil Procedure, this matter
3 was referred to Magistrate Judge Markovich for a Report and Recommendation. The
4 undersigned finds that Petitioner's PWHC is untimely, and that Petitioner has not shown
5 that he is entitled to equitable tolling. Accordingly, the Magistrate Judge recommends
6 that the District Court deny the Petition under 28 U.S.C. § 2254 for a Writ of Habeas
7 Corpus.

8 **I. FACTUAL AND PROCEDURAL BACKGROUND**

9 **A. Plea and Sentencing**

10 On October 4, 2006, Petitioner pled guilty to second-degree murder and
11 aggravated assault in Cochise County Superior Court. (Doc. 16 Ex. A). Following an
12 aggravation/mitigation hearing, Petitioner was sentenced to 16 years imprisonment for
13 second-degree murder, followed by a consecutive sentence of 7.5 years for aggravated
14 assault. (Doc. 16 Exs. B & C). Petitioner subsequently filed a motion to modify sentence,
15 which was denied by the trial court. (Doc. 16 Exs. D & E).

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

17 On January 18, 2007, Petitioner initiated proceedings in Cochise County Superior
18 Court for post-conviction relief ("PCR"). (Doc. 16 Ex. F). On November 21, 2007,
19 Petitioner's appointed counsel filed a notice pursuant to Ariz. R. Crim. P. 32.4(c)
20 informing the court of her review of the record and stating that she found no colorable
21 claims for relief. (Doc. 16 Ex. G). Counsel also requested that Petitioner be permitted to
22 file a supplemental pro se petition. On February 20, 2008, Petitioner filed a letter, which
23 the court characterized as a supplemental pro se petition, requesting that his sentences run
24 concurrently. (Doc. 16 Ex. H).

25 The trial court denied PCR on March 25, 2008. (Doc. 16 Ex. I). The court
26 concluded that Petitioner's claim regarding concurrent sentences was presented to the
27 trial court during the aggravation/mitigation hearing before sentencing, and that
28 Petitioner had not asserted any material issue of fact or law which would entitle him to

1 post-conviction relief.

2 Petitioner did not file a petition for review with the Arizona COA.

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

4 On January 17, 2012, Petitioner filed a PWHC in Cochise County Superior Court.
5 (Doc. 16 Ex. J). Petitioner stated he did not appeal his sentence because appointed PCR
6 counsel “said she would file” and “Petitioner did not understand what lawyer did.” *Id.*
7 The court treated the habeas petition as a petition for PCR and noted that
8 “[s]ubstantively, [Petitioner] contends that he was entitled to concurrent sentences.
9 Procedurally, [Petitioner] appears to contend that his failure to take action from 2008
10 until now occurred because his previous PCR counsel said she would take further action
11 and Petitioner did not understand what she did.” (Doc. 16 Ex. K). The court appointed
12 counsel due to the “serious nature” of Petitioner’s crimes and “the substantial sentences
13 he received.” *Id.*

14 On June 4, 2012, appointed counsel filed a motion to withdraw because, based on
15 his review of the record, he found no colorable claims for relief. (Doc. 16 Ex. M). The
16 court denied the motion to withdraw and required counsel to serve as advisory counsel
17 for Petitioner until the conclusion of the PCR proceedings. (Doc. 16 Ex. N). The court
18 also permitted Petitioner to file a pro se petition. *Id.* On July 5, 2012,² Petitioner filed a
19 pro se petition alleging that both of his appointed PCR attorneys had rendered ineffective
20 assistance of counsel by failing to raise the consecutive/concurrent sentence issue. (Doc.
21 16 Ex. O at 1–2). Petitioner also alleged a Double Jeopardy violation, arguing that
22 because the commitment order stated his 7.5 year sentence commenced on November 6,
23 2006, the sentence was already served and expired. *Id.* at 3, 5. Petitioner again requested
24 that his sentences run concurrently. *Id.* at 6–7.

25 On August 10, 2012, the trial court issued its order dismissing the second PCR

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27 ² Although the petition was docketed by the Clerk on July 13, 2012, the Court
28 assumes that Petitioner deposited his petition in the prison mailing system on July 5,
2012, as indicated by Petitioner’s signature on his Petition. (Doc. 1 at 11). This
discrepancy is not material to the Court’s decision in this matter.

1 petition. (Doc. 16 Ex. R). The court cited *State v. Hampton*, 213 Ariz. 167 (2006) for the
2 proposition that a defendant may be validly sentenced to consecutive terms for crimes
3 involving separate victims, and noted that Petitioner plead guilty to the murder of Bryant
4 and the aggravated assault of King. *Id.* at 2–3. The court concluded that “consecutive
5 sentences were appropriate, and the sentencing judge did not impose an invalid sentence
6 in any way by requiring that the sentences be served consecutively.” *Id.* at 3. The court
7 further stated that “[b]ecause the trial court imposed lawful sentences, neither trial
8 counsel nor PCR counsel fell below any applicable standard of care in failing to complain
9 about an error that the trial judge did not commit.” *Id.* In addition, the court noted that
10 “[i]t actually appears that the sentencing judge gave defendant a better result that he was
11 entitled to. The court, in imposing consecutive sentences, should have given defendant
12 credit for the time served as against only one sentence but not both.”

13 The court also found that Petitioner’s claim that trial counsel³ was ineffective was
14 precluded under Ariz. R. Crim. P. 32.2 because it could have been raised during
15 Petitioner’s first PCR proceedings but was not. *Id.* The court further stated that even if
16 the claim was not precluded, it lacked merit, and that the claim that Petitioner’s first PCR
17 counsel was ineffective also lacked merit. *Id.* The court dismissed the petition and
18 concluded that Petitioner had presented no claims that presented a material issue of fact
19 or law that would entitle him to relief. *Id.*

20 On August 27, 2012, Petitioner filed a petition for review with the Arizona Court
21 of Appeals. (Doc. 16 Ex. S). The Court of Appeals issued a memorandum decision on
22 December 11, 2012, granting review and denying relief. (Doc. 16 Ex. T). Petitioner then
23 filed a petition for review with the Arizona Supreme Court, which denied review. (Doc.
24 16 Ex. U). The Court of Appeals issued its mandate on July 15, 2013. (Doc. 16 Ex. V).

25 **D. Habeas Petition**

26 Petitioner deposited his PWHC in the prison mailing system on June 24, 2014.

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28 ³ The undersigned notes that Petitioner’s second pro se PCR petition complained
about PCR counsel’s ineffective assistance, not trial counsel’s ineffective assistance.

1 (Doc. 7). In Ground One, Petitioner alleges that he was given unconstitutional multiple
2 sentences for committing a single act. In Ground Two, Petitioner alleges that his
3 appellate counsel was ineffective for failing to advise him where to appeal. In Ground
4 Three, Petitioner argues that because the commitment order set both sentences into
5 servitude on November 6, 2006, he has already served the 7.5 year sentence, and he
6 cannot now be held to serve the 7.5 year sentence consecutive to the 16 year sentence.

7 Respondents contend that the PWHC is untimely and that Petitioner has not shown
8 that he is entitled to equitable tolling. (Doc. 16). Respondents further allege that even if
9 the petition were timely, all of Petitioner's claims are procedurally defaulted.

10 For the reasons stated below, the undersigned finds that the PWHC is untimely
11 and thus not properly before this Court for review. Accordingly, the undersigned
12 recommends that the District Court deny and dismiss the Petition with prejudice.

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
28 prevented from filing by such State action;

(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*, 133 S. Ct. 1924, 1929 (2013).

10 By pleading guilty, Petitioner waived his right to a direct appeal under Arizona
11 law. However, he retained his right to seek review in an “of-right” PCR proceeding
12 pursuant to Arizona Rules of Criminal Procedure 32, 32.1, and 32.4. Indeed, Petitioner
13 filed a timely notice for PCR in state court.⁴ Because petitioner plead guilty, his
14 conviction became final upon “the conclusion of the Rule 32 of-right proceeding and
15 review of that proceeding.” *Summers*, 481 F.3d at 711 (holding that an “of right
16 proceeding,’ available under Arizona Rule of Criminal Procedure 32 to criminal
17 defendants who plead guilty, is a form of ‘direct review’ within the meaning of 28 U.S.C.
18 2244(d)(1)(A).”).

19 The trial court denied Petitioner’s of-right petition for PCR on March 25, 2008.
20 Petitioner had 35 days to file a petition for review with the Arizona Court of Appeals, but
21 he failed to do so. *See* Ariz. R. Crim. P. 32.9(c) (requiring a petition for review that
22 challenges the final decision in a PCR proceeding be filed with the Arizona Court of
23 Appeals within 30 days); *State v. Savage*, 573 P.2d 1388, 1389 (Ariz. 1978) (holding that
24 Rule 1.3 from the Arizona Rules of Criminal Procedure allows 5 additional days for
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26 ⁴ Petitioner was sentenced on November 6, 2006 and had 90 days from that date to
27 file a notice of PCR. *See Summers v. Schriro*, 481 F.3d 710, 715 (9th Cir. 2007) (“To
28 bring an of-right proceeding under Rule 32, a plea-convicted defendant must provide to
the Arizona Superior Court, within 90 days of conviction and sentencing in that court,
notice of his or her intent to file a Petition for Post-Conviction Review.”) (citing Ariz. R.
Crim. P. 32.4(a)). The notice for PCR was timely filed on January 18, 2007.

1 mailing). Therefore, Petitioner’s judgment became final on April 29, 2008 within the
2 meaning of 28 U.S.C. § 2244(d)(1)(A) when his time for seeking appellate review
3 expired. *See Gonzalez v. Thaler*, 132 S. Ct. 641 (2012) (holding that where a state
4 prisoner does not seek review in a state’s highest court, the judgment becomes “final” for
5 purposes of § 2244(d)(1)(A) on the date that the time for seeking such review expires).
6 Thus, absent any tolling, the one-year limitations period would have commenced on April
7 30, 2008 and expired on April 30, 2009, over five years before the instant § 2254 petition
8 was filed. *See Patterson v. Stewart*, 251 F.3d 1243, 1245–47 (9th Cir. 2001) (the
9 limitations period begins to run on the day after the triggering event pursuant to Fed. R.
10 Civ. P. 6(a)). Accordingly, the petition is untimely unless the statute of limitations was
11 tolled. As discussed below, it was not.

12 **B. Statutory Tolling**

13 The one-year limitation period under AEDPA is statutorily tolled during the time
14 in “which a properly filed application for State post-conviction or other collateral review
15 with respect to the pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2); *see*
16 *also Lott v. Mueller*, 304 F.3d 918, 921 (9th Cir. 2002). A state petition that is not filed
17 within the state’s required time limit, however, is not “properly filed,” and is thus not
18 entitled to statutory tolling. *See Allen v. Siebert*, 552 U.S. 3, 6–7 (2007). Unlike the 2007
19 notice, Petitioner’s second PCR notice was not “properly filed” and thus did not
20 statutorily toll the one-year limitations period.

21 “[A]n application is ‘properly filed’ when its delivery and acceptance are in
22 compliance with the applicable laws and rules governing filings,” including “the time
23 limits upon its delivery . . .” *Artuz v. Bennett*, 531 U.S. 4, 8 (2000). If a petitioner files an
24 application after the generally applicable state time limit, the application may nonetheless
25 be considered “properly filed” if it fits within any exception to that limit. *Pace v.*
26 *DiGuglielmo*, 544 U.S. 408, 413 (2005). However, the existence of exceptions to the
27 state’s timely filing requirements does not prevent a late application from being deemed
28 improperly filed when the application does not fit within any exceptions to the time limit.

1 *Id.* “When a post-conviction petition is untimely under state law, that is the end of the
2 matter for purposes of § 2244(d)(2).” *Id.* at 414 (internal brackets and quotation marks
3 omitted).

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

24 In the instant case, Petitioner’s second notice of PCR⁵ was untimely filed.
25 Petitioner filed the state PWHC/second notice of PCR on January 17, 2012—almost four
26 years after the trial court issued its order denying relief on Petitioner’s of-right PCR

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28 ⁵ Petitioner filed a PWHC with the state court, which the court construed as a
notice of PCR.

1 petition, and well beyond the applicable time limits set forth in Ariz. R. Crim. P. 32.4(a).
2 *See, e.g., Leacock v. Ryan*, 2016 WL 8255617, at *4 (D. Ariz. Nov. 16, 2016) (second
3 PCR petition filed three and a half years after conclusion of of-right PCR proceedings
4 was untimely), *report and recommendation adopted*, 2017 WL 588899 (D. Ariz. Feb. 14,
5 2017); *Cisneroz v. Ryan*, 2016 WL 8259523, at *4 (D. Ariz. Oct. 25, 2016), *report and*
6 *recommendation adopted*, 2017 WL 633145 (D. Ariz. Feb. 16, 2017).

7 Furthermore, the record does not reflect that Petitioner complied with Rule 32.2(b)
8 when he submitted his untimely notice. He does not claim that he is being held in custody
9 after his sentence expired, that there is newly discovered evidence, that there has been a
10 significant change in the law, or that no fact-finder could have found him guilty.
11 Moreover, he has also not adequately explained why he is without fault in waiting four
12 years to file his second PCR notice. While Petitioner stated that he did not appeal his
13 sentence because appointed PCR counsel “said she would file” and “Petitioner did not
14 understand what lawyer did,” this does not explain the nearly four year delay from the
15 time the court denied the first of-right PCR petition and Petitioner subsequently filing the
16 state PWHC/second notice of PCR. (Doc. 16 Ex. J).

17 Therefore, under state law, the second notice for PCR was untimely and was not
18 “properly filed” for purposes of 28 U.S.C. § 2244(d)(2), and the time period during which
19 Petitioner pursued his untimely second PCR petition through the state courts is not
20 subject to statutory tolling. *Banjo v. Ayers*, 614 F.3d 964, 968 (9th Cir. 2010) (“An
21 untimely petition . . . is not ‘properly filed’ pursuant to 28 U.S.C. § 2254(d)(2), and so it
22 does not toll the statute of limitations.”); *Pace*, 544 U.S. at 414 (“When a post-conviction
23 petition is untimely under state law, that is the end of the matter for purposes of §
24 2244(d)(2).”); *Trigueros v. Adams*, 658 F.3d 983, 988 (9th Cir. 2011) (“An untimely state
25 petition is not ‘properly filed’ and does not trigger statutory tolling under AEDPA.”); *De*
26 *Jesus v. Acevedo*, 567 F.3d 941, 943–44 (7th Cir. 2009) (holding that a “state court’s
27 order denying a request for collateral review (whether on the merits or for any procedural
28 reason) does not require the exclusion, under 28 U.S.C. § 2244(d)(2), of time that passed

1 before the state collateral proceeding began”).⁶

2 In sum, the undersigned finds that Petitioner is not entitled to statutory tolling.
3 Direct review of Petitioner’s of-right PCR petition concluded on March 25, 2008.
4 Petitioner had 35 days from that date to file a notice of PCR and pursue collateral relief in
5 the state courts. Had Petitioner timely filed a notice of PCR within that 35-day period,
6 then Petitioner would be entitled to statutory tolling until he completed one full round of
7 collateral review in the state courts. Petitioner’s untimely second PCR petition was not
8 filed until January 17, 2012. Because Petitioner’s conviction became final within the
9 meaning of § 2244(d)(1) on April 29, 2008, and because Petitioner did not file his second
10 notice of PCR to pursue collateral relief in the state courts until 2012, Petitioner’s
11 untimely second PCR petition did not toll, pause, or re-start the statute of limitations, and
12 it ran uninterrupted until April 30, 2009. Once the federal statute of limitations has run, a
13 collateral state action cannot revive it. *See Sibley v. Culliver*, 377 F.3d 1196, 1203 (11th
14 Cir. 2004); *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003) (“section 2244(d)
15 does not permit the reinitiation of the limitations period that has ended before the state

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17 ⁶ “Only the time period during which a round of habeas review is pending tolls the
18 statute of limitation; periods between different rounds of collateral attack are not tolled.”
19 *Banjo*, 614 F.3d at 968. The Ninth Circuit “employ[s] a two-part test to determine
20 whether the period between the denial of one petition and the filing of a second petition
21 should be tolled. First, we ask whether the petitioner’s subsequent petitions are limited to
22 an elaboration of the facts relating to the claims in the first petition. If the petitions are
23 not related, then the subsequent petition constitutes a new round of collateral attack, and
24 the time between them is not tolled. If the successive petition was attempting to correct
25 deficiencies of a prior petition, however, then the prisoner is still making proper use of
26 state court procedures, and habeas review is still pending. Second, if the successive
27 petition was not timely filed, the period between the petitions is not tolled.” *Id.* at 968–69
28 (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.”); *see*
also Hemmerle, 495 F.3d at 1075 (explaining that when the court construes the new
petition as part of the first round of collateral review, tolling applies if the petition was
denied on the merits but not if the petition was deemed untimely). If a new claim is
asserted in the second petition, then the second petition is considered a “new round,”
even if the second petition corrects deficiencies in the first petition. *Stanclie v. Clay*, 692
F.3d 948, 955–56 (9th Cir. 2012) (finding that because the petitioner “did not limit his
second petition to an elaboration of the facts and his second petition started a ‘new
round,’ he is not entitled to statutory gap tolling for the [] days between his first and
second superior court petitions.”). Here, because the undersigned finds that Petitioner’s
second notice of PCR was untimely, Petitioner is not entitled to tolling for the periods
between the petitions.

1 petition was filed”); *Leacock*, 2016 WL 8255617 at *4 (“Once the one-year AEDPA time
2 limit has passed, a habeas petitioner cannot restart his federal time limit by filing an
3 action in state court . . . There can be no tolling following the expiration of the limitation
4 period because ‘there is no period remaining to be tolled.’” (quoting *Webster v. Moore*,
5 199 F.3d 1256, 1259 (11th Cir. 2000))). Accordingly, absent equitable tolling, the statute
6 of limitations expired on April 30, 2009, making the instant § 2254 petition untimely.

7 **C. Equitable Tolling**

8 In certain limited circumstances, AEDPA’s one-year filing deadline may be
9 equitably tolled. *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010). A petitioner is entitled
10 to equitable tolling if he can demonstrate “‘(1) that he has been pursuing his rights
11 diligently and (2) that some extraordinary circumstances stood in his way’” to prevent
12 him from timely filing a petition. *Holland*, 130 S. Ct. at 2562 (quoting *Pace*, 544 U.S. at
13 418). An extraordinary circumstance is one that is “beyond a prisoner’s control [that]
14 make[s] it impossible to file a petition on time.” *Miles v. Prunty*, 187 F.3d 1104, 1107
15 (9th Cir. 1999) (citations omitted). And, to justify equitable tolling, the extra ordinary
16 circumstance must be attributable to “external forces [] rather than a petitioner’s lack of
17 diligence[.]” *Id.* Further, a petitioner must establish a “causal connection” between the
18 extraordinary circumstance and his failure to file a timely petition. *See Bryant v. Arizona*
19 *Attorney General*, 499 F.3d 1056, 1060 (9th Cir. 2007). “[T]he threshold necessary to
20 trigger equitable tolling [under AEDPA] is very high, lest the exceptions swallow the
21 rule.” *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003) (quoting *Miranda v. Castro*,
22 292 F.3d 1063, 1066 (9th Cir. 2002)).

23 Here, Petitioner has failed to meet his burden. The record before this Court is
24 devoid of any evidence to demonstrate that Petitioner is entitled to equitable tolling.
25 Petitioner contends that he did not file an appeal of the dismissal of his of-right PCR
26 proceeding because his post-conviction counsel said she would take further action.
27 However, that assertion is belied by post-conviction counsel’s notice to the trial court that
28 she reviewed the record and found no colorable claims for relief. Moreover, Petitioner

1 does not explain why he waited four years for his attorney “to take further action” before
2 he filed his subsequent state PCR petition for collateral relief. Petitioner’s pro se status,
3 indigence, limited legal resources, ignorance of the law, or lack of representation during
4 the applicable filing period do not constitute extraordinary circumstances justifying
5 equitable tolling. *See, e.g., Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006); *see*
6 *also Ford v. Pliler*, 590 F.3d 782, 789 (9th Cir. 2009) (“A petitioner’s misunderstanding
7 of accurate information cannot merit relief, as equitable tolling requires a petitioner to
8 show that some extraordinary circumstance[] beyond [his] control caused his late
9 petition, and this standard has never been satisfied by a petitioner’s confusion or
10 ignorance of the law alone.”); *Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1011 (9th
11 Cir. 2009) (“To apply the doctrine in extraordinary circumstances necessarily suggests
12 the doctrine’s rarity, and the requirement that extraordinary circumstances stood in his
13 way suggests that an external force must cause the untimeliness, rather than . . . merely
14 oversight, miscalculation or negligence on the petitioner’s part”) (internal quotation
15 marks and brackets omitted)). Simply stated, Petitioner cannot demonstrate any
16 extraordinary circumstances that prevented him from timely filing the petition.

17 Accordingly, the undersigned finds that Petitioner is not entitled to equitable
18 tolling and the PWHC is untimely.

19 **III. RECOMMENDATION**

20 Based on the foregoing,

21 **IT IS HEREBY RECOMMENDED** that the Petition for Writ of Habeas Corpus
22 pursuant to 28 U.S.C. § 2254 be DENIED.

23 **IT IS FURTHER RECOMMENDED** that a certificate of appealability and leave
24 to proceed in forma pauperis on appeal be DENIED because dismissal of the Petition is
25 justified by a plain procedural bar and reasonable jurists would not find the procedural
26 ruling debatable.


27 Pursuant to 28 U.S.C. § 636(b) and Rule 72(b)(2) of the Federal Rules of Civil
28 Procedure, any party may serve and file written objections within fourteen (14) days after

1 being served with a copy of this Report and Recommendation. A party may respond to
2 another party's objections within fourteen (14) days after being served with a copy. Fed.
3 R. Civ. P. 72(b)(2). No replies shall be filed unless leave is granted from the District
4 Court. If objections are filed, the parties should use the following case number: **CV-14-**
5 **2053-TUC-JGZ**

6 Failure to file timely objections to any factual or legal determination of the
7 Magistrate Judge may result in waiver of the right of review. The Clerk of the Court shall
8 send a copy of this Report and Recommendation to all parties.

9 Dated this 27th day of July, 2017.

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Eric J. Markovich
United States Magistrate Judge