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7 **IN THE UNITED STATES DISTRICT COURT**
8 **FOR THE DISTRICT OF ARIZONA**
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10 Donald Roy Malone,
11 Petitioner,

No. CV-14-02205-LCK

ORDER

12 v.

13 Charles Ryan, et al.,
14 Respondents.
15

16 Petitioner Donald Roy Malone, presently incarcerated at the Arizona State Prison
17 in Florence, Arizona, has filed a Petition for Writ of Habeas Corpus pursuant to 28
18 U.S.C. § 2254. Pursuant to the Rules of Practice of this Court, this matter was referred to
19 Magistrate Judge Kimmins for Report and Recommendation.¹ Before this Court are the
20 Petition (Doc. 1), Respondents' Answer (Doc. 11), and Petitioner's Reply (Doc. 12). The
21 Court finds that the Petition should be dismissed as untimely.

22 **FACTUAL AND PROCEDURAL BACKGROUND**

23 In March 1998, a jury found Petitioner guilty of armed robbery, six counts of
24 aggravated assault, and six counts of kidnapping. (Doc. 11, Ex. B.) On April 24, 1998,
25 Petitioner was sentenced in the Superior Court of Pima County to 63 years imprisonment.
26 (Doc. 11, Ex. C.)
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28 ¹ This matter was referred to the current Magistrate Judge on May 10, 2016. (Doc. 16.)

1 On December 14, 1998, Petitioner appealed his conviction to the Arizona Court of
2 Appeals. (Doc. 11, Ex. E.) The Arizona Court of Appeals affirmed his convictions and
3 sentences on June 29, 1999. (Doc. 11, Ex. A.) Petitioner then filed a petition for review
4 with the Arizona Supreme Court, which was denied on July 25, 2000. (Doc. 11, Exs. G,
5 H.)

6 In the meantime, on January 26, 2000, Petitioner filed a Notice of Post-Conviction
7 Relief (PCR). (Doc. 11, Ex. J.) The PCR court stayed Petitioner's PCR proceeding during
8 the time that his petition for review was pending with the Arizona Supreme Court. (Doc.
9 11, Ex. K.) After the conclusion of Petitioner's appeal, the PCR court lifted the stay and
10 ordered that Petitioner file his petition by January 27, 2001. (*Id.*) Because Petitioner did
11 not file a timely petition by that date, the PCR court dismissed his PCR Petition. (Doc.
12 11, Ex. L.) Afterwards, Petitioner filed a motion for reconsideration and the court
13 reinstated his petition. (Doc. 11, Exs. M, N.) On October 30, 2001, Petitioner filed a PCR
14 Petition. (Doc. 11, Ex. O.) On January 31, 2002, the trial court denied him relief on one
15 claim and granted him partial relief on the other. (*Id.*)

16 On September 8, 2004, Petitioner filed a second Petition for PCR. (Doc. 11, Ex.
17 S.) The PCR court denied relief. (Doc. 11, Ex. V.) Upon Petition for Review, the Arizona
18 Court of Appeals denied relief, and the mandate issued on October 21, 2005. (Doc. 11,
19 Exs. W, X, Y.)

20 On July 12, 2012, Petitioner filed a third Notice and Petition for PCR, and the
21 PCR court denied Petitioner relief. (Doc. 11, Ex. DD.) Petitioner filed a petition for
22 review from the PCR court's denial; however, the court of appeals found no error and
23 denied relief. (Doc. 11, Exs. II, JJ.) Petitioner filed a petition for review with the Arizona
24 Supreme Court on May 1, 2013, which was denied. (Doc. 11, Exs. KK, LL.) The
25 mandate for that decision issued on November 18, 2013. (Doc. 11, Ex. MM.)

26 Petitioner filed the Petition for Writ of Habeas Corpus in this Court on June 30,
27 2014. (Doc. 1.)
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3 **DISCUSSION**

4 Respondents argue that Petitioner’s Habeas Petition is time-barred because it
5 violates the statute of limitations. Petitioner argues that he is entitled to equitable tolling
6 because he encountered difficulties in trying to obtain his court transcripts and records.

7 **Statute of Limitations and Statutory Tolling**

8 Under the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996,
9 federal petitions for writ of habeas corpus filed by state prisoners are governed by a one-
10 year statute of limitations period. 28 U.S.C. § 2244(d)(1). The limitations period begins
11 to run from the latest of:

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

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

17 (C) the date on which the constitutional right asserted was initially recognized by
18 the Supreme Court, if the right has been newly recognized by the Supreme Court
19 and made retroactively applicable to cases on collateral review; or

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

22 *Id.*

23 In applying (d)(1)(A), the Court must assess when direct review of Petitioner’s
24 conviction became final. The Arizona Supreme Court denied review of Petitioner’s direct
25 appeal on July 25, 2000, and his time to petition for a writ of certiorari from the United
26 States Supreme Court expired ninety days later, on October 23, 2000. Sup. Ct. R. 13.
27 Thus, the judgment against Petitioner became final on that date. The statute of limitations
28 began to run, absent tolling, on October 24, 2000.

The statute of limitations is tolled during the time a properly filed state PCR
petition is pending. 28 U.S.C. § 2244(d)(2). At the time Petitioner’s direct review became
final, he had already begun his first PCR proceeding by filing a notice, which

1 immediately tolled the statute of limitations. *Isley v. Ariz. Dep't of Corrections*, 383 F.3d
2 1054, 1056 (9th Cir. 2004) (finding that tolling period begins with filing of notice
3 pursuant to Arizona Rule of Criminal Procedure 32.4(a)). The period of tolling continued
4 through January 31, 2002, when the trial court denied Petitioner relief. Petitioner did not
5 seek further review and, thus, the one-year federal statute of limitations began running
6 the next day, on February 1, 2002, and expired on Monday, February 3, 2003.² *See*
7 *Worrell v. Ryan*, No. CV-13-01683, 2015 WL 1951657, at *8 (D. Ariz. Apr. 28, 2015)
8 (the statute of limitations began running the day after the trial court denied the
9 petitioner's PCR proceeding and because the petitioner did not seek review of that
10 decision).

11 Petitioner filed a second PCR notice on September 8, 2004. The State argues that
12 the statute of limitations was not tolled during this proceeding because the limitations
13 period already had expired. The Court agrees. *See Ferguson v. Palmateer*, 321 F.3d 820,
14 823 (9th Cir. 2003) (holding that “§ 2244(d) does not permit the reinitiation of the
15 limitations period that ended before the state petition was filed”). Similarly, Petitioner's
16 third PCR proceeding, filed on July 12, 2012, did not toll the limitations period.

17 Petitioner's first PCR proceeding entitled him to statutory tolling during the time
18 that it was pending. However, the federal statute of limitations began to run immediately
19 after the PCR Petition was denied and expired on February 3, 2003. Petitioner did not file
20 his federal Habeas Petition until June 30, 2014. Because Petitioner filed the Petition more
21 than one year after the statute of limitations expired, the Petition is statutorily time-
22 barred.

23 **Equitable Tolling**

24 Petitioner argues he is entitled to equitable tolling because he was unable to obtain
25 his court transcripts and records, which constitutes “extraordinary circumstances.”
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28 ² The statute of limitations expired on February 1, 2003, which was a Saturday.
Thus, Petitioner had until Monday, February 3, 2003, to file a Habeas Petition.

1 Petitioner bears the burden of showing that equitable tolling is appropriate. *Rasberry v.*
2 *Garcia*, 448 F.3d 1150, 1153 (9th Cir. 2006). Generally, a litigant seeking equitable
3 tolling “bears the burden of establishing two elements: (1) that he has been pursuing his
4 rights diligently, and (2) that some extraordinary circumstance stood in his way.” *Pace*,
5 544 U.S. at 418. The diligence required for tolling is “reasonable diligence” as opposed
6 to “maximum feasible diligence.” *Doe v. Busby*, 661 F.3d 1001, 1012 (9th Cir. 2011).
7 Thus, the effort needed is that expected of a reasonable person under those particular
8 circumstances. *Id.* at 1015. Furthermore, the petitioner must show that the extraordinary
9 circumstances were the cause of his untimeliness. *Spitsyn v. Moore*, 345 F.3d 796, 799
10 (9th Cir. 2003) (quoting *Stillman v. LaMarque*, 319 F.3d 1199, 1203 (9th Cir. 2003)).

11 Petitioner must establish that an extraordinary circumstance prevented him from
12 timely filing a Petition in this Court. Equitable tolling is only available when
13 “extraordinary circumstances beyond a prisoner’s control make it impossible to file a
14 petition on time.” *Stillman*, 319 F.3d at 1202 (quoting *Miles v. Prunty*, 187 F.3d 1104,
15 1107 (9th Cir. 1999)). Petitioner asserts that he had a difficult time obtaining his court
16 records and transcripts. Courts have recognized that “it is ‘unrealistic to expect [a habeas
17 petitioner] to prepare and file a meaningful petition on his own within the limitations
18 period’ without access to his legal file.” *Espinoza-Matthews v. California*, 432 F.3d 1021,
19 1027 (9th Cir. 2005) (quoting *Spitsyn*, 345 F.3d at 801). However, Petitioner bears the
20 burden of showing that “the hardship caused by lack of access to his materials was an
21 extraordinary circumstance that caused him to file . . . late.” *Waldron-Ramsey v.*
22 *Pacholke*, 556 F.3d 1008, 1013 (9th Cir. 2009).

23 Here, Petitioner notes that he “had to rely on his court appointed counsels and the
24 Court to send him his court-transcripts and records; and then all of them were not sent at
25 the same time, which caused even a further delay.” (Doc. 12.) Petitioner does not point to
26 a single specific instance where he timely asked for documents and he did not receive a
27 necessary document before the deadline. He asserts that the delay made it “impossible to
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1 file a petition on time” but does not provide the support necessary to establish an
2 extraordinary circumstance. *See Waldron-Ramsey*, 556 F.3d at 1013-14 (petitioner was
3 not entitled to equitable tolling because he didn’t identify specific instances where he was
4 deprived of a document necessary to his petition); *Green v. Hornbeak*, No. 07-16136,
5 2009 WL 430442, at *1 (9th Cir. 2009) (finding no extraordinary circumstance because
6 the petitioner failed to provide concrete details regarding the information she needed
7 from the missing documents). Because Petitioner did not detail any actions he took to
8 timely obtain his materials or to delineate the delay by court and counsel, he falls short
9 of meeting his burden to show it was beyond his control to timely file. Thus, he has not
10 established an extraordinary circumstance.

11 Furthermore, Petitioner does not demonstrate that he was reasonably diligent in
12 pursuing the timely filing of his Habeas Petition. Petitioner did not provide a timeline of
13 the actions he took to pursue his rights since he was convicted in 1998. Additionally, he
14 could have shown due diligence by preparing a basic habeas petition and filing it to
15 satisfy the AEDPA deadline or by filing less than 11 years after the expiration of the
16 federal statute of limitations. *See Waldron-Ramsey*, 556 F.3d at 1013. A reasonably
17 diligent person would be expected to undertake preventative measures to ensure his
18 Petition is timely or, alternatively, have a well-supported reason for not timely filing.
19 Petitioner did not demonstrate any of the above, thus, he has not shown that he pursued
20 his rights diligently.

21 Petitioner fails to show that he exercised due diligence or that extraordinary
22 circumstances prevented him from timely filing in this Court. Therefore, he is not entitled
23 to equitable tolling and the Petition is time-barred.

24 **CERTIFICATE OF APPEALABILITY**

25 Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, this Court must
26 issue or deny a certificate of appealability (COA) at the time it issues a final order adverse
27 to the applicant. A COA may issue only when the petitioner “has made a substantial
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1 showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). This showing can
2 be established by demonstrating that “reasonable jurists could debate whether (or, for that
3 matter, agree that) the petition should have been resolved in a different manner” or that the
4 issues were “adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*,
5 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For
6 procedural rulings, a COA will issue only if reasonable jurists could debate (1) whether
7 the petition states a valid claim of the denial of a constitutional right, and (2) whether the
8 court’s procedural ruling was correct. *Id.* The Court finds that reasonable jurists would not
9 find this Court’s procedural ruling debatable. Therefore, a COA will not issue.

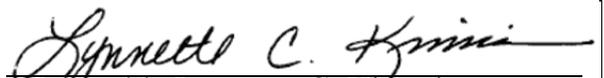
10 Accordingly,

11 **IT IS ORDERED** that the Petition for Writ of Habeas Corpus is **DISMISSED**.

12 **IT IS FURTHER ORDERED** that the Clerk of Court should enter judgment and
13 close this case.

14 **IT IS FURTHER ORDERED** that, pursuant to Rule 11 of the Rules Governing
15 Section 2254 Cases, in the event Petitioner files an appeal, the Court denies issuance of a
16 certificate of appealability.

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18 Dated this 11th day of August, 2016.

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20 
21 Honorable Lynnette C. Kimmins
22 United States Magistrate Judge
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