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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Michael Edward Aguilar,
10 Petitioner,
11 v.
12 Charles L. Ryan, et al.,
13 Respondents.

No. CV-15-0286-TUC-LCK

ORDER

14
15 Petitioner Michael Aguilar has filed a Petition for Writ of Habeas Corpus pursuant
16 to 28 U.S.C. § 2254. Before the Court are the Petition (Doc. 1), Respondents' Answer
17 (Doc. 12), and Aguilar's Reply (Doc. 13). The parties have consented to Magistrate
18 Judge jurisdiction.¹ (Doc. 16.) The Court will dismiss the Petition as premature.

19 **FACTUAL AND PROCEDURAL BACKGROUND**

20 Aguilar was convicted in the Pima County Superior Court on two counts of
21 attempted armed robbery, and sentenced to 11.25 years imprisonment. (Doc. 12, Exs. A,
22 B.) Aguilar filed a pro se Motion to Vacate Judgment, which the trial court denied. (*Id.*,
23 Exs. E, L.) He appealed that denial to the Arizona Court of Appeals and, over his
24 objection, the appeal was consolidated with his already-filed notice of appeal. (*Id.*, Exs.
25 N, O, P.) The only brief presented to the court of appeals was that filed by appointed
26 counsel. (*Id.*, Doc. Q.) The Arizona Court of Appeals affirmed his convictions and
27 sentences. (*Id.*, Doc. T at 7.) The Arizona Supreme Court denied review. (*Id.*, Exs. U, V.)

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¹ This case was reassigned to the current judge on May 10, 2016. (Doc. 20.)

1 Brady from testifying due to the prosecution's failure accurately to disclose his criminal
2 history; he did not allege prosecutorial misconduct. (Doc. 12, Ex. Q at 13-15.) Aguilar
3 also contends that Claim Six, alleging sufficiency of the evidence, was raised on direct
4 appeal. Again, the Court disagrees. Before this Court, Aguilar alleges there was not
5 sufficient evidence to convict him on either charge of attempted armed robbery. (Doc. 1
6 at 22.) He then sets forth seven factual statements alleging that the BB gun was planted
7 (and had no fingerprint or DNA connection to him); the testifying victim was on heroin
8 and committed perjury; the victim on the 9-1-1 call initially stated she "thinks" he has a
9 gun but then then later answered, yes, he pulled a gun on me; and exculpatory text
10 messages were not admitted. (*Id.*) In contrast, on appeal, Aguilar alleged that admission
11 of the 9-1-1 call violated his Sixth Amendment right to confrontation (and, absent
12 admission of the call, the trial court should have granted a directed verdict as to one of
13 the victims, Count 2). (Doc. 12, Ex. Q at 18-20.) Aguilar concedes he has never presented
14 Claim 7 to the Arizona Court of Appeals. Thus, the Court concludes none of the claims in
15 the Petition were fairly presented to the Arizona Court of Appeals.

16 Review of the state court docket reveals that Aguilar has a PCR proceeding
17 pending in state court. A petitioner has not exhausted state court remedies if he has a state
18 PCR petition pending at the time he files a petition for writ of habeas corpus in federal
19 court. *See Sherwood v. Tomkins*, 716 F.2d 632, 634 (9th Cir. 1983) (pending appeal);
20 *Schnepp v. Oregon*, 333 F.2d 288, 288 (9th Cir. 1964) (pending post-conviction
21 proceeding); *Qualls v. Ryan*, No. CV 13-1288-PHX-JAT (DKD), 2013 WL 3833218, at
22 *1-2 (D. Ariz. Jul. 24, 2013) (denying habeas corpus petition as premature where
23 petitioner presently had a Rule 32 petition pending). The pending PCR proceeding could
24 affect Aguilar's convictions and ultimately these proceedings; therefore, it is
25 inappropriate for this Court to rule on Aguilar's claims at this time. *See Sherwood*, 716
26 F.2d at 634.

1 The Court’s review of the state court proceedings indicates that the one-year
2 statute of limitations applicable to a future petition has not begun to run. The Arizona
3 Supreme Court denied review of Aguilar’s direct appeal on June 11, 2015. (Doc. 12, Ex.
4 V.) For purposes of the applicable statute of limitations set forth in 28 U.S.C.
5 § 2244(d)(1)(A), Aguilar’s conviction became final on September 9, 2015, when the
6 ninety days to petition for a writ of certiorari from the United States Supreme Court
7 expired, Sup. Ct. R. 13. *See Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999) (holding
8 that “direct review” includes the period during which a petitioner can petition for writ of
9 certiorari, regardless of whether the petitioner seeks such review); *see also Jimenez v.*
10 *Quarterman*, 555 U.S. 113, 119 (2009) (finding direct review to include the time up to
11 the expiration of the period to seek review by the Supreme Court). At the time Aguilar’s
12 direct review became final, he had already begun his first PCR proceeding by filing a
13 notice on June 24, 2015 (Doc. 12, Ex. W), which immediately tolled the statute of
14 limitations. *Isley v. Ariz. Dep’t of Corrections*, 383 F.3d 1054, 1056 (9th Cir. 2004)
15 (finding that tolling period begins with filing of notice pursuant to Arizona Rule of
16 Criminal Procedure 32.4(a)); 28 U.S.C. § 2244(d)(2) (the federal habeas statute of
17 limitations is tolled during the time a properly filed state PCR petition is pending).
18 Therefore, Aguilar will suffer no prejudice as a result of a dismissal without
19 prejudice.³ *See Slack v. McDaniel*, 529 U.S. 473, 487 (2000) (holding that a petition filed
20 after a prior petition has been dismissed for failure to exhaust before the district court
21 adjudicated any claims is not a second or successive petition).

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23 ³ The Court considered whether a stay of the current petition would be a viable
24 remedy at this time, in accordance with *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005)
25 and *Mena v. Long*, 813 F.3d 907 (9th Cir. 2016). The Supreme Court recognizes that
26 petitioners who are “reasonably confused” about timeliness rules may file “protective”
27 petitions in federal court and ask the court to stay and obey the federal habeas corpus
28 proceedings under *Rhines* until the state remedies are exhausted. *Pace v. DiGuglielmo*,
544 U.S. 408, 416 (2005). By protectively filing a habeas corpus petition, a petitioner
may comply with the one-year statute of limitations applicable to federal habeas corpus
petitions. *See* 28 U.S.C. 2244(d)(1). Here, the one-year limitations period is tolled by the
pending PCR proceeding; therefore, there is no need to hold this proceeding in abeyance
to prevent a statute of limitations problem. *See id.* Thus, dismissing the Petition under the
circumstances of this case will not prejudice Aguilar.

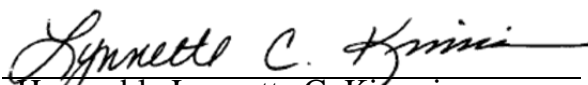
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IT IS FURTHER ORDERED the Petition for Writ of Habeas Corpus is **DISMISSED WITHOUT PREJUDICE as premature.**

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

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

Dated this 17th day of November, 2016.



Honorable Lynnette C. Kimmins
United States Magistrate Judge