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

9 David Yulo Martinez, III,

10 Petitioner,

11 v.

12 Charles L Ryan, et al.,

13 Respondents.
14

No. CV-15-00566-TUC-BPV

ORDER

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16 Petitioner David Yulo Martinez, III, a state prisoner, has filed a Petition for Writ
17 of Habeas Corpus. (Doc. 1. (“Petition”))¹ Thereafter, Petitioner filed an Amended
18 Petition pursuant to 28 U.S.C. § 2254, wherein Petitioner alleges that he is imprisoned
19 and sentenced in violation of the United States Constitution and seeks an evidentiary
20 hearing in support of his claims. (Doc. 16.) Respondents oppose the Amended Petition
21 and the request for evidentiary development. (Doc. 22.) Petitioner did not file a reply.

22 In accordance with the provisions of 28 U.S.C. §636(c)(1), all parties consented to
23 proceed before a United States Magistrate Judge to conduct any and all further
24 proceedings in this case, including trial and entry of a final judgment, with direct review
25 by the Ninth Circuit Court of Appeals if an appeal is filed. (Doc. 25). For the following
26 reasons, the Court dismisses this action as untimely.

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¹ “Doc” refers to numbered documents in this Court’s case file.

1 **PROCEDURAL BACKGROUND**

2 Trial and Appeal

3 On April 2, 2009, following a jury trial in Pima County Superior Court, Petitioner
4 was convicted of four counts each of armed robbery and aggravated assault. On June 9,
5 2009, the trial court imposed a combination of consecutive and concurrent, aggravated
6 sentences totaling 90 years’ imprisonment. (Doc. 16 at 32–33.)² Petitioner filed a timely
7 appeal (Doc. 16-2 at 44–75), and the Arizona Court of Appeals affirmed the convictions
8 and sentences in a memorandum decision filed April 29, 2010. (Doc. 16-3 at 77.) On
9 June 2, 2010, Petitioner, through counsel, filed a petition for review of the appellate
10 court’s decision, challenging the appellate court’s resolution of all of the issues raised
11 except for the improper jury instruction claim. (Doc. 16-3 at 84–100.) The Arizona
12 Supreme Court summarily denied review on October 21, 2010. (Doc. 23-4, Ex. D.)

13 Collateral Review: First Petition for Post-Conviction Relief

14 On November 4, 2010, Petitioner filed a notice of post-conviction relief (“PCR”)
15 under Rule 32 of the Arizona Rules of Criminal Procedure. (Doc. 23, Ex. E.) Petitioner,
16 through counsel, filed his PCR petition on September 13, 2011, raising one claim of trial
17 court error and several claims of ineffective assistance of counsel. (Doc. 16-4 at 145–82.)
18 Subsequently, Petitioner amended the petition to include a claim of prosecutorial
19 misconduct. (Doc. 16-4 at 191–95.) Later, after the State responded to the PCR petition,
20 Petitioner expressly withdrew his claim that defense counsel had been ineffective in
21 advising him regarding a plea offer. (Doc. 16-4 at 185.) On February 15, 2012, the PCR
22 court summarily denied the petition noting that Petitioner had withdrawn his claim of
23 ineffective assistance of counsel based on defense counsel’s advice regarding a proffered
24 plea and raised no colorable claims in the petition. (*Id.* at 196–201.)

25 On June 8, 2012, before filing a petition for review of the PCR court’s decision,
26 Petitioner moved to retract the withdrawal of the ineffective assistance of counsel claim

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28 ² Citations to the record filed by Petitioner refer to the Bates stamp numbers affixed to the
lower right corner of each page of the appendix.

1 regarding defense counsel's advice on a plea offer. (Doc. 16-4 at 202–08.) The PCR court
2 treated the motion as motion for rehearing under Rule 32.9(a) of the Arizona Rules of
3 Criminal Procedure, found the claim untimely, and denied the motion by minute entry
4 dated June 27, 2012. (Doc. 16-4 at 214.) The Court found, alternatively, that had the
5 motion been timely filed, it would be procedurally barred. (*Id.*)

6 Petitioner's petition for review of the PCR decision was filed on August 10, 2012.
7 (Doc. 16-4 at 215–256.) The Arizona Court of Appeals granted review but denied relief
8 in a memorandum decision filed on December 21, 2012. (Doc. 16-4 at 257–72.) The
9 Arizona Supreme Court summarily denied review on July 23, 2013. (Doc. 23-8, Ex. H.)
10 The appellate court issued its mandate on September 27, 2013. (Doc. 16-5 at 314.)

11 *Collateral Review: Second Petition for Post-Conviction Relief*

12 On August 14, 2013, Petitioner filed a second PCR notice. (Doc. 16-5 at 296.)
13 After first denying Petitioner's request for counsel and dismissing the notice, the PCR
14 court reconsidered that ruling, deemed the petition timely, and appointed counsel to
15 represent Petitioner. (Doc. 16-5 at 301–09.) Counsel filed a second PCR petition on
16 March 14, 2014, finding no issues for review and requesting an extension of time for
17 Petitioner to file a pro se PCR petition. (Doc. 16-5 at 331.) Petitioner filed his petition on
18 April 24, 2014, raising claims of ineffective trial and PCR counsel. (Doc. 16-6 at 346.)
19 The PCR court denied relief and dismissed the second petition on June 5, 2014, finding
20 all of Petitioner's claims precluded and Petitioner's claim of ineffective assistance of
21 PCR counsel non-cognizable. (Doc. 16-6 at 436.) On September 30, 2014, the Arizona
22 Court of Appeals granted a petition for review of the PCR court's decision, but denied
23 relief, finding the PCR court clearly identified Petitioner's claims and resolved them
24 correctly. (Doc. 23-9, Ex. I.) No motion for reconsideration or petition for review from
25 that decision was filed, and the mandate issued on December 4, 2014. (Doc. 23-10, Ex.
26 J.)

27 *Federal Habeas Petition*

28 Petitioner filed his petition for writ of habeas corpus in this Court on December 4,

1 2015.

2 **DISCUSSION**

3 Federal Courts analyze habeas claims under the Antiterrorism and Effective Death
4 Penalty Act (AEDPA) framework, and can only grant relief “on the ground that
5 [petitioner] is in custody in violation of the Constitution or laws or treaties of the United
6 States.” 28 U.S.C. §2254(a).

7 Under the AEDPA, a state prisoner must generally file a petition for writ of habeas
8 corpus within one year from the date on which the judgment became final by the
9 conclusion of direct review or the expiration of time for seeking such review” 28
10 U.S.C. § 2244(d)(1)(A). “The time during which a properly filed application for state
11 post-conviction or other collateral review with respect to the pertinent judgment or claim
12 is pending shall not be counted toward any period of limitation” 28 U.S.C. §
13 2244(d)(2).

14 The AEDPA’s limitations period is subject to equitable tolling in appropriate
15 cases. *Holland v. Florida*, 560 U.S. 631 (2010). Generally, a petitioner is entitled to
16 equitable tolling upon a showing of (1) a diligent pursuit of petitioner’s rights; and (2)
17 extraordinary circumstances that stood in petitioner’s way, preventing timely filing. *Id.*
18 at 649 (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). Petitioner must also
19 establish a “causal connection” between the extraordinary circumstance and his failure to
20 file a timely petition. *Bryant v. Arizona Atty. Gen.*, 499 F.3d 1056, 1061 (9th Cir. 2007).
21 Tolling is appropriate when “extraordinary circumstances beyond a prisoner’s control
22 make it impossible to file a petition on time.” *Calderon v. U.S. Dist. Court for the Cent.*
23 *District of Cal.*, 128 F.3d 1283 (9th Cir. 1997) *as amended on denial of reh’g and reh’g*
24 *en banc* (Oct. 29, 1997), *overruled on other grounds by* 163 F.3d 530 (9th Cir. 1998),
25 *abrogated on other grounds by* *Woodford v. Garceau*, 538 U.S. 202 (2003); *see also*
26 *Miranda v. Castro*, 292 F.3d 1063, 1067 (9th Cir. 2002) (stating that “the threshold
27 necessary to trigger equitable tolling [under AEDPA] is very high, lest the exceptions
28 swallow the rule”) (citations omitted). Equitable tolling may be appropriate when the

1 “extraordinary circumstances” consist of “external forces” and not petitioner’s “lack of
2 diligence.” *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999). The extraordinary
3 circumstances requirement is a “high hurdle,” *see Calderon*, 128 F.3d at 1289, and policy
4 considerations counsel against equitable tolling. *Mohasco Corp. v. Silver*, 447 U.S. 807
5 (1980).

6 Equitable tolling also is appropriate if a petitioner establishes his actual innocence
7 by showing that “no reasonable juror would have convicted him in light of the new
8 evidence.” *Schlup v. Delo*, 513 U.S. 298, 327 (1995). “Actual innocence, if proved,
9 serves as a gateway through which a petitioner may pass” when the impediment is the
10 expiration of the AEDPA statute of limitations. *McQuiggin v. Perkins*, 569 U.S. 383, 386
11 (2013).

12 Petitioner bears the burden of proof on the existence of cause for equitable tolling.
13 *Pace*, 544 U.S. at 418; *Raspberry v. Garcia*, 448 F.3d 1150, 1153 (9th Cir. 2006) (“Our
14 precedent permits equitable tolling of the one-year statute of limitations on habeas
15 petitions, but the petitioner bears the burden of showing that equitable tolling is
16 appropriate.”).

17 ANALYSIS

18 Limitation Period Under § 2244(d)(1)(A)

19 Petitioner’s conviction and sentence became final on January 19, 2011, 90 days
20 after his direct appeal was denied by the Arizona Supreme Court on October 21, 2010,
21 when the time for filing a petition for a writ of certiorari from the United States Supreme
22 Court expired. *See* 28 U.S.C. § 2244(d)(1)(A); Sup.Ct.R. 13; *Wixom v. Washington*, 264
23 F.3d 894, 897 (9th Cir. 2001) (judgment becomes final either by the conclusion of direct
24 review by the highest court, including the United States Supreme Court, or by the
25 expiration of the time to seek such review); *Porter v. Ollison*, 620 F.3d 952, 958–59 (9th
26 Cir. 2010) (“When, on direct appeal, review is sought in the state’s highest court but no
27 petition for certiorari to the United States Supreme Court is filed, direct review is
28 considered to be final when the certiorari petition would have been due, which is 90 days

1 after the decision of the state’s highest court.”). Accordingly, Petitioner was required to
2 file his federal petition for writ of habeas corpus within one year of the date his
3 convictions became final, *i.e.*, one year from January 19, 2011. Absent any statutory or
4 equitable tolling periods, Petitioner’s right to file a federal habeas petition expired on
5 January 19, 2012. *See Patterson v. Stewart*, 251 F.3d 1243, 1246 (9th Cir. 2001)
6 (calculating the AEDPA’s one-year statute of limitations using the “anniversary method”
7 of Rule 6(a) of the Federal Rules of Civil Procedure).

8 *Statutory Tolling Under § 2244(d)(2): First Petition for Post-Conviction Relief*

9 The limitations period was tolled immediately, however, by the pendency of
10 Petitioner’s state petition for post-conviction relief. *See* 28 U.S.C. § 2244(d)(2). There
11 was no gap between the conclusion of direct review, and Petitioner’s properly filed notice
12 of petition for post-conviction review. *See Isley v. Arizona Dept. of Corrections*, 383 F.3d
13 1054 (9th Cir. 2004) (state petition is “pending” within the meaning of 28 U.S.C. §
14 2244(d)(2) when properly filed notice of post-conviction relief is filed). A PCR
15 application is also pending during the intervals between a lower court decision and a
16 review by a higher court. *See Biggs v. Duncan*, 339 F.3d 1045, 1048 (9th Cir. 2003).
17 Thus, the issue is not when direct review became final under § 2244(d)(1)(A), rather, this
18 Court must determine, applying state law, how long Petitioner’s petition for post-
19 conviction relief was “pending” for purposes of tolling the limitations period pursuant to
20 § 2244(d)(2). *See Wixom*, 264 F.3d at 897 (applying Washington law to determine
21 conclusion of collateral review in state court). An application for state post-conviction
22 review remains pending until the application has achieved final resolution through the
23 State’s post-conviction procedures. *See Hemmerle v. Schriro*, 495 F.3d 1069, 1077 (9th
24 Cir. 2007) (citing *Carey v. Saffold*, 536 U.S. 214, 219–20 (2002)). Thus, the first PCR
25 proceeding in this matter was “pending” and tolled AEDPA’s statute of limitations until
26 the Arizona Supreme Court denied review of Petitioner’s petition on July 23, 2013. *See*
27 *Hemmerle*, 495 F.3d at 1077 (holding that nothing remains “pending” after the Arizona
28

1 Supreme Court denies review in PCR proceedings).³

2 Because nothing was pending after the Arizona Supreme Court's decision, the
3 statute of limitations commenced to run the next day—on July 24, 2013. *See Hemmerle*,
4 495 F.3d at 1074 (statute of limitations tolled until date on which PCR notice was
5 dismissed where no petition for review was filed).

6 *Statutory Tolling Under § 2244(d)(2): Second Petition for Post-Conviction Relief*

7 The time between a first and second application for post-conviction relief is not
8 tolled because no application is pending during that period. *See Biggs*, 339 F.3d at 1048.
9 It follows from *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003) (holding that
10 section 2244(d) does not permit the reinitiation of the limitations period that has ended
11 before the state petition was filed), that § 2244(d) also does not permit the reinitiation of
12 the limitations period after a second petition is filed.

13 In this case, the limitations period continued running until August 14, 2013, when
14 Petitioner filed his second PCR proceeding. Twenty-two (22) days of non-tolled time

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16 ³ In *Celaya v. Stewart* the Arizona District Court reached the conclusion that, under
17 Arizona rules, a decision issued by the court of appeals after it accepts review of a
18 petition is not finalized until issuance of the mandate. 691 F. Supp. 2d 1046 (D. Ariz.
19 2010), *aff'd sub nom* 473 Fed. Appx. 794 (9th Cir. 2012), *withdrawn and superseded on*
20 *other grounds on denial of reh'g en banc*, 497 Fed. Appx. 744 (9th Cir. 2012). The court
21 reached this conclusion after examining differences between the state court PCR
22 proceedings in *Celaya* and *Hemmerle*. Unlike the petitioner in *Hemmerle*, *Celaya* failed
23 to seek review from the Arizona Court of Appeals' decision granting review of the
24 petition and denying relief. *Id.* Under Arizona rules, if no motion for reconsideration or
25 petition for further review is filed, and the time for filing expires, the clerk of the Court of
26 Appeals is directed to issue a mandate. *See* Ariz. R. Crim. P. 31.23 (2013). In *Hemmerle*,
27 after the Arizona Supreme Court denied review, there was no further requirement for a
28 mandate to issue; the petition was no longer pending. *See Hemmerle*, 495 F.3d at 1077;
see also Ariz. R. Crim. P. Rule 32.9(g)(2013) (Rules 31.18 and 31.19 apply to petitions
for review from appellate court decisions); Ariz. R. Crim. P. Rule 31.19(h)(2013)
(directing clerk of the Arizona Supreme Court to notify the parties and the Court of
Appeals when a petition for review has been denied and to return the briefs to the Court
of Appeals). Applying this reasoning here, Petitioner's first PCR, like *Hemmerle's*, was
finally resolved when the Arizona Supreme Court denied review.

1 elapsed between the conclusion of Petitioner’s first PCR proceeding and the filing of the
2 notice of his second PCR proceeding. After the PCR court denied the petition, the
3 Arizona Court of Appeals granted a petition for review of the PCR court’s decision, but
4 denied relief on September 30, 2014. The limitations period continued to be tolled until
5 the mandate issued on December 4, 2014. *See e.g., Celaya*, 473 F. App’x 794. Petitioner
6 filed his federal habeas petition one year later on December 4, 2015. Petitioner’s
7 Amended Petition was filed on June 29, 2016, 230 days after the limitations period
8 expired (including the 22 days between the first and second PCR petitions).

9 Neither party has raised the issue of whether Petitioner’s Amended Petition relates
10 back to the original petition for statute of limitations purposes. Rule 15 of the Federal
11 Rules of Civil Procedure governing amendments to habeas petitions permits otherwise
12 untimely amendments to “relate back” to the date of the timely-filed original pleading
13 only when the claim asserted in the amended pleading “arose out of the conduct,
14 transaction, or occurrence set forth or attempted to be set forth in the original pleading.”
15 Fed. R. Civ. P. 15(c)(2); *see Mayle v. Felix*, 545 U.S. 644, 649 (2005). The Court finds
16 that only a subset of Claim A(2)—alleging the ineffective assistance of post-conviction
17 relief counsel for withdrawing the claim of ineffective assistance of trial counsel during
18 plea negotiations—relates back to the first petition. Thus, this particular claim is only
19 untimely by 22 days.⁴ Moreover, even if all of the claims related back to the original
20 petition, they would also be untimely filed by 22 days. Thus, in the absence of equitable
21 tolling, the Amended Petition is untimely.

22 *Equitable Tolling*

23 Petitioner has not met his burden to prove the existence of cause required for
24 equitable tolling. Petitioner filed no reply to Respondents’ argument that his petition is
25 untimely and raised no argument in his Amended Petition in support of equitable tolling.
26 Petitioner failed to proffer any extraordinary circumstance that would justify equitable

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28 ⁴ Furthermore, this claim is subject to dismissal because it is non-cognizable on habeas
review under 28 U.S.C. § 2254

1 tolling or demonstrate that an external impediment hindered the diligent pursuit of his
2 rights. Petitioner has not argued actual innocence and, in fact, asserts he would have
3 accepted a plea offer had he known about crucial evidence identifying him as the
4 perpetrator of the offenses. Petitioner's lack of familiarity with the law or lack of legal
5 assistance does not toll the statute of limitations. *See Rasberry*, 448 F.3d at 1154 (holding
6 petitioner's inability to calculate the limitations period is not extraordinary circumstances
7 that toll the statute). "[I]t is well established that 'ignorance of the law, even for an
8 incarcerated *pro se* petitioner, generally does not excuse prompt filing.'" *Marsh v.*
9 *Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000) (quoting *Fisher v. Johnson*, 174 F.3d 710,
10 714 (9th Cir. 1999)). Petitioner has not met the "high hurdle" of demonstrating
11 extraordinary circumstances impeded the timely filing of his habeas petition.
12 Accordingly, this Court finds no cause to equitably toll the limitations period.

13 Conclusion

14 In the absence of equitable tolling, Petitioner's amended habeas petition, with the
15 exception of the subset of Claim A(2) discussed above, was filed 230 days after the
16 statute of limitations expired. The subset of Claim A(2) that relates back to the original
17 petition was filed 22 days late. Accordingly,

18 IT IS ORDERED that the Petitioner's Petition is DISMISSED as untimely. The
19 Clerk of the Court shall enter judgment accordingly and close the file in this action.

20 IT IS FURTHER ORDERED that a Certificate of Appealability is GRANTED as
21 to whether Petitioner's § 2254 petition is barred by AEDPA's statute of limitations.

22 Dated this 25th day of June, 2018.

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24 
25 _____
26 Bernardo P. Velasco
27 United States Magistrate Judge
28