

1 **WO**

2

3

4

5

6

IN THE UNITED STATES DISTRICT COURT

7

FOR THE DISTRICT OF ARIZONA

8

Ryan Starr Soucy,

) CV 17-0110-TUC-DCB (LAB)

9

Petitioner,

) **REPORT AND RECOMMENDATION**

10

vs.

11

Charles L. Ryan; et al.,

12

Respondents.

13

14

15

Pending before the court is a petition for writ of habeas corpus constructively¹ filed in this court on March 3, 2017, by Ryan Starr Soucy, an inmate currently held in the Arizona State Prison Complex in Eloy, Arizona. (Doc. 1, pp. 1, 11)

18

Also pending is Soucy’s motion to stay federal proceedings, filed on the same day. (Doc. 3)

20

Pursuant to the Rules of Practice of this court, the matter was referred to Magistrate Judge Bowman for report and recommendation. LRCiv 72.2(a)(2).

22

The Magistrate Judge recommends that the District Court, after its independent review of the record, enter an order dismissing the petition and denying the motion. The petition is time-barred; a stay would be futile.

25

26

27

¹ March 3, 2017 is the date the petition was placed in the prison mailing system. (Doc. 1, p. 11); see *Campbell v. Henry*, 614 F.3d 1056, 1059 (9th Cir. 2010).

28

1 Summary of the Case

2 On January 11, 2011, Soucy pleaded guilty pursuant to a plea agreement to “theft by
3 misrepresentation, aggravated assault of a peace officer, and three counts of possession of a
4 dangerous drug.” (Doc. 21, pp. 29, 77) On February 8, 2011, the trial court sentenced him to
5 “a total of 18.5 years in prison.” (Doc. 21, p. 29)

6 Soucy filed notice of post-conviction relief (PCR), but appointed counsel was unable to
7 find any meritorious issues to raise. (Doc. 19-7); (Doc. 19-8) (Notice of Review filed October
8 24, 2011) Soucy subsequently filed his own post-conviction relief (PCR) petition pro se. He
9 raised sixteen ineffective assistance of counsel claims and four sentencing claims. (Doc. 21,
10 pp. 29, 31, 39) The PCR court dismissed the petition on July 9, 2012. (Doc. 21, p. 42) His
11 petition for review with the Arizona Court of Appeals was denied as untimely in September of
12 2012. (Doc. 23, p. 27); (Doc. 23, p. 43)

13 On March 4, 2013, Soucy filed a second notice of post-conviction relief (PCR). (Doc.
14 23, p. 27) He filed his petition on May 8, 2013. (Doc. 22, p. 3) The PCR court acknowledged
15 receipt of his petition on May 13, 2013. (Doc. 23, p. 27).

16 On June 6, 2013, the Arizona Court of Appeals granted Soucy’s motion to proceed with
17 a delayed petition for review of his first PCR proceeding. (Doc. 23, p. 27); *but see* (Doc. 21,
18 p. 73) (order dated June 10, 2013) The PCR court subsequently stayed Soucy’s second PCR
19 proceeding. (Doc. 23, p. 27)

20 On September 11, 2013, the Arizona Court of Appeals issued an order granting review
21 but denying relief. (Doc. 23, p. 27) Soucy did not file a petition for review with the Arizona
22 Supreme Court. (Doc. 18, p. 3) Soucy subsequently filed a motion to withdraw the second
23 petition, and on October 15, 2013, the PCR court dismissed the second petition “without
24 prejudice.” (Doc. 22, pp. 23, 26) The Arizona Court of Appeals issued its mandate on
25 November 5, 2013. (Doc. 23, p. 28) Ordinarily, a subsequent PCR notice must be filed within
26 30 days “after the issuance of the final order or mandate by the appellate court in the petitioner’s
27 first petition for post-conviction relief proceeding.” Ariz.R.Crim.P. 32.4(a).

1 On April 16, 2014, Soucy constructively filed his third notice of post-conviction relief
2 (PCR). (Doc. 22, pp. 28-30) Appointed counsel was unable to find any meritorious issues, so
3 Soucy filed a petition pro se. (Doc. 22, pp. 35, 38) On June 24, 2015, the PCR court denied the
4 petition as untimely and, in the alternative, meritless. (Doc. 23, pp. 3-12) (The PCR court
5 erroneously referred to this proceeding as Soucy’s “second.”).

6 The PCR court denied Soucy’s motion for reconsideration on August 28, 2015. (Doc.
7 23, p. 27) The court found that the third notice was not filed within 30 days of the order and
8 mandate of the court of appeals and the claims in the third petition did not fall within Rule 32’s
9 “savings clause.” (Doc. 23, pp. 28-29) (citing Ariz.R.Crim.P. 32) The court rejected Soucy’s
10 argument that the PCR court had dismissed his second PCR *petition* but not his second PCR
11 *notice* and his third petition dated back to his second PCR notice. *Id.* The court explained that
12 when a petition is dismissed, the court need not explicitly dismiss the notice as well. (Doc. 23,
13 p. 29)

14 On March 1, 2016, the Arizona Court of Appeals granted review of the third PCR
15 petition but denied relief. (Doc. 23, p. 42) The court adopted the PCR court’s analysis of the
16 timeliness issue. (Doc. 23, p. 45) The court further noted that the rules do not explicitly permit
17 a dismissal “without prejudice” in the PCR context and warned against using that phrase. (Doc.
18 23, p. 45, n. 1) The Arizona Supreme Court denied review on August 22, 2016. (Doc. 23, p.
19 62)

20 Soucy filed his fourth notice of post-conviction relief (PCR) on March 2, 2017. (Doc.
21 24, pp. 3-18) The PCR court summarily dismissed the notice on March 29, 2017. (Doc. 24, pp.
22 32-34) Soucy’s petition for review with the Arizona Court of Appeals is still pending. (Doc.
23 18, p. 4); (Doc. 24, p. 36)

24 Previously, on March 3, 2017, Soucy constructively filed in this court the pending
25 petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. 1) He claims (1) counsel
26 was ineffective for (a) failing to file a motion to suppress, (b) failing to investigate, (c) failure
27 to explain the law, and (d) failure to object to the trial court’s ultimatum to enter a plea; (2) the
28 court interfered with plea negotiations by imposing a deadline to accept the plea; (3) PCR

1 counsel was ineffective for failing to raise the issues described in the first claim; and (4) PCR
2 counsel was ineffective for filing a “Notice of Completion” without finding meritorious issues.
3 (Doc. 1)

4 The same day, Soucy filed the pending motion to stay. (Doc. 3) He argues the petition
5 should be stayed while he exhausts Claim (2) and Claim (4) in his fourth PCR proceeding. *Id.*

6 On June 14, 2017, the respondents filed an answer to the petition arguing among other
7 things that it is time-barred. (Doc. 18) They filed a response to the motion arguing that a stay
8 would be futile because the petition is untimely. (Doc. 25)

9 On July 7, 2017, Soucy filed a reply to the respondents’ answer and a reply in support
10 of his motion for a stay. (Doc. 26); (Doc. 27)

11 The respondents are correct. The petition is time-barred, a stay would be futile.

12
13 Discussion

14 The writ of habeas corpus affords relief to persons in custody in violation of the
15 Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). The petition,
16 however, must be filed within the applicable limitation period or it will be dismissed. The
17 statute reads in pertinent part as follows:

- 18 (1) A 1-year period of limitation shall apply to an application for a writ of
19 habeas corpus by a person in custody pursuant to the judgment of a State
20 court. The limitation period shall run from the latest of--
21 (A) the date on which the judgment became final by the conclusion of
22 direct review or the expiration of the time for seeking such review;
23 (B) the date on which the impediment to filing an application created
24 by State action in violation of the Constitution or laws of the
25 United States is removed, if the applicant was prevented from filing
26 by such State action;
27 (C) the date on which the constitutional right asserted was initially
28 recognized by the Supreme Court, if the right has been newly
recognized by the Supreme Court and made retroactively
applicable to cases on collateral review; or
(D) the date on which the factual predicate of the claim or claims
presented could have been discovered through the exercise of due
diligence.

1 (2) The time during which a properly filed application for State
2 post-conviction or other collateral review with respect to the pertinent
3 judgment or claim is pending shall not be counted toward any period of
4 limitation under this subsection.

5 28 U.S.C. § 2244(d). The “one-year statute of limitations . . . applies to each claim in a habeas
6 application on an individual basis.” *Mardesich v. Cate*, 668 F.3d 1164, 1170 (9th Cir. 2012).

7 The limitation period for each of Soucy’s claims was triggered on “the date on which the
8 judgment became final by the conclusion of direct review or the expiration of the time for
9 seeking such review.” 28 U.S.C. § 2244(d)(1)(A). He does not argue that any of the other
10 statutory triggers apply. (Doc. 1, p. 11); (Doc. 27)

11 Soucy was convicted pursuant to a plea of guilty. Accordingly, his first PCR petition
12 was an “of-right” proceeding and functioned as direct review of his conviction. *See Summers*
13 *v. Schriro*, 481 F.3d 710, 711 (9th Cir. 2007) (“AEDPA’s one-year statute of limitations does
14 not begin to run until the conclusion of the Rule 32 of-right proceeding and review of that
15 proceeding, or until the expiration of the time for seeking such proceeding or review.”).

16 On September 11, 2013, the Arizona Court of Appeals granted review of Soucy’s first
17 PCR petition but denied relief. (Doc. 23, p. 27) He then had 35 days to file a petition for
18 review with the Arizona Supreme Court. Ariz.R.Crim.P. 31.19(a) (30 days to petition the
19 Arizona Supreme Court); Ariz.R.Crim.P. 1.3(a) (5 days added for service). His judgment
20 became final when he failed to do so on October 16, 2013. *See Hemmerle v. Schriro*, 495 F.3d
21 1069, 1073-74 (9th Cir. 2007), *cert. denied*, 555 U.S. 829 (2008).

22 The one-year limitation period began running the next day and expired one year later on
23 October 16, 2014. *See Hemmerle*, 495 F.3d at 1077. Soucy constructively filed his petition
24 in this court on March 3, 2017. (Doc. 1, p. 11) It is time-barred.

25 The limitation period was not statutorily tolled on April 16, 2014 when Soucy
26 constructively filed his third notice of post-conviction relief. (Doc. 22, pp. 28-30) Statutory
27 tolling only occurs when a “*properly filed* application for State post-conviction or other
28 collateral review” is pending. 28 U.S.C. § 2244(d)(2) (emphasis added). And an untimely
application is not “properly filed.” *Pace v. DiGuglielmo*, 544 U.S. 408, 417, 125 S.Ct. 1807,

1 1814 (2005). Here, the third PCR application was untimely, so it was not properly filed. (Doc.
2 23, pp. 3-12) (application was untimely); (Doc. 23, pp. 27-29) (same); (Doc. 23, pp. 42-45)
3 (same) And the limitation period was not statutorily tolled. *See* 28 U.S.C. § 2244(d).

4 Soucy argues his third PCR petition *was* properly filed because it relates back to his
5 second PCR notice, which was never explicitly dismissed. (Doc. 1, p. 11); (Doc. 27, p. 3) The
6 Arizona Court of Appeals, however, ruled that the petition was untimely, and “a state court’s
7 interpretation of state law . . . binds a federal court sitting in habeas corpus.” (Doc. 23, pp. 42-
8 45); *Bradshaw v. Richey*, 546 U.S. 74, 76, 126 S. Ct. 602, 604 (2005).

9 Soucy further argues that the state courts “are utilizing a rule that does not exist and is
10 not regularly followed.” (Doc. 1, p. 11); (Doc. 27, pp. 8, 10) He is mistaken. The state courts
11 found that Soucy’s PCR proceeding was untimely under Ariz.R.Crim.P. 32. (Doc. 23, pp. 3-
12 12); (Doc. 23, pp. 27-29); (Doc. 23, pp. 42-45) That rule is regularly followed. *See Ortiz v.*
13 *Stewart*, 149 F.3d 923, 931 (9th Cir. 1998) (rejecting the petitioner’s argument that Arizona Rule
14 of Criminal Procedure 32 cannot bar federal habeas review because it has not been “strictly or
15 regularly followed.”). Soucy seems to be referring to a footnote in which the Arizona Court of
16 Appeals noted that the rules do not explicitly permit a dismissal “without prejudice” in the PCR
17 context and warned against using that phrase. (Doc. 23, p. 45, n. 1) He reasons that his petition
18 was ruled untimely based upon this “rule that does not exist.” (Doc. 1, p. 11); (Doc. 27, pp.
19 4-5, 8) He is incorrect. His petition was ruled untimely in accordance with Ariz.R.Crim.P. 32.
20 (Doc. 23, pp. 3-12); (Doc. 23, pp. 27-29); (Doc. 23, pp. 42-45)

21 Soucy further argues that he is entitled to equitable tolling because the PCR court’s
22 dismissal of his second petition “without prejudice” was confusing and led him to believe that
23 his third petition would be timely.

24 “[A] petitioner is entitled to equitable tolling [of the limitation statute] only if he shows
25 (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance
26 stood in his way and prevented timely filing.” *Lakey v. Hickman*, 633 F.3d 782, 786 (9th Cir.
27 2011) (punctuation modified), *cert. denied*, 131 S.Ct. 3039 (2011). “The petitioner must
28 additionally show that the extraordinary circumstances were the cause of his untimeliness and

1 that the extraordinary circumstances made it impossible to file a petition on time.” *Id.* “The
2 high threshold of extraordinary circumstances is necessary lest the exceptions swallow the rule.”
3 *Id.*

4 In this case, Soucy cannot show that the PCR court’s dismissal of his second petition
5 “without prejudice” prevented him from filing a timely petition. Assuming he was confused²,
6 this confusion was cleared up in plenty of time for him to file a timely petition.

7 The PCR court dismissed his third petition as untimely on June 24, 2015. (Doc. 23, pp.
8 3-12) Assuming Soucy was confused by the PCR court’s previous dismissal of his second
9 petition “without prejudice,” this confusion was cleared up when he learned that his third PCR
10 proceeding was untimely. (Doc. 23, pp. 3-12) Assuming Soucy is entitled to equitable tolling
11 due to his confusion, equitable tolling ended when he discovered his error – June 24, 2015.
12 The limitation period began running the next day and ended one year later on June 24, 2016.
13 Soucy’s pending petition was filed on March 3, 2017, more than eight months later. Assuming
14 Soucy is entitled to a period of equitable tolling, his petition is still untimely.

15 Soucy further argues that appointed counsel was ineffective when he filed a Notice of
16 Review explaining he was unable to find any meritorious issues to raise in the first PCR
17 proceeding. (Doc. 27, pp. 1-2); *see* (Doc. 19-8) (Notice of Review filed October 24, 2011)
18 While that might be true, Soucy does not explain why counsel’s performance prevented him
19 from filing a timely petition in this court.

20
21 RECOMMENDATION

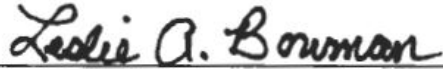
22 The Magistrate Judge recommends that the District Court, after its independent review
23 of the record, enter an order DISMISSING the petition for writ of habeas corpus and DENYING
24 the motion for a stay. (Doc. 1), (Doc. 3) The petition is time-barred; a stay would be futile.

25 Pursuant to 28 U.S.C. §636 (b), any party may serve and file written objections within
26 14 days of being served with a copy of this report and recommendation. If objections are not

27
28 ² Soucy does not explain why he filed a third PCR notice if he really believed his second PCR
notice was still viable.

1 timely filed, they may be deemed waived. The Local Rules permit a response to an objection.
2 They do not permit a reply to a response without the permission of the District Court.

3 DATED this 13th day of July, 2017.

4
5 

6

Leslie A. Bowman
7 United States Magistrate Judge
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28