

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FILED

NOV 29 2017

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

MICHAEL LYNN COOK,

Petitioner-Appellant,

v.

CHARLES L. RYAN, Warden and  
ATTORNEY GENERAL FOR THE STATE  
OF ARIZONA,

Respondents-Appellees.

No. 17-16488

D.C. No. 2:16-cv-03872-ROS  
District of Arizona,  
Phoenix

ORDER

Before: LEAVY and TALLMAN, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 3) is denied because appellant has not shown that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012).

Any pending motions are denied as moot.

**DENIED.**

**FILED**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

APR 20 2018

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

MICHAEL LYNN COOK,

No. 17-16488

Petitioner-Appellant,

D.C. No. 2:16-cv-03872-ROS  
District of Arizona,  
Phoenix

v.

CHARLES L. RYAN, Warden and  
ATTORNEY GENERAL FOR THE STATE  
OF ARIZONA,

ORDER

Respondents-Appellees.

Before: McKEOWN and N.R. SMITH, Circuit Judges.

Appellant's motion to file an oversized combined motion for reconsideration and motion for reconsideration en banc (Docket Entry No. 23) is granted. The combined motion for reconsideration and motion for reconsideration en banc (Docket Entry No. 24) is deemed properly filed.

The motion for reconsideration is denied and the motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

1. c.

1  
2  
3  
4  
5

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

8  
9 Michael Lynn Cook, No. CV-16-03872-PHX-ROS  
10 Petitioner,  
11 v.  
12 Charles L Ryan, et al.,  
13 Respondents.  
14

**ORDER**

15 On April 28, 2017, Magistrate Judge Michelle H. Burns issued a Report and  
16 Recommendation (“R&R”) recommending Petitioner Michael Lynn Cook’s petition for  
17 writ of habeas corpus be dismissed as untimely. (Doc. 16). Cook filed objections and  
18 supplements arguing the R&R should be overruled. The R&R’s analysis is correct and it  
19 will be adopted in full.

20 At present, the sole issue is the timeliness of Cook’s petition. The relevant facts  
21 and dates are undisputed. Cook was convicted in state court of, among other things,  
22 attempted second-degree murder. He was sentenced to prison terms totaling 40 years.  
23 Cook filed a direct appeal but the Arizona Court of Appeals affirmed his convictions and  
24 sentences. While that appeal was pending, Cook filed his first post-conviction relief  
25 (“PCR”) petition with the state trial court. Cook’s direct appeal concluded on March 1,  
26 2010 but his first PCR petition remained pending until July 17, 2013. Approximately six  
27 months before his first PCR proceeding ended, Cook filed a second PCR petition with the  
28 state trial court. The trial court denied the second PCR petition on November 6, 2013.

1 (Doc. 1-6 at 2). Cook then filed a petition for review of the denial of his second PCR  
2 petition with the Arizona Court of Appeals. The court of appeals granted review but  
3 denied relief. In its ruling, the court of appeals repeatedly stated Cook's second PCR  
4 petition was "untimely." (Doc. 1-6 at 13). The court of appeals issued its mandate on  
5 July 13, 2016 and Cook filed the present federal petition on November 7, 2016. (Doc. 1-  
6 at 7).

7 Federal law requires a petition for writ of habeas corpus be filed within one year  
8 of a conviction becoming final. 28 U.S.C. § 2244(d)(1)(A). This period is subject to  
9 both statutory and equitable tolling. Statutory tolling applies while a "properly filed  
10 application for State post-conviction . . . is pending." 28 U.S.C. § 2244(d)(2). Equitable  
11 tolling applies if a petitioner was pursuing his rights diligently but extraordinary  
12 circumstances prevented him from filing on time. *Holland v. Florida*, 560 U.S. 631, 648  
13 (2010). The threshold for equitable tolling is "very high" and it is "unavailable in most  
14 cases." *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002) (quotation marks and  
15 citations omitted). Based on these principles, and the undisputed dates regarding Cook's  
16 various filings, the timeliness inquiry is relatively straightforward.

17 Cook's convictions were final and his first PCR petition was no longer pending as  
18 of July 17, 2013. If the one-year limitations period began to run at that time, Cook's  
19 federal petition filed in November 2016 was more than two years too late. Alternatively,  
20 if the one-year limitations period did not begin to run until the second PCR petition was  
21 no longer pending as of July 13, 2016, Cook's federal petition is timely. Finally, even if  
22 the one-year period began to run on July 17, 2013, Cook's federal petition is timely if he  
23 is entitled to equitable tolling.

24 The R&R concluded the one-year period began to run in 2013 when Cook's first  
25 PCR petition was no longer pending. According to his objections and other filings, Cook  
26 believes that is incorrect and his second PCR petition also tolled the statute of limitations.  
27 In other words, the one-year period did not begin to run until Cook's second PCR petition  
28 was no longer pending. But in rejecting Cook's second PCR petition, the Arizona Court

1 of Appeals explicitly found that petition “untimely.” As explained by the Supreme  
2 Court, an untimely petition is not considered “properly filed” to merit tolling of the  
3 limitations period. *Pace v. DiGuglielmo*, 544 U.S. 408 (2005). Thus, Cook’s second  
4 PCR petition had no impact on when his one-year period began to run and his federal  
5 petition is untimely by more than two years.

6 Cook argues it is unfair to start the one-year period from his first PCR petition  
7 because he had no way of knowing the state courts would eventually deem his second  
8 PCR petition untimely. Cook points to decisions by the state trial court allowing his  
9 second PCR petition to proceed as evidence that he had no reason to believe there may be  
10 a future timeliness problem in federal court. The problem for Cook is that the Supreme  
11 Court explicitly contemplated this exact scenario in ruling that untimely petitions have no  
12 impact on calculating the federal deadline.

13 In *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), a Pennsylvania state court had held  
14 a petition for post-conviction relief was untimely. The petitioner then filed a federal  
15 petition, arguing his state petition had been “properly filed” even though it had been  
16 deemed untimely. That is, he was entitled to statutory tolling until his untimely petition  
17 was no longer pending. In the petitioner’s view, it would be unfair to deem an untimely  
18 petition not “properly filed” because “a petitioner trying in good faith to exhaust state  
19 remedies may litigate in state court for years only to find out at the end that [his petition]  
20 was never ‘properly filed,’ and thus that his federal habeas petition is time barred.” *Id.* at  
21 416. The Supreme Court rejected this argument, claiming a petitioner in this type of  
22 “predicament” should file “a ‘protective’ petition in federal court . . . asking the federal  
23 court to stay and abey the federal habeas proceedings until state remedies are exhausted.”  
24 *Id.* This exact reasoning applies to Cook.

25 After his first PCR petition was denied, Cook could have filed a protective federal  
26 petition to protect his right to federal review of his conviction. Cook could not, however,  
27 rely on his second PCR petition tolling the time period given the strong possibility that  
28 his second PCR petition would eventually be deemed untimely. Because the Supreme

1 Court has addressed and rejected Cook's exact claim regarding statutory tolling, the  
2 R&R's conclusion on statutory tolling is correct.

3 On the topic of equitable tolling, the R&R correctly concludes Cook has not  
4 established he pursued his rights diligently or that extraordinary circumstances prevented  
5 him from filing a timely petition. It appears Cook seeks to invoke equitable tolling based  
6 on his belief that he needed to wait until his second PCR petition was resolved before  
7 filing his federal petition. But as explained in *Pace*, petitioners must file protective  
8 petitions in such circumstances. Cook's decision to wait until a final ruling on his  
9 untimely second petition does not show he was proceeding diligently. In addition, Cook  
10 does not point to any extraordinary circumstances that prevented him from filing his  
11 federal petition between July 2013 and November 2016. Equitable tolling does not  
12 apply.

13 Finally, Cook "request[s] access to case authorities that are available only in  
14 electronic databases such as Lexis and Westlaw" as well as an order compelling  
15 Respondents to produce certain material. (Doc. 20 at 1). Because Cook's petition is  
16 untimely under Supreme Court and statutory law, there is no need to provide Cook the  
17 relief he seeks.

18 ///  
19 ///

20 Accordingly,

21 **IT IS ORDERED** the Report and Recommendation (Doc. 16) is **ADOPTED IN**  
22 **FULL**. The Petition for Writ of Habeas Corpus (Doc. 1) is **DENIED** and this case is  
23 **DISMISSED WITH PREJUDICE**.

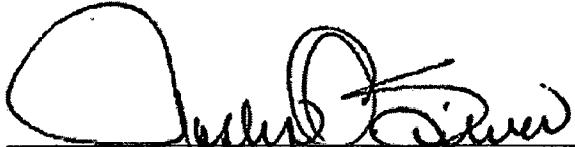
24 **IT IS FURTHER ORDERED** the Motion to Order Access (Doc. 20) and Motion  
25 to Compel (Doc. 25) are **DENIED**.

26 **IT IS FURTHER ORDERED** that a Certificate of Appealability and leave to  
27 proceed in forma pauperis on appeal are **DENIED** because dismissal of the petition is  
28 justified by a plain procedural bar and jurists of reason would not find the procedural

1 ruling debatable.

2 Dated this 6th day of July, 2017.

3  
4  
5  
6



7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Honorable Roslyn O. Silver  
Senior United States District Judge

1 WO  
2  
3  
4  
5

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

8  
9 Michael Lynn Cook, ) CIV 16-03872-PHX-ROS (MHB)  
10 Petitioner, )  
11 vs. ) **REPORT AND RECOMMENDATION**  
12 Charles L. Ryan, et al., )  
13 Respondents. )  
14 \_\_\_\_\_)

15 TO THE HONORABLE ROSLYN O. SILVER, UNITED STATES DISTRICT COURT:

16 On November 7, 2016, Petitioner Michael Lynn Cook filed a *pro se* Petition for Writ  
17 of Habeas Corpus pursuant to 28 U.S.C. § 2254, (Doc. 1), and a memorandum in support  
18 (Doc. 3). Respondents filed an answer on December 28, 2016, and a Petitioner filed a reply  
19 and supplement thereafter (Docs. 11, 13, 15).

20 **BACKGROUND<sup>1</sup>**

21 The following facts were found by the state appellate court.

22 On October 18, 2005, Cook shot C.S. five times while driving out of the  
23 parking lot of a mosque in Phoenix. Paramedics took C.S. to a hospital  
24 where he provided Officer A. Of the Phoenix Police Department with a  
25 description of the car and the shooter, but stated the shooter was not  
someone he knew. Detective K. of the Phoenix Police department  
identified and interviewed three additional eyewitnesses at the scene of  
the shooting: two of Cooks's younger siblings and the daughter of the

26  
27 \_\_\_\_\_  
28 <sup>1</sup> Unless otherwise noted, the following facts are derived from the exhibits submitted  
with Doc. 11 – Respondents' Answer.

1 mosque's Imam, S.S. Both of Cook's siblings told Detective K. that  
2 Cook shot C.S. S.S., however identified Cook's brother as the shooter.

3 On December 1, 2005, Detective J. Of the Phoenix Police Department  
4 showed C.S. a six-person photographic lineup from which C.S. selected  
5 a photograph of Cook and identified him as the shooter. On December  
6 28, 2005, Detective J. showed the same photographic lineup to S.S. At  
7 that time, S.S. informed Detective J. she had misidentified the shooter  
when she spoke to Detective K. on the night of the shooting and that  
Cook, not J.W., had shot C.S. She identified two photographs from the  
lineup-one of which was the photograph of Cook-and told Detective K.  
one of the two photographs depicted the shooter but was not sure which  
one.

8 (Exh. A at 1.) After a jury trial, Petitioner was convicted of attempted second-degree murder,  
9 drive-by shooting, weapons misconduct, and five counts of aggravated assault. (Exh. B at 1.).  
10 He was sentenced to concurrent and consecutive prison terms totaling 40 years. (Id.)

11 Petitioner timely appealed his convictions and sentences. (Exh. A at 1.) In finding no  
12 error, the Arizona Court of Appeals affirmed. (Id. at 3.) The record cited by Respondents  
13 suggests that Petitioner appealed to the Arizona Supreme Court. (Exh. F.)<sup>2</sup> Moreover, it  
14 appears that the Arizona Supreme Court denied the petition to review. (Id.)

15 On February 17, 2010, Petitioner filed a notice of post-conviction relief (PCR). (Exh.  
16 C.) Subsequently, appointed counsel gave notice that he found no claims to be raised in the  
17 proceeding. (Exh. D.) Petitioner thereafter filed a *pro se* PCR petition, which was summarily  
18 denied by the trial court. (Exh. E.) Petitioner then petitioned the Arizona Court of Appeals  
19 for review of the dismissal, but review was denied on July 17, 2013. (Exh. G.) While  
20 Petitioner's petition for review of the dismissal of his first PCR petition was pending in the  
21 Arizona Court of Appeals, he filed a second PCR notice on January 17, 2012, raising a claim  
22 of newly discovered evidence. (Exh. H.) The trial court summarily denied relief, and  
23

24  
25 \_\_\_\_\_  
26 <sup>2</sup>Respondent failed to provide a copy of Petitioner's appeal to the Arizona Supreme  
27 Court or a copy of the Court docket. However, Petitioner did not dispute the facts relating  
to the appeal proceeding as stated by Respondent. As a result, the Court will accept  
Respondents' assertions regarding this appeal proceeding as true.

1 Petitioner petitioned the Arizona Court of Appeals for review. (Exh. B at 1.) The Court of  
2 Appeals denied relief on November 12, 2015. (Id. at 3.)

3 On November 7, 2016, Petitioner filed the instant habeas. (Doc. 1.) According to the  
4 Screening Order, Petitioner raised eighteen grounds for relief. (Doc. 5.)

- 5 1. The trial court erred when it denied the defense motion to preclude  
6 Carl S. from identifying Petitioner in court because “Carl S[’s]  
7 identification, as well as that of other witnesses, was inherently  
8 unreliable and overly suggestive under the Due Process Clause of the  
9 Fifth and Fourteenth [Amendments], which prohibits the admission of  
10 identification testimony obtained from overly suggestive procedures”;
- 11 2. The trial court erred by “denying the defense motion for an acquittal  
12 on all counts under the Due Process Clause of the [Fourteenth  
13 Amendment]; the stipulation that Petitioner was a prohibited possessor  
14 at the time of the alleged offense was self-incrimination in violation  
15 of the [Fifth Amendment]”;
- 16 3. Petitioner received ineffective assistance of trial and appellate counsel  
17 in violation of the Sixth and Fourteenth Amendments;
- 18 4. Because assault is a lesser-included offense of attempted murder,  
19 Petitioner was subjected to “multiplicity” in violation of his Fifth, Sixth,  
20 and Fourteenth Amendment rights and to a violation of the prohibition  
21 against double jeopardy;
- 22 5. Petitioner’s Sixth and Fourteenth Amendment rights were violated  
23 because he is actually innocent;
- 24 6. Petitioner received ineffective assistance of counsel in violation of the  
25 Sixth and Fourteenth Amendments;
- 26 7. Petitioner’s Sixth and Fourteenth Amendment rights were violated  
27 because he received the ineffective assistance of appellate counsel and  
28 because the State engaged in misconduct;
- 29 8. Petitioner’s Fourteenth Amendment due process rights were violated  
30 because the trial court erroneously refused to consider an affidavit;
- 31 9. Petitioner was denied his Sixth Amendment rights to confrontation and  
32 compulsory process;

- 1 10. Petitioner raised the issues in Grounds Three through Nine in a state-  
2 court reply brief without objection and, therefore, the issues are  
3 exhausted and are not procedurally barred;
- 4 11. "Petitioner was denied his right to a fair trial, perjury infected the trial,  
5 counsel was ineffective, [and there were violations of his rights] to  
6 confront[ation]/effective cross-examination, [and] compulsory process  
7 under the [Sixth and Fourteenth Aments] (Based on newly discovered  
8 evidence);
- 9 12. Petitioner's Fourteenth Amendment due process rights were violated  
10 because the trial court erred in denying "Petitioner's Motion for an  
11 Order to Show Cause as to the Newly Discovered Evidence/Witnesses  
12 Cassette Tapes of Interviews";
- 13 13. Petitioner's Fourteenth Amendment due process rights were violated  
14 because the trial court erred in denying Petitioner's "Motion to Strike  
15 the State's second 9-9-2013 untimely response";
- 16 14. Petitioner's Fourteenth Amendment due process rights were violated  
17 because the trial court abused its discretion when it denied Petitioner's  
18 "Motion for Alternate Counsel and Evidentiary Hearing on whether  
19 newly discovered evidence required new trial, to subpoena witnesses;"
- 20 15. Petitioner's Fourteenth Amendment due process rights were violated  
21 when the post-conviction judge and the state court of appeals  
22 erroneously denied Petitioner's motions to compel discovery;
- 23 16. Petitioner's Fourteenth Amendment due process rights and Sixth  
24 Amendment rights were violated when the Arizona Court of Appeals  
25 erroneously denied Petitioner's Motion to Recall the Mandate and  
when it "ruled on and denied [the] Petition for Review of that motion  
to the Arizona Supreme Court";
- 26 17. Petitioner's Sixth and Fourteenth Amendment rights were violated  
27 because the Arizona Court of Appeals and Supreme Court upheld  
28 Petitioner's convictions and sentences "based on false hearsay  
testimony" and because Petitioner's appellate counsel was ineffective;  
and
18. Petitioner's Sixth and Fourteenth Amendment rights were violated  
because his "[t]rial counsel and the State knowingly  
concealed/suppressed material exonerating evidence."

1           In their Answer, Respondents contends that Petitioner's habeas petition is untimely  
2 and must be dismissed.

### 3           DISCUSSION

4           The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a  
5 statute of limitations on federal petitions for writ of habeas corpus filed by state prisoners.  
6           See 28 U.S.C. § 2244(d)(1). The statute provides:

7           A 1-year period of limitation shall apply to an application for a writ of habeas  
8 corpus by a person in custody pursuant to the judgment of a State court. The  
9 limitation period shall run from the latest of –

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

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

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

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

20           "[T]he period of 'direct review' in 28 U.S.C. § 2244(d)(1)(A) includes the period  
21 within which a petitioner can file a petition for a writ of certiorari from the United States  
22 Supreme Court, whether or not the petitioner actually files such a petition." Bowen v. Roe,  
23 188 F.3d 1157, 1158-59 (9<sup>th</sup> Cir. 1999). Additionally, "[t]he time during which a properly  
24 filed application for State post-conviction or other collateral review with respect to the  
25 pertinent judgment or claim is pending shall not be counted toward" the limitations period.  
26 28 U.S.C. § 2244(d)(2); see Lott v. Mueller, 304 F.3d 918, 921 (9<sup>th</sup> Cir. 2002). A state  
27 petition that is not filed, however, within the state's required time limit is not "properly filed"  
28 and, therefore, the petitioner is not entitled to statutory tolling. See Pace v. DiGuglielmo, 544  
U.S. 408, 413 (2005). "When a postconviction petition is untimely under state law, 'that [is]  
the end of the matter' for purposes of § 2244(d)(2)." Id. at 414.

1       A post-conviction petition is “clearly pending after it is filed with a state court, but  
2 before that court grants or denies the petition.” Chavis v. Lemarque, 382 F.3d 921, 925 (9<sup>th</sup>  
3 Cir. 2004). In Arizona, post-conviction review is pending once a notice of post-conviction  
4 relief is filed even though the petition is not filed until later. See Isley v. Arizona Department  
5 of Corrections, 383 F.3d 1054, 1056 (9<sup>th</sup> Cir. 2004). An application for post-conviction relief  
6 is also pending during the intervals between a lower court decision and a review by a higher  
7 court. See Biggs v. Duncan, 339 F.3d 1045, 1048 (9<sup>th</sup> Cir. 2003) (citing Carey v. Saffold, 536  
8 U.S. 214, 223 (2002)). However, the time between a first and second application for post-  
9 conviction relief is not tolled because no application is “pending” during that period. See  
10 Biggs, 339 F.3d at 1048; see also King v. Roe, 340 F.3d 821 (9<sup>th</sup> Cir. 2003) (The petitioner  
11 was “not entitled to tolling during the interval between the completion of one round of state  
12 collateral review and the commencement of a second round of review.”). Moreover, filing  
13 a new petition for post-conviction relief does not reinitiate a limitations period that ended  
14 before the new petition was filed. See Ferguson v. Palmateer, 321 F.3d 820, 823 (9<sup>th</sup> Cir.  
15 2003).

16       The statute of limitations under AEDPA is subject to equitable tolling in appropriate  
17 cases. See Holland v. Florida, 560 U.S. 631, 645-46 (2010). However, for equitable tolling  
18 to apply, a petitioner must show ““(1) that he has been pursuing his rights diligently and (2)  
19 that some extraordinary circumstances stood in his way”” and prevented him from filing a  
20 timely petition. Id. at 648-49 (quoting Pace, 544 U.S. at 418).

21       The Court finds that Petitioner’s Petition for Writ of Habeas Corpus is untimely. After  
22 trial and sentencing, Petitioner appealed his convictions and sentences to the Arizona Court  
23 of Appeals. (Exh. F.) The court of appeals affirmed Petitioner’s convictions and sentences  
24 on June 25, 2009. (Id.) Petitioner then filed a petition for review with the Arizona Supreme  
25 Court. (Exh. F.) The Arizona Supreme Court denied review on December 1, 2009. (Id.)  
26 Petitioner’s convictions became final 90 days later – on March 1, 2010 – when the time  
27 expired for filing a petition for writ of *certiorari* in the United States Supreme Court. See 28

1 U.S.C. § 2244(d)(1)(A) (providing AEDPA statute of limitations begins “the date on which  
2 the judgment became final by the conclusion of direct review or the expiration of the time  
3 for seeking such review”); Porter v. Ollison, 620 F.3d 952, 958-59 (9<sup>th</sup> Cir. 2010) (“When,  
4 on direct appeal, review is sought in the state’s highest court but no petition for *certiorari* to  
5 the United States Supreme Court is filed, direct review is considered to be final when the  
6 *certiorari* petition would have been due, which is 90 days after the decision of the state’s  
7 highest court.”).

8 However, before his convictions became final, Petitioner filed his first PCR petition  
9 on February 17, 2010. (Exh. C.) Since the PCR notice was properly filed, it started tolling  
10 AEDPA’s 1-year statute of limitation before it started to run. The first PCR proceeding was  
11 “pending” and tolled AEDPA’s statute of limitations until July 17, 2013, when the state  
12 appellate court denied review of the PCR petition dismissal. (Exh. G.) Petitioner did not take  
13 any further action in this PCR proceeding. Because nothing was pending after the appellate  
14 court’s decision, the statute of limitations began running the next day – on July 18, 2013. See  
15 Hemmerle v. Schriro, 495 F.3d 1069, 1074 (9<sup>th</sup> Cir. 2007) (statute of limitations was tolled  
16 until date on which notice of post-conviction relief was dismissed where no petition for  
17 review was filed). The limitations period continued running uninterrupted for one year – until  
18 July 18, 2014 – when it expired. Petitioner did not file his Petition for Writ of Habeas Corpus  
19 until November 7, 2016. (Doc. 1.)

20 The second PCR proceeding initiated on January 17, 2012, (Exh. H), did not have any  
21 tolling effect under AEDPA. The state court held that Petitioner’s second PCR petition was  
22 successive and untimely pursuant to Rule 32 of the Arizona Rules of Criminal Procedure, and  
23 Petitioner failed to raise a claim that fit within any exception. (Exh. B at 1-2.) The Arizona  
24 Court of Appeals affirmed. (Id.) See Pace, 544 at 412 (“when a post-conviction petition is  
25 untimely under state law, that [is] the end of the matter for purposes of § 3355(d)(2)”). A  
26 state petition that is not filed within the state’s required time limit does not toll the statute of  
27 limitations. Id. Thus, the PCR proceeding was not “properly filed” under 28 U.S.C. §

1 2244(d)(2). See, e.g., Pace, 544 U.S. at 414-17; Bonner v. Carey, 425 F.3d 1145, 1148-49  
2 (9<sup>th</sup> Cir. 2005) (recognizing and applying Pace).

3 In sum, Petitioner's habeas petition was filed almost two and a half years after the  
4 limitations period expired. The habeas petition is therefore untimely.

5 The Ninth Circuit recognizes that the AEDPA's limitations period may be equitably  
6 tolled because it is a statute of limitations, not a jurisdictional bar. See Calderon v. United  
7 States Dist. Ct. (Beeler), 128 F.3d 1283, 1288 (9<sup>th</sup> Cir. 1997), overruled in part on other  
8 grounds by Calderon v. United States Dist. Ct. (Kelly), 163 F.3d 530, 540 (9<sup>th</sup> Cir. 1998).  
9 Tolling is appropriate when “extraordinary circumstances” beyond a [petitioner’s] control  
10 make it impossible to file a petition on time.” Id.; see Miranda v. Castro, 292 F.3d 1063,  
11 1066 (9<sup>th</sup> Cir. 2002) (stating that “the threshold necessary to trigger equitable tolling [under  
12 AEDPA] is very high, lest the exceptions swallow the rule”) (citations omitted). “When  
13 external forces, rather than a petitioner’s lack of diligence, account for the failure to file a  
14 timely claim, equitable tolling of the statute of limitations may be appropriate.” Miles v.  
15 Prunty, 187 F.3d 1104, 1107 (9<sup>th</sup> Cir. 1999). A petitioner seeking equitable tolling must  
16 establish two elements: “(1) that he has been pursuing his rights diligently, and (2) that some  
17 extraordinary circumstance stood in his way.” Pace, 544 U.S. at 418. Petitioner must also  
18 establish a “causal connection” between the extraordinary circumstance and his failure to file  
19 a timely petition. See Bryant v. Arizona Attorney General, 499 F.3d 1056, 1060 (9<sup>th</sup> Cir.  
20 2007).

21 Petitioner has not proffered any extraordinary circumstance that would justify  
22 equitable tolling or demonstrated that an external impediment hindered the diligent pursuit  
23 of his rights. And, Petitioner’s *pro se* status, indigence, limited legal resources, ignorance of  
24 the law, or lack of representation during the applicable filing period do not constitute  
25 extraordinary circumstances justifying equitable tolling. See, e.g., Rasberry v. Garcia, 448  
26 F.3d 1150, 1154 (9<sup>th</sup> Cir. 2006) (“[A] *pro se* petitioner’s lack of legal sophistication is not,  
27 by itself, an extraordinary circumstance warranting equitable tolling.”).

1 To the extent Petitioner suggests in his Reply and supplement that Martinez v. Ryan,  
2 566 U.S. 1, 132 S. Ct. 1309 (2012), applies in this context, he is mistaken. Martinez applies  
3 only to excusing procedural default and/or lack of exhaustion in state court. See id. at 1315.  
4 In Martinez, the Court held:

5 Where, under state law, claims of ineffective assistance of trial counsel must  
6 be raised in an initial-review collateral proceeding, a procedural default will  
7 not bar a federal habeas court from hearing a substantial claim of ineffective  
8 assistance at trial if, in the initial-review collateral proceeding, there was no  
9 counsel or counsel in that proceeding was ineffective.  
10 Id. at 1320. Thus, Martinez has no application to the statute of limitations in the AEDPA  
11 which governs Petitioner's filing in federal court. See McKinnie v. Long, 2013 WL 1890618  
12 (C.D. Cal. Apr. 5, 2013) ("Martinez dealt solely with the state procedural default doctrine,  
13 which is entirely different from the issue presented here of whether petitioner's claims are  
14 time barred under the AEDPA statute of limitations."); Moore v. Williams, 2013 WL 271454  
15 at \*5 (D. Nev. Jan. 23, 2013) ("Petitioner has conflated the federal timeliness question with  
16 the issue of whether a claim in the federal petition is barred due to procedural default in state  
17 court."). Accordingly, Martinez does not present a basis for equitable tolling. Petitioner's  
18 habeas petition is untimely.

## CONCLUSION

19 Having determined that Petitioner's amended habeas petition is untimely, the Court  
20 will recommend that Petitioner's Petition for Writ of Habeas Corpus (Doc. 1) be denied and  
21 dismissed with prejudice.

22 **IT IS THEREFORE RECOMMENDED** that Petitioner's Petition for Writ of  
23 Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1) be **DENIED** and **DISMISSED WITH**  
24 **PREJUDICE**;

25 **IT IS FURTHER RECOMMENDED** that a Certificate of Appealability and leave  
26 to proceed *in forma pauperis* on appeal be **DENIED** because the dismissal of the Petition is  
27 justified by a plain procedural bar and jurists of reason would not find the procedural ruling  
28 debatable.

1        This recommendation is not an order that is immediately appealable to the Ninth  
2        Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of  
3        Appellate Procedure, should not be filed until entry of the district court's judgment. The  
4        parties shall have fourteen days from the date of service of a copy of this recommendation  
5        within which to file specific written objections with the Court. See 28 U.S.C. § 636(b)(1);  
6        Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen  
7        days within which to file a response to the objections. Pursuant to Rule 7.2, Local Rules of  
8        Civil Procedure for the United States District Court for the District of Arizona, objections  
9        to the Report and Recommendation may not exceed seventeen (17) pages in length. Failure  
10      timely to file objections to the Magistrate Judge's Report and Recommendation may result  
11      in the acceptance of the Report and Recommendation by the district court without further  
12      review. See *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9<sup>th</sup> Cir. 2003). Failure  
13      timely to file objections to any factual determinations of the Magistrate Judge will be  
14      considered a waiver of a party's right to appellate review of the findings of fact in an order  
15      or judgment entered pursuant to the Magistrate Judge's recommendation. See Rule 72,  
16      Federal Rules of Civil Procedure.

DATED this 27th day of April, 2017.

Michelle H. Barnes

Michelle H. Burns  
United States Magistrate Judge

**Additional material  
from this filing is  
available in the  
Clerk's Office.**