UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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

ADRIAN HERNANDEZ, Petitioner-Appellant, v. CHARLES L. RYAN; et al., Respondents-Appellees.	No. 19-16084 D.C. No. 2:18-cv-00413-DLR District of Arizona, Phoenix ORDER

Before: CLIFTON and NGUYEN, Circuit Judges.

Appellant's motion for reconsideration en banc (Docket Entry No. 6) 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.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ADRIAN HERNANDEZ, Petitioner-Appellant, v. CHARLES L. RYAN; et al., Respondents-Appellees.	No. 19-16084 D.C. No. 2:18-cv-00413-DLR District of Arizona, Phoenix ORDER

Before: TALLMAN and NGUYEN, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) 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.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Adrian Hernandez,

Petitioner,

v.

Charles L Ryan, et al.,

Respondents.

NO. CV-18-00413-PHX-DLR

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED accepting the Report and Recommendation of the Magistrate Judge as the order of this Court. Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U. S. C. § 2254 is denied and this action is hereby dismissed with prejudice.

Brian D. Karth
District Court Executive/Clerk of Court

May 15, 2019

By s/ Michelle Sanders
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Adrian Hernandez,

Petitioner,

v.

Charles L Ryan, et al.,

Respondents.

No. CV-18-00413-PHX-DLR

ORDER

Before the Court is the Report and Recommendation ("R&R") of Magistrate Judge James F. Metcalf (Doc. 25) regarding Petitioner's Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 (Doc. 1). The R&R recommends that the petition be denied and dismissed with prejudice. The Magistrate Judge advised the parties that they had fourteen days from the date of service of a copy of the R&R to file specific written objections with the Court. Petitioner filed an objection to the R&R on March 29, 2019, (Doc. 26), and Respondents filed their response on April 15, 2019 (Doc. 27).

The Court has considered the objections and reviewed the R&R de novo. *See* Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1). The Magistrate Judge correctly found the petition is untimely. As part of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Congress set a one-year statute of limitations for all applications for writs of habeas corpus filed pursuant to § 2254, challenging convictions and sentences rendered by state courts. 28 U.S.C. § 2244(d). Petitioner did not meet that one-year limitation.

Petitioner's one-year habeas limitations period commenced on May 1, 2012, the day after his proceeding with Arizona Supreme Court was dismissed. However, because Petitioner commenced his first post-conviction relief ("PCR") proceeding on April 10, 2012, before his limitations period began to run, the limitations period was tolled from its inception, through May 8, 2015, when the Arizona Court of Appeals issued its mandate on its order denying relief. His one-year limitations period expired one year later, on May 8, 2016. Petitioner's habeas petition (Doc. 1) is deemed filed on January 30, 2018, more than a year after the expiration of his one-year limitations period. The R&R correctly concluded that the petition is untimely, as it was not filed within the one-year deadline.

Petitioner raises multiple objections to the R&R but fails to establish a basis for additional tolling of the one-year limitations period. Petitioner's newly discovered evidence assertion is without merit. The alleged newly discovered evidence is based on the trial record, which could have been discovered with reasonable diligence during the filing period set forth in 28 U.S.C. § 2244(D)(1)(a).

Petitioner's assertions that the time between his first and second PCR proceeding should be tolled because they are related, and that he deserves equitable tolling because he is a non-English speaker, will not be considered because those argument were not made to the Magistrate Judge. *See Unites States v. Howell*, 231 F.3d 615, 621-22 (9th Cir. 2000).

Petitioner's assertion that the limitations period should be tolled because his PCR counsel was ineffective is a re-argument of the issues he raised to the Magistrate Judge. He does not identify any specific error in the Magistrate Judge's finding on that issue. The Magistrate Judge correctly found that alleged infective assistance conduct—the omission of a claim for relief—was not the type of extraordinary attorney misconduct that warrants equitable tolling. *See Holland v. Florida*, 560 U.S 631, 651-52 (2010).

Petitioner's assertion that the inadequacy of the prison library prevented a timely filing of his habeas petition is not supported by any explanation of what the inadequacy was or how the inadequacy prevented him from meeting the one-year filing period.

Petitioner has not shown a basis for additional statutory tolling, equitable tolling, or

actual innocence. The Court therefore accepts the R&R within the meaning of Federal Rule of Civil Procedure 72(b) and overrules Petitioner's objections. *See* 28 U.S.C. § 636(b)(1).

IT IS ORDERED that the R&R (Doc. 25) is **ACCEPTED**. A Certificate of Appealability and leave to proceed in forma pauperis on appeal (Doc. 28) are **DENIED** because the dismissal of the Petition is justified by a plain procedural bar and reasonable jurists would not find the ruling debatable, and because Petitioner has not made a substantial showing of the denial of a constitutional right. The Clerk of the Court shall enter judgment denying and dismissing Petitioner's Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 (Doc. 1) with prejudice and shall terminate this action.

Dated this 15th day of May, 2019.

Douglas L. Rayes
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Adrian Hernandez, Petitioner -vs- Charles L. Ryan, et al., Respondents.	CV-18-0413-PHX-DLR (JFM) **Report & Recommendation on Petition for Writ of Habeas Corpus**

I. MATTER UNDER CONSIDERATION

Petitioner, presently incarcerated in the Red Rock Correctional Center at Eloy, Arizona, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on February 5, 2018 (Doc. 1). On September 10,2 018 Respondents filed their Limited Answer (Docs. 10-22). Petitioner filed a Reply on October 11, 2018 (Doc. 24).

The Petitioner's Petition is now ripe for consideration. Accordingly, the undersigned makes the following proposed findings of fact, report, and recommendation pursuant to Rule 8(b), Rules Governing Section 2254 Cases, Rule 72(b), Federal Rules of Civil Procedure, 28 U.S.C. § 636(b) and Rule 72.2(a)(2), Local Rules of Civil Procedure.

II. RELEVANT FACTUAL & PROCEDURAL BACKGROUND

A. FACTUAL BACKGROUND

In disposing of Petitioner's direct appeal, the Arizona Court of Appeals described the factual background as follows:

> ¶2 In the early morning of October 28, 2009, Defendant and an accomplice forcibly entered a residence, armed with semiautomatic handguns, intending to burglarize the house. Present in the house were adults Leyva, Peralta and Martinez. Also present were Leyva' s three minor children, ages one, four and six.
> ¶3 Once inside the house, Defendant and the accomplice forced all the occupants into one room and took turns guarding the occupants at gun point. Defendant and the accomplice fled after police arrived.

> Defendant was arrested shortly thereafter and identified as one of the men who entered the home and restrained the victims. Defendant later admitted participating in the burglary.

(Exhibit S, Mem. Dec. at ¶¶ 2-3.) (Exhibits to the Answer, Docs. 10-22, are referenced herein as "Exhibit ___.")[1]

B. PROCEEDINGS AT TRIAL

On November 5, 2009, the State indicted Defendant on: (1) first-degree burglary, a class 2 dangerous felony; (2) three counts of kidnapping (relating to the adults), class 2 dangerous felonies; (3) three counts of kidnapping (relating to the children), alleged as dangerous crimes against children and class 2 dangerous felonies; (4) three counts of armed robbery, class 2 dangerous felonies; and (5) misconduct involving weapons, a class 4 felony.[2] (Exhibit A, Indictment.) The state filed an Allegation of Aggravating Circumstances. (Exhibit B.) "The State later dismissed one of the armed robbery counts and the misconduct involving weapons charge." (Exhibit S, Mem. Dec. at ¶ 4, n.2.)

Petitioner, represented by counsel Cain, proceeded to a settlement conference on February 23, 2010 before Judge Steinle, where the prosecution reviewed its case and the likelihood of a life sentence at trial, and defense counsel asserted the defense at trial would be duress which would require Petitioner to testify. The judge reviewed the unaggravated sentencing exposure of 57 years, the potential for aggravating factors, and the likelihood of an aggravated sentence between 50 and 90 years, and the potential for a 17-year sentence under the plea offer. (Exhibit E, R.T. 2/23/10.) Addressing the duress defense,

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[1] Respondents have attached duplicate sets of their exhibits (Docs. 11-22) to their e-filed Answer, one set is appended to the index filed as the main docket item (e.g. Docs. 11, 12, etc.), and one set as separate attachments to the same docket item (e.g. Docs. 11-1 thru 11-8, Doc. 12-1, etc.). Except as noted hereinafter, the undersigned has not discerned any differences, but references herein the copies attached to the main docket entry (e.g. Doc. 11, 12, etc.), which have in the .pdf file have been bookmarked with labels.

[2] The driver of the getaway car, a 17-year-old female, was also charged in the Indictment (Exhibit A), but was ultimately severed for trial in part on the basis that her defense was duress from Petitioner and his accomplice (Exhibit G, R.T. 3/11/10 at 12-13).

the judge cautioned:

> THE COURT:
> * * *
> I've used the duress defense in the past. Juries don't like the duress defense. They have to believe everything that you say in order to find duress. And my guess. when they look at your credibility and they weigh it against the children coming into court and the adults talking about what you did. Based upon the number of trials I did, probabilities are they're not going to believe you, and then it's going to be too late.
> When the victims come in and point over at table and go, "That's the man that did this thing," you can get up there and say, "'I did it, but I did it because someone threatened me," I don't think the jury's going to believe your defense.
> Ms. Cain tried a lot of cases in my court over the last five years. She is very persuasive to juries. But the one time she tried to persuade them about a duress defense, the jury found the defendant guilty and on a very short deliberation. It's not an easy defense to do.
> * * *
> So you have a hard choice to make. What are you going to do with your life? Are you going to accept the plea that will give you a chance at a life? Or are you going to go ahead and go to trial, and if you lose at trial spend the rest of your life in a jail cell?
> You're going to have to make that choice. Do you have any questions of me?
> THE DEFENDANT: No. I'm going to go on with the trial because I'm innocent.
> THE COURT: And without going into any great detail, are you innocent because you weren't there or are you innocent because you were under duress?
> THE DEFENDANT: I didn't know it was going to happen.
> * * * *
> THE DEFEN[D]ANT: No. I mean, you know, he put the gun to my head and said if I didn't do it he'd pump me full of lead. You know, I all started out as a party and ended up like this.

(*Id.* at 10-12.) The plea offer was left pending. (*Id.* at 15.)

On March 11, 2010, the matter was assigned to Judge Whitten for trial. (Exhibit G, R.T. 3/11/10 AM.) Petitioner appeared before Judge Whitten, who offered to discuss a potential settlement by plea, and inquired of counsel:

> THE COURT: Okay. Counsel, will you waive any conflict and allow me to go forward and have these kind of discussions with your client, and then also if they aren't successful serve as the trial judge?
> MS. CAIN: Yes, Your Honor.
> THE COURT: And, for the record, will the State also?
> MR. SIMMONS: Yeah, Judge. No objection.
> THE COURT: I don't intend to do a normal settlement conference because I am going to be the trial judge, so I don't want to hear from anybody about how strong the evidence is going to be. Do you understand?

THE DEFENDANT: Yes.

(Exhibit H, R.T. 3/11/10 PM at 4.) The court reviewed Petitioner's likely sentencing exposure at trial (37 to 6.15 years) and the state offered a plea with a sentence of 20 to 24 years, flat. Petitioner argued the offer was for too long of a sentence, it was disproportional because nobody got hurt, and he was innocent. Petitioner indicated he would accept a plea of 7 to 10 years, but that offer was not acceptable to the prosecution. The court summarized:

> If you really think that a jury will believe the victims and not you, and you really think the jury will convict you, then the decision you are making is going to cost you at least 17 years of your life. So I want you to think carefully about it and not just reject it because it's too much time. Not just reject it because murderers get less, because murderers have nothing to do with your case. Your case is about this decision. And if you have reasonably looked at your case and decide you think you will get convicted, then what you are doing right now is choosing 37 years of prison when you could be choosing 20, and that doesn't make sense to me.

(*Id.* at 23-24.) Petitioner rejected the offer.

Petitioner proceeded to trial on March 15, 2010. (Exhibit I, R.T. 3/15/10.) During Voir Dire, Juror No. 40 responded to questioning about impartiality as follows:

> Q. ...No. 40?
> A. I put some of my most important belongings into my ex-boyfriend's truck and he took it to work on a worksite and his truck got stolen.
> Q. And has that affected your ability to be fair and impartial in this case?
> A. Absolutely.

(R.T. 3/15/10 PM, Doc.13-1 at 83.) Nonetheless, Juror 40 was seated for trial. (*Id.* at 93, 107.)[3]

Petitioner testified in his own behalf, asserting intoxication and duress. (Exhibit K, R.T. 3/22/10 at 55 *et seq.*) The jury was instructed on the defense of duress. (Exhibit L,

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[3] Respondents provide part 1 (pages 1 through 50) of proceedings on voir dire on March 15, 2010 (Exhibit I, Doc. 12 and also at Doc. 12-1). The portion purporting to be part 2 (pages 50-60) of those proceedings provided as Doc. 13 appears to be instead a portion of proceedings on March 16, 2010 (*compare* Exhibit J, part 2, pp. 50-60 (filed at Doc. 15)). Nonetheless, the remainder (pages 51-109) of the March 15, 2010 transcript is provided at Doc. 13-1.

R.T. 3/23/10 at 9.) The jury convicted on all remaining charges, and made finding to support the dangerous crimes against children charges. (*Id.* at 42, *et seq.*) The state dismissed all other aggravating circumstances. (*Id.* at 47.)

Petitioner proceeded to sentencing on June 24, 2010. (Exhibit N, R.T. 6/24/10.) The trial court sentenced Defendant to mitigated terms of 7 years each on the burglary, adult kidnapping and armed robbery counts, all to be served concurrently. However, because the Dangerous Crimes Against Children Statute triggers mandatory enhanced sentences, the court sentenced Defendant to enhanced terms of 10 years for each of the three child kidnapping counts, each to be served consecutively to Defendant's concurrent sentences, and to each other with no credit for time served. (Exhibit N, R.T. 6/24/10 at 7; Exhibit S, Mem. Dec. at ¶ 6.) Accordingly, Petitioner is serving an effective prison term of 37 years.

C. PROCEEDINGS ON DIRECT APPEAL

Petitioner filed a direct appeal, and counsel argued that there was insufficient evidence to support the child kidnapping charges, because there was no evidence that Petitioner knew children were in the house. Counsel argued this was a violation, *inter alia*, of Petitioner's federal right to due process under the Fourteenth Amendment, citing *In re Winship*, 397 U.S. 358 (1970). (Exhibit P, Opening Brief.)

The Arizona Court of Appeals rejected the argument, concluding that the Arizona Dangerous Crimes Against Children statute did not require such intent, and applied to a defendant when his victim turns out to be a child, even if the defendant quite reasonably believed to the contrary. "Even if he did not know that children lived in the home and did not plan to kidnap them prior to the invasion, he nonetheless did restrain them during the event." (Exhibit S, Mem. Dec. at 13.)

Although Petitioner obtained from the Arizona Supreme Court an extension of time until April 16, 2012 to do so, Petitioner did not timely file a petition for review, and his proceeding with the Arizona Supreme Court was dismissed on April 30, 2012. (Exhibit

T, Motion; Exhibit U, Order 4/30/12.)

D. PROCEEDINGS ON POST-CONVICTION RELIEF

1. First PCR Proceeding

In the meantime, on April 10, 2012, Petitioner had filed a Notice of Post-Conviction Relief (Exhibit V). Counsel was appointed (Exhibit W, M.E. 4/1712), who ultimately filed a Notice of Completion of Review (Exhibit W), asserting an inability to find an issue for review. Petitioner was granted leave to file a *pro per* PCR petition, and counsel was ordered to remain in an advisory capacity. (Exhibit Y, M.E. 10/31/12.) Petitioner filed his *pro per* Petition (Exhibit Z), arguing ineffective assistance based on failure to advise Petitioner that voluntary intoxication was not a defense, failure to advise Petitioner on the jury instruction on voluntary intoxication, and argued Petitioner would have accepted the plea offer had he been adequately advised on the defense. The State argued (Exhibit AA) that Petitioner's defense had always been based on duress, not intoxication, and thus Petitioner's claims were without merit. Petitioner replied (Exhibit BB) that he had alerted counsel of his intent to assert an intoxication defense. He also argued that counsel was deficient in explaining the duress defense. The PCR court summarized Petitioner's claims as contending "that trial counsel rendered ineffective assistance by failing to inform him that voluntary intoxication is not an affirmative defense under Arizona law, not advising him that a voluntary intoxication instruction would be given, and waiving his presence for the discussion of preliminary jury instructions." The court dismissed the petition without a hearing as failing to assert a colorable claim, based on the conclusion that: "the record does not support any of the Defendant's claims or allegations. Instead, the record contradicts those claims and allegations." (Exhibit CC, M.E. 8/19/13 at 2.)

Petitioner sough review from the Arizona Court of Appeals, challenging the PCR court's no-colorable-claim dismissal. (Exhibit DD, Petition for Review.) On March 24, 2015, the appellate court granted review, but denied relief on the merits as to the claims based on the intoxication defense. As to the claim based on the duress defense, the court

ruled that the claim was improperly presented on review because it was not first properly presented to the trial court, having not been raised until his reply in the PCR court. (Exhibit FF, Mem. Dec. 3/24/15.)

Petitioner did not seek reconsideration or further review. (Exhibit FF, Mandate.)

2. Second PCR Proceeding

Almost fourteen months later, on May 20, 2016, Petitioner filed a second PCR Notice and Petition (Exhibit GG), raising claims that: (1) trial counsel was ineffective for failing to challenge a juror, and appellate and PCR counsel were ineffective for failing to raise the claims; and (2) trial counsel was ineffective for waiving the judge's conflict of interest at the settlement conference. The PCR court summarily dismissed the PCR. (Exhibit HH, M.E. 8/16/16.)

Petitioner sought review from the Arizona Court of Appeals (Exhibit JJ), who granted review, but denied relief on October 26, 2017 (Exhibit II Mem. Dec. 10/26/17). The court found any claim of ineffective assistance of PCR counsel to be without merit, based on the lack of a constitutional right to such counsel. The remaining claims were rejected as precluded because they "were, or could have been, raised in the earlier PCR proceeding" and because they were untimely. (*Id.* at ¶ 6.) Petitioner did not see further review. (Exhibit II, Mandate.)

E. PRESENT FEDERAL HABEAS PROCEEDINGS

Petition – Over three months later, Petitioner commenced the current case by filing his Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on February 5, 2018 (Doc.1). Petitioner's Petition asserts the following four grounds for relief:

> In **Ground One**, Petitioner alleges that his conviction for kidnapping persons under the age of 15 was supported by **insufficient evidence** in violation of his Fifth, Sixth, and Fourteenth Amendment rights. In **Ground Two**, he alleges that he was denied the effective assistance of counsel in violation of his Fifth, Sixth, and Fourteenth Amendment rights [based on **ineffectiveness regarding an intoxication defense**]. In **Ground Three**, he alleges that he received the ineffective assistance of trial, appellate, and post-conviction relief counsel in

> violation of his Fifth, Sixth, and Fourteenth Amendment rights [based on **ineffectiveness regarding juror bias**]. **In Ground Four,** Petitioner alleges that trial counsel rendered **ineffective assistance** in violation of his Fifth, Sixth, and Fourteenth Amendment rights by **waiving a conflict of interest** as to a settlement conference.

(Order 5/31/18, Doc. 3 at 2 (emphasis added).) In his Petition, Petitioner makes no argument regarding the timeliness of it. (Petition, Doc. 1 at 11.)

Response - On September 10, 2018, Respondents filed their Limited Answer (Docs. 10-22), arguing that the petition is untimely and Grounds 3 and 4 are procedurally defaulted.

Reply - On October 11, 2018 Petitioner filed a Reply (Doc. 24). Petitioner argues any procedural default should be excused based on ineffective assistance of appellate and PCR counsel. He argues his Petition is timely based on statutory tolling for the pendency of his first PCR proceeding. He argues he is entitled to equitable tolling based on the ineffective assistance of PCR counsel. Finally, Petitioner argues the merits of his claims. (*Id.* at 12, *et seq.*)

III. APPLICATION OF LAW TO FACTS

A. TIMELINESS

1. One Year Limitations Period

Respondents assert that Petitioner's Petition is untimely. As part of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Congress provided a 1-year statute of limitations for all applications for writs of habeas corpus filed pursuant to 28 U.S.C. § 2254, challenging convictions and sentences rendered by state courts. 28 U.S.C. § 2244(d). Petitions filed beyond the one-year limitations period are barred and must be dismissed. *Id.*

2. Commencement of Limitations Period

a. Conviction Final

The one-year statute of limitations on habeas petitions generally begins to run on "the date on which the judgment became final by conclusion of direct review or the

expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A).[4]

Here, Respondents argue Petitioner's direct appeal remained pending through April 16, 2012, when Petitioner's extended deadline to file a petition for review with the Arizona Supreme Court expired. (*See* Exhibit U, Order 4/30/12.) Because it does not affect the outcome, the undersigned assumes for purposes of this Report and Recommendation (in Petitioner's favor), that Petitioner's conviction did not become final until the Arizona Supreme Court actually dismissed the matter it had apparently opened upon filing of Petitioner's motion to extend. That did not occur until April 30, 2012.

For purposes of 28 U.S.C. § 2244, "direct review" includes the period within which a petitioner can file a petition for a writ of certiorari from the United States Supreme Court, whether or not the petitioner actually files such a petition. *Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012). The Supreme Court "can review, however, only judgments of a 'state court of last resort' or of a lower state court if the 'state court of last resort' has denied discretionary review." *Gonzalez v. Thaler*, 565 U.S. 134, 154 (2012) (citing U.S. Sup.Ct. R. 13.1 and 28 U.S.C. § 1257(a)). Here, Petitioner ultimately did not file a petition for review by the Arizona Supreme Court. Accordingly, the time for seeking a writ of certiorari with the U.S. Supreme Court cannot be considered in determining when Petitioner's judgment became final. *Id.*

Therefore, Petitioner's conviction became final no later than April 30, 2012, and on that basis his limitations period commenced running no later than May 1, 2012.

b. Newly Discovered Factual Predicates

Although the conclusion of direct review normally marks the beginning of the statutory one year, section 2244(d)(1)(D) does provide an alternative of "the date on which

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[4] Later commencement times can result from a state created impediment, newly recognized constitutional rights, and newly discovered factual predicates for claims. *See* 28 U.S.C. § 2244(d)(1)(B)-(D). Except as discussed hereinafter, Petitioner proffers no argument that any of these apply.

the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." Thus, where despite the exercise of due diligence a petitioner was unable to discover the factual predicate of his claim, the statute does not commence running on that claim until the earlier of such discovery or the elimination of the disability which prevented discovery. Thus, the commencement is not delayed until actual discovery, but only until the date on which it "could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D).

Here, Petitioner argues that he belatedly discovered evidence of PCR counsel's ineffectiveness, which he then raised in his second PCR proceeding. (Reply, Doc. 24 at 10-11.) But Petitioner fails to show what that new evidence might have been. To the extent that Petitioner refers to the facts underlying his claims of juror bias or the waiver of the judge's conflict of interest, Petitioner fails to show how this was "newly discovered." Petitioner was present at the time the juror was questioned, and was present when counsel waived the trial judge's conflict of interest in handling the settlement conference.

Moreover, those matters were included in the transcripts and thus would have long been available to Petitioner or his appellate counsel and PCR counsel. "Under ordinary circumstances-and there is no room for the application of a different principle here-a lawyer's knowledge is attributed to her client." *Wood v. Spencer*, 487 F.3d 1, 4-5 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 260 (2007). *See also Ford v. Galaza*, 683 F.3d 1230, 1236 (9th Cir. 2012) (citing *Wood*, 487 F.3d at 4-5, but not relying on attribution of attorney's knowledge to petitioner). It is true that where the factual predicate concerns such things as counsel's conflict of interest or failure to file a notice of appeal, which counsel could be presumed to conceal from his client, the knowledge of counsel may not be attributable to the petitioner. *See e.g. Anjulo-Lopez v. United States*, 541 F.3d 814, 817 (8th Cir. 2008) (counsel's failure to file notice of appeal). But here, neither appellate nor PCR counsel would have had reason to conceal from Petitioner trial counsel's ineffectiveness.

Any assertion that the failures of PCR counsel to raise the claims is newly discovered would be equally unavailing. Petitioner would have been aware of that failure

Spanish speaking doesn't understand English

at least as of the time of PCR counsel's Notice of Completion of Review, filed October 18, 2012 (Exhibit X). As discussed hereinafter, the undersigned ultimately concludes that because of the available statutory tolling, Petitioner's limitations period did not begin running until May 9, 2015, over 30 months later. Moreover, Petitioner does not assert in this case a claim of ineffective assistance of PCR counsel.

we did

To the extent that Petitioner would refer to a belated discovery of the legal import of the facts, his recent discovery does not qualify under § 2244(d)(1)(D). "Time begins when the prisoner knows (or through diligence could discover) the important facts, not when the prisoner recognizes their legal significance." *Hasan v. Galaza*, 254 F.3d 1150, 1154 n. 3 (9th Cir. 2001). The rationale is well put by the Seventh Circuit:

> Like most members of street gangs, Owens is young, has a limited education, and knows little about the law. If these considerations delay the period of limitations until the prisoner has spent a few years in the institution's law library, however, then § 2244(d)(1) might as well not exist; few prisoners are lawyers.

Owens v. Boyd, 235 F.3d 356, 359 (7th Cir. 2000), *as amended* (Jan. 22, 2001).

c. Conclusion re Commencement

Therefore, without considering any tolling, Petitioner's one year began running no later than May 1, 2012, and expired on April 30, 2013.[5]

3. Timeliness Without Tolling

Petitioner's Petition (Doc. 1) was filed on February 15, 2018.

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[5] For purposes of counting time for a federal statute of limitations, the standards in Federal Rule of Civil Procedure 6(a) apply. *Patterson v. Stewart*, 251 F.3d 1243, 1246 (9th Cir. 2001). Rule 6(a)(1)(A) directs that the "the day of the event that triggers the period" is excluded. Thus, the one year commenced the day after Petitioner's conviction became final, or on May 1, 2012 (day one), and the last day was 364 days later, on April 30, 2013. *See Patterson v. Stewart*, 251 F.3d 1243 1246 (9th Cir. 2001) (applying "anniversary method" under Rule 6(a) to find that one year grace period from adoption of AEDPA statute of limitations, on April 24, 1996, commenced on April 25, 1996 and expired one year later on the anniversary of such adoption, April 24, 1997).

However, the Petition includes Petitioner's declaration that it "was placed in the prison mailing system on 1/30/18." (Doc. 1 at 11.) "In determining when a pro se state or federal petition is filed, the 'mailbox' rule applies. A petition is considered to be filed on the date a prisoner hands the petition to prison officials for mailing." *Porter v. Ollison*, 620 F.3d 952, 958 (9th Cir. 2010). Respondents offer nothing to counter this contention, and the undersigned finds that the Petition was delivered to prison officials for mailing on that date, and concludes that it should be deemed "filed" as of that date, January 30, 2018.

As determined in subsection (1) above, without any tolling Petitioner's one year habeas limitations period expired no later than April 30, 2013, making his Petition almost five years delinquent.

4. Statutory Tolling

The AEDPA provides for tolling of the limitations period when a "properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). This provision only applies to state proceedings, not to federal proceedings. *Duncan v. Walker*, 533 U.S. 167 (2001).

Properly Filed - Statutory tolling of the habeas limitations period only results from state applications that are "properly filed," and an untimely application is never "properly filed" within the meaning of § 2244(d)(2). *Pace v. DiGuglielmo*, 544 U.S. 408 (2005). On the other hand, the fact that the application may contain procedurally barred claims does not mean it is not "properly filed." "[T]he question whether an application has been 'properly filed' is quite separate from the question whether the claims contained in the application are meritorious and free of procedural bar." *Artuz v. Bennett*, 531 U.S. 4, 9 (2000).

Mailbox Rule - For purposes of calculating tolling under § 2244(d), the federal prisoner "mailbox rule" applies. Under this rule, a prisoner's state filings are deemed "filed" (and tolling thus commenced) when they are delivered to prison officials for mailing. In *Anthony v. Cambra*, 236 F.3d 568 (9th Cir. 2000), the Ninth Circuit noted:

> [I]n *Saffold v. Newland*, 224 F.3d 1087 (9th Cir.2000), we squarely held that the mailbox rule applies with equal force to the filing of state as well as federal petitions, because "[a]t both times, the conditions that led to the adoption of the mailbox rule are present; the prisoner is powerless and unable to control the time of delivery of documents to the court." *Id.* at 1091.

Id. at 575.

Similarly, the "mailbox rule" applies to determining whether an Arizona prisoner's state filings were timely. Although a state may direct that the prison mailbox rule does not apply to filings in its court, *see Orpiada v. McDaniel,* 750 F.3d 1086, 1090 (9th Cir. 2014), Arizona has applied the rule to a variety of its state proceedings. *See e.g. Mayer v. State,* 184 Ariz. 242, 245, 908 P.2d 56, 59 (App.1995) (notice of direct appeal); *State v. Rosario,* 195 Ariz. 264, 266, 987 P.2d 226, 228 (App.1999) (PCR notice); *State v. Goracke,* 210 Ariz. 20, 23, 106 P.3d 1035, 1038 (App. 2005) (petition for review to Arizona Supreme Court).

Application to Petitioner - Petitioner's limitations period ordinarily would have commenced running on May 1, 2012.

However, Petitioner's **first PCR proceeding** was commenced no later than April 10, 2012, before his limitations period began running, when Petitioner filed his Notice of PCR (Exhibit V). That proceeding remained pending at least until March 24, 2015, when the Arizona Court of Appeals denied relief on the petition for review. (Exhibit FF.) However, the mandate was not issued by the Arizona Court of Appeals until May 8, 2015. (*Id.*) *See Celaya v. Stewart,* 691 F. Supp. 2d 1046 (D. Ariz. 2010), *aff'd* 473 Fed. Appx. 794 (9th Cir. 2012), *withdrawn and superseded on other grounds on denial of reh'g en banc,* 497 Fed. Appx. 744 (9th Cir. 2012) (under Arizona rules, a decision issued by the court of appeals after it accepts review of a petition is not finalized until issuance of the mandate).

Accordingly, the undersigned presumes for purposes of this Report and Recommendation (in Petitioner's favor) that the first PCR proceeding remained pending, and Petitioner's limitations period tolled from its inception, through May 8, 2015. It

commenced running again on May 9, 2015 and expired one year later on May 8, 2016.

Petitioner's **second PCR proceeding** was not commenced until May 20, 2016, when Petitioner filed his second PCR notice (Exhibit GG). Because it does not affect the outcome, the undersigned assumes for purposes of this Report & Recommendation, that Petitioner's PCR notice was delivered to prison officials for mailing on the date it was signed, May 16, 2016. (Exhibit GG at 4.)

At that time, his one year had been expired for over eight days. Once the statute has run, a subsequent post-conviction or collateral relief filing does not reset the running of the one year statute. *Jiminez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001); *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003). Accordingly, Petitioner has no statutory tolling resulting from his second PCR proceeding, and his limitations period expired no later than May 8, 2016.[6]

Consequently, Petitioner's habeas petition, deemed filed January 30, 2018, was over 20 months delinquent.

5. Equitable Tolling

The AEDPA habeas statute of limitations is not jurisdictional and is subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631 (2010). "Equitable tolling of the one-year limitations period in 28 U.S.C. § 2244 is available in our circuit, but only when 'extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time' and 'the extraordinary circumstances were the cause of his untimeliness.'" *Laws v. Lamarque*, 351 F.3d 919, 922 (9th Cir. 2003).

To receive equitable tolling, [t]he petitioner must establish two

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[6] Respondents argue that this proceeding would not, in any event, have resulting in tolling because "the state court dismissed Hernandez's successive petition as untimely." (Answer, Doc. 10 at 7.) The undersigned is not convinced. The Arizona Court of Appeals did not dispose of Petitioner's claim of ineffective PCR counsel based on timeliness, but solely on the basis that it was "not cognizable under Rule 32." (Exhibit II, Mem. Dec. 10/26/17 at ¶ 5.) It was only Petitioner's "IAC claims against trial and appellate counsel, and his claims of trial error" which were deemed untimely. (*Id.* at ¶ 6.)

> elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way. The petitioner must additionally show that the extraordinary circumstances were the cause of his untimeliness, and that the extraordinary circumstances ma[de] it impossible to file a petition on time.

Ramirez v. Yates, 571 F.3d 993, 997 (9th Cir. 2009) (internal citations and quotations omitted). "Indeed, 'the threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the exceptions swallow the rule.'" *Miranda v. Castro*,292 F.3d 1063, 1066 (9th Cir. 2002) (quoting *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir.).

Even if extraordinary circumstances prevent a petitioner from filing for a time, equitable tolling will not apply if he does not continue to diligently pursue filing afterwards. "If the person seeking equitable tolling has not exercised reasonable diligence in attempting to file after the extraordinary circumstances began, the link of causation between the extraordinary circumstances and the failure to file is broken, and the extraordinary circumstances therefore did not prevent timely filing." *Valverde v. Stinson*, 224 F.3d 129, 134 (2nd Cir. 2000). Ordinarily, thirty days after elimination of a roadblock should be sufficient. *See Guillory v. Roe*, 329 F.3d 1015, 1018, n.1 (9th Cir. 2003).

Petitioner bears the burden of proof on the existence of cause for equitable tolling. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); *Rasberry v. Garcia*, 448 F.3d 1150, 1153 (9th Cir. 2006) ("Our precedent permits equitable tolling of the one-year statute of limitations on habeas petitions, but the petitioner bears the burden of showing that equitable tolling is appropriate.").

Petitioner argues he is entitled to equitable tolling based on the ineffective assistance of counsel in his first PCR, because of the failure to raise the claims asserted in Petitioner's second PCR proceeding. (Reply, Doc. 24 at 10-11.) Although an attorney's behavior can establish the extraordinary circumstances required for equitable tolling, mere negligence or professional malpractice is insufficient. *Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir.2001). A "'garden variety claim of excusable neglect,' such as a simple 'miscalculation' that leads a lawyer to miss a filing deadline does not warrant equitable tolling.'" *Holland v. Florida*, 560 U.S. 631, 651-652 (2010). Rather, the attorney's

misconduct must rise to the level of extraordinary circumstances. *Id.* Similarly, a failure of counsel to identify claims for review is not an extraordinary circumstance.

Petitioner argues that PCR counsel's performance was so deficient that it amounted to a constructive denial of counsel, and thus is sufficiently egregious. But PCR counsel did not abandon Petitioner, but instead reviewed a wide ranging scope of documents, and concluded that no claims remained to be raised. (*See* Exhibit X, Not. Completion of Review.) That PCR counsel may have overlooked claims is simple negligence or malpractice, and not an extraordinary circumstance.

Even if PCR counsel's performance could be deemed an extraordinary circumstance, Petitioner fails to show that he was diligent in the face of that circumstance. Petitioner was afforded some three months to prepare his *pro per* PCR petition, along with access to his entire file and transcripts, and advisory counsel. (*See* Exhibit Y, M.E. 10/3/12.) He did not identify the claims at that time, nor, apparently, over much of the ensuing 39 months between filing his first PCR petition and his second PCR notice.

To the extent that Petitioner intends to rely on his unrepresented status over that time period, his reliance is misplaced. "It is clear that *pro se* status, on its own, is not enough to warrant equitable tolling." *Roy v. Lampert,* 465 F.3d 964, 970 (9th Cir. 2006). A prisoner's "proceeding *pro se* is not a 'rare and exceptional' circumstance because it is typical of those bringing a § 2254 claim." *Felder v. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000). *See also Rasberry v. Garcia,* 448 F.3d 1150, 1154 (9th Cir. 2006) ("a *pro se* petitioner's lack of legal sophistication is not, by itself, an extraordinary circumstance warranting equitable tolling").

Moreover, once Petitioner had identified the claims raised in his second PCR petition, instead of filing his federal petition, he filed his second state PCR proceeding. Petitioner proffers no reason for having done so.

Petitioner cannot assert that he was instead attempting to exhaust his state remedies. In *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), the Supreme Court analyzed the potential catch-22 between the habeas limitations period and the exhaustion requirement, where a

state petitioner has filed a state post-conviction relief proceeding which may ultimately be deemed untimely, thus not properly filed, and resulting in the expiration of his habeas limitations period. "A prisoner seeking state postconviction relief might avoid this predicament, however, by filing a 'protective' petition in federal court and asking the federal court to stay and abey the federal habeas proceedings until state remedies are exhausted." *Id.* at 416. Petitioner proffers no reason why this avenue was not available to him, nor why he did not pursue it. Nor does he explain why he continued along that path after having been alerted by the PCR court that his attempts at presenting his claims to the state courts were faulty.

In sum, Petitioner fails to show grounds for equitable tolling.

6. Actual Innocence

To avoid a miscarriage of justice, the habeas statute of limitations in 28 U.S.C. § 2244(d)(1) does not preclude "a court from entertaining an untimely first federal habeas petition raising a convincing claim of actual innocence." *McQuiggin v. Perkins*, 133 S.Ct. 1924, 1935 (2013). To invoke this exception to the statute of limitations, a petitioner "'must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.'" *Id.* at 1935 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). This exception, referred to as the "*Schlup* gateway," applies "only when a petition presents 'evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error.'" *Id.* at 1936 (quoting *Schlup*, 513 U.S. at 316).

Petitioner makes no such claim of actual innocence in this proceeding.

Petitioner does argue in his Ground 1 that there was insufficient evidence at trial of his guilt of the child kidnapping charges, because there was no evidence he intended to target children. (Petition, Doc. 1 at 6.) However, a finding of "actual innocence" is not to be based upon a finding that insufficient evidence to support the charge was presented at trial, but rather upon affirmative evidence of innocence. *See U.S. v. Ratigan*, 351 F.3d 957

(9th Cir. 2003) (lack of proof of FDIC insurance in a bank robbery case, without evidence that insurance did not exist, not sufficient to establish actual innocence). Petitioner only alleges a lack of evidence at trial, not new, credible evidence of a lack of intent. "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful." *Schlup*, 513 U.S. at 324.

Moreover, the Arizona Court of Appeals rejected the contention that Arizona's child kidnapping offense had as an element the intent to target children. (Exhibit S, Mem. Dec. at ¶ 12.) This federal habeas court is not free to revisit that state law decision. *See Bains v. Cambra*, 204 F.3d 964, 971 (9th Cir. 2000) ("federal court is bound by the state court's interpretations of state law"). Thus, even if Petitioner could present credible evidence of an absence of such intent, it would not establish his innocence.

Accordingly, there is no basis for a finding of actual innocence.

7. Summary re Statute of Limitations

Taking into account the available statutory tolling, Petitioner's one year habeas limitations period commenced running no later than May 9, 2015, and expired no later than one year later on May 8, 2016. Petitioner has shown no basis for additional statutory tolling, and no basis for equitable tolling or actual innocence to avoid the effects of his delay. Consequently, the Petition must be dismissed with prejudice as untimely.

B. OTHER DEFENSES

The undersigned concludes that Petitioner's Petition is plainly barred by the statute of limitations. Moreover, Respondents have only responded to Grounds Three and Four on the basis of procedural default. Thus, addressing those grounds on that alternative basis would not provide a basis for disposing of the Petition as a whole. Accordingly,

Respondents other defenses are not reached

IV. CERTIFICATE OF APPEALABILITY

Ruling Required - Rule 11(a), Rules Governing Section 2254 Cases, requires that in habeas cases the "district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Such certificates are required in cases concerning detention arising "out of process issued by a State court", or in a proceeding under 28 U.S.C. § 2255 attacking a federal criminal judgment or sentence. 28 U.S.C. § 2253(c)(1).

Here, the Petition is brought pursuant to 28 U.S.C. § 2254, and challenges detention pursuant to a State court judgment. The recommendations if accepted will result in Petitioner's Petition being resolved adversely to Petitioner. Accordingly, a decision on a certificate of appealability is required.

Applicable Standards - The standard for issuing a certificate of appealability ("COA") is whether the applicant has "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, 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." *Id.*

Standard Not Met - Assuming the recommendations herein are followed in the district court's judgment, that decision will be on procedural grounds. Under the reasoning set forth herein, jurists of reason would not find it debatable whether the district court was

correct in its procedural ruling.

Accordingly, to the extent that the Court adopts this Report & Recommendation as to the Petition, a certificate of appealability should be denied.

V. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the Petitioner's Petition for Writ of Habeas Corpus, filed February 5, 2018 (Doc. 1) be **DISMISSED WITH PREJUDICE.**

IT IS FURTHER RECOMMENDED that, to the extent the foregoing findings and recommendations are adopted in the District Court's order, a Certificate of Appealability be **DENIED.**

VI. EFFECT OF RECOMMENDATION

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to *Rule 4(a)(1), Federal Rules of Appellate Procedure*, should not be filed until entry of the district court's judgment.

However, pursuant to *Rule 72(b), Federal Rules of Civil Procedure,* the parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. *See also* Rule 8(b), Rules Governing Section 2254 Proceedings. Thereafter, the parties have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any findings or recommendations of the Magistrate Judge will be considered a waiver of a party's right to *de novo* consideration of the issues, *see United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003)(*en banc*), and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the recommendation of the Magistrate Judge, *Robbins v. Carey*, 481 F.3d 1143, 1146-47 (9th Cir. 2007).

In addition, the parties are cautioned Local Civil Rule 7.2(e)(3) provides that

"[u]nless otherwise permitted by the Court, an objection to a Report and Recommendation issued by a Magistrate Judge shall not exceed ten (10) pages."

Dated: March 15, 2019

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James F. Metcalf
United States Magistrate Judge