# APPENDICES

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|---|---|
| **Appendix A** | **Ninth Circuit Order Denying COA** |
| **Appendix B** | **U.S. District Court Order Adopting R& R and Denying COA** |
| **Appendix C** | **U.S. District Court Magistrate Judge's Report and Recommendation** |
| **Appendix D** | **Petitioner's Objections to Magistrate's Report and Recommendation** |

# APPENDIX A
# Ninth Circuit Order Denying COA

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 13 2020

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

DOUGLAS D. YOKOIS,

Petitioner-Appellant,

v.

DAVID SHINN, Director; MARK BRNOVICH, Attorney General,

Respondents-Appellees.

No. 20-15427

D.C. No. 2:18-cv-01312-DGC
District of Arizona,
Phoenix

ORDER

Before: SILVERMAN and COLLINS, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 4) 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.**

# APPENDIX B
# U.S. District Court Order
# Adopting R& R and Denying COA

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

Douglas D. Yokois,

Petitioner,

vs.

David Shinn, Director of the Arizona Department of Corrections; and Mark Brnovich, Attorney General of the State of Arizona,

Respondents.

No. CV-18-01312-PHX-DGC (MHB)

**ORDER**

Douglas Yokois is confined in Arizona state prison. He has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Doc. 1. Magistrate Judge Michelle Burns issued a report recommending that the petition be dismissed ("R&R"). Doc. 17. Yokois filed an objection. Doc. 21. For reasons stated below, the Court will accept the R&R and dismiss the petition.

## I. Background.

In September 2017, Yokois was indicted in state court on multiple charges of sexually abusing and exploiting his twelve-year old daughter. Doc. 10-1 at 12-18. He pled guilty to two counts of attempted sexual conduct with a minor and one count of sexual exploitation of a minor. *Id.* at 29-53. He was sentenced to twenty-two years in prison in March 2009. *Id.* at 72-96.

Yokois waived his right to appeal by pleading guilty and did not seek post-conviction relief in state court. He brought this federal habeas proceeding in April 2018, asserting due process violations resulting from ineffective assistance of counsel. Doc. 1. Judge Burns recommends that the petition be dismissed as untimely. Doc. 17.

**II. R&R Standard of Review.**

This Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). The Court "must review the magistrate judge's findings and recommendations de novo if objection is made, but not otherwise." *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). The Court is not required to conduct "any review at all . . . of any issue that is not the subject of an objection." *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *see also* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3).

**III. The AEDPA's One-Year Limitation Period.**

Federal habeas proceedings are governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2241 *et seq.* The AEDPA establishes a one-year limitation period for the filing of habeas petitions. 28 U.S.C. § 2244(d); *see Pliler v. Ford*, 542 U.S. 225, 230 (2004). The limitation period generally begins to run when the state conviction becomes final by the expiration or conclusion of direct review. 28 U.S.C. § 2244(d)(1)(A).

Equitable tolling applies where the petitioner shows that "(1) some 'extraordinary circumstance' prevented him from filing on time, and (2) he has diligently pursued his rights." *Luna v. Kernan*, 784 F.3d 640, 646 (9th Cir. 2015) (citing *Holland v. Florida*, 560 U.S. 631, 649 (2010)). In addition, an equitable exception to the limitation period applies if the petitioner establishes a fundamental miscarriage of justice through a "credible showing of actual innocence." *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013); *see Schlup v. Delo*, 513 U.S. 298, 327 (1995).[1]

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[1] Statutory tolling is available for the time during which a properly filed petition

**IV. Judge Burns's R&R.**

Judge Burns found Yokois's habeas petition untimely under the AEDPA's one-year limitation period because he filed the petition nearly eight years after his conviction became final in June 2009, and he has not established equitable tolling. Doc. 17 at 4-8. Judge Burns noted that Yokois does not explain why he waited so long to file the petition, and nothing in the record suggests that an external force prevented him from timely filing. *Id.* at 5. Judge Burns concluded that Yokois has failed to present evidence of actual innocence to support his miscarriage of justice arguments. *Id.* at 6-8. Judge Burns found Yokois's reliance on *Martinez v. Ryan*, 566 U.S. 1 (2012), misplaced because *Martinez* "recognized a narrow set of circumstances in which the *procedural default* of a claim of ineffective assistance of trial counsel can be excused" and "does not apply to tolling the limitations of § 2244(d)." *Id.* at 6 (emphasis in original; citing *Cook v. Ryan*, 688 F.3d 598, 607 (9th Cir. 2012)).

**V. Yokois's Objection.**

Yokois does not dispute that his petition is untimely. Doc. 21 at 5. He contends that Judge Burns erred in failing to apply the miscarriage of justice exception. *Id.* at 5-6. A miscarriage of justice occurs when "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Schlup*, 513 U.S. at 327. To establish the requisite probability, the petitioner must prove with "new reliable evidence" that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 324, 327. Yokois presents no such evidence. *See id.* at 324 (a gateway claim of actual innocence requires "new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial"); *see also McQuiggin*, 569 U.S. at 386 (cautioning that "tenable actual-innocence gateway pleas are rare"); *House v. Bell*, 547

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for post-conviction relief is pending in state court. 28 U.S.C. § 2244(d)(2). As noted, Yokois did not seek post-conviction relief.

U.S. 518, 538 (2006) (emphasizing that the *Schlup* standard is "demanding" and seldom met).

Yokois contends that "fundamental flaws" and "structural errors" in the state court proceedings provide an alternative basis for the miscarriage of justice exception, but cites no legal authority in support of this contention. Doc. 21 at 6-11. The Supreme Court has recognized only one instance where a miscarriage of justice can excuse an untimely habeas petition: actual innocence. *See Schlup*, 513 U.S. at 327; *McQuiggin*, 569 U.S. at 386. Yokois has failed to make a credible showing of actual innocence.

Yokois notes that he cited *Martinez* to address the possibility that this Court "might make a separate finding that [he] failed to exhaust state remedies and therefor federal habeas relief is unavailable." Doc. 21 at 5. The Court makes no such finding. Judge Burns correctly found that *Martinez* does not excuse Yokois's untimeliness under the AEDPA. Doc. 17 at 6-7.

**IT IS ORDERED:**

1. Judge Burns's R&R (Doc. 17) is **accepted**.

2. Yokois's petition for writ of habeas corpus (Doc. 1) is **dismissed**.

3. A certificate of appealability and leave to proceed in forma pauperis on appeal are **denied** because Yokois has not made a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c)(2).

4. The Clerk is directed to enter judgment and **terminate** this action.

Dated this 10th day of February, 2020.

David G. Campbell
Senior United States District Judge

# APPENDIX C
# U.S. District Court
# Magistrate Judge's R & R

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

| | |
|---|---|
| Douglas D. Yokois,<br>Petitioner,<br>vs.<br>Charles L. Ryan, et al.,<br>Respondents. | CV 18-01312-PHX-DGC (MHB)<br>**REPORT AND RECOMMENDATION** |

TO THE HONORABLE DAVID G. CAMPBELL, UNITED STATES DISTRICT COURT:

Petitioner Douglas D. Yokois, acting through counsel, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1). Respondents filed an Answer (Doc. 10), and Petitioner filed a Reply (Doc. 14).

**BACKGROUND**

Pursuant to a plea agreement, on March 12, 2009, Petitioner was convicted in Maricopa County Superior Court, case CR2007-155558, of two counts of attempted sexual conduct with a minor and one count of sexual exploitation of a minor. He was sentenced to a 22-year term of imprisonment.[1] (Doc. 4.)

[1] According to the record, Petitioner was indicted on September 4, 2007, for 26 counts related to the sexual abuse of his 12-year-old daughter, including, two counts of molestation of a child, two counts of sexual conduct with a minor, one count of sexual abuse, nineteen counts of sexual exploitation of a minor, and one count of furnishing obscene or harmful items to a minor. (Exh. C.)

After sentencing, the record reflects that Petitioner failed to seek further review in any post-conviction relief proceeding at the superior court or in any other state court. Petitioner filed his habeas petition in this Court on April 27, 2018, raising five grounds for relief. (Doc. 1.)

In Ground One, Petitioner alleges that his due process rights and right to counsel were violated when his trial counsel failed to inform him of the "constitutional rights, obligations or requirements associated with aggravating factors and aggravated terms of imprisonment" during Petitioner's "first trial."[2] In Ground Two, Petitioner alleges that his due process rights and right to counsel were violated when his trial counsel failed to investigate his innocence. In Ground Three, Petitioner alleges that his due process rights and right to counsel were violated when his trial counsel failed to inform him of the constitutional rights, obligations, or requirements associated with aggravating factors and aggravated terms of imprisonment during Petitioner's second trial. In Ground Four, Petitioner alleges that his due process rights and right to counsel were violated when his trial counsel failed to object to the court's improper determination of aggravating factors. In Ground Five, Petitioner alleges that his due process rights and right to counsel were violated when his trial counsel failed to object to the imposition of sentence in the absence of properly determined aggravating factors. (Docs. 4, 1.)

**DISCUSSION**

In their Answer, Respondents contend that Petitioner's habeas petition is untimely and, as such, must be denied and dismissed.

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[2] The Court notes that throughout his Petition, Petitioner refers to his "first trial" and "second trial" – presumably referring to his change-of-plea proceeding and his sentencing hearing. Petitioner asserts that the trial judge conducted two separate bench trials in CR2007-155558 – one to determine Petitioner's guilt and one to determine the existence of aggravating factors. Petitioner also states that the first trial was conducted pursuant to a "stipulated outcome of guilt," as set forth in a plea agreement. (Docs. 1, 4, 10.)

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

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially 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.

An "of-right" petition for post-conviction review under Arizona Rule of Criminal Procedure 32, which is available to criminal defendants who plead guilty, is a form of "direct review" within the meaning of 28 U.S.C. § 2244(d)(1)(A). See Summers v. Schriro, 481 F.3d 710, 711 (9th Cir. 2007). Therefore, the judgment of conviction becomes final upon the conclusion of the Rule 32 of-right proceeding, or upon the expiration of the time for seeking such review. See id.

Additionally, "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward" the limitations period. 28 U.S.C. § 2244(d)(2); see Lott v. Mueller, 304 F.3d 918, 921 (9th Cir. 2002). A post-conviction petition is "clearly pending after it is filed with a state court, but before that court grants or denies the petition." Chavis v. Lemarque, 382 F.3d 921, 925 (9th Cir. 2004). A state petition that is not filed, however, within the state's required time limit is not "properly filed" 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.

In Arizona, post-conviction review is pending once a notice of post-conviction relief is filed even though the petition is not filed until later. See Isley v. Arizona Department of Corrections, 383 F.3d 1054, 1056 (9th Cir. 2004). An application for post-conviction relief is also pending during the intervals between a lower court decision and a review by a higher court. See Biggs v. Duncan, 339 F.3d 1045, 1048 (9th Cir. 2003) (citing Carey v. Saffold, 536 U.S. 214, 223 (2002)). However, the time between a first and second application for post-conviction relief is not tolled because no application is "pending" during that period. See id. Moreover, filing a new petition for post-conviction relief does not reinitiate a limitations period that ended before the new petition was filed. See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003).

The statute of limitations under the AEDPA is subject to equitable tolling in appropriate cases. See Holland v. Florida, 560 U.S. 631, 645-46 (2010). However, for equitable tolling to apply, a petitioner must show "'(1) that he has been pursuing his rights diligently and (2) that some extraordinary circumstances stood in his way'" and prevented him from filing a timely petition. Id. at 2562 (quoting Pace, 544 U.S. at 418).

The Court finds that Petitioner's Petition for Writ of Habeas Corpus is untimely. On March 12, 2009, the trial court sentenced Petitioner pursuant to the terms set forth in the plea agreement. By pleading guilty, Petitioner waived his right to a direct appeal, and had 90 days to file an "of-right" petition for post-conviction relief under Rule 32 of the Arizona Rules of Criminal Procedure, which he failed to do.

Thus, Petitioner's case became final and the statute of limitations began running on June 10, 2009. Petitioner was required to initiate habeas proceedings on or before June 10, 2010. Petitioner filed his habeas petition on April 27, 2018. Absent equitable tolling, his habeas petition is untimely by almost 8 years. See United States v. Marcello, 212 F.3d 1005, 1010 (7th Cir. 2000) (federal habeas petition submitted one day late was properly dismissed as untimely under AEDPA, noting that a "missed" deadline "is not grounds for equitable tolling"); Hartz v. United States, 419 Fed.Appx. 782, 783 (9th Cir. 2011) (unpublished)

(affirming dismissal of federal habeas petition where petitioner "simply missed the statute of limitations deadline by one day").

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

There is nothing in the record explaining why Petitioner waited almost 8 years to file his Petition or indicating that an external force prevented him from timely filing the Petition. And, a petitioner's *pro se* status, indigence, limited legal resources, ignorance of the law, or lack of representation during the applicable filing period do not constitute extraordinary circumstances justifying equitable tolling. See, e.g., 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.").

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Petitioner attempts, however, to explain his untimeliness by stating that he "seeks to file his Petition pursuant to *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309 (2012), and its progeny... ." Petitioner states that under Martinez, "the procedural default caused by Petitioner's post conviction relief counsel's failure to file for post conviction relief allows this court to consider all aspects of Petitioner's claims of ineffective assistance of counsel at time of first and second trials." In his Reply to Respondents' Answer, Petitioner again argues that Martinez applies to excuse his untimeliness, and also argues that he has demonstrated a fundamental miscarriage of justice.

In support of his fundamental miscarriage of justice claim, Petitioner argues the merits of the claims set forth in his habeas petition stating, among other things:

> Petitioner demonstrated with clarity that he was denied a jury trial in the state court system, knowingly induced to enter a plea of guilty without investigation of specific information provided by Petitioner to his defense attorney, duped into unwitting (and therefore unconstitutional) waiver of fundamental constitutional rights, subjected to aggravated sentencing without constitutionally acceptable determination of aggravating factors, and ignored when he requested appellate review.
>
> Petitioner argues that the claim of structural error, the challenge to aggravated sentencing, the challenge to the plea stipulation to an aggravated term of imprisonment, and the claim of an involuntary plea is sufficient to invoke the miscarriage of justice exception to the standard time frame for filing a federal habeas petition.

(Doc. 14.) Petitioner states that "[s]tanding alone, a flawed state court procedure that does not demonstrate actual innocence would not ordinarily suffice to qualify for a miscarriage of justice exception to untimeliness. However, in this case, the intertwining of the violations does suffice ... ."

Initially, the Court finds that Martinez v. Ryan, 566 U.S. 1 (2012), does not apply here. Martinez recognized a narrow set of circumstances in which the *procedural default* of a claim of ineffective assistance of trial counsel can be excused because of the ineffectiveness of counsel in PCR proceedings. See Cook v. Ryan, 688 F.3d 598, 607 (9th Cir. 2012). Martinez does not apply to tolling the limitations of § 2244(d). Other courts have also reached this conclusion. See Lambrix v. Sec'y, Florida Dept. of Corr., 756 F.3d 1246, 1249 (11th Cir. 2014) ("the equitable rule in *Martinez* applies only to the issue of cause to

excuse the procedural default of an ineffective assistance of trial counsel claim that occurred in a state collateral proceeding and has no application to the operation or tolling of the § 2244(d) state of limitations for filing a § 2254 petition"); Madueno v. Ryan, No. CV-13-01382-PHX-SRB, 2014 WL 2094189, at *7 (D. Ariz. May 20, 2014) ("*Martinez* has no application to the statute of limitations in the AEDPA which governs Petitioner's filing in federal court."). Thus, Petitioner cannot rely on Martinez to overcome the untimeliness of his claims.

Regarding Petitioner's fundamental miscarriage of justice claim, such a claim occurs if a "constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray v. Carrier, 477 U.S. 478, 495-496 (1986). Under certain circumstances, a claim of "actual innocence" serves as a "gateway through which a petitioner may pass whether the impediment is a procedural bar or expiration of the statute of limitations." Stewart v. Cate, 757 F.3d 929, 937-938 (9th Cir. 2014). "When an otherwise time-barred habeas petitioner 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 non-harmless constitutional error, the Court may consider the petition on the merits." Id. "The Supreme Court has recently cautioned, however, that tenable actual-innocence gateway pleas are rare." Id. (citing McQuiggin v. Perkins, 569 U.S. 383, 133 S.Ct. 1924 (2013)). "A petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." Id.

To establish a claim of "actual innocence" the petitioner must first present "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." Schlup v. Delo, 513 U.S. 298, 324, 115 S. Ct. 851, 865 (1995).

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While Petitioner's conclusory arguments may challenge the plea process, fairness of his sentence, and the adequacy of the procedures that led to his sentence, Petitioner fails to argue or point to any new reliable evidence of actual, factual innocence. Therefore, Petitioner has not demonstrated that there is evidence of actual innocence such that the fundamental miscarriage of justice exception entitles him to review of his time-barred claims.

Accordingly, Petitioner is not entitled to any tolling and his habeas petition is untimely.

## CONCLUSION

Having determined that Petitioner's habeas petition is untimely, the Court will recommend that Petitioner's Petition for Writ of Habeas Corpus be denied and dismissed with prejudice.

**IT IS THEREFORE RECOMMENDED** that Petitioner's Petition for Writ of Habeas Corpus (Doc. 1) **DENIED** and **DISMISSED WITH PREJUDICE**;

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

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. The parties shall have fourteen days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. See 28 U.S.C. § 636(b)(1); Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen days within which to file a response to the objections. Pursuant to Rule 7.2, Local Rules of Civil Procedure for the United States District Court for the District of Arizona, objections to the Report and Recommendation may not exceed seventeen (17) pages in length. Failure timely to file objections to the Magistrate Judge's Report and Recommendation may result in the acceptance of the Report and Recommendation by the district court without further

review. See United States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure timely to file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation. See Rule 72, Federal Rules of Civil Procedure.

DATED this 5th day of August, 2019.

Michelle H. Burns
United States Magistrate Judge

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

Douglas D Yokois,

Petitioner,

v.

Charles L Ryan, et al.,

Respondents.

**NO. CV-18-01312-PHX-DGC**

**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 adopting 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.

Debra D. Lucas
Acting District Court Executive/Clerk of Court

February 10, 2020

By s/ S. Quinones
Deputy Clerk

# APPENDIX D
# Petitioner's Objections to Magistrate Judge's R & R

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

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|---|---|
| Douglas D. Yokois,<br><br>Petitioner,<br><br>vs.<br><br>Charles L. Ryan, *et al.*,<br><br>Respondents. | CV 18–01312–PHX–DGC<br><br>**PETITIONER'S OBJECTION TO MAGISTRATE'S REPORT AND RECOMMENDATION** |

**COMES NOW** Petitioner Douglas D. Yokois, by and through undersigned counsel, pursuant to the **14th Amendment to the United States Constitution; 28 U.S.C. § 636(b)(1); Rules 6(a), 6(b), & 72, FRCP;** and the Court's **08/13/2019 Order (Doc.20)** extending time to September 18, 2019; and hereby submits Petitioner's Objection to the **Magistrate Judge's Report and Recommendation** ("**R & R**") **(Doc.17)** that was filed on August 5, 2019. The **R & R** indicated that the Objection was not to exceed seventeen (17) pages. *See* **R & R (Doc.17)**, at page 8, lines 24-26.

## I. PROCEDURAL HISTORY (Federal Court)

On April 27, 2018, Petitioner filed his **28 U.S.C. § 2254 Verified Petition for Writ of Habeas Corpus and Memorandum of Law (Doc.1)**, seeking habeas relief from his state court criminal conviction in Maricopa County Superior

Court Cause No. CR2007-155558, in which he was convicted on March 12, 2009 of the following offenses: Amended Attempted Sexual Conduct With A Minor and Dangerous Crime Against Children in the First Degree, a Non-Dangerous and Non-Repetitive Class 2 Felony (**Count 3**); Amended Attempted Sexual Conduct With A Minor and Dangerous Crime Against Children in the First Degree, a Non-Dangerous and Non-Repetitive Class 2 Felony (**Count 4**); and Sexual exploitation of a Minor and Dangerous Crime Against Children in the Second Degree, a Non-Dangerous and Non Repetitive Class 3 felony (**Count 26**).

Petitioner was sentenced on **Count 3** to Lifetime Probation upon release from incarceration, concurrent with probation in Count 4; on **Count 4** to Lifetime Probation upon release from incarceration, concurrent with probation in Count 3; and on **Count 26** to 22 years (an aggravated term), with 566 days of presentence incarceration credit and with Community Supervision waived pursuant to **A.R.S. § 13-603.K** and **A.R.S. § 41-1604.07.D,** due to probation in Counts 3 & 4.

## II. PETITIONER PRESENTED FIVE CLAIMS FOR RELIEF

### A. On Ground One, Petitioner Asserted A Violation of His 14th Amendment Right to Due Process of Law as a Result of Ineffective Assistance of Counsel at Time of First Trial (For Stipulated Outcome of Guilt Pursuant to Plea Agreement) For Failure to Inform Petitioner of Constitutional Rights, Obligations, and Requirements Associated with Aggravating Factors and Aggravated Terms of Imprisonment

The facts supporting Ground One are found at Petitioner's **Verified Petition (Doc.01)**, from page 6, line 20, to page 8, line 15.

### B. On Ground Two, Petitioner Asserted A Violation of His 14th Amendment Right to Due Process of Law as a Result of Ineffective Assistance of Counsel (IAC) at Time of First Trial (as to Guilt on Underlying Offenses) for Failure to Investigate Petitioner's Innocence

The facts supporting Ground Two are found at Petitioner's **Verified Petition (Doc.01)**, from page 8, line 20, to page 9, line 12.

**C. On Ground Three, Petitioner Asserted A Violation of His 14th Amendment Right to Due Process of Law as a Result of Ineffective Assistance of Counsel at Time of Second Trial (For the Determination of Aggravating Factors) For Failure to Inform Petitioner of Constitutional Rights, Obligations, or Requirements Associated with Aggravating Factors or Aggravated Terms of Imprisonment**

The facts supporting Ground Three are found at Petitioner's **Verified Petition (Doc.01)**, from page 9, line 19, to page 11, line 25.

**D. On Ground Four, Petitioner Asserted A Violation of His 14th Amendment Right to Due Process of Law as a Result of Ineffective Assistance of Counsel at Time of Second Trial (For Determination of Aggravating Factors) For Failure of Defense Counsel to Object to the Sentencing Court Improperly Determining Aggravating Factors, Which Resulted in Petitioner Being Subjected to an Aggravated Term of Imprisonment**

The facts supporting Ground Four are found at Petitioner's **Verified Petition (Doc.01)**, from page 10, line 7, to page 14, line 8.

**E. On Ground Five, Petitioner Asserted A Violation of His 14th Amendment Right to Due Process of Law as a Result of Ineffective Assistance of Counsel at Time of Second Trial (For Determination of Aggravating Factors) For Failure of Defense Counsel to Object to the Sentencing Court Imposing an Aggravated Term of Imprisonment in the Absence of Properly Determined Aggravating Factors**

The facts supporting Ground Five are found at Petitioner's **Verified Petition (Doc.01)**, from page 14, line 15, to page 16, line 16.

## III. THE MAGISTRATE JUDGE'S FINDINGS

**First,** the Magistrate found that ***Martinez v. Ryan***, 566 U.S. 1 (2012) is inapplicable. *See* **R & R (Doc.17)**, at page 6, lines 22-23. **Second,** the Magistrate Judge found that Petitioner's case became final and the statute of limitations

began running on June 10, 2009, that Petitioner's Petition for Writ of Habeas Corpus was untimely, and that, absent equitable tolling, the Petition was untimely and should be dismissed on that basis. *See* **R & R (Doc.17)**, at page 4, lines 16-24.

**Third,** the Magistrate Judge found that:

> While Petitioner's conclusory arguments may challenge the plea process, fairness of his sentence, and the adequacy of the procedures that led to his sentence, Petitioner fails to argue or point to any new reliable evidence of actual, factual innocence. Therefore, Petitioner has not demonstrated that there is evidence of actual innocence such that the fundamental miscarriage of justice exception entitles him to review of his time-barred claims.

**R & R (Doc.17)**, at page 8, lines 1-5.

**Finally,** the Magistrate Judge recommended that the Petition be denied and dismissed with prejudice and that a Certificate of Appealability be denied. *See* **08/05/2019 R & R (Doc.17)**, at page 8, lines 12-17.

## IV. OBJECTIONS TO THE MAGISTRATE'S CONCLUSIONS

### A. The Magistrate Judge's Conclusion — that *Martinez v. Ryan*, 566 U.S. 1 (2012) Is Inapplicable to the Petition in this Matter — is Incorrect, but that Case Applies in a Different Context than Discussed in the Report and Recommendation

In the **R & R,** the Magistrate Judge acknowledged that the holding of ***Martinez v. Ryan***, 566 U.S. 1 (2012), provides a basis for excusing a procedural default of a claim of ineffective assistance of trial counsel because of the ineffectiveness of counsel in state collateral (post conviction relief / PCR) proceedings, citing ***Cook v. Ryan***, 688 F.3d 598, 607 (9th Cir. 2012). *See* **R & R (Doc.17)**, at page 6, lines 22-26.

While the purpose of the Magistrate's discussion was to point out that the holding of ***Martinez v. Ryan*** has no application to the operation or tolling

of the **28 USC § 2244(d)** statute of limitations for filing a **28 USC § 2254** petition (*i.e.*, the issue of untimeliness), Petitioner takes pains to reemphasize that he did invoke ***Martinez v. Ryan*** in his Petition. The importance of ***Martinez v. Ryan*** within the context of this **Objection** to the Magistrate's **R & R** is to address the possibility that the District Court Judge — upon subsequent review of this **Objection,** the Magistrate's **R & R,** and the entire case filings — might make a separate finding that Petitioner failed to exhaust state remedies and therefor federal habeas relief is unavailable. Such a finding is completely independent of the Magistrate's finding of untimeliness. The citation and invocation of ***Martinez v. Ryan*** eliminates that possibility, because ***Martinez*** excuses the failure to exhaust state remedies (*i.e.*, the procedural default).

### B. The Magistrate Judge's Second Finding — That, Absent Equitable Tolling, the Petition Is Untimely and Should Be Dismissed on That Basis — Is Non-dispositive, Because the Petition Was Filed Pursuant to an Exception to Untimeliness

Petitioner assumes that the District Court Judge will agree with the Magistrate that the Petition in this matter, having been filed nearly eight (8) years late, is an untimely petition. Petitioner points out that his challenge to dismissal of the Petition rests upon a basis that is not only independent of the question of whether the Petition was untimely filed, but constitutes a formal exception to the general rule that untimely petitions are to be dismissed with prejudice. That exception is the fundamental miscarriage of justice exception.

### C. Petitioner Argues That the Magistrate Judge's Third Finding — That Petitioner Has Not Demonstrated That There Is Evidence of Actual Innocence Such That the Fundamental Miscarriage of Justice Exception Entitles Him to Review of the Time-Barred Claims — Is Incorrect

#### 1. Petitioner's Express Acknowledgement

In his Petition seeking habeas relief, Petitioner expressly acknowledged the distinction that the Magistrate Judge basically identified, *i.e.*, between **(A)** clear evidence of actual innocence on the one hand, and **(B)** fundamental flaws at every stage of the state criminal justice process in his case.

**2. Petitioner's Presentation of Fundamental Flaws**

The fundamental flaws that permeated the entire case at the state court level included **(1)** an unknowing and uninformed inducement to entering an admission of guilt, **(2)** imposition of a sentence that exceeded the statutory maximum in the absence of either **a)** a knowing admission of aggravating facts or **b)** the formal determination of aggravating factors by the standard of beyond a reasonable doubt, and **(3)** the utter absence of effective assistance of counsel at every stage of the state court criminal proceedings.

**3. Petitioner's Presentation Was Not "Conclusory"**

The Magistrate Judge characterized Petitioner's presentation of his claims for habeas corpus relief under the fundamental miscarriage of justice exception as "*conclusory.*" *See* **R & R (Doc.17)**, at page 8, lines 1-2 ("*While Petitioner's conclusory arguments....*"). Even a cursory look at the averments of the Petition in this matter will confirm that Petitioner's claims are grounded in facts and those facts are supported by the record of the state court proceedings and by the **Appendix** to the Petition, which consists of the plea agreement (**Appendix Item 1**), the reporter's transcript of the change of plea proceeding (**Appendix Item 2**), the personal affidavit of the Petitioner (**Appendix Item 3**), and the reporter's transcript of the sentencing hearing (**Appendix Item 4**).

Petitioner demonstrated with clarity that he was denied a jury trial in the state court system, knowingly induced to enter a plea of guilty without investigation of

specific information provided by Petitioner to his defense attorney, duped into unwitting (and therefore unconstitutional) waiver of fundamental constitutional rights, subjected to aggravated sentencing without constitutionally acceptable determination of aggravating factors, and ignored when he requested appellate review.

**4. Petitioner's Presentation Addressed an Alternative to Clear Evidence of Actual Innocence and Included a Claim of Structural Error**

Petitioner argued that the claim of structural error, the challenge to aggravated sentencing, the challenge to the plea stipulation to an aggravated term of imprisonment, and the claim of an involuntary plea is sufficient to invoke the miscarriage of justice exception to the standard time frame for filing a federal habeas petition. In addition, Petitioner argued structural error in the Petition, as follows:

> ¶ 18 Because there was no waiver, we have to determine whether the error was trial error or structural error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 17, 115 P.3d 601, 607 (2005) (distinguishing between trial error and structural error); *State v. Ring*, 204 Ariz. 534, 552, ¶ 45, 65 P.3d 915, 933 (2003) (same). Trial errors are characterized as those " 'which occur [ ] during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented.' " *Ring*, 204 Ariz. at 552, ¶ 45, 65 P.3d at 933 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 307-08, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)). Trial errors are subject to either harmless error or fundamental error review to determine whether reversal is warranted. *Henderson*, 210 Ariz. at 567, ¶ 17, 115 P.3d at 607.
>
> ¶ 19 Structural errors, however, are subject to automatic reversal. *See Fulminante*, 499 U.S. at 309-10, 111 S.Ct. 1246; *see also State v. Hickman*, 205 Ariz. 192, 199 n. 7, ¶ 29, 68 P.3d 418, 425 (2003). Structural errors are defined as those errors which affect the "entire conduct of the trial from beginning to end." *Fulminante*, 499 U.S. at 309-10, 111 S.Ct. 1246. The United States Supreme Court has designated only a few limited errors as structural, including a complete failure to provide trial

> counsel and denial of a public criminal trial. *Ring*, 204 Ariz. at 552-53, ¶ 46, 65 P.3d at 933-34. Just as those errors qualify as structural errors, we find that so too does the complete failure of the trial court to notify and explain to a defendant the right to a jury trial and to obtain a knowing, intelligent and voluntary waiver of that right. ¶ 19 *See State v. Maldonado*, 206 Ariz. 339, 342, ¶ 12, 78 P.3d 1060, 1063 (App.2003) (stating that the right to forego a jury trial is reserved to the defendant personally until a knowing, intelligent, and voluntary waiver). The right to a jury trial "affect[s] the framework within which the trial proceeds," *Fulminante*, 499 U.S. at 310, 111 S.Ct. 1246, and the failure to personally advise a defendant of that right results in a violation of the Arizona and United States Constitutions.

***State v. Stephen Le Noble***, 216 Ariz. 180, ¶ 18-19, 164 P.3d 686, ¶ 18-19, (App.,2007, Div.1) (referring to trial for guilt, but also applicable to trial for aggravating factors).

It seems axiomatic that structural errors for which prejudice is presumed — *e.g.*, denial of jury trial; invalid waiver of fundamental constitutional rights; unconstitutional determination of facts required for aggravated sentencing — constitute a miscarriage of justice:

> *"A court may also excuse an untimely petition if the prisoner shows that a fundamental "miscarriage of justice" has occurred...."*

***McQuiggin v. Perkins***, 133 S. Ct. 1924, 1935 (2013).

In this case, the constitutional violations and the intertwining of violations becomes extremely important. Standing alone, a flawed state court procedure that does not demonstrate actual innocence would not ordinarily suffice to qualify for a miscarriage of justice exception to untimeliness. However, in this case, the intertwining of the violations does suffice:

> To be sure, a habeas petitioner need not prove his innocence beyond all doubt in order to reach the safe haven of the miscarriage exception: it suffices if the petitioner can show a probability that a reasonable jury would not have convicted but for the constitutional violation.

***Burks v. Dubois***, 55 F.3d 712, 718 (1995), citing ***Murray v. Carrier***, 477 U.S. 478, 496 (1986).

Here, Petitioner can show more than an error in proceedings where there might have been a difference in the outcome; Petitioner's claim involves the failure of an attorney to investigate specific evidence of innocence, combined with complete denial of a trial on the elements of the offense that subjected him to sentencing greater than allowed pursuant to the plea of guilty. There was an unknowing and uninformed inducement to entering an admission of guilt on the part of trial level counsel, imposition by the court of a sentence that exceeded the statutory maximum in the absence of either knowing admission of aggravating facts or formal determination of aggravating factors by the standard of beyond a reasonable doubt. Petitioner suffered the utter absence of effective assistance of counsel at every stage of the state court criminal proceedings.

Petitioner pointed out that the United States Supreme Court has recently spoken, in ***Jae Lee v. United States***, 137 S.Ct. 1958 (2017). There, the United States Supreme Court drew a sharp contrast between two types of ineffective assistance, separating for increased scrutiny those instances in which the deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself. The Supreme Court held that:

> When a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, we do not ask whether, had he gone to trial, the result of that trial "*would have been different*" than the result of the plea bargain. **That is because, while we ordinarily "*apply a strong presumption of reliability to judicial proceedings*," "*we cannot accord*" any such presumption "*to judicial proceedings that never took place.*"** (Internal citations omitted).

> We instead consider whether the defendant was prejudiced by the "*denial of the entire judicial proceeding ... to which he had a right.*"

***Jae Lee v. United States***, 137 S.Ct. 1958, 1965 (2017) (bold print added).

That is precisely what occurred here. Petitioner was constitutionally entitled to a trial by a jury on any aggravating factors the State of Arizona might assert to subject Petitioner to sentencing greater than the presumptive term. Petitioner was not informed of that right by the Court, the State, or his defense counsel. Petitioner was induced to enter a plea of guilty that subjected him to a stipulated aggravated sentence, thereby unknowingly waiving his federal constitutional rights to a jury trial and to the right to a determination of aggravating factors by proof beyond a reasonable doubt.

Further, prejudice is unmistakable — Petitioner was subjected to a sentence greater than that constitutionally permissible on the basis of his plea of guilty, and this occurred solely because he was denied the jury trial to which he was entitled under the federal constitution. Under the United States Supreme Court's jurisprudence as set forth in ***Jae Lee v. United States***, *supra*, Petitioner is entitled to federal habeas corpus relief.

For the miscarriage of justice exception to untimeliness to apply, Petitioner need not prove his innocence beyond all doubt in order to reach the safe haven of the miscarriage exception: it suffices that he can demonstrate beyond a doubt that he was denied the entire proceeding at which the trial on aggravating factors (*i.e.*, ***Apprendi***'s "*functional equivalent of elements of a greater offense*") were to be determined by a jury. Prejudice cannot be more clear.

Here, the combination of multiple constitutional violations, beginning with the failure to investigate specific information supporting a claim of

innocence and continuing through a monstrous series of failures to inform Petitioner of fundamental constitutional rights, ending with unknowing waiver and unconstitutional sentencing, constitutes a manifest miscarriage of justice that even included denial of a jury trial for the very facts that subjected Petitioner to aggravated sentencing. Accordingly, Respondents' untimeliness argument must fail; the miscarriage of justice exception to an untimely petition entitled Petitioner to federal habeas corpus review of his claims for relief.

## V. THE MAGISTRATE JUDGE'S RECOMMENDATION THAT THE PETITION BE DENIED AND DISMISSED WITH PREJUDICE AND THAT A CERTIFICATE OF APPEALABILITY BE DENIED SHOULD BE OVERRULED AND PETITIONER SHOULD BE GRANTED HABEAS RELIEF OR, IN THE LESSER ALTERNATIVE, GRANTED AN EVIDENTIARY HEARING ON HIS CLAIMS OF A FUNDAMENTAL MISCARRIAGE OF JUSTICE

The Magistrate Judge recommended that the Petition be denied and dismissed with prejudice and that a Certificate of Appealability be denied. *See* **08/05/2019 R & R (Doc.17)**, at page 8, lines 12-17.

Based upon the presentation in this Objection, in the Petition, and in the Reply to the Respondents' Limited Answer, Petitioner believes that he has made a *prima facia* case for a miscarriage of justice exception to an untimely filed Petition for Writ of Habeas Corpus. Accordingly, it would be improper to dismiss the Petition with prejudice; and improper to deny a certificate of appealability in the event that the District Court elects to dismiss the Petition.

**RESPECTFULLY SUBMITTED** this 18th day of September, 2019.

**Law Office of Jimmy Borunda, Esq.**

Jimmy Borunda

Jimmy Borunda, Esq.
Attorney for Petitioner Douglas Yokois

**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on the 18th day of September, 2019, I electronically filed Petitioner's Objection to Magistrate's Report and Recommendation with the United States District Court for the District of Arizona using the CM/ECF System for the filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrant:

Joseph T. Maziarz, Chief Counsel; and Eliza C. Ybarra, Assistant Attorney General, 2005 North Central Avenue, Phoenix, Arizona 85004-1580.

One additional copy provided to Petitioner Douglas Yokois by First Class Mail, addressed as follows:

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