UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 9 2021

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

KEVIN NORRIS MITCHELL, Petitioner-Appellant, v. ATTORNEY GENERAL FOR THE STATE OF ARIZONA; DAVID SHINN, Director, Director of Arizona Department of Corrections, Respondents-Appellees.	No. 20-17282 D.C. No. 2:18-cv-03165-SPL District of Arizona, Phoenix ORDER

Before: McKEOWN and BUMATAY, Circuit Judges.

This appeal is from the denial of appellant's Federal Rule of Civil Procedure 60(b) motion. The request for a certificate of appealability is denied because appellant has not shown "that (1) jurists of reason would find it debatable whether the district court abused its discretion in denying the Rule 60(b) motion and, (2) jurists of reason would find it debatable whether the underlying section [2254 petition] states a valid claim of the denial of a constitutional right." *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015); *see also* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Lynch v. Blodgett*, 999 F.2d 401, 403 (9th Cir. 1993) (order).

Any pending motions are denied as moot.

DENIED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

KEVIN NORRIS MITCHELL, Petitioner-Appellant, v. ATTORNEY GENERAL FOR THE STATE OF ARIZONA; DAVID SHINN, Director, Director of Arizona Department of Corrections, Respondents-Appellees.	No. 20-17282 D.C. No. 2:18-cv-03165-SPL District of Arizona, Phoenix ORDER

Before: CANBY and VANDYKE, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 4) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Kevin Norris Mitchell,

Petitioner,

v.

Charles Ryan, et al.,

Respondents.

No. CV-18-03165-PHX-SPL (ESW)

REPORT AND RECOMMENDATION

TO THE HONORABLE STEVEN P. LOGAN, UNITED STATES DISTRICT JUDGE:

Pending before the Court is Kevin Norris Mitchell's ("Petitioner") "Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus" (the "Petition") (Doc. 1). For the reasons explained herein, the undersigned recommends that the Court dismiss the Petition (Doc. 1) as untimely. The undersigned also recommends that the Court deny Petitioner's request for an evidentiary hearing. (Doc. 1 at 19; Doc. 27 at 1). The record is sufficiently developed and an evidentiary hearing is unnecessary for resolution of this matter. *See Roberts v. Marshall*, 627 F.3d 768, 773 (9th Cir. 2010) ("District courts have limited resources (especially time), and to require them to conduct further evidentiary hearings when there is already sufficient evidence in the record to make the relevant determination is needlessly wasteful.").

I. BACKGROUND

In 2011, a jury sitting in the Superior Court of Arizona found Petitioner guilty of (i) three counts of sexual abuse, a class 3 felony and (ii) nine counts of sexual conduct with a minor, a class 2 felony. (Bates Nos. 2-13). The trial court sentenced Petitioner to a total of ninety-five years in prison, followed by lifetime probation. (Bates Nos. 15-23).

On July 10, 2012, the Arizona Court of Appeals affirmed Petitioner's convictions and sentences. (Bates Nos. 127-36). The Arizona Supreme Court denied Petitioner's request for further review. (Bates No. 164). On September 13, 2012, Petitioner filed a Notice of Post-Conviction Relief ("PCR"). (Bates Nos. 149-51). Petitioner's appointed PCR counsel could not find a colorable claim for relief. (Bates No. 156). On February 7, 2014, Petitioner filed a pro se PCR Petition. (Bates Nos. 247-49). Petitioner filed a Motion for Rehearing, which the trial court denied. (Bates Nos. 251-83, 285-86). On June 6, 2016, the Arizona Court of Appeals granted Petitioner's request for review, but denied relief. (Bates Nos. 376-80). The Arizona Supreme Court denied Petitioner's Petition for Review. (Bates No. 473). In October 2018, Petitioner initiated this federal habeas proceeding. (Doc. 1).

II. LEGAL STANDARDS

Under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 110 Stat. 1214,[1] a state prisoner must file his or her federal habeas petition within one year of 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 petitioner was prevented from filing by the State action;
>
> C. The date on which the right asserted was initially

[1] The one-year statute of limitations for a state prisoner to file a federal habeas petition is codified at 28 U.S.C. § 2244(d).

> recognized by the United States Supreme Court, if that right was newly recognized by the Court and made retroactively applicable to cases on collateral review; or
>
> D. The date on which the factual predicate of the claim presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1); *see also Hemmerle v. Schriro*, 495 F.3d 1069, 1073-74 (9th Cir. 2007). The one-year limitations period, however, does not necessarily run for 365 consecutive days as it is subject to tolling. Under AEDPA's statutory tolling provision, the limitations period is tolled during the "time during which a properly filed application for State post-conviction relief or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2) (emphasis added); *Roy v. Lampert*, 465 F.3d 964, 968 (9th Cir. 2006) (limitations period is tolled while the state prisoner is exhausting his or her claims in state court and state post-conviction remedies are pending) (citation omitted).

AEDPA's statute of limitations is also subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631, 645 (2010) ("Now, like all 11 Courts of Appeals that have considered the question, we hold that § 2244(d) is subject to equitable tolling in appropriate cases."). Yet equitable tolling is applicable only "if extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." *Roy*, 465 F.3d at 969 (citations omitted); *Gibbs v. Legrand*, 767 F.3d 879, 888 n.8 (9th Cir. 2014). A petitioner must show (i) that he or she has been pursuing his rights diligently and (ii) some extraordinary circumstances stood in his or her way. *Pace v. DiGuglielmo,* 544 U.S. 408, 418 (2005); s*ee also Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1011 (9th Cir. 2009); *Roy*, 465 F.3d at 969.

III. DISCUSSION

In this case, the relevant triggering event for purposes of AEDPA's statute of limitations is the date on which Petitioner's judgment became "final by the conclusion of

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

The Arizona Court of Appeals affirmed Petitioner's convictions and sentences on July 10, 2012. (Bates Nos. 127-36). On January 3, 2013, the Arizona Supreme Court denied Petitioner's request for further review. (Bates No. 164). Petitioner had ninety days from January 3, 2013 (until April 3, 2013) to file a petition for writ of certiorari in the United States Supreme Court, but Petitioner did not do so. Sup. Ct. R. 13. Consequently, Petitioner's convictions and sentences became final on April 3, 2013. *Bowen v. Roe*, 188 F.3d 1157, 1158-59 (9th Cir. 1999) ("[T]he period of 'direct review' in 28 U.S.C. § 2244(d)(1)(A) 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."). The one-year statute of limitations did yet not begin to run, however, as Petitioner filed a PCR Notice on September 13, 2012.[2] (Bates Nos. 149-51).

Petitioner does not contest Respondents' assertion that statutory tolling applies through February 28, 2017, which is the date the Arizona Court of Appeals issued its mandate concerning the denial of his PCR Petition. (Doc. 12 at 6; Bates No. 475). However, Petitioner asserts that he is entitled to additional statutory tolling. (Doc. 27 at 2-3).

A. Petitioner is Not Entitled to Statutory Tolling Beyond February 28, 2017

In support of his argument for additional statutory tolling, Petitioner cites his "Petition to Amend/Motion for Reconsideration" that he filed in the trial court on June 23, 2016. (Doc. 27 at 2; Bates Nos. 382-410). The filing requests that the trial court grant him leave to amend his PCR Petition. (*Id.*). The trial court denied the request. (Bates No. 450). Petitioner sought further review by the Arizona Court of Appeals.

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[2] In Arizona, a post-conviction relief ("PCR") proceeding becomes "pending" as soon as the notice of PCR is filed. *Isley v. Ariz. Dep't of Corrections*, 383 F.3d 1054, 1055-56 (9th Cir. 2004) ("The language and structure of the Arizona postconviction rules demonstrate that the proceedings begin with the filing of the Notice.").

(Bates Nos. 454-71). On September 12, 2017, the Arizona Court of Appeals denied review, explaining that the "superior court did not abuse its discretion in denying the motion to amend, or denying the motion for reconsideration that was filed almost three years after the original petition." (Bates No. 478) (citing Ariz. R. Crim. P. 32.6(d), 32.9(a)). On July 10, 2018, Petitioner filed a Petition for Review in the Arizona Supreme Court. (Bates No. 480). On July 11, 2018, the Arizona Supreme Court issued an Order striking the Petition for Review as untimely filed and dismissing the matter. (*Id.*).

A statutory tolling analysis under AEDPA begins by determining whether the collateral review petition was "properly filed." This is because statutory tolling does not apply to collateral review petitions that are not "properly filed." *Pace*, 544 U.S. at 417; 28 U.S.C. § 2244(d)(2). A collateral review petition is "properly filed" when its delivery and acceptance are in compliance with state rules governing filings. *Artuz v. Bennett*, 531 U.S. 4, 8 (2000); *Orpiada v. McDaniel*, 750 F.3d 1086, 1089 (9th Cir. 2014) (court looked to Nevada state filing requirements in determining whether habeas petitioner's PCR petition was a "properly filed" application that is eligible for tolling). This includes compliance with filing deadlines. An untimely state collateral review petition is not "properly filed." *Pace*, 544 U.S. at 417 (holding that "time limits, *no matter their form*, are 'filing' conditions," and that a state PCR petition is therefore not "properly filed" if it was rejected by the state court as untimely).

Respondents correctly assert that the state court proceedings concerning his "Petition to Amend/Motion for Reconsideration" did not toll the limitations period. (Doc. 12 at 7). First, the filing was not a petition for collateral review. Second, even if the filing was construed as a petition for collateral review, it was untimely filed. (Bates No. 477-78). "When a postconviction petition is untimely under state law, that [is] the end of the matter for purposes of [AEDPA's statute of limitations]." *Pace*, 544 U.S. at 414; *see also White v. Martel*, 601 F.3d 882, 884 (9th Cir. 2010) ("We have held that, pursuant to *Pace*, tolling under section 2244(d)(2) is unavailable where a state habeas petition is deemed untimely under [a state's] timeliness standards."). Accordingly,

Petitioner is not entitled to statutory tolling beyond February 28, 2017 (the date the Arizona Court of Appeals issued its mandate concerning the denial of his PCR Petition).[3] The deadline for Petitioner to file a federal habeas petition was February 28, 2018. *See Patterson v. Stewart*, 251 F.3d 1243, 1247 (9th Cir. 2001) ("Excluding the day on which Patterson's petition was denied by the Supreme Court, as required by Rule 6(a)'s 'anniversary method,' the one-year grace period began to run on June 20, 1997 and expired one year later, on June 19, 1998 . . . ."). As such, unless equitable tolling applies, the October 2018 Petition (Doc. 1) seeking federal habeas relief is untimely.

B. Equitable Tolling Does Not Apply

It is a petitioner's burden to establish that equitable tolling is warranted. *Pace*, 544 U.S. at 418; *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."). As mentioned, a petitioner seeking equitable tolling must establish that: (i) he or she has been pursuing his or her rights diligently and (ii) that some extraordinary circumstances stood in his or her way. A petitioner must also show that the "extraordinary circumstances" were the "but-for and proximate cause of his [or her]

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[3] The Arizona Supreme Court denied review of Petitioner's PCR proceeding on December 22, 2016. (Bates No. 473). Because it does not affect the outcome, the undersigned has adopted Respondents' use of the February 28, 2017 date that the Arizona Court of Appeals issued its mandate. However, the undersigned notes that courts have disagreed as to whether statutory tolling applies through the date the Arizona Supreme Court denies review or through the date the Arizona Court of Appeals issues its mandate. *Menendez v. Ryan*, No. CV14-2436-PHX-DGC (JFM), 2015 WL 8923410, at *9 (D. Ariz. Oct. 20, 2015) ("[A]n Arizona post-conviction relief proceeding remains pending until issuance of the mandate, at least in those PCR cases in which a mandate is called for under Ariz. Rev. Stat. § 12-120.24."), *Report and Recommendation adopted*, No. CV-14-02436-PHX-DGC, 2015 WL 8758007 (D. Ariz. Dec. 15, 2015); *Williamson v. Ryan*, No. CV16-00875-PHX-ROS (JZB), 2017 WL 9690340, at *3 (D. Ariz. Feb. 6, 2017) ("Although the mandate issued on March 24, 2015, the Arizona Supreme Court decision ended post-conviction review.") (citing *Hemmerle v. Schiro*, 495 F.3d 1069, 1074 (9th Cir. 2007)), *Report and Recommendation adopted*, No. CV-16-00875-PHX-ROS, 2018 WL 3145975 (D. Ariz. June 27, 2018); Keith J. Hilzendeger, *Arizona State Post–Conviction Relief*, 7 Ariz. Summit L. Rev. 585, 677 (2014) ("The period of tolling continues until the highest appellate court in which review is sought denies a petition for review in the Rule 32 proceedings. Just as with direct review, the issuance of the mandate in Rule 32 proceedings is not the event that ends the period of tolling.") (citing *State v. Dalglish*, 901 P.2d 1218, 1220-21 (Ariz. Ct. App. 1995)).

untimeliness." *Allen v. Lewis*, 255 F.3d 798, 800 (9th Cir. 2001) (per curiam); *see also Ramirez v. Yates*, 571 F.3d 993, 997 (9th Cir. 2009). A petitioner's pro se status, on its own, is not enough to warrant equitable tolling. *See, e.g., Johnson v. United States*, 544 U.S. 295, 311 (2005) ("[W]e have never accepted *pro se* representation alone or procedural ignorance as an excuse for prolonged inattention when a statute's clear policy calls for promptness.").

Petitioner asserts that he is entitled to equitable tolling. (Doc. 27 at 3). Petitioner explains that on October 16, 2017, he retained an attorney who advised him that the statute of limitations would be tolled pending resolution of Petitioner's request for leave to file an Amended PCR Petition. (*Id.* at 3-4). Petitioner contends that the attorney "grossly misled" Petitioner and that the limitations period thus should be equitably tolled. (*Id.* at 4). Petitioner also states that his attorney is responsible for the untimely Petition for Review filed in the Arizona Supreme Court. (*Id.*). Petitioner contends that "had the Petition for Review been timely, Mr. Mitchell's one year would have started after the Arizona Supreme Courts ruling, and given Mr. Mitchell time to prepare his habeas corpus . . . ." (*Id.*).

The Ninth Circuit has explained that "[n]ot all attorney mistakes qualify as a basis for equitable tolling." *Luna v. Kernan*, 784 F.3d 640, 646 (9th Cir. 2015). "Attorney mistakes that warrant the label 'garden variety'—like miscalculating a filing deadline—are the sorts of mistakes that, regrettably, lawyers make all the time." *Id.* at 647. "[R]un-of-the-mill mistakes by one's lawyer that cause a filing deadline to be missed do not rise to the level of extraordinary circumstances." *Id.* at 646. "Courts do not recognize run-of-the-mill mistakes as grounds for equitable tolling because doing so 'would essentially equitably toll limitations periods for every person whose attorney missed a deadline.'" *Id.* at 647 (quoting *Lawrence v. Florida*, 549 U.S. 327, 336 (2007)).

Petitioner has not shown that his attorney's conduct transcended "garden variety" negligence. *See Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir. 2001) ("We conclude that the miscalculation of the limitations period by Frye's counsel and his negligence in

general do not constitute extraordinary circumstances sufficient to warrant equitable tolling."); *Randle v. Crawford*, 604 F.3d 1047, 1058 (9th Cir. 2010) ("To the extent that his counsel's negligence in miscalculating the filing deadlines in his state proceedings resulted in Randle also missing the federal deadline, we have held that an attorney's negligence in calculating the limitations period for a habeas petition does not constitute an 'extraordinary circumstance' warranting equitable tolling."). In addition, Petitioner has not shown that trial counsel's advice made it impossible for him to file a timely federal habeas petition. *See Randle*, 604 F.3d at 1058 ("[C]ounsel's incorrect advice with respect to the time frame in which to file a state habeas case did not prevent Randle from filing his federal habeas petition on time.").

Moreover, ignorance of the law is insufficient to warrant equitable tolling. *See Johnson v. United States*, 544 U.S. 295, 311 (2005) ("[W]e have never accepted *pro se* representation alone or procedural ignorance as an excuse for prolonged inattention when a statute's clear policy calls for promptness");[4] *Rasberry v. Garcia*, 448 F.3d at 1154 ("[A] pro se petitioner's lack of legal sophistication is not, by itself, an extraordinary circumstance warranting equitable tolling."). The undersigned finds that Petitioner has failed to show the existence of "extraordinary circumstances" that were the proximate cause of the untimely filing of this proceeding. *See Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003) (for equitable tolling to apply, a "prisoner must show that the 'extraordinary circumstances' were the cause of his untimeliness"). Accordingly, the undersigned does not find that equitable tolling applies in this case. The undersigned finds that the Petition (Doc. 1) is untimely.

C. The Actual Innocence/*Schlup* Gateway Does Not Apply to Excuse the Untimeliness of the Petition

In *McQuiggin v. Perkins*, 133 S.Ct. 1924, 1931-34 (2013), the Supreme Court

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[4] *Johnson* involved a collateral review proceeding filed by a federal prisoner under 28 U.S.C. § 2255. Section 2254 petitions and Section 2255 motions are treated the same for purposes of determining whether equitable tolling applies. *United States v. Battles*, 362 F.3d 1195, 1196-97 (9th Cir. 2004) ("The two sections have the same operative language and the same purpose. We fail to see any reason to distinguish between them in this respect.").

announced an equitable exception to AEDPA's statute of limitations. The Court held that the "actual innocence gateway" to federal habeas review that was applied to procedural bars in *Schlup v. Delo*, 513 U.S. 298, 327 (1995) and *House v. Bell*, 547 U.S. 518 (2006) extends to petitions that are time-barred under AEDPA. The "actual innocence gateway" is also referred to as the "Schlup gateway" or the "miscarriage of justice exception."

Under *Schlup*, a petitioner seeking federal habeas review under the miscarriage of justice exception must establish his or her factual innocence of the crime and not mere legal insufficiency. *See Bousley v. United States*, 523 U.S. 614, 623 (1998); *Jaramillo v. Stewart*, 340 F.3d 877, 882-83 (9th Cir. 2003). "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." *Schlup*, 513 U.S. at 324; *see also McQuiggin*, 133 S.Ct. at 1927 (explaining the significance of an "[u]nexplained delay in presenting new evidence"). 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." *McQuiggin*, 133 S.Ct. at 1935 (quoting *Schlup*, 513 U.S. at 327). Because of "the rarity of such evidence, in virtually every case, the allegation of actual innocence has been summarily rejected." *Shumway v. Payne,* 223 F.3d 982, 990 (9th Cir. 2000) (citing *Calderon v. Thomas*, 523 U.S. 538, 559 (1998)).

To the extent Petitioner asserts that the actual innocence/*Schlup* gateway applies, Petitioner has not presented any new reliable evidence establishing that he is factually innocent of his convictions. *Lee v. Lampert*, 653 F.3d 929, 937 (9th Cir. 2011) ("In order to present otherwise time-barred claims to a federal habeas court under *Schlup*, a petitioner must produce sufficient proof of his actual innocence to bring him "within the 'narrow class of cases . . . implicating a fundamental miscarriage of justice.'") (citations omitted); *Shumway*, 223 F.3d at 990 ("[A] claim of actual innocence must be based on reliable evidence not presented at trial."); *Larsen v. Soto*, 742 F.3d 1083, 1096 (9th Cir. 2013) ("[W]e have denied access to the Schlup gateway where a petitioner's evidence of innocence was merely cumulative or speculative or was insufficient to overcome

otherwise convincing proof of guilt."). Because Petitioner has failed to satisfy his burden of producing "new reliable evidence" of his actual innocence, the undersigned recommends that the Court find that Petitioner cannot pass through the actual innocence/*Schlup* gateway to excuse the untimeliness of this federal habeas proceeding. *See Smith v. Hall*, 466 F. App'x 608, 609 (9th Cir. 2012) (explaining that to pass through the *Schlup* gateway, a petitioner must first satisfy the "threshold requirement of coming forward with 'new reliable evidence'"); *Griffin v. Johnson*, 350 F.3d 956, 961 (9th Cir. 2003) ("To meet [the *Schlup* gateway standard], [petitioner] must first furnish 'new reliable evidence . . . that was not presented at trial.'"). *McQuiggin*, 133 S.Ct. at 1936 (quoting *Schlup*, 513 U.S. at 316).

IV. CONCLUSION

Based on the foregoing,

IT IS RECOMMENDED that Petitioner's request for an evidentiary hearing be denied.

IT IS FURTHER RECOMMENDED that the Petition (Doc. 1) be **DISMISSED WITH PREJUDICE**.

IT IS FURTHER RECOMMENDED that a certificate of appealability and leave to proceed in forma pauperis on appeal be denied because dismissal of the Petition is justified by a plain procedural bar.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Fed. R. App. P. 4(a)(1) 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); Fed. R. Civ. P. 6, 72. Thereafter, the parties have fourteen days within which to file a response to the objections. Failure to file timely 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 to file timely objections to any factual determinations of the Magistrate Judge may 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* Fed. R. Civ. P. 72.

Dated this 21st day of August, 2019.

Eileen S. Willett
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Kevin Norris Mitchell,

Petitioner,

v.

David Shinn, et al.,

Respondents.

No. CV-18-03165-PHX-SPL

ORDER

The Court has before it, Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1), the Answer from the Respondents (Doc. 12), and Petitioner's Reply. (Doc. 27) Additionally, the Court is in receipt of the Report and Recommendation (Doc. 28), Petitioner's Objections (Doc. 33), Amendment to Petitioner's Objections (Doc. 34), Petitioner's Motion to Correct Portions of Petitioner's Objections (Doc. 35), and the Response to the Objections. (Doc. 36)

In the instant Petition, the Petitioner is seeking relief on 9 grounds. (Doc. 1 at 6-19) Additionally, Petitioner has requested an evidentiary hearing. (Doc. 1 at 10; Doc. 27 at 1) This Court finds that the record is sufficiently developed. The matters can be resolved without the assistance of an evidentiary hearing.

A district judge "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). When a party files a timely objection to an R&R, the district judge reviews *de novo* those portions of the R&R that have been "properly objected to." Fed. R. Civ. P. 72(b). A proper objection requires

specific written objections to the findings and recommendations in the R&R. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003); 28 U.S.C. § 636(b) (1). It follows that the Court need not conduct any review of portions to which no specific objection has been made. *See Reyna-Tapia*, 328 F.3d at 1121; *see also Thomas v. Arn*, 474 U.S. 140, 149 (1985) (discussing the inherent purpose of limited review is judicial economy). Further, a party is not entitled as of right to *de novo* review of evidence or arguments which are raised for the first time in an objection to the R&R, and the Court's decision to consider them is discretionary. *United States v. Howell*, 231 F.3d 615, 621-622 (9th Cir. 2000).

The Court has carefully undertaken an extensive review of the sufficiently developed record. The Petitioner's objections to the findings and recommendations have also been thoroughly considered. After conducting a *de novo* review of the issues and objections, to include the actual innocence consideration, the Court reaches the same conclusions reached by Judge Willett. Having carefully reviewed the record, the Petitioner failed to show that extraordinary circumstances or that newly discovered and reliable evidence of actual innocence were the proximate cause of the untimely filing as previously addressed in *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). This Court finds the Petitioner is not entitled to equitable tolling or habeas relief. The R&R will be adopted in full. Accordingly,

IT IS ORDERED:

1. That the Magistrate Judge's Report and Recommendation (Doc. 28) is **accepted** and **adopted** by the Court;

2. That the Petitioner's Objections (Doc. 33) are **overruled**;

3. That the Petitioner's Leave of Court For Amendment To Petitioner's Objections and Motion to Correct Portions of Petitioner's Objections to the Report and Recommendation (Docs. 34, 35) are **granted**;

4. That the Petition for Writ of Habeas Corpus (Doc. 1) is **denied** and this action is **dismissed with prejudice**;

5. That a Certificate of Appealability and leave to proceed *in forma pauperis* on appeal 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

6. That the Clerk of Court shall enter judgment according and terminate this action.

Dated this 26th day of November 2019.

Honorable Steven P. Logan
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Kevin Norris Mitchell,

Petitioner,

v.

Charles L Ryan, et al.,

Respondents.

NO. CV-18-03165-PHX-SPL

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 and 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 with prejudice.

Brian D. Karth
District Court Executive/Clerk of Court

November 27, 2019

By s/ L. Dixon
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Kevin Norris Mitchell,

Petitioner,

vs.

Charles L. Ryan, et al.,

Respondents.

No. CV-18-03165-PHX-SPL

ORDER

On November 27, 2019, this Court adopted Magistrate Judge Eileen S. Willett's Report & Recommendation and dismissed Petitioner's Petition for Writ of Habeas Corpus (Doc. 38). Petitioner has filed a Motion to Alter or Amend the Judgment pursuant to Federal Rule of Civil Procedure 59(e) (Doc. 40).

Reconsideration is disfavored and "appropriate only in rare circumstances." *Defenders of Wildlife v. Browner*, 909 F.Supp. 1342, 1351 (D. Ariz. 1995). Motions for Reconsideration are "not the place for parties to make new arguments not raised in their original briefs," nor should such motions be used to ask the Court to rethink its previous decision. *Motorola, Inc. v. J.B. Rodgers Mech. Contractors*, 215 F.R.D. 581 (D. Ariz. 2003).

The Court may grant a motion under Rule 59(e) if the district court is presented with newly discovered evidence, committed clear error, the initial decision was manifestly unjust, or there is an intervening change in controlling law. *Sch. Dist. No. 1J, Multnomah Cty., Or. V. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). The Court finds that

Petitioner's motion does not satisfy the requirements of Rule 59(e). Accordingly,

IT IS ORDERED that Petitioner's Motion to Alter or Amend the Judgment pursuant to Federal Rule of Civil Procedure 59(e) (Doc. 40) is **denied**.

Dated this 19th day of December, 2019.

Honorable Steven P. Logan
United States District Judge

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Kevin Norris Mitchell,

Petitioner,

vs.

David Shinn et al.,

Respondents.

No. CV-18-03165-PHX-SPL

ORDER

I. BACKGROUND

On August 21, 2019, Magistrate Judge Eileen S. Willett issued a Report and Recommendation ("R&R") concluding that Petitioner's habeas petition, filed on October 2, 2018, was untimely and recommending dismissal. (Doc. 28). The R&R found that statutory tolling on Petitioner's habeas petition concluded on February 28, 2018—the date on which the Arizona Court of Appeals denied his PCR petition. (Doc. 28 at 6). Petitioner sought additional statutory tolling because he had subsequently filed a motion to amend his PCR petition and then sought review of the denial of that motion. (Doc. 28 at 4-5). The R&R rejected this argument because the motions were untimely and therefore not properly filed. (Doc. 28 at 4-5). Petitioner also argued he was entitled to equitable tolling based on the "ineptitude" of his attorney which caused the untimely filings. (Doc. 28 at 7-8); (Doc. 46 at 7). The R&R rejected this argument because "Petitioner has not shown that his attorney's conduct transcended 'garden variety' negligence." (Doc. 28 at 7). This Court adopted the R&R and dismissed the action. (Doc. 38).

Before the Court is Petitioner's Motion to Reopen the Case pursuant to Federal Rule 60(b). (Doc. 46). Petitioner argues the R&R miscalculated the statutory tolling period by failing to account for the time he had to file a writ of certiorari with the US Supreme Court, and again argues he is entitled to equitable tolling based on the ineptitude of his attorney causing the untimely filings. (Doc. 46 at 3-5).

II. LEGAL STANDARD

Federal Rule 60(b) "allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances." *Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005). The Rule states that "the court may relieve a party or its legal representative from a final judgment, order, or proceeding" on the basis of "mistake, inadvertence, surprise, or excusable neglect" or "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(1)-(6). A movant seeking relief under Rule 60(b) must show "'extraordinary circumstances' justifying the reopening of a final judgment." *Gonzalez*, 545 U.S. at 535 (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950)). Such circumstances "rarely occur in the habeas context." *Id.*

III. DISCUSSION

In relevant part, under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254, a state prisoner must file his or her federal habeas petition within one year of "[t]he date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Id.* Here, the Arizona Court of Appeals denied Petitioner's PCR petition (and, thus, Petitioner's application was no longer "pending") on February 28, 2017. (Doc. 12 at 6). The statute of limitations was statutorily tolled until February 28, 2017, at which point the one-year statute of limitations began. Petitioner therefore had until February 28, 2018 to file his habeas petition.

To the extent Petitioner argues the R&R miscalculated the statutory tolling period by failing to account for the ninety days he had to file a writ of certiorari with the US Supreme Court (Doc. 46 at 3), any such error is harmless. These extra ninety days would have only given Petitioner until May 29, 2018 to file a timely habeas petition. The petition

was not filed until October 2, 2018. Thus, the result is the same: the petition was not filed until well outside the statutory period.

Further, the R&R correctly concluded that Petitioner is not entitled to additional statutory tolling based on the filing of his motion to amend the PCR. Under AEDPA's statutory tolling provision, the limitations period is tolled during the "time during which a *properly filed* application for State post-conviction relief or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2) (emphasis added). Untimely petitions are not "properly filed" and therefore do not extend the tolling period. *See Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005). Here, Petitioner's motion to amend was denied as untimely. (Doc. 28 at 4). The Arizona Court of Appeals affirmed the denial. (Doc. 28 at 5). The petition to review the denial was also untimely and was therefore dismissed by the Arizona Supreme Court. (Doc. 28 at 50). Because these filings were untimely, they did not extend the statutory tolling period.

The R&R also correctly concluded that Petitioner is not entitled to equitable tolling. Petitioner argues he is entitled to equitable tolling because his attorney erroneously advised him that the statute of limitations on his habeas petition would be tolled pending the resolution of the motion to amend his PCR. (Doc. 28 at 7-8). As the R&R correctly explained, Ninth Circuit law makes clear that attorney mistakes "like miscalculating a filing deadline" and others which "cause a filing deadline to be missed" are not the sort of extraordinary circumstance required to warrant equitable tolling. (Doc. 28 at 7) (citing *Luna v. Kernan*, 784 F.3d 640, 646 (9th Cir. 2015)). Petitioner was therefore not entitled to equitable tolling based on the untimely subsequent motions.

Nor did the unfortunate death of Petitioner's first attorney save his habeas petition from being dismissed as untimely. The attorney's death occurred in March of 2018, and Petitioner argues he consequently "was abandoned from March 2018 until June 2018." (Doc. 46 at 6). But again, Petitioner's habeas petition was not filed until October 2018, four months after the alleged abandonment. It was not error for the R&R to dismiss the petition as untimely.

IV. CONCLUSION

The legal conclusions of the R&R were not based on error or mistake, and Petitioner fails to allege any reasons that justify relief from the dismissal of his habeas petition. Because the petition was untimely, dismissal was warranted. Accordingly,

IT IS ORDERED that Petitioner's Motion to Reopen Case (Doc. 46) is **denied**.

IT IS FURTHER ORDERED that a Certificate of Appealability and leave to proceed *in forma pauperis* on appeal are **denied**.

IT IS FURTHER ORDERED that this matter shall remain closed.

Dated this 4th day of November, 2020.

Honorable Steven P. Logan
United States District Judge