No.

IN THE SUPREME COURT OF THE UNITED STATES

ALEKSYS LOMELI GARCIA, PETITIONER

VS.

DAVID SHINN, RESPONDENT

ON A PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

ACCOMPANYING APPENDICES TO PETITION FOR CERTIORARI

AUGUST 16, 2021

Aleksys Lomeli Garcia, # 273617

In Propria Persona

Arizona State Prison

Safford Complex, Tonto Unit

896 South Cook Road

Safford, Arizona 85546

TABLE OF ACCOMPANYING APPENDICES

JL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Aleksys Lomeli-Garcia,

Petitioner,

v.

Charles L. Ryan, et al.,

Respondents.

No. CV 19-08199-PCT-DWL (DMF)

ORDER

On July 10, 2019, Petitioner Aleksys Lomeli-Garcia, who is confined in the Arizona State Prison Complex-Safford, filed a pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, a Memorandum of Facts and Authorities in Support of the Petition, and a Motion for Stay and Abeyance and to Supplement or Amend the Petition. On July 17, 2019, Petitioner filed a Motion for Conformed Copies. In a September 26, 2019 Order, the Court denied Petitioner's Motion for Conformed Copies, directed the Clerk of Court to serve the Petition, Memorandum in Support, and the Motion for Stay and Abeyance on Respondents, and directed Respondents to answer the Motion for Stay and Abeyance.

On September 30, 2019, Petitioner filed a "Motion to Expedite and Decide Within 7 Days, Initial Rule 4 Issues, Two Pending July Motions and 2254(b)(1)(B)(3) Issues" and a document titled "Supplemental Authority and Clarified Class Relief Notice."[1] In the Motion to Expedite, Petitioner asserted that in Ground One of the Petition, he seeks "state-

[1] Petitioner signed the Motion to Expedite on September 25, 2019. The Motion and Petitioner's Supplemental Authority were not docketed until October 2, 2019.

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wide injunctive relief" to remedy an alleged violation of the rights of thousands of prisoners who had defaulted their rights to effectively petition the courts for habeas corpus relief between 1996 and 2019. Petitioner further asserted that in Ground Two of the Petition, he seeks habeas relief to be granted in thousands of cases for resentencing purposes "under the authority of" *United States v. Preiser*, 506 F.2d 1113 (2d Cir. 1974), and *Jules v. Savage*, 512 F.2d 881 (3d Cir. 1975).

In an October 2, 2019 Order, Magistrate Judge Fine denied Petitioner's Motion to Expedite, noting that the Court's had clearly stated in the September 26, 2019 Order that the Court would not decide the Motion for Stay and Abeyance until Respondents answer that Motion.

On October 15, 2019, Petitioner filed a Motion for Reconsideration of the Court's September 26, 2019 Order and to Vacate Magistrate Judge Fine's October 2, 2019 Order (Doc. 12). In the Motion for Reconsideration, Petitioner asserts that when the Court issued the September 26, 2019 Order, it did not consider the material Petitioner had included in his Motion to Expedite and Supplemental Authority. Petitioner further asserts that Magistrate Judge Fine, unaware of the facts set forth in Petitioner's September 25 filing, denied Petitioner's Motion to Expedite on the grounds that it was filed after the Court's September 26, 2019 Order and was moot. Petitioner asserts the Court should modify the September 26, 2019 Order and vacate Magistrate Judge Fine's October 2, 2019 Order because the Court did not "adequately consider or address the material facts and issues" in his Motion to Expedite and Supplemental Authority.

Motions for reconsideration should be granted only in rare circumstances. *Defenders of Wildlife v. Browner*, 909 F. Supp. 1342, 1351 (D. Ariz. 1995). A motion for reconsideration is appropriate where the district court "(1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *School Dist. No. 1J, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). Such motions should not be used for the purpose of asking a court "'to rethink what the court had already thought

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through – rightly or wrongly.'" *Defenders of Wildlife*, 909 F. Supp. at 1351 (*quoting Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983)). A motion for reconsideration "may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). Nor may a motion for reconsideration repeat any argument previously made in support of or in opposition to a motion. *Motorola, Inc. v. J.B. Rodgers Mech. Contractors, Inc.*, 215 F.R.D. 581, 586 (D. Ariz. 2003). Mere disagreement with a previous order is an insufficient basis for reconsideration. *See Leong v. Hilton Hotels Corp.*, 689 F. Supp. 1572, 1573 (D. Haw. 1988).

First, neither the Supreme Court nor the Ninth Circuit Court of Appeals has permitted a pro se habeas petitioner to seek habeas relief on behalf of a class of prisoners. Moreover, nothing in the Rules Governing Section 2254 Proceedings, foll. 28 U.S.C. § 2254, authorizes a habeas petitioner to act as a class representative on behalf of other prisoners. But even if Petitioner can, in theory, seek habeas relief on behalf of a class, he cannot adequately represent the interests of the putative class because he is proceeding pro se. Under Rule 23(a)(4) of the Federal Rules of Civil Procedure, "One or more members of a class may sue . . . as representative parties on behalf of all members only if . . . the representative parties will fairly and adequately protect the interests of the class." A pro se litigant may not litigate claims on behalf of others and may not pursue claims as a class action representative. *Johns v. County of San Diego*, 114 F.3d 874, 877 (9th Cir. 1997); *C.E. Pope Equity Trust v. United States*, 818 F.2d 696, 697 (9th Cir. 1987) (while a non-attorney may appear pro se on his own behalf, "[h]e has no authority to appear as an attorney for others than himself"); *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978) (the named representative of a class action "must appear able to prosecute the action vigorously through qualified counsel"); *McShane v. United States*, 366 F.2d 286, 288 (9th Cir. 1966) (non-lawyer had no authority to appear as an attorney for other persons in a purported class action); *accord Smith v. Schwarzenegger*, 393 Fed.

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App'x 518, 519 (9th Cir. 2010). "This rule is an outgrowth not only of the belief that a layman, untutored in the law, cannot 'adequately represent' the interests of the members of the 'class,' but also out of the long-standing general prohibition against even attorneys acting as both class representative and counsel for the class." *Huddleston v. Duckworth*, 97 F.R.D. 512, 514 (N.D. Ind. 1983).

Because Petitioner cannot act as a class representative, his arguments and factual assertions concerning the grounds for relief he purports to raise on behalf of a class are irrelevant, and neither the Court nor Magistrate Judge Fine erred in declining to consider the extraneous assertions in Petitioner's Motion to Expedite and Supplemental Authority. The Court finds no basis to reconsider the September 26, 2019 Order or to vacate Magistrate Judge Fine's October 2, 2019 Order. Thus, the Court will deny Petitioner's Motion for Reconsideration.

IT IS ORDERED:

(1) The reference to the Magistrate Judge is **withdrawn** as to Petitioner's Motion for Reconsideration (Doc. 12). All other matters in this action remain with the Magistrate Judge for disposition as appropriate.

(2) Petitioner's Motion for Reconsideration (Doc. 12) is **denied.**

Dated this 18th day of October, 2019.

Dominic W. Lanza
United States District Judge

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 23 2020

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

In re: ALEKSYS LOMELI-GARCIA.

No. 20-70106

D.C. No.
3:19-cv-08199-DWL-DMF
District of Arizona,
Prescott

ALEKSYS LOMELI-GARCIA,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, PHOENIX,

Respondent,

DAVID SHINN, Director; ATTORNEY GENERAL FOR THE STATE OF ARIZONA,

Real Parties in Interest.

ORDER

Before: PAEZ, M. SMITH, and N.R. SMITH, Circuit Judges.

Petitioner has not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus. *See Bauman v. U.S. Dist. Court*, 557 F.2d 650 (9th Cir. 1977). Accordingly, the petition is denied.

Petitioner's motions to proceed in forma pauperis (Docket Entry Nos. 2 and 3) are denied as moot.

DENIED.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 14 2020

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

In re: ALEKSYS LOMELI-GARCIA.

ALEKSYS LOMELI-GARCIA,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, PHOENIX,

Respondent,

DAVID SHINN, Director; ATTORNEY GENERAL FOR THE STATE OF ARIZONA,

Real Parties in Interest.

No. 20-70106

D.C. No.
3:19-cv-08199-DWL-DMF
District of Arizona,
Prescott

ORDER

Before: PAEZ, M. SMITH, and N.R. SMITH, Circuit Judges.

Petitioner has filed a combined motion for reconsideration and motion for reconsideration en banc (Docket Entry No. 5).

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

No further filings will be entertained in this closed case.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Aleksys Lomeli-Garcia,

Petitioner,

v.

David Shinn, et al.,

Respondents.

No. CV-19-08199-PCT-DWL (DMF)

REPORT AND RECOMMENDATION RE: PETITION (DOC. 1) AND MOTION TO SUPPLEMENT (DOC. 19)

TO THE HONORABLE DOMINIC W. LANZA, UNITED STATES DISTRICT JUDGE:

This matter is on referral to the undersigned Magistrate Judge pursuant to Rules 72.1 and 72.2 of the Local Rules of Civil Procedure for further proceedings and a report and recommendation. (Doc. 6) On July 10, 2019[1], Petitioner Aleksys Lomeli-Garcia ("Petitioner"), who is confined in the Arizona State Prison Safford Tonto Unit in Safford, Arizona, filed a *pro se* Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a Person in State Custody (Non-Death Penalty) ("Petition"). (Doc. 1)[2] Petitioner also filed

[1] The Petition was docketed by the Clerk of Court on July 10, 2019. (Doc. 1 at 1) Petitioner signed the Petition on June 28, 2019, but instead of placing the Petition in the prison mailing system, declared that the Petition would be "filed on my behalf with my permission by my mother Mrs. Garcia." (Doc. 1 at 11) Accordingly, the Court will use the date the Petition was filed on Petitioner's behalf, which was July 10, 2019.

[2] Citation to the record indicates documents as displayed in the official Court electronic document filing system maintained by the District of Arizona under Case No. CV-19-08199-PCT-DWL (DMF).

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a motion to stay and abey and to supplement (Doc. 3), which is addressed in a separate Report and Recommendation. On November 5, 2019, Respondents filed a Limited Answer to the Petition (Doc. 16) as well as a Response to Petitioner's Motion for Stay and Abeyance and to Supplement/Amend Habeas Petition (Doc. 15). On January 8, 2020, Petitioner filed a reply to Respondents' Limited Answer, which he labeled a Traverse, combined with his reply in support of his motion for stay and abeyance. (Doc. 20)

Also pending is Petitioner's "Untimely Motion to Supplement 7/10/19 Ground Four and Amend Doc. #2 Exh. F with New Exh. F and Substantive Innocence Claim," filed on January 8, 2020. (Doc. 19) Respondents have filed a response (Doc. 21), and Petitioner has filed his reply (Doc. 22).

For the reasons set forth below, the undersigned Magistrate Judge recommends that this Court dismiss the Petition with prejudice as untimely and deny a certificate of appealability. Due to the untimeliness of the Petition, undersigned also recommends the Court deny Petitioner's "Untimely Motion to Supplement 7/10/19 Ground Four and Amend Doc. #2 Exh. F With New Exh. F and Substantive Innocence Claim" (Doc. 19) as futile. As indicated above, the motion to stay and abey and to supplement (Doc. 3) is addressed in a separate Report and Recommendation.

I. BACKGROUND

A. Indictment and Plea Agreement

On May 3, 2011, a Navajo County Grand Jury indicted Petitioner on two charges of first degree murder, two charges of first degree felony murder, one count of burglary in the first degree, two counts of theft of means of transportation, one count of theft, one count of hindering prosecution in the first degree, two counts of conspiracy to commit first degree murder, one count of conspiracy to commit second degree murder, and one count of conspiracy to commit theft. (Doc. 16-1 at 3-9)

On August 19, 2011, Petitioner entered into a plea agreement and agreed to plead guilty to Counts 1 and 2 each for first degree murder, to Count 5 for burglary in the first degree, and to Count 8 for theft of property having a value of $25,000.00 or more. (*Id.* at

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17) The agreement specified that Petitioner would receive a lifetime prison sentence on each of his first degree murder convictions "where he could be eligible for release after serving 25 calendar years (day for day) for each conviction." (*Id.* at 17-18) The agreement provided that whether these sentences would run concurrently or consecutively would be up to the sentencing court's discretion. (*Id.* at 18) It further provided that "all remaining terms and conditions of sentencing for each of defendant's convictions would be left to the court's discretion." (*Id.*) The agreement reiterated that Petitioner's sentences for the two first degree murder counts could be 50 calendar years if his murder counts were imposed to run consecutively. (*Id.* at 19) Petitioner initialed the terms and conditions of the plea agreement and attested that he had read and approved each term and condition. (*Id.* at 21) Under Paragraph 6, Petitioner agreed that by entering the plea agreement he waived and gave up the right to a direct appeal. (*Id.* at 20) By consenting to Paragraph 12 of the agreement, Petitioner agreed that among other rights, he was waiving and giving up the right to the finding by a jury of sentence enhancement factors or aggravating factors for the purposes of sentencing. (*Id.* at 21) The superior court's change of plea minute entry documents that the court advised Petitioner "of all the constitutional rights to a trial and an appeal, which [Petitioner] has and gives up by pleading guilty." (*Id.* at 24)

In Petitioner's sentencing memorandum, as a mitigating factor, defense counsel explained that Petitioner said he had used LSD, Spice, Bath Salts, Methamphetamine, and other drugs on a "drug fueled run" during the days prior to the murders and that Petitioner "was most likely in a drug induced psychosis when the crime was committed." (*Id.* at 54) While acknowledging that the murders committed by Petitioner and his co-defendant were brutal, heinous, and shocking, defense counsel emphasized that the synthetic drugs Petitioner had used, that is, Spice and/or bath salts, were "legal and easy to get at one point" and often caused "seemingly normal people [to engage] in brutal and bizarre behaviors." (*Id.* at 53-54, 56-57)

On July 13, 2012, the superior court sentenced Petitioner on Count 1 (First Degree Murder) to a term of life imprisonment, with the possibility of parole after 25 calendar

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years, day for day. (*Id.* at 166) The court determined that this sentence would run concurrent with the sentences imposed in Count 5 (Burglary in the First Degree) and in Count 8 (Theft of Property Having a Value of $25,000.00 or More). (*Id.*) On the Count 2 charge of First Degree Murder, Petitioner was sentenced to a second sentence of life imprisonment, with the possibility of parole after 25 calendar years, day for day. (*Id.* at 167) This sentence was made to run consecutive to the sentence in Count 1. (*Id.*) The court sentenced Petitioner to an aggravated sentence of 10 years imprisonment on Count 5, to run concurrent to the sentences in Counts 1 and 8. (*Id.* at 160) On Count 8, the court sentenced Petitioner to an aggravated term of 10 years imprisonment, to run concurrent to the sentences in Counts 1 and 5. On the date of Petitioner's sentencing, the superior court provided to Petitioner, and Petitioner signed for, a notice of rights of review. (*Id.*) The right to appeal section instructed Petitioner that he did not have a right to direct appeal because he had pleaded guilty, and that he could seek review by means of a petition for post-conviction relief. (*Id.* at 155) The notice clearly informed Petitioner that he "must file a NOTICE OF POST-CONVICTION RELIEF (Form 24(b), Arizona Rules of Criminal Procedure) within 90 days of the entry of judgment and sentence if you do not file, or you do not have the right to file, a Notice of Appeal." (*Id.* (emphasis in original)) The notice further advised Petitioner that if he failed to file a Notice of Post-Conviction Relief, he "may never have another opportunity to have any errors made in [his] case corrected." (*Id.*) This notice also informed Petitioner that he could obtain the Form 24(b) from his counsel, the clerk of the superior court, or from the jail or prison, and that the notice had to arrive at the clerk's office "within 90 days after you were sentenced." (*Id.*)

B. Post-Conviction Relief ("PCR") Proceedings

As noted above, Petitioner was sentenced on July 13, 2012. (Doc. 16-1 at 165-171) Petitioner failed to file a notice of post-conviction relief ("PCR notice") within the 90-day period allowed. Instead, Petitioner filed a "notice of appeal from superior court" on July 13, 2013, one year after he was sentenced. (Doc. 16-1 at 174) In August 2013, the Arizona Court of Appeals dismissed the appeal, stating it lacked jurisdiction. (*Id.* at 188) The court

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of appeals advised Petitioner that if he wished to seek review of his conviction or sentence, he must proceed under Rule 32, Arizona Rules of Criminal Procedure. (*Id.*) The superior court then filed an order concluding that because Petitioner had entered a guilty plea, he was not able to take a direct appeal. (*Id.* at 196) Alternatively, the superior ruled that if Petitioner intended the notice of appeal to serve as a PCR notice, the PCR notice was untimely, thus, dismissed. (*Id.*)

C. Petitioner's Habeas Claims

Petitioner raises four grounds for relief. In Ground One, Petitioner alleges that his access to the courts was "obstructed" and "denied" with respect to his right to "exercis[e]" his state-court direct appeal and his right to effectively petition this Court in a timely manner. (Doc. 1 at 6) In Ground Two, Petitioner alleges that his Sixth and Fourteenth Amendment rights to timely and adequate notice of the State's "accusation" and its "full potential punishment ingredient" were violated, which divested and constitutionally restricted the state court's subject matter jurisdiction concerning the enhanced sentencing statutes. (*Id.* at 7) In Ground Three, Petitioner asserts he received ineffective assistance of counsel, which caused Petitioner to accept a plea agreement he otherwise would have rejected. (*Id.* at 8) In Ground Four, Petitioner claims he was denied a meaningful opportunity to present a complete defense. (*Id.* at 9)

II. APPLICABLE LEGAL STANDARD

A. AEDPA's Statute of Limitations

A threshold issue for the Court is whether the habeas petition is time-barred by the statute of limitations. The time-bar issue must be resolved before considering other procedural issues or the merits of any habeas claim. *See White v. Klitzkie*, 281 F.3d 920, 921-22 (9th Cir. 2002). The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs Petitioner's habeas petition because he filed it after April 24, 1996, the effective date of AEDPA. *Patterson v. Stewart*, 251 F.3d 1243 (9th Cir. 2001) (citing *Smith v. Robbins*, 528 U.S. 259, 267 n.3 (2000)).

Under AEDPA, a state prisoner seeking federal habeas relief from a state court

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conviction is required to file the petition within one year of "the date on which the 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). If a defendant is convicted pursuant to a guilty plea in the Arizona state courts, the first post-conviction proceeding is considered a form of direct review and the conviction becomes "final" for purposes of Section 2244(d)(1)(A) when the Rule 32 of right proceeding concludes or the time for filing such expires. *Summers v. Schriro*, 481 F.3d 710, 711 (9th Cir. 2007) (conviction pursuant to plea agreement is final on expiration of the time for seeking Rule 32 relief).

III. ANALYSIS

A. Start Date for the AEDPA Limitations Period

Under AEDPA, there are four possible starting dates for the beginning of the statute of limitations period:

> (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.

28 U.S.C. § 2244(d)(1).

As discussed above, Petitioner pleaded guilty, waiving his right to a direct appeal. After Petitioner's sentencing on July 13, 2012 (Doc. 16-1 at 157), he had 90 days to file his of-right PCR notice with the superior court. Ariz. R. Crim. P. 32.4(a)(2)(C). Petitioner's deadline to file a PCR notice with the superior court was October 11, 2012.[3]

[3] If one adds five days pursuant to Arizona Rule of Criminal Procedure 1.3(a) for mailing, Petitioner's deadline to file a PCR notice with the superior court would have been October

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Petitioner concedes that he did not file a PCR notice on or before this deadline.

Accordingly, for purposes of section 2244(d)(1)(A), AEDPA's one-year statute of limitations began to run on October 12, 2012, the day after the deadline for filing a PCR notice with the superior court expired. Thus, absent any tolling, Petitioner was required to file a federal habeas petition on or before October 11, 2013. *See Patterson v. Stewart*, 251 F.3d 1243, 1247 (9th Cir. 2001) ("Excluding the day on which [the prisoner's] petition was denied by the Supreme Court, as required by Rule 6(a)'s 'anniversary method,' [AEDPA's] one-year grace period began to run on June 20, 1997 and expired one year later, on June 19, 1998 ... ."). Petitioner did not file the Petition until July 10, 2019, making the filing of the Petition untimely by approximately 5 years and nine months.

As discussed above, the Petition is untimely under the starting date identified by section 2244(d)(1)(A). Petitioner, however, contends that he is entitled to a later initiation of AEDPA's limitations period under each of § 2244(d)(1)(B), (C), and (D). (Doc. 2 at 15-18)

In Ground One, Petitioner contends that the State of Arizona prevented him from filing a timely § 2254 habeas petition because of inadequate legal resources available to him as an inmate subsequent to Arizona Department of Corrections ("ADOC") Departmental Order 902 ("D.O. 902"). (Doc. 1 at 6) In his reply, Petitioner states that his Ground One argument demonstrates that his Petition was timely pursuant to §

16, 2012. Ariz. R. Crim. P. 1.3(a) provides that "[w]henever a party has the right or is required to take some action within a prescribed period after service of a notice or other paper and the notice or paper is served by a method authorized by Rule 5(c)(2)(C) or (D), Arizona Rules of Civil Procedure, five calendar days shall be added to the prescribed period." Arizona courts have broadly applied the rule expanding time limits by five days after service by mail. *See, e.g., State v. Rabun*, 782 P.2d 737 (Ariz. 1989) (applying Rule 1.3(a) to Rule 31.3 deadline for notices of appeal); *State v. Savage*, 573 P.2d 1388 (Ariz. 1978) (applying Rule 1.3(a) to Rule 32.9(c) deadline for petition for review from denial of motion for rehearing in PCR proceeding); and *State v. Zuniga*, 786 P.2d 956 (Ariz. 1990) (holding that when parties first receive notice of a trial court's order by mail, Rule 1.3 extends the time to file an appeal of the order by five days, commencing from the date the clerk mails the order to the parties). Application of the five day mailing rule does not affect the outcome in this matter.

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2244(d)(1)(B). (Doc. 20 at 29) Petitioner declares that D.O. 902 "noticed him that the prison paralegal would not provide him with procedural or substantive law legal advice" and asserts that he was unaware of any jailhouse lawyer "whom he could trust, that were properly trained, or that would not try to extort him." (Doc. 2 at 11)

Petitioner states that he "overcame" the state imposed impediment as to Grounds One, Two, and 3(A) on or about January 10, 2019, and as to Grounds 3(B) and Four on or about June 1, 2019, but he does not explain what occurred on those dates to remove the alleged impediment as to these grounds. (Doc. 3 at 2) Moreover, Petitioner does not detail any diligent efforts he made after the start of AEDPA's October 12, 2012, one-year statute of limitations period until 2019 to try to overcome the obstacles he alleges the ADOC policy created to filing the Petition in this case. *See Mutab v. Ryan*, No. CV-07-1415-PHX-DGC (CRP), 2009 WL 4282280, at *2 (D. Ariz. Nov. 25, 2009). ("Because Mutab has presented no evidence showing that he took advantage of paralegal assistance provided by the ADOC, he has failed to show that the implementation of D.O. 902 caused his untimeliness. *See Bryant v. Arizona Atty. Gen.*, 499 F.3d 1056, 1061 (9th Cir. 2007).") Accordingly, Petitioner fails to demonstrate that ADOC administration of D.O. 902 caused his untimeliness in filing the Petition.

Petitioner asserts that § 2244(d)(1)(C) applies to define a commencement date for one or more grounds of the Petition. (Doc. 20 at 29-30) However, Petitioner does not identify any newly-recognized constitutional right initially recognized by the United States Supreme Court and made retroactively applicable to cases on collateral review to support a later commencement date for running of the AEDPA one-year statute of limitations as to any of his grounds as is required by this subsection. 28 U.S.C. § 2244(d)(1)(C).

Petitioner further contends that § 2244(d)(1)(D) applies to commence AEDPA's statute of limitations because he was unaware of "the legal basis for his ground[s]" or of the "legal relevancy" of the facts in his case. (Doc. 2 at 17) Petitioner states that § 2244(d)(1)(D) should apply to his Grounds Three and Four based on "new scientific evidence" he was made aware of in 2019 demonstrating that the bath salts Petitioner had

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been ingesting during the days prior to the double murder could cause severe psychotic behavior. (Doc. 2 at 17-18, Doc. 2-6 at 2-94, Doc. 2-7 at 1-114) This evidence, however, was not new, but rather cumulative to evidence supplied at the time of Petitioner's sentencing. *See Lee v. Lampert*, 653 F.3d 929, 944 (9th Cir. 2011) (finding a police report was not new evidence for purposes of a *Schlup* claim because the contents of the police report had been presented to the jury at trial).

In Petitioner's sentencing memorandum, defense counsel discussed Petitioner had been "using Spice/Bath Salts, LSD, Methamphetamine and other drugs for days before and the night of the murders . . . and was most likely in a drug induced psychosis when the crime was committed." (Doc. 16-1 at 54) The sentencing memorandum went on to focus specifically on the possible effect of use of Spice or Bath Salts:

> Especially revealing is his reported use of the synthetic chemicals Spice/Bath Salts. As reported in countless news articles, the use of these chemicals often causes violent and bizarre behaviors and the individuals described having out of body experiences. (See articles attached as Exhibit I) [Petitioner], in his interview with me and the psychologist, indicated that he had an out of body experience and that the crimes do not seem real. These statements are consistent with the use of Spice and/or Bath Salts. The articles explain how a seemingly reasonably normal kid ends up involved in a brutal double homicide. This is also confirmed by Medical Addiction Specialist, Dr. Michael Sucher. (See letter and CV attached as Exhibit 2)

(*Id.*) Because the record indicates that Petitioner and his defense counsel were aware of the factual predicate of Grounds Three and Four, the identification of additional, cumulative evidence supplied with the Petition does not establish grounds for application of § 2244(d)(1)(D) to alter the commencement of AEDPA's statute of limitations period.

B. Statutory Tolling

AEDPA provides for tolling of the limitations period when a "properly filed application for State post-conviction or other collateral relief with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). A state post-conviction relief ("PCR") petition not filed within the state's required time limit, however, is not "properly filed," and the petitioner is not entitled to statutory tolling during those proceedings. *Pace*

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v. DiGuglielmo, 544 U.S. 408, 414 (2005) ("When a post-conviction petition is untimely under state law, 'that [is] the end of the matter' for purposes of § 2244(d)(2)."); *Allen v. Siebert*, 552 U.S. 3, 6 (2007) (finding that inmate's untimely state post-conviction petition was not "properly filed" under AEDPA's tolling provision, and reiterating its holding in *Pace*, 544 U.S. at 414). 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). 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).

Here, Petitioner did not file a timely PCR notice. Rather, Petitioner filed a "notice of appeal from superior court" on July 13, 2013, one year after he was sentenced. (Doc. 16-1 at 174) In August 2013, the Arizona Court of Appeals dismissed the appeal, stating it lacked jurisdiction. (*Id.* at 188) The court of appeals advised Petitioner that if he wished to seek review of his conviction or sentence, he must proceed under Rule 32, Arizona Rules of Criminal Procedure. (*Id.*) Shortly thereafter, on August 29, 2013, the superior court filed an order concluding that because Petitioner had entered a guilty plea, he was not able to take a direct appeal. (*Id.* at 196) The superior court alternatively ruled that "if [Petitioner] intended his Notice of Appeal to be a Notice of Post-Conviction Relief, it is dismissed because it is untimely." (*Id.*)

Thus, Petitioner's July 13, 2013, untimely notice was not properly filed and did not statutorily toll time for filing a federal habeas petition.

C. Equitable Tolling

The U.S. Supreme Court has held "that § 2244(d) is subject to equitable tolling in appropriate cases." *Holland v. Florida*, 560 U.S. 631, 645 (2010). AEDPA's limitations period may be equitably tolled because it is a statute of limitations, not a jurisdictional bar. *Id.* at 645-46. It is 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

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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.").

The Ninth Circuit Court of Appeals "will permit equitable tolling of AEDPA's limitations period 'only if extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time.'" *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999) (*quoting Calderon v. U.S. Dist. Ct.*, 163 F.3d 530, 541 (9th Cir. 1998) (en banc), *abrogated on other grounds by Woodford v. Garceau*, 538 U.S. 202 (2003) (citations omitted)). Put another way, for equitable tolling to apply, Petitioner must show "(1) that he has been pursuing his rights diligently and (2) that some extraordinary circumstances stood in his way" to prevent him from timely filing a federal habeas petition. *Holland*, 560 U.S. at 649 (quoting *Pace*, 544 U.S. at 418). "The diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence." *Id.* at 653 (internal citations and quotations omitted). Whether to apply the doctrine of equitable tolling "'is highly fact-dependent,' and [the petitioner] 'bears the burden of showing that equitable tolling is appropriate.'" *Espinoza-Matthews v. California*, 432 F.3d 1021, 1026 (9th Cir. 2005) (internal citations omitted); *see also Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002) (stating that equitable tolling is "unavailable in most cases," and "the threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the exceptions swallow the rule") (citations and internal emphasis omitted).

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*, 448 F.3d at 1154 ("[A] *pro se* petitioner's lack of legal sophistication is not, by itself, an extraordinary circumstance warranting equitable tolling."); *see also Ballesteros v. Schriro*, CIV 06-675-PHX-EHC (MEA), 2007 WL 666927, at *5 (D. Ariz. Feb. 26, 2007) (a petitioner's *pro se* status, ignorance of the law, lack of representation during the applicable filing period, and temporary incapacity do not constitute extraordinary circumstances). A prisoner's "proceeding *pro se* is not a 'rare and exceptional' circumstance because it is typical of

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those bringing a § 2254 claim." *Felder v. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000).

After reviewing the record, undersigned concludes that neither the Petition nor the record sets forth grounds that justify equitable tolling. Petitioner does not contend that equitable tolling applies, or explain how it applies in his case, but merely concludes that his "application of 2244(d)(1)(B-D) to his case is perfectly consistent with Ninth Circuit law, [*Souliotes v. Evans*, 622 F.3d 1173 (9th Cir. 2010), *opinion vacated*, *Souliotes v. Evans*, 654 F.3d 902 (9th Cir. 2011)] and that court's equitable tolling principles[.]" (Doc. 20 at 30) He concludes that his Petition "is so obviously timely under 28 U.S.C. § 2244(d)(1)(B-D) . . . that it would be plain error for any Court, respectfully, to hold otherwise." (*Id.*) Petitioner has not met his burden of showing either that he has been pursuing his rights diligently or that some extraordinary circumstances made it impossible for him to file a timely petition for habeas corpus. Accordingly, equitable tolling is unavailable.

D. Actual Innocence Excuse for Untimeliness

If a district court finds that a federal habeas petition is untimely, the untimeliness may be excused in rare instances by an equitable exception to AEDPA's statute of limitations. In *McQuiggin v. Perkins*, 569 U.S. 383, 391-396 (2013), the Supreme Court held that the "actual innocence gateway" to federal habeas review that applies 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.

To pass through the actual innocence/*Schlup* gateway, a petitioner 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 Lampert*, 653 F.3d at 945; *McQuiggin*, 569 U.S. at 399 (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

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him in the light of the new evidence." *Id.* (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).

Petitioner contends that he is innocent of the murders and related crimes on which he was convicted because he did not voluntarily inhale the "secret" components of Spice and bath salts, which unknown to him could cause homicidal psychoses. (Doc. 20 at 25) Petitioner declares that these designer drugs were not illegal in Arizona at the time of the double murders. (Doc. 20 at 24) He contends that his reports of having used at the time of his crimes illegal drugs such as methamphetamine and marijuana were misinterpreted because when he reported having used "marijuana," "pot," "weed," and "meth," he was actually using street names referring only to legal Spice or legal bath salts. (*Id.* at 25)

Petitioner's defense counsel attached to Petitioner's sentencing memorandum numerous news articles detailing occurrences of bizarre, violent, and gruesome behavior by persons under the influence of Spice or bath salts. (Doc. 16-1 at 60-75) Also attached was a statement of a physician specializing in addiction medicine who opined on the violent and psychotic behavior often produced after ingestion of Spice, a synthetic cannabinoid. (*Id.* at 78-79)

Petitioner does not demonstrate how the evidence he supplies with his Petition is "new evidence" for purposes of a claim of actual innocence rather than cumulative to the same type of evidence his defense counsel presented at the time of his plea agreement and sentencing. *See Lampert*, 653 F.3d at 944. Additionally, Petitioner does not establish that he was unable to discover this new evidence prior to 2019. Further, as detailed in Petitioner's sentencing memorandum, the evidence at the time of Petitioner's guilty plea and sentencing was that Petitioner admitted to being under the influence of not only bath salts and/or Spice, but also "LSD, Methamphetamine and other drugs" during a "drug fueled run for a few days prior to and at the time of this crime and was most likely in a drug induced psychosis when the crime was committed." (*Id.* at 54)

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Under all of the circumstances discussed above, Petitioner has not met his burden for the actual innocence/*Schlup* gateway to excuse the Petition's untimeliness.

E. The Petition is Untimely

Because Petitioner filed his Petition years after the one-year statute of limitations had run pursuant to § 2244(d)(1) and he fails to establish any basis for statutory or equitable tolling of the limitations period or for the equitable exception for actual innocence, the Petition is untimely. Therefore, the undersigned recommends that the Petition be dismissed with prejudice.

IV. PENDING MOTION AT DOC. 19

Also pending is Petitioner's "Untimely Motion to Supplement 7/10/19 Ground Four and Amend Doc. #2 Exh. F With New Exh. F and Substantive Innocence Claim". (Doc. 19) Petitioner explains that he wishes to amend Ground Four to include the argument that the factual allegations should be considered pursuant to legal standards addressed in *Schlup v. Delo*, *Herrera v. Collins*, 506 U.S. 390 (1993), and *Harris* v. *Vasquez*, 913 F.2d 606 (9th Cir. 1990), such that an actual innocence claim should not be procedurally defaulted. (Doc. 19 at 3-4) Petitioner further states that he has prepared a "winnowed down version" of his Exhibit F to his memorandum of facts and authorities in support of the Petition (Doc. 2), which he hopes would make it easier for the Court to review his Ground Four claim. (Doc. 19 at 2-3)

A petition for habeas corpus may be amended pursuant to the Federal Rules of Civil Procedure. 28 U.S.C. § 2242; *see also* Rule 12, Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254 (providing that the Federal Rules of Civil Procedure may be applied to habeas petitions to the extent they are not inconsistent with the habeas rules). A court looks to Rule 15 of the Federal Rules of Civil Procedure to address a party's motion to amend a pleading in a habeas corpus action. *See James v. Pliler*, 269 F.3d 1124, 1126 (9th Cir. 2001). Under Rule 15(a), leave to amend shall be freely given "when justice so requires." Fed. R. Civ. P. 15(a). Courts must review motions to amend in light of the strong policy permitting amendment. *Gabrielson v. Montgomery Ward & Co.*, 785 F.2d 762, 765 (9th

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Cir. 1986). Factors that may justify denying a motion to amend are undue delay, bad faith or dilatory motive, futility of amendment, undue prejudice to the opposing party, and whether the petitioner has previously amended. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). In addition, "a district court does not abuse its discretion in denying a motion to amend where the movant presents no new facts but only new theories and provides no satisfactory explanation for his failure to fully develop his contentions originally." *Bonin*, 59 F.3d at 845.

The "winnowed down" Exhibit F evidence centers on discussion of synthetic designer drugs used in bath salts and Spice and the effects these drugs have on users. (Doc. 19 at 11-84) This evidence is provided in support of the declaration of Petitioner's "consultant" and fellow inmate, Kent R. Holcomb. (*Id.* at 11-22) With assistance from Mr. Holcomb, Petitioner wishes to argue under Ground Four that the State of Arizona "knowingly caused [Petitioner] to involuntarily suffer a chemically induced criminal psychosis" . . . and that pursuant to A.R.S. §§ 13-201, 13-502, he is innocent of all charges. (*Id.* at 11) Mr. Holcomb declares that the State of Arizona was responsible for Petitioner's crimes because the Arizona Department of Health was aware in 2010 to 2011 of the life-threatening effects of use of these substances but still permitted retailers to sell the substances. (*Id.*) Mr. Holcomb expresses his opinion that when Petitioner reported using weed and meth, which was reflected in Petitioner's presentence documents, Petitioner was actually using street slang referring to legal spice incense as "marijuana," "pot," or "weed," and also referring to legal bath salts as "meth," "glass," and "g." (*Id.* at 12) Mr. Holcomb attests that Petitioner's use of LSD and cocaine could not have induced his murderous psychoses and that at the time of the double murder, Petitioner's psychoses must only have been caused by Petitioner's use of Spice and/or bath salts, and not by illegal drugs. (*Id.* at 16)

As is discussed above, Petitioner reported that he was under the influence of "multiple drugs" at the time of the murders. (Doc. 16-1 at 39) Petitioner reported using methamphetamine for the week prior to the offenses, and smoking spice every day. (*Id.* at

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45) He reported drinking three or four beers the night of the murders. (*Id.*) Petitioner's sentencing memorandum reported that he had used "Spice/Bath Salts, LSD, Methamphetamine and other drugs for days before and the night of the murders." (*Id.* at 54) When Petitioner was evaluated by a clinical psychologist, Petitioner reported that '[a]t the time of his arrest, he was 'seeing trees move,' after taking 'acid' (LSD), 'glass' (methamphetamine), Spice, and 'weed' (cannabis) for several days consecutively. He said that he had been awake for nearly three days after he took his first hit of methamphetamine." (*Id.* at 101) Petitioner reported a history of use of "methamphetamine, LSD, PCP, cocaine, crack cocaine, Ecstasy, prescription pain medications, and Spice at various points in his life" and said his drug of choice was marijuana. (*Id.* at 104) Petitioner's own reports of using a variety of drugs and identifying weed or marijuana in addition to Spice, and using Spice/Bath Salts in addition to methamphetamine clearly contradict Mr. Holcomb's attempt to argue that Petitioner was only under the influence of then-legal substances at the time of the murders.

Petitioner's arguments in favor of amending Ground Four and supplementing Exhibit F to Doc. 2 do not alter the undersigned's conclusion that the Petition is untimely. For all the reasons above, Petitioner's motion to supplement would be futile. Accordingly, the undersigned recommends the Court deny Petitioner's "Untimely Motion to Supplement 7/10/19 Ground Four and Amend Doc. #2 Exh. F With New Exh. F and Substantive Innocence Claim" (Doc. 19).

V. CONCLUSION

Based on the above analysis, undersigned finds the Petition is untimely and recommends that the Petition for Writ of Habeas Corpus (Doc. 1) be dismissed with prejudice. Assuming the recommendations herein are followed in the District Judge's judgment, the District Judge's decision will be on procedural grounds. Under the reasoning set forth herein, reasonable jurists would not find it debatable whether the District Judge was correct in its procedural ruling. Accordingly, to the extent the District Judge adopts this Report and Recommendation regarding the Petition, a certificate of appealability

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should be denied. Further, Petitioner's motion to supplement (Doc. 19) should be denied.

IT IS THEREFORE RECOMMENDED that Aleksys Lomeli-Garcia's Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a Person in State Custody (Non-Death Penalty) (Doc. 1) be dismissed with prejudice.

IT IS FURTHER RECOMMENDED that the Court deny Petitioner's "Untimely Motion to Supplement 7/10/19 Ground Four and Amend Doc. #2 Exh. F With New Exh. F and Substantive Innocence Claim" (Doc. 19).

IT IS FURTHER RECOMMENDED that a Certificate of Appealability be denied because dismissal of the Petition is justified by a plain procedural bar and reasonable jurists 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) of the 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); Fed. R. Civ. P. 6, 72. The parties shall have fourteen days within which to file responses to any 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 determination 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 27th day of March, 2020.

Deborah M. Fine

Honorable Deborah M. Fine
United States Magistrate Judge

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Aleksys Lomeli-Garcia,

Petitioner,

v.

David Shinn, et al.,

Respondents.

No. CV-19-08199-PCT-DWL (DMF)

REPORT AND RECOMMENDATION RE: PETITIONER'S MOTION FOR STAY AND ABEYANCE AND TO SUPPLEMENT/AMEND

TO THE HONORABLE DOMINIC W. LANZA, UNITED STATES DISTRICT JUDGE:

On July 10, 2019,[1] Aleksys Lomeli-Garcia ("Petitioner") filed a pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 ("Petition"). (Doc. 1) On the same date, Petitioner also filed a Motion for Stay and Abeyance and to Supplement/Amend. (Doc. 3) In the motion, Petitioner requests a stay for time to return to state court to exhaust each of the four grounds of the Petition and leave to supplement or amend the Petition with future evidence developed during subsequent exhaustion in state court. (Doc. 3 at 1-5) On September 26, 2019, Respondents were ordered to respond to the motion within forty days of the date of service. (Doc. 6 at 6) Respondents timely filed their response in opposition

[1] The Petition was docketed by the Clerk of Court on July 10, 2019. (Doc. 1 at 1) Petitioner signed the Petition on June 28, 2019, but instead of placing the Petition in the prison mailing system, declared that the Petition would be "filed on my behalf with my permission by my mother Mrs. Garcia." (Doc. 1 at 11) Accordingly, the Court will use the date the Petition was filed on Petitioner's behalf, which was July 10, 2019.

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to the motion on November 5, 2019. (Doc. 15) On the same day, Respondents also filed their response to the Petition. (Doc. 16) Petitioner filed a reply in support of the motion to stay/supplement, combining such with his reply in support of his Petition. (Doc. 20)

This matter is on referral to the undersigned Magistrate Judge pursuant to Rules 72.1 and 72.2 of the Local Rules of Civil Procedure for further proceedings and a report and recommendation (Doc. 6). Petitioner's Motion for Stay and Abeyance and to Supplement/Amend (Doc. 3) is ripe for decision. As set forth below, undersigned recommends that the motion to stay/supplement (Doc. 3) be denied. The Petition is addressed in a separate Report and Recommendation, wherein undersigned recommends the Petition be dismissed with prejudice as untimely.

I. PROCEDURAL HISTORY

Petitioner entered a plea agreement in Navajo County Superior Court and pleaded guilty to two counts of first-degree murder, one count of burglary in the first degree, and one count of theft of property having a value of $25,000.00 or more. (Doc. 16-1 at 17)

Petitioner raises four grounds for relief in the Petition. In Ground One, Petitioner alleges that his access to the courts was "obstructed" and "denied" with respect to his right to "exercis[e]" his state-court direct appeal and his right to effectively petition this Court in a timely manner. (Doc. 1 at 6) In Ground Two, Petitioner alleges that his Sixth and Fourteenth Amendment rights to timely and adequate notice of the State's "accusation" and its "full potential punishment ingredient" were violated, which divested and constitutionally restricted the state court's subject matter jurisdiction concerning the enhanced sentencing statutes. (*Id.* at 7) In Ground Three, Petitioner asserts he received ineffective assistance of counsel, which caused Petitioner to accept a plea agreement he otherwise would have rejected. (*Id.* at 8) In Ground Four, Petitioner claims he was denied a meaningful opportunity to present a complete defense. (*Id.* at 9)

Petitioner requests a stay of these habeas proceedings pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005) and *Calderon v. United States District Court*, 144 F.3d 618 (9th Cir. 1997). (Doc. 3 at 2) Petitioner recognizes that all four of the Petition's grounds for relief

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are unexhausted in state court. (*Id.*) However, Petitioner argues he "discovered" the claims asserted in Grounds One, Two, and 3(A)[2] on January 10, 2019, and "discovered the validity of his Ground 3(B)[3] and Ground Four factual predicates" on or about June 1, 2019. (*Id.*) Petitioner implies that the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") statute of limitations was tolled on his grounds for relief until those two dates.

Respondents argue that a stay is not appropriate because the Petition is untimely, that Petitioner has failed to establish good cause for his failure to exhaust his grounds for relief in state court, and that Petitioner's grounds lack merit. (Doc. 15 at 3-4)

The Petition is addressed in a separate Report and Recommendation, wherein undersigned recommends the Petition be dismissed with prejudice as untimely. As set forth below, undersigned recommends that the motion to stay/supplement (Doc. 3) be denied.

II. APPLICABLE LAW

Under 28 U.S.C. § 2254(b), habeas relief may not be granted unless a petitioner has exhausted the remedies available in state court. Exhaustion requires that the petitioner's contentions were fairly presented to the state courts, *Ybarra v. McDaniel*, 656 F.3d 984, 991 (9th Cir. 2011), and disposed of on the merits by the highest court of the state, *Greene v. Lambert*, 288 F.3d 1081, 1086 (9th Cir. 2002). As a matter of comity, a federal court will not entertain a habeas petition unless the petitioner has exhausted the available state judicial remedies on every ground presented in it. *See Rose v. Lundy*, 455 U.S. 509 (1982) (dismissal of mixed petition containing unexhausted claims is proper); *Sherwood v. Tomkins*, 716 F.2d 632, 634 (9th Cir. 1983) (affirming district court's dismissal of habeas petition for failure to exhaust state remedies where state court appeal was pending).

Petitioner states that his motion to stay and abey his Petition is premised on the Supreme Court case *Rhines v. Weber*. Under *Rhines*, a Court may stay a "mixed" federal

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[2] Petitioner explains that his Ground 3(A) claim alleges ineffective assistance of counsel for failure to raise Petitioner's Ground Two claim.

[3] Petitioner states his Ground 3(B) claim is that counsel was ineffective for failing to raise Petitioner's Ground Four claim.

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petition—one that includes both exhausted and unexhausted claims—while the Petitioner returns to state court to exhaust his unexhausted claims; all claims remain pending in federal court and are protected from any statute-of-limitations issues. *Rhines*, 544 U.S. at 277-78. In *Mena v. Long*, 813 F.3d 907, 912 (9th Cir. 2016), the Ninth Circuit held that a district court has discretion to stay and hold in abeyance fully unexhausted petitions under the circumstances set forth in *Rhines*.

Rhines applies in "limited circumstances." *See* 544 U.S. at 277. For a *Rhines* stay, the petitioner must show (1) good cause for his failure to earlier exhaust the claims in state court, (2) the unexhausted claims are not "plainly meritless," and (3) he has not engaged in "abusive litigation tactics or intentional delay." *Id.* at 277-78. The Supreme Court has not precisely defined what constitutes "good cause" for a *Rhines* stay. *See Blake v. Baker*, 745 F.3d 977, 980-81 (9th Cir. 2014). The Ninth Circuit has found that good cause turns on whether the petitioner can set forth a reasonable excuse, supported by sufficient evidence, to justify the failure to exhaust. *Blake*, 745 F.3d at 982. *See also Dixon v. Baker*, 847 F.3d 714 (9th Cir. 2017).

Significantly, there is no purpose to stay and abey an untimely federal habeas corpus petition in order to exhaust claims in state court because to do so could not cure a petitioner's failure to comply with AEDPA's statute of limitations. *See Jordan v. Ryan*, No. CV 11-0210-PHX-JAT, 2011 WL 4101517, at *4 (D. Ariz. Sept. 14, 2011); *Dang v. Sisto*, No. C 07-3268 SI (pr), 2007 WL 3407419, at *2 (N.D. Cal. Nov. 13, 2007).

III. ANALYSIS

Petitioner requests a stay and abeyance to permit him to return to state court to exhaust his federal habeas claims and also leave to supplement or amend the Petition with future evidence developed during exhaustion in state court. (Doc. 3 at 1) Petitioner first argues that the statutory tolling provisions of 28 U.S.C. § 2244(d)(1)(B) through (D) apply to extend the commencement of the AEDPA one-year statute of limitations to January 2019 or June 2019, depending on the Ground of the Petition. (*Id.* at 2) Based on the assumption that the Petition is timely, Petitioner explains that exhaustion in state court of his four

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grounds for relief will permit him to fully develop evidence supporting those grounds. (*Id.* at 4) Petitioner asserts that once he has exhausted the four grounds raised in the Petition, he intends to supplement or amend the Petition with additional supporting evidence. (*Id.*)

As is explained in the Report and Recommendation regarding the Petition, the Petition was filed over six years after his "judgment became final by the conclusion of direct review or the expiration of the time for seeking such review[.]" 28 U.S.C. § 2242(d)(1)(A). Moreover, for the reasons set forth in the Report and Recommendation regarding the Petition, Petitioner fails to demonstrate: that an alternative commencement of AEDPA's statute of limitations pursuant to § 2242(d)(1)(B) through (D) applies; or that either statutory or equitable tolling is justified; or that he is entitled to the rare equitable exception available when a petitioner shows actual innocence. Accordingly, in the Report and Recommendation regarding the Petition, undersigned recommends the Court find the Petition is untimely and dismiss the Petition with prejudice.

In the Report and Recommendation regarding the Petition, the undersigned concludes that Petitioner fails to demonstrate that he was diligent in attempting to overcome the obstacle he alleges was imposed by the Arizona Department of Corrections in its administration of Departmental Order 902. Moreover, undersigned finds that the "new" evidence Petitioner seeks to introduce to attempt to establish his legal innocence of the convicted crimes is cumulative to evidence his defense introduced at the time of his plea agreement and sentencing. These circumstances also support a finding that Petitioner has not demonstrated good cause for his failure to exhaust his grounds for relief first in state court.

Because the undersigned concludes that the Petition is untimely under AEDPA, a stay and abeyance would be futile because Petitioner is unable to cure his failure to comply with AEDPA's statute of limitations. *Jordan v. Ryan*, 2011 WL 4101517, at *4 ("Furthermore, the Petition in this case was untimely, and the granting of Petitioner's motion for stay and abeyance would not overcome his failure to meet the statute of limitations."); *Dang v. Sisto*, No. C 07-3268 SI (pr), 2007 WL 3407419, at *2 (N.D. Cal.

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Nov. 13, 2007) ("If the petition is already untimely-as discussed in the preceding section-there is no reason to stay and hold the matter in abeyance for the exhaustion of state court remedies as to additional claims because they too would be untimely.").

Moreover, because the Petition is untimely and a return to state court would be futile, there is no basis for Petitioner's request for leave to supplement or amend the Petition with "future" evidence developed during exhaustion in state court.

Accordingly,

IT IS THEREFORE RECOMMENDED that Petitioner's Motion for Stay and Abeyance and to Supplement/Amend (Doc. 3) be denied.

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) of the 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); Fed. R. Civ. P. 6, 72. The parties shall have fourteen days within which to file responses to any 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 determination 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 26th day of March, 2020.

Deborah M. Fine

Honorable Deborah M. Fine
United States Magistrate Judge

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App. #4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Aleksys Lomeli-Garcia, Petitioner, v. Charles L Ryan, et al., Respondents.	No. CV-19-08199-PCT-DWL **ORDER**

On July 10, 2019, Petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 ("the Petition"). (Doc. 1.) That same day, Petitioner filed a motion entitled "Hybrid Motion for Stay and Abeyance and to Supplement/Amend Habeas Pet." ("Motion to Stay/Abey"). (Doc. 3.) And while the Petition and the Motion to Stay/Abey were pending, Petitioner filed another motion entitled "Untimely Motion to Supplement . . . Ground Four and Amend Doc. #2 . . . And Substa[n]tive Innocence Claim" ("Motion to Supplement/Amend"). (Doc. 19.)

On March 27, 2020, Magistrate Judge Fine issued a pair of Reports and Recommendations ("R&Rs"). In one of the R&Rs, Judge Fine recommends that the Petition be dismissed with prejudice and the Motion to Supplement/Amend be denied. (Doc. 24.) In the other R&R, Judge Fine recommends that the Motion to Stay/Abey be denied. (Doc. 23.) Afterward, Petitioner filed combined objections to the R&Rs (Doc. 27) and Respondents filed a response (Doc. 28).

For the following reasons, the Court will overrule Petitioner's objections to the

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R&Rs, dismiss the Petition with prejudice, deny Petitioner's two pending motions, and terminate this action.

I. Background

The Guilty Plea And Sentencing. In May 2011, Petitioner was indicted on various counts of murder, burglary, and associated crimes. (Doc. 24 at 2.)

In August 2011, Petitioner entered into a plea agreement. (*Id.* at 2-3.) In it, he pleaded guilty to two counts of first-degree murder, one count of burglary, and one count of theft of means of transportation. (*Id.*) "The agreement specified that Petitioner would receive a lifetime prison sentence on each of his first degree murder convictions 'where he could be eligible for release after serving 25 calendar years (day for day) for each conviction.' The agreement provided that whether these sentences would run concurrently or consecutively would be up to the sentencing court's discretion . . . [and] reiterated that Petitioner's sentences for the two first degree murder counts could be 50 calendar years if his murder counts were imposed to run consecutively." (*Id.* at 3, citations omitted.)

Before sentencing, Petitioner's counsel filed a memorandum stating that Petitioner had used LSD, spice, methamphetamine, and other drugs in the days preceding the murders and "was most likely in a drug induced psychosis" at the time of the murders. (*Id.*)

In July 2012, sentencing took place. (*Id.* at 3-4.) The trial court ordered the two sentences for the murder counts to run consecutively and ordered the remaining sentences to run concurrently. (*Id.* at 4.) The trial court also provided Petitioner with a "notice of rights" form, which stated that Petitioner "did not have a right to direct appeal because he had pleaded guilty, [but] he could seek review by means of a petition for post-conviction relief" ("PCR") (*Id.*) This form also "clearly informed" Petitioner that any PCR notice was due within 90 days of entry of judgment and sentence if he did not file a notice of appeal. (*Id.*)

The State-Court Appellate Proceedings. In July 2013—one year after sentencing—Petitioner filed a notice of appeal. (*Id.* at 4.)

In August 2013, the Arizona Court of Appeals dismissed the appeal based on a lack

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of jurisdiction. (*Id.* at 4-5.) The court explained that (1) because Petitioner had pleaded guilty, he was unable to pursue a direct appeal, and (2) to the extent Petitioner intended his notice of appeal to serve as a PCR notice, it was untimely. (*Id.*)

The Petition. In July 2019—more than five years after the last activity in state court—Petitioner filed the Petition. (Doc. 1.) It raises four grounds for relief: (1) Petitioner's "access to the courts was 'obstructed' and 'denied' with respect to his right to 'exercis[e]' his state-court direct appeal and his right to effectively petition this Court in a timely manner"; (2) Petitioner's "Sixth and Fourteenth Amendment rights to timely and adequate notice of the State's 'accusation' and its 'full potential punishment ingredient' were violated, which divested and constitutionally restricted the state court's subject matter jurisdiction concerning the enhanced sentencing statutes"; (3) ineffective assistance of counsel ("IAC"), which "caused Petitioner to accept a plea agreement he otherwise would have rejected"; and (4) denial of the "opportunity to present a complete defense." (Doc. 24 at 5, citations omitted.)

II. Legal Standard

A party may file written objections to an R&R within fourteen days of being served with a copy of it. Rules Governing Section 2254 Cases 8(b) ("Section 2254 Rules"). Those objections must be "specific." *See* Fed. R. Civ. P. 72(b)(2) ("Within 14 days after being served with a copy of the recommended disposition, a party may serve and file *specific* written objections to the proposed findings and recommendations.") (emphasis added).

District courts are not required to review any portion of an R&R to which no specific objection has been made. *See, e.g., Thomas v. Arn*, 474 U.S. 140, 149-50 (1985) ("It does not appear that Congress intended to require district court review of a magistrate's factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings."); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) ("[T]he district judge must review the magistrate judge's findings and recommendations de novo if objection is made, but not otherwise."). Thus, district judges need not review an objection to an R&R that is general and non-specific. *See, e.g., Warling v. Ryan*, 2013

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WL 5276367, *2 (D. Ariz. 2013) ("Because de novo review of an entire R & R would defeat the efficiencies intended by Congress, a general objection 'has the same effect as would a failure to object.'") (citations omitted); *Haley v. Stewart*, 2006 WL 1980649, *2 (D. Ariz. 2006) ("[G]eneral objections to an R & R are tantamount to no objection at all.").[1]

III. Analysis

A. **The Petition**

The R&R appearing at Docket No. 24 concludes the Petition should be dismissed with prejudice because it was filed outside AEDPA's statute of limitations. (Doc. 24 at 6-14.) Specifically, the R&R explains that the one-year statute of limitations for Petitioner to file a habeas petition began running on October 12, 2012 (*i.e.*, the 90-day deadline for Petitioner to file a PCR notice after his sentencing hearing), the habeas deadline was therefore October 11, 2013, and the filing of the Petition in mid-2019 came several years too late. (*Id.* at 6-7.) The R&R also considers and rejects various arguments proffered by Petitioner as to why he should be entitled to a later accrual date, including the argument that the Arizona Department of Corrections ("DOC") interfered with his filing efforts. (*Id.* at 7-9.) Finally, the R&R concludes that (1) Petitioner is not entitled to statutory tolling because the "notice of appeal" he filed in July 2013 was untimely under state law (*id.* at 9-10); (2) Petitioner is not entitled to equitable tolling because "Petitioner has not met his burden of showing either that he has been pursuing his rights diligently or that some extraordinary circumstances made it impossible for him to file a timely petition for habeas corpus" (*id.* at 10-12); and (3) Petitioner cannot invoke the "actual innocence" exception for untimeliness because the supposed "new" evidence he proffers (*i.e.*, "he did not voluntarily inhale the 'secret' components of Spice and bath salts, which unknown to him could cause homicidal psychoses") is not actually new, was not unavailable to him before 2019, and does not, in any event, negate the concession in his sentencing memorandum

[1] *See generally* S. Gensler, 2 Federal Rules of Civil Procedure, Rules and Commentary, Rule 72, at 422 (2018) ("A party who wishes to object to a magistrate judge's ruling must make specific and direct objections. General objections that do not direct the district court to the issues in controversy are not sufficient. . . . [T]he objecting party must specifically identify each issue for which he seeks district court review . . . .").

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that he was also under the voluntary influence of other drugs, such as LSD and methamphetamine, at the time of the murders (*id.* at 12-14).

Petitioner's prolix objections to the R&Rs are 30 pages long. (Doc. 27.) With respect to the R&R's conclusion that the Petition should be dismissed on timeliness grounds, Petitioner's objections can be grouped into four broad categories. First, Petitioner argues that the R&R "has errored [sic] by failing to apply or consider the *Carrier* [and] *Perkins* . . . principles for tolling purposes under 28 USC 2244(d)(1)(B)(D)" and that, under those principles, he is entitled to tolling. (*Id.* at 3-5.) Second, Petitioner argues that the R&R applied the "incorrect 2244(d)(1)(B) legal standard." (*Id.* at 5-13.) Third, Petitioner argues that the R&R "fail[ed] to apply correct 2244(d)(1)(D) standard to correct 2019 factual predicates." (*Id.* at 14-23.) Fourth, Petitioner argues that the R&R committed "errors in application of *Holland* [and] *Schlup*." (*Id.* at 23-24.)

These objections lack merit. At bottom, Petitioner is simply attempting to repackage and reassert the same arguments he presented to the magistrate judge. The Court has carefully reviewed the R&R's timeliness analysis, agrees with it in all respects, and adopts it.

B. **The Motion To Supplement/Amend**

The R&R appearing at Docket No. 24 also recommends that Petitioner's Motion to Supplement/Amend be denied. (Doc. 24 at 14-17.) Specifically, the R&R concludes that Petitioner's motion—which seeks to offer additional evidence and argument concerning synthetic designer drugs and their effect on users—is futile because, even if this new information were added, the Petition would remain subject to dismissal due to its untimeliness. (*Id.*)

In his objections, Petitioner argues that (1) the R&R "grossly, and obviously, errors [sic] when it uses fabricated 2012 record facts in an effort to impeach the credibility of [Petitioner's] expert opinion," (2) Respondents have "agreed" that Petitioner's expert's "patient history facts" are true and have further "agreed" that the "2011-2012 fabricated facts" are false, and (3) "[o]nly by attempting to impeach [Petitioner's] expert with false

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facts, that both parties concur are fabricated, can the Magistrate favor the State by attempting to block [Petitioner's] submission of his *Schlup* actual innocence evidence." (Doc. 27 at 26-28.) In response, Respondents clarify that, although "Petitioner repeatedly states throughout his objection . . . that 'both parties have agreed' or 'Ariz. agrees' with Petitioner to certain facts . . . Respondents have entered into no such agreement or concessions." (Doc. 28 at 1 n.1.)

Petitioner's objections to the portion of the R&R recommending the denial of his Motion to Supplement/Amend will be overruled. Even if the proposed materials were added to the record, Petitioner would not be able to overcome the untimeliness of his Petition via an "actual innocence" claim. Thus, the R&R correctly concludes that the Motion to Supplement/Amend should be denied based on futility.

C. **Motion To Stay/Abey**

The R&R appearing at Docket No. 23 recommends that Petitioner's Motion to Stay/Abey be denied. Specifically, the R&R explains that "there is no purpose to stay and abey an untimely federal habeas corpus petition in order to exhaust claims in state court because to do so could not cure a petitioner's failure to comply with AEDPA's statute of limitations." (Doc. 23 at 4.) Thus, given the conclusion in the other R&R that the Petition must be dismissed due to its untimeliness, the R&R concludes that "a stay and abeyance would be futile." (*Id.* at 5.)

In his objections, Petitioner argues that the R&R's analysis of his Motion to Stay/Abey is "tainted" by the "befuddled" analysis in the other R&R and thus objects to that analysis "[f]or the same reasons" that he objects to the other R&R. (Doc. 27 at 28-29.)

This objection will be overruled. As noted, the Court disagrees with Petitioner's contention that the other R&R is flawed and "befuddled." And because Petitioner identifies no other reason why the recommended denial of his Motion to Stay/Abey is incorrect, that recommendation will be accepted.

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Accordingly, **IT IS ORDERED** that:

(1) Petitioner's objections to the R&Rs (Doc. 27) are **overruled**.

(2) The R&Rs (Docs. 23, 24) are **accepted**.

(3) The Petition (Doc. 1) is **dismissed with prejudice**.

(4) The Motion To Stay/Abey (Doc. 3) is **denied**.

(5) The Motion To Supplement (Doc. 19) is **denied**.

(6) 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 jurists of reason would not find the procedural ruling debatable.

(7) The Clerk shall enter judgment accordingly and terminate this action.

Dated this 18th day of May, 2020.

Dominic W. Lanza
United States District Judge

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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

ALEKSYS LOMELI-GARCIA, Petitioner-Appellant, v. ATTORNEY GENERAL FOR THE STATE OF ARIZONA; DAVID SHINN, Director, Respondents-Appellees,	No. 20-16118 D.C. No. 3:19-cv-08199-DWL District of Arizona, Prescott ORDER

Before: IKUTA and MILLER, Circuit Judges.

Appellant's motion for leave to file an oversized request for a certificate of appealability (Docket Entry No. 2) is granted.

This appeal is from the denial of appellant's 28 U.S.C. § 2254 petition and subsequent Federal Rule of Civil Procedure 59(e) motion. The request for a certificate of appealability (Docket Entry Nos. 2 & 5) 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); *Miller-El v.*

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Cockrell, 537 U.S. 322, 327 (2003); *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015); *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

FILED

MAR 26 2021

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

ALEKSYS LOMELI-GARCIA, Petitioner-Appellant, v. ATTORNEY GENERAL FOR THE STATE OF ARIZONA; DAVID SHINN, Director, Respondents-Appellees.	No. 20-16118 D.C. No. 3:19-cv-08199-DWL District of Arizona, Prescott ORDER

Before: CHRISTEN and WATFORD, Circuit Judges.

Appellant's motion for clarification (Docket Entry No. 12) is granted. The court clarifies that appellant's motion for reconsideration en banc (Docket Entry No. 10) is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 10 2021

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

ALEKSYS LOMELI-GARCIA, Petitioner-Appellant, v. ATTORNEY GENERAL FOR THE STATE OF ARIZONA; DAVID SHINN, Director, Respondents-Appellees.	No. 20-16118 D.C. No. 3:19-cv-08199-DWL District of Arizona, Prescott ORDER

Before: McKEOWN and BUMATAY, Circuit Judges.

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

No further filings will be entertained in this closed case.

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