APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 16 2021

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

ISAAC JUDE RODRIGUEZ, Petitioner-Appellant, v. DAVID SHINN, Director; ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellees.	No. 21-16049 D.C. No. 2:20-cv-00847-DWL District of Arizona, Phoenix ORDER

Before: WARDLAW and BADE, Circuit Judges.

We have received and reviewed appellant's response to this court's June 22, 2021 order to show cause.

The request for a certificate of appealability is denied because the notice of appeal was not timely filed and appellant did not file a motion to extend time for appeal in the district court within the jurisdictional time limit. *See* 28 U.S.C. §§ 2107, 2253(c)(2); Fed. R. App. P. 4(a)(5)(A).

Any pending motions are denied as moot.

DENIED.

APPENDIX B

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Isaac Jude Rodriguez,

Petitioner,

v.

David Shinn, et al.,

Respondents.

No. CV-20-00847-PHX-DWL

ORDER

On April 30, 2020, Petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 ("the Petition"). (Doc. 1.) On December 31, 2020, Magistrate Judge Fine issued a Report and Recommendation ("R&R") concluding the Petition should be denied and dismissed with prejudice. (Doc. 18.) Afterward, Petitioner filed objections to the R&R. (Doc. 23.) For the following reasons, the Court overrules Petitioner's objections, adopts the R&R, and terminates this action.

I. Relevant Background

The Charges, Guilty Plea, And Sentence. In July 2012, Petitioner was indicted in Maricopa County Superior Court on two counts of armed robbery, one count of theft, and six counts of kidnapping. (Doc. 18 at 2.) Petitioner ultimately pleaded guilty to two counts of armed robbery and four counts of kidnapping. (*Id.*) During the change of plea hearing, Petitioner admitted that on July 26, 2011, he "committed armed robbery when in the course of taking property from" the two victims in "their immediate presence, against their will, by using threats of force with intent to coerce or surrender the property." (*Id.*) Petitioner

further admitted that "while taking the property of those two [victims], he was armed with a deadly weapon, that being a handgun." (*Id.*) Regarding the kidnapping charges, Petitioner admitted he "knowingly restrained" the four victims "with the intent to inflict death, physical injury, or otherwise engage in the commission of a felony, that being, taking funds from a bank." (*Id.*)

On April 29, 2013, sentencing took place. (*Id.*) Petitioner was sentenced to concurrent terms of 14.5 years' imprisonment on each of the armed robbery counts. (*Id.*) As for the kidnapping counts, the trial court suspended the imposition of sentence. (*Id.* at 2-3.) All of the sentences were consistent with the plea agreement. (*Id.* at 3.)

During the sentencing hearing, the trial court advised Petitioner of his right to petition for post-conviction relief ("PCR"), of his right to counsel in PCR proceedings, and of the requirement that Petitioner file a PCR notice within 90 days of sentencing. (*Id.*) Petitioner also received and signed a copy of a notice of right to post-conviction relief, which stated that Petitioner needed to file a PCR notice within 90 days of sentencing or Petitioner would forfeit the right to review. (*Id.*)

The First PCR Proceeding. On May 27, 2016—over three years after sentencing—Petitioner filed a PCR notice for post-conviction DNA testing. (*Id.*) In this notice, Petitioner checked a box indicating that he was not raising an ineffective assistance of counsel claim. (*Id.*)

The trial court appointed PCR counsel to represent Petitioner, permitted the filing of a PCR petition for DNA testing, and deferred deciding whether Petitioner met the legal requirements for post-conviction DNA testing. (*Id.*) Over three months later, Petitioner's counsel filed a notice of completion, avowing that she was unable to find support for a petition for post-conviction DNA testing and requesting that Petitioner be permitted to file a *pro per* petition. (*Id.*)

On January 11, 2017, Petitioner filed a *pro per* petition regarding DNA testing. (*Id.*) In this petition, Petitioner also argued that his trial counsel had been ineffective. (*Id.*) Petitioner's theory of ineffectiveness was that DNA testing hadn't been conducted during

the underlying proceeding due to a conflict between himself and his trial counsel over which lab would conduct the testing. (*Id.* at 3-4.)

On June 30, 2017, the PCR court issued its ruling denying the petition. (*Id.*) Among other things, the court found that Petitioner had failed to meet the applicable state-law standards (by not demonstrating a reasonable probability that he would not have been convicted had the DNA evidence been re-tested) and noted that the factual basis for Petitioner's conviction included other physical, testimonial, and circumstantial evidence. (*Id.* at 4-5.)

The Second PCR Proceeding. On July 11, 2017, about two weeks after the superior court denied his PCR petition for DNA testing, Petitioner filed a second PCR notice. (*Id.* at 5.)

On October 29, 2017, Petitioner's appointed counsel filed a notice of completion and avowed that he found no colorable legal issues that were not frivolous. (*Id.*) The court then permitted Petitioner to file a *pro per* PCR petition. (*Id.*)

In his second PCR petition, Petitioner raised four grounds for relief. (*Id.* at 5-6.) First, Petitioner claimed ineffective assistance of trial counsel at the plea-bargain stage, arguing that counsel was ineffective by failing to challenge or "investigate" the state's evidence and by failing to disclose the results of the DNA re-testing before his plea agreement. (*Id.*) Second, Petitioner claimed that his counsel was ineffective for "failing to suppress the identification the witness made." (*Id.*) Third, Petitioner claimed that the trial court erred by failing to consider his motion to change counsel, which deprived him of his right to counsel and forced him to involuntarily plead guilty. (*Id.*) Fourth, Petitioner claimed that the trial court violated his rights by "failing to comply with Rule 17.4 of the Arizona Rules of Criminal Procedure and Rule 11 of the Federal Rules of Procedure regarding guilty pleas"—specifically, by informing him of the possible sentencing ranges he would be subject to if convicted after a trial and by reviewing the state's evidence against him, thereby coercing him into entering the plea. (*Id.*)

On October 5, 2018, the PCR court issued an order denying the second PCR petition.

(*Id.* at 6.) Among other things, the court found that the second PCR petition was filed four years late, without valid excuse for the delay, and that Petitioner had failed to present new information that would allow for Petitioner's ineffective assistance of counsel claim to be reviewed. (*Id.* at 6-7.)

On July 15, 2019, Petitioner filed a petition for review with the Arizona Supreme Court, which the Supreme Court denied as untimely. (*Id.*)

These Proceedings. On April 22, 2020, Petitioner filed the Petition. (*Id.* at 8.) It raises six grounds for relief: (1) ineffective assistance of counsel at the pre-trial and plea bargaining stages; (2) ineffective assistance of counsel for failing to suppress witness identification evidence; (3) the trial court violated his right to counsel by failing to consider his motion to substitute counsel; (4) the trial court violated his Fifth and Fourteenth Amendment rights by coercing him into pleading guilty; (5) the superior court erroneously denied his second PCR petition; and (6) the Arizona Court of Appeals violated state law, as well as the Fourteenth Amendment, by dismissing his petition for review as untimely. (*Id.* at 8-9.)

The R&R. The R&R concludes that Petitioner's claims in Grounds One, Two, Three, and Four are barred by AEDPA's one-year statute of limitations. (Doc. 19 at 9-15.) Specifically, the R&R concludes that Petitioner's state-court conviction became final on July 29, 2013, upon expiration of the 90-day deadline for Petitioner to file a PCR notice after his April 29, 2013 sentencing hearing, and that AEDPA's one-year statute of limitations therefore expired on July 29, 2014, rendering the Petition (which was filed in April 2020) "untimely filed by over five years." (*Id.* at 10-11.) The R&R further concludes that (1) the concept of statutory tolling is inapplicable here because Petitioner didn't file his first PCR notice until 2016, by which point the statute of limitations had already expired (*id.* at 11-12); (2) Petitioner is not entitled to equitable tolling because "Petitioner has not met his burden of showing that he has been pursuing his rights diligently and that some extraordinary circumstances prevented Petitioner from filing a timely petition for habeas corpus" (*id.* at 12-14); and (3) the "actual innocence/*Schlup* gateway" is inapplicable

because, *inter alia*, Petitioner "has not presented new reliable evidence" establishing factual innocence (*id.* at 14-15).

As for Grounds Five and Six, the R&R concludes they are "not cognizable" because they are premised on violations of state law and because procedural errors during PCR proceedings are not, in any event, cognizable under 28 U.S.C. § 2254. (*Id.* at 15-17.)

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.").

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 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]

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[1] *See generally* 2 S. Gensler, Federal Rules of Civil Procedure, Rules and Commentary, Rule 72, at 457 (2021) ("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 . . . .").

III. Analysis

Petitioner has filed written objections to the R&R. (Doc. 23.) The only specific argument raised by Petitioner is that "failure to consider [his] claims will result in a fundamental miscarriage of justice." (*Id.* at 3.) Although not entirely clear, Petitioner's position seems to be that (1) the R&R's timeliness analysis as to Counts One, Two, Three, and Four was incorrect because those claims should be considered timely pursuant to the miscarriage-of-justice gateway, and (2) the R&R's error with respect to that gateway was construing it as applying only to claims based on actual innocence, when in fact it allows for the presentation of any alleged "error that serious affect[s] the fairness, integrity or public reputation of judicial proceedings and other types of fundamental unjustness, independent of the defendant's innocence." (*Id.* at 5.)

This objection is overruled because Petitioner's position is foreclosed by Ninth Circuit law. *Johnson v. Knowles*, 541 F.3d 933, 937 (9th Cir. 2008) ("[I]n light of Supreme Court precedent, as well as our own, we conclude that the miscarriage of justice exception is limited to those *extraordinary* cases where the petitioner asserts his innocence and establishes that the court cannot have confidence in the contrary finding of guilt. A petitioner who asserts only procedural violations without claiming actual innocence fails to meet this standard.") (citation omitted). *See also Baumgartner v. Ryan*, 2020 WL 9074811, *16 (D. Ariz. 2020) ("Although not explicitly limited to actual innocence claims, the Supreme Court has not yet recognized a 'miscarriage of justice' exception to exhaustion outside of actual innocence. The Ninth Circuit has expressly limited it to claims of actual innocence.") (citations omitted).

Accordingly, **IT IS ORDERED** that:

(1) Petitioner's objections to the R&R (Doc. 23) are **overruled**.

(2) The R&R's recommended disposition (Doc. 18) is **accepted**.

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

(4) A Certificate of Appealability and leave to proceed *in forma pauperis* on appeal are **denied** because dismissal is justified by a plain procedural bar and reasonable

jurists would not find the procedural ruling debatable and because, for any portions of the Petition not procedurally barred, Petitioner has not made a substantial showing of the denial of a constitutional right and jurists of reason would not find the Court's assessment of Petitioner's claims debatable or wrong.

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

Dated this 7th day of May, 2021.

Dominic W. Lanza
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Isaac Jude Rodriguez,

Petitioner,

v.

David Shinn, et al.,

Respondents.

NO. CV-20-00847-PHX-DWL

JUDGMENT IN A CIVIL CASE

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

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

Debra D. Lucas
District Court Executive/Clerk of Court

May 10, 2021

By s/ M. Hawkins
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Isaac Jude Rodriguez,

Petitioner,

v.

David Shinn, et al.,

Respondents.

No. CV-20-0847-PHX-DWL (DMF)

REPORT AND RECOMMENDATION

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

On April 22, 2020[1], Petitioner Isaac Jude Rodriguez ("Petitioner"), who is confined in the Arizona State Prison Complex-Yuma, filed a pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1)[2] ("Petition"). The Court required an answer to the Petition (Doc. 5). Respondents timely filed a Limited Answer (Doc. 8). Petitioner was granted several extensions to file his reply (Docs. 14, 16), and Petitioner filed a timely reply on November 12, 2020 (Doc. 17). This matter is ripe.

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[1] The Petition was docketed by the Clerk of Court on April 30, 2020 (Doc. 1). The Petition contains a certificate of service indicating that Petitioner placed the Petition in the prison mailing system on April 22, 2020 (Doc. 1 at 37). Pursuant to the prison mailbox rule, the undersigned has used April 22, 2020, as the filing date. *Porter v. Ollison*, 620 F.3d 952, 958 (9th Cir. 2010) ("A petition is considered to be filed on the date a prisoner hands the petition to prison officials for mailing.").

[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 CV-20-0847-PHX-DWL (DMF).

This matter is on referral to the undersigned United States Magistrate Judge for further proceedings and a report and recommendation pursuant to Rules 72.1 and 72.2 of the Local Rules of Civil Procedure (Doc. 5 at 4). For the reasons set forth below, it is recommended that the Court deny and dismiss the Petition (Doc. 1) with prejudice and that the Court deny a certificate of appealability.

I. PROCEDURAL HISTORY

A. Charges, Guilty Pleas, and Sentences

In July 2012, Petitioner was indicted in Maricopa County Superior Court, case number CR 2012-134503-001, with two counts of armed robbery, one count of theft, and six counts of kidnapping, all dangerous offenses (Doc. 8-1 at 4-10). The prosecution further alleged several aggravating circumstances and that Petitioner had multiple prior and historical felony convictions (*Id.* at 12-17). Before trial and represented by counsel, Petitioner pleaded guilty to two counts of armed robbery and four counts of kidnapping (*Id.* at 19-21). Following a colloquy with Petitioner, the trial court accepted Petitioner's guilty pleas (*Id.* at 57-59, 69-82). During the change of plea hearing, Petitioner admitted that on July 26, 2011, he "committed armed robbery when in the course of taking property from" the two victims in "their immediate presence, against their will, by using threats of force with intent to coerce or surrender the property" (*Id.* at 79). Petitioner further admitted that "while taking the property of those two [victims], he was armed with a deadly weapon, that being a handgun" (*Id.*). Regarding the kidnapping charges, Petitioner admitted that he "knowingly restrained" the four victims "with the intent to inflict death, physical injury, or otherwise engage in the commission of a felony, that being, taking funds from a bank" (*Id.* at 79-80).

At his sentencing hearing, Petitioner stated that he was "deeply remorseful for the pain and anguish [he] caused to all the victims and the victims' families involved in the case" and "accept[ed] the punishment for committing armed robbery and the kidnapping charges" (*Id.* at 88). On April 29, 2013, the trial court sentenced Petitioner to concurrent terms of 14.5 years' imprisonment for each of the armed robbery convictions; for each of

the kidnapping convictions, the trial court suspended the imposition of sentence and imposed instead concurrent terms of 7 years' probation upon Petitioner's release from prison (*Id.* at 23-38, 84-96). All of the sentences imposed were consistent with the plea agreement (*Id.* at 19-21, 23-38, 84-96).

At sentencing in open court, the trial court advised Petitioner of his "right to petition the [c]ourt for [p]ost-[c]onviction [r]elief", of Petitioner's right to counsel for post-conviction relief proceedings, and of the requirement that Petitioner file a notice of post-conviction relief ("PCR notice") within ninety days of sentencing (*Id.* at 94). Also on April 29, 2013, the day of his sentencing, Petitioner signed and received a copy of a notice of right to post-conviction relief (*Id.* at 102). The notice acknowledged that Petitioner needed to file a PCR notice within ninety (90) days of sentencing or Petitioner would forfeit the right to review (*Id.*).

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

1. First PCR proceeding

Over three years after his sentencing, on May 27, 2016, Petitioner filed a PCR notice for post-conviction DNA testing under former Arizona Rule of Criminal Procedure 32.12, which is now Arizona Rule of Criminal Procedure 32.17 (Doc. 8-1 at 104-106). Petitioner checked the box on the PCR notice stating that he was not raising an ineffective assistance of counsel claim (*Id.* at 105). Noting that a DNA testing petition may be made at any time, the court appointed PCR counsel to represent Petitioner, permitted the filing of a PCR petition for DNA testing, and deferred decision to after briefing regarding whether or not Petitioner met the legal requirements for post-conviction DNA testing (*Id.* at 108-109). Over three months later, Petitioner's counsel filed a notice of completion, avowing that she was unable to find support for a petition for post-conviction DNA testing and requested that Petitioner be permitted to file a pro per petition (*Id.* at 111-114).

Petitioner filed a pro per petition in January 11, 2017, regarding DNA testing and arguing that his trial counsel had been ineffective (Doc. 8-2 at 4-24). Petitioner alleged that after defense counsel had requested and been approved funding for the re-testing of

DNA evidence, Petitioner had requested that the re-testing be done at the laboratory of his choice, but counsel told him he could not choose facilities (*Id.*). Petitioner further alleged that after he refused to give a DNA sample to Chromosomal Laboratories, which was doing the re-testing, his counsel told him that refusing to give the sample would forfeit his opportunity to have the DNA evidence re-tested (*Id.*). Also, Petitioner criticized that the DNA re-testing was not completed and claimed that his trial counsel therefore had failed to adequately investigate the prosecution's forensic evidence (*Id.*). Petitioner claimed that all of this amounted to a conflict of interest between him and his counsel, rendering counsel ineffective (*Id.*). Among other attachments, Petitioner included a letter from his trial counsel confirming that Petitioner had refused to produce a sample for the laboratory representative that had come to the jail to sample Petitioner's DNA (*Id.* at 24).

The state responded that the pro per petition did not request DNA testing of any specific items of evidence or otherwise satisfy the requirements of the applicable rule. The state also argued that to the extent that Petitioner requested testing of the DNA evidence taken from the wheelchair as his trial counsel had requested, such request would not satisfy Rule 32.17 because the samples were previously subject to DNA testing, Petitioner had not established that he was seeking different tests, and that even favorable results would not have created a possibility that Petitioner would not have been convicted. The state further noted that Petitioner's ineffective assistance of counsel claims did not warrant relief because his petition was untimely and did not otherwise satisfy the requirements of Rule 32. *See* Doc. 8-2 at 26-36.

In his reply, Petitioner maintained that his request was compliant with Rule 32.17 (Doc. 8-2 at 32-33).

On June 30, 2017,[3] the PCR court issued its ruling denying the petition (*Id.* at 41-42). The court found that Petitioner had failed to meet Rule 32.17's standards by not demonstrating a reasonable probability that he would not have been convicted if the DNA evidence was re-tested, and noted that the factual basis for Petitioner's conviction included

[3] "A court order is entered when the clerk files it." Ariz. R. Crim. P. 1.3.

other physical, testimonial, and circumstantial evidence (*Id.*). The court also noted that Petitioner had admitted to the offenses at sentencing (*Id.*). Further, the court rejected Petitioner additional claims for Rule 32 relief, finding the petition did not make any reliable allegation that counsel's performance fell below an objective standard and that Petitioner had "failed to demonstrate that the result would have changed" (*Id.*). Accordingly, the court found that Petitioner "failed to establish a material issue of fact or law for which he would be entitled . . . to relief" (*Id.*).

On August 8, 2017, Petitioner signed a pro per motion for extension of time to file a petition for review to the Arizona Court of Appeals from the PCR court's denial of Petitioner's pro se petition for DNA testing (*Id.* at 44-45). Petitioner's motion averred that the unit where he was housed did not have a proper legal library, the law library was closed the first week in August, and he did not have help to prepare his legal documents properly (*Id.* at 44). By the time that Petitioner signed the motion, Petitioner was represented by counsel in connection with his second PCR petition, *see* Section I(B)(2) *infra*. Thus, on August 17, 2017, the court issued a notice of ex parte communication, forwarded Petitioner's motion for extension of time to counsel, and took no action on the motion for extension of time (*Id.* at 47).

2. Second PCR proceeding

On July 11, 2017,[4] about two weeks after the superior court denied Petitioner's PCR petition for DNA testing, Petitioner filed a second PCR notice (Doc. 8-2 at 49-51). On August 4, 2017, the court appointed counsel for the second PCR proceedings (*Id.* at 53-54). On October 29, 2017, counsel filed a notice of completion and avowed that he found no colorable legal issues that were not frivolous (*Id.* at 56-57). The court then permitted Petitioner to file a pro per PCR petition (*Id.* at 59-60).

In his second PCR petition, Petitioner raised four grounds for relief. First, he claimed ineffective assistance of trial counsel at the plea-bargain stage, arguing that

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[4] Though Petitioner appears to have signed and notarized the notice on April 18, 2017, it was not received and filed by the court until July 11, 2017 (Doc. 8-2 at 49, 51).

counsel was ineffective by failing to challenge or "investigate" the state's evidence and by failing to disclose the results of the DNA re-testing before his plea agreement "so that he could make a clear choice to sign a plea or prevail at trial" because they "may have been favorable." Second, he claimed that his counsel was ineffective for "failing to suppress the identification the witness made," believing that one of the state's witnesses provided an unreliable identification by not being positive that Petitioner was the offender, and that the officers unreasonably relied on this unreliable identification of Petitioner. Third, Petitioner claimed that the trial court erred by failing to consider his pre-trial motion to change counsel, arguing that such failure deprived him of his right to counsel and forced him to involuntarily plead guilty. Fourth, Petitioner claimed that the trial court violated his rights by "failing to comply with Rule 17.4 of the Arizona Rules of Criminal Procedure and Rule 11 of the Federal Rules of Procedure regarding guilty pleas." Specifically, he argued that the trial court improperly interfered with plea negotiations by informing him of the possible sentencing ranges he would be subject to if convicted after a trial and by reviewing the state's evidence against him, thereby coercing him into entering the plea. *See* Doc. 8-2 at 62-87, 89-92; *see also* Doc. 8-2 at 94-95.

The state responded that Petitioner's claims could not be presented in an untimely Rule 32 proceeding. The state further argued that any claim that Petitioner was unaware of his appeal rights was unavailing because the trial court advised Petitioner of his rights at sentencing and Petitioner signed an acknowledgement of those rights. The state also argued that Petitioner's claims were otherwise precluded because they could have been raised in his first PCR proceeding and that the PCR court had expressly denied Petitioner's first ineffective assistance of counsel claim. *See* Doc. 8-2 at 97-105.

Petitioner filed a reply reiterating his claims and insisting that his first PCR proceeding was not a PCR proceeding, but a DNA-test request proceeding, and that he therefore could not have raised his claims in his first PCR proceeding (*Id.* at 107-118).

On October 5, 2018, the PCR court issued an order denying the second PCR petition (*Id.* at 120-121). The court found that the second PCR petition was filed four years late

without valid excuse for the delay (*Id.* at 120). The court also found that Petitioner failed to present new information that would allow for Petitioner's repeated ineffective assistance of counsel claim to be reviewed (*Id.* at 121). Additionally, the court noted that Petitioner "relie[d] heavily upon events and matters known to him at the time of the plea proceedings" and that "[b]y pleading guilty, he effectively waived his claims as to those issues" (*Id.*). The court also found that no evidence supported Petitioner's claims that he was coerced into the plea agreement and that Petitioner had avowed on the record that he was pleading guilty knowingly, intelligently, and voluntarily (*Id.*). The court concluded: "Suffice it to say that [the second PCR petition] is untimely and even if the untimeliness were ignored or not applicable, [Petitioner] failed to establish the threshold required for his [p]etition to proceed." (*Id.*)

The court granted Petitioner's request for an extension until January 18, 2019, to petition for review to the Arizona Court of Appeals (*Id.* at 123). Despite the extension, Petitioner failed to timely file the petition for review. On March 25, 2019, Petitioner filed his petition for review with the Arizona Court of Appeals along with a "Motion to Leave of Superior Court to File a Delayed Petition for Review" (Doc. 8-2 at 125-145, 147-148).[5] On March 27, 2019, the Arizona Court of Appeals dismissed the petition for review as untimely and instructed that the trial court may nevertheless permit Petitioner to file an untimely petition for review if presented with proper evidence that Petitioner was not responsible for his late filing (*Id.* at 150-151). The court of appeals also forwarded Petitioner's motion for leave to the trial court (*Id.* at 153-154).

Petitioner and Respondents agree that on July 15, 2019, Petitioner filed a petition for review to the Arizona Supreme Court, which the supreme court denied as untimely (Doc. 1 at 35; Doc. 8 at 10).[6]

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[5] In his Petition, Petitioner erroneously refers to the petition for review as his third PCR petition (Doc. 1 at 6).

[6] Respondents reference Exhibits MM and NN, but these exhibits were not filed with the Court. Because all parties are in agreement regarding the date of the petition for review and that the petition for review was denied as untimely, the Court may decide the issues raised in the Limited Answer without the missing exhibits.

II. THESE HABEAS PROCEEDINGS

On April 22, 2020, Petitioner filed these proceedings, naming David Shinn as Respondent and the Arizona Attorney General as an Additional Respondent (Doc. 1). In Petition Ground One, Petitioner argues that his trial counsel was ineffective at the pre-trial and plea bargaining stages for "failing to disclose material evidence" before Petitioner entered his plea agreement, thereby prohibiting Petitioner from making "a sound decision" regarding whether to plead guilty (*Id.* at 8-14). Specifically, Petitioner claims that his counsel failed to disclose the results of re-testing of DNA evidence that was requested and approved before Petitioner entered into the plea agreement, arguing that the results "may have been favorable" to Petitioner (*Id.* at 13). Petitioner also complains that counsel otherwise failed to challenge the state's DNA evidence (*Id.* at 14). In Petition Ground Two, Petitioner asserts that his trial counsel was ineffective for failing to suppress the witness's identification of Petitioner as unreliable (*Id.* at 15-17). In Petition Ground Three, Petitioner argues that the trial court violated his right to counsel by failing to consider his motion to substitute counsel, claiming that the failure to do so led to his unknowing and involuntary guilty plea (*Id.* at 18-24). In Petition Ground Four, Petitioner claims that the trial court violated his Fifth and Fourteenth Amendment rights by acting coercively by "caution[ing] him about potential sentences should he be convicted after trial, compared to the sentenced [sic] he faced if he pleaded guilty, comment[ing] on the weight and nature of the evidence against Petitioner, which implied guilt, and discuss[ing] hypothetical agreements the court would or would not accept," thereby making him unknowingly and involuntarily accept the plea agreement (*Id.* at 25-28). In Petition Ground Five, Petitioner claims that the superior court erroneously denied his second PCR petition and the claims contained therein on October 5, 2018 (*Id.* at 29-31).[7] In Petition Ground Six, Petitioner claims that the Arizona Court of Appeals violated Petitioner's Fourteenth Amendment rights under the United States Constitution as well as state constitutional rights when it

[7] Petitioner mistakenly asserts that the denial was on October 3, 2018, but the order was filed on October 5, 2018 (Doc. 1 at 30). "A court order is entered when the clerk files it." Ariz. R. Crim. P. 1.3.

dismissed Petitioner's petition for review as untimely on March 27, 2019 (*Id.* at 32-35).

Respondents argue that the Petition should be dismissed with prejudice because these proceedings were untimely filed and that all the claims raised in the Petition are procedurally defaulted without excuse (Doc. 8). Respondents assert that the Petition "is untimely by 2,058 days because the one-year limitation period to file a habeas petition elapsed on July 30, 2014" and that "neither statutory nor equitable tolling renders [the Petition] timely" (*Id.* at 12). Respondents argue that Petitioner "failed to exhaust his clams by not properly presenting them to both the trial court and the Arizona Court of Appeals, and does not present an excuse for his procedural defaults" (*Id.* at 15). Further, Respondents argue that neither Grounds Five and Six presents a cognizable claim because these claims are based on the interpretation of state court rules and Petitioner does not otherwise develop any allegation of a federal constitutional violation (*Id.* at 22).

In his reply (Doc 17), Petitioner argues that additional exhibits should have been provided by Respondents regarding the constitutional claims raised by Petitioner. Petitioner further notes that Respondents did not attach referenced Exhibits MM and NN (*Id.* at 2-3). *See* footnote 6, *supra*. Petitioner further argues the merits of his claims, but he does not address the defenses raised by Respondents in their Limited Answer (*Id.* at 4-29).

III. TIMELINESS OF GROUNDS ONE, TWO, THREE, AND FOUR

A. Start Date of AEDPA's One Year Limitations Period

A threshold issue for the Court is whether a 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, there are four possible starting dates for the beginning of its one-

year 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). The latest of the applicable possible starting dates is the operative start date. *Id.*

Here, the Petition Grounds One, Two, Three, and Four arise from a final judgment and sentence, and the record does not present circumstances for a later start date based on subsections (B), (C), or (D). Thus, AEDPA's one-year statute of limitations start date is determined by 28 U.S.C. § 2244(d)(1)(A). AEDPA's one-year statute of limitations period runs from when the judgment and sentence 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).

In Arizona, a defendant who pleads guilty waives the right to direct appeal and may seek review only by collaterally attacking the conviction(s) by way of post-conviction proceedings under Arizona Rule of Criminal Procedure 32 (now Rule 33). *See* Ariz. R. Crim. P. 17.2(e); A.R.S. § 13–4033(B). At the time of Petitioner's sentencing, Rule 32.4(a)(2)(C) required an of-right notice of post-conviction relief to be filed within 90 days after entry of judgment and sentence. 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, 716-717 (9th Cir. 2007); *see also* A.R.S. § 13-4033(B). When an Arizona petitioner's PCR proceeding is of-right, AEDPA's

statute of limitations does not begin to run until the conclusion of review or the expiration of the time for seeking such review. *Summers*, 481 F.3d at 711, 716-17.

Petitioner's sentencing was on April 29, 2013. Petitioner had ninety (90) days in which to file a PCR notice. Ninety days ran on Sunday, July 28, 2013, so the last day for filing a PCR notice was Monday, July 29, 2013. Petitioner did not file a PCR notice in this timeframe. Thus, Petitioner's conviction and sentence became final on July 29, 2013, triggering the start of AEDPA's one-year statute of limitations the next day. Thus, AEDPA's one-year statute of limitations began running on Tuesday, July 30, 2013, and expired on Tuesday, July 29, 2014. *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 was required to file a federal habeas petition regarding Grounds One, Two, Three, and Four on or before July 29, 2014. Petitioner did not file the Petition until April 22, 2020. Thus, Petition Grounds One, Two, Three, and Four were untimely filed by over five years. Therefore, the Court will address whether statutory tolling, equitable tolling, or the actual innocence gateway applies to render Petition Grounds One, Two, Three, and Four, and these proceedings thereon, timely filed.

B. Statutory Tolling

AEDPA expressly provides for tolling of the limitations period when a "properly filed application for [s]tate post-conviction or other collateral relief with respect to the pertinent judgment or claim is pending." 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). This includes compliance with filing deadlines. A state post-conviction relief petition not filed within the state's required time limit is not "properly filed," and the petitioner is not entitled to statutory tolling during those proceedings. *Pace 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). Once the statute of limitations has run, subsequent collateral review petitions do not "restart" AEDPA's one year limitations period clock. *Jiminez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001); *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003).

Here, the statute of limitations expired on Petition Grounds One, Two, Three, and Four before the filing of any of Petitioner's PCR proceedings. The statute of limitations expired on July 29, 2014, and Petitioner's PCR proceedings were filed in 2016 and 2017. Thus, statutory tolling does not apply to Petition Grounds One, Two, Three, and Four.

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 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 when an extraordinary circumstance prevented a petitioner acting with reasonable diligence from making a timely filing." *Smith v. Davis*, 953 F.3d 582, 600 (9th Cir. 2020) (en banc). 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). To meet the first prong, a petitioner "must show that he has been reasonably diligent in pursuing his rights not only while an impediment to filing caused by an extraordinary circumstance existed, but before

and after as well, up to the time of filing his claim in federal court." *Smith*, 953 F.3d at 598-99 (expressly rejecting the "stop-clock" approach to equitable tolling). The second prong is met "only when an extraordinary circumstance prevented a petitioner acting with reasonable diligence from making a timely filing." *Id.* at 600.

"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).

There must be a causal link between the extraordinary circumstance and the inability to timely file the petition. *Sossa v. Diaz*, 729 F.3d 1225, 1229 (9th Cir. 2013) ("[E]quitable tolling is available only when extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time and the extraordinary circumstances were the cause of the prisoner's untimeliness."). A literal impossibility to file, however, is not required. *Grant v. Swarthout*, 862 F.3d 914, 918 (9th Cir. 2017) (stating that equitable tolling is appropriate even where "it would have technically been possible for a prisoner to file a petition," so long as the prisoner "would have likely been unable to do so.").

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

After carefully reviewing the entire record before the Court, undersigned concludes that Petitioner has not met his burden of showing that he has been pursuing his rights diligently and that some extraordinary circumstances prevented Petitioner from filing a timely petition for habeas corpus. Accordingly, equitable tolling is unavailable to Petitioner regarding Petition Grounds One, Two, Three, and Four.

D. Actual Innocence

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. *See Schlup*, 513 U.S. at 329 (petitioner must make a credible showing of "actual innocence" by "persuad[ing] the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.").

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. U.S.*, 523 U.S. 614, 623 (1998); *Jaramillo v. Stewart*, 340 F.3d 877, 882-83 (9th Cir. 2003). 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 v. Perkins*, 569 U.S. 383, 399 (2013) (quoting *Schlup*, 513 U.S. at 327). "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 Lee v. Lampert*, 653 F.3d 929, 945 (9th Cir. 2011); *McQuiggin*, 569 U.S. at 399 (explaining the significance of an "[u]nexplained delay in presenting new evidence"). 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. Thompson*, 523 U.S. 538, 559 (1998)).

While Petitioner complains about his counsel and the procedures underlying his convictions and sentences, he does not assert his actual innocence. In fact, Petitioner admitted his guilt at the change of plea hearing and at sentencing. Even if any of Petitioner's grounds could be construed as an actual innocence claim, he has not presented new reliable evidence as required for the actual innocence/*Schlup* gateway. Further, Petitioner has not shown that it is more likely than not that no reasonable juror would have convicted him in the light of any new evidence. Accordingly, the actual innocence/*Schlup* gateway provides no relief to Petitioner for the untimely filing of Petition Grounds One, Two, Three, and Four.

E. Petition Grounds One, Two, Three, and Four Are Untimely Under AEDPA

Under applicable law and the above analysis, Petition Grounds One, Two, Three, and Four were untimely filed. Petitioner is not entitled to statutory tolling. Equitable tolling does not render the Petition's filing timely as to Grounds One, Two, Three, and Four, nor does the actual innocence gateway. Thus, these untimely proceedings as to Petition Grounds One, Two, Three, and Four should be dismissed with prejudice.

IV. GROUNDS FIVE AND SIX ARE NOT COGNIZABLE IN HABEAS PROCEEDINGS

A federal court may only consider a petition for writ of habeas corpus if the petitioner alleges that "he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *Estelle v. McGuire*, 502 U.S. 62, 67 68 (1991); *see also Franzen v. Brinkman*, 877 F.2d 26, 26 (9th Cir.1989) ("A habeas petition must allege the petitioner's detention violates the constitution, a federal statute or a treaty."); *see also Gilmore v. Taylor*, 508 U.S. 333, 349 (1993) (stating that "mere error of state law, one that does not rise to the level of a constitutional violation, may not be corrected on federal habeas."). On habeas corpus review, federal courts lack jurisdiction to review state court

applications of state procedural rules. *Poland v. Stewart*, 169 F.3d 573, 584 (9th Cir. 1998) (stating that "[f]ederal habeas courts lack jurisdiction ... to review state court applications of state procedural rules)." Moreover, a habeas petitioner cannot "transform a state law issue into a federal one by merely asserting a violation of due process." *Poland*, 169 F.3d at 584 (quoting *Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir. 1996)); *see also Jones v. Gomez*, 66 F.3d 199, 205 (9th Cir. 1995) (stating that a petitioner's conclusory suggestion that a federal constitutional right had been violated fell "far short of stating a valid claim of constitutional violation.")

In Petition Ground Five, Petitioner claims that the superior court erroneously denied his second PCR petition and the claims contained therein on October 5, 2018. In Petition Ground Six, Petitioner claims that the Arizona Court of Appeals violated Petitioner's Fourteenth Amendment rights under the United States Constitution as well as state constitutional rights when it dismissed as untimely Petitioner's petition for review in his second PCR proceedings on March 27, 2019. The Court agrees with Respondents that Petition Ground Five is not cognizable because it is based solely "on the interpretation of a state court rule, and Petitioner does not otherwise develop any allegation of a federal constitution violation" (Doc. 8 at 22). *See* Doc. 1 at 30 ("[T]he superior court improperly interpreted Arizona law concerning [Rule 32.12] and the ruling may not have been sufficient to ensure that proper consideration was given to a substantial claim."). The Court further agrees with Respondents that Petitioner "merely cites to the Fourteenth Amendment in Ground Six, but fails to develop a claim of a federal constitutional violation" (Doc. 8 at 22). Like Ground Five, Ground Six "relies on the interpretation and application of state court rules" (*Id.*), rendering the ground non-cognizable in habeas proceedings. *See* Doc. 1 at 32 ("Rule 32.9(c)(3) states that motions for extensions of time to file petitions or cross-petitions for review must be filed with the trial court, which must decide the motions promptly" and "the Maricopa County Superior Court has never responded or decided on the above-pending motion.")

Further, the claimed procedural errors in Grounds Five and Six arising during post-

conviction relief proceedings are not cognizable in habeas corpus proceedings under 28 U.S.C. § 2254 because they do not challenge a petitioner's detention. *See Franzen v. Brinkman*, 877 F.2d 26 (9th Cir. 1989) (per curiam); *see also Ortiz v. Stewart*, 149 F.3d 923, 939 (9th Cir. 1998) (finding that the post-convictions court's failure to appoint petitioner counsel in his second post-conviction proceedings did not constitute a basis for a federal habeas claim); *Gerlaugh v. Stewart*, 129 F.3d 1027, 1045 (9th Cir. 1997) (stating that errors in the post-conviction proceeding were not cognizable in federal habeas corpus proceedings). Whether the state courts complied with Arizona statutes and rules governing state post-conviction proceedings is a matter of state law that is not "addressable through habeas corpus proceedings." *Franzen*, 877 F.2d at 26.

Therefore, Petitioner's claims in Grounds Five and Six, which challenge the application of Arizona law related to post-conviction proceedings, are not cognizable on federal habeas review. Additionally, Petitioner cannot transform state law claims into federal claims by citing the Due Process Clause of the Fourteenth Amendment. *See Poland*, 169 F.3d at 584. Therefore, Petitioner is not entitled to relief on Grounds Five and Six.

V. CONCLUSION AND CERTIFICATE OF APPEALABILITY

Based on the above analysis, Petition Grounds One, Two, Three, and Four were untimely filed and neither statutory tolling, equitable tolling, nor the actual innocence gateway apply to render the filing of Petition Grounds One, Two, Three, and Four timely. In addition, Grounds Five and Six of the Petition are not cognizable in federal habeas proceedings. Because it was unnecessary to do so, undersigned did not address Respondents' arguments regarding exhaustion, procedural default, and excuse for procedural default. Undersigned recommends that the Petition (Doc. 1) be denied and dismissed with prejudice because all of the Petition grounds are, at a minimum, untimely or not cognizable in habeas proceedings.

Under the reasoning set forth herein, reasonable jurists would not find it debatable whether the District Judge was correct in its procedural rulings. Further, for any portions

of the Petition not procedurally barred, Petitioner has not made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and jurists of reason would not find the Court's assessment of Petitioner's claims "debatable or wrong". *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, to the extent the District Judge adopts this Report and Recommendation regarding the Petition, a certificate of appealability should be denied.

Accordingly,

IT IS THEREFORE RECOMMENDED that the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1) be denied and dismissed with prejudice.

IT IS FURTHER RECOMMENDED that a Certificate of Appealability 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 31st day of December, 2020.

Deborah M. Fine

Honorable Deborah M. Fine
United States Magistrate Judge

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 17 2021

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

ISAAC JUDE RODRIGUEZ,

Petitioner-Appellant,

v.

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

Respondents-Appellees.

No. 21-16049

D.C. No. 2:20-cv-00847-DWL
District of Arizona,
Phoenix

ORDER

Before: NGUYEN and FORREST, Circuit Judges.

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

No further filings will be entertained in this closed case.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 22 2021

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

ISAAC JUDE RODRIGUEZ, Petitioner-Appellant, v. DAVID SHINN, Director; ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellees.	No. 21-16049 D.C. No. 2:20-cv-00847-DWL District of Arizona, Phoenix ORDER

The record suggests that this court may lack jurisdiction over this request for a certificate of appealability because the notice of appeal was not filed or deposited for mailing in the prison's internal mail system within 30 days after entry of the district court's judgment on May 10, 2021. *See* 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A), (c).

Within 21 days after this order, appellant must move for voluntary dismissal of this request for a certificate of appealability or show cause why it should not be dismissed for lack of jurisdiction. If appellant elects to show cause, a response may be filed within 10 days after service of appellant's memorandum.

If appellant does not comply with this order, the Clerk will dismiss this request for a certificate of appealability pursuant to Ninth Circuit Rule 42-1.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Karen M. Burton
Deputy Clerk
Ninth Circuit Rule 27-7

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