NO.: USAP9-25-5476

IN THE
SUPREME COURT OF THE UNITED STATES

RUBEN CASILLAS BRITO - Petitioner
V.
RYAN THORNELL, et. al. - Respondents

APPENDIX

Submitted by and for:

RUBEN CASILLAS BRITO, In Pro Se
#313183
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Brito v. Coday, et al. 25-5476 - 007 - Dispositive Order - COA Denied

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United States Court of Appeals for the Ninth Circuit

Notice of Docket Activity

The following transaction was entered on 02/25/2026 5:14:18 PM PST and filed on 02/25/2026

Case Name: Brito v. Coday, et al.

Case Number: 25-5476

Docket Text:

ORDER FILED. CANBY and HURWITZ, Circuit Judges.
The request for a certificate of appealability (Docket Entry No. 3) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000); see also 28 U.S.C. § 2253(c)(2); Gonzalez v. Thaler, 565 U.S. 134, 140-41 (2012).
Any pending motions are denied as moot.
DENIED. [Entered: 02/25/2026 05:15 PM]

Document: Order

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APP. A

FILED

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RUBEN CASILLAS BRITO,

Petitioner - Appellant,

v.

EDWARD CODAY and ATTORNEY GENERAL OF THE STATE OF ARIZONA,

Respondents - Appellees.

No. 25-5476

D.C. No. 4:24-cv-00179-JCH
District of Arizona, Tucson

ORDER

Before: CANBY and HURWITZ, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 3) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012).

Any pending motions are denied as moot.

DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Ruben Casillas Brito,

Petitioner,

v.

Edward Coday, et al.,

Respondents.

NO. CV-24-00179-TUC-JCH

JUDGMENT IN A CIVIL CASE

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

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

Debra D. Lucas
District Court Executive/Clerk of Court

August 21, 2025

By s/ C. Ortiz
Deputy Clerk

APP. B

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Ruben Casillas Brito,

Petitioner,

v.

Edward Coday, et al.,

Respondents.

No. CV-24-00179-TUC-JCH

ORDER

Before the Court is Petitioner Ruben Casillas Brito's Objection ("Objection") to Magistrate Judge Jacqueline Rateau's Report and Recommendation ("R&R"), filed May 16, 2025. Doc. 23. Included with his Objection, Petitioner filed several exhibits, including a motion for discovery and production of documents and interrogatories for Barbara LaWall, Teresa Miller, and John O'Brien. *See id.* at 10–49. On May 27, Petitioner filed 55 pages of "additional attachments" to the Objection that he alleges, due to technical difficulties, did not properly upload when he filed the Objection. Doc. 24. On May 30, Respondent filed a Response, requesting the Court overrule Petitioner's objections. Doc. 25. On June 3, Petitioner filed a 27-page Reply (Doc. 26) and, on June 10, an 8-page "Addition to Reply" (Doc. 27).

As an initial matter, no reply briefing is permitted on an R&R objection without leave of the Court. *See* Doc. 18 at 17. Further, an objection to an R&R shall not exceed ten pages unless permitted by the Court. LRCiv 7.2(3). Accordingly, under LRCiv 7.2(m)(1), the Court will strike Petitioner's Reply (Doc. 26) and Addition to Reply (Doc. 27) as

oversized and impermissible. The Court did not consider these filings when reviewing the R&R and Petitioner's Objection. The Court did, however, consider the "additional attachments" to the Objection (Doc. 24).

Upon de novo review, and for the following reasons, the Court will overrule Petitioner's Objection, adopt the R&R in full, and dismiss the Petition as untimely.

BACKGROUND[1]

On August 1, 2016, Petitioner pleaded guilty to one count each of molestation of a child, molestation of a child in the second degree, and sexual conduct with a minor in the second degree. Doc. 15 at 2. The trial court sentenced Petitioner to a 10-year prison term followed by a suspended 20-year probation term. *Id.* Petitioner filed petitions for post-conviction relief ("PCR") in the state court in 2016, 2017, and 2022. *Id.* at 2–6.

On March 29, 2024, Petitioner filed a 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. Petitioner alleges his imprisonment is unlawful on the following grounds: (1) the Arizona Court of Appeals "dismissed and denied" a petition for review "before it was received and reviewed," (2) Petitioner's Rule 33 motion for post-conviction relief in state court was summarily dismissed without an evidentiary hearing or "conducting the *Strickland* procedure standard of review," (3) fundamental and prejudicial errors by counsel denied Petitioner the right to a fair trial, and (4) counsel was so deficient that Petitioner was "duressed to plead guilty by undue influence." *Id.* at 6–9. Respondents filed an answer arguing the Petition should be dismissed as untimely and because the claims are non-cognizable, waived, and/or procedurally defaulted. Doc. 15. Petitioner filed a Reply, citing the COVID-19 pandemic to excuse his untimely Petition and renewing his ineffective assistance of counsel ("IAC") claim. Doc. 16.

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[1] Petitioner does not object to the R&R's detailed summary of the relevant facts and procedural posture. *See generally* Doc. 23. Accordingly, the Court will adopt that portion of the R&R in full and provide only an abbreviated summary here.

On April 24, 2025, Magistrate Judge Jacqueline Rateau issued an R&R, recommending the Court dismiss the Petition (1) as untimely and (2) for failure to demonstrate that equitable tolling applies. Doc. 18 at 16.

LEGAL STANDARD

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

ANALYSIS

Petitioner does not dispute that the AEDPA applies to the petition and that the petition is untimely. *See generally* Doc. 23. Accordingly, the Court reviews those R&R portions for clear error. The Court notes a minor typo on page 8, line 21—the R&R gives July 5, 2016, as the date Petitioner's first PCR application was adjudicated, but the date should be July 5, 2017.[2] Otherwise, the Court finds no error and adopts those R&R portions in full, incorporating the identified correction.

Petitioner objects to the R&R on the following grounds: (1) the COVID-19 pandemic was a circumstance beyond his control, necessitating equitable tolling; (2) the R&R mischaracterized the dates Petitioner was under lockdown for COVID-19; (3) the R&R misstates the history for some of Petitioner's post-conviction activities; (4) the R&R failed to address Petitioner's claim of newly discovered evidence, ineffective assistance of counsel, and prosecutorial misconduct; and (5) the R&R failed to address errors committed by the Arizona Court of Appeals. *Id.* at 2–6. The Court reviews these objections de novo.

COVID-19 effects on equitable tolling. The AEDPA imposes a one-year limitation on state prisoners to file habeas corpus petitions in federal court. 28 U.S.C. § 2244(d)(1). The limitation period begins to run from "the date on which the judgment became final by

[2] The R&R uses the correct date of adjudication elsewhere.

the conclusion of direct review or the expiration of the time for seeking such review." § 2244(d)(1)(A). The limitation period does not run while "a properly filed application for State post-conviction or other collateral review" is pending. § 2244(d)(2).

Here, 102 days of the AEDPA one-year limitation period lapsed between the first PCR petition's dismissal (July 5, 2017) and the second PCR petition's filing (October 16, 2017). *See* Doc. 18 at 8–9. Tolling began from the second PCR petition's filing, until the Arizona Court of Appeals issued its mandate on February 26, 2021. *Id.* at 9. Thereafter, the AEDPA limitation period resumed and ran for 263 more days, until expiring on November 17, 2021. *Id.*

Petitioner initiated a third PCR application in state court on October 20, 2022, which was resolved January 18, 2024. *See id.* at 4–6. Petitioner then filed the instant Petition on March 29, 2024. *Id.* at 6. The third PCR proceedings did not toll the AEDPA limitations period. *Id.* at 9. But even if they had, the instant Petition would still be untimely by over 400 days. Petitioner does not dispute that his Petition is untimely. *See generally* Doc. 23 at 2–4. Petitioner objects to the R&R's finding that he is not entitled to equitable tolling. *See id.*

A petition could still be timely outside the one-year statute of limitations if equitable tolling applies, but the threshold to meet this standard is very high. *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002). Equitable tolling will not apply unless the petitioner affirmatively demonstrates (1) he diligently pursued his rights and (2) extraordinary circumstances beyond his control caused the untimeliness and made it impossible to file a timely petition. *See Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); *Ramirez v. Yates*, 571 F.3d 993, 997 (9th Cir. 2009). The R&R found Petitioner failed to show that he diligently pursued his rights or that timely filing was impossible. Doc. 18 at 11–16.

First, Petitioner argues he showed diligence despite pandemic-related restrictions on the prison. Doc. 23 at 3–4. Petitioner read law books and took a two-year correspondence course to be a legal assistant/paralegal. *Id.* at 4. While Petitioner's effort to obtain general legal knowledge is commendable, he does not show diligence *specific* to

preparing the Petition. "The diligence required for equitable tolling purposes is 'reasonable diligence,' not 'maximum feasible diligence.'" *Holland v. Florida*, 560 U.S. 631, 653 (2010) (internal citations omitted). "To determine if a petitioner has been diligent in pursuing his petition, courts consider the petitioner's overall level of care and caution in light of his or her particular circumstances." *Doe v. Busby*, 661 F.3d 1001, 1013 (9th Cir. 2011). While reasonable diligence is a fact-specific inquiry, it "seemingly requires the petitioner to work on his petition with some regularity—as permitted by his circumstances—until he files it in the district court." *Smith v. Davis*, 953 F.3d 582, 602 (9th Cir. 2020) (en banc). Other courts found diligent pursuit when petitioners, for example, made repeated requests for materials from prison libraries, wrote letters to attorneys, contacted state courts to obtain the trial file, and worked on the petition as soon as significant obstacles were removed—all to timely pursue their habeas petition. *See, e.g.*, *Busby*, 661 F.3d at 1012–13; *Weaver v. Amsberry*, 535 F. Supp. 3d. 1016, 1021–23. Petitioner still had access to the mail during lockdown. *See id.* at 4. There is nothing in the Petition, Reply, or Objection explaining what Petitioner did during and after the lockdown to diligently work on his Petition. Further, Petitioner does not allege he exercised diligence during the 102 pandemic-free days in 2017, when the AEDPA limitation period first began to run. Petitioner failed to show how he acted with reasonable diligence "not only while an impediment to filing . . . existed, but before and after as well, up to the time of filing his claim in federal court." *Smith*, 953 at 598–99.

Second, Petitioner argues the pandemic was "an extraordinary circumstance beyond [his] control" that made timely filing impossible. Doc. 23 at 2–3. The pandemic was undoubtedly a circumstance beyond Petitioner's control that made preparing legal filings more difficult. But Petitioner does not explain how the pandemic made timely filing impossible. Equitable tolling requires impossibility. *See Vanderark v. Greene*, No. 20-1417, 2021 WL 2228059, at *3 (C.D. Ill. June 2, 2021) (The pandemic alone was inadequate to trigger equitable tolling when the court received "numerous" habeas petitions "despite limitations caused by the COVID-19 pandemic.").

Petitioner failed to show reasonable diligence and extraordinary circumstances to necessitate equitable tolling.

Mischaracterizing lockdown dates. The R&R notes that defendant made filings in 2020 and 2022 despite the prison being on hard lockdown. Doc. 18 at 13. Petitioner clarifies that his filings were made on both sides of the hard lockdown, but not during. Doc. 23 at 4. Even taking Petitioner's clarification as true, the ultimate issue is whether Petitioner had the ability to file documents during the hard lockdown. Petitioner makes no claim that he was unable to file documents during the lockdown period.

Misstating post-conviction activities. Petitioner "objects to the misstatements of the history of some [of] the Petition as found in the 'R&R.'" Doc. 23 at 4–5. The objection here is difficult to follow but it does not seem to refute or rebut the R&R's finding that equitable tolling does not apply. The Court sees nothing erroneous about the R&R's finding that Petitioner knew about the Petition's third and fourth grounds before the pandemic.

Failure to address state court errors on the merits. Petitioner's remaining objections focus on the R&R's failure to address his claims on the merits. Petitioner also generally objects that a § 2244 petition should not be dismissed before conducting an evidentiary hearing or opening discovery. Doc. 23 at 1. The Court is not required to consider the merits of an untimely petition. Because the claims are untimely and Petitioner has not shown that equitable tolling applies, the Court need not consider Petitioner's claims on the merits, conduct an evidentiary hearing, open discovery, or otherwise examine alleged errors by the Arizona Court of Appeals.

CONCLUSION

Petitioner objects to the R&R's finding that equitable tolling does not apply and argues that the R&R should have addressed his claims on the merits. But Petitioner does not demonstrate that equitable tolling applies, thus the Court need not consider the merits of his arguments. Because the Court will overrule Petitioner's objections and dismiss the Petition as untimely, Petitioner's accompanying motions and requests for interrogatories (Doc. 23 at 25–49) will be denied as moot.

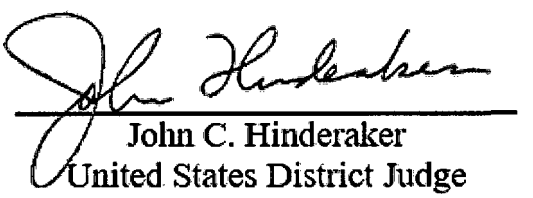
Accordingly,

IT IS ORDERED overruling Petitioner's Objection (Doc. 23), **denying as moot** Petitioner's discovery requests (Doc. 23 at 25–49), and **adopting in full** the R&R (Doc. 18) with the noted correction.

IT IS FURTHER ORDERED dismissing the Petition as untimely. The Clerk of Court shall enter judgment and close this matter.

Under Rule 11(a) of the Rules Governing § 2254 Cases, the Court declines to issue a certificate of appealability because reasonable jurists could not "debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal citation and quotation omitted).

Dated this 21st day of August, 2025.



John C. Hinderaker
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Ruben Casillas Brito,

Petitioner,

v.

Edward Coday, et al.,

Respondents.

No. CV-24-00179-TUC-JCH (JR)

REPORT AND RECOMMENDATION

Petitioner Ruben Casillas Brito ("Petitioner" or "Brito"), incarcerated at the Arizona State Prison Complex in Florence, Arizona, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 ("Petition"). (Doc. 1.) The matter is on referral to Magistrate Judge Jacqueline Rateau for Report and Recommendation. (Doc. 10.) The Petition is fully briefed. (Doc. 15, 16.) As explained below, the Magistrate Judge recommends that the district court dismiss the Petition.

...

APP. C

Factual and Procedural Background[1]

State Court Conviction Proceedings

On May 20, 2014, Petitioner was indicted by a grand jury on four counts of molestation of a child and two counts of sexual conduct with a minor under fifteen involving three separate victims. (Doc. 15-1 at 3-4.) The State of Arizona ("State") filed allegations that the offenses were not committed on the same occasion but were consolidated for trial; that the offenses were dangerous crimes against children; and that Petitioner had been convicted of prior offenses. *Id.* at 6, 8, 10, 12. The State also filed a notice of aggravating factors. *Id.* at 14.

On August 1, 2016, Petitioner entered into a plea agreement, pleading guilty to one count of molestation of a child, an amended count of molestation of a child in the second degree, and an amended count of sexual conduct with a minor in the second degree. *Id.* at 17-24, 26-27. The amended counts were designated preparatory dangerous crimes against children offenses. *Id.* at 26-27.

On September 7, 2016, the Arizona Superior Court, Pima County sentenced Petitioner to 10 years of imprisonment followed by a suspended sentence of 20 years of probation. *Id.* at 29-32.

State Court Post-Conviction Proceedings

First Post-Conviction Proceeding: On December 6, 2016, Petitioner filed a notice

[1] Unless otherwise indicated, the Factual and Procedural Background is taken from Respondent's Limited Answer to Petition for Writ of Habeas Corpus and the exhibits thereto. (Doc. 15.)

of post-conviction relief ("PCR"). (Doc. 15-1 at 34-37.) On April 7, 2017, Petitioner's counsel filed a notice of review stating that after reading the record and transcripts and after consultation with Petitioner she could "find[] no legal issues of merit." *Id.* at 39. The trial court gave Petitioner additional time to file a PCR petition pro se, but Petitioner failed to do so. On July 5, 2017, the court dismissed Petitioner's first PCR notice. *Id.* at 41.

Second Post-Conviction Proceeding: On October 16, 2017, Petitioner filed a second PCR notice. *Id.* at 43-47. On July 5, 2018, Petitioner's counsel filed a notice of review representing to the court that he could not find any "colorable issues to raise." (Doc. 15-1 at 138; Doc. 15-3 at 164.) On December 2, 2019, Petitioner filed a pro per PCR petition claiming that he was denied his right to the effective assistance of trial counsel in violation of his Sixth and Fourteenth Amendment rights, that he was denied his right to a speedy trial in violation of his Sixth and Fourteenth Amendment rights, and that he was "forced and coerced to sign a plea deal due to trial counsel's deliberate ineffectiveness, conflict of interest and other means of pressure which declares the plea deal to be moot." (Doc. 15-1 at 49-52.) The State responded, and Petitioner replied. *Id.* at 112-124, 126-136. On April 8, 2020, the court denied Petitioner's PCR petition. *Id.* at 138-142.

Petitioner attempted to file a petition for review with the Arizona Court of Appeals, but, on May 22, 2020, the appeals court issued an order finding that his petition for review was not in compliance with Rule 32.9 of the Arizona Rules of Criminal Procedure and gave Petitioner until July 1, 2020, to file a petition for review in compliance with the rule. *Id.* at 144. On June 13, 2020, Petitioner filed a petition for review with the Arizona Court of Appeals. (Doc. 15-2 at 3-136.) On August 31, 2020, the appeals court determined that

Petitioner's filing was "a photocopy of his [PCR] petition and reply that had been filed with the trial court, along with a copy of the state's response with some handwritten notes on it." (Doc. 15-3 at 3-5.) In denying Petitioner's petition for review the appeals court held that Petitioner's filing "in no way conforms to the requirements of Rule 33.16(c)(2) and (d) and justifies our summary refusal to grant review." *Id.* at 5. Petitioner did not seek review with the Arizona Supreme Court, and, on February 26, 2021, the court of appeals issued its mandate. *Id.* at 7.

Third Post-Conviction Proceeding: On October 20, 2022, Petitioner filed a third PCR notice. *Id.* at 11-13. On November 21, 2022, Petitioner filed his PCR petition alleging: (1) ineffective assistance of plea counsel; (2) "an unlawful induced plea of guilty or no contest"; (3) "fraud, deceit, misrepresentation, multiplicity, double jeopardy, and prosecutorial misconduct"; (4) "existence of newly discovered material"; and (5) his plea agreement should be voidable because the State alleged the existence of an allegedly non-existent second felony conviction in order to enhance sentencing. *Id.* at 15-137. The State responded, and Petitioner replied. *Id.* at 139-145, 147-162.

On May 16, 2023, the court denied relief and dismissed Petitioner's third PCR petition. *Id.* at 164-166. The court found that Petitioner's claims of ineffective assistance of counsel and "an unlawful induced plea of guilty" were "finally adjudicated on the merits in [his] second PCR," and, as such, were precluded. *Id.* at 165. The court rejected Petitioner's claim of prosecutorial misconduct and a duplicitous indictment, holding that "[t]he indictment is not duplicitous[,] and relief is not warranted on this ground." *Id.* The court denied relief on Petitioner's claim of the "existence of newly discovered material"

due to Petitioner's review of his case file stating, in pertinent part, "[s]etting aside the fact that this information is not new, none of the information [Brito] points out is both material and not already precluded." (Doc. 15-3 at 165.) Lastly, the court rejected Petitioner's claim regarding his prior conviction, finding that no mistake was made. *Id.* at 166.

On May 30, 2023, Petitioner filed a "notice of appeal" in the Arizona Court of Appeals, which the appellate court construed as "an attempt to seek review of the denial of post-conviction relief," but "not in compliance" with the applicable rules. (Doc. 15-4 at 3-5, 7.) On June 7, 2023, the appeals court granted Petitioner leave to re-file his petition for review in compliance with the applicable rules by July 7, 2023. *Id.* at 7. On July 17, 2023, the Arizona Court of Appeals found that Petitioner had not complied with its June 7, 2023, order and dismissed Brito's proceedings. *Id.* at 10.

On July 24, 2023, Petitioner filed a petition for review with the Arizona Court of Appeals. *Id.* at 23-51. On November 2, 2023, the Arizona Court of Appeals granted review, but denied relief. *Id.* at 53-56. The appellate court addressed Petitioner's claim that the PCR court erred by dismissing his third PCR petition without holding an evidentiary hearing determining that Petitioner "misapprehend[ed] the correct standard" and pointed out that "[b]ecause the [post-conviction] court concluded that Brito had presented no [colorable] claim[s], it was not required to conduct an evidentiary hearing." *Id.* at 55. The appeals court addressed Petitioner's claim that the court erred by finding his ineffective assistance of counsel claims precluded, determining that "[t]he ground of ineffective assistance of counsel cannot be raised repeatedly" and "[Petitioner] overlooked the court's determination that he raised the same ineffective assistance claims in his last proceeding."

(Doc. 15-4 at 55-56.) Finally, as to Petitioner's claim that his conviction and sentence were "unconstitutional" because the State had "no hard evidence or factual basis," the appeals court stated that it need not address it because "[Petitioner] does not appear to have raised this claim below." *Id.* at 56.

Petitioner did not file a petition for review with the Arizona Supreme Court, and, on January 18, 2024, the court of appeals issued its mandate. *Id.* at 58-59.

Federal Court Proceedings

First Habeas Proceeding: On September 14, 2022, Petitioner filed a motion for extension of time to file his motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2254, requesting a 90-day "extension of time to file his 28 U.S.C. § 2254 Motion." *See Brito v. Coday*, No. CV 22-00421-TUC-JCH (JR), Doc. 1. The Clerk of Court docketed Petitioner's motion as a petition for a writ of habeas corpus. *Id.* at Doc. 3. United States District Judge John C. Hinderaker denied Petitioner's motion and dismissed the case without prejudice. *Id.* Judge Hinderaker set forth the applicable deadlines for filing a § 2254 habeas petition and a habeas petitioner's entitlement to equitable tolling in appropriate circumstances. *Id.* In denying relief, Judge Hinderaker found that "[b]efore a petition is filed . . . the Court has no authority to disregard or otherwise 'extend' the statutory requirements set forth in § 2254(d)[.]" *Id.*

Second Habeas Proceeding: On March 29, 2024, Petitioner filed the instant Petition alleging four grounds for relief. (Doc. 1.) In Ground One, Petitioner contends that the Arizona Court of Appeals made an erroneous conclusion of law in 2023, resulting in a miscarriage of justice, when his petition for review was "dismissed and denied before it

was received and reviewed," in violation of the Fifth Amendment. (Doc. 1 at 6.) In Ground Two, Petitioner argues that the court abused its discretion by summarily dismissing his Rule 33 PCR petition on May 16, 2023, without conducting an evidentiary hearing or "conducting the *Strickland* procedure standard of review." *Id.* at 7. (italics added.) In Ground Three, Petitioner alleges that his counsel's errors were "so fundamental that the error goes to the inception of the case and violated [his] substantial rights" and his due process right to a fair trial was "stripped from him." *Id.* at 8. Lastly, in Ground Four, Petitioner alleges that his counsel's errors "go to the inception of the case," violating his substantial and due process rights, and claims that there was "no possible way [he] would have had a fair trial." *Id.* at 9. Petitioner also argues that due to his counsel's egregious ineffective assistance, he was placed under "duress[] to plead guilty by undue influence." *Id.*

The AEDPA Applies to the Petition

The Petition, filed after April 24, 1996, is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA"). *See Smith v. Robbins*, 528 U.S. 259, 267 n.3 (2000).

The Petition is Untimely[2]

The time limitations imposed by the AEDPA applies to the Petition. *See, e.g., Furman v. Wood*, 190 F.3d 1002, 1004 (9th Cir. 1999). "Whether a petition is time barred

[2] As a result of finding that the Petition is untimely, this Court does not reach Respondent's arguments that the claims alleged in Grounds One, Two and Three of the Petition are non-cognizable on habeas review, that Petitioner waived the claim alleged in Ground Three by pleading guilty, and that all of Petitioner's claims alleged in the Petition are unexhausted and procedurally defaulted and, as a result, are precluded from habeas review.

by the statute of limitations is a threshold issue that must be resolved before considering other procedural issues or the merits of the individual claim." *White v. Klitzkie*, 281 F.3d 920, 921-22 (9th Cir. 2002).

The AEDPA imposes a one-year limitation period on state prisoners filing habeas corpus petitions in federal court. 28 U.S.C. § 2244(d)(1). The limitation period runs from "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). "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2).

As laid out above, Petitioner was sentenced on September 7, 2016. (Doc. 15-1 at 29.) Thereafter, Petitioner had 90 days—until December 6, 2016—to file a PCR notice to have a "properly filed" application for state post-conviction review pending and toll the one-year AEDPA statute of limitation.

On December 6, 2016, Petitioner filed his first PCR notice. *Id.* at 34-37. On July 5, 2016, the court dismissed Petitioner's first PCR proceeding. *Id.* at 41. Thus, the AEPDA limitation period was statutorily tolled from December 6, 2016, to July 5, 2017. The AEDPA limitation period began running on July 6, 2017, and continued to run until October 16, 2017, when Petitioner filed his second PCR notice. *Id.* at 43-47. In other words, 102 days[3] of the AEDPA one-year limitation period had elapsed by the time Petitioner filed

[3] (July 6, 2017, to October 16, 2017)

his second PCR notice.

The AEDPA limitation period remained tolled during the pendency of Petitioner's second PCR proceeding until the Arizona Court of Appeals issued its mandate on February 26, 2021. (Doc. 15-3 at 7.) *See Menendez v. Ryan,* CV-14-2436-PHX-DGC (JFM), 2015 WL 8923410, at *9 (D. Ariz. Oct. 20, 2015), *report and recommendation adopted,* 2015 WL 8758007, at *5 (D. Ariz. Dec. 15, 2015) (recognizing that in Arizona the issuance of a mandate signals the final resolution of the proceeding for purposes of tolling under 28 U.S.C. § 224(d)(2)); *Rodriguez v. Shinn*, No. CV-20-00068-TUC-DTF, 2021 WL 4942714, at *6 (D. Ariz. Oct. 21, 2021) (following *Menendez*). Thereafter, the one-year AEDPA limitation period began running again on February 27, 2021, and expired 263 days later, on November 17, 2021.

Petitioner filed his third PCR notice on October 20, 2022. (Doc. 15-3 at 11-13.) At the time of this filing, the one-year AEDPA limitation period had already expired, having expired on November 17, 2021. Having been filed outside the AEDPA's one-year limitation period, Petitioner's third PCR petition was not "properly filed" as required by the AEDPA to statutorily toll the limitations period. *See Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003) (holding that "'section 2244(d) does not permit the reinitiation of the limitations period that has ended before the state petition was filed.'"). Accordingly, Petitioner's third PCR petition did not statutorily toll the one-year AEDPA limitation period.

Considering the foregoing, this Court finds that the Petition is untimely as having been filed after November 17, 2021, the date that the AEDPA limitation period expired.

The district court must dismiss the Petition unless Petitioner meets his burden of establishing that the doctrine of equitable tolling applies to save the untimely Petition. For the reasons set forth below, this Court finds that Petitioner fails to meet his burden of establishing that the doctrine of equitable tolling applies to save the untimely Petition.

Equitable Tolling

Petitioner urges that the doctrine of equitable tolling applies to save his untimely Petition claiming:

> As far as being untimely, Brito has explained that during the years of 2020-2022 there was a dangerous and deadly pandemic raging throughout the world and the prison facilities were not immune from its effects. Brito was on hard lockdown; no access to the limited law library; could not communicate or socialize with other inmates. It was impossible to receive legal information much less retrieve own documents that were in the hands of a case manager in another building until 2022 when the mandated lockdowns were lifted. This will explain the extraordinary circumstances beyond Brito's control lest we forget.

(Doc. 16 at 2.)

The threshold necessary to trigger equitable tolling is very high. *Miranda v. Castro,* 292 F.3d 1063, 1066 (9th Cir. 2002). The doctrine of equitable tolling should be applied sparingly, *Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1011 (9th Cir. 2009), "lest the exceptions swallow the rule." *Mendoza v. Carey*, 449 F.3d 1065, 1068 (9th Cir. 2006) (citations omitted). To be entitled to equitable tolling a petitioner must affirmatively demonstrate both that: (1) he diligently pursued his rights and (2) some extraordinary circumstance beyond his control stood in his way and prevented him from filing his Petition on time. *See Pace v. DiGuglielmo,* 544 U.S. 408, 418, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005). "The petitioner must additionally show that the extraordinary circumstances were

the cause of his untimeliness, and that the extraordinary circumstances made it impossible to file a petition on time." *Ramirez v. Yates*, 571 F.3d 993, 997 (9th Cir. 2009) (citations and internal quotations omitted). This Court examines the equitable tolling doctrine's requirements *seriatim*.

Diligently Pursuing His Rights Throughout the Limitation Period: "A petitioner must show diligence throughout the one-year statute of limitations." *Valles v. Allison*, No. 21-CV-0819-GPC-WVG, 2023 WL 2447520, at *8 (S.D. Cal. Mar. 10, 2023), *certificate of appealability denied*, No. 23-55264, 2024 WL 4274357 (9th Cir. July 1, 2024) (holding that the requirement that the petitioner has been diligently pursuing his rights "indicates a need for a petitioner to show his diligence continued up through the point of filing his habeas petition in federal court[]" (citing *Smith v. Davis*, 953 F.3d 582, 593 n.3 (9th Cir. 2020)).

Petitioner claims that his facility "was on hard lockdown" and that he "no access to the limited law library; could not communicate or socialize with other inmates." (Doc. 16 at 2.) He claims that "[i]t was impossible to receive legal information much less retrieve own documents that were in the hands of a case manager[.]" *Id.* As explained below, this Court finds that Petitioner's contentions regarding the COVID-19 restrictions he was subjected to are insufficient to establish that he was diligently pursuing his rights throughout the AEDPA one-year limitation period.

While habeas courts have recognized that COVID-19 precautions that were imposed on prisoners included impediments to legal research and law library access, habeas courts have held that "habeas petitioners must demonstrate or explain how they were diligent in

pursuing their rights despite the restrictions." *Valles*, 2023 WL 2447520, at *8 (citing *Donald v. Pruitt*, 853 Fed. App'x 230, 234 (10th Cir. 2021) (finding that habeas petitioner was not entitled to equitable tolling based on limited access to the law library during COVID-19 and petitioner failed to demonstrate he was pursuing his rights during the period before the COVID-19 restrictions took effect); *Mack v. Alves*, 578 F. Supp. 3d 154, 157 (D. Mass. Dec. 30, 2021) (determining that petitioner did not establish that he diligently pursued his rights during the pendency of the limitations period' petitioner was unable to show "why the resources at his disposal during the pendency of those restrictions, including postal mail, were insufficient for that purpose[]"); *Sloan v. United States*, Case No. 18-cr-40051, 2021 WL 6102164, at *3 (C.D. Ill. Dec. 23, 2021) (determining that petitioner failed to explain why he was not able to pursue his claim prior to the COVID-19 pandemic when law library access was not limited and failed to explain any steps that he took to pursue his claim while library access was limited due to COVID-19 restrictions); *United States v. Henry*, Civil No. 2:20-cv-01821, 2020 WL 7332657, at *4 (W.D. Pa. Dec. 14, 2000) (holding that "[t]he bottom line is that the COVID-19 pandemic does not automatically warrant equitable tolling for any petitioner who seeks it on that basis. The petitioner must establish that he was pursuing his rights diligently and that the COVID-19 pandemic specifically prevented him from filing his motion."). Additionally, district courts have found the requirements for equitable tolling absent where the restrictions imposed on prisoners during the COVID 19 pandemic did not prevent the *filing* of habeas petitions. *See, e.g.*, *Vanderark v. Greene*, No. 20-1417, 2021 WL 2228059, at *3 (C.D. Ill. June 2, 2021) (recognizing that "[n]umerous habeas petitions have been filed in this [c]ourt over

the last year ... despite limitations caused by the COVID-19 pandemic."); *Sloan*, 2021 WL 6102164, at *3 (holding that "[n]otably, at no time during this pandemic have litigants been unable to file pleadings with the Court.").

Petitioner here has failed to offer any evidence that he was diligently pursuing his legal rights throughout the AEDPA one-year limitation period. Although Petitioner claims that he "could not socialize or communicate with other inmates," and that it was impossible to "receive" legal information and "his documents," he fails to offer any evidence that he was diligently pursuing his habeas claim despite these restrictions during the one-year AEDPA limitation period.

Furthermore, this Court points out that the record establishes that Petitioner filed a petition for review in the state court of appeals that was rejected by that court on May 22, 2020. (Doc. 15-1 at 144.) On June 13, 2020, Petitioner filed another petition for review in the state appellate court. (Doc. 15-2 at 3-136.) Also, on October 20, 2022, Petitioner filed his third PCR notice, and, on November 21, 2022, Petitioner filed his third PCR petition. (Doc. 15-3 at 11-13, 15-137) These filings, made in 2020 and 2022, occurred when Petitioner alleges that he was on hard lockdown and demonstrate that Petitioner had access to the court for *filing* notwithstanding the claimed COVID-19 restrictions.

This Court finds that Petitioner has failed to proffer evidence that he was prevented from filing his habeas petition during the AEDPA limitation period. Even if Petitioner had proffered such evidence (and this Court finds that Petitioner has not proffered such evidence), Petitioner's state court filings during 2020 and 2022 belies a finding that he was prevented from *filing* with the court during the AEDPA limitation period.

Considering the foregoing, this Court finds that Petitioner fails to establish that he was diligently pursuing his rights throughout the AEDPA limitation period.

Extraordinary Circumstance Beyond His Control: Since this Court concludes that Petitioner fails to establish that he was diligently pursuing his rights throughout the AEDPA limitations period, it need not consider whether Petitioner has established that some extraordinary circumstance beyond Petitioner's control prevented him from filing his Petition in a timely manner. *See Pace*, 544 U.S. at 418 (a litigant seeking equitable tolling hears the burden of establishing both diligent pursuit and extraordinary circumstance beyond his control). Regardless, as explained below, this Court finds that Petitioner has failed to meet his burden of establishing that an extraordinary circumstance beyond his control prevented him from timely filing his Petition.

As mentioned, Petitioner urges that the COVID-19 pandemic is a circumstance beyond his control that prevented him from timely filing his Petition claiming that he had "no access to the limited law library[.]" (Doc. 16 at 2.) He also claims that "[i]t was impossible to receive legal information much less retrieve own documents that were in the hands of a case manager in another building until 2022 when the mandated lockdowns were lifted." *Id.*

This Court finds that Petitioner has failed to provide a sufficiently specific explanation how COVID-19 precautions prevented him from timely filing his habeas petition. As mentioned above, in Ground One, Petitioner claims that the Arizona Court of Appeals made an erroneous conclusion of law in 2023 when his petition for review was "dismissed and denied before it was received and reviewed[.]" (Doc. 1 at 6.) In Ground

Two, Petitioner claims that the trial court abused its discretion when it dismissed his Rule 33 PCR petition in May of 2023 without conducting an evidentiary hearing. *Id.* at 7. In Ground Three, Petitioner broadly claims that because of his counsel's errors his due process rights were violated and that his right to a fair trial was "stripped from him." *Id.* at 8. In Ground Four, Petitioner claims that "there was no possible way" that he "would have had a fair trial" because he "was duressed (*sic*) to plead guilty by undue influence." *Id.* at 9.

Petitioner's first two claims for relief involve determinations of State court that are alleged to have occurred in 2023. These alleged acts occurred after the expiration of the AEDPA limitation period. *See* Doc. 1 at 6-7. Petitioner has made no effort to connect the claims for relief alleged in Grounds One and Two to his contention that COVID-19 lockdowns and restrictions in effect in 2020 through 2022 were extraordinary circumstances that prevented him from filing his Petition.

As to the claims alleged in Grounds Three and Four, Petitioner has similarly failed to establish how the COVID-19 pandemic precautions constituted an extraordinary circumstance beyond his control that prevented him from timely filing his Petition. The factual basis for the claims alleged in Grounds Three and Four would have been known to Petitioner regardless of the COVID-19 pandemic and the restrictions put in place because of it. For instance, in Ground Three, Petitioner vaguely alleges that his counsel's alleged errors violated his right to due process. In Ground Four, he claims that his counsel, *inter alia*, failed to prepare a defense, failed to conduct any investigation, failed to file any motions, and failed to test the "adversarial evidence[.]" (Doc. 1 at 9.) Petitioner's

allegations regarding his counsel's alleged conduct that occurred during counsel's representation of him. Thus, counsel's alleged conduct was known to Petitioner independent of the existence of the COVID-19 pandemic. Accordingly, this Court finds that Petitioner has failed to establish that COVID-19 was an extraordinary circumstance beyond his control that prevented him from filing his Petition within the AEDPA limitation period.

In sum, this Court finds that Petitioner has failed to establish both that: (1) he diligently pursued his rights throughout the AEDPA limitation period, and (2) some extraordinary circumstance beyond his control prevented him from timely filing his Petition. Accordingly, this Court determines that Petitioner has failed to meet his high burden of establishing that the doctrine of equitable tolling applies to save his untimely Petition. Thus, this Court recommends that the district court find that the requirements for the application of the doctrine of equitable tolling do not exist in this case.

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Recommendation

Based on the foregoing, the undersigned recommends the district court issue an order **dismissing** the Petition as untimely. Pursuant to Federal Rule of Civil Procedure 72(b)(2), any party may serve and file written objections within fourteen days of being served with a copy of the Report and Recommendation. A party may respond to the other party's objections within fourteen days. No reply brief shall be filed on objections unless leave is granted by the district court. If objections are not timely filed, they may be deemed waived. If objections are filed, the parties should use the following case number: **24-CV-00179-JCH.**

Dated this 23rd day of April, 2025.

Jacqueline M. Rateau

Honorable Jacqueline M. Rateau
United States Magistrate Judge

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Brito v. Coday, et al. 25-5476 - 008 - Motion to Reconsider Dispositive Order

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United States Court of Appeals for the Ninth Circuit

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Case Name: Brito v. Coday, et al.

Case Number: 25-5476

Docket Text:

MOTION to Reconsider filed by Appellant Ruben Casillas Brito. [Entered: 03/04/2026 02:28 PM]

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APP. D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 30 2026

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

RUBEN CASILLAS BRITO,

Petitioner - Appellant,

v.

EDWARD CODAY and ATTORNEY GENERAL OF THE STATE OF ARIZONA,

Respondents - Appellees.

No. 25-5476

D.C. No. 4:24-cv-00179-JCH
District of Arizona, Tucson

ORDER

Before: R. NELSON and SUNG, Circuit Judges.

The motion (Docket Entry No. 8) for reconsideration and reconsideration en banc is denied. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

APP. E