Chala #134523 v. Thornell et al

2024 | Cited 0 times | D. Arizona | March 14, 2024

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Francisco V. Chala,

Petitioner, v. Ryan Thornell, et al.,

Respondents.

No. CV-23-01488-PHX-ROS (DMF)

REPORT AND RECOMMENDATION

TO THE HONORABLE ROSLYN O. SILVER, SENIOR UNITED STATES DISTRICT JUDGE:

This matter is on referral to the undersigned for further proceedings and a report and recommendation pursuant to Rules 72.1 and 72.2 of the Local Rules of Civil Procedure. (Doc. 7 at 4) 1

Petitioner F Prison Complex in Buckeye, Arizona, filed a pro se Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a Person in State Custody (Non- July 27, 2023. (Doc. 1) On September 12, 2023, the Court ordered Respondents to answer

the Petition. (Doc. 7 at 3-4)

On November 21, 2023, Respondents filed their Limited Answer to the Petition. (Doc. 13) To their Limited Answer, Respondents attached a Certificate of Service, stating

1 Citation to the record indicates documents as displayed in the official Court electronic document filing system maintained by the District of Arizona under Case No. CV-23- 01488-PHX-ROS (DMF). . (Id. at 24; see Doc. 12) 2

Despite proper service of the Limited Answer, Petitioner did not file a reply, and the time to do so expired in late December 2023. (See Doc. 7 at 4)

For the reasons set forth below, it is recommended that these proceedings be dismissed with prejudice as untimely, that the Clerk of Court be directed to terminate this matter, and that a certificate of appealability be denied. I. BACKGROUND

A. Charges, Convictions, and Sentences Court case number CR 96-02154, the Arizona Court of Appeals summarized the events

leading to the charges against Petitioner:

[Petitioner] and Jose Mercado argued with D.N. because they thought D.N. lasted twenty-five to thirty minutes, took place in the parking lot of the drove away. As they did so, Mercado fired three shots into the air. A short time later, [Petitioner] and Mercado again confronted D.N. as he walked down the street. After a brief argument, [Petitioner] and Mercado shot D.N. and his friend, D.H., who also happened to be in the area. D.N. was severely injured and D.H. died. Detectives arrested [Petitioner] and Mercado two days later and interviewed them at police headquarters. (Doc. 13-1 at 142) 3

On March 1, 1996, a Maricopa County grand jury indicted Petitioner with two crimes: murder in the first degree, a class 1 dangerous felony (count 1), and attempted murder in the first degree, a class 2 dangerous felony, or in the alternative, aggravated assault, a class 3 dangerous felony (count 2). (Id. at 4-6) The state later moved to dismiss the allegation of aggravated assault in count 2. (Id. at 8-9) During trial court proceedings, 2 See also https://perma.cc/7HER-YKNC (last accessed on 3/13/2024). 3 The appellate See 28 U.S.C. § 2254(e)(1); Purkett v. Elem proceedings in federal courts, the factual findings of state courts are presumed to be Runningeagle v. Ryan, 686 F.3d 758, 763 n.1 (9th Cir. 2012) (rejecting argument that the statement of facts in an Arizona Supreme Court opinion should not be afforded the presumption of correctness). Petitioner was represented by appointed counsel Charles J. Babbitt of the Office of the Legal Defender See, e.g., id. at 11, 14, 18, 46, 53) Petitioner was also assisted by a Spanish language interpreter during trial court proceedings. (Id.)

Following a multi-day jury trial, on December 22, 1997, a jury found Petitioner not guilty of one count of first-degree murder (count 1) but found Petitioner guilty of the lesser- included offense of second-degree murder as to count 1. (Id. at 39, 42; see also id. at 11- 12, 14-16, 18-19, 21-25, 27-29, 31-34, 36-37, 39-40) As to count 2, the jury found Petitioner guilty of attempted first-degree murder. (Id. at 40, 44)

On February 20, 1998, the trial court sentenced Petitioner to a 16-year term of imprisonment as to the lesser included offense in count 1 and a 21-year term of imprisonment as to count 2, to be served consecutively, with 729 days of presentence incarceration credit as to both counts. (Id. at 46-51) the trial court imposed community supervision in the amount of one day for every seven days of the sentence imposed. (Id. at 49) The trial court further ordered restitution to the victims in the amount of $47,305.62. (Id.) The trial court advised Petitioner of and provided Id.)

B. On February 23, 1998, Petitioner and his trial counsel filed notices of appeal of Id. at 53, 55) On July 27, 1998, through appellate , Petitioner filed an opening brief in the court of appeals. (Id. at 67-86) In his opening brief, Petitioner raised four issues for review: (1) whether the trial court erred when

impairment following the shooting, (3) whether the trial court erred in admitting autopsy

Id.)

The state filed a response brief (Id. at 88-117), and Petitioner filed a reply (Id. at 119-39)

and sentences statements to a

detective to be voluntary; did not err in allowing the surviving victim to testify regarding Rule 20 motion. (Id. at 141-48)

On April 28, 1999, Petitioner filed a pro se petition for review to the Arizona Supreme Court. (Id. at 150-71) On August 27, 1999, the Arizona Supreme Court denied Id. at 173) On September 23, 1999, the Arizona Court of Appeals issued the mandate. (See Doc. 13-2 at 13)

C. First Post- On March 9, 1998, 4

Petitioner filed a pro se PCR notice in the superior court and requested appointment of PCR counsel. (Doc. 13-1 at 57-60) On August 24, 1998, through appellate counsel, Petitioner filed a Motion for Stay of Rule 32 of appeals. (Id. at 62-63) Proceedings and ordered appellate

appeal. (Id. at 65)

colorable issues to raise and requested additional time for Petitioner to file a pro se PCR petition. (Id. at 175-78)

On August 8, 2000, the state filed a Motion to Dismiss Rule 32 Proceeding because Petitioner had not filed a pro se PCR petition following an extension of time to do so. (Id. at 180-81) 4

Melville, 68 F.4th at 1159 ned his petition over to prison authorities on the same day Butler v. Long, 752 F.3d 1177, 1178 n.1 (9th Cir. -1 at 58-59) and dismiss -2 at 3-4) The record does not reflect that Petitioner filed a motion for reconsideration or a petition for review of the . 5

D. Second PCR Proceedings Over three years later, on December 3, 2003, 6

Petitioner filed a second pro se PCR notice in the superior court notice should be excused because

his legal paperwork was lost and was not returned to

Petitioner until April 2003. (Id. at 6-9, 11)

On January 19, 2004, the superior court dismissed Peti

30 days of the manda Id. at 13) The superior court found that Petitioner had not shown that the failure to timely file his second Id.) The record does not reflect that Petitioner filed of his second PCR proceedings. 7

E. Third PCR Proceedings Over four years later, on December 9, 2008, 8

Petitioner filed a third pro se PCR in the superior court. (Id. at 15-25) Petitioner asserted that his 21-year sentence as to count 2 was improperly aggravated and that the Arizona Department s. (Id.)

On March 13, 2009, the Id. at 27-28) In doing so, the superior court stated:

5 Further, the electronic docket maintained by the Maricopa County Superior Court does not reflect that Petitioner filed a motion for reconsideration or a petition for review of the See https://perma.cc/TT8K-6KZJ (identifying Petitioner as Defendant (3) or Party (A)) (last accessed March 1, 2024). 6 See footnote 4, supra. 7 See footnote 5, supra. 8 See footnote 4, supra.

discovered material facts and a significant change in law that would probably overturn his conviction or sentence. In order for a Defendant to be entitled to post-conviction relief based on newly discovered evidence, [Petitioner] must show that the evidence was discovered after trial although existed before trial; the evidence could not have been discovered and produced at trial through reasonable diligence; the evidence is neither cumulative nor impeaching; the evidence is material; and the evidence probably could have changed the verdict. State v. Saenz, 197 Ariz. 487, 489 ¶ 7, 4 P.3d 1030, 1032 (App. 2000). [Petitioner] fails to meet this standard or to even allege what newly discovered facts entitle him to relief. Similarly, [Petitioner] fails to specify what change in law would probably overturn his sentence. [Petitioner] argues that he improperly received an aggravated sentence on one count. [Petitioner] cannot raise this claim in an untimely Rule 32 proceeding because an untimely notice may only raise claims pursuant to Rule 32.1(d), (e), (f), (g), or (h). Ariz. R. Crim. P. 32.4(a). In addition, [Petitioner] is precluded from relief on this claim pursuant to Rule 32.2(a) because it either was raised or could have been raised on appeal or in a prior Rule 32 proceeding. [Petitioner] claims that the Arizona Department of Corre has miscalculated his sentence. The Court does not have authority to determine earned release credits, release date, or eligibility for release. These are matters for the Director of the ADOC, who is not a party to this criminal case. [Petitioner] has not demonstrated that he is being held in custody beyond the expiration of his sentence, as required by Rule 32.1(d), and has not stated any other claim upon which relief can be granted in a Rule 32 proceeding. (Id.)

The record does not reflect that Petitioner filed a motion for reconsideration or a

9 F. Fourth PCR Proceedings Over ten years later, on May 13, 2020, 10

Petitioner filed a fourth pro se PCR notice Id. at 30-110) In his fourth PCR notice, Petitioner argued that the state court lacked jurisdiction; that the untimeliness of his PCR notice should be excused; that his sentences were illegal; that the superior court improperly the superior Apprendi v. New Jersey, 530 U.S. 466 (2000); and that he was unable to raise his PCR proceedings due to a change in the law. (Id. at 31-52) 9 See footnote 5, supra. 10 See footnote 4, supra.

Id. at 112-14) In doing so, the superior court stated:

A. Rule 32.1(b) Claim In his current submission, [Petitioner] contends that the Court lacks subject matter jurisdiction and consequently he is entitled to relief pursuant to Ariz. R. Crim. P. 32.1(b). (Notice at 2) The Court disagrees. Subject matter jurisdict of the Arizona Constitution vests original jurisdiction in the Arizona Superior -123(A). Accordingly, this Court had subject matter jurisdiction to adjudicate B. Rule 32.4(b)(3)(D) Claim [Petitioner] contends that any untimeliness of this proceeding is without fault on his part. (Notice at 5, 3) This claim arises under Ariz. R. Crim. P. 32.4(b)(3)(D). [Petitioner] offers no factual support, nor does he provide legal authority for applying the rule to a fourth Rule 32 proceeding. C. Rule 32.1(a) and Rule 32.1(c) Claims [Petitioner] claims his convictions and sentences were obtained in violation of his rights under the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution and Article 2, Sections 13 and 24 of the Arizona Constitution, thereby entitling him to relief under Ariz. R. Crim. P. 32.1(a). (Notice at 7) Specifically, [Petitioner] claims that he received ineffective assistance of counsel or was deprived of counsel, and the Court violated his due process rights under Apprendi v. New Jersey, 530 U.S. 466 (2000). (Id. at 20, 3, 12) In addition, [Petitioner] erroneously complains that attempted first-degree murder is not a cognizable offense. (Id. at 13) The record reflects that [Petitioner] raised claims of erroneous sentence aggravation in his third Rule 32 proceeding and never pursued them on appeal. The Court rejected the argument in dismissing the third Rule 32 proceeding. To the extent that he is raising new Rule 32.1(a) claims, relief is barred. See Ariz. R. Crim. P. 32.2(a)(3). [Petitioner] argues that his sentences are illegal pursuant to Ariz. R. Crim. P. 33.1(c). (Notice at 13) Rule 32.1(plain when he discovered the issue. To the extent this claim is based upon Apprendi, the case does not apply for reasons explained more fully below. Alternatively, [Petitioner] contends that the Court should not have dismissed his first Rule 32 proceeding without appointing counsel. (Notice at 11-13) [Petitioner] may not litigate prior Rule 32 rulings in this proceeding. If review in the Arizona Court of Appeals. Furthermore, his reliance on Osterkamp and Pruett is misplaced and erroneous, because those cases apply to Defendants who pled guilty. (Id. at 9-10) D. Rule 32.1(g) Claim [Petitioner] also contends that a significant change in law occurred that would alter his convictions or sentence if applicable retroactively under Ariz. discovering the Rule 32.1(g) does not State v. Shrum, 220 Ariz. 115, 118, ¶ 15, 203 P.3d 1175, 1178 (2009). The Arizona Supreme Court construes the rule to req Id. (quoting State v. Slemmer, 170 Ariz. 174, 182, 823 P.2d 41, 49 (1991)). This change occurs, for example, when an

appellate court overrules previously binding authority. Id. at ¶ 16. [Petitioner] relies upon Apprendi, but the reliance is misplaced. Apprendi does not apply retroactively because Apprendi was decided. See State v. Feebles, 210 Ariz. 589, 595, ¶ 17, 115 P.3d 629, 635 (App. 2009). E. Rule 32.1(e) Claim He further claims relief based upon newly discovered material facts pursuant to Ariz. R. Crim. P. 32.1(e). (Notice at 3) The Rule 32.1(e) claim must be Ariz. R. Crim. P. 32.4(b)(3)(B). To be entitled to Rule 32.1(e) relief, [Petitioner] must show that the facts were discovered after trial although existed before trial; the facts could not have been discovered and produced at trial or on appeal through reasonable diligence; the facts are neither solely cumulative nor impeaching; the facts are material; and the facts probably would have changed the verdict or sentence. See State v. Saenz, 197 Ariz. 487, 489, ¶ 7, 4 P.3d 1030, 1032 (App. 2000), see also Ariz. R. Crim. P. 32.1(e). [Petitioner] does not provide any newly discovered facts or any information to support the other elements of a Rule 32.1(e) claim. The exhibits to his Notice which include a transcript, an indictment, court rulings, and verdict forms are not new facts for purposes of Rule 32.1(e). Moreover, newly discovered legal authorities do not support Rule 32.1(e) relief based upon newly discovered material facts. In sum, [Petitioner] has failed to state a claim for which relief can be granted in a successive Rule 32 proceeding. [Petitioner] must assert substantive claims and adequately explain the reasons for their untimely assertion. Ariz. R. Crim. P. 32.2(b). He has failed to meet this standard. (Id.)

The record does not reflect that Petitioner filed a motion for reconsideration or a 11

G. Fifth PCR Proceedings Over a year later, on November 16, 2021, 12

Petitioner filed a fifth pro se PCR notice and PCR petition in the superior court. (Id. at 116-18, 120-45) In his

11 See footnote 5, supra. 12 See footnote 4, supra. fifth PCR notice and associated PCR petition, Petitioner asserted that he received an illegal sentence; ; ; that because Petitioner was proceeding pro se; that Petitioner improperly received a term of community supervision; that Petitioner had mental health issues; and that Petitioner was taken advantage of because Petitioner was a foreign national and relied on another inmate who made incorrect filings. (Id. at 125-36)

associated PCR petition. (Id. at 147-50) In doing so, the superior court stated:

A. Rule 32.4(b)(3)(D) Claim In his current submission, [Petitioner] contends that any untimeliness of this proceeding is without fault on his part. (Notice at 3) This claim arises under Ariz. R. Crim. P. 32.4(b)(3)(D). [Petitioner] describes himself as a foreign national without knowledge of the U.S. legal system. (Notice at 3; Petition at 3) He also claims that the prior Rule 32 proceedings were unsuccessful because he was relying upon help from an uninformed inmate. (Petition at 15, 17) But [Petitioner] fails to provide authority for applying Rule 32.4(b)(3)(D) to a fifth Rule 32 proceeding. B. Rule 32.1(a) and Rule 32.1(c) Claims [Petitioner] also claims his convictions and sentences were obtained in violation of his rights under the Sixth, Eighth, and Fourteenth Amendments to the U.S.

Constitution, thereby entitling him to relief under Ariz. R. Crim. P. 32.1(a). (Notice at 2; Petition at 1, 7, 10-14) Specifically, [Petitioner] claims that he received ineffective assistance of counsel at trial and on appeal, his sentences are cruel, unusual, and nonsensical because the attempted murder sentence is longer than the second-degree murder sentence, his sentences should be concurrent under A.R.S. § 13-116 because the underlying offenses occurred at the same time, his attempted murder sentence was erroneously aggravated, and the sentences fail to account for his post-sentencing diagnosis of post-traumatic stress disorder and other mental health issues. (Petition at 1, 3, 6-14) The record reflects that [Petitioner] raised claims of erroneous sentence aggravation in his third Rule 32 proceeding and never pursued them on appeal. Likewise, [Petitioner] previously raised ineffective assistance of counsel claims, and relief on that ground is precluded. See Ariz. R. Crim. P. 32.2(a)(2); State v. Spreitz, 202 Ariz. 1, 2, ¶ 4, ineffective assistance of counsel claims are raised, or could have been raised, -conviction relief proceeding, subsequent claims of ineffective assistance will be deemed waived and preclude To the extent that he is raising new Rule 32.1(a) claims, relief is also precluded. See Ariz. R. Crim. P. 32.2(a)(3). He also argues that his sentences are illegal pursuant to Ariz. R. Crim. P. 32.1(c). (Notice at 2; Petition a er] does not explain when he discovered these issues. He complains that this Court never provided reasons for running his murder sentence consecutively to the attempted murder sentence. (Petition at 9) This argument rests upon a faulty premise. At the time A.R.S. § 13- if multiple sentences of imprisonment are imposed on a person at the same time, the sentence or sentences imposed by the court shall run consecutively unless the court expressly directs otherwise, in which case the court shall set sentences are the default if the Court fails to specify whether sentences run concurrently or consecutively. Therefore, the Court was not required to articulate reasons for running the murder sentence consecutively. See id. His remaining sentencing claims are also unavailing. [Petitioner] contends that A.R.S. § 13-116 required the Court to impose concurrent sentences because the offenses occurred at the same time. (Petition at 6, 9) Nothing in the statute requires a Court to run sentences concurrently when different victims are involved, however. See State v. Hampton, 213 Ariz. 167, 182, ¶¶ 64-65, 140 P.3d 950, 965 (2006) (upholding consecutive sentences for homicide victims). The Court also rejects the argument that the sentencing order lacks clarity and community supervision cannot apply to a flat sentence. (Petition at 7, 13) See State v. Jenkins, 193 Ariz. 115, 119-20, ¶¶ 11-14, 970 P.2d 947, 951-52 (App. 1998) (holding that community - C. Rule 32.1(e) Claim He further claims relief based upon newly discovered material facts pursuant to Ariz. R. Crim. P. 32.1(e). (Notice at 3; Petition at 2) The Rule 32.1(e) . P. 32.4(b)(3)(B). To be entitled to Rule 32.1(c) relief, [Petitioner] must show that the facts were discovered after trial although existed before trial, the facts could not have been discovered and produced at trial or on appeal through reasonable diligence; the facts are neither solely cumulative nor impeaching; the facts are material; and the facts probably would have changed the verdict or sentence. See State v. Saenz, 197 Ariz. 487, 489, ¶ 7, 4 P.3d 1030, 1032 (App. 2000), see also Ariz. R. Crim. P. 32.1(e). [Petitioner] does not provide any newly discovered facts or any information to support the other elements of a Rule 32.1(e) claim. The partial sentencing transcript attached to the Petition is not a new fact or evidence for purposes of Rule 32.1(e). [Petitioner] is relying upon his post-sentencing diagnosis of post-traumatic stress disorder as well as other unspecified context or information about when the issue was discovered, the Court cannot determine whether he has exercised reasonable diligence in raising the issue with the

Court. It is not even clear to the Court whether the alleged trauma occurred prior to sentencing or thereafter. Nor is the Court persuaded, on this record, that the diagnosis would have made a difference at sentencing. D. Rule 32.1(d) Claim Alternatively, [Petitioner] contends that he is or will be held beyond the expiration of his sentences, and consequently is entitled to relief under Ariz. R. Crim. P. 3 premised upon the Court adopting his sentencing error arguments. Because the Court rejected those arguments, and the sentencing terms manifestly have not expired, [Petitioner] is not entitled to Rule 32.1(d) relief. In sum, [Petitioner] has failed to state a claim for which relief can be granted in a successive Rule 32 proceeding. [Petitioner] must assert substantive claims and adequately explain the reasons for their untimely assertion. Ariz. R. Crim. P. 32.2(b). He has failed to meet this standard. (Id.)

On March 1, 2022, 13

Petitioner filed a petition for review in the Arizona Court of Appeals. (Id. at 152-63) In his petition for review, Petitioner argued that he was precluded from raising ineffective assistance of counsel, that his sentences were illegal, that newly sentences were illegal, and that the untimeliness of his PCR notice was excused. (Id.)

On December 15, 2022, the court of appeals granted review but denied relief, determining that Petitioner had not shown that the superior court abused its discretion in Id. at 165)

On January 20, 2023, Petitioner filed a petition for review in the Arizona Supreme Court. (Id. at 167- petition for review. (Id. at 174)

II.

In his July 27, 2023, Petition, Petitioner raises four grounds for relief. (Doc. 1) In

and to his sentences being run consecutively. (Id. at 6) Petitioner argues that the sentencing Id.) In Ground Two,

Petitioner asserts that he received ineffective assistance of trial counsel because trial counsel did not object to an illegal sentence, failed to object to other unspecified mistakes that caused Petitioner not to have a fair trial, and failed to mentio Id.

13 See footnote 4, supra. at 8) In Ground Three, Petitioner asserts that he received ineffective assistance of appellate counsel because appellate counsel failed to raise issues regarding illegal sentences. (Id. at 9) Petitioner states that appellate couns s Id.) In Ground Four, Petitioner

generally ; states that he avers that he did not have help with his case until he recently found

an inmate to assist with PCR filings; and generally asserts that he was being taken advantage of. (Id. at 10) Petitioner did not include explanation regarding any untimeliness of the Petition; section 16 of the Petition was left blank. (Id. at 11)

In their Limited Answer to the Petition, Respondents assert that Petition was untimely filed without excuse. (Doc. 13 at 8-13) Respondents further assert that Ground Four of the Petition is non-cognizable and that each ground of the Petition is procedurally defaulted without excuse. (Id. at 13-23) Respondents request that a certificate of appealability be denied. (Id. at 23)

To their Limited Answer, Respondents attached a Certificate of Service, stating that

Id. at 24; see also Doc. 12) Despite proper service of the Limited Answer, Petitioner did not file a reply in support of his Petition, and the time to do so expired in late December 2023. (Doc. 7 at 4; Doc. 13) III. TIMELINESS

A threshold issue for the Court is whether these habeas proceedings are time-barred by the applicable 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. 2022).

A. -Year Limitations Period

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)). AEDPA provides a one-year statute of limitations period. See 28 U.S.C. § 2244(d)(1).

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.

one-year statute of limitations start date is determined by 28 U.S.C. § 2244(d)(1)(A) unless

a later start date applies under 28 U.S.C. § 2244(d)(1)(B), (C), or (D). Here, the record does not present any basis for a later start date pursuant to 28 U.S.C. § 2244(d)(1)(B), (C), or -year statute of limitations period runs fro

On February 20, 1998, Petitioner was sentenced. (Doc. 13-1 at 46-48) Thereafter, Petitioner commenced a timely direct appeal of his convictions and sentences. (Id. at 53- 55) sentences. (Id. at 141-48) On August 27, 1999, the Arizona Supreme Court denied

(Id. at 173) Petitioner had ninety days, until November 26, 1999, 14

to file a petition for review in the 14 Ninety days from August 27, 1999, was November 25, 1999. Because November 25, United States Supreme Court. See Harris v. Carter, 515 F.3d 1051, 1052-53 n.1 (9th Cir. 2008) (judgment becomes final when period for filing petition for certiorari in U.S. Supreme Court expires, i.e., 90 days after state supreme court issues opinion or denies review). The record does not reflect that Petitioner filed a petition for review in the United States 26, 1999. one-year limitations period began to run on November 27, 1999, . See Patterson v. Stewart, 251 F.3d 1243, 1247 (9th Cir. 2001) -year grace period began to run on June 20, 1997

and e

B. Statutory Tolling AEDPA expressly provides for statutory tolling of the limitations period when a -conviction or other collateral review with respect to the pertinent ju

rules governing filings. Artuz v. Bennett, 531 U.S. 4, 8 (2000). This includes compliance with filing deadlines. A state post-

tolling during those proceedings. Pace v. DiGuglielmo, 544 U.S. 408, 414 Allen v. Siebert untimely state post- provision, and reiterating its holding in Pace, 544 U.S. at 414). Once the statute of

Jiminez v. Rice, 276 F.3d 478, 482 (9th Cir. 2001); Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003). 1999, was Thanksgiving Day, Petitioner had until the following business day, November 26, 1999, to file a petition for review in the United States Supreme Court.

In Melville v. Shinn, 68 F.4th 1154, 1159-61 (9th Cir. 2023), the Ninth Circuit held Id. at 1156; see also id. at 1160-61. The Ninth Circuit

concluded Id. at 1156. Thus, whether the state aw and Id. at 1160.

Petitioner filed his first PCR notice on March 9, 1998, during the pendency of his direct appeal. (Doc. 13-1 at 57-60) Through appellate counsel, Petitioner filed a motion to Id. at 62-63) See Section III(A), supra. On no colorable issues to raise in PCR proceedings, and requested an extension of time for

Petitioner to file a pro se PCR petition. (Id. at 175-78) Because Petitioner did not file a pro se (Id. at 180- proceedings. (Doc. 13-2 at 3-4) Petitioner had 30 days, until October 19, 2000, to file a petition for review in the court of appeals. See former Ariz. R. Crim. P. 32.9(c) (30 days to

Because Petitioner did not file a petition for review in the court of appeals, first PCR proceedings ceased pending sentences became final on October 19, 2000, when no state avenue for relief remained open. October 19, 2000, -year limitations period was tolled pursuant to 28 U.S.C. § 2244(d)(2). Petitioner is entitled to statutory tolling through October 19, 2000, the date on which the one-year statute of limitations period commenced to run on October 20, 2000, and the period for Petitioner to file a habeas petition expired on October 19, 2001. 15

See Patterson v. Stewart, 251 F.3d 1243, 1247 (9th was denied by the -year grace period began to run on June 20, 1997 and expired one year later, on June 19, Petitioner filed these habeas proceedings on July 27, 2023, over twenty-one

Although Petitioner initiated his second PCR proceedings on December 3, 2003 (Doc. 13-2 at 6- proceedings were untimely and that Petitioner did not show that the failure to timely file

Id. at 13) Because an untimely PCR Pace, 544 U.S. at 414, timely second PCR notice did not toll the limitations period. Moreover,

limitations period expired in October tions period. See Jiminez, 276 F.3d at 482; Ferguson, 321 F.3d at

823. limitations period. Petitioner initiated his third, fourth, and fifth PCR proceedings after the

expiratio, third, fourth, and fifth PCR proceedings as untimely and successive. (Doc. 13-2 at 27-28, 112-14, 147-50)

through October 19, 2000, when no state avenue for relief remained open limitations period expired one year later on October 19, 2001. These proceedings, which

Petitioner initiated on July 27, 2023, over twenty-one years after the expiration of 15

expired on September 19, 2001. (Doc. 13 at 10-11) However, Respondents do not account for thirty days for Petitioner to proceedings. See Melville, 68 F.4th at 1156 (PCR pending while avenue for relief

remains open, whether or not petitioner took advantage of it). tolling and/or the actual innocence gateway apply to render these proceedings timely filed.

C. Equitable Tolling

1. Applicable Law The U.S. Holland v. Florida period may be equitably tolled because it is a statute of limitations, not a jurisdictional bar.

Id. at 645-46. Petitioner bears the burden of establishing that equitable tolling is warranted. Pace, 544 U.S. at 418; Rasberry v. Garcia 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

T

Smith v. Davis, 953 F.3d 582, 600 (9th Cir. 2020) (en banc). Put another way, for equitable tolling to apply, Petitioner must

habeas petition. Holland, 560 U.S. at 649 (quoting Pace, 544 U.S. at 418). To meet the first prong, while an impediment to filing caused by an extraordinary circumstance existed, but before

Smith, 953 F.3d at 598- - ce prevented a petitioner acting with Id. at 600.

In the 2020 en banc decision in Smith v. Davis, 953 F.3d at 582, the Ninth Circuit -cl applying equitable tolling (that requires diligence only during the course of the extraordinary circumstance, and not thereafter, resulting in a day-for-day pause of the running of the limitations clock). Instead, the Court adopted a rule which conditions

an impediment caused by extraordinary circumstances prevented timely filing is a diligence in all time periods before, during, and after the existence of an extraordinary circumstance to Id. at 595.

A egal 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 phistication is not, by itself, an extraordinary circumstance

see also Ballesteros v. Schriro, 2007 WL 666927, at *5 (D.

representation during the applicable filing period, and temporary incapacity do not

Felder v. Johnson, 204 F.3d 168, 171 (5th Cir. 2000).

Frye v. Hickman, 273 F.3d 1144,

1146 (9th Cir. 2001). Instead, a petitioner must establish that due to circumstances beyond

Waldron- Ramsey, 556 F.3d at 1014 (denying tolling when a petition was 340 days late because, for Faretta self-representation claim. He could have developed that argument, outlined the other arguments and the facts underlying those arguments on the form habeas petition, and then Even if a petitioner faces difficulties in accessing legal materials, the petitioner is not entitled to equitable tolling absent credible allegations that the petitioner was denied access to a particular document when needed. Id. Moreover, receipt of an actual case or statute is unnecessary to filing a habeas claim based on the facts and legal theory without citation to case law. Waldron- Ramsey, 556 F.3d at 1014.

T barriers Mendoza v. Carey, 449 F.3d 1065, 1069 (9th Cir. 2006). I -English- speaking petitioner ... must, at a minimum, demonstrate that during the running of the AEDPA time limitation, he was unable, despite diligent efforts, to procure either legal materials in his own language or translation assistance from an inmate, library personnel, Id. at 1070; see also Diaz v. Kelly, 515 F.3d 149, 154 (2d Cir. 2008) (diligence requirement of equitable tolling imposes on the prisoner a substantial obligation to make all reasonable efforts to obtain assistance to mitigate language difficulties).

able diligence, not Id. at 653 (internal citations and quotations omitted). - 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 threshold necessary to trigger equitable

internal emphasis omitted).

In addition, 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)

circum file, however, is not required. Grant v. Swarthout, 862 F.3d 914, 918 (9th Cir. 2017) been

2. Analysis Petitioner does not expressly argue in his Petition that he is entitled to equitable tolling. In Ground Four of the Petition, Petitioner asserts - taken advantage of. (Doc. 1 at 10) may be construed

as arguments supporting equitable tolling, Petitioner has not shown that any extraordinary circumstance prevented him from timely filing a habeas petition and Petitioner has not shown that Petitioner has been diligently pursuing his rights. Nor does the record reflect such.

claimed status as a foreign national, with no knowledge of how to proceed in his case, does not

warrant equitable tolling. Rasberry, 448

F.3d at 1154; Ballesteros, 2007 WL 666927, at *5. Moreover, even if Petitioner had a language barrier as a foreign national, Petitioner has not shown that he was unable to obtain assistance to mitigate any language difficulties. The record demonstrates that Petitioner was capable of making numerous filings in English in state court during the two decades after his conviction and 2003 second, 2008 third, 2020 fourth, and 2021 fifth PCR proceedings. Petitioner has not demonstrated that he did not or could not understand how or when to file a timely habeas petition, nor that Petitioner was unable to file a timely habeas petition with or without assistance.

Similarly, circumstance[,] Felder, 204 F.3d at 171, nor is a lack of representation. Ballesteros, 2007 WL 666927, at *5. Although Petitioner argues that he had no assistance with his case until another inmate Petitioner does not specify any steps taken by him to pursue his habeas claims prior to obtaining assistance. Further, Petitioner generally asserts that but Petitioner does not explain who took advantage of him, nor does Petitioner explain how someone took advantage of him such that he was unable to file a timely habeas petition. Petitioner has not demonstrated an extraordinary circumstance that prohibited him from filing a timely habeas petition.

Even if Petitioner could demonstrate that an extraordinary circumstance prevented him from timely filing his habeas petition, Petitioner has not established that he has been diligently pursuing his rights. Respondents argue that Petitioner loss of his legal paperwork from e tolling . 16

(Doc. 13 at 13) Petitioner failed to file a PCR petition in his first PCR proceedings in 2000. (See Doc. 13-2 at 3-4) After purportedly recovering his lost legal paperwork in April 2003, Petitioner waited to file a second PCR notice until December 2003 (Id. at 6-9, 11), and the superior court found that Petitioner had not demonstrated that he was not at fault for the untimely filing of the second PCR notice (Id. at 13). Following the dismissal of his second PCR proceedings, Petitioner did not file a habeas petition, instead initiating three additional PCR proceedings in December 2008 (Id. at 15-25), in May 2020 (Id. at 30-110), and in November 2021 (Id. at 120-45). Petitioner does not explain why he could not file a habeas petition promptly following the alleged return of his legal paperwork in April 2003, nor does he explain why he could not file a timely habeas petition following the dismissal of each of his five state court PCR proceedings.

Petitioner has not met his burden of showing that he has been pursuing his rights diligently and that some extraordinary circumstance prevented Petitioner from filing a timely petition for habeas corpus. Accordingly, equitable tolling is not appropriate on this record and does not apply here to render these proceedings timely. 16 Although Petitioner asserted in his second PCR notice that he lacked access to his legal paperwork from early 2000 until April 2003 (Doc. 13-2 at 8), Petitioner does not argue such in his habeas Petition.

D. Actual Innocence In McQuiggin v. Perkins, 569 U.S. 383, 391-396 (2013), the Supreme Court held

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

district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him gui

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). McQuiggin v. Perkins, 569 U.S. 383, 399

(2013) (quoting Schlup, 513 U.S. to support his allegations of constitutional error with new reliable evidence whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical Schlup, 513 U.S. at 324. See also Lee v. Lampert, 653 F.3d 929, 945 (9th Cir. 2011); McQuiggin case Shumway v. Payne,

223 F.3d 982, 990 (9th Cir. 2000) (citing Calderon v. Thompson, 523 U.S. 538, 559 (1998)).

Petitioner does not argue in his Petition that he is actually innocent. Attached to the Petition are: proceedings (Doc. 1 at 13- PCR proceedings (Id. at 17- December 15, 2022,

memor Id. at 36-37); proceedings (Id. at 38- Pet Id 20, 2023, petition for review in the Arizona Supreme Court in his fifth PCR proceedings (Id. at 46- ntencing (Id. at 53-58). of factual innocence. Petitioner does not argue that his attachments are evidence that more likely than not would have prevented a jury from convicting him of the offenses underlying the Petition, nor is such apparent Further, the record otherwise does not establish

Petitioner does not argue actual innocence and does not present new reliable evidence that would more likely than not prevent a jury from convicting him. Nor does the record otherwise contain such evidence. Thus, the actual innocence gateway does not apply twenty-one-year late filing of these proceedings.

E. These Proceedings Are Untimely Under AEDPA As explained above, these habeas proceedings were untimely filed and neither equitable tolling nor the actual innocence gateway render this action timely filed. These untimely proceedings should be dismissed with prejudice and terminated. IV. CONCLUSION

For the reasons set forth above, the July 27, 2023, Petition was untimely filed and neither equitable tolling nor the actual innocence gateway render this action timely filed. Because the Petition wa regarding procedural default and non-cognizability. Due to untimeliness, it is

recommended that the Petition be dismissed with prejudice and that the Clerk of Court be directed to terminate this matter.

judgment, it is recommended that a certificate of appealability be denied because dismissal is justified by a plain procedural bar and reasonable jurists would not find the procedural ruling debatable. Slack v. McDaniel, 529 U.S. 473, 484 (2000); 28 U.S.C. § 2253.

Accordingly, IT IS THEREFORE RECOMMENDED Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a Person in State Custody

(Non-Death Penalty) (Doc. 1) be dismissed with prejudice and that the Clerk of Court be directed to terminate this matter.

IT IS FURTHER RECOMMENDED that a Certificate of Appealability be denied because dismissal is justified by a plain procedural bar and reasonable jurists would not find the procedural ruling debatable.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1) of the Federal

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

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 appellate review of the findings of fact in an order or judgment entered pursuant to the

See Fed. R. Civ. P. 72. Dated this 14th day of March, 2024.