UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Craig Murray Jones, Petitioner -vs- David Shinn, et al., Respondents.	CV-19-5258-PHX-DJH (JFM) **Report & Recommendation on Petition for Writ of Habeas Corpus**

I. MATTER UNDER CONSIDERATION

Petitioner has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1). The Petitioner's Petition is now ripe for consideration. In addition, Petitioner has filed a Motion for Release or in the alternative Appointment of Counsel (Doc. 17). Accordingly, the undersigned makes the following proposed findings of fact, report, and recommendation pursuant to Rule 8(b), Rules Governing Section 2254 Cases, Rule 72(b), Federal Rules of Civil Procedure, 28 U.S.C. § 636(b) and Rule 72.2(a)(2), Local Rules of Civil Procedure.

II. RELEVANT FACTUAL & PROCEDURAL BACKGROUND

A. FACTUAL BACKGROUND AND PROCEEDINGS AT TRIAL

Petitioner was investigated on allegations of sexual abuse of minors, *i.e.* two of his daughters and one of their cousins. In the ensuing investigation, Petitioner made incriminating statements, and had a camera with a nude photo of one of the victims.

On November 12, 2013 Petitioner was indicted[1] in Maricopa County Superior Court on 25 counts, including charges of molestation, aggravated assault, attempted

[1] Petitioner had twice been indicted on some of the charges in 2011. (Pet. Exh. K, Indictments.)

molestation, furnishing obscene materials, sexual conduct with a minor, sexual abuse, child abuse, attempted sexual conduct with a minor, sexual exploitation, public sexual indecency, attempted public sexual indecency, and indecent exposure. (Exh. A, Indictment.)[2]

After various attempts at self-representation, Petitioner proceeded to trial with counsel and was convicted on "five counts of molestation of a child; four counts of furnishing harmful items to minors; three counts of sexual conduct with a minor; two counts each of attempted molestation of a child and child abuse; and one count each of sexual abuse, attempted sexual conduct with a minor, indecent exposure, and aggravated assault." (Exh. EE, Mem. Dec. 8/16/16 at ¶ 1.) Petitioner was sentenced to an aggregate term of 114 years in prison. (*Id.* at ¶ 3; Pet. Att. A, Sentence 5/29/15 (Doc. 1 at 6.).)

On the date of sentencing Petitioner received a copy of a Notice of Rights of Review (Exh. S-3) identifying the deadlines for petitions for post-conviction relief.

B. PROCEEDINGS ON DIRECT APPEAL

Petitioner filed a direct appeal through counsel, arguing error in: (1) terminating Petitioner's self-representation; (2) admission of hearsay; (3) determining concurrent sentences; (4) determining consecutive sentences; and (5) amendment of one count. (Exh. CC, Open. Brief.)

On August 16, 2016, the Arizona Court of Appeals vacated the conviction and sentence on the amended count but affirmed the remaining convictions and sentences. (Exh. EE, Mem. Dec. 8/16/16 at ¶ 44.) On August 20, 2016, the Arizona Department of

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[2] Exhibits in the record are referenced as follows:

Exhibits to the Answer, Doc. 14	"Exh. ___"
Attachments to the Petition, Doc. 1	"Pet. Att. ___"
Exhibits to the Petition, Doc. 1	"Exh. P-___"
Exhibits to the Reply, Doc. 16	"Exh. R-___"
Petitioner's Supplemental Exhibits, Doc. 18	"Exh. PS-___"
Exhibits to the Supplemental Answer, Doc. 22	"Exh. S-___"

In violation of the instructions for the required habeas petition form, Petitioner has placed his ("Attachment") exhibits to his Petition in the middle of the Petition. Consequently, the undersigned provides docket numbers and pages for these exhibits to aid in locating them.

Corrections received mail for Petitioner from the Arizona Court of Appeals. (Exh. PS-FF, Mail Log at 39 (Doc. 18 at 60).)[3]

No motion for reconsideration or petition for review was filed, and on September 30, 2016, the court issued its Mandate (Exh. EE).

On that same date, appellate counsel Brown forwarded to Petitioner "his entire file," including 26 volumes of Reporters Transcripts from 2013, 2014 and 2015. (Exh. PS, Not. Compliance 5/1/19.) The prison mail logs provided by Petitioner do not list any mail from appellate counsel (or any counsel) between September 28, 2016 and November 1, 2016. (Exh. PS-FF, Mail Log at 40-43 (Doc. 18 at 61-64).) The prior mail from appellate counsel was received on May 12, 2016. (*Id.* at 34 (Doc. 18 at 56).) The next mail form appellate counsel was received on June 22, 2017. (*Id.* at 58 (Doc. 18 at 79).)

In October 2016, Petitioner wrote to the Clerk of the Arizona Court of Appeals requesting copies of the transcripts and the state's answering brief. (Exh. PS-GG, Affidavit of Pet. at ¶ 6(B), (Doc. 18 at 117).) The Clerk responded on October 18, 2016 advising Petitioner on (and seeking payment of) the copying fees. (Pet. Exh. Q.) Petitioner received mail from the Arizona Court of Appeals on October 20, 2016. (Exh. PS-FF, Mail Log at 41 (Doc. 18 at 62).)

C. PROCEEDINGS ON POST-CONVICTION RELIEF

First Pre-PCR Filing – In the interim, on October 13, 2016, Petitioner purports to have filed with the trial court a "Notice and Request for Court Record" (Pet. Exh. R (Doc. 1 at 257)), asserting that appellate counsel had "abandoned" Petitioner by failing to provide the answering brief on appeal and any reply brief, and that on October 3, 2016 Petitioner had received the appellate court Mandate. Petitioner requested copies of the briefs, memorandum decision and trial transcripts.

Special Action - On October 26, 2016 Petitioner filed a Petition for Special Action

[3] Because Petitioner seeks to avoid the procedural defenses based on lack of receipt of various records, etc. the undersigned makes findings surrounding mail delivered to Petitioner.

with the Arizona Supreme Court, asking for a stay of the mandate to allow Petitioner to file a motion for reconsideration or petition for review, as well as copies of various records. (Exh. P-R (Doc. 1 at 289); Pet. Affid. Doc. 18 at 117, ¶ 6(D) (showing mailing on October 24, 2016.) On February 7, 2017, the Arizona Supreme Court declined jurisdiction over the Petition for Special Action. (Exh. P-II, Doc. 18 at 139, Docket Case M-16-0068.)

Pinal County Habeas – On October 19, 2016 Petitioner attempted to file a state petition for writ of habeas corpus with the Pinal County Superior Court. After it was returned for lack of a civil cover sheet, Petitioner resent it on November 15, 2016. (Pet. Affid., Doc. 18 at 117-119, ¶¶ 6(C) and 6(I). The Petition was returned unfiled on December 2, 2016 as an improperly filed Rule 32 PCR petition, which was required to be filed with the trial court in Maricopa County. (Exh. P-II, Doc. 18 at 143, Letter 12/2/16.)

Arizona Supreme Court Habeas –On October 28, 2016 Petitioner filed a state petition for writ of habeas corpus with the Arizona Supreme Court, which was summarily dismissed on January 24, 2017 as an improper Rule 32 PCR proceeding. (Exh. P-II, Doc. 18 at 140, Docket Case HC-16-0018.)

Second and Third Pre-PCR Filing – On February 6, 2017, Petitioner filed with the trial court a Notice of Inability to Proceed with Post-Conviction Relief (Exh. P-R, Doc. 1 at 296) requesting from the court copies of records from the appeal (responsive brief, reply brief, memorandum decision) and transcripts.

On June 23, 2017, a second "Request for Documents" was filed with the trial court. The court granted the request for copies of the appellate decision and mandate, and directed copies of the order to counsel so they would be aware of the request. (Exh. FF, M.E. 7/7/17.)

On July 20, 2017, trial counsel Lauritano forwarded her file to Petitioner, but denied having any transcripts. (Exh. S-2, Not. Compliance.) The prison mail log reflects multiple items of mail from trial counsel on July 20, 2017. (Exh. PS-FF, Mail Log at 62 (Doc. 18 at 83).)

On July 27, 2017, Petitioner filed a Request for Order, complaining that several of

his trial counsel and appellate counsel had not responded. Petitioner requested an Order requiring counsel to provide their files. (Exh. P-R, Doc. 1 at 302.)

First PCR Proceeding – Almost 20 months later, on March 21, 2019, Petitioner filed a Notice of Post-Conviction Relief (Exh. GG, Exh. R-A) and an Affidavit in Support (Exh. R-A).[4] The PCR court summarily dismissed the proceeding on the basis that it was untimely, and the purported excuse for its untimeliness was insufficient, and the claims asserted not permitted in an untimely proceeding. (Exh. HH, M.E. 4/15/19.)

D. PRESENT FEDERAL HABEAS PROCEEDINGS

Petition – Over five months later, on September 23, 2019, Petitioner, presently incarcerated in the Arizona State Prison Complex at Florence, Arizona, commenced the current case by filing his Petition for Writ of Habeas Corpus (Doc. 1).[5] Petitioner's Petition asserts on constitutional bases the following ten grounds for relief:

1. denial of his right self-representation;
2. an unreasonable determination of the facts on his self-representation claim;
3. four-year pretrial detention used for tactical advantage;
4. ineffective assistance of trial counsel re investigation of defense;
5. abandonment by appellate counsel;
6. ineffective assistance of trial counsel re witness;
7. vindictive charging after refusal to plead guilty;
8. trial judge presided over grand juries;
9. appellate judge presided over portions of trial court proceedings;
10. breakdown in communications with trial counsel.

[4] The Affidavit in Support was originally misfiled. The trial court observed the misfiling, but noted that the "Court addressed Defendant's claims in a dismissal order filed on April 16, 2019" in the proper file. (Exh. R-B, M.E. 11/6/19, Case CR2003-008562-001 DT.) Indeed, the PCR court specifically identified the Affidavit as being "before the Court" when the PCR proceeding was dismissed. (Exh. HH, M.E. 4/15/19.)

[5] The Petition includes Petitioner's declaration under penalty of perjury that it was delivered to the prison mail system on the same date. (Petition, Doc. 1 at 3.)

(Order 12/17/19, Doc. 6 at 2-3.) Petitioner argues appellate counsel abandonment as a basis for avoiding the statute of limitations.

Response - On March 12, 2020, Respondents filed their Limited Answer ("Answer") (Doc. 14). Respondents argue the petition is untimely, and Grounds 2 through 10 are procedurally defaulted.

Reply - On April 20, 2020, Petitioner filed a Reply (Doc. 16). Petitioner argues cause for any procedural default, and equitable tolling of the statute of limitations based on the abandonment of appellate counsel, and lack of access to the record.

Petitioner was granted leave to supplement the record with various records attached to his Motion to Expand Record (Doc. 18). (Order 4/26/21, Doc. 19.)

Supplemental Answer – The Court observed that Respondents had not addressed Petitioner's assertion in the reply that any untimeliness or procedural default resulted from lack of access to the record, and a variety of state post-conviction proceedings identified by the Reply with potential impact on the procedural defenses. Respondents were directed to supplement the record and their Answer. (Order 4/26/21, Doc. 19.)

On June 14, 2021, Respondents filed their Supplemental Answer (Doc. 22) and various supplemental records. Respondents argue that the additional post-conviction filings do not render the Petition timely because:

- the lack of access was not a "state created impediment" that would delay the commencement of the limitations period;
- no statutory tolling resulted because: (1) the proceedings were untimely; (2) they did not challenge the conviction and instead only sought records; and (3) there is no "gap tolling" for time between post-conviction proceedings;
- no equitable tolling resulted because: (1) he has not shown how his lack of access prevented a timely filing given his ability to file the instant petition without the records; (2) he fails to show why he could not rely on his own memory of events at trial; (3) he could have filed a protective habeas petition and sought a stay to exhaust his state remedies; (4) he fails to explain the

delay in filing his federal petition after receiving PCR counsel's file; and (5) stop-clock equitable tolling no longer applies in the Ninth Circuit.

Respondents also argue that Petitioner's lack of access to the record does not provide cause to excuse his procedural defaults because:

- he has been able to raise his claims in the instant Petition despite lack of such records;
- he fails to show how lack of access caused an untimely PCR notice or failure to file a petition for review in his PCR proceeding.

Supplemental Reply – Petitioner filed his Supplemental Reply (Doc. 29) on August 5, 2021. Petitioner argues:

- that stop-clock tolling should continue to apply to "prospective equitable tolling";
- he could not have made "protective" filings before receiving the transcripts because there were proceedings conducted without Petitioner's presence while there was a breakdown in the attorney/client relationship that could have revealed federal claims, such as "ineffective assistance of counsel, prosecutorial misconduct, judicial bias, improper comments on evidence, comments affecting directly a ruling on controversial issues, improper statements of law, and improper allocation of definition of burden of proof" (Doc. 29 at 5);
- such protective filings would have had to assert more than conclusory allegations;
- he would have been required to rely on such transcripts to properly raise claims and exhaust his state remedies;
- without the records, there was a no "full and fair" hearing on the facts of his claims;[6]

[6] The presence or absence of a "full and fair hearing" is relevant to deciding the deference given to a state court factual findings, *see Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir.

- he raised the claims to his appellate counsel;
- he had been instructed by trial counsel to not file a PCR notice until direct appeal was complete, and he was unaware of that ruling until writing to the Arizona Court of Appeals;
- because he had not been provided a "full and fair" hearing by the state courts, he was not required to file a "protective" habeas petition;
- he has yet to obtain all of the records to support his claims;
- despite the unconventional nature of his approach in seeking relief in the state courts, he has shown diligence in the face of the lack of records;
- the PCR court's decision was affected by the misfiling of the supporting affidavit provided by Petitioner.

III. APPLICATION OF LAW TO FACTS

A. TIMELINESS

1. One Year Limitations Period

Respondents assert that Petitioner's Petition is untimely. Congress has established a 1-year statute of limitations for all applications for writs of habeas corpus filed pursuant to 28 U.S.C. § 2254, challenging convictions and sentences rendered by state courts. 28 U.S.C. § 2244(d). Petitions filed beyond the one-year limitations period are barred and must be dismissed. *Id*.

2. Commencement of Limitations Period

a. Conviction Final

The one-year statute of limitations on habeas petitions generally begins to run on

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2004), whether an evidentiary hearing can be allowed on habeas, *see Townsend v. Sain*, 372 U.S. 293, 313 (1963), whether an exclusionary rule claim can be heard on habeas, *see Stone v. Powell*, 428 U.S. 465, 481–82 (1976), and in applying various specific constitutional guarantees, *see e.g. Delaware v. Fensterer*, 474 U.S. 15, 22 (1985) (applying confrontation clause). *Cf. Magwood v. Patterson*, 561 U.S. 320, 335 (2010) (eschewing a "full and fair opportunity" standard to allowing successive habeas petitions). It is not relevant to either the statute of limitations or procedural default defenses.

"the date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A).[7]

Here, Petitioner's direct appeal remained pending at least through August 16, 2016, when the Arizona Court of Appeals denied his appeal.[8] (Exh. EE, Mem. Dec. 8/16/16.) Thereafter, Petitioner had 30 days to seek review by the Arizona Supreme Court. Moreover, in 2016, Arizona applied Arizona Rule of Criminal Procedure 1.3 to extend "the time to file an appeal by five days when the order appealed from has been mailed to the interested party and commences to run on the date the clerk mails the order." *State v. Zuniga*, 163 Ariz. 105, 106, 786 P.2d 956, 957 (1990). [9] Here, there is no indication that the Memorandum Decision was delivered to Petitioner or his counsel by any means other than mailing. Accordingly, Petitioner's time to seek review by the Arizona Supreme Court expired 35 days after the appellate court decision, or on **September 20, 2016**.

For purposes of 28 U.S.C. § 2244, "direct review" includes the period within which a petitioner can file a petition for a writ of certiorari from the United States Supreme Court, whether or not the petitioner actually files such a petition. *Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012). The Supreme Court "can review, however, only judgments of a 'state

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[7] Later commencement times can result from a state created impediment, newly recognized constitutional rights, and newly discovered factual predicates for claims. *See* 28 U.S.C. § 2244(d)(1)(B)-(D). Except as discussed hereinafter, Petitioner proffers no argument that any of these apply.

[8] Respondents identify August 6, 2016 as the date of the Arizona Court of Appeals' decision, and carry the 10 day difference into calculating a September 11, 2016 expiration (which was a Sunday). (Answer, Doc. 14 at 8.) Both the Mandate and the Memorandum Decision reflect the filing date as "August 16, 2016." (Exh. EE.)

[9] As part of a general restyling and restructuring of the Arizona Rules of Criminal Procedure, effective January 1, 2018, it appears that Rule 1.3 was amended to exclude from the five-days-after-mail rule "the clerk's distribution of notices, minute entries, or other court-generated documents." Ariz. R. Crim. Proc. 1.3(a)(5). In addition, Rule 1.3(c) was added to clarify that a "court order is entered when the clerk files it," *see also* Ariz. R. Crim. Proc. 31.1(c)(6) (defining "entry"), and the rules on appeals, petitions for review, motions for reconsideration, etc. were revised to reference "entry" of the order being appealed, *see e.g.* Ariz. R. Crim. Proc. 31.2(a)(2)(B), 31.20 (c), 31.21(b)(2)(A), 32.9(a), and 32.9(c)(1)(A). *See* Ariz. Sup. Ct. Order R-17-002, available at https://www.azcourts.gov/Portals/20/2017%20Rules/17-0002.pdf, last accessed 4/19/19.

court of last resort' or of a lower state court if the 'state court of last resort' has denied discretionary review." *Gonzalez v. Thaler*, 565 U.S. 134, 154 (2012) (citing U.S. Sup.Ct. R. 13.1 and 28 U.S.C. § 1257(a)). Here, Petitioner did not seek direct review by the Arizona Supreme Court. Accordingly, the time for seeking a writ of certiorari with the U.S. Supreme Court cannot be considered in determining when Petitioner's judgment became final. *Id.*

Based on the foregoing, Petitioner's conviction became final on September 20, 2016, upon expiration of his time to file a petition for review with the Arizona Supreme Court.

b. State Created Impediments

Petitioner asserts that he was impeded by state action as a result of appellate counsels' failure to effect delivery to Petitioner of her file in 2016 upon issuance of the decision of the Arizona Court of Appeals, and subsequent failings of the state court system to provide him with copies. (Reply, Doc. 16 at 7.) Petitioner clarifies that it was, in particular, the transcripts which he required. (Supp. Reply, Doc. 29 at 3-4.)

28 U.S.C. § 2244(d)(1)(B) provides that the habeas statute of limitations can begin running at the later time of "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." This later deadline does not apply for the following reasons.

Not Impediment to Federal Petition - First, § 2244(d)(1)(B) is concerned only with circumstances "when a petitioner has been impeded from filing a [federal] habeas petition." *Shannon v. Newland*, 410 F.3d 1083, 1088 (9th Cir. 2005). *See* Brian R. Means, *State Impediment - Generally*, Federal Habeas Manual § 9A:22 (2018) ("The language of § 2244(d)(1)(B) and § 2255(f)(2) makes clear that the challenged action must have actually impeded the petitioner's ability to have filed a timely federal action."); and Brian R. Means, *Commencement of the one-year statute of limitations—State impediment*, Postconviction Remedies § 25:14 (2018) ("The first requirement is that the prisoner was

impeded from filing his federal habeas petition."). Petitioner fails to show that he his lack of access to the trial record precluded him from filing a timely federal habeas "application." At most, he argues that he was prevented from asserting specific claims. It is not the ability to assert specific claims that is relevant to §2244(d)(1(B), but the ability to file a federal application at all.

Nor can Petitioner rely on his obligation to first assert the claims to the state court. Rather, as asserted by Respondents, he could have filed a "protective" habeas petition. In *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), the Supreme Court analyzed the potential catch-22 between the habeas limitations period and the exhaustion requirement. "A prisoner seeking state postconviction relief might avoid this predicament, however, by filing a 'protective' petition in federal court and asking the federal court to stay and abey the federal habeas proceedings until state remedies are exhausted." *Id.* at 416.

Petitioner argues this avenue was not available to him because the state courts would not permit an unsupported state petition, and without reviewing the record, etc. he might have missed being able to assert claims, particularly those arising from hearings where he was not present (and due to a broken relationship with counsel he would not have been advised about them). But Petitioner offers nothing to show that the state courts would not have allowed him time to recover the file.

Moreover, contrary to Petitioner's protests about having to layout his evidence to pursue state relief, an Arizona PCR proceeding is commenced by simply filing a notice of post-conviction relief. *See* Ariz. R. Crim. Proc. 32.4. As reflected in the Notice of Rights of Review (Exh. S-3), Petitioner had "30 days of the order and mandate affirming the judgment and sentence on direct appeal," or until October 31, 2016 to file his PCR notice. Had he timely done so, counsel would have been appointed, who could have assisted him in obtaining the complete record, and he could have sought discovery to obtain it. *See* Ariz. R. Crim. Proc. 32.6(b)(1) and (2) (previously Rule 32.4(d)) (allowing discovery). Moreover, for timely, first petitions, the obligation to assert claims does not arise until the actual PCR petition is filed. *State v. Rosales*, 205 Ariz. 86, 91, 66 P.3d 1263, 1268 (Ct.

App. 2003).[10]

No State Created Impediment – Finally, instead of following the provided route to obtain review of his claims, Petitioner chose (in his terms) an "unconventional approach." (Supp. Reply, Doc. 29 at 7.) Instead of simply filing a timely PCR notice after the mandate issued in September 2016, he spent two and a half years requesting records from: the trial court, the Arizona Supreme Court in a petition for speciation action, a habeas proceeding in another county, and a habeas proceeding with the Arizona Supreme. It was not until March 21, 2019 that Petitioner finally filed a Notice of Post-Conviction Relief. Thus, any impediment was not created by the State, but rather by Petitioner's own failure to utilize established procedures to attempt to challenge his conviction.

c. Conclusion re Commencement

Therefore, Petitioner's one year began running on September 21, 2016, and without any tolling expired on September 20, 2017.[11] Thus, without any statutory or equitable tolling, Petitioner's Petition, delivered for mailing and filed on September 23, 2019, was delinquent by over two years.

3. Statutory Tolling

a. Applicable Law

The AEDPA provides for tolling of the limitations period when a "properly filed application for State post-conviction or other collateral review with respect to the pertinent

[10] The Arizona form for notices of postconviction relief provides spaces for identifying particularly claims. This appears to arise from the use of the same form for all PCR notices, including untimely or successive petitions which are required to identify claims subject to exceptions to procedural bars to such petitions. *See* Ariz. R. Crim. Proc. 32.2(b) (allowing court to summarily dismiss untimely or successive PCR notice that "does provide sufficient reasons why the defendant did not raise the claim in a previous notice or petition, or in a timely manner").

[11] For purposes of counting time for a federal statute of limitations, the standards in Federal Rule of Civil Procedure 6(a) apply. *Patterson v. Stewart*, 251 F.3d 1243, 1246 (9th Cir. 2001). Rule 6(a)(1)(A) directs that the "the day of the event that triggers the period" is excluded. *See Patterson v. Stewart*, 251 F.3d 1243 1246 (9th Cir. 2001) (applying "anniversary method" under Rule 6(a) to find that one year grace period from adoption of AEDPA statute of limitations, on April 24, 1996, commenced on April 25, 1996 and expired one year later on the anniversary of such adoption, April 24, 1997).

judgment or claim is pending." 28 U.S.C. § 2244(d)(2). This provision only applies to state proceedings, not to federal proceedings. *Duncan v. Walker*, 533 U.S. 167 (2001).

b. Application to Petitioner

Petitioner's limitations period commenced running on September 21, 2016. After that time, in addition to his PCR proceeding, he made various pre-PCR filings, two state habeas petitions and petition for special action.

The **pre-PCR filings** requesting records do not trigger any tolling. *See Ramirez v. Yates*, 571 F.3d 993, 1000 (9th Cir. 2009) (state discovery motions did not toll because they did not challenge the conviction). "[I]f a filing of that sort could toll the AEDPA limitations period, prisoners could substantially extend the time for filing federal habeas petitions by pursuing in state courts a variety of applications that do not challenge the validity of their convictions." *Hodge v. Greiner*, 269 F.3d 104, 107 (2d Cir. 2001).

Because it does not affect the outcome, the undersigned assumes *arguendo* (in Petitioner's favor) that the balance of these **non-traditional proceedings** resulted in statutory tolling, including the Pinal County habeas petition, the Arizona Supreme Court habeas petition, and the Arizona Supreme Court special action.[12] The earliest of these proceedings was the Pinal County habeas, which Petitioner mailed on October 9, 2016. The latest pending was the special action petition (filed October 26, 2016) which remained pending through February 7, 2017.

Based on that assumption, Petitioner's one year ran for 17 days (from September 21, 2016 through October 7, 2016) was tolled from October 8, 2016 through February 7, 2017. Thereafter, Petitioner still had 348 days of his one year remaining, which expired on Monday, January 22, 2018.

[12] The Petition for Special Action was filed after the mandate, and thus was, at best, an untimely attempt to reopen the direct appeal. The Pinal County petition was never actually filed, having been sent to the wrong court. The Supreme Court habeas petition was filed in the wrong court, and (treated as a PCR petition) was untimely. Thus, it appears unlikely that this court would, upon full consideration, find statutory tolling from these proceedings.

Almost fourteen months after that date, on March 21, 2019, Petitioner commenced his **traditional PCR proceeding** by filing a Notice of Post-Conviction Relief (Exh. GG, Exh. R-A). At that time, his limitations period had been expired for almost 14 months. Once the statute has run, a subsequent post-conviction or collateral relief filing does not reset the running of the one-year statute. *Jiminez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001); *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003). Accordingly, Petitioner has no statutory tolling resulting from his traditional PCR proceeding.[13]

Consequently, even with all arguably permitted statutory tolling, Petitioner's habeas petition was over 20 months delinquent.

4. Equitable Tolling

Equitable tolling of the one-year limitations period in 28 U.S.C. § 2244 is available. *Pace v. DiGuglielmo*, 544 U.S. 408 (2005).

> To receive equitable tolling, [t]he petitioner must establish two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way. The petitioner must additionally show that the extraordinary circumstances were the cause of his untimeliness, and that the extraordinary circumstances ma[de] it impossible to file a petition on time.

Ramirez v. Yates, 571 F.3d 993, 997 (9th Cir. 2009) (internal citations and quotations omitted). "Indeed, 'the threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the exceptions swallow the rule.' " *Miranda v. Castro,*292 F.3d 1063, 1066 (9th Cir. 2002) (quoting *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir.).

Petitioner bears the burden of proof on the existence of cause for equitable tolling. *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

[13] Moreover, this PCR proceeding was dismissed as untimely. (Exh. HH, M.E. 4/15/19.) Statutory tolling of the habeas limitations period only results from state applications that are "properly filed," and an untimely application is never "properly filed" within the meaning of § 2244(d)(2). *Pace v. DiGuglielmo*, 544 U.S. 408 (2005).

appropriate.").

In the *en banc* decision in *Smith v. Davis*, 953 F.3d 582 (9th Cir.), *cert. denied*, 141 S. Ct. 878, 208 L. Ed. 2d 440 (2020) the Ninth Circuit resolved a discrepancy between prior decisions and eschewed the "stop-clock" method of 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 equitable tolling on a question of causation. "As we have previously described it, whether an impediment caused by extraordinary circumstances prevented timely filing is a "causation question" that requires courts to evaluate a petitioner's diligence in all time periods—before, during, and after the existence of an "extraordinary circumstance"—to determine whether the extraordinary circumstance actually did prevent timely filing." *Id.* at 595.

Petitioner argues that the *Smith* decision does not preclude "prospective equitable tolling," citing *Brown v. Davis*, 432 F. Supp. 3d 1099 (E.D. Cal. 2020). (Supp. Reply, Doc. 29 at 2.) Petitioner's reliance is misplaced. *Brown* dealt with a case where a petitioner was seeking a ruling by the habeas court that the habeas limitations would be equitably tolled based on the Petitioner's ongoing inability to timely file because of restrictions from COVID-19, such that a later filing would be deemed timely. Here, Petitioner does not seek tolling for future delay, but rather for past delay.

Petitioner notes that *Smith* was only recently decided. But, "retroactive application of judicial decisions is the rule not the exception." *United States v. Kane*, 876 F.2d 734, 735–36 (9th Cir. 1989), *modified on other grounds by United States v. Robinson*, 958 F.2d 268 (9th Cir. 1992). Petitioner shows no prejudice from a retroactive application. For example, he does not suggest that he had delayed in reliance on the application of the prior stop-clock rule. Nor can he show *Smith* could not have been anticipated. Indeed, *Smith* was heard *en banc* because the panel decisions "issued in the last two decades on the proper application of equitable tolling point in opposite directions," and that the more recent had shifted away from a stop-clock approach. *Smith*, 953 F.3d at 589.

a. Abandonment by Appellate Counsel

Petitioner's primary ground for equitable tolling is the contention that appellate counsel abandoned him, *e.g.* by failing to provide him copies of the state's response, not allowing him to participate in formulating a reply, and failing to seek reconsideration or review in the Arizona Supreme Court.

Although an attorney's behavior can establish the extraordinary circumstances required for equitable tolling, mere negligence or professional malpractice is insufficient. *Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir.2001). A "garden variety claim of excusable neglect,' such as a simple 'miscalculation' that leads a lawyer to miss a filing deadline does not warrant equitable tolling.' " *Holland v. Florida*, 560 U.S. 631, 651-652 (2010). Rather, the attorney's misconduct must rise to the level of extraordinary circumstances. *Id.* Although inclined to conclude counsel's failings were, at best, mere negligence,[14] the undersigned assumes *arguendo* (in Petitioner's favor) that they rose to the level of being an extraordinary circumstance.

Even so, Petitioner fails to show how appellate counsel's failings precluded Petitioner from timely filing a habeas petition. Petitioner proffers nothing to show that appellate counsel was obligated to file Petitioner's federal habeas petition. Petitioner acknowledges that he was aware of the appellate decision and mandate almost immediately after the issuance of the mandate. He proffers no reason why he did not immediately proceed with filing his federal habeas petition. Rather, Petitioner expended the next four months pursuing extraordinary state remedies, seeking to reopen his direct appeal. Even if all of that time could be attributed to appellate counsel, thereafter Petitioner did not timely commence his federal petition, nor even his traditional PCR proceeding.

[14] Counsel continued communicating with Petitioner throughout the appellate process, and filed a reply brief. (*See* Exh. P-R, Doc. 1 at 278 (letter 11/30/15), 282 (letter 1/15/16), 285 (letter 3/2/16),

b. Lack of Appellate File

Petitioner also complains that he encountered difficulties in obtaining his file from appellate counsel and the state courts, and in particular the transcripts.

On May 1, 2019, appellate counsel filed a notice, advising that he had forwarded Petitioner "his entire file" on September 30, 2016. (Exh. P-HH, Notice of Compliance.) Petitioner has provided copies of the prison legal mail log, which does not appear to reflect the delivery of the file to Petitioner. No mail from counsel Brown appears between May 12, 2016 (Exh. P-FF, Mail Log Doc. 18 at 56) and June 27, 2017 (*id.* at 79).[15]

Diligence after Defective PCR Efforts - Even so, Petitioner proffers nothing to show efforts to obtain his records in the four and a half months between the culmination of his non-traditional PCR proceedings on February 7, 2017 and his June 23, 2017 Request for Documents. Although Petitioner asserts he filed his "Notice of Inability to Proceed" on February 6, 2017, that filing did not seek assistance in getting appellant counsel's file, only copies of records which Petitioner had available to him directly from the appellate court as shown by the response from the Arizona Court of Appeals of October 18, 2016. Petitioner's Request for Order on July 27, 2017 again sought the records.

Diligence after Trial Court Intervention - Moreover, Petitioner does not show any efforts in the fourteen months between his July 27, 2017 Request for Order and October 30, 2018, when Petitioner again wrote to appellate counsel seeking his file. (Exh. P-R, Doc. 1 at 304, Letter 10/30/18.) While some patience is to be expected in awaiting rulings in post-conviction practice, at some point a reasonably diligent litigant is expected to take some action in the face of the apparent failure of the trial court to rule. In the face of an expiring habeas limitations period, three months is a reasonable time, or until October 25, 2017. But Petitioner did not revisit the trial court again for almost seventeen months, when he filed his PCR Notice. The only thing he did in the interim was almost a

[15] Petitioner argues that counsel falsely represented sending him the file. (Motion to Expand, Doc. 18 at 1.) Petitioner offers nothing to support the allegation of falsehood other than his non-receipt. There many other more likely explanations for Petitioner's lack of receipt including the records being lost in the mails, misplaced by prison officials, etc.

year later, on October 30, 2018, when he again wrote appellate counsel, who had already demonstrated he was not forwarding any additional records. That does not reflect diligence.

Nor does Petitioner show any efforts in the following four months until his March 21, 2019 Notice of Post-Conviction Relief. Indeed, his Affidavit detailing his various mailings and filings skips from June 21, 2017 until March 15, 2019. (Exh. P-GG, Affidavit.) Nor did he take any action after the PCR court's Order of April 15, 2019 for appellate counsel to produce the file and counsel's May 1, 2019 Notice of Compliance indicating he had nothing left to provide, until he finally filed his federal petition in September 2019.

Effect of Limited Records - Moreover, as discussed hereinabove in connection with state created impediments, Petitioner fails to show that his lack of records prevented him from filing his federal petition. As argued by Respondents, the records sought by Petitioner largely relate to matters within Petitioner's own memory. Moreover, a habeas petition need not be filed with evidentiary support from the state court record. Rather, it is up to the respondents to provide the state court record. *See* Rules Governing § 2254 Cases, Rule 5(c) and (d).

It is true that courts have entertained what has amounted to at least a partial presumption that delay in filing a habeas petition can be justified where the petitioner had no access to his legal files.

> While the district court is correct that Ramirez did "not identify a single document in storage without which he could not file a habeas petition," we have previously held that a complete lack of access to a legal file may constitute an extraordinary circumstance, and that it is "unrealistic to expect a habeas petitioner to prepare and file a meaningful petition on his own within the limitations period without access to his legal file." *Espinoza-Matthews v. California*, 432 F.3d 1021, 1027-28 (9th Cir.2005).

Ramirez v. Yates, 571 F.3d 993, 998 (9th Cir. 2009) (remanding to determine whether lack of access made timely filing impossible, and whether petitioner pursued his rights diligently). But here, Petitioner has never asserted a loss of access to all records.

Moreover, he fails to point to any of the claims he now raises which he could not previously assert because of a lack of records. At most, he suggests there might be some additional claims to be raised.

In sum, Petitioner has demonstrated dogged (albeit not constant) determination in attempting to get records from his prosecution. But he fails to show any diligence in doing the one thing required by 28 U.S.C. § 2244(d): filing a timely federal habeas petition.

Petitioner fails to show he is entitled to equitable tolling.

5. Summary re Statute of Limitations

Taking into account the available statutory tolling, Petitioner's one year habeas limitations period commenced running on September 21, 2016, and expired on September 20, 2017, making his September 23, 20219 Petition over two years delinquent. Petitioner has shown no basis for additional statutory tolling or equitable tolling. Consequently, absent a showing of actual innocence to avoid the effects of his delay. the Petition must be dismissed with prejudice.

B. PROCEDURAL DEFAULT OF GROUNDS 2-10

Respondents argue that, with the exception of his self-representation claim in Ground 1, Petitioner has procedurally defaulted his state remedies on his claims and they are barred from federal habeas review.

1. Not Properly Exhausted

Generally, a federal court has authority to review a state prisoner's claims only if available state remedies have been exhausted. *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (*per curiam*). The exhaustion doctrine, first developed in case law, has been codified at 28 U.S.C. § 2254(b) and (c). When seeking habeas relief, the burden is on the petitioner to show that he has properly exhausted each claim. *Cartwright v. Cupp*, 650 F.2d 1103, 1104 (9th Cir. 1981). *See* 28 U.S.C. § 2254(b) and (c). Ordinarily, to exhaust his state remedies, the petitioner must have fairly presented his federal claims to the state courts. "A petitioner

fairly and fully presents a claim to the state court for purposes of satisfying the exhaustion requirement if he presents the claim: (1) to the proper forum, (2) through the proper vehicle, and (3) by providing the proper factual and legal basis for the claim." *Insyxiengmay v. Morgan*, 403 F.3d 657, 668 (9th Cir. 2005). With regard to the proper forum, "'claims of Arizona state prisoners are exhausted for purposes of federal habeas once the Arizona Court of Appeals has ruled on them.'" *Castillo v. McFadden*, 399 F.3d 993, 998 (9th Cir. 2005)(quoting *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999)). With regard to the proper vehicle, "to exhaust one's state court remedies in Arizona, a petitioner must first raise the claim in a direct appeal or collaterally attack his conviction in a petition for post-conviction relief pursuant to Rule 32." *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994).

Petitioner makes no assertion that he has fairly presented his claims in Grounds 2 to 10 to the Arizona Court of Appeals in his direct appeal or in his PCR Proceeding. Indeed his only such proceeding with the Arizona Court of Appeals was in his direct appeal, and the only common claim between that proceeding and the Petition is the self-representation claim in Ground 1. (*Compare* Exh. CC, Open. Brief *with* Order 12/17/19, Doc. 6 at 2-3 (listing habeas claims).)

2. Procedural Default

Ordinarily, unexhausted claims are dismissed without prejudice. *Johnson v. Lewis*, 929 F.2d 460, 463 (9th Cir. 1991). However, where a petitioner has failed to properly exhaust his available administrative or judicial remedies, and those remedies are now no longer available because of some procedural bar, the petitioner has "procedurally defaulted" and is generally barred from seeking habeas relief. Dismissal with prejudice of a procedurally defaulted habeas claim is generally proper absent a "miscarriage of justice" which would excuse the default. *Reed v. Ross*, 468 U.S. 1, 11 (1984).

Respondents argue that Petitioner may no longer present his unexhausted claims to the state courts. Respondents rely upon Arizona's preclusion bar, set out in Ariz. R. Crim.

Proc. 32.2(a) and time limit bar, set out in Ariz. R. Crim. P. 32.4. (Answer, Doc. 14 at 15-16.)

Petitioner does not contend otherwise.

No Direct Appeal - Petitioner's time for direct appeal has long expired. *See* Ariz.R.Crim.P. 31.3. (20 days after entry of the judgment and sentence). Moreover, no provision is made for a successive direct appeal.

Review in PCR Untimely – Petitioner did not seek review in his PCR proceeding. The time to do so expired 30 days after the PCR court's ruling. *See* Ariz. R. Crim. Proc. 32.9(c). That time expired long ago.

Claims Waived - Under the rules applicable to Arizona's post-conviction process, a claim may not ordinarily be brought in a petition for post-conviction relief that "has been waived at trial, on appeal, or in any previous collateral proceeding." Ariz.R.Crim.P. 32.2(a)(3). Under this rule, some claims may be deemed waived if the State simply shows "that the defendant did not raise the error at trial, on appeal, or in a previous collateral proceeding." *Stewart v. Smith*, 202 Ariz. 446, 449, 46 P.3d 1067, 1070 (2002) (quoting Ariz.R.Crim.P. 32.2, Comments). *But see State v. Diaz*, 236 Ariz. 361, 340 P.3d 1069 (2014) (failure of PCR counsel, without fault by petitioner, to file timely petition in prior PCR proceedings did not amount to waiver of claims of ineffective assistance of trial counsel).

For others of "sufficient constitutional magnitude," the State "must show that the defendant personally, "knowingly, voluntarily and intelligently' [did] not raise' the ground or denial of a right." *Id*. That requirement is limited to those constitutional rights "that can only be waived by a defendant personally." *State v. Swoopes*, 216 Ariz. 390, 399, 166 P.3d 945, 954 (App.Div. 2, 2007). Indeed, in coming to its prescription in *Stewart v. Smith*, the Arizona Supreme Court identified: (1) waiver of the right to counsel, (2) waiver of the right to a jury trial, and (3) waiver of the right to a twelve-person jury under the Arizona Constitution, as among those rights which require a personal waiver. 202 Ariz. at 450, 46 P.3d at 1071. Claims based upon ineffective assistance of counsel are

determined by looking at "the nature of the right allegedly affected by counsel's ineffective performance. *Id*.

Here, none of Petitioner's claims are of the sort requiring a personal waiver, and Petitioner's claims of ineffective assistance similarly have at their core the kinds of claims not within the types identified as requiring a personal waiver.

New PCR Untimely - Even if not barred by preclusion, Petitioner would now be barred from raising his claims in a new PCR proceeding by Arizona's time bars. Ariz.R.Crim.P. 32.4 requires that petitions for post-conviction relief (other than those which are "of-right") be filed "within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the order and mandate in the direct appeal, whichever is the later." *See State v. Pruett*, 185 Ariz. 128, 912 P.2d 1357 (App. 1995) (applying 32.4 to successive petition, and noting that first petition of pleading defendant deemed direct appeal for purposes of the rule). That time has long since passed.

Exceptions - Rules 32.2 and 32.4(a) do not bar dilatory claims if they fall within the category of claims specified in Ariz.R.Crim.P. 32.1(d) through (h). See Ariz. R. Crim. P. 32.2(b) (exceptions to preclusion bar); Ariz. R. Crim. P. 32.4(a) (exceptions to timeliness bar). Petitioner has not asserted that any of these exceptions are applicable to his claims. Nor does it appears that such exceptions would apply. The rule defines the excepted claims as follows:

> d. The person is being held in custody after the sentence imposed has expired;
> e. Newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence. Newly discovered material facts exist if:
> (1) The newly discovered material facts were discovered after the trial.
> (2) The defendant exercised due diligence in securing the newly discovered material facts.
> (3) The newly discovered material facts are not merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines testimony which was of critical significance at trial such that the evidence probably would have changed the verdict or sentence.
> f. The defendant's failure to file a notice of post-conviction relief of-right or notice of appeal within the prescribed time was without fault on the defendant's part; or

> g. There has been a significant change in the law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence; or
>
> h. The defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found defendant guilty of the underlying offense beyond a reasonable doubt, or that the court would not have imposed the death penalty.

Ariz.R.Crim.P. 32.1.

Paragraph 32.1 (d) (expired sentence) generally has no application to an Arizona prisoner who is simply attacking the validity of his conviction or sentence. Where a claim is based on "newly discovered evidence" that has previously been presented to the state courts, the evidence is no longer "newly discovered" and paragraph (e) has no application. Here, Petitioner offers nothing to show that the facts underlying his claims are newly discovered. Paragraph (f) has no application where the petitioner filed a timely direct appeal. Paragraph (g) has no application because Petitioner has not asserted a change in the law since his last PCR proceeding. Finally, paragraph (h), concerning claims of actual innocence, has no application to the procedural claims Petitioner asserts in this proceeding.

Therefore, none of the exceptions apply, and Arizona's time and waiver bars would prevent Petitioner from returning to state court. Thus, Petitioner's claims that were not fairly presented are all now procedurally defaulted.

3. Cause and Prejudice

If the habeas petitioner has procedurally defaulted on a claim, or it has been procedurally barred on independent and adequate state grounds, he may not obtain federal habeas review of that claim absent a showing of "cause and prejudice" sufficient to excuse the default. *Reed v. Ross*, 468 U.S. 1, 11 (1984).

"Cause" is the legitimate excuse for the default. *Thomas v. Lewis*, 945 F.2d 1119, 1123 (1991). "Because of the wide variety of contexts in which a procedural default can occur, the Supreme Court 'has not given the term "cause" precise content.'" *Harmon v. Barton*, 894 F.2d 1268, 1274 (11th Cir. 1990) (quoting *Reed*, 468 U.S. at 13). The

Supreme Court has suggested, however, that cause should ordinarily turn on some objective factor external to petitioner, for instance:

> ... a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that "some interference by officials", made compliance impracticable, would constitute cause under this standard.

Murray v. Carrier, 477 U.S. 478, 488 (1986) (citations omitted).

Petitioner argues that this Court should find cause to excuse his procedural defaults based on his lack of access to his files. But, at least in his direct appeal, his files were in the possession of appellate counsel. And Petitioner proffers no explanation why the claims he has managed to raise in this proceeding could not have been asserted in a timely PCR proceeding.

Petitioner suggests that he would have been able to coach appellate counsel to raise additional claims. But Petitioner fails to show why his coaching was required for appellate counsel to identify his claims.

It may be that Petitioner intends to simply rely on the ineffectiveness of appellate counsel in discovering the claims on his own. While claims of ineffective assistance of counsel may establish cause, they must themselves be properly exhausted to rely upon them as cause. *Cockett v. Ray*, 333 F.3d 938, 943 (9th Cir. 2003). Petitioner has not properly exhausted such claims of ineffectiveness.

Summary re Cause and Prejudice – Based upon the foregoing, the undersigned concludes that Petitioner had failed to establish cause to excuse his procedural defaults.

Both "cause" and "prejudice" must be shown to excuse a procedural default, although a court need not examine the existence of prejudice if the petitioner fails to establish cause. *Engle v. Isaac*, 456 U.S. 107, 134 n. 43 (1982); *Thomas v. Lewis*, 945 F.2d 1119, 1123 n. 10 (9th Cir.1991). Petitioner has filed to establish cause for his procedural default. Accordingly, this Court need not examine the merits of Petitioner's claims or the purported "prejudice" to find an absence of cause and prejudice.

/ /

C. ACTUAL INNOCENCE

To avoid a miscarriage of justice, the habeas statute of limitations in 28 U.S.C. § 2244(d)(1) does not preclude "a court from entertaining an untimely first federal habeas petition raising a convincing claim of actual innocence." *McQuiggin v. Perkins*, 133 S.Ct. 1924, 1935 (2013). To invoke this exception to the statute of limitations, 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.'" *Id.* at 1935 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

Similarly, the standard for "cause and prejudice" to excuse a procedural default is one of discretion intended to be flexible and yielding to exceptional circumstances, to avoid a "miscarriage of justice." *Hughes v. Idaho State Board of Corrections*, 800 F.2d 905, 909 (9th Cir. 1986). Accordingly, failure to establish cause may be excused "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 496 (1986) (emphasis added). 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. *See* Hertz & Lieberman, *Federal Habeas Corpus Pract. & Proc.* §26.4 at 1229, n. 6 (4th ed. 2002 Cumm. Supp.). The Ninth Circuit has expressly limited it to claims of actual innocence. *Johnson v. Knowles*, 541 F.3d 933, 937 (9th Cir. 2008).

This actual innocence exception, referred to as the "*Schlup* gateway," applies "only when a petition presents 'evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error.' " *Id.* at 1936 (quoting *Schlup,* 513 U.S. at 316). "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—that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful." *Schlup*, 513 U.S. at 324.

Petitioner makes no claim of actual innocence based on new credible evidence, and the record reveals none. Accordingly, his untimely Petition and his procedurally defaulted claims in Grounds 2 through 10 must be dismissed with prejudice.

IV. MOTION FOR RELEASE

On October 7, 2020, Petitioner has filed a Motion for Release seeking release pending resolution of his habeas petition, or in the alternative Appointment of Counsel (Doc. 17). Petitioner cites as cause the merits of the Petition and his "deteriorating health." Petitioner offers no specifics on his health other than to assert he is "considered to be 'wasting.'" Respondents have not responded.

It is unresolved in the Ninth Circuit whether district courts have authority to release a habeas petitioner pending resolution of their petition. *See In re Roe*, 257 F.3d 1077, 1080 (9th Cir. 2001) (noting divergence among circuits and declining to resolve whether release may be granted pending a decision by the district court on a habeas petition). *Cf. Marino v. Vasquez*, 812 F.2d 499 (9th Cir.1987) (grant of release on bail *after* conditional grant of habeas relief).

Even if it is assumed that such authority exists, it is limited to "an 'extraordinary case[ ] involving special circumstances or a high probability of success.'" *Roe*, 257 F.3d at 1080 (quoting *Land v. Deeds*, 878 F.2d 318 (9th Cir. 1989)).[16]

No High Probability of Success – In light of the conclusions reached herein on the Petition, Petitioner cannot show a high probability of success.

No Special Circumstances - "Special circumstances" have been found to include such things as: (1) "a serious deterioration of health while incarcerated, and unusual delay in the appeal process," *Salerno v. United States*, 878 F.2d 317 (9th Cir. 1987); and (2) situations where "the sentence was so short that if bail were denied and the habeas petition

[16] The same standard is generally applied on appeal, pursuant to Federal Rule of Appellate Procedure 23. *See United States v. Mett*, 41 F.3d 1281, 1282 (9th Cir. 1994) (bail on appeal, after conditional grant of petition). *But see Aronson v. May*, 85 S.Ct. 3, 5 (1964) (requiring showing of "substantial questions" rather than high probability of success, for release on appeal of habeas petition).

were eventually granted, the defendant would already have served the sentence," *Landano v. Rafferty*, 970 F.2d 1230, 1239 (3rd Cir. 1992).

Petitioner has not shown exceptional circumstances. Although Petitioner argues his health has deteriorated during his incarceration, he provides no details to show that it is serious. The bald assertion that his condition "is considered to be 'wasting'," without identification of who has reached such a conclusion, the basis for the conclusion, and the prognosis, is not sufficient.

Given Petitioner's 114 year sentence, there appears no risk that Petitioner's sentence will expire before his petition could be resolved. Nor does Petitioner identify any other equally weighty special circumstances making Petitioner's situation an extraordinary case justifying release.

Appointment of Counsel – Nor does Petitioner provide justification for the appointment of counsel. The sixth amendment right to counsel does not apply in habeas corpus actions. *Knaubert v. Goldsmith*, 791 F.2d 722 (9th Cir.), *cert. denied*, 479 U.S. 867 (1986).

The Court does have authority under 18 U.S.C. § 3006A(a)(2) to appoint counsel for an indigent habeas petitioner whenever "the court determines that the interests of justice so require." The Rules Governing Section 2254 Cases in the United States District Courts provides that an attorney shall be appointed for an indigent petitioner "[i]f an evidentiary hearing is warranted," Rule 8(c), or "[i]f necessary for effective discovery," Rule 6(a). Otherwise, the decision to appoint counsel is within the discretion of the court. *Terrovona v. Kincheloe*, 912 F.2d 1176, 1177 (9th Cir. 1990); *Knaubert v. Goldsmith*, 791 F.2d 722, 728 (9th Cir.), *cert. denied*, 479 U.S. 867 (1986).

The purpose of 18 U.S.C. §3006A(a)(2) is to provide for appointed counsel whenever required by the Constitution, *Knaubert*, and since the Sixth Amendment right to counsel does not apply in habeas corpus actions, *Id.*, the upward parameter of the court's discretion is measured by whether the failure to appoint counsel would amount to a denial of due process. *Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir. 1986), *cert. denied*, 107

S.Ct. 1911 (1987); *Knaubert; Kreiling v. Field*, 431 F.2d 638, 640 (9th Cir. 1970); *Eskridge v. Rhay*, 345 F.2d 778, 782 (9th Cir. 1965), *cert. denied*, 382 U.S. 996 (1966).

"In deciding whether to appoint counsel in a habeas proceeding, the district court must evaluate the likelihood of success on the merits as well as the ability of the petitioner to articulate his claims pro se in light of the complexity of the legal issues involved." *Weygandt v. Look,* 718 F.2d 952, 954 (9th Cir. 1983). Factors which have been held relevant in determining the appropriate exercise of discretion include: whether the claim is non-frivolous; whether the nature of the litigation makes the appointment of counsel beneficial to the litigant and to the court; the *pro se* litigant's ability to investigate facts and present claims; and the complexity of the factual and legal issues involved in the case. *Battle v. Armontrout*, 902 F.2d 701, 702 (8th Cir. 1990).

No evidentiary hearing is required to resolve the Petition. And, there is no anticipated discovery which would require appointment of counsel to be effective. Petitioner makes no showing of the likelihood of his success, and asserts no specific circumstances, beyond those routinely faced by *pro se* prisoners, that would require appointment of counsel to ensure Petitioner is afforded due process in these proceedings. His bald assertions of declining health do not.

Petitioner's claims are not unusually complex, nor are Respondents' defenses. And Petitioner has shown himself capable of marshaling evidence and arguments in support of his Motion and Petition, bolstered with at least facially appropriate authorities cited.

Plaintiff complains about his lack of access to legal materials. But requiring an untrained prisoner, without access to a law library, to prosecute his habeas petition *pro se* is not, without more, a violation of due process in the Ninth Circuit. *See Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir. 1986) ("Indigent state prisoners applying for habeas corpus relief are not entitled to appointed counsel unless the circumstances of a particular case indicate that appointed counsel is necessary to prevent due process violations."); and *Hess v. Schriro*, 2007 WL 2892963 (D.Ariz. 2007) (due process did not require appointment of counsel for Arizona, *pro se,* habeas petitioner without access to case law cited in response

to habeas petition).

Accordingly, the undersigned must recommend that Petitioner's Motion for Release or in the alternative Appointment of Counsel be denied.

V. CERTIFICATE OF APPEALABILITY

Ruling Required - Rule 11(a), Rules Governing Section 2254 Cases, requires that in habeas cases the "district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Such certificates are required in cases concerning detention arising "out of process issued by a State court", or in a proceeding under 28 U.S.C. § 2255 attacking a federal criminal judgment or sentence. 28 U.S.C. § 2253(c)(1).

Here, the Petition is brought pursuant to 28 U.S.C. § 2254, and challenges detention pursuant to a State court judgment. The recommendations if accepted will result in Petitioner's Petition being resolved adversely to Petitioner. Accordingly, a decision on a certificate of appealability is required.

Applicable Standards - The standard for issuing a certificate of appealability ("COA") is whether the applicant has "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, 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." *Id.* "If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." 28 U.S.C. §

2253(c)(3). *See also* Rules Governing § 2254 Cases, Rule 11(a).

Standard Not Met - Assuming the recommendations herein are followed in the district court's judgment, that decision will be on procedural grounds. Under the reasoning set forth herein, jurists of reason would not find it debatable whether the district court was correct in its procedural ruling.

Accordingly, to the extent that the Court adopts this Report & Recommendation as to the Petition, a certificate of appealability should be denied.

VI. RECOMMENDATION

IT IS THEREFORE RECOMMENDED:

(A) Petitioner's that Petitioner's Motion for Release or in the alternative Appointment of Counsel (Doc. 17) be **DENIED**.

(B) Petitioner's Petition for Writ of Habeas Corpus, filed September 23, 2019 (Doc. 1) be **DISMISSED WITH PREJUDICE**.

(C) To the extent the foregoing findings and recommendations are adopted in the District Court's order, a Certificate of Appealability be **DENIED**.

VII. EFFECT OF RECOMMENDATION

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), Federal Rules of Appellate Procedure*, should not be filed until entry of the district court's judgment.

However, pursuant to *Rule 72(b), Federal Rules of Civil Procedure,* the parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. *See also* Rule 8(b), Rules Governing Section 2254 Proceedings. Thereafter, the parties have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any findings or recommendations of the Magistrate Judge will be considered a waiver of a party's right to *de novo* consideration of the issues, *see United States v. Reyna-Tapia*, 328

F.3d 1114, 1121 (9th Cir. 2003)(*en banc*), and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the recommendation of the Magistrate Judge, *Robbins v. Carey*, 481 F.3d 1143, 1146-47 (9th Cir. 2007).

In addition, the parties are cautioned Local Civil Rule 7.2(e)(3) provides that "[u]nless otherwise permitted by the Court, an objection to a Report and Recommendation issued by a Magistrate Judge shall not exceed ten (10) pages."

Dated: August 20, 2021

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James F. Metcalf
United States Magistrate Judge