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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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United States of America,  
Plaintiff/Respondent,

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No. CV 11-0061-PHX-JAT (MEA)

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No. CR-03-0764-PHX-JAT

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vs.

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**ORDER**

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Jesse Rothchild Moore,  
Defendant/Movant.

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Pending before the Court is Defendant’s motion under 28 U.S.C. § 2255 (Supp. 2011) to vacate, set aside, or correct his sentence (Doc. 1). This case was referred to a magistrate judge, who issued a Report and Recommendation (Doc. 8) recommending this Court find that the Motion in this case is both barred by the statute of limitations and waived pursuant to § 2255 in the written plea agreement.

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In reviewing a Report and Recommendation (“R&R”), this Court must conduct a de novo review of any portion of the R&R to which either party objects. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). Although Plaintiff does not raise any particular or cognizable objections in his filed Objection (Doc. 9), the Court will review the Motion de novo.

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The Antiterrorism and Effective Death Penalty Act (“AEDPA”) provides a one-year statute of limitations for defendants to file habeas petitions, starting when their convictions become final. 28 U.S.C. § 2244(d) (2006). “The Supreme Court has held that a conviction

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1 is final in the context of a habeas review when ‘a judgment of conviction has been rendered,  
2 the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a  
3 petition of certiorari finally denied.’” *United States v. Schwartz*, 274 F.3d 1220, 1223 (9th  
4 Cir. 2001) (quoting *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987)). For cases in which  
5 the defendant does not file a direct appeal, the conviction becomes final fourteen days after  
6 judgment is entered. *See Schwartz*, 274 F.3d at 1224 n.1; *United States v. Garcia*, 210 F.3d  
7 1058, 1060–61 (9th Cir. 2000).

8 In this case, judgment was entered on June 26, 2008. Defendant did not take a direct  
9 appeal.<sup>1</sup> Thus the conviction and sentence became final fourteen days later on July 10, 2008.  
10 The statute of limitations expired one year later on July 11, 2009. Accordingly, the Motion  
11 filed January 7, 2011, was filed more than one year after the statute of limitations expired and  
12 may be dismissed.

13 Equitable tolling is available when a movant has been pursuing his rights diligently and  
14 some extraordinary circumstance prevented timely filing. *See, e.g., United States v. Buckles*,  
15 No. 08-36031, 2011 WL 2150992, at \*5 (9th Cir. 2011) (holding that the movant was not  
16 entitled to equitable tolling notwithstanding his counsel’s alleged misconduct, because it had  
17 “no effect” on the timeliness of his motion). Here, again, Defendant’s conviction became  
18 final in July 2008. Defendant did not file this Motion until January 2011. After the  
19 Government’s motion to dismiss Defendant’s Motion, Defendant filed a response (Doc. 5).  
20 In it, he asserts that the Court did not ensure there was a factual basis for his guilty plea or  
21 place him under oath before the plea colloquy. Even assuming *arguendo* these facts are both  
22 true, neither qualifies as an extraordinary circumstance that would prevent a timely filing.  
23 This Court agrees with the R&R that Defendant has presented no evidence that an  
24 extraordinary circumstance stood in his way from 2009 (when the statute of limitations  
25 expired) to 2011 (when Defendant took any action on his case). Accordingly, having

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27 <sup>1</sup>Defendant took a direct appeal of his 2005 conviction, which was reversed and  
28 remanded by the Ninth Circuit Court of Appeals in 2006, but he did not do so for his 2008  
conviction.

1 considered equitable tolling, the Court continues to find the Motion untimely.

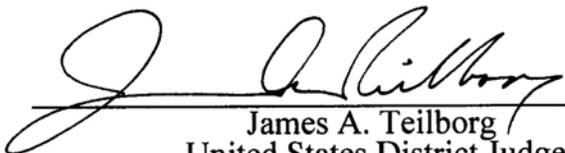
2 Because the statute of limitations bars Defendant's Motion, the Court need not reach  
3 the R&R's second basis for denying Defendant's Motion—that Defendant waived his right  
4 to a collateral attack in his plea agreement.

5 Based on the foregoing,

6 **IT IS ORDERED** that the Report and Recommendation (Doc. 8) is accepted and  
7 adopted; Plaintiff's motion to dismiss (Doc. 4) is granted; Defendant's objections (Doc. 9)  
8 are overruled; his motion to vacate, set aside, or correct his sentence (Doc. 1) is denied and  
9 dismissed with prejudice; and the Clerk of the Court shall enter judgment accordingly.

10 **IT IS FURTHER ORDERED** that pursuant to Rule 11 of the Rules Governing  
11 Section 2255 Proceedings, in the event Defendant files an appeal, the Court denies issuance  
12 of a certificate of appealability, because dismissal of the motion is based on a plain  
13 procedural bar, and jurists of reason would not find this Court's procedural ruling debatable.  
14 *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

15 DATED this 1<sup>st</sup> day of August, 2011.

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20 James A. Teilborg  
21 United States District Judge  
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