

1 WO  
2  
3  
4  
5

6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Thomas Stewart,

10 Petitioner,

11 v.

12 Charles L Ryan, et al.,

13 Respondents.

No. CV-12-01688-PHX-JAT

**ORDER**

14 Pending before the Court is Petitioner's Petition for Writ of Habeas Corpus  
15 ("Petition"). Magistrate Judge Anderson issued a Report and Recommendation ("R&R")  
16 recommending that the Petition be denied and dismissed because it is barred by the Anti-  
17 Terrorism and Effective Death Penalty Act's ("AEDPA") statute of limitations.

18 **I. REVIEW OF AN R&R**

19 The Court "may accept, reject, or modify, in whole or in part, the findings or  
20 recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). It is "clear that  
21 the district judge must review the magistrate judge's findings and recommendations *de*  
22 *novo if objection is made*, but not otherwise." *United States v. Reyna-Tapia*, 328 F.3d  
23 1114, 1121 (9th Cir. 2003) (en banc). District courts are not required to conduct "any  
24 review at all . . . of any issue that is not the subject of an objection." *Thomas v. Arn*, 474  
25 U.S. 140, 149 (1985) (emphasis added); *see also* 28 U.S.C. § 636(b)(1) ("the court shall  
26 make a *de novo* determination of those portions of the [R&R] to which objection is  
27 made."). In this case, Petitioner filed objections to the R&R (Doc. 38), and the Court will  
28 review any objections *de novo*.

1     **II.     FACTUAL BACKGROUND**

2             The R&R summarized the factual and procedural history in this case (Doc. 28 at  
3 2–7). Petitioner made several objections to the factual history in connection with his  
4 actual innocence claims. (Doc. 38 at 5–12). To the extent that these objections bear on  
5 Petitioner’s statutory tolling and actual innocence gateway claims the Court will consider  
6 them below. However, those objections that are not relevant to the statute of limitations  
7 analysis are not addressed because the Court does not reach the merits of these  
8 objections. Accordingly, the Court adopts the R&R’s history in this case and will address  
9 the Petitioner’s objections in the context of his arguments.<sup>1</sup>

10     **III.     R&R**

11             On October 7, 2013, the Magistrate Judge issued an R&R recommending that the  
12 Petition be denied as barred by the AEDPA’s statute of limitations. (Doc. 28). As  
13 explained by the Magistrate Judge, the AEDPA provides a one year statute of limitations  
14 for state prisoners to file a petition for writ of habeas corpus in federal court. (*Id.* at 8  
15 (citing 28 U.S.C. § 2244(d)(1)). That period generally commences on “the date on which  
16 the judgment became final by the conclusion of direct review or the expiration of the time  
17 for seeking such review.” (*Id.* (quoting 28 U.S.C. § 2244(d)(1)(A))). Examining  
18 Petitioner’s procedural history in state court, the Magistrate Judge concluded that  
19 Petitioner’s conviction became final on October 7, 2005, after the Petitioner’s extension  
20 of time to file a petition for review in the Arizona Supreme Court expired. (Doc. 28 at 9–  
21 10). Thus, absent any tolling, the Magistrate Judge determined the statute of limitations  
22 would have started to run on October 8, 2005.<sup>2</sup>

23             Starting with statutory tolling, the Magistrate Judge explained that:

24                     [a]n application for post-conviction relief remains “pending”  
25                     for purposes of the tolling provision in § 2244(d)(2) until it

---

26             <sup>1</sup> The Magistrate Judge made factual findings concerning the order and timing of  
27 Petitioner’s various post-conviction appeals. This Court describes the procedural history  
in accord with the Magistrate Judge’s findings of fact.

28             <sup>2</sup> Petitioner does not object to this point. Accordingly, the Court finds that absent  
any tolling, the statute of limitations would have started to run on October 8, 2005.

1 achieves final resolution through the State's post-conviction  
2 procedure. *Carey v. Saffold*, 536 U.S. 214, 219–220 (2002). A  
3 post-conviction petition is “clearly pending after it is filed  
4 with a state court, but before that court grants or denies the  
5 petition.” *Chavis v. Lemarque*, 382 F.3d 921, 925 (9th Cir.  
6 2004). In Arizona, post-conviction review is pending once a  
7 notice of post-conviction relief is filed even though the  
8 petition itself may not be filed until later. *Isley v. Ariz. Dep't*  
9 *of Corrs*, 383 F.3d 1054, 1056 (9th Cir. 2004).

6 (Doc. 28 at 8–9). Examining each post-conviction proceeding in turn, the Magistrate  
7 Judge explained that the statute of limitations remain tolled until January 19, 2007, the  
8 date the trial court denied the Petitioner's Motion for Reconsideration from the Denial of  
9 Petition for Post-Conviction Relief. (Doc. 28 at 10). Thus on January 20, 2007, the  
10 Petitioner had no “pending” petitions for purposes of tolling under § 2244(d)(2) and the  
11 statute of limitations began to run. (*Id.*) Although Petitioner filed additional petitions, the  
12 Magistrate Judge noted that special action petitions do not toll the AEDPA limitations  
13 period. (Doc. 28 at 12). As a result, the Magistrate Judge explained that the limitations  
14 period ran uninterrupted and expired one-year later on January 22, 2008. (Doc. 28 at 10–  
15 11).

16 Turning to equitable tolling, the Magistrate Judge explained that the Petitioner is  
17 entitled to equitable tolling if he shows: “(1) that he has been pursuing his rights  
18 diligently, and (2) that some extraordinary circumstance stood in his way.” (*Id.* at 9)  
19 (citing *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace v. Diguglielmo*, 544  
20 U.S. 408, 418 (2005))). Additionally, “[a] habeas petitioner may also be entitled to  
21 equitable tolling of the limitations period if he makes a convincing showing of actual  
22 innocence.” (*Id.* at 13) (quoting *McQuiggen v. Perkins*, 133 S.Ct 1924, 1928 (2013)). The  
23 Magistrate Judge determined that the Petitioner failed to show any extraordinary  
24 circumstances that stood in his way. (*Id.* at 13). Additionally, the Magistrate Judge  
25 concluded that Petitioner failed to make a convincing showing of actual innocence:  
26 “[n]owhere in Petitioner's unorganized filings has he made a colorable claim showing  
27 that in light of new evidence presented, any juror, acting reasonably, would have voted to  
28 find him not guilty.” (*Id.* at 14).

1 **IV. PETITIONER’S OBJECTIONS**

2 Petitioner raises numerous objections that can be broadly classified into four  
3 arguments. First, that the Petition for Special Action constituted a “pending” action that  
4 tolled the statute of limitations. (Doc. 38 at 18–20). Second, that equitable tolling is  
5 appropriate because Petitioner diligently pursued his rights and an extraordinary  
6 circumstance stood in his way. (*Id.* at 20–22). Third, that equitable tolling is appropriate  
7 because Petitioner can show actual innocence. (*Id.* at 22–28). Finally, Petitioner objects  
8 to the Magistrate Judge’s construal of his Predicate Claim in Ground Four. (*Id.* at 25).

9 **A. Statutory Tolling**

10 Petitioner objects to the Magistrate Judge’s recommendation that the statutory  
11 tolling ended on January 19, 2007, when the Arizona Court of Appeals denied  
12 Petitioner’s second Rule 32 Petition. (Doc. 38 at 14). Rather, Petitioner argues that the  
13 statute of limitations was tolled until August 22, 2011, the date the Arizona Court of  
14 Appeals denied his Petition for Review from his third Rule 32 Petition. (*Id.* at 6).  
15 Specifically, Petitioner argues that his Petition for Writ of Certiorari from the Denial of  
16 Review of Special Action tolled the statute of limitations. (*Id.* at 14).

17 As a preliminary matter, the Magistrate Judge finds, and the Petitioner does not  
18 object to the finding, that the properly filed post-conviction proceedings tolled the  
19 AEDPA limitations. Accordingly, the Court finds Petitioner’s second Rule 32 Petition  
20 tolled the limitations until January 19, 2007.

21 “The time during which a properly filed application for State post-conviction or  
22 other collateral review with respect to the pertinent judgment or claim is pending shall  
23 not be counted toward” the limitations period. 28 U.S.C. § 2244(d)(2). Petitions for post-  
24 conviction relief are tolled during the “intervals between a lower court decision and a  
25 filing of a new petition in a higher court.” *Biggs v. Duncan*, 339 F.3d 1045, 1048 (9th  
26 Cir. 2003) (quoting *Carey v. Saffold*, 536 U.S. 214, 223 (2002)).

27 Here, Petitioner’s Petition for Writ of Certiorari did not seek direct review of the  
28 Arizona Court of Appeals denial of the Second Rule 32 Petition. Rather, it sought review

1 of Petitioner’s Special Action challenging the denial of his Motion to Remand for New  
2 Determination of Probable Cause. As the Magistrate Judge points out “[s]pecial actions  
3 do not toll the AEDPA limitations because they are not ‘application[s] for State post-  
4 conviction or other collateral review with respect to the pertinent judgment or claims’  
5 within the meaning of § 2244(d)(2).” (Doc. 28 at 12) (quoting *Dema v. Arizona*, 2008  
6 WL 2941167, at \*11 (D. Ariz. July 25, 2008)); *see also Casteel v. Ryan*, 2013 WL  
7 3805135, at \*7 (D. Ariz. July 19, 2013); *Conway v. Ryan*, 2012 WL 786326, at \*4 (D.  
8 Ariz. Feb. 9, 2012). Thus, the Court finds the Petitioner’s Petition for Writ of Certiorari  
9 seeking review of the Motion to Remand for New Determination of Probable Cause is not  
10 an application for State post-conviction relief or other collateral review which would  
11 qualify to toll the statute of limitations.<sup>3</sup> Accordingly, the Court adopts the Magistrate  
12 Judge’s recommendation that the Petition for Writ of Certiorari seeking review of the  
13 Motion to Remand for New Determination of Probable Cause did not toll the statute of  
14 limitations.

15 **B. Equitable Tolling**

16 Absent any equitable tolling, the AEDPA’s statute of limitations began to run on  
17 January 19, 2007. Petitioner objects to the Magistrate Judge’s recommendation that  
18 equitable tolling is inapplicable to the instant case. (Doc. 38 at 20). Specifically,  
19 Petitioner argues he is entitled to equitable tolling because (1) he has been pursuing his  
20 rights diligently and extraordinary circumstances prevented him from filing a timely  
21 petition (*id.*); and (2) he has made a showing of actual innocence (*id.* at 21).

---

23 <sup>3</sup> Petitioner argues that the Petition for Special Action was “consolidated” with the  
24 Rule 32 Petition. (Doc. 38 at 20). The Court finds no indication that these two actions  
25 were consolidated. Rather, the trial court dismissed Petitioner’s Second Rule 32 Petition,  
denied his Motion for Reconsideration, and Petitioner never filed a petition for review  
from the trial court’s order denying the Rule 32 Petition. . (Doc. 16, Exh. MM; Exh. XX).

26 Alternatively, Petitioner argues the Court of Appeals reinstated the Rule 32  
27 Petition after it accepted the Petitioner’s Third Rule 32 Petition. (Doc. 38 at 14).  
However, “§ 2244(d) does not permit the reinitiation of the limitations period that has  
28 ended before the state petition was filed.” *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th  
Cir. 2003). Because the Court finds the statute of limitations expired before Petitioner  
filed the Third Rule 32 Petition, that Petition does not reinitiate the statute of limitations  
period for the habeas action pending before the Court.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**1. Whether Petitioner has Diligently Pursued Rights and an Extraordinary Circumstance Existed**

Equitable tolling requires both a showing that Petitioner diligently pursued his rights and that extraordinary circumstances prevented Petitioner from filing a timely petition. *Holland*, 560 U.S. at 649. A petitioner seeking equitable tolling bears the burden of demonstrating such tolling is warranted in his case. *Doe v. Busby*, 661 F.3d 1001, 1011 (9th Cir. 2011) (citing *Holland*, 560 U.S. at 649).

The Magistrate Judge recommended that this Court find Petitioner failed to show extraordinary circumstances stood in his way and prevented him from filing a timely petition. (Doc. 28 at 13). The Magistrate Judge noted that Petitioner failed to provide any compelling argument that Petitioner faced extraordinary circumstances. (*Id.* at 14). Petitioner does not explicitly object to this point. Although Petitioner argues that extraordinary circumstances warrant tolling (Doc. 38 at 21), he fails to offer argument or facts showing those circumstances were present in the instant case. Accordingly, the Court finds Petitioner has failed to present a compelling argument that extraordinary circumstances prevented him from filing a timely petition. Therefore, Petitioner is not entitled to equitable tolling in this case.<sup>4</sup> Without equitable tolling, the Petitioner’s statute of limitations began on January 19, 2007 and ended one year later on January 22, 2008. Accordingly, the Court finds Petitioner’s Writ of Habeas petition, filed on August 6, 2012 (Doc. 1), to be barred as untimely because it was filed after the statute of limitations expired.

**2. Whether Petitioner Made a Convincing Showing of Actual Innocence**

Petitioner argues that under the exception to the statute of limitations for actual innocence, as recognized in *Lee v. Lampert*, 653 F.3d 929 (9th Cir. 2011) (en banc), he is entitled to “gateway” through the statute of limitations. The *Lee* Court adopted the actual innocence gateway previously recognized in *Schlup v. Delo*, 513 U.S. 298, 314–315

---

<sup>4</sup> The Court need not consider whether Petitioner diligently pursued his right because Petitioner failed to show extraordinary circumstances.

1 (1995).<sup>5</sup>

2 “[A]ctual innocence, if proved, serves as a gateway through which a petitioner  
3 may pass” to overcome the expiration of the statute of limitations. *McQuiggen*, 133 S.Ct  
4 at 1928. For Petitioner to meet the actual innocence gateway of *Schlup*, the Court must  
5 determine, “how reasonable jurors would react to the overall, newly supplemented  
6 record,” and whether, “it is more likely than not that no reasonable juror would have  
7 convicted him.” *Lee*, 653 F.3d at 945 (quoting *House v. Bell*, 547 U.S. 518, 538 (2006)  
8 and *Schlup*, 513 U.S. at 327).

9 Petitioner submits several affidavits as new evidence that supports his claim of  
10 actual innocence. (Doc. 38, Appendix (“Appx”) 5 at 2–3, 7–8). These affidavits describe  
11 a conversation between inmates Eric Stewart, Mark Michaels, and Roger Thompson. (*Id.*)  
12 According to the affidavits by Stewart and Michaels, Thompson stated he had a  
13 conversation with William Foster Thomas, a witness at Petitioner’s trial. (*Id.*) Allegedly,  
14 Thomas admitted to lying during the trial. (*Id.*) Petitioner argues this new evidence serves  
15 as a gateway to overcome the statute of limitations. (Doc. 38 at 24). Because Petitioner  
16 relies entirely on hearsay affidavits, Petitioner has not submitted any evidence that would  
17 be admissible at trial. Because there is no new admissible evidence the Court cannot say  
18 “it is more likely than not that no reasonable juror would have convicted [Petitioner]”.  
19 Accordingly, the Court adopts the recommendation of the Magistrate Judge and finds  
20 Petitioner is not entitled to gateway around the statute of limitations period.<sup>6</sup>

### 21 C. Factual Predicate of Claim in Ground Four

22 In Ground Four of his claim, Petitioner referenced newly discovered evidence that  
23 concerned a witness at his trial. (Doc. 1-3 at 6). Respondents addressed this as a

24 \_\_\_\_\_  
25 <sup>5</sup> *Schlup* recognized an actual innocence gateway for procedurally defaulted  
claims. *Lee*, 653 F.3d at 934.

26 <sup>6</sup> Petitioner also alleges prosecutorial misconduct and witness perjury to support  
27 his actual innocence argument. (Doc. 38 at 23). After thoroughly reviewing the complete  
28 record, the Court does not find any evidence showing a colorable claim of actual  
innocence. Accordingly, the Court adopts the Magistrate Judge’s recommendation that  
none of the Petitioner’s filings show any juror, acting reasonably, would have found  
Petitioner not guilty. (Doc. 28 at 14).

1 § 2244(d)(1)(4) argument<sup>7</sup> (Doc. 15 at 50). The Magistrate Judge disagreed that  
2 Petitioner expressly made such an argument (Doc. 28 at 15). Nonetheless, the Magistrate  
3 Judge addressed the argument and recommended this Court find that the claim is barred  
4 by the statute of limitations (*id.*).<sup>8</sup>

5 Petitioner’s sole objection to the Magistrate Judge’s recommendation is to the  
6 statement, “Respondent’s contend that one of Petitioner’s claims in Ground Four  
7 implicates § 2244(d)(1)(D), which applies a limitations period from ‘the date on which  
8 the factual predicate of the claim or claims presented could have been discovered through  
9 the exercise of due diligence.’” (Doc. 38 at 25). Instead, Petitioner cites the Traverse  
10 Reply (Doc. 26 at 8–18) as properly framing his argument. (Doc. 38 at 25). The cited  
11 sections do not argue a § 2244(d)(1)(D) claim, but rather concern Petitioner’s actual  
12 innocence argument. (*See* Doc. 26 at 8–18). Thus, the Court agrees with the Magistrate  
13 Judge and finds Petitioner did not argue a § 2244(d)(1)(D) claim. Rather, Petitioner  
14 intended the information cited in the argument<sup>9</sup> to support his actual innocence gateway  
15 claim.<sup>10</sup> The Court did not find Petitioner met the burden to show actual innocence. *See*  
16 discussion *supra* Part.IV.B.2. Accordingly, the Court finds Petitioner’s Ground 4-A claim  
17 was an extension of his actual innocence gateway claim, and because the Court finds  
18 Petitioner has not shown actual innocence, the Court finds this barred by the statute of  
19

---

20 <sup>7</sup> § 2244(d)(1)(4) applies a statute of limitations period from “the date on which  
21 the factual predicate of the claim or claims presented could have been discovered through  
22 the exercise of due diligence,” if that date is later than “the conclusion of direct review or  
23 the expiration of the time for seeking such review.” *See* 28 U.S.C. § 2244(d)(1).  
Respondent argues the “factual predicate” is the alleged conversation between William  
Foster Thomas and Roger Thompson. (Doc. 15 at 50); *see* discussion *supra* Part.IV.B.2.

24 <sup>8</sup> Specifically, the Magistrate Judge notes the Petitioner did not “write anything to  
25 indicate he exercised due diligence to discover the information” (Doc. 28 at 15) and did  
not state when Petitioner became aware of the information (*Id.*) Thus the Magistrate  
found there was “no basis to start the limitation period clock at a later time.” (*Id.*)

26 <sup>9</sup> The Court addressed this information, the hearsay affidavits, in the Petitioner’s  
27 actual innocence claim. *See supra* Part.IV.B.2.

28 <sup>10</sup> The Court’s finding is further supported by the Petitioner continuing to argue  
his actual innocence claim after spending one paragraph addressing the Predicate Claim  
in Ground Four. (*See* Doc. 38 at 25–28).

1 limitations.

2 **V. CONCLUSION**

3 Based on the foregoing,

4 **IT IS ORDERED** that the Report and Recommendation (Doc. 28) is accepted and  
5 adopted to the extent specified above. The objections (Doc. 38) are overruled.

6 **IT IS FURTHER ORDERED** that the Petition in this case is denied because it is  
7 barred by the statute of limitations and the Clerk of the Court shall enter judgment  
8 accordingly.

9 **IT IS FINALLY ORDERED** that pursuant to Rule 11 of the Rules Governing  
10 Section 2554 Cases, in the event Petitioner files an appeal, the Court denies issuance of a  
11 certificate of appealability because dismissal of the petition is based on a plain procedural  
12 bar and jurists of reason would not find this Court's procedural ruling debatable. *See*  
13 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

14 Dated this 23rd day of April, 2014.

15  
16  
17   
18 **James A. Teilborg**  
19 **Senior United States District Judge**