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

9 Damon Shane Tucker,

10 Petitioner,

11 v.

12 Charles L Ryan, et al.,

13 Respondents.

No. CV-13-00577-PHX-JAT

**ORDER**

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15 Pending before this Court is Petitioner's Petition for Writ of Habeas Corpus  
16 ("Petition"). The Magistrate Judge issued a Report and Recommendation ("R&R")  
17 recommending that the Petition be denied and dismissed because it is barred by the Anti-  
18 Terrorism and Effective Death Penalty Act's ("AEDPA") statute of limitations. (Doc. 15  
19 at 9). The R&R further recommended that a Certificate of Appealability and leave to  
20 proceed *in forma pauperis* on appeal be denied. *Id.*

21 **I. Review of an R&R**

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

1 make a *de novo* determination of those portions of the [report and recommendation] to  
2 which objection is made”). In this case, Petitioner filed objections to the R&R, and the  
3 Court will review those objections *de novo*.

## 4 **II. Factual and Procedural Background**

5 The R&R summarized the factual and procedural history and neither party  
6 objected to this history. (Doc. 15 at 1–4; Doc. 16). Therefore, the Court adopts that  
7 portion of the R&R in this case. That history is as follows:

8 In January, 2003, Petitioner was charged by the State  
9 of Arizona with thirteen counts of sexual exploitation of a  
10 minor. (Doc. 10-1, at 3, 17.) These charges came as a result of  
11 a search warrant served by Mesa police officers on  
12 Petitioner’s home, during which computer-generated  
13 photographic images of nude females appearing to be  
14 between eight and ten years old and posing in sexually  
15 explicit positions were found on Petitioner’s computer and in  
16 a black binder. (*Id.* at 3–4.) Petitioner admitted that the  
17 images were his. (*Id.* at 4.) Petitioner was tried on six of the  
18 counts charged. (*Id.*) During his trial Petitioner denied  
19 downloading the images or ownership and knowledge of the  
20 images in the binder. (*Id.*) Petitioner was convicted on all  
21 counts, all class 2 felonies and dangerous crimes against  
22 children, and sentenced to six consecutive ten-year terms of  
23 imprisonment. (*Id.* at 2, 4.)

24 On appeal, Petitioner’s court-appointed counsel filed a  
25 brief in accordance with *Anders v. California*, 386 U.S. 738  
26 (1967), finding no colorable claims to raise on appeal. (Doc.  
27 10-1, at 25.) Petitioner thereafter filed a *pro se* supplemental  
28 opening brief raising the following claims on appeal: (1) that  
the sexual exploitation of a minor statute is unconstitutional;  
(2) that the trial court erred in denying his motion to suppress  
his statement to police; (3) that his sentence was excessive  
and unconstitutional; and (4) ineffective assistance of trial  
counsel. (Doc. 10-2, at 3; Doc. 10-3, 17–27.) On September  
13, 2005, the Arizona Court of Appeals affirmed Petitioner’s  
convictions and sentences, finding the ineffective assistance  
of counsel claim non-cognizable on direct appeal, and finding  
the other claims meritless. (Doc. 10-1, at 2–12.) Petitioner  
sought review by the Arizona Supreme Court, and on June 5,  
2006, that court summarily denied review. (Doc. 10-4, at 2.)

1 On October 4, 2005, Petitioner filed a timely Notice of  
2 Post-Conviction Relief (“PCR”). (Doc. 10-4, at 4.)  
3 Petitioner’s counsel thereafter filed a Notice of Completion of  
4 Post-Conviction Review by Counsel; Request for Extension  
5 of Time to Allow Defendant to File Pro-Per Supplement to  
6 Petition for Post-Conviction Relief, indicating that he had  
7 reviewed the record for fundamental errors pursuant to  
8 Anders, and found no claims to raise in post-conviction  
9 proceedings. (Doc. 10-4, at 11–12.) Petitioner then filed a *pro*  
10 *se* supplemental PCR petition, raising the following claims:  
11 (1) ineffective assistance of trial counsel; (2) insufficient  
12 evidence to support his convictions; (3) his convictions  
13 otherwise violated ex-post-facto principles; and (4) his  
14 sentences were excessive. (Doc. 10-4, at 14–23.) On August  
15 28, 2007, the trial court summarily dismissed Petitioner’s  
16 PCR, pursuant to Rule 32-6(C), Ariz.R.Cim.P., “for the  
17 reasons stated in the State’s Response.” (Doc. 11-1, at 14.)  
18 Petitioner sought review by the Arizona Court of Appeals,  
19 and on December 29, 2008, that court denied review without  
20 comment. (*Id.*, at 16.)

21 On May 11, 2009, Petitioner filed a second PCR  
22 notice. (Doc. 11-1, at 22–24.) In his *pro se* PCR petition,  
23 Petitioner claimed that a jury instruction omitted an essential  
24 element of the charged offense, and that his failure to raise  
25 this claim in his previous PCR petition was due to the “lack  
26 of law libraries.” (Doc. 11-2, at 2–4.) Petitioner also claimed  
27 that the faulty jury instruction constituted fundamental error,  
28 and that his trial counsel’s failure to object to the instruction  
constituted ineffective assistance of counsel. (*Id.* at 5.) On  
November 30, 2009, the trial court summarily denied relief,  
finding that Petitioner’s claims were untimely:

[A]n untimely notice may only raise claims pursuant to Rule 32.1(d), (f), (g), or (h). Rule 32.4(a), Arizona Rules of Criminal Procedure. In addition, defendant is precluded from relief on these claims pursuant to Rule 32(a), Ariz. R. Crim. P., because these claims either were or could have been raised on appeal or in a prior Rule 32 proceeding.

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(*Id.* at 14.)

The Court also found that Petitioner’s faulty jury instruction claim was not “newly discovered,” because it “could have reasonably been discovered prior to [Petitioner]’s sentencing,” and, in any event, Petitioner had “not shown that a different jury instruction would have changed the verdict.” (*Id.* at 15.) Although Petitioner claims that he sought review of the trial court’s decision by the Arizona Court of Appeals, counsel for Respondents avows that the record of that court does not reflect that filing. (Doc. 10, at 4 n.3.)

On February 9, 2011, Petitioner filed a third PCR notice, and in his *pro se* PCR petition he raised numerous ineffective assistance of counsel claims, reurged his jury instruction challenge, and challenged his enhanced sentences. (Doc. 11-2, at 17–19; Doc. 14, at 2–11.) The trial court dismissed the petition, finding that “[t]his is [Petitioner]’s third Rule 32 proceeding and it has been initiated in an untimely manner.” (Doc. 11-3, at 2.) Petitioner filed a petition for review by the Arizona Court of Appeals, and on September 21, 2011, that court denied review without comment. (*Id.* at 5.)

On October 18, 2012, Petitioner filed a fourth PCR notice, and in it, claimed that a significant change in the law, specifically the holding in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), had occurred that probably would overturn his conviction or sentence. (Doc. 11-3, at 7, 9–10.) On October 31, 2012, the trial court denied relief, holding that “[t]he *Martinez* holding does not apply to the defendant nor does it provide relief at the state court level.” (*Id.* at 13–14.) Petitioner sought review in the Arizona Court of Appeals, and, on February 27, 2013, that court denied review without comment. (*Id.* at 16.)

On March 20, 2013, Petitioner filed the instant habeas petition, in which he raises three claims: (1) that he was entitled to new counsel in state court pursuant to *Martinez*; (2) that the sexual exploitation of a minor statute is unconstitutional; and (3) that he is actually innocent and is thus entitled to present any unexhausted claims pursuant to the gateway exception articulated in *Schlup v. Delo*, 513 U.S. 298 (1995). (Doc. 1, at 6–9.) In their Limited Answer, Respondents argue that Petitioner’s petition is untimely and should be dismissed, as it was filed past the 1-year deadline

1 imposed by the Antiterrorism and Effective Death Penalty  
2 Act of 1996 (“AEDPA”), 28 U.S.C. §2244(d).

3 (Doc. 15 at 1–4).

4 **III. R&R**

5 As indicated above, on August 7, 2013, the Magistrate Judge issued an R&R  
6 recommending that the Petition be denied as barred by the AEDPA’s statute of  
7 limitations. (*Id.* at 1–9). As explained by the Magistrate Judge, the AEDPA provides a  
8 one year statute of limitations for state prisoners to file a petition for writ of habeas  
9 corpus in federal court. (*Id.* at 4 (citing 28 U.S.C. § 2244(d)(1))). That period generally  
10 commences on “the date on which the judgment became final by the conclusion of direct  
11 review or the expiration of the time for seeking such review.” (*Id.* at 4 (quoting 28 U.S.C.  
12 § 2244(d)(1)(A))). Examining Petitioner’s procedural history in state court, the  
13 Magistrate Judge concluded that Petitioner’s conviction became final on September 2,  
14 2006, 90 days after the Arizona Supreme Court denied review. (*Id.* at 5). Petitioner timely  
15 filed a PCR petition which was denied by the trial court and then dismissed by the  
16 Arizona Court of Appeals on December 29, 2008. (*Id.* at 5).

17 Starting with statutory tolling, the Magistrate Judge explained that the one-year  
18 limitations period is tolled during the time that a “properly filed application for State  
19 post-conviction or other collateral review with respect to the pertinent judgment or claim  
20 is pending.” (*Id.* at 4–5 (quoting 28 U.S.C. § 2244(d)(2))). However, the time between a  
21 first and second PCR petition is not tolled. (*Id.* at 5 (citing *Biggs v. Duncan*, 339 F.3d  
22 1045, 1048 (9th Cir. 2003))). Therefore, while statutory tolling applied to the first PCR  
23 petition, “[m]ore than 2-and-a-half years of non-tolled time elapsed in the interim  
24 between each of Petitioner’s subsequent PCR proceedings.” (*Id.* at 5). Additionally, about  
25 17 months “elapsed while Petitioner’s second, third and fourth proceedings were  
26 pending,” which arguably did not toll the statute of limitations either because those  
27 petitions were not properly filed. (*Id.* at 6).

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1 Turning to equitable tolling, the Magistrate Judge explained that a Petitioner is  
2 entitled to equitable tolling if he shows: “(1) that he has been pursuing his rights  
3 diligently and (2) that some extraordinary circumstances stood in his way.” (*Id.* at 6  
4 (quoting *Pace v. Diguglielmo*, 544 U.S. 408, 418 (2005))). The Magistrate Judge  
5 determined that Petitioner failed the second prong of this test, because he “has not  
6 proffered any extraordinary circumstance that would justify equitable tolling.” In  
7 addition, “Petitioner concedes that his habeas petition is untimely under the AEDPA.”  
8 (*Id.* at 7 (citing Doc. 12 at 1)).

9 Finally, the Magistrate Judge turned to Petitioner’s claim that he is innocent. (*Id.*  
10 at 7). The Magistrate Judge noted that a credible showing of actual innocence excuses the  
11 statute of limitations period established by the AEDPA. (*Id.* at 7). However, to pass  
12 through that gateway, a “petitioner must show that it is more likely than not that no  
13 reasonable juror would have convicted him in the light of the new evidence.” (*Id.* at 7  
14 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995))). The Magistrate Judge determined  
15 that Petitioner did not present any new facts or law, and his claims were that of legal  
16 error, not claims of actual innocence. (*Id.* at 8).

#### 17 **IV. The Petitioner’s Objections**

18 Petitioner does not object to the Magistrate Judge’s application of the AEDPA’s  
19 statute of limitations to his procedural history and the Court adopts those  
20 recommendations. Instead, Petitioner objects to the R&R by arguing that, based on  
21 equitable tolling, the AEDPA’s statute of limitations does not apply to his case, because:  
22 (1) “he was entitled to new counsel in state court pursuant to *Martinez* [*v. Ryan*, 132 S.Ct.  
23 1309 (2012)]” (Doc. 16 at 2); (2) the state trial court lacked subject matter jurisdiction  
24 (Doc. 16 at 6); (3) “he is actually innocent and thus entitled to present any unexhausted  
25 claims pursuant to the gateway exception articulated is [sic] *Schlup v. Delo*, 513 U.S. 298  
26 (1995)” (Doc. 16 at 8); and (4) he did not have access to a copy of the AEDPA in the  
27 prison law library (Doc. 16 at 4–5).

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1           Petitioner is entitled to equitable tolling if he shows: “(1) that he has been pursuing  
2 his rights diligently and (2) that some extraordinary circumstances stood in his way.”  
3 *Pace v. Diguglielmo*, 544 U.S. 408, 418 (2005).

4           **A.     Petitioner’s Reliance on *Martinez***

5           Petitioner claims he is permitted equitable tolling, because he “was entitled to new  
6 counsel in state court pursuant to [*v. Ryan*, 132 S.Ct. 1309 (2012)]” (Doc. 16 at 2).  
7 However, *Martinez* applies only to excusing procedural default and/or lack of exhaustion  
8 in state court. *Martinez*, 132 S.Ct. at 1315. In *Martinez*, the Court only held:

9                               Where, under state law, claims of ineffective assistance of  
10 trial counsel must be raised in an initial-review collateral  
11 proceeding, a procedural default will not bar a federal habeas  
12 court from hearing a substantial claim of ineffective  
13 assistance at trial if, in the initial-review collateral  
14 proceeding, there was no counsel or counsel in that  
15 proceeding was ineffective.

16           *Id.* at 1320. Thus, nothing in *Martinez* requires the state court to appoint new counsel for  
17 a defendant.

18           Moreover, *Martinez* has no application to the statute of limitations in the AEDPA  
19 which governs Petitioner’s filing in federal court. *Accord McKinnie v. Long*, 2013 WL  
20 1890618, at \*7–8 (C.D.Cal. Apr. 5, 2013) (“*Martinez* dealt solely with the state  
21 procedural default doctrine, which is entirely different from the issue presented here of  
22 whether petitioner’s claims are time barred under the AEDPA statute of limitations.”);  
23 *Moore v. Williams*, 2013 WL 271454, at \*5 (D.Nev. Jan. 23, 2013) (“Petitioner has  
24 conflated the federal timeliness question with the issue of whether a claim in the federal  
25 petition is barred due to procedural default in state court.”). Accordingly, *Martinez* does  
26 not present a basis for equitable tolling.

27           **B.     Subject Matter Jurisdiction**

28           Petitioner claims the state trial court lacked subject matter jurisdiction because  
Arizona’s child pornography statute, A.R.S. § 13-3553 (2014), is unconstitutional. (Doc.  
16 at 3). “Equitable exceptions” can apply to the AEDPA’s statute of limitations, such as

1 when a petitioner demonstrates diligence and extraordinary circumstances, or actual  
2 innocence. *Lee v. Lampart*, 653 F.3d 929, 933–34 (9th Cir. 2011) (en banc).

3 Petitioner cites no authority that places the state court’s alleged lack of subject  
4 matter jurisdiction among such exceptions. Thus, the Court is not persuaded by  
5 Petitioner’s argument that, because the state trial court allegedly lacked subject matter  
6 jurisdiction, the AEDPA’s statute of limitations does not apply to his case. Accordingly,  
7 the Court adopts the Magistrate Judge’s R&R concluding that the Petition is barred by the  
8 AEDPA’s statute of limitations.

9 Further, even if Petitioner’s Petition was not barred by the AEDPA’s statute of  
10 limitations, habeas relief would not be available. Specifically, Petitioner’s arguments fail  
11 because this Court cannot review alleged state court errors, such as a state court’s lack of  
12 jurisdiction. *See Reel v. Ryan*, 2013 WL 2284988 at \*5 (D. Ariz. May 22, 2013). A  
13 federal habeas court cannot reexamine state court determinations of state law questions.  
14 *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991).

15 When the Arizona Court of Appeals denied Petitioner’s PCR petition, the Arizona  
16 Court of Appeals effectively concluded that the state trial court had jurisdiction. This  
17 Court cannot review the state court’s decision regarding state law. Accordingly, the  
18 Court cannot grant habeas relief under a theory that the state court lacked jurisdiction.

19 **C. Actual Innocence Gateway Articulated in *Schlup***

20 Petitioner argues that under the equitable exception to the statute of limitations for  
21 actual innocence recognized in *Lee v. Lampert*, 653 F.3d 929, 932 (9th Cir. 2011) (en  
22 banc), he is entitled to the “gateway” around the statute of limitations. (Doc. 16 at 8). The  
23 Court in *Lee* held “that a credible claim of actual innocence constitutes an equitable  
24 exception to AEDPA’s limitations,” adopting the actual innocence gateway previously  
25 recognized in *Schlup v. Delo*, 513 U.S. 298, 314–15 (1995). *Lee*, 653 F.3d at 932. For  
26 Petitioner to meet the equitable exception of the actual innocence gateway, he must first  
27 “support his allegations of constitutional error with new reliable evidence . . . that was not  
28 presented at trial.” *Id.* at 939 (quoting *Schlup*, 513 U.S. at 324). “The evidence of

1 innocence must be ‘so strong that a court cannot have confidence in the outcome of the  
2 trial.’” *Id.* at 938 (quoting *Schlup*, 513 U.S. 316). The Court must then determine whether  
3 “it is more likely than not that no reasonable juror would have convicted him in light of  
4 the new evidence.” *Id.* at 938 (quoting *Schlup*, 513 U.S. at 327).

5 In this case, Petitioner does not present any new facts or law in order to pass  
6 through the actual innocence gateway. Instead, Petitioner argues that “there was no  
7 specific criminal act charged in the indictment, the indictment charged file names and the  
8 identity and age of the participants were not alleged, nor was there any statement of fact  
9 and all counts were multiplicitous.” (Doc. 16 at 6). These claims are claims of legal error  
10 and do not constitute “new reliable evidence . . . that was not presented at trial.” *Lee*, 653  
11 F.3d at 939 (quoting *Schlup*, 513 U.S. at 324). Therefore, Petitioner has not presented  
12 new evidence establishing that “it is more likely than not that no reasonable juror would  
13 have convicted him in light of the new evidence.” *Id.* at 938 (quoting *Schlup*, 513 U.S. at  
14 327). Accordingly, Petitioner cannot pass through the actual innocence gateway around  
15 the AEDPA’s statute of limitations, and his Petition is untimely.

16 **D. Petitioner Did Not Have Access to a Copy of the AEDPA in the Prison**  
17 **Law Library**

18 Petitioner claims he is entitled to an equitable exception from AEDPA’s statute of  
19 limitations, because he did not have access to a copy of the AEDPA in the prison law  
20 library. (Doc. 16 at 4–5). Petitioner raises this claim for the first time in his objection to  
21 the R&R. The Court “has discretion, but is not required, to consider evidence presented  
22 for the first time in a party’s objection to a magistrate judge’s recommendation.” *U.S. v.*  
23 *Howell*, 231 F.3d 615, 621 (9th Cir. 2000). However, “in making a decision on whether  
24 to consider newly offered evidence, the district court must actually exercise its discretion,  
25 rather than summarily accepting or denying the motion.” *Id.* at 622. Additionally, “in  
26 certain circumstances a district court abuses its discretion when it fails to consider new  
27 arguments or evidence proffered by a *pro se* habeas petitioner.” *Sossa v. Diaz*, 729 F.3d  
28 1225, 1231 (9th Cir. 2013); *see also Espinoza-Matthews v. California*, 432 F.3d 1021,  
1026 n. 4 (9th Cir. 2005) (“[b]ecause [Petitioner] was a *pro se* petitioner at all relevant

1 times . . . the district court should have exercised its discretion to review the supplemental  
2 evidence”). Therefore, because Petitioner was a pro se petitioner at all relevant times, the  
3 Court exercises its discretion to review the merits of this claim that is raised for the first  
4 time in Petitioner’s objection to the R&R.

5 Equitable tolling may be appropriate where the petitioner did not have access to  
6 the AEDPA in the law library of the prison at which he resided. *See Whalem/Hunt v.*  
7 *Early*, 233 F.3d 1146, 1148 (9th Cir. 2000) (remanding for an evidentiary hearing where  
8 the petitioner alleged the law library of the prison in which he was incarcerated did not  
9 have legal materials describing the AEDPA and he had no knowledge of the limitations  
10 period). However, to be entitled to equitable tolling, Petitioner must first demonstrate that  
11 he was diligent in pursuing his rights. *Roy v. Lampert*, 465 F.3d 964, 969–73 (9th Cir.  
12 2006) (requiring petitioners to establish diligence to be entitled to an evidentiary hearing  
13 over their claims of insufficient legal resources in the prison law libraries); *see also*  
14 *Crihalmean v. Ryan*, 2013 WL 5524509 at \*4 (D. Ariz. Oct. 4, 2013). Petitioner must  
15 exercise “reasonable diligence” but not “maximum feasible diligence.” *Holland v.*  
16 *Florida*, 560 U.S. 631, 653 (2010).

17 Petitioner has not diligently pursued his rights. Petitioner’s conviction became  
18 final on September 2, 2006. His only timely PCR petition was dismissed by the Arizona  
19 Court of Appeals on December 29, 2008. Not until March 20, 2013 did Petitioner file the  
20 instant habeas Petition. Petitioner does not explain his substantial delay in filing his  
21 Petition. “[P]ro se status, on its own, is not enough to warrant equitable tolling.” *Roy*, 465  
22 F.3d at 970. Additionally, Petitioner does not allege what he did to pursue his claims and  
23 seek resources before the AEDPA’s statute of limitations expired. *Compare id.* at 973  
24 (“[b]y alleging what they did to pursue their claims and complain about their situations,  
25 and alleging that they did so before the AEDPA’s statute of limitations expired,  
26 [Petitioners] have done enough to demonstrate that they were not the cause of the  
27 tardiness”). Petitioner also does not allege that he had no knowledge of the AEDPA’s  
28 limitations period. Therefore, Petitioner has not made sufficient allegations regarding his

1 diligence. Accordingly, Petitioner is not entitled to equitable tolling of his claim based  
2 upon his alleged lack of access to the AEDPA in the law library of the prison at which he  
3 resided.

4 **V. Request for Appointment of Counsel**

5 In his objections to the R&R, Petitioner requests appointment of counsel. (Doc. 16  
6 at 9). There is no constitutional right to counsel on habeas. *Bonin v. Vasquez*, 999 F.2d  
7 425, 429 (9th Cir. 1993). Indigent state prisoners applying for habeas corpus relief are not  
8 entitled to appointed counsel unless the circumstances indicate that appointed counsel is  
9 necessary to prevent due process violations. *Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th  
10 Cir. 1986), *cert. denied*, 107 S.Ct. 1911 (1987)

11 The Court has discretion to appoint counsel when a magistrate judge or the district  
12 court judge determines that the interests of justice so require. *Terrovona v. Kincheloe*,  
13 912 F.2d 1176, 1181 (9th Cir. 1990) (quoting 18 U.S.C. § 3006A(a)(2)(B)). In deciding  
14 whether to appoint counsel in a habeas proceeding, the district court must evaluate the  
15 likelihood of success on the merits as well as the ability of the petitioner to articulate his  
16 claims pro se in light of the complexity of the legal issues involved. *Weygandt v. Look*,  
17 718 F.2d 952, 954 (9th Cir. 1983).

18 In this case, for the reasons stated above, the Court finds that Petitioner has no  
19 likelihood of success on the merits of his Petition. Additionally, the Court finds that the  
20 issues in this case are not complex and that Petitioner has articulated his claims  
21 adequately pro se. As a result, the Court denies the request for appointment of counsel.

22 **VI. Petitioner's Request for an Evidentiary Hearing**

23 Also in his objections to the R&R, Petitioner requests an evidentiary hearing.  
24 (Doc. 16 at 9). Under 28 U.S.C. § 2254(e)(2), a petitioner is entitled to an evidentiary  
25 hearing if he presents a “meritorious claim,” and he exercised reasonable diligence in  
26 developing the factual record in the state proceedings. *Williams v. Taylor*, 529 U.S. 420,  
27 434–37 (2000). A petitioner exercises the diligence necessary to preserve a claim if the  
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1 petitioner “made a reasonable attempt, in light of the information available at the time, to  
2 investigate and pursue claims in state court.” *Id.* at 435.

3 Thus, in order to qualify for an evidentiary hearing, Petitioner must both: “(1)  
4 allege facts which, if proven, would entitle him to relief, and (2) show that he did not  
5 receive a full and fair hearing in a state court, either at the time of the trial or in a  
6 collateral proceeding.” *Belmontes v. Brown*, 414 F.3d 1094, 1124 (9th Cir. 2005), *rev’d*  
7 *on other grounds*, 549 U.S. 7 (2006). Additionally, a habeas petitioner “should receive an  
8 evidentiary hearing when he makes ‘a good faith *allegation that would, if true*, entitle  
9 him to equitable tolling.’” *Roy v. Lampert*, 465 F.3d 964, 969 (9th Cir. 2006) (quoting  
10 *Laws v. Lamarque*, 351 F.3d 919, 919 (9th Cir. 2003). No hearing is necessary, however,  
11 if this Court “is able to determine without a hearing that the allegations are without  
12 credibility or that the allegations if true would not warrant a new trial . . . .” *United States*  
13 *v. Navarro–Garcia*, 926 F.2d 818, 822 (9th Cir. 1991).

14 In his objections to the R&R, Petitioner fails to offer any specific information on  
15 what additional evidence would be revealed at the evidentiary hearing. Petitioner does  
16 specifically claim that “he [did] not have access to a copy of the AEDPA” in the prison  
17 law library. (Doc. 16 at 4–5). However, even if true, that fact would not entitle Petitioner  
18 to relief. As discussed above, Petitioner has not pursued that claim diligently, as is  
19 required by *Pace v. Diguglielmo*, 544 U.S. 408, 418 (2005) for a petitioner to be entitled  
20 to the equitable exception from AEDPA’s statute of limitations. Thus, the Court finds  
21 that Petitioner has not made any allegations that, if true, would warrant equitable tolling,  
22 or, ultimately, habeas relief. Accordingly, the Court denies Petitioner’s request for an  
23 evidentiary hearing.

## 24 **VII. Conclusion**

25 Based on the foregoing,

26 **IT IS ORDERED** that the Report and Recommendation (Doc. 15) is accepted and  
27 adopted; the objections (Doc. 16) are overruled; and the request for an evidentiary  
28 hearing (*id.*) and the request for appointment of counsel (*id.*) are denied. The Petition in

1 this case is denied with prejudice, and the Clerk of the Court shall enter judgment  
2 accordingly.

3 **IT IS FURTHER ORDERED** that Pursuant to Rule 11 of the Rules Governing  
4 Section 2554 Cases, in the event Petitioner files an appeal, the Court denies issuance of a  
5 certificate of appealability, because dismissal of the Petition is based on a plain  
6 procedural bar, and jurists of reason would not find this Court's procedural ruling  
7 debatable. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Further, Petitioner has not  
8 made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C.  
9 § 2253(c)(2).

10 Dated this 1st day of April, 2014.

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15 James A. Teilborg  
16 Senior United States District Judge  
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