

1 NOT FOR PUBLICATION  
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7 **IN THE UNITED STATES DISTRICT COURT**  
8 **FOR THE DISTRICT OF ARIZONA**  
9

10 Brian Odell Hopson,

11 Petitioner,

12 v.

13 Charles L. Ryan, et al.,

14 Respondents.  
15  
16

No. CV-13-01396-PHX-DJH

**ORDER**

17 This matter is before the Court on *pro se* Petitioner's Second Amended Petition for  
18 Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 28) and the Report and  
19 Recommendation ("R&R") issued by United States Magistrate Judge Eileen S. Willett  
20 (Doc. 50). "Petitioner raises six grounds and a number of sub-grounds for habeas relief  
21 in the Second Amended Petition." (Doc. 50 at 1:22-23). After a thorough and sound  
22 analysis, Magistrate Judge Willett recommended, among other things, that this Court  
23 deny Petitioner's Second Amended Petition because it is time-barred.

24 On October 3, 2015, Petitioner timely filed objections to the R&R. (Doc. 59). On  
25 December 3, 2015, Petitioner filed what he terms a "(Motion for Summary Judgment)  
26 Related to Relief on (Objections to Magistrate Judge's Report and Recommendation)[.]"  
27 (Doc. 55). On January 28, 2016, roughly three and a half months after filing his original  
28 objections, Petitioner filed a motion seeking to supplement those objections. (Doc. 59).

1 **I. Motion to Supplement**

2 In seeking to supplement, Petitioner mistakenly relies upon Fed.R.Civ.P. 15(d).  
3 This Rule does permit a party to supplement “pleadings” under certain circumstances.  
4 The difficulty for Petitioner, however, is that Fed.R.Civ.P. 7(a) lists the “pleadings”  
5 which federal courts allow. Objections to an R & R are not on that list. Hence, because  
6 Petitioner’s objections did not constitute a pleading, Rule 15(d) cannot form the basis for  
7 supplementing those objections. Petitioner does not offer any other legal basis for  
8 supplementing, especially given that the time to file objections to the R & R has long  
9 since passed. Thus, the Court denies Petitioner’s motion to supplement and will not  
10 consider any objections included therein.

11 **II. R & R and Objections**

12 The Magistrate Judge set forth the full procedural background of this case in the  
13 R&R. The Court need not repeat that information here. Moreover, Petitioner has not  
14 objected to any of the information in the background section. *See Thomas v. Arn*, 474  
15 U.S. 140, 149 (1989) (The relevant provision of the Federal Magistrates Act, 28 U.S.C. §  
16 636(b)(1)(C), “does not on its face require any review at all . . . of any issue that is not the  
17 subject of an objection.”)

18 **A. Standard of Review**

19 This Court must “make a de novo determination of those portions of the report or  
20 specified proposed findings or recommendations to which” Petitioner is objecting. 28  
21 U.S.C. § 636(b)(1)(C); *see also* Fed.R.Civ.P. 72(b)(3) (“The district judge must  
22 determine de novo any part of the magistrate judge’s disposition that has been properly  
23 objected to.”); *U.S. v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9<sup>th</sup> Cir. 2003) (same). Further,  
24 this Court "may accept, reject, or modify, in whole or in part, the findings or  
25 recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C); Fed.R.Civ.P.  
26 72(b)(3).

27 **B. Analysis**

28 In the R & R, the Magistrate Judge found that “unless statutory or equitable  
tolling applies, the Original Petition filed on August 8, 2013 is one year late.” (Doc. 50

1 at 6:5-56). Proceeding to the issue of statutory tolling, the Magistrate Judge found that  
2 Petitioner’s First, Second and Fourth PCR Proceedings “had no statutory tolling effect.”  
3 (*Id.* at 7:16; 7: 26; and 10:5-6) (citations omitted). As to Petitioner’s third PRC  
4 Proceeding, the Magistrate Judge found that it was “untimely” and “therefore had no  
5 statutory tolling effect on AEDPA’s statute of limitations.” (*Id.* at 9:18-19) (citing *Pace*  
6 *v. DiGuiglielmo*, 544 U.S. 408, 417 (2005)).

7 In objecting to this particular finding, Petitioner cites to and quotes from several  
8 cases. Without offering any rationale at all, Petitioner objects that the Magistrate Judge’s  
9 finding as to his Third PCR Proceeding is “unreasonable[.]” (Doc. 53 at 3:1-26). The  
10 Magistrate Judge carefully detailed the history of the Third PCR Proceeding and then, as  
11 just mentioned, she found that it was “untimely” and “had no statutory tolling effect on  
12 AEDPA’s statute of limitations.” (Doc. 50 at 9:18-19) (citation omitted). Petitioner’s  
13 objection is wholly unsubstantiated particularly given the Magistrate Judge’s sound  
14 reasoning to support these conclusions.

15 The basis for Petitioner’s next objection is not entirely clear. Petitioner claims that  
16 he was “Reasonably Diligent with New Petition for Special Action, Under Related  
17 circumstances And The Interest of Justice[.]” (Doc. 53 at 3-5). The timeliness or  
18 Petitioner’s reasonable diligence with respect to his “New Petition for Special Action”  
19 was not an issue before the Magistrate Judge, however. Rather, the issue, among other  
20 things, was whether this “New Petition” was an “application[] for PCR of collateral  
21 review with respect to Petitioner’s convictions and sentences.” (Doc. 50 at 11:4-5).

22 Once again, the Magistrate Judge soundly explained why it was not, and Petitioner  
23 is not challenging this aspect of the R&R. Therefore the Court assumes, in part from  
24 some of his comments, which Petitioner is objecting to the Magistrate Judge’s finding  
25 that he is not entitled to equitable tolling. For example, Petitioner refers to his lack of  
26 legal training, the limited legal resources available to him, and that he had “never heard  
27 of a protective petition until [R]espondents suggested it in their response to related fed.  
28 [sic] habeas.” (Doc. 53 at 8:4-6) (citations omitted). These assertions gain nothing by  
repetition.

1 The Magistrate Judge’s reasons for finding that Petition cannot establish  
2 extraordinary circumstances based thereon apply with equal force here. In particular:

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4 Petitioner’s pro se status, indigence, limited legal  
5 resources, and alleged ignorance of the law alone do not  
6 constitute extraordinary circumstances justifying equitable  
7 tolling. *See, e.g., Rasberry v. Garcia*, 448 F.3d 1150, 1154  
8 (9th Cir. 2006) (“[A] *pro se* petitioner’s lack of legal  
9 sophistication is not, by itself, an extraordinary circumstance  
10 warranting equitable tolling.”); *Johnson v. United States*, 544  
11 U.S. 295, 311 (2005) (“[W]e have never accepted *pro se*  
12 representation alone or procedural ignorance as an excuse for  
13 prolonged inattention when a statute’s clear policy calls for  
14 promptness.”); *Waldron–Ramsey*, 556 F.3d at 1012 n. 4  
15 (“[W]e have held that a pro se petitioner’s confusion or  
16 ignorance of the law is not, itself, a circumstance warranting  
17 equitable tolling.”). Petitioner’s State court filings during the  
18 limitations period show that Petitioner had access to legal  
19 resources and was capable of analyzing and presenting legal  
20 arguments.

21  
22 (*Id.* at 15:3-14). Thus, there is no merit to Petitioner’s objections to the Magistrate  
23 Judge’s finding that he is not entitled to rely upon equitable tolling.

24  
25 Petitioner’s final objection is to the Magistrate Judge’s recommendation that his  
26 untimeliness is not excused by “the actual innocence gateway/ miscarriage of justice  
27 exception” to the ADEPA’s statute of limitations. (Doc. 50 at 16:1-2) (emphasis  
28 omitted). This exception “is also referred to as the ‘*Schlup* gateway[.]’” (*Id.* at 16:8).  
Petitioner merely recites “Miscarriage of Justice For Review or Relief[.]” followed by  
some case cites. (Doc. 53 at 10:21-28). Petitioner does not actually challenge the  
Magistrate Judge’s finding that the *Schlup* gateway is inapplicable. Hence, as with his  
other objections, this one also lacks merit.

Based upon the foregoing, the Court overrules in their entirety Petitioner’s  
objections to the R& R (Doc. 53).

### III. Summary Judgment Motion

Petitioner’s motion for summary judgment (Doc. 55) not entirely comprehensible.  
One aspect of this motion is comprehensible. In particular, Petitioner asserts that by  
failing to object to the R&R, Respondents have conceded to the merits of his objections.  
LRCiv 7.2(i) is the basis for this assertion. Petitioner is mistakenly relying upon this

1 Rule, which has no place in the R&R process. LRCiv 7.2(i) governs motions - not  
2 objections to R&Rs. The R & R process is different. “[W]ithin fourteen days after being  
3 served with a copy” of the R&R, “any party *may* serve and file written objections to such  
4 proposed findings and recommendations as provided by rules of court.” 28 U.S.C.  
5 636(b)(1) (emphasis added). Similarly, “[a] party *may* respond to another party’s  
6 objections within 14 days after being served with a copy.” Fed.R.Civ.P. 72(b)(2)  
7 (emphasis added). As the R&R explains, there may be consequences for not timely  
8 objecting to a Magistrate Judge’s factual determinations. (Doc. 50 at 20:14-17). A  
9 concession to the validity of the other party’s objections is not one of those  
10 consequences, however. Therefore, despite what Petitioner suggests, Respondents’  
11 failure to object to his objections does not mean that Petitioner’s objections are deemed  
12 meritorious.

13 In the remainder of this summary judgment motion, Petitioner is rehashing  
14 arguments in this Second Amended Petition and in his objections. This Court’s adoption  
15 and acceptance of the R&R renders moot, the remainder of Petitioner’s motion. Hence,  
16 the Court denies Petitioner’s motion for summary judgment.

#### 17 **IV. Conclusion**

18 Based upon the foregoing,

19 **IT IS ORDERED** that Petitioner's “Motion to Supplement (Objections to  
20 Magistrate Judge's Report and Recommendation)” (Doc. 59) is **DENIED**.

21 **IT IS FURTHER ORDERED** that Magistrate Judge Willett’s Report and  
22 Recommendation (Doc. 50) is **accepted** and **adopted** as the Order of this Court.  
23 Petitioner’s Objections (Doc. 53) are overruled.

24 **IT IS FURTHER ORDERED** that Petitioner’s Second Amended Petition for  
25 Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 28) is **DENIED**.

26 **IT IS FURTHER ORDERED** that Petitioner's “(Motion for Summary Judgment)  
27 Related to Relief on (Objections to Magistrate Judge's Report and Recommendation)”  
28 (Doc. 55) is **DENIED** as moot.

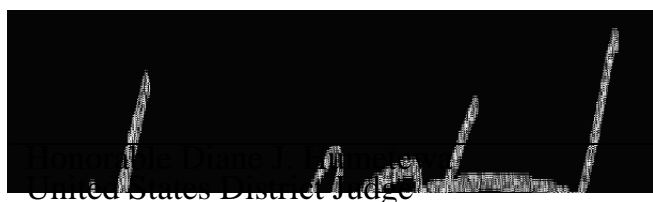
**IT IS FURTHER ORDERED** that pursuant to Rule 11(a) of the Rules Governing

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Section 2254 Cases, a Certificate of Appealability and leave to proceed *in forma pauperis* on appeal are denied because dismissal of the Petition is justified by a plain procedural bar and jurists of reason would not find the procedural ruling debatable.

**IT IS FINALLY ORDERED** that the Clerk of the Court shall terminate this action and enter judgment accordingly.

**Dated** this 12th day of April, 2016.



United States District Judge