

1 NOT FOR PUBLICATION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

9 Mark Anthony Alcantar,

10 Petitioner,

11 v.

12 Charles L. Ryan, *et al.*,

13 Respondents.
14

No. CV-15-02146-PHX-JJT

ORDER

15 At issue are Petitioner Mark Anthony Alcantar's Petition under 28 U.S.C. §2254
16 for Writ of Habeas Corpus (Doc. 1), as well as Petitioner's "Response to Petition," which
17 the Clerk of the Court docketed and the Court treats as a motion to set aside the petition
18 or dismiss it without prejudice (Doc. 17). Magistrate Judge Eileen Willett issued a Report
19 and Recommendation ("R&R") in the matter on April 1, 2016 (Doc. 20), to which no
20 party filed an Objection, recommending denial and dismissal of the Petition and denial of
21 the Motion to Set Aside. Because no party objected, timely or otherwise, the Court may
22 accept the R&R without further review. *United States v. Reyna-Tapia*, 328 F.3d 1114,
23 1121 (9th Cir. 2003). The Court nonetheless has conducted its own review of the Petition
24 and Motion, and for the reasons set forth in the R&R, this Court will deny the Petition
25 and the Motion.

26 In the R&R, Judge Willett thoroughly and correctly analyzed the issues involved
27 in the instant Petition, and because this Court will adopt the recommendations set forth in
28 the R&R as well as the reasoning behind those recommendations, it will not restate those

1 issues or their resolution here in detail. The Petition presents a very straightforward
2 matter of the application of the time limitations imposed on a habeas petition under
3 28 U.S.C §2254. Petitioner was convicted on September 23, 2013, and thereafter had 90
4 days to seek review under a state PCR proceeding. He did not do so, and so his
5 conviction in the Arizona State Court matter became final as of December 23, 2013,
6 pursuant to Section 2244(d)(1)(A) of AEDPA. AEDPA's limitation period thus
7 commenced on December 24, 2013, and any habeas petition filed on or after that date is
8 barred absent statutory or equitable tolling.¹ Petitioner filed nothing in the state matter
9 that would have triggered any statutory tolling, and he has offered nothing to support an
10 argument for equitable tolling, as Judge Willett noted. The Petition is untimely and
11 cannot stand.

12 As Judge Willett reasoned, granting Petitioner's Motion to Set Aside the Petition
13 or dismiss it without prejudice does not serve judicial economy because the defect here is
14 irremediable. Any re-urging of the Petition in the future would raise the same
15 insurmountable obstacle. The Petition always will be untimely and that cannot be
16 remedied by returning to state court for PCR, as Petitioner suggests he might do, or any
17 other action he could take. The Court therefore will follow the R&R and deny the Motion
18 to Set Aside Petition (17) as well.

19 IT IS ORDERED adopting Magistrate Judge Willett's R&R in its entirety and
20 incorporating same into this Order.

21 IT IS FURTHER ORDERED denying the Motion to Set Aside Petition for Writ of
22 Habeas Corpus (Doc. 17)

23 IT IS FURTHER ORDERED denying the Petition for Writ of Habeas Corpus
24 pursuant to 28 U.S.C. § 2254 (Doc. 1) and dismissing this matter with prejudice.

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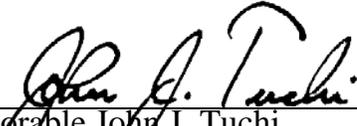
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28 ¹ Judge Willett correctly notes that Petitioner makes no actual innocence claim in
his Petition, so neither she nor the Court have anything to analyze for conformity with the
standards of *Schlup v. Delo*, 513 U.S. 298 327 (1995).

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IT IS FURTHER ORDERED denying a Certificate of Appealability and leave to proceed *in forma pauperis* on appeal in this matter because the dismissal of the instant Petition is justified by a plain procedural bar and jurists of reason would not find the procedural ruling debatable.

Dated this 22nd day of June, 2016.



Honorable John J. Tuchi
United States District Judge