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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Michael Darrin Isham,
10 Petitioner,

11 v.

12 Charles L Ryan, et al.,
13 Respondents.
14

No. CV-16-02918-PHX-JAT

ORDER

15 Pending before this Court is Petitioner's Petition for Writ of Habeas Corpus
16 ("Petition"). (Doc. 1). Respondent has filed a Response to which the Petitioner filed a
17 Reply. (Docs. 14; 16). The Magistrate Judge to whom this case was assigned issued a
18 Report and Recommendation. ("R&R") (Doc. 17). In the R&R, the Magistrate Judge
19 recommended that that the Petition be denied and dismissed because it is barred by the
20 statute of limitations. The R&R further recommended that a certificate of appealability
21 be denied. In response, Petitioner filed an Objection to the R&R. (Doc. 18).

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). Further, this
24 court must review the "portions of the [Magistrate Judge's] report *to which objection is*
25 *made*" by either party. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir.
26 2003) (en banc) (emphasis in original); *Schmidt v. Johnstone*, 263 F.Supp.2d 1219, 1226
27 (D. Ariz. 2003) ("Following *Reyna-Tapia*, this Court concludes that de novo review of
28 factual and legal issues is required if objections are made, 'but not otherwise.'").

1 **I. Objection**

2 Petitioner’s Petition and Reply asserted the following single ground for relief:

3 He claims that the prosecutor has refused to disclose a
4 videotape that would exonerate Petitioner and that
5 Petitioner’s counsel has failed to request the videotape.
6 Petitioner asserts that this violates his Fourth, Fifth, Sixth,
7 and Fourteenth Amendment rights, as well as his rights under
8 *Brady v. Maryland*, 373 U.S. 83 (1963).

9 (Doc. 5 at 2). Petitioner’s Objection to the R&R essentially reargues claims already
10 made in his Petition and Reply. (Docs. 1; 16; 18). The only new, cognizable claim the
11 Court was able to identify in the Objection was Petitioner’s argument that the purported
12 destruction of the videotape on October 15, 2015 constituted newly discovered evidence
13 and would be a factual predicate that would reset the limitations period to start running
14 from that date. (Doc. 18 at 3).

15 The R&R based its decision solely on the statute of limitations and did not address
16 Respondents other defenses. (Doc. 17 at 13). Therefore, in accordance with *Reyna-*
17 *Tapia*, the Court will limit its de novo review to the sole objected to issue of whether or
18 not the videotape’s purported destruction will impact the commencement of the
19 limitations period.

20 **II. Statute of Limitations**

21 Petitions for writs of habeas corpus are governed by the Anti-Terrorism and
22 Effective Death Penalty Act (“AEDPA”) which provides a one-year statute of limitations
23 for petitioners to state their claims. 28 U.S.C. § 2244(d) (2006). Normally the
24 limitations period begins “when the judgment became final by the conclusion of direct
25 review of the expiration of the time for seeking such review,” but it can be reset to “the
26 date on which the factual predicate of the claim or claims presented could have been
27 discovered through the exercise of due diligence.” 28 U.S.C. § 2244(d)(1)(A),(D). The
28 period of direct review before the judgment becomes final includes a “90-day period
 within which a petitioner can file for a writ of certiorari from the United States Supreme
 Court, even if the petitioner does not actually file such a petition.” *Spitsyn v. Moore*,
 345 F.3d 796, 798 (9th Cir. 2003) (citing *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir.

1 1999).

2 Here, Petitioner's judgment became final on July 28, 2013, 90 days after the
3 Arizona Supreme Court denied review of Petitioner's direct appeal on April 29, 2013.
4 (Docs. 1 at 3; 17 at 3). AEDPA's one-year statute of limitations began to run the next
5 day giving Petitioner until July 29, 2014 to file his Petition, absent any factors which
6 would provide tolling.

7 **A. Factual Predicates**

8 Petitioner argues that a videotape he claims was suppressed by the prosecution
9 would exonerate him and that the destruction of the videotape on October 15, 2015
10 qualifies as newly discovered evidence that would be a factual predicate of this claim and
11 reset the start date of the one year limitations period. (Doc. 18 at 3).

12 "Section 2244(d)(1)(D) provides a petitioner with a later accrual date than section
13 2244(d)(1)(A) only if vital facts could not have been known by the date the appellate
14 process ended. The due diligence clock starts ticking when a person knows or through
15 diligence could discover the vital facts, regardless of when their legal significance is
16 actually discovered." *Ford v. Gonzalez*, 683 F.3d 1230, 1235 (9th Cir. 2012) (citations
17 omitted).

18 While Petitioner's claim relies on the videotape, it does not qualify as the factual
19 predicate of the claim. Rather, the factual predicate of his claim is his discovery of the
20 videotape's existence, which occurred on July 2, 2012, more than a year before his
21 judgment became final and two years before the limitations period ended as per section
22 2244(d)(1)(A). (Doc. 1 at 6). Because Petitioner was aware of the videotape for more
23 than two years prior to the limitations period ending, the Court finds that its alleged
24 destruction cannot be a newly discovered factual predicate that would reset the start date
25 of the limitations period. *See, e.g., United States v. Lockett*, 919 F.2d 585, 591 (9th Cir.
26 1990) (in the context of Federal Rule of Criminal Procedure 41, "newly discovered
27 evidence" does not mean "newly available evidence"); *Flanagan v. Johnson*,
28 154 F.3d 196, 199 (5th Cir. 1998) ("[Petitioner] is confusing his knowledge of the factual

1 predicate of his claim with the time permitted for gathering evidence in support of that
2 claim”).

3 **B. Timeliness**

4 The Court agrees with the R&R’s finding that Petitioner is not entitled to statutory
5 or equitable tolling. (Doc. 17 at 8, 12). As determined in subsection (A) above, Petitioner
6 cannot receive a later accrual date under § 2244(d)(1)(D) due to a newly discovered
7 factual predicate. Absent any tolling, Petitioner’s one year period to file commenced on
8 July 29, 2013 and expired on July 29, 2014. Therefore, Petitioner’s August 22, 2016
9 Petition was more than two years delinquent. (Doc. 1). Petitions filed beyond this one
10 year limitations period are barred and must be dismissed. 28 U.S.C. § 2244(d).

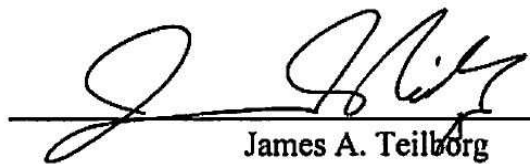
11 **III. Conclusion**

12 Based on the foregoing,

13 **IT IS ORDERED** that the Report and Recommendation (Doc. 17) is accepted.
14 The Objection (Doc. 18) is overruled as specified above. The Petition (Doc. 1) is denied
15 and dismissed with prejudice and the Clerk of the Court shall enter judgment accordingly.

16 **IT IS FUTHER ORDERED** that pursuant to Rule 11 of the Rules Governing
17 Section 2254 Cases, in the event Petitioner files an appeal, the Court denies issuance of a
18 certificate of appealability because dismissal of the petition is based on a plain procedural
19 bar and jurists of reason would not find this court’s procedural ruling debatable. *See*
20 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

21 Dated this 7th day of July, 2017.

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27 James A. Teilborg
28 Senior United States District Judge