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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

William Denning,)
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 Petitioner,)
 vs.)
 Laura Schweitzer, et al.,)
 Respondents.)

No. CV-07-8021-PCT-PGR (HCE)

ORDER

Having reviewed *de novo* the Report and Recommendation of Magistrate Judge Estrada (doc. #37) in light of the petitioner’s Objections to Report and Recommendation (doc. #38), the Court concludes that the petitioner’s objections should be overruled as meritless because that the Magistrate Judge correctly determined that the petitioner’s habeas petition, filed pursuant to 28 U.S.C. § 2254 on May 24, 2007, should be dismissed as time-barred inasmuch as it was filed more than ten years after the limitations period set forth in 28 U.S.C. § 2244(d)(1) expired on April 24, 1997.

First, the Court rejects the petitioner’s contention that the commencement of the AEDPA’s limitation period was extended by 28 U.S.C. § 2244(d)(1)(D), which provides that the one-year limitations period commences as of “the date on which the factual predicate of the claim or claims presented could have been

1 discovered through the exercise of due diligence.”¹ The petitioner, who was
2 convicted in part of the sexual assault of two girls under the age of fifteen, and
3 given enhanced sentences because they were under fifteen, argues that
4 testimony from these victims in related hearings in Nevada in December of 1987
5 shows that one of the victims was fifteen at the time she was assaulted and that
6 the assault of the other victim may have taken place outside of Arizona. The
7 petitioner argues in part that since he was unsuccessful in obtaining the
8 transcripts of this testimony until August of 2005, the limitations period could not
9 have began running for purposes of § 2244(d)(1)(D) prior to then.

10 The Court agrees with the Magistrate Judge that it is immaterial for
11 purposes of the statute of limitations that the petitioner did not obtain the
12 transcripts until August of 2005 since it is undisputed that the petitioner knew of
13 these factual predicates in December of 1987 given that he was present in the
14 Nevada court when the testimony of the victims related to these issues was
15 given. It is this contemporaneous knowledge on the petitioner’s part that
16 triggered § 2244(d)(1)(D)’s due diligence requirement, not the receipt eighteen
17 years later of the transcripts.

18 Second, the Court also rejects the petitioner’s contention that
19 commencement of the limitations period was delayed pursuant to statutory tolling
20 under 28 U.S.C. § 2244(d)(2). As the Magistrate Judge correctly noted, the
21 petitioner had no state post-conviction relief (PCR) proceeding pending between
22 April 24, 1996 and April 24, 1997, *i.e.*, during the time the AEDPA’s one-year
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25 The Court agrees with the Magistrate Judge that the petitioner’s statute
26 of limitations-related arguments based on the Nevada testimony apply only to
Grounds I, III, and portions of Grounds V and VI of his habeas petition.

1 limitations period was running, inasmuch as his first two PCRs were filed and
2 resolved before the effective date of the AEDPA and his other three PCRs were
3 not filed until long after the AEDPA's limitations period had expired.

4 Third, the Court also rejects the petitioner's contention that the
5 commencement of the limitations period was subject to equitable tolling. The
6 petitioner's argument that such tolling is appropriate because he was not
7 knowledgeable about the AEDPA's requirements due to a lack of legal materials
8 available to him is insufficient to establish that the untimeliness of his federal
9 habeas petition was caused by an external impediment and not by his own lack of
10 diligence. The Court agrees with the Magistrate Judge that the petitioner's
11 ignorance of the law and lack of legal sophistication do not of themselves
12 constitute the required extraordinary circumstances, and that any alleged lack of
13 legal materials during the relevant limitations period, *i.e.*, between April of 1996
14 and April of 1997, does not establish the required causal connection between the
15 unavailability of AEDPA-related information and the untimeliness of his federal
16 habeas petition because the petitioner has not shown what, if anything, he did to
17 ascertain his rights regarding federal habeas review prior to filing his habeas
18 petition.²

19 Furthermore, the petitioner's argument that the eighteen year delay in
20 providing him with the Nevada transcripts establishes an extraordinary
21 circumstance justifying equitable tolling is also unpersuasive because (1) that
22 delay does nothing to explain his failure to timely file his claims unrelated to the

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24 The Court also rejects the petitioner's arguments that his federal
25 habeas petition was timely filed because the lack of legal materials related to the
26 AEDPA and his failure to be given the Nevada transcripts for eighteen years
constituted state-created impediments pursuant to 28 U.S.C. § 2244(d)(1)(B).

1 Nevada testimony, *i.e.*, Grounds II, IV, and portions of Grounds V and VI, and
2 (2) as to the remaining claims, *i.e.*, Grounds I, III, and portions of Grounds V and
3 VI, the petitioner has not established that he diligently attempted to obtain the
4 Nevada transcripts throughout the eighteen year period.

5 Third, the Court further rejects the petitioner's contention that the AEDPA's
6 limitations period has no applicability to his claim of actual innocence, *i.e.*, his
7 claim that he is actually innocent of the facts giving rise to the sentencing
8 enhancement for one of the victims based on the Nevada testimony of that victim
9 that she was fifteen at the time she was sexually assaulted. Assuming that the
10 application of the actual innocence exception applies to a claim challenging a
11 noncapital sentencing error, the Court agrees with the Magistrate Judge that the
12 more appropriate construction of the AEDPA's statute of limitations is that it
13 applies to claims of actual innocence and thus requires such claims to be brought
14 diligently. As the Court has already concluded, the petitioner did not pursue any
15 claim arising from the victim's age with reasonable diligence after he first learned
16 of the age-related issue in December of 1987.

17 However, since, as extensively discussed by the Magistrate Judge, there is
18 no precedent binding on this Court regarding the issue of whether a claim of
19 untimeliness under the AEDPA may be avoided by a claim of actual innocence,
20 and since there is a split of authority among the federal courts regarding this
21 issue, the Court concludes that a certificate of appealability should issue solely as
22 to this issue. As to the other claims raised by the petitioner, no certificate of
23 appealability is appropriate because the petitioner has not shown either that
24 jurists of reason would find it debatable whether the petition states a valid claim of
25 the denial of a constitutional right, or that jurists of reason would find it debatable
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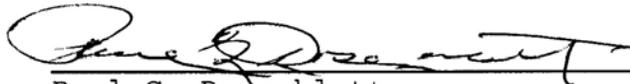
1 whether the Court was correct in its procedural ruling. Therefore,

2 IT IS ORDERED that the Magistrate Judge's Report and Recommendation
3 (doc. #37) is accepted and adopted by the Court.

4 IT IS FURTHER ORDERED that the petitioner's Petition for Writ of Habeas
5 Corpus by a Person in State Custody Pursuant to 28 U.S.C. § 2254 (doc. #6) is
6 denied and that this action is dismissed with prejudice as time-barred. The Clerk
7 of the Court shall enter judgment accordingly.

8 IT IS FURTHER ORDERED that a certificate of appealability shall issue
9 solely as to the petitioner's contention that the statute of limitations set forth in 28
10 U.S.C. § 2244(d)(1) does not apply to his claim of actual innocence.

11 DATED this 6th day of December, 2009.

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15 Paul G. Rosenblatt
16 United States District Judge
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