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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

DARREN MICHAEL BIRKS, JR.,

Petitioner,

v.

JOSIE GASTELLO, Warden,

Respondent.

Case No. 5:21-cv-00399-AB (AFM)

**ORDER ACCEPTING FINDINGS  
AND RECOMMENDATIONS OF  
UNITED STATES MAGISTRATE  
JUDGE**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, records on file and the Report and Recommendation (“Report”) of United States Magistrate Judge. Further, the Court has engaged in a *de novo* review of those portions of the Report to which objections have been made. Petitioner’s objections are overruled. With the exception of the following, Petitioner’s objections do not warrant discussion as they are properly addressed in the Report.

Petitioner objects to the Report’s determination that the statute of limitation began to run when his conviction became final. Instead, Petitioner contends that he is entitled to delayed accrual under 28 U.S.C. § 2244(d)(1)(D), which provides that the statute of limitation commences when a petitioner knows or through the exercise of due diligence should discover the factual predicate of his claims.

The petition here raises two claims for relief: (1) Petitioner’s guilty plea was

1 not voluntary or knowing because he was “deceived into accepting a gang  
2 enhancement allegation that is neither supported by law or fact” and (2) Petitioner’s  
3 plea is fundamentally unfair because it is based upon a misapplication California’s  
4 gang enhancement provision. (ECF 1 at 12-14.) According to Petitioner, he  
5 discovered the factual predicate for his claims on April 23, 2020, the date on which  
6 he was shown a copy of *People v. Le*, 61 Cal. 4th 416 (2015), and “discovered” that  
7 his sentence was contrary to *People v. Rodriguez*, 47 Cal. 4th 510 (2009). (ECF 12  
8 at 1.)

9 Under section 2244(d)(1)(D), the limitation period commences when  
10 petitioner knows or through the exercise of due diligence should discover the factual  
11 predicate of his claims, not when petitioner learns the *legal* significance of those  
12 facts. *See Ford v. Gonzalez*, 683 F.3d 1230, 1235 (9th Cir. 2012); *Hasan v. Galaza*,  
13 254 F.3d 1150, 1154 n.3 (9th Cir. 2001). Thus, Petitioner’s “discovery” of judicial  
14 decisions does not constitute a “factual predicate” justifying delayed accrual of the  
15 limitation period. *See Shannon v. Newland*, 410 F.3d 1083, 1089 (9th Cir. 2005)  
16 (intervening state court decision establishing abstract proposition of law arguably  
17 helpful to petitioner does not constitute a “factual predicate” under section  
18 2244(d)(1)(D)); *Arroyo v. Jaime*, 2020 WL 6899614, at \*3 (C.D. Cal. Nov. 24, 2020)  
19 (a favorable state court decision – no matter how recent – does not constitute a factual  
20 predicate for purposes of section 2244(d)(1)(D)); *Singer v. Dir. of Corr.*, 2010 WL  
21 1444479, at \*3 (C.D. Cal. Mar. 4, 2010) (the decision in *Cunningham v. California*,  
22 549 U.S. 270 (2007) does not constitute a “factual predicate” within the meaning of  
23 28 U.S.C. § 2244(d)(1)(D)), *report and recommendation adopted*, 2010 WL 1444475  
24 (C.D. Cal. Apr. 2, 2010).<sup>1</sup>

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27 <sup>1</sup> The Court notes that the cases upon which Petitioner relies were decided in 2009 (*Rodriguez*) and  
28 2015 (*Le*). Petitioner has not demonstrated that through the exercise of due diligence he could not  
have discovered these legal authorities long before April 23, 2020.

1           Petitioner also argues that “the *Boykin*<sup>2</sup> claim also came to light on or about  
2 10/17/2020.” (ECF 12 at 2.) As discussed in the Report, Petitioner entered a guilty  
3 plea on February 4, 2015, and the state court imposed the agreed-upon sentence on  
4 February 11, 2015. Petitioner’s conclusory assertion fails to demonstrate that  
5 Petitioner could not discover the factual predicate for his claim that his guilty plea  
6 was invalid until more than five year after he was sentenced. Accordingly,  
7 Petitioner’s contention that he is entitled to a delayed accrual date under 28 U.S.C.  
8 § 2244(d)(1)(D) lacks merit.

9           For these reasons, the Court accepts the findings and recommendations of the  
10 Magistrate Judge.

11           IT THEREFORE IS ORDERED that (1) the Report and Recommendation of  
12 the Magistrate Judge is accepted and adopted; and (2) Judgment shall be entered  
13 dismissing the action with prejudice.

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15 DATED: June 15, 2021



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18           ANDRÉ BIROTTE JR.  
19           UNITED STATES DISTRICT JUDGE

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28           <sup>2</sup> *Boykin v. Alabama*, 395 U.S. 238, 242-244 (1969) (Constitution requires that guilty plea be knowing, intelligent, and voluntary).