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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 TERRY ALFRED COXE,

9 Petitioner,

10 v.

11 PATRICK GLEBE,

12 Respondent.

CASE NO. 16-5450 BHS

ORDER ADOPTING REPORT
AND RECOMMENDATION AND
DENYING PETITIONER'S
MOTION TO AMEND

13 This matter comes before the Court on the Report and Recommendation ("R&R")
14 of the Honorable J. Richard Creatura, United States Magistrate Judge (Dkt. 24), and
15 Petitioner Terry Alfred Coxe's ("Coxe") motion to file amended petition (Dkt. 22) and
16 objections to the R&R (Dkt. 25).

17 On November 18, 2016, Coxe moved to file an amended petition. Dkt. 22. On
18 March 23, 2017, Judge Creatura issued the R&R recommending that the Court dismiss
19 Coxe's petition as time barred because Coxe failed to timely file his federal petition, he is
20 not entitled to equitable tolling, and he failed to meet his burden to show actual
21 innocence. Dkt. 24. On April 6, 2017, Coxe filed objections. Dkt. 25.
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1 The district judge must determine de novo any part of the magistrate judge's
2 disposition that has been properly objected to. The district judge may accept, reject, or
3 modify the recommended disposition; receive further evidence; or return the matter to the
4 magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).

5 In this case, Coxe requests that the Court consider his claim on the merits or, in the
6 alternative, issue a certificate of appealability. Dkt. 25 at 7. Regarding timeliness of
7 Coxe's petition and equitable tolling, the Court agrees with Judge Creatura. The statute
8 of limitations expired on June 21, 2013, and Coxe did not file his federal petition until
9 June 2016. Moreover, Coxe fails to show that he was diligent or that any impediment
10 stood in his way to filing his federal petition. Therefore, the Court adopts the R&R on
11 these issues.

12 Regarding Coxe's actual innocence claim, he objects to Judge Creatura's
13 conclusion that a structural error does not support an actual innocence claim. Coxe cites
14 numerous authorities for the proposition that ineffective assistance of counsel constitutes
15 prejudice. Dkt. 25 at 2–5. Prejudice, however, does not establish actual innocence. As
16 Judge Creatura concluded, this exception requires a showing of new evidence in support
17 of factual innocence. Dkt. 24 at 11 (citing *Schlup v. Delo*, 513 U.S. 298, 314–15 (1995)).
18 In the absence of any new evidence, the Court adopts the R&R on this issue.

19 Regarding a certificate of appealability, the Court agrees with Judge Creatura that
20 Coxe is not entitled to a certificate of appealability with respect to this petition.

1 Finally, Coxe's motion to file an amended petition is without merit. Any existing
2 issue is time barred and, without any new evidence in support of actual innocence,
3 amending the petition is futile.

4 Therefore, the Court having considered the R&R, Coxe's objections, and the
5 remaining record, does hereby find and order as follows:

- 6 (1) The R&R is **ADOPTED**;
- 7 (2) Coxe's motion to amend (Dkt. 22) is **DENIED**;
- 8 (3) Coxe's petition is **DENIED** as time barred;
- 9 (4) A Certificate of Appealability is **DENIED**; and
- 10 (5) The Clerk shall enter **JUDGMENT** against Coxe and close this case.

11 Dated this 23rd day of May, 2017.

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BENJAMIN H. SETTLE
15 United States District Judge
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