S.D.N.Y.-W.P.
16-cv-9342
Briccetti, J.
Davison, M.J.

# United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 28th day of November, two thousand eighteen.

Present:

Amalya L. Kearse,
Debra Ann Livingston,
Susan L. Carney,
*Circuit Judges.*

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Sheila Davalloo,

*Petitioner-Appellant,*

v.

18-2267

Sabrina Kaplan, Superintendent,

*Respondent-Appellee.*

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Appellant, pro se, moves for a certificate of appealability and in forma pauperis status. Upon due consideration, it is hereby ORDERED that the motions are DENIED and the appeal is DISMISSED because Appellant has not shown that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling" as to the untimeliness of Appellant's 28 U.S.C. § 2254 petition. *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

**UNITED STATES COURT OF APPEALS**
**FOR THE**
**SECOND CIRCUIT**

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At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 23rd day of January, two thousand and nineteen,

Present: Amalya L. Kearse,
Debra Ann Livingston,
Susan L. Carney,

Circuit Judges,

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Sheila Davalloo,

Petitioner - Appellant,

v.

Sabina Kaplan, Superintendent,

Respondent - Appellee.

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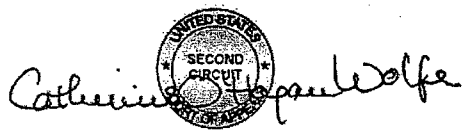
**ORDER**
Docket No. 18-2267

Appellant Sheila Davalloo filed a motion for reconsideration and the panel that determined the motion has considered the request.

IT IS HEREBY ORDERED, that the motion is denied.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
SHEILA DAVALLOO,

Petitioner,

-against-

SABINA KAPLAN, Superintendent,
Bedford Hills Correctional Facility,

Respondent.
----------X

**REPORT AND RECOMMENDATION**

16 Civ. 9342 (VB)(PED)

TO THE HONORABLE VINCENT L. BRICCETTI, United States District Judge:

## I. INTRODUCTION

In 2002, petitioner Sheila Davalloo was employed as a research scientist at a pharmaceutical company in Stamford, Connecticut. In the summer of that year, petitioner (who was married to Paul Christos) began an affair with a co-worker, Nelson Sessler. Their affair was interrupted in the fall of 2002, when Sessler began a relationship with another co-worker, Anna Lisa Raymundo. On November 8, 2002, Anna Lisa Raymundo was murdered; her body was found in her Stamford, Connecticut home. After Raymundo's death, petitioner and Sessler resumed their affair.

On March 23, 2003, petitioner handcuffed and blindfolded Christos (under the pretext of playing a "game") and then stabbed him twice in the chest with a paring knife. Petitioner drove Christos to the Westchester County Medical Center campus in Valhalla but, instead of proceeding to the emergency room, she drove to a secluded area behind the Behavioral Health Center and stabbed Christos again (with the same knife), this time piercing his heart. Persons on break outside the building saw Christos struggle, interceded and secured an ambulance to transport Christos to the emergency room. He underwent emergency open-heart surgery and

survived.

Petitioner was charged with the attempted murder of her husband. At the time of her indictment, petitioner was also a suspect in Raymundo's murder. Sessler, after learning of petitioner's attack on her husband, began cooperating with the Stamford Police Department by recording conversations he had with petitioner ("the Sessler tapes"). The recordings were preserved by the Stamford Police Department.

Petitioner's attempted murder case proceeded to a bench trial. During trial, defense counsel moved for production of the Sessler tapes; the prosecution objected on various grounds. The trial court resolved the issue by conducting an *in camera* review of the Sessler tapes, and ultimately ruled that none of them contained *Rosario* material or prior inconsistent statements of Sessler. However, after petitioner testified on her own behalf, the prosecution played excerpts from the Sessler tapes in an effort to impeach petitioner's testimony. Those excerpts were received in evidence over defense counsel's objection.

On February 19, 2004, at the conclusion of trial, petitioner was convicted of second degree attempted murder, first degree assault and fourth degree criminal possession of a weapon. On April 20, 2004, petitioner was sentenced to concurrent terms of imprisonment of twenty-five years (attempted murder), twenty-five years (assault) and one year (weapon possession). She is currently incarcerated at Bedford Hills Correctional Facility in Westchester County, New York.

On November 24, 2016, petitioner filed a *pro se* Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.[1] Presently before this Court is respondent's motion to dismiss the

[1] On that day, petitioner placed the instant Petition in the prison mailing system. See Noble v. Kelly, 246 F.3d 93, 97 (2d Cir. 2001) (extending the "mailbox rule," Houston v. Lack, 487 U.S. 266 (1988), to *pro se* petitions for habeas relief).

instant petition as untimely.[2] This motion is before me pursuant to an Order of Reference dated April 14, 2017 (Dkt. #10). For the reasons set forth below, I conclude that the petition is time-barred and therefore respectfully recommend that Your Honor grant respondent's motion and dismiss the petition in its entirety.

## II. PROCEDURAL HISTORY

Petitioner (by and through counsel) timely appealed her conviction to the Appellate Division, Second Department on various grounds, including: (1) that trial counsel was ineffective because he was "unaware" of the Sessler tapes prior to trial, and improperly acceded to their inspection by the trial court *in camera*; and (2) prosecutorial misconduct based upon the prosecution's failure to provide the Sessler tapes to the defense. See Respondent's Exhibits attached to Memorandum of Law in Support of Motion to Dismiss ("Resp. Exh."), Exh. 3, at 29-65. By Decision and Order dated April 3, 2007, the Second Department affirmed petitioner's judgment of conviction. People v. Davalloo, 39 A.D.3d 559, 833 N.Y.S.2d 576 (2d Dep't 2007). On July 26, 2007, the New York Court of Appeals denied petitioner leave to appeal. People v. Davalloo, 9 N.Y.3d 864, 872 N.E.2d 1200, 840 N.Y.S.2d 894 (2007)(Table). Petitioner did not seek a writ of *certiorari* to the United States Supreme Court.

On November 6, 2007, petitioner was charged in Connecticut with the murder of Anna Lisa Raymundo and a warrant was issued by the Superior Court of the State of Connecticut for

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[2] Respondent filed the motion on August 14, 2017 (Dkt. #15). Petitioner was served with respondent's motion and filed an opposition on or about September 6, 2017 (Dkt. #18). On October 17, 2017, the Clerk's Office rejected the filing of respondent's motion as deficient and notified respondent (via ECF) that supporting documents must be filed separately. On December 14, 2017, chambers staff observed that the motion had not yet been properly filed on ECF and notified respondent's counsel (via voicemail message) of the lingering deficiency. On December 18, respondent re-filed the motion (Dkt. #20).

petitioner's arrest. On June 24, 2008, pursuant to the Interstate Agreement on Detainers, the State Attorney for the State of Connecticut, Judicial District of Stamford/Norwalk, executed a "Request for Temporary Custody" of petitioner. Petitioner unsuccessfully challenged her transfer and, on December 30, 2008, she was extradited to Connecticut.

Meanwhile, on or about October 28, 2008, petitioner filed a *pro se* motion in Westchester County Supreme Court to vacate her conviction pursuant to CPL § 440.10, on the ground that the Sessler tapes were used against her at trial in violation of her Sixth Amendment right to counsel.. Resp. Exh. 5. By Decision and Order entered February 27, 2009, the trial court (Hubert. J.) held that petitioner's claim could have been fully litigated on direct appeal and, thus, denied her motion as procedurally barred pursuant to CPL 440.10(2)(c). Resp. Exh. 7. Petitioner did not seek leave to appeal the trial court's decision.

In Connecticut, petitioner's case proceeded to a jury trial (at which she represented herself). On February 10, 2012, the jury convicted petitioner of first degree murder. On April 27, 2012, petitioner was sentenced to 50 years imprisonment, consecutive to her New York sentence.[3]

On or about November 4, 2014, petitioner filed an application for a writ of error coram nobis, wherein she alleged that appellate counsel was ineffective for failing to argue on direct appeal that the Sessler tapes were used against petitioner at trial in violation of her Sixth Amendment right to counsel. See Resp. Exh. 15, 17. By Decision and Order dated May 6, 2015,

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[3] On November 24, 2016, petitioner filed a 28 U.S.C. § 2254 petition in this Court, collaterally challenging her Connecticut conviction. *Davalloo v. Kaplan*, 17 Civ. 01484 (GBD) (GWG). On July 18, 2017, the Honorable Gabriel W. Gorenstein, U.S.M.J. granted that respondent's motion to transfer that petition to the United States District Court for the District of Connecticut. Id., Dkt. #17.

the Appellate Division denied petitioner's coram nobis application. People v. Davalloo, 128 A.D.3d 717, 6 N.Y.S.3d 500 (Mem) (2d Dep't 2015). On July 15, 2015, the New York Court of Appeals denied petitioner's application for leave to appeal the denial of her coram nobis petition. People v. Davalloo, 25 N.Y.3d 1200, 37 N.E.3d 1166, 16 N.Y.S.3d 523 (Table).

While her coram nobis petition was pending, petitioner filed (on or about November 17, 2014) a second motion to vacate her conviction pursuant to CPL § 440.10(1)(g), on the ground that "new evidence" demonstrated that the Sessler tapes were used against her at trial in violation of her Sixth Amendment right to counsel. See Resp. Exh. 8. The "new evidence" cited by petitioner consisted of transcripts provided to her during her Connecticut trial, of (1) the Sessler tapes and (2) the testimony of police officer Gregory Holt, which demonstrates that petitioner had invoked her right to counsel prior to the Sessler tapes. See id. By Decision and Order entered March 20, 2015, the trial court (Warhit, J.) denied petitioner's motion. Resp. Exh. 10. On July 24, 2015, the Appellate Division denied petitioner leave to appeal from the denial of her second 440.10 motion. On or about August 21, 2015, petitioner submitted an application to the New York Court of Appeals seeking review of the Appellate Division's summary denial of her leave application. On November 27, 2015, the Court of Appeals denied petitioner's application.

Petitioner filed the instant habeas corpus petition on November 24, 2016. On March 13, 2017, upon initial evaluation of the petition, Your Honor issued an Order to Show Cause (Dkt. #8) directing petitioner to file a declaration by May 12, 2017, showing cause why the petition should not be dismissed as time-barred. The Order to Show Cause set forth the applicable statute of limitations and tolling provisions, and advised petitioner to provide a list of filing, decision and notice dates related to any and all of her post-conviction motions and appeals. Petitioner was also advised to "allege any facts that show that she has been pursuing her rights

diligently and that some extraordinary circumstance prevented her from timely submitting this petition." On April 13, 2017, petitioner filed a Declaration wherein she (1) set forth a chronological listing of all relevant dates associated with her post-conviction collateral motions, and (2) asserted that the instant petition was timely because it was grounded upon issues raised in her second 440.10 motion (filed November 27, 2014) which, in turn, was based upon new evidence not discovered until 2012. On April 14, 2017, Your Honor issued an Order to Answer (Dkt. #11). Respondent filed the instant motion on or about August 14, 2017.

## III. DISCUSSION

B. Legal Standards Governing Timeliness of Habeas Petitions

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") established a one-year statute of limitations for the filing of a habeas corpus petition seeking relief from a state court conviction. See 28 U.S.C. § 2244(d)(1). The one-year limitation period runs from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Id. "Pursuant to 28 U.S.C. § 2244(d)(1)(A), a judgment becomes final only after the denial of certiorari or the expiration of time for seeking certiorari–in the latter case, ninety days after a decision by the New York Court of Appeals." Chrysler v. Guiney, 14 F. Supp.3d 418, 433 (S.D.N.Y. 2014).

AEDPA's statute of limitations is tolled during the pendency of a properly filed application for state post-conviction relief, or other collateral review, of a claim raised in the petition. See 28 U.S.C. § 2244(d)(2). The one-year limitation period is also subject to equitable tolling, which is warranted when a petitioner has shown "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." Holland v. Florida, 560 U.S. 631, 649 (2010) (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)). "The term 'extraordinary' refers not to the uniqueness of a party's circumstances, but rather to the severity of the obstacle impeding compliance with a limitations period." Harper v. Ercole, 648 F.3d 132, 137 (2d Cir. 2011). "To secure equitable tolling, it is not enough for a party to show that he experienced extraordinary circumstances. He must further demonstrate that those circumstances caused him to miss the original filing deadline." Id. Additionally, "[c]onsistent with the maxim that equity aids the vigilant, a petitioner seeking equitable tolling of AEDPA's limitations period must demonstrate that he acted with reasonable diligence throughout the period he seeks to toll." Id. at 138 (internal quotation marks and citations omitted); see also Valverde v. Stinson, 224 F.3d 129, 134 (2d Cir. 2000) (A petitioner seeking equitable tolling must "demonstrate a causal relationship between the extraordinary circumstances on which the claim for equitable tolling rests and the lateness of his filing, a demonstration that cannot be made if the petitioner, acting with reasonable diligence, could have filed on time notwithstanding the extraordinary circumstances.").

Further, a claim of actual innocence may provide an "equitable exception" to AEDPA's statute of limitations. See McQuiggin v. Perkins, 133 S. Ct. 1924, 1928, 1931 (2013). To invoke the exception (creating a "gateway" to habeas review despite expiration of the statute of limitations), a petitioner must make the same showing of actual innocence that is required to

overcome a procedural bar to habeas review, as articulated in *Schlup v. Delo*, 513 U.S. 298 (1995), and applied in *House v. Bell*, 547 U.S. 518 (2006). See McQuiggin, 133 S. Ct. at 1928. Specifically:

> To satisfy the *Schlup* standard, a claim of actual innocence must be both "credible" and "compelling." *See House*, 547 U.S. at 521, 538, 126 S. Ct. 2064. For the claim to be "credible," it must be supported by "new reliable evidence–whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence–that was not presented at trial." *Schlup*, 513 U.S. at 324, 115 S. Ct. 851; *see also House*, 547 U.S. at 537, 126 S. Ct. 2064. For the claim to be "compelling," the petitioner must demonstrate that "more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt–or[,] to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt." *House*, 547 U.S. at 538, 126 S. Ct. 2064.

Rivas v. Fischer, 687 F.3d 514, 541 (2d Cir. 2012). "[T]he *Schlup* standard is demanding and permits review only in the extraordinary case." House, 547 U.S. at 538 (internal quotation marks and citation omitted). Accordingly, "tenable actual innocence gateway pleas are rare[.]" McQuiggin, 133 S. Ct. at 1928.

C. Application of Legal Standards to the Instant Petition

Petitioner contends that the instant petition was timely filed pursuant to 28 U.S.C. § 2244(d)(1)(D). Specifically, petitioner asserts that the instant petition was timely because:

(1) in 2012, during her Connecticut trial, petitioner was given access (for the first time) to transcripts of the Sessler Tapes;

(2) based upon this "new evidence," petitioner filed her second 440.10 motion (on November 27, 2014);

(3) the claims raised in her second 440.10 motion became fully exhausted on November 27, 2015, when the Court of Appeals denied her application for review of the Appellate Division's summary denial of her leave application; and

(4) petitioner filed the instant habeas (grounded upon issues raised in her second 440.10 motion) on November 24, 2016, "3 days prior to the expiration of the 1-year statute of limitation." Dkt. #18 (petitioner's opposition to respondent's motion to dismiss). See Dkt. #9 (petitioner's Declaration).

Petitioner is mistaken. First, she erroneously conflates 28 U.S.C. §2244(d)(1)(A) (one year from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review") and 28 U.S.C. §2244(d)(1)(D) (one year from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence"). Second, even assuming *arguendo* that petitioner could not have discovered the factual predicate of her claims prior to her receipt of the Sessler tapes transcripts during her Connecticut trial, a verdict was rendered in that trial on April 27, 2012. Thus, under 28 U.S.C. §2244(d)(1)(D), the statute of limitations began to run–at the latest–on April 27, 2012. That one-year period to timely file a habeas petition had long since expired when, on or about November 17, 2014, petitioner filed her second § 440.10 motion. The filing of that §440.10 motion did not reset the already-expired statute of limitations period. See Smith v. McGinnis, 208 F.3d 13, 17 (2d Cir. 2000) (per curiam) (filing of state court collateral challenge after expiration of one-year statute of limitations does not reset date from which the statute of limitations begins to run); De Los Santos v. Ercole, No. 07 Civ. 7569, 2013 WL 1189474, at *3 (S.D.N.Y. Mar. 22, 2013) (collecting cases and holding that a collateral motion that was not filed "*within* the one-year limitation period" does not reset or toll the statute) (emphasis in original).[4]

[4] Copies of all unpublished cases available only in electronic form cited herein have been mailed to petitioner. See Lebron v. Sanders, 557 F.3d 76, 78 (2d Cir. 2009).

Therefore, the instant habeas petition became time-barred as of April 28, 2013, unless the one-year statute of limitations was tolled by equitable considerations. However, petitioner does not argue that she is entitled to, or proffer any basis for the application of, equitable tolling (even though, in the Order to Show Cause (Dkt. #8), she had been advised to "allege any facts that show that she has been pursuing her rights diligently and that some extraordinary circumstance prevented her from timely submitting this petition"). Nor does petitioner argue that she is entitled to an equitable exception from AEDPA's statute of limitations based upon a claim of actual innocence. Accordingly, I conclude–and respectfully recommend that Your Honor should conclude–that the instant petition for a writ of habeas corpus is time-barred.

## IV. CONCLUSION

For the reasons set forth above, I conclude–and respectfully recommend that Your Honor should conclude–that respondent's motion to dismiss should be granted and the instant petition for a writ of habeas corpus should be dismissed as time-barred. Further, because reasonable jurists would not find it debatable that petitioner has failed to demonstrate by a substantial showing that he was denied a constitutional right, I recommend that no certificate of appealability be issued. See 28 U.S.C. § 2253(c); Slack, 529 U.S. at 483-84.

Dated: December 20, 2017
White Plains, New York

Respectfully Submitted,

PAUL E. DAVISON, U.S.M.J.

## NOTICE

Pursuant to 28 U.S.C. § 636(b)(1)(C), Rule 72(b) of the Federal Rules of Civil Procedure and Rule 8(b) of the Rules Governing Section 2254 Cases in the United States District Courts, the parties shall have fourteen (14) days from service of this Report and Recommendation to serve and file written objections. If copies of this Report and Recommendation are served upon the parties by mail, the parties shall have an additional three (3) days, or a total of seventeen (17) days, from service of this Report and Recommendation to serve and file written objections. See also Fed. R. Civ. P. 6(a). Such objections, if any, along with any responses to the objections, shall be filed with the Clerk of the Court with extra copies delivered to the chambers of the Hon. Vincent L. Briccetti , at the Hon. Charles L. Brieant, Jr. Federal Building and United States Courthouse, 300 Quarropas Street, White Plains, New York 10601, and to the chambers of the undersigned at the same address.

Failure to file timely objections to this Report and Recommendation will preclude later appellate review of any order of judgment that will be entered. See Caidor v. Onondaga County, 517 F.3d 601, 604 (2d Cir. 2008).

Requests for extensions of time to file objections must be made to Judge Briccetti.

A copy of this Report and Recommendation has been mailed to:

Sheila Davalloo, DIN #04G0449
Bedford Hills Correctional Facility
247 Harris Road
Bedford Hills, New York 10507-2400

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHEILA DAVALLOO,
Petitioner,

v.

SABINA KAPLAN, Superintendent, Bedford Hills Correctional Facility,
Respondent.

**MEMORANDUM OPINION AND ORDER**

16 CV 9342 (VB)



Briccetti, J.:

Pending before the Court is Magistrate Judge Davison's Report and Recommendation ("R&R"), dated December 20, 2017, on respondent's motion to dismiss Sheila Davalloo's pro se petition for a writ of habeas corpus. (Doc. #21).

Familiarity with the factual and procedural background of this case is presumed; the Court recites only those facts necessary for the resolution of petitioner's objections.

On February 19, 2004, after a bench trial, petitioner was convicted in Supreme Court, Westchester County, of second degree attempted murder, first degree assault, and fourth degree criminal possession of a weapon. On April 20, 2004, petitioner was sentenced to a determinate term of 25 years' imprisonment on the attempted murder and assault charges, and a concurrent definite term of one year imprisonment on the possession of a weapon charge. On April 3, 2007, the Appellate Division, Second Department, affirmed the conviction. People v. Davalloo, 39 A.D.3d 559 (2d Dep't 2007). On July 26, 2007, the Court of Appeals denied leave to appeal. People v. Davalloo, 9 N.Y.3d 864 (2007). Petitioner did not seek a writ of certiorari to the United States Supreme Court.

On October 28, 2008, petitioner filed a motion to vacate her conviction in Supreme Court, Westchester County, pursuant to N.Y. C.P.L. § 440.10. The court denied her motion on February 27, 2009. Petitioner did not seek leave to appeal.

On November 17, 2014, petitioner filed a second motion to vacate her conviction in Supreme Court, Westchester County, pursuant to Section 440.10. Petitioner asserts her second 440.10 motion was based on evidence she discovered during a separate trial in Connecticut, in which she was convicted of first degree murder in February 2012 and sentenced on April 27, 2012, to 50 years' imprisonment to run consecutively to her New York sentence. The state court denied the second 440.10 motion on March 20, 2015; the Appellate Division denied leave to appeal on July 24, 2015; and the Court of Appeals dismissed petitioner's application seeking review on or about November 27, 2015.

On November 24, 2016, petitioner filed the instant petition for a writ of habeas corpus. On March 13, 2017, this Court ordered petitioner to show cause why the petition should not be denied as time-barred. In that order, petitioner was advised, among other things, to "allege any facts that show that she has been pursuing her rights diligently and that some extraordinary circumstance prevented her from timely submitting [her] petition." (Doc. #8). In response to the order to show cause, petitioner asserted the petition was timely because it was based on evidence to which she was first given access in her 2012 Connecticut trial. (Doc. #9).

On August 14, 2017, respondent moved to dismiss the petition as untimely under 28 U.S.C. § 2244(d). (Docs. ##15, 20). Petitioner opposed the motion by letter dated September 4, 2017. (Doc. #18).

In his R&R, Judge Davison held that even if April 27, 2012—the date of petitioner's sentencing in the Connecticut case—was "the date on which the factual predicate of the claim or

claims presented could have been discovered through the exercise of due diligence," 28 U.S.C. § 2244(d)(1)(D), "the instant habeas petition became time-barred as of April 28, 2013, unless the one-year statute of limitations was tolled by equitable considerations." (R&R at 10). As plaintiff had not argued that she was entitled to or proffered any basis for the application of equitable tolling or an equitable exception based upon a claim of actual innocence, Judge Davison concluded the petition was time-barred and recommended granting respondent's motion to dismiss the habeas petition as untimely.

The Court agrees with Judge Davison's recommendation. Accordingly, the R&R is adopted as the opinion of the Court, and the petition is DISMISSED as untimely.

**DISCUSSION**

I. Standard of Review

A district court reviewing a magistrate judge's report and recommendation "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). Parties may raise objections to the magistrate judge's report and recommendation, but they must be "specific[,] written," and submitted within fourteen days after being served with a copy of the recommended disposition, Fed. R. Civ. P. 72(b)(2); see also 28 U.S.C. § 636(b)(1), or within seventeen days if the parties are served by mail, see Fed. R. Civ. P. 6(d).

When a party submits a timely objection to a report and recommendation, the district court reviews those parts of the report and recommendation objected to under a de novo standard of review. 28 U.S.C. § 636(b)(1); see also Fed. R. Civ. P. 72(b)(3). The district court may adopt those portions of the recommended ruling to which no timely objections have been made, provided no clear error is apparent from the face of the record. See Wilds v. United Parcel Serv.,

Inc., 262 F. Supp. 2d 163, 169 (S.D.N.Y. 2003). The district court is discouraged from entertaining new legal arguments which are made for the first time in objections. See Ortiz v. Barkley, 558 F. Supp. 2d 444, 451 (S.D.N.Y. 2008).

Because petitioner is proceeding pro se, the Court "will 'read [her] supporting papers liberally, and . . . interpret them to raise the strongest arguments that they suggest.'" Id. (quoting Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994)).

II. Objections

Petitioner timely objected to the R&R (Doc. #22), and, after respondent filed a response (Doc. #25), petitioner filed a reply (Doc. # 26). The Court has carefully reviewed the R&R, petitioner's objections, the response to the objections, petitioner's reply thereto, and the underlying record de novo. Having done so, the Court finds no error in Judge Davison's thorough and well-reasoned R&R.

Petitioner seems to argue, for the first time, that the period between the close of her Connecticut trial and September 18, 2014, should be equitably tolled because she did not have access to her Connecticut discovery materials during that time. In addition, under petitioner's theory, the statute of limitations was tolled between September 18, 2014, and November 27, 2015—the date on which the Court of Appeals dismissed her application seeking review of the denial of her second 440.10 motion to vacate—pursuant to 28 U.S.C. § 2244(d)(2).

Respondent argues petitioner is barred from asserting an equitable tolling argument for the first time in her objections.

The Second Circuit has not yet decided whether a party may raise a new legal argument for the first time in objections to a magistrate judge's report and recommendation. See Levy v. Young Adult Inst., Inc., 103 F. Supp. 3d 426, 433 (S.D.N.Y. 2015). "Some courts in this circuit

have stated, as a general matter, that 'a party waives any arguments not presented to the magistrate judge.'" Id. (quoting Watson v. Geithner, 2013 WL 5441748, at *2 (S.D.N.Y. Sept. 27, 2013)).[1] Other courts have applied a multi-factor test to determine whether to review new arguments. Id.

Here, the Court need not determine whether petitioner waived her equitable tolling argument because, even assuming the Court can consider petitioner's argument, it fails.

Equitable tolling of the one-year statute of limitations is warranted if petitioner has shown (i) she pursued her rights with "reasonable diligence" and (ii) "some extraordinary circumstance . . . prevented timely filing." Holland v. Florida, 560 U.S. 631, 649, 653 (2010) (internal citations omitted). "The term 'extraordinary' refers not to the uniqueness of a party's circumstances, but rather to the severity of the obstacle impeding compliance with a limitations period." Harper v. Ercole, 648 F.3d 132, 137 (2d Cir. 2011). "To secure equitable tolling, it is not enough for a party to show that he experienced extraordinary circumstances. He must further demonstrate that those circumstances caused him to miss the original filing deadline." Id.

Petitioner has failed to show extraordinary circumstances prevented her from timely filing her habeas petition. Petitioner did not need her Connecticut discovery materials, including transcripts that reflected events for which she was present, to bring her second 440.10 motion to vacate. Indeed, the state court noted in its Decision and Order denying petitioner's second 440.10 motion that her claims were "vastly duplicative" of her first 440.10 motion, which she filed in 2008. (Resp. Ex. 10 at 7–8).

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[1] Plaintiff will be provided with copies of all unpublished opinions cited in this decision. See Lebron v. Sanders, 557 F.3d 76, 79 (2d. Cir. 2009).

Petitioner also argues she still does not have access to audio tapes used in her trials, and therefore the limitations period has yet to run on a habeas petition based on those tapes. This argument is unavailing for the same reason. Petitioner was present for the recorded events and also when the tapes were played at her trials.

Petitioner's remaining objections, including her objection that a certificate of appealability should be issued and as to the R&R as a whole, have no basis in the record and rest on conclusory statements which do not specifically address the R&R.

In short, petitioner's objections are entirely without merit.

**CONCLUSION**

The R&R is adopted as the opinion of the Court for the reasons stated herein. Accordingly, the motion to dismiss is GRANTED and the petition is DISMISSED.

The Clerk is instructed to (i) terminate the motion (Doc. #20), (ii) enter judgment accordingly, and (iii) close this case.

As petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. See 28 U.S.C. § 2253(c)(2); Love v. McCray, 413 F.3d 192, 195 (2d. Cir. 2005).

The Court certifies under 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith; therefore, in forma pauperis status is denied for the purpose of an appeal. See Coppedge v. United States, 369 U.S. 438, 444–45 (1962).

Dated: July 5, 2018
White Plains, NY

SO ORDERED:

Vincent L. Briccetti
United States District Judge

Additional material from this filing is available in the Clerk's Office.