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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Ernesto Gonzalez,)	No. CV-13-1616-PHX-JAT (JZB)
	}	
Petitioner,	}	REPORT AND RECOMMENDATION
	}	
vs.	}	
	}	
Charles L. Ryan, et al.,	}	
	}	
Respondents.	}	

TO THE HONORABLE JAMES A. TEILBORG, UNITED STATES SENIOR DISTRICT JUDGE:

Petitioner Ernesto Gonzalez, who is confined in an Arizona State Prison, has filed a *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (Doc. 1.)

I. SUMMARY OF CONCLUSION

Petitioner’s convictions became final on June 13, 2012. The deadline to file this habeas petition was June 14, 2013. Petitioner did not begin habeas proceedings until June 27, 2013. This petition is untimely and there is no evidence to suggest the untimeliness should be excused. The Court rejects Petitioner’s claim that delays associated with a potential deposition of a codefendant merit an exception under *Schlup v. Delo*, 513 U.S. 298 (1995).

Additionally, Petitioner’s claim under Ground One is precluded. Petitioner’s claims under Grounds Two through Four are unexhausted and procedurally defaulted.

1 Petitioner does not satisfy cause and prejudice to excuse this default. Petitioner's actual
2 innocence argument under *Herrera v. Collins*, 506 U.S. 390 (1993), if cognizable, also
3 fails for the same reasons, mutatis mutandis, as his argument under *Schlup*: Petitioner
4 fails to prove that no reasonable juror would have convicted him in the light of the new
5 evidence. For the reasons that follow, the Court concludes that Petitioner's claims are
6 untimely, procedurally barred from review, and fail on their merits. Therefore, the Court
7 will recommend that the petition be denied.

8 **II. BACKGROUND**

9 **A. FACTS OF THE CASE**

10 The Arizona Court of Appeals found the following facts as true:¹

11 On December 26, 2007, Phoenix Police Officer Kartchner, along
12 with other police units, responded to a call of a residential burglary
13 involving armed suspects who had invaded a house and had fled. Officer
14 McBride entered the house where the home invasion occurred and did a
15 protective sweep of the interior. He did not find armed subjects or anything
16 of evidentiary value inside. However, as he and other officers were walking
around the perimeter of the house, they smelled a very strong odor of fresh
marijuana emanating from the house next door. The officer decided to
make contact with any individuals in that house to determine if the armed
suspects were inside, if there were victims who needed protection and to
investigate the source of the smell of marijuana.

17 A team of officers knocked on the door and were yelling loudly.
18 They heard a car alarm go off in the garage and could hear movement
19 inside the garage. [Petitioner] opened the front door. Officer McBride
20 observed that he was "extremely agitated" and was talking back to the
21 officers. He was aggressive and did not want to come outside to speak to
22 them. With the door open, the officers could smell an even stronger odor of
marijuana coming from the house. The officers proceeded to enter the
house to do a protective sweep and to investigate the odor of marijuana.
They found large bales of marijuana throughout the house and in the
garage. They also found [Gonzalez-Garcia] hiding in a closet in the
bathroom of the master bedroom.

23 Detective Rice testified that based on his training and experience, he
24 believed that the home invaders had targeted the wrong residence and that
25 the house where officers found the marijuana was a "stash house" where
large amounts of drugs are stored and distributed. Detective Chadwick
executed a search warrant that Detective Bensen obtained after the initial
entry into the stash house. He seized 80 bales of marijuana, numerous items
used for wrapping, packaging and concealing marijuana, drug transaction

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27 ¹ The Arizona Court of Appeals' recitation of the facts is presumed correct. *See*
28 28 U.S.C. § 2254(d)(2), (e)(1); *Runnigeagle v. Ryan*, 686 F.3d 758, 763 n.1 (9th Cir.
2012) (rejecting argument that statement of facts in state appellate court's opinion should
not be afforded the presumption of correctness).

1 ledgers and a set of keys found on [Petitioner], one of which fit the stash
house door.

2 Core samples of the bales were tested and revealed that the
3 substance was marijuana and that the total weight was 1,672 pounds.
4 Detective Bensen estimated that 1,672 pounds of marijuana had a street
value of \$836,000 or more and that the marijuana was possessed for sale.
At trial, the jury was shown a video of [Gonzalez-Garcia] purchasing
numerous items of drug paraphernalia.

5 (Doc. 12, Exh. J at 3-5.)

6 **B. PROCEEDINGS AT TRIAL**

7 On January 4, 2008, the State indicted Petitioner and codefendant Alexander
8 Gonzalez-Garcia on possession of marijuana for sale and possession of drug
9 paraphernalia. (Doc. 12, Exh. A.) The indictment also charged Gonzalez-Garcia with
10 possession of dangerous drugs for sale and resisting arrest. (Doc. 12, Exh. A.) Prior to
11 trial, Petitioner joined in a motion to suppress evidence (drugs and paraphernalia) found
12 in the home where Petitioner was arrested. (Doc. 12, Exh B.) After an evidentiary
13 hearing, the court denied the motion. (Doc. 12, Exhs. C, D, E.) Petitioner also filed and
14 renewed several motions to sever his trial from the codefendant. The trial court denied
15 these motions. (Doc. 12, Exhs. F, G, J.) The case proceeded to trial, where the jury found
16 Petitioner guilty of both charges. (Doc. 12, Exh. J.) The judge found that Petitioner had
17 four prior felony convictions and sentenced Petitioner to presumptive, concurrent
18 sentences. (*Id.*) Petitioner appealed. (*Id.*)

19 **C. PROCEEDINGS ON DIRECT APPEAL**

20 In a timely, direct appeal, Petitioner's counsel filed a brief in accordance with
21 *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d
22 878(1969), asserting that counsel found no appealable issues. (Doc. 12, Exh. I.)
23 Appellate counsel identified two issues (denial of the motions to suppress and sever) that
24 the Petitioner requested the court review on appeal. Petitioner declined an invitation to
25 file a *pro se* supplemental brief. (Doc. 12, Exh. J.)

26 On June 29, 2010, the Arizona Court of Appeals affirmed the Petitioner's
27 convictions. (*Id.*) In a 12-page memorandum opinion, the court concluded that the initial
28 warrantless entry and search were legal because the officers had probable cause to search

1 the house after smelling the “strong odor of marijuana emanating” from the home. (*Id.*)
2 The court found there were also exigent circumstances because “of the possibility that
3 armed suspects were attempting to flee, the potential for violence and the possibility of
4 destruction of evidence.” (*Id.*) During a justified protective sweep, officers lawfully
5 found bales of marijuana in plain view. (*Id.*) The court found the “evidence obtained as a
6 result of the search pursuant to the warrant was admissible.” (*Id.*) The court also
7 concluded that the motions to sever were properly denied because there was “substantial
8 overlapping evidence against both defendants,” there was “no danger arising from one
9 defendant making incriminating statements against the other or offering antagonistic
10 defenses,” the jurors were properly instructed, and there was “nothing to suggest” that
11 there was an unfair “rub-off effect” from the charges. (*Id.*)

12 On July 20, 2010, Petitioner filed a petition for review with the Arizona Supreme
13 Court. (Doc. 12, Exh. K.) On December 21, 2010, the court denied review. (Doc 12,
14 Exhs. L, M.)

15 **D. PETITION FOR POST-CONVICTION RELIEF**

16 On July 20, 2010, Gonzalez filed a Notice of Post-Conviction Relief (“PCR”).
17 (Doc. 12, Exh. N.) On January 2, 2012, counsel appointed for Petitioner filed a notice
18 stating that after reviewing the case he was “unable to find any colorable claim for relief
19 to raise in post-conviction relief proceedings.” (Doc. 12, Exh. P.) Petitioner was granted
20 additional time to file a “Pro Per Petition for Post-Conviction Relief.” (Doc. 12, Exh. Q.)
21 On April 18, 2012, Petitioner filed his petition asserting actual innocence, prosecutorial
22 misconduct at trial, and ineffective assistance of trial and appellate counsel. (Doc. 12,
23 Exh. R.)

24 On June 11, 2012, the trial court dismissed the petition and found:

25 Defendant raises claims of prosecutorial misconduct. Because all of
26 these claims refer to matters set forth on the record, they are precluded
27 because they were waived by failure to object at trial or by failing to raise
28 the issues on appeal. Defendant also raises claims of actual innocence and
of ineffective assistance of trial and appellate counsel. None of these claims

1 are colorable.
2 (Doc. 12, Exh U.)

3 Petitioner had 30 days to petition the court of appeals for review. *See* Ariz. R.
4 Crim. P. 32.9(c) (“Within thirty days after the final decision of the trial court on the
5 petition for post-conviction relief or the motion for rehearing, any party aggrieved may
6 petition the appropriate appellate court for review of the actions of the trial court.”). State
7 records reflect, and Petitioner concedes, that he did not petition the court of appeals for
8 review of the trial court decision. (Doc. 1 at 5.)

9 **E. FEDERAL PETITION FOR WRIT OF HABEAS CORPUS**

10 On June 27, 2013, Petitioner filed the instant Petition for Writ of Habeas Corpus.
11 (Doc. 1.) Petitioner raises four grounds for relief. In Ground One, Petitioner alleges the
12 trial court’s failure to suppress drug-related evidence violated his rights under the Fourth
13 and Fourteenth Amendments. In Ground Two, Petitioner alleges the trial court’s failure
14 to sever his trial from his codefendant violated his rights under the Fourteenth
15 Amendment. In Ground Three, Petitioner alleges the prosecutor committed misconduct
16 by utilizing inflammatory language regarding the stash house. In Ground Four, Petitioner
17 alleges actual innocence.

18 On March 25, 2014, the State filed a Response to the Petition. The State argues the
19 Petition is untimely, Ground One is precluded, and Grounds Two through Four are
20 unexhausted and procedurally defaulted.

21 On April 24, 2014, Petitioner filed a Reply. Petitioner argues that actual
22 innocence affords an exception to his untimeliness. Petitioner also argues he was diligent
23 despite his untimeliness. He asserts that the investigator he hired had an unexpected
24 medical issue that prevented a timely deposition of the codefendant, which caused his
25 untimely Petition. He also reasserts that the failure to suppress evidence and sever the
26 trial was unconstitutional. Finally, he requests an accommodation because he is a non-
27 lawyer operating in a restrictive environment.

28 **III. APPLICATION OF LAW**

1 The writ of habeas corpus affords relief to persons in custody pursuant to the
2 judgment of a state court in violation of the Constitution, laws, or treaties of the United
3 States. 28 U.S.C. §§ 2241(c)(3), 2254(a). Petitions for Habeas Corpus are governed by
4 the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).² 28 U.S.C. § 2244.

5 **A. THE PETITION IS UNTIMELY.**

6 The AEDPA imposes a one-year limitation period, which begins to run “from the
7 latest of . . . the date on which the judgment became final by the conclusion of direct
8 review or the expiration of the time for seeking such review.” 28 U.S.C. §
9 2244(d)(1)(A).

10 **1. Time Calculation**

11 Here, the Arizona Supreme Court denied direct review on December 21, 2010.
12 (Doc.12, Exhs. L, M.) A judgment becomes “final” under § 2244(d)(1)(A) when the time
13 for filing a petition for review in the United States Supreme Court expires. *See Harris v.*
14 *Carter*, 515 F.3d 1051, 1053 n.1 (9th Cir. 2008); *Miranda v. Castro*, 292 F.3d 1063, 1065
15 (9th Cir. 2002). Petitions for certiorari must be filed within 90 days after the Arizona
16 Supreme Court issued its opinion or denied review. *Harris*, 515 F.3d at 1053 n.1. Thus,
17 Petitioner’s convictions would have become final on March 21, 2011, which is 90 days
18 after the Arizona Supreme Court denied direct review.

19 On July 20, 2010, Petitioner filed a timely PCR notice, which tolled the limitations
20 period. *See Isley v. Arizona Dept. of Corrections*, 383 F.3d 1054, 1055-56 (9th Cir.
21 2004). On June 13, 2012, the trial court dismissed Petitioner’s state PCR petition. (Doc.
22 12, Exh. U.) Because Petitioner did not move for rehearing or petition for review to the
23 Arizona Court of Appeals, statutory tolling ended on the date the trial court “summarily
24 dismissed” the PCR petition. *See Hemmerle v. Schriro*, 495 F.3d 1069, 1074 & n.4 (9th
25 Cir. 2007) (properly filed PCR notice tolled AEDPA’s statute of limitations until
26 “summarily dismissed” by trial court, where prisoner did not petition for review of

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28 ² The AEDPA applies only to those cases that were filed after its effective date,
April 24, 1996. *See Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997).

1 dismissal). Thus, the AEDPA statute of limitations began running the next day, June 14,
2 2012. Because statutory tolling ended on June 13, 2012, Petitioner had through June 14,
3 2013, to file a § 2254 petition. The Petition was filed, however, on June 27, 2013, which
4 is 13 days after the statute of limitations expired.³

5 The Petition is untimely because it was not filed within the deadline established by
6 28 U.S.C. § 2244(d)(1). Absent equitable tolling or other exception, the Petition will be
7 dismissed with prejudice, regardless of the margin of untimeliness. *See United States v.*
8 *Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000) (federal habeas petition submitted one day
9 late was properly dismissed as untimely under AEDPA, noting that a “missed” deadline
10 “is not grounds for equitable tolling”); *Hartz v. United States*, 419 Fed.Appx. 782, 783
11 (9th Cir. 2011) (unpublished) (affirming dismissal of federal habeas petition where
12 petitioner “simply missed the statute of limitations deadline by one day”); *Lookingbill v.*
13 *Cockrell*, 293 F.3d 256, 265 (5th Cir. 2002) (“[w]e consistently have denied tolling even
14 where the petition was only a few days late”); *United States v. Locke*, 471 U.S. 84, 100–
15 01 (1985) (“If 1-day late filings are acceptable, 10-day late filings might be equally
16 acceptable, and so on in a cascade of exceptions that would engulf the rule erected by the
17 filing deadline . . . A filing deadline cannot be complied with, substantially or otherwise,
18 by filing late—even by one day.”).

19 Petitioner asserts that the Petition is not barred and argues the following:

20 The one-year statute of limitations does not bar this action because
21 when the habeas petition was first filed Petitioner had pending in state court
22 a Rule 32 petition. (See Attachment “E” at 1–3.) The statute of limitations
in the instant case was tolled and the one-year did not begin until after
issuance of the state court mandate issued at or around 7/12/12.

23 (Doc. 1 at 11.)

24 First, Petitioner’s prior federal petition was filed and dismissed without prejudice
25 while the statute of limitations was already tolled by the ongoing state PCR proceeding.
26 The state PCR proceeding began on July 20, 2010 and ended on June 13, 2012. The first

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28 ³ Although the Petition was filed on August 8, 2013, the Court affords Petitioner
the benefit of having mailed the Petition on June 27, 2013.

1 federal habeas petition was filed on January 9, 2012 and was dismissed without prejudice
2 on January 27, 2012. All of the time concerning the first habeas petition was already
3 tolled.

4 Second, there is no record before the Court of a state mandate on July 12, 2012.
5 The only “mandate” that issued in this case was issued by the Arizona Court of Appeals
6 on January 25, 2011.⁴ (Doc. 12, Exh. M.) Petitioner’s referenced date of July 12, 2012 is
7 approximately 30 days after the PCR petition was dismissed by the trial court, but the
8 time began to run immediately after the dismissal, not 30 days later. Absent equitable
9 tolling, the Petition is untimely.

10 **2. Equitable Tolling**

11 A habeas petitioner is entitled to equitable tolling “only if he shows ‘(1) that he
12 has been pursuing his rights diligently, and (2) that some extraordinary circumstance
13 stood in his way’ and prevented timely filing.” *Holland v. Florida*, 560 U.S. 631, 649
14 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 1814–15
15 (2005)). The petitioner bears the burden of showing that equitable tolling should apply.
16 *Espinoza-Matthews v. California*, 432 F.3d 1021, 1026 (9th Cir. 2005). Equitable tolling
17 of the filing deadline for a federal habeas petition is available only if extraordinary
18 circumstances beyond the petitioner’s control make it impossible to file a petition on
19 time. *See Chaffer v. Prosper*, 592 F.3d 1046, 1048–49 (9th Cir. 2010). Equitable tolling
20 is only appropriate when external forces, rather than a petitioner’s lack of diligence,
21 account for the failure to file a timely habeas action. *See Chaffer*, 592 F.3d at 1048–49.
22 Equitable tolling is to be rarely granted. *See, e.g., Waldron–Ramsey v. Pacholke*, 556
23 F.3d 1008, 1011 (9th Cir. 2009); *Jones v. Hulick*, 449 F.3d 784, 789 (7th Cir. 2006);
24 *Stead v. Head*, 219 F.2d 1298, 1300 (11th Cir.2000). Petitioner must show that “the
25 extraordinary circumstances were the cause of his untimeliness and that the extraordinary

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27 ⁴ As noted previously, Petitioner concedes he did not appeal his PCR denial. (Doc.
28 1 at 5.) The Court of Appeals issued its mandate after the conclusion of Petitioner’s
direct appeal.

1 circumstances made it impossible to file a petition on time.” *Porter v. Ollison*, 620 F.3d
2 952, 959 (9th Cir.2010). “Indeed, ‘the threshold necessary to trigger equitable tolling
3 [under AEDPA] is very high, lest the exceptions swallow the rule.’” *Miranda*, 292 F.3d
4 at 1066 (quoting *Marcello*, 212 F.3d at 1010).

5 In his Reply, Petitioner asserts equitable tolling should be granted because
6 Petitioner hired a “consulting and management business” to depose the codefendant, but
7 medical conditions by employees prevented the timely deposition. (Doc. 14 at 2.) The
8 one-year statute of limitations for filing a habeas petition may be equitably tolled if
9 extraordinary circumstances beyond a prisoner’s control prevent the prisoner from filing
10 on time. *See Holland*, 560 U.S. at 649; *Bills v. Clark*, 628 F.3d 1092, 1096–97 (9th Cir.
11 2010).

12 The Court does not find Petitioner has pursued his rights diligently. As an initial
13 matter, the Court notes that a deposition of the codefendant has no bearing on Petitioner’s
14 first three claims (suppression, severance, and prosecutorial misconduct at trial). Also,
15 the timeline of the investigation and deposition of the codefendant do not establish
16 diligence. Petitioner’s trial concluded in March of 2009, and his direct appeal concluded
17 on December 21, 2010. Petitioner did not hire an investigator until February 4, 2013.⁵
18 (Doc. 14 at 2.) Petitioner had the ability since 2009 to seek out the codefendant to
19 determine if he could procure favorable evidence. More importantly, Scott Barnes,
20 Petitioner’s consultant/investigator, states that he agreed with Petitioner to depose the
21 codefendant prior to June 1, 2013. Barnes had spoken to the codefendant and Barnes
22 believed that the codefendant would reaffirm (in a deposition) that Petitioner had no
23 “awareness of marijuana in the residence.” (Doc. 14, Exh. 5.) Barnes states that Barnes
24 and Petitioner agreed the deposition would be concluded by June 1, 2013. (*Id.*) Barnes
25

26 ⁵ The Court affords Petitioner the benefit of this February 4, 2013 date. The
27 contract submitted by Petitioner as proof that an investigator was hired is dated February
28 4, 2014 on the first page. (Doc. 14, Exh. 4.) The final page of the contract also has two
signature dates of February 4, 2014, although the execution date is listed as February 4,
2013. (Doc. 14, Exh. 4.) The Court assumes the investigator was hired in 2013.

1 further states that the deadline was not met. (*Id.*) Petitioner was thus aware that he did
2 not have a deposition of the codefendant's statements on June 1, 2013. Petitioner was in
3 the same position on June 1, 2013 as he was on June 27, 2013 when he mailed the
4 Petition. The same information was known to Petitioner before the deadline that was
5 known to Petitioner on the date he mailed the Petition. There is no excuse for Petitioner
6 to have waited beyond June 13, 2013 to file the Petition. Stated differently, Petitioner
7 filed a late Petition with the same information he could have filed in a timely Petition.
8 The Petitioner must establish a causal connection between the alleged roadblock to the
9 timely filing of their federal habeas petition and the actual failure to file the Petition on
10 time. *See Gaston v. Palmer*, 417 F.3d 1030, 1034 (9th Cir. 2003).

11 Moreover, Petitioner still did not depose the codefendant from the time he filed his
12 Petition (June 27, 2013) to the date of his Reply (April 24, 2014), which is an additional
13 period of more than nine months. Petitioner's investigator asserts that the codefendant
14 "has moved to the State of California, and we remain in efforts to locate him to conclude
15 our breached duty to" Petitioner. (Doc. 14, Exh. 5.) The ongoing failure to procure
16 evidence does not reflect diligence. Petitioner bears the burden of proving his entitlement
17 to the equitable tolling of his statute of limitations. *Spitsyn v. Moore*, 345 F.3d 796, 799
18 (9th Cir. 2003).

19 Petitioner's assertion that he is "untrained in the law" and "inexperienced" is
20 unavailing. (Doc. 14, at 7.) Petitioner's *pro se* status, indigence, limited legal resources,
21 ignorance of the law, or lack of representation during the applicable filing period do not
22 constitute extraordinary circumstances justifying equitable tolling. *See, e.g., Raspberry v.*
23 *Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006) ("[A] *pro se* petitioner's lack of legal
24 sophistication is not, by itself, an extraordinary circumstance warranting equitable
25 tolling.").

26 **3. Actual Innocence**

27 To avoid a miscarriage of justice, the statute of limitations in 28 U.S.C. §
28 2244(d)(1) does not preclude this Court from entertaining an untimely first federal habeas

1 petition raising a convincing claim of actual innocence. “Actual innocence, if proved,
2 serves as a gateway through which a petitioner may pass whether the impediment is a
3 procedural bar . . . [or] expiration of the statute of limitations.” *McQuiggin v. Perkins*,
4 133 S. Ct. 1924, 1928 (2013). “When an otherwise time-barred habeas petitioner
5 ‘presents evidence of innocence so strong that a court cannot have confidence in the
6 outcome of the trial unless the court is also satisfied that the trial was free of non-
7 harmless constitutional error,’ the Court may consider the petition on the merits. *See*
8 *Schlup v. Delo*, 513 U.S. 298, 115 S. Ct. 851, 130 L.Ed.2d 808 (1995).” *Stewart v. Cate*,
9 757 F.3d 929, 939 (9th Cir. 2014).

10 To invoke this exception to the statute of limitations, a petitioner “‘must show that
11 it is more likely than not that no reasonable juror would have convicted him in the light
12 of the new evidence.’” *Perkins*, 133 S. Ct. at 1935 (quoting *Schlup*, 513 U.S. at 327).
13 This exception, referred to as the “*Schlup* gateway,” applies “only when a petition
14 presents ‘evidence of innocence so strong that a court cannot have confidence in the
15 outcome of the trial unless the court is also satisfied that the trial was free of nonharmless
16 constitutional error.’” *Perkins*, 133 S.Ct. at 1936 (quoting *Schlup*, 513 U.S. at 316). Such
17 a claim must be founded upon “new reliable evidence—whether it be exculpatory
18 scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that
19 was not presented at trial.” *Schlup*, 513 U.S. at 324. However, “the habeas court’s
20 analysis is not limited to such evidence,” but rather “the habeas court must consider ‘all
21 the evidence,’ old and new, incriminating and exculpatory, without regard to whether it
22 would necessarily be admitted under ‘rules of admissibility that would govern at trial.’”
23 *House v. Bell*, 547 U.S. 518, 537–38 (2006) (quoting *Schlup*, 513 U.S. at 327–28).
24 Significantly, “[t]his is a high threshold that is rarely met.” *Lee v. Lampert*, 653 F.3d
25 929, 945 (9th Cir. 2011). *See also Perkins*, 133 S. Ct. at 1928 (“tenable actual-innocence
26 gateway pleas are rare”).

27 Here, Petitioner fails to present anything other than his assertions and the affidavit
28 of an investigator. Despite his claim that the codefendant would exonerate him,

1 Petitioner does not have an affidavit from the codefendant. *Schlup* instructed that a claim
2 of actual innocence must be supported by “new reliable evidence--whether it be
3 exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical
4 evidence--that was not presented at trial.” *Schlup*, 513 U.S. at 324. Moreover, a petitioner
5 may not simply allege that such evidence exists, but must present it to the habeas court,
6 through affidavit of the witness. *See Weeks v. Bowersox*, 119 F.3d 1342, 1352–53 (8th
7 Cir. 1997). Petitioner has not presented an affidavit from the codefendant. Nor does he
8 proffer anything to suggest why such an affidavit would be deemed trustworthy. Though
9 sworn, affidavits are not convincing evidence of innocence because “the affiants’
10 statements are obtained without the benefit of cross-examination and an opportunity to
11 make credibility determinations.” *Herrera v. Collins*, 506 U.S. 390, 417 (1993). Even if
12 Petitioner had the sworn statement of the codefendant, such evidence from a
13 coconspirator more than five years after the event would be viewed with significant
14 skepticism. Petitioner’s personal assertion of innocence is also insufficient. *See*
15 *Hubbard v. Pinchak*, 378 F.3d 333, 340 (3rd Cir. 2004) (“The only evidence that
16 Hubbard asserts is ‘new’ is what he terms as ‘his own sworn testimony.’ . . . A
17 defendant’s own late-proffered testimony is not ‘new’ because it was available at trial.
18 Hubbard merely chose not to present it to the jury. That choice does not open the
19 gateway.”).

20 Actual innocence evidence “must be considered in light of the proof of
21 Petitioner’s guilt at trial.” *Herrera*, 506 U.S. at 418. Under *Schlup*, “the petitioner must
22 show that it is more likely than not that no reasonable juror would have convicted him in
23 the light of the new evidence.” *Schlup*, 513 U.S. at 327. Here, the Arizona court of
24 appeals found “there was substantial overlapping evidence against both defendants” at
25 trial. (Doc. 12, Exh. J at 9.) Defendant was found inside a house containing 1,672 pounds
26 of marijuana valued at \$836,000. When Petitioner answered the door after officers
27 knocked, Petitioner was “‘extremely agitated’ and was talking back to the officers.” (Doc
28 12, Exh. J at 4.) He was “aggressive and did not want to come outside to speak” to the

1 officers. (*Id.*) He also had a key to the stash-house door in his pocket. (*Id.*) Petitioner
2 submits that he met the codefendant for the first time that evening. Petitioner claims he
3 was merely at the house because the codefendant was intoxicated and needed someone to
4 drive him home. It is extremely unlikely that the codefendant would invite a random
5 stranger into a home containing 1,672 pounds of marijuana, and thus betray the secrecy
6 of the stash house to law enforcement or other criminals. In light of all of the evidence,
7 Petitioner has not met his burden.

8 **4. Evidentiary Hearing**

9 An evidentiary hearing is not warranted regarding equitable tolling because the
10 Court has accepted as true the facts Petitioner asserts regarding due diligence. A habeas
11 petitioner asserting equitable tolling “should receive an evidentiary hearing when he
12 makes ‘a good-faith allegation that would, if true, entitle him to equitable tolling.’” *Roy v.*
13 *Lampert*, 465 F.3d 964, 969 (9th Cir. 2006) (quoting *Laws v. Lamarque*, 351 F.3d 919,
14 919 (9th Cir. 2003)). The Court has accepted as true Petitioner’s assertion and dates
15 regarding the potential deposition of the codefendant. The Court is also mindful that
16 when evaluating a *pro se* habeas petitioner’s allegations of such extraordinary
17 circumstances, the court must “construe *pro se* habeas filings liberally.” *Id.* (quoting
18 *Allen v. Calderon*, 408 F.3d 1150, 1153 (9th Cir. 2005)).

19 Here, even construing his Petition liberally, Petitioner fails to allege extraordinary
20 circumstances that kept him from filing his federal habeas petition on time. The Court has
21 accepted his facts as true and finds an evidentiary hearing on the equitable tolling issue is
22 unnecessary.

23 The Court further concludes that an evidentiary hearing on the *Schlup* gateway
24 claim is not warranted. Petitioner’s claim of innocence and the affidavit of an investigator
25 are insufficient for the Court to “lose confidence in the outcome of the trial.” *Schlup*, 513
26 U.S. at 316. *See also Stewart*, 757 F.3d at 941 (noting that the “*Schlup* Court suggested
27 that when considering an actual-innocence claim in the context of a request for an
28 evidentiary hearing, the district court need not test the new evidence by a standard

1 appropriate for deciding a motion for summary judgment, but rather may consider how
2 the timing of the submission and the likely credibility of the affiants bear on the probable
3 reliability of that evidence”) (citations and quotations omitted)).

4 **B. GROUND ONE: MOTION TO SUPPRESS**

5 In Ground One, Petitioner asserts that his rights under the Fourth and Fourteenth
6 Amendments were violated by an illegal, warrantless search. This claim was properly
7 exhausted by Petitioner because he argued this precise point in his brief to the Arizona
8 Court of Appeals. (Doc. 12, Exh. I.) It is however precluded as a claim in these
9 proceedings.

10 In *Stone v. Powell*, 428 U.S. 465 (1976), the Supreme Court established the limits
11 of the “exclusionary rule” in relation to federal habeas proceedings. “We conclude that
12 where the State has provided an opportunity for full and fair litigation of a Fourth
13 Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the
14 ground that evidence obtained in an unconstitutional search or seizure was introduced at
15 his trial.” *Id.* at 494. The Court noted that the exclusionary rule was merely “a judicially
16 created means of effectuating the rights secured by the Fourth Amendment.” *Id.* at 482.
17 Accordingly, they adopted this limitation on its application in federal habeas corpus
18 actions after “weighing the utility of the exclusionary rule against the costs of extending
19 it to collateral review of Fourth Amendment claims.” *Id.* at 489.

20 The *Stone* rule only applies, however, where there was an “opportunity for full and
21 fair consideration of [the defendant’s] reliance upon the exclusionary rule with respect to
22 seized evidence by the state courts at trial and on direct review.” *Id.* “The relevant inquiry
23 is whether petitioner had the opportunity to litigate his claim, not whether he did in fact
24 do so or even whether the claim was correctly decided.” *Ortiz-Sandoval v. Gomez*, 81
25 F.3d 891, 899 (9th Cir. 1996). *See Gordon v. Duran*, 895 F.2d 610, 613–14 (9th Cir.
26 1990) (“Given that [the petitioner] had an opportunity in state court for ‘full and fair
27 litigation’ of his fourth amendment claim, the Constitution does not require the [the
28 petitioner] be granted habeas corpus relief on the ground that evidence obtained in an

1 unconstitutional search or seizure was introduced at his trial.”).

2 Petitioner litigated this claim before the state courts. He raised this issue in a
3 motion to suppress where the trial court held an evidentiary hearing, heard oral argument,
4 and ultimately denied his motion. (Doc. 12, Exhs. B, C, D, E.) Petitioner raised the issue
5 on appeal, which was considered and denied. (Doc. 12, Exh. I.) Accordingly, Ground
6 One is not cognizable and barred from consideration by *Stone*.

7 **C. GROUND TWO: MOTION TO SEVER**

8 Petitioner’s claim under Ground Two is unexhausted and procedurally defaulted.
9 Petitioner argues no cause and prejudice to excuse this default.

10 Ordinarily, a federal court may not grant a petition for writ of habeas corpus
11 unless the petitioner has exhausted available state remedies. 28 U.S.C. § 2254(b). To
12 exhaust state remedies, a petitioner must afford the state courts the opportunity to rule
13 upon the merits of his federal claims by “fairly presenting” them to the state’s “highest”
14 court in a procedurally appropriate manner. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004)
15 (“[t]o provide the State with the necessary ‘opportunity,’ the prisoner must ‘fairly
16 present’ his claim in each appropriate state court . . . thereby alerting that court to the
17 federal nature of the claim”).

18 A claim has been fairly presented if the petitioner has described both the operative
19 facts and the federal legal theory on which his claim is based. *See Baldwin*, 541 U.S. at
20 33. A “state prisoner does not ‘fairly present’ a claim to a state court if that court must
21 read beyond a petition or brief . . . that does not alert it to the presence of a federal claim
22 in order to find material, such as a lower court opinion in the case, that does so.” *Id.* at
23 31–32. Thus, “a petitioner fairly and fully presents a claim to the state court for purposes
24 of satisfying the exhaustion requirement if he presents the claim: (1) to the proper forum.
25 . . . (2) through the proper vehicle, . . . and (3) by providing the proper factual and legal
26 basis for the claim.” *Insyxiengmay v. Morgan*, 403 F.3d 657, 668 (9th Cir. 2005) (internal
27 citations omitted).

28 The requirement that a petitioner exhaust available state court remedies promotes

1 comity by ensuring that the state courts have the first opportunity to address alleged
2 violations of a state prisoner's federal rights. *See Duncan v. Walker*, 533 U.S. 167, 178
3 (2001); *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). Principles of comity also
4 require federal courts to respect state procedural bars to review of a habeas petitioner's
5 claims. *See Coleman*, 501 at 731-32. Pursuant to these principles, a habeas petitioner's
6 claims may be precluded from federal review in two situations.

7 First, a claim may be procedurally defaulted and barred from federal habeas
8 corpus review when a petitioner failed to present his federal claims to the state court, but
9 returning to state court would be "futile" because the state court's procedural rules, such
10 as waiver or preclusion, would bar consideration of the previously unraised claims. *See*
11 *Teague v. Lane*, 489 U.S. 288, 297-99 (1989)); *Beaty v. Stewart*, 303 F.3d 975, 987 (9th
12 Cir. 2002). If no state remedies are currently available, a claim is technically exhausted,
13 but procedurally defaulted. *Coleman*, 501 U.S. at 732, 735 n. 1.

14 Second, a claim may be procedurally barred when a petitioner raised a claim in
15 state court, but the state court found the claim barred on state procedural grounds. *See*
16 *Beard v. Kindler*, 558 U.S. 53, 60-61 (2009). "[A] habeas petitioner who has failed to
17 meet the State's procedural requirements for presenting his federal claim has deprived the
18 state courts of an opportunity to address those claims in the first instance." *Coleman*, 501
19 U.S. at 731-32. In this situation, federal habeas corpus review is precluded if the state
20 court opinion relies "on a state-law ground that is both 'independent' of the merits of the
21 federal claim and an 'adequate' basis for the court's decision." *Harris v. Reed*, 489 U.S.
22 255, 260 (1989).

23 A state procedural ruling is "independent" if the application of the bar does not
24 depend on an antecedent ruling on the merits of the federal claim. *See Stewart v. Smith*,
25 536 U.S. 856, 860 (2002); *Ake v. Oklahoma*, 470 U.S. 68, 74-75 (1985). A state court's
26 application of the procedural bar is "adequate" if it is "strictly or regularly followed." *See*
27 *Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir.1994). If the state court occasionally excuses
28 non-compliance with a procedural rule, that does not render its procedural bar inadequate.

1 *See Dugger v. Adams*, 489 U.S. 401, 410–12 n.6 (1989). “The independent and adequate
2 state ground doctrine ensures that the States’ interest in correcting their own mistakes is
3 respected in all federal habeas cases.” *Coleman*, 501 U.S. at 732. Although a procedurally
4 barred claim has been exhausted, as a matter of comity, the federal court will decline to
5 consider the merits of that claim. *See Id.* at 729–32.

6 Ground Two is unexhausted because Petitioner did not identify a claim under the
7 United States Constitution when he litigated this issue in state court. Proper exhaustion
8 requires a petitioner to have “fairly presented” to the state courts the exact federal claim
9 he raises on habeas by describing the operative facts and federal legal theory upon which
10 the claim is based. *See, e.g., Picard v. Connor*, 404 U.S. 270, 275–78 (1971) (“[W]e have
11 required a state prisoner to present the state courts with the same claim he urges upon the
12 federal courts.”). A claim is only “fairly presented” to the state courts when a petitioner
13 has “alert[ed] the state courts to the fact that [he] was asserting a claim under the United
14 States Constitution.” *Shumway v. Payne*, 223 F.3d 982, 987 (9th Cir. 2000) (quotations
15 omitted); *see Johnson v. Zenon*, 88 F.3d 828, 830 (9th Cir. 1996) (“If a petitioner fails to
16 alert the state court to the fact that he is raising a federal constitutional claim, his federal
17 claim is unexhausted regardless of its similarity to the issues raised in state court.”).

18 A “general appeal to a constitutional guarantee,” such as due process, is
19 insufficient to achieve fair presentation. *Shumway*, 223 F.3d at 987 (quoting *Gray v.*
20 *Netherland*, 518 U.S. 152, 163 (1996)); *see Castillo v. McFadden*, 399 F.3d 993, 1003
21 (9th Cir. 2005) (“Exhaustion demands more than drive-by citation, detached from any
22 articulation of an underlying federal legal theory.”). Similarly, a federal claim is not
23 exhausted merely because its factual basis was presented to the state courts on state law
24 grounds—a “mere similarity between a claim of state and federal error is insufficient to
25 establish exhaustion.” *Shumway*, 223 F.3d at 988 (quotations omitted); *see Picard*, 404
26 U.S. at 275–77.

27 Here, Petitioner’s state argument did not reference any federal law. Petitioner’s
28 state argument read:

1 Trial court erred by refusing to sever Appellant's trial from the trial
2 of this co-defendant. Damaging video evidence depicting only the co-
3 defendant was admitted at the joint trial. This evidence caused severe
4 prejudice to Appellant's "mere presence" defense at trial. Appellant
5 contends there is no other evidence linking him to the marijuana or drug
6 paraphernalia offenses.

7 (Doc. 12, Exh. I at 5.)

8 Ground Two is unexhausted and procedurally defaulted because Petitioner cannot
9 file another appeal or PCR on this issue in state court. Under Ariz. R. Crim. P. 31.3, the
10 time for filing a direct appeal expires 20 days after entry of the judgment and sentence.
11 Moreover, no provision is made for a successive direct appeal. Accordingly, direct appeal
12 is no longer available for review of Petitioner's unexhausted claims. Petitioner is also
13 barred from raising his claims by Arizona's time bars. Ariz. R.Crim. P. 32.4 requires that
14 petitions for post-conviction relief (other than those which are "of-right") be filed "within
15 ninety days after the entry of judgment and sentence or within thirty days after the
16 issuance of the order and mandate in the direct appeal, whichever is the later." *See State*
17 *v. Pruett*, 912 P.2d 1357, 1360 (App.1995) (applying Rule 32.4 to successive petition,
18 and noting that first petition of pleading defendant deemed direct appeal for purposes of
19 the rule). That time has long since passed.

20 **D. GROUNDS THREE AND FOUR: PROSECUTORIAL MISCONDUCT** 21 **AND ACTUAL INNOCENCE**

22 Petitioner argued prosecutorial misconduct and actual innocence in the PCR
23 petition filed with the trial court. Petitioner failed, however, to file a petition for review
24 with the court of appeals after his PCR petition was denied by the trial court. The law
25 "requires that before a state prisoner files a federal habeas petition, he or she must give
26 the state courts one full opportunity to resolve any constitutional issues by invoking one
27 complete round of the State's established appellate review process." *Swoopes v. Sublett*,
28 196 F.3d 1008, 1010 (9th Cir. 1999) (citation and quotation omitted). "In cases not
carrying a life sentence or the death penalty, claims of Arizona state prisoners are
exhausted for purposes of federal habeas once the Arizona Court of Appeals has ruled on

1 them.” *Castillo*, 399 F.3d at 998 n.3 (9th Cir. 2005) (quoting *Swoopes*, 196 F.3d at 1010.
2 These claims are unexhausted because Petitioner did not file for appellate review after his
3 PCR denial.

4 Both claims are also procedurally defaulted. Petitioner waived the claims asserted
5 in Grounds Three and Four by failing to raise them either on direct appeal or in a rule-
6 compliant petition for post-conviction relief. *See State v. Shrum*, 220 Ariz. 115, 203 P.3d
7 1175, 1178 (Ariz.2009) (stating that “[r]ule 32.2(a) precludes collateral relief on a ground
8 that either was or could have been raised on direct appeal or in a previous PCR
9 proceeding.”).

10 The state court ruled as follows regarding these claims:

11 Defendant raises claims of prosecutorial misconduct. Because all of
12 these claims refer to matters set forth on the record, they are precluded
13 because they were waived by failure to object at trial or by failing to raise
14 the issues on appeal.

15 Defendant also raises the claims of actual innocence and of
16 ineffective assistance of trial and appellate counsel. None of these are
17 colorable.

18 (Doc. 12, Exh. U.) Petitioner did not exhaust available state remedies with respect to his
19 claims in Grounds Three and Four and a return to state court to present those claims
20 would be futile because Arizona’s procedural rules would bar presentation of these
21 claims. Accordingly, these claims are unexhausted and procedurally defaulted.

22 **E. CAUSE AND PREJUDICE**

23 A procedurally defaulted claim may not be barred from federal review, however,
24 “if the petitioner can demonstrate either (1) ‘cause for the default and actual prejudice as a
25 result of the alleged violation of federal law,’ or (2) ‘that failure to consider the claims
26 will result in a fundamental miscarriage of justice.’” *Jones v. Ryan*, 691 F.3d 1093, 1101
27 (9th Cir. 2012) (quoting *Coleman*, 501 U.S. at 732); *see also Boyd v. Thompson*, 147 F.3d
28 1124, 1126-27 (9th Cir. 1998) (the cause and prejudice standard applies to *pro se*
petitioners as well as to those represented by counsel). To establish “cause,” a petitioner
must establish that some objective factor external to the defense impeded his efforts to
comply with the state’s procedural rules. *Cook v. Schriro*, 538 F.3d 1000, 1027 (9th Cir.

1 2008) (quoting *Murray v. Carrier*, 477 U.S. 478, 488-89 (1986)). “Prejudice” is actual
2 harm resulting from the constitutional violation or error. *Magby v. Wawrzaszek*, 741 F.2d
3 240, 244 (9th Cir. 1984). To establish prejudice, a petitioner must show that the alleged
4 error “worked to his actual and substantial disadvantage, infecting his entire trial with
5 error of constitutional dimensions.” *United States v. Frady*, 456 U.S. 152, 170 (1982);
6 *Thomas v. Lewis*, 945 F.2d 1119, 1123 (9th Cir. 1996). Where a petitioner fails to
7 establish either cause or prejudice, the court need not reach the other requirement. *See*
8 *Hiivala v. Wood*, 195 F.3d 1098, 1105 n.6 (9th Cir. 1999); *Cook*, 538 F.3d at 1028 n.13.
9 Lastly, “[t]o qualify for the ‘fundamental miscarriage of justice’ exception to the
10 procedural default rule” a petitioner “must show that a constitutional violation has
11 ‘probably resulted’ in the conviction when he was ‘actually innocent’ of the offense.”
12 *Cook*, 538 F.3d at 1028 (quoting *Murray*, 477 U.S. at 496); *see also Schlup*, 513 U.S. at
13 329 (petitioner must make a credible showing of “actual innocence” by “persuad[ing] the
14 district court that, in light of the new evidence, no juror, acting reasonably, would have
15 voted to find him guilty beyond a reasonable doubt.”). “To be credible, such a claim
16 requires petitioner to support his allegations of constitutional error with new reliable
17 evidence—whether it be exculpatory scientific evidence, trustworthy eye--witness
18 accounts, or critical physical evidence—that was not presented at trial.” *Schlup*, 513 U.S.
19 at 324.

20 In this case, Petitioner does not assert any basis sufficient to overcome the
21 procedural bar. Petitioner's *pro se* status and ignorance of the law do not satisfy the cause
22 standard. *Hughes v. Idaho State Bd. of Corrections*, 800 F.2d 905, 908 (9th Cir. 1986);
23 *Kibler v. Walters*, 220 F.3d 1151, 1153 (9th Cir. 2000) (affirming that “lack of
24 knowledge” and “limited access to materials were insufficient to establish good cause”).
25 Likewise, Petitioner does not establish that failure to consider his defaulted claim will
26 result in a fundamental miscarriage of justice. “[T]he miscarriage of justice exception is
27 concerned with actual as compared to legal innocence.” *Calderon v. Thompson*, 523 U.S.
28 538, 559 (1998) (citation and quotation omitted). The Court has already considered and

1 rejected Petitioner's *Schlup* gateway claim.⁶ Petitioner's assertion and the affidavit by
2 his investigator do not establish that no reasonable juror would have voted to find
3 Petitioner guilty beyond a reasonable doubt.

4 **F. GROUND FOUR: FREESTANDING ACTUAL INNOCENCE CLAIM**

5 Assuming that Petitioner's freestanding actual innocence claim under *Herrera v.*
6 *Collins*, 506 U.S. 390 (1993) is cognizable in these proceedings,⁷ the Court finds that
7 Petitioner has not met his burden under this claim. "[T]he *Herrera* majority's statement
8 that the threshold for a freestanding claim of innocence would have to be extraordinarily
9 high, contemplates a stronger showing than insufficient of the evidence to convict." *See*
10 *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997) (en banc) (internal citations
11 omitted). Petitioner failed to meet the lower standard of actual innocence under the
12 *Schlup* gateway (*supra*, at 12-13), and therefore does not meet his burden to proceed on
13 his *Herrera* claim.

14 **CONCLUSION**

15 The record is sufficiently developed and the Court does not find that an
16 evidentiary hearing is necessary for resolution of this matter. *See Rhoades v. Henry*, 638
17 F.3d 1027, 1041 (9th Cir. 2011); *Roberts v. Marshall*, 627 F.3d 768, 773 (9th Cir. 2010).
18 Based on the above analysis, the Court finds that Petitioner's claims are untimely,
19 precluded or procedurally barred from review, and Petitioner has not satisfied the burden
20 to establish actual innocence. The Court will therefore recommend that the Petition for
21 Writ of Habeas Corpus (Doc. 1) be denied and dismissed with prejudice.

22
23 ⁶ "Actual innocence, if proved, serves as a gateway through which a petitioner
24 may pass whether the impediment is a procedural bar . . . [or] expiration of the statute of
limitations." *Perkins*, 133 S. Ct. at 1928.

25 ⁷ The United States Supreme Court has not explicitly held that a "freestanding"
26 claim of factual innocence, i.e., one unaccompanied by a substantive claim of
27 constitutional error in trial proceedings, provides a basis for federal habeas relief in a
28 non-capital case. *See Jones v. Taylor*, 763 F.3d 1242, 1246 (9th Cir. 2014) ("We have
not resolved whether a freestanding actual innocence claim is cognizable in a federal
habeas corpus proceeding in the non-capital context, although we have assumed that such
a claim is viable.").

