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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Larry Charles Snow, Jr.,

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No. CV-11-1023-PHX-GMS

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Plaintiff,

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ORDER

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vs.

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Charles L. Ryan, et al.,

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Defendants.

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Pending before this Court is a Petition for Writ of Habeas Corpus filed by Petitioner Larry Charles Snow. (Doc. 1). Magistrate Judge Michelle Burns has issued a Report and Recommendation (“R & R”) in which she recommends that the Court deny the petition with prejudice. (Doc. 16). Petitioner has objected to the R & R and filed a Motion for a Certificate of Appealability. (Docs. 21, 22). Because objections have been filed, the Court will review the petition de novo. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). For the following reasons, the Court accepts the R & R, denies the petition, and declines to issue a certificate of appealability.

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BACKGROUND

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The facts regarding Petitioner’s apprehension, plea, and state court post-conviction proceedings are ably set forth in the R & R, and will only be briefly summarized here. On March 10, Petitioner was indicted on nineteen counts of sexual conduct with a minor, child molestation, sexual abuse, and related offenses. (Doc. 13-1, Ex. B). The indictment stemmed

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1 from an investigation conducted by the Phoenix Police Department after it had been
2 contacted by the FBI. The FBI had received information from a person in London that
3 Petitioner, under the internet pseudonym “Greenhorn,” had boasted of molesting his six-year
4 old stepdaughter, had stated that he had married the girl’s mother to obtain ready access to
5 the child, and had offered access to the girl to other child predators should they travel to
6 Phoenix. (Doc. 13–2, Ex. N, Ex. B at 18–20). The girl was interviewed and described
7 substantial abuse, and Petitioner admitted to abusing the girl for over a year. (Doc. 13-1, Ex.
8 A).

9 On May 6, 2004, Petitioner pled guilty to two amended counts of attempted sexual
10 conduct with a minor under the age of 15, which were categorized as class 3 felonies and
11 dangerous crimes against children in the second degree (Count Four and Count Seven), and
12 one count of sexual conduct with a minor under the age of 15, classified as a class 2 felony
13 and a dangerous crime against children in the first degree (Count Five). (Doc. 13-1, Ex. D).
14 On February 11, 2005, he was issued a ten-year sentence on Count Four and a twenty-year
15 sentence on Count Five, to run consecutively, and 99 years probation for Count Seven. (Doc.
16 13-1, Ex. F).

17 After his appointed counsel stated that he could find no colorable claim for post-
18 conviction relief (“PCR”), Petitioner filed a *pro per* PCR petition claiming that the state had
19 failed to provide the name of the London informant, that his plea was involuntary, that his
20 counsel was ineffective during plea negotiations and sentencing, and that his sentence had
21 been aggravated in violation of *Blakely v. Washington*, 542 U.S. 296 (2004) because the
22 content of the internet chats that formed the basis of the investigation had not been found by
23 a jury. (Doc. 13, Ex. J). The petition was denied on December 20, 2005, and the Court of
24 Appeals denied review on November 16, 2006. (Doc. 13-2, Exs. M, O).

25 Eighteen months later, Petitioner filed a “Motion for Sentence Correction,” asking that
26 his sentence be modified in light of *State v. Gonzalez*, 216 Ariz. 11, 162 P.3d 650 (App.
27 2007), which held that A.R.S. § 13-604.01, the law undergirding Count Four and Count
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1 Seven, did not provide for a sentencing enhancement for attempted sexual conduct when the
2 victim was under the age of twelve. (Doc. 13, Ex. P). The court treated the petition as a
3 successive PCR petition, and after a response from the state and a telephonic hearing, ruled
4 that Petitioner was not precluded from bringing a successive claim. (Doc. 13, Ex. U). The
5 State moved to stay resentencing until the Arizona Supreme Court had ruled on a pending
6 case that would decide whether *Gonzalez* had created a “significant change in the law” for
7 the purposes of Arizona Rule of Criminal Procedure 32.1, and therefore would resolve the
8 question of whether subsequent petitions based on *Gonzalez* were precluded. (Doc. 13, Ex.
9 W). The Court granted the stay, and on March 19, 2009, the Arizona Supreme Court ruled
10 that the appeals court in *Gonzalez* did not create a significant change in the law, but was
11 merely “the first to interpret a statute.” *State v. Shrum*, 220 Ariz. 115, 120, 203 P.3d 1175,
12 1180 (2009). The trial court thereafter ruled that Petitioner’s subsequent *Gonzalez*-based
13 PCR was precluded because he had not raised the issue in his initial PCR. (Doc. 13-3, Ex.
14 CCC). Both the Court of Appeals and the Arizona Supreme Court denied review. (Doc. 13-3,
15 Exs. GG, II).

16 Petitioner filed his Petition for Writ of Habeas Corpus on May 23, 2011, alleging that
17 his sentence had been issued in violation of *Gonzalez*, and that the error constituted a
18 violation of his rights to Due Process and Equal Protection. (Doc. 1).

19 In the R & R, Judge Burns wrote that Petitioner’s claim was not cognizable on habeas
20 review because “[t]he gravamen of Petitioner’s claim challenges the state court’s
21 interpretation and application of state sentencing statutes, and the propriety of Petitioner’s
22 post-conviction proceedings.” (Doc. 16 at 7–8). Further, Judge Burns noted that even were
23 the petition cognizable, it was not timely under AEDPA, and equitable tolling was not
24 available because Petitioner had been aware of the facts regarding his sentence on February
25 11, 2005, and “[a]ny purported lack of legal sophistication regarding the legal significance
26 of those facts does not justify equitable tolling on the instant record.” (Doc. 16 at 12, *citing*
27 *Pham v. Ryan*, CV-09-2535 (FJM), 2010 WL 4393012 (D. Ariz. Oct. 29, 2010) (denying
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1 2244(d)(1)(A)). The limitations period is subject to statutory tolling under the terms of
2 AEDPA or equitable tolling under extraordinary circumstances.

3 The one-year limitation period is statutorily tolled during any time in which a
4 “properly filed” state petition for post-conviction relief is “pending” before the state court,
5 and “must be tolled for the entire period in which a petitioner is appropriately pursuing and
6 exhausting his state remedies.” 28 U.S.C. § 2244(d)(2); *Nino v. Galaza*, 183 F.3d 1003, 1004
7 (9th Cir. 1999).

8 In certain limited circumstances, AEDPA’s one-year filing deadline may be equitably
9 tolled. *See Holland v. Florida*, 130 S. Ct. 2549, 2590 (2010). A petitioner is entitled to
10 equitable tolling if he can demonstrate that “(1) he has been pursuing his rights diligently,
11 and (2) that some extraordinary circumstance stood in his way” to prevent his timely filing.
12 *Pace*, 544 U.S. at 418. Nevertheless, equitable tolling is rare: the Court must “take seriously
13 Congress’s desire to accelerate the federal habeas process” and may equitably toll the
14 AEDPA’s limitation period only when the test’s “high hurdle is surmounted.” *Calderon v.*
15 *United States Dist. Ct. (Beeler)*, 128 F.3d 1283, 1289 (9th Cir. 1997), *overruled in part on*
16 *other grounds*, 163 F.3d 530 (9th Cir. 1998).

17 **II. Analysis**

18 Judge Burns’s R & R properly concludes that the petition is untimely under AEDPA,
19 since the statute of limitations began to run on December 18, 2006, thirty days after the
20 Arizona Court of Appeals denied review of his first PCR petition. (Doc. 16 at 10). It further
21 concludes that if the petition were timely, it would nevertheless be denied because “the claim
22 turns solely on alleged state law errors.” (Doc. 16 at 7). The Court has reviewed the petition
23 de novo and determined that these conclusions are correct. Only Petitioner’s objections will
24 be discussed in this order.

25 **A. Arizona Rule 32.1**

26 When a prisoner files a petition for Post-Conviction Relief in Arizona State Court, he
27 waives any claim that he could have raised but did not, and cannot raise that claim in a
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1 subsequent collateral proceeding. ARIZ. R. CRIM. P. 32.2(a)(3). This general rule admits to
2 number of exceptions, including subsequent petitions predicated upon discovery of new
3 evidence pursuant to Rule 32.1(e) or significant changes in the law pursuant to Rule 32.1(g).
4 ARIZ. R. CRIM. P. 32.2(b). Evidence is “newly-discovered” for the purposes of Rule 32.1
5 when the following five requirements are met:

- 6 1. the evidence must appear on its face to have existed at the
7 time of trial but be discovered after trial;
- 8 2. the motion must allege facts from which the court could
9 conclude the defendant was diligent in discovering the facts and
10 bringing them to the court’s attention;
- 11 3. the evidence must not simply be cumulative or impeaching;
- 12 4. the evidence must be relevant to the case;
- 13 5. the evidence must be such that it would likely have altered the
14 verdict, finding or sentence if known at the time of trial.

11 *State v. Cooper*, 166 Ariz. 126, 129, 800 P.2d 992, 995 (App. 1990) (quoting *State v. Bilke*,
12 162 Ariz. 51, 52–53, 781 P.2d 28, 29–30 (1989)). The Court of Appeals decided *Gonzalez*
13 in 2007, and therefore the fact that it had been decided could not have “existed at the time
14 of trial,” and cannot form the basis for a claim under Rule 32.1(e). *Id.* More generally, court
15 opinions are simply not newly-discovered material facts, since they are by definition
16 decisions of law. Petitioner may not gain relief by mischaracterizing a legal claim as a factual
17 one once the legal claim has been denied. Petitioner’s subsequent PCR was not rendered
18 timely through Rule 32.1(e).

19 **B. Constitutional Violation**

20 Petitioner argues that the R & R improperly misconstrues his petition as resting solely
21 on state law grounds when in fact he claims that he was denied due process rights under the
22 Fourteenth Amendment. (Doc. 21 at 3). He argues that “due process demands that Snow be
23 sentenced properly,” and that sentencing “pursuant to the wrong statute constitutes a
24 structural defect” under *Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993). (Doc. 21 at 4). The
25 Arizona procedural rules that precluded Petitioner’s subsequent claim comply with Due
26 Process, and his sentence did not constitute a structural constitutional defect. Habeas review
27 is not available for state claims denied on procedural grounds when the state law ground is
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1 “independent of the federal question and adequate to support the judgment.” *Walker v.*
2 *Martin*, 131 S.Ct. 1120, 1127 (2011) (internal quotations omitted).² The Supreme Court has
3 held that Arizona’s rule barring subsequent PCR petitions does not violate federal law and
4 such claims are not subject to federal review. *See Stewart v. Smith*, 536 U.S. 856, 861 (2002)
5 (“Because the state court’s determination that respondent waived his . . . claim under Ariz.
6 Rule Crim. Proc. 32.2(a)(3) did not require an examination of the merits of that claim, it was
7 independent of federal law.”). The Court in *Brecht* described “structural defects” as
8 constitutional failings—such as the failure to provide a defendant with counsel—that “make
9 a trial fundamentally unfair even if they do not affect the outcome of the proceeding.” *Brecht*,
10 507 U.S. at 640. Having a PCR petition denied on a valid state procedural ground does not
11 create such a defect. Petitioner has not raised a federal claim, and habeas review would not
12 be available even were his claim timely.

13 **C. Equitable Tolling**

14 Petitioner claims that his petition is not untimely under AEDPA because his
15 subsequent state PCR was improperly denied. (Doc. 21 at 5). As discussed above, AEDPA’s
16 statute of limitations began to run thirty days after the expiration of Petitioner’s first PCR;
17 filing a subsequent state PCR did not reset or toll the limitations period. *See Ferguson v.*
18 *Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003).

19 Petitioner argues that his case should be equitably tolled because “Snow *did not know*
20 about the facts of DCAC in connection with his charge.” (Doc. 21 at 7) (emphasis added).
21 The “fact” that Petitioner claims he did not know was the decision of the *Gonzalez* court

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23 ² Petitioner quotes *Martin* as holding that “[Arizona’s] time bar, either by design or
24 operation, discriminates against federal claims or claimants.” (Doc. 21 at 8). *Martin* did
25 not involve Arizona’s time bar; in it, the Court upheld California’s procedural time bar
26 even though the bar did not set a particular time limit on filing claims but stated only that
27 they should be filed “as promptly as the circumstances allow.” 131 S.Ct. at 1126.
28 Moreover, Petitioner selectively quotes the passage to distort its meaning; the full quote
reads: “Martin has not alleged that California’s time bar, either by design or operation,
discriminates against federal claims or claimants.” *Id.* at 1125..

1 issued in 2007. The *Gonzalez* court noted that its interpretation of the statute was not
2 novel—in fact, the statute offered no textual support for punishing those who attempted
3 sexual assaults against children under twelve, because of what “appears to have been
4 legislative oversight.” *Gonzalez*, 216 Ariz. at 14. Failing to note the plain text of a statute
5 does not provide the basis for equitable tolling when a petitioner knows the underlying facts
6 of the acts for which he was convicted. *See Pham v. Ryan*, CV-09-2535 (FJM), 2010 WL
7 4393012 (D. Ariz. Oct. 29, 2010) (denying equitable tolling for a habeas claim filed based
8 on the denial of a second state PCR alleging that petitioner was sentenced in violation of
9 *Gonzalez*). After the *Gonzalez* decision was rendered, the Arizona legislature revised the
10 sentencing statute to correct the error that the court had noted. *See* A.R.S. § 13-705(B).

11 Nor do Petitioner’s other arguments merit equitable tolling. A claim based on the plain
12 language of a state sentencing statute is not one in which “there was no reasonable basis in
13 existing law.” *Reed v. Ross*, 468 U.S. 1, 15 (1984).³ Petitioner was not prevented from
14 including a *Gonzalez*-style claim in his first state PCR, and this case simply does not present
15 the “extraordinary circumstances sufficient to merit equitable relief.” *Holland v. Florida*, 130
16 S. Ct. 2549, 2565 (2010). The petition was untimely filed, and Petitioner is not entitled to
17 equitable tolling.

18 **D. Certificate of Appealability**

19 A Certificate of Appealability (“COA”) will issue when counts are dismissed on
20 procedural grounds so long as “reasonable jurists could debate” whether the decision is
21 correct. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When a decision issues on the merits,
22 a COA will issue when “reasonable jurists would find the district court’s assessment of the
23 constitutional claims debatable or wrong.” *Id.* No reasonable jurist could debate that the

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25 ³ *Ross* was in fact a case in which the Court defined “cause” for failing to abide by a state
26 procedural rule sufficient to overcome procedural default. *Ross*, 468 U.S. at 15. Petitioner
27 cites it for the proposition that it will equitably toll his deadlines under AEDPA. Under
28 neither circumstance does it offer Petitioner relief.

1 petition is untimely, and no reasonable jurist would find the Court's conclusion that
2 Petitioner was raising a state law claim not cognizable on habeas review to be debatable or
3 wrong. No COA will issue.

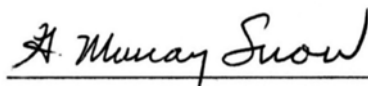
4 **CONCLUSION**

5 The conclusions of the R & R are correct—Petitioner raises state law claims that are
6 not cognizable on habeas review, and his petition is untimely. Petitioner's objections are
7 meritless.

8 **IT IS THEREFORE ORDERED:**

- 9 1. Magistrate Judge Burns' R&R (Doc. 16) is **accepted**.
- 10 2. Petitioner's Petition for Writ of Habeas Corpus (Doc. 1) is **denied and**
11 **dismissed with prejudice**.
- 12 3. The Clerk of Court shall **terminate** this action.
- 13 4. Motion for Certificate of Appealability (Doc. 22) is denied. Pursuant to Rule
14 11(a) of the Rules Governing Section 2254 Cases, in the event Petitioner files an appeal, the
15 Court declines to issue a certificate of appealability because reasonable jurists would not find
16 the Court's procedural ruling debatable. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

17 DATED this 5th day of April, 2012.

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20 _____
21 G. Murray Snow
22 United States District Judge
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