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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Jason Adel Kadri,

No. CV-14-00540-PHX-ROS

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Petitioner,

ORDER

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v.

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Charles L. Ryan, et al.,

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Respondents.

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Before the Court is Petitioner Jason Adel Kadri's objection to the report and recommendation of the Magistrate Judge. (Docs. 24, 21). For the following reasons, the magistrate judge's recommendation will be adopted in full and the petition denied.

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BACKGROUND

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Petitioner was indicted on May 15, 2009 in Maricopa County Superior Court on five counts of possession of dangerous drugs for sale, marijuana for sale, and drug paraphernalia. Prior to trial, Petitioner's counsel moved to suppress evidence based on an alleged lack of reasonable suspicion for the traffic stop during which the evidence was obtained. The motion was denied. Petitioner was eventually convicted on all counts. On May 12, 2010, he was sentenced to 15.75 years in prison based at least in part on his stipulation to five prior convictions.

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I. Appeal of Sentence

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Petitioner appealed claiming counsel had not fully advised him of his rights before entering the stipulation. On October 25, 2011, the Arizona Court of Appeals held in his

1 favor, finding the record did not show Petitioner had been fully apprised of his
2 constitutional rights and that documents supporting his five convictions were not
3 admitted before the trial court. Based on this, the court remanded for the trial court to
4 determine whether Petitioner would have stipulated to the convictions if he had been
5 afforded a full colloquy, in other words, if he could prove prejudice with respect to the
6 error that had been found. On January 27, 2012, following a hearing, the trial court held
7 no prejudice had occurred and affirmed Petitioner's sentence.

8 **II. Appeal of Conviction**

9 At the same time he was appealing his sentence, Petitioner also filed a petition for
10 post-conviction relief, arguing, on various grounds, that he had suffered ineffective
11 assistance of counsel.¹ On November 3, 2011, following oral argument and an
12 evidentiary hearing, the court denied the petition on the merits. The court also denied the
13 motion for reconsideration that followed. Petitioner did not appeal that denial.

14 Approximately eight months later, on August 3, 2012, Petitioner filed a Petition
15 for Special Action, arguing the PCR court had abused its discretion and that PCR counsel
16 was ineffective in failing to timely seek review of the court's decision.² On August 7,
17 2012, the Arizona Court of Appeals dismissed the petition. Petitioner's Petition for
18 Review by the Arizona Supreme Court was likewise denied on January 31, 2013.

19 On March 14, 2014, Petitioner filed the present Petition for Writ of Habeas
20 Corpus. The Magistrate Judge determined the petition was untimely and recommended
21 denial. Petitioner argues equitable tolling is appropriate and renders his petition timely.

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24 ¹ Petitioner claimed: (1) trial counsel failed to timely file a motion to suppress
25 without which the State could not have prevailed at trial; (2) trial counsel failed to
26 adequately prepare for trial; (3) trial counsel failed to ensure that a video of a police
interrogation containing unfairly prejudicial statements was properly redacted as
mandated by a pre-trial order to omit prior act evidence; and (4) trial counsel failed to
contest the credibility of the detaining officer on cross-examination.

27 ² Petitioner appears to attempt to explain this lengthy delay by pointing to a
28 reorganization of the Public Defender's office, which allegedly affected his
representation. But the turnover in Petitioner's counsel occurred at the trial level, not on
appeal.

1 ANALYSIS

2 **I. Standard of Review for Report and Recommendation**

3 A district judge “may accept, reject, or modify, in whole or in part, the findings or
4 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b). Where any party
5 has filed timely objections to a magistrate judge’s report and recommendations, a district
6 court’s review of the part objected to is to be *de novo*. *Id. See also United States v.*
7 *Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). “Neither the Constitution nor the
8 statute requires a district judge to review, de novo, findings and recommendations that
9 the parties themselves accept as correct.” *Mortensen v. BAC Home Loans Servicing, LP*,
10 1:10-CV-00298-EJL, 2013 WL 943085 (D. Idaho Mar. 8, 2013).

11 **II. Legal Standard**

12 Under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”),
13 state prisoners have a one-year period in which to file a federal petition for writ of habeas
14 corpus. 28 U.S.C. § 2244(d)(1). Generally, the limitations period runs from the latest of
15 either the date on which the judgment became final through the conclusion of direct
16 review or the date on which the time for seeking such review expired. 28 U.S.C. §
17 2244(d)(1)(A). Equitable tolling is available when a petitioner can show “(1) that he has
18 been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in
19 his way, and prevented timely filing.” *Holland v. Florida*, 130 S.Ct. 2549, 2562 (2010)
20 (internal quotation marks omitted).

21 Even if untimely, a court may consider a petition for writ of habeas corpus if it
22 raises a claim of actual innocence. *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931-35
23 (2013). To prevail on such a claim, “a petitioner ‘must show that it is more likely than not
24 that no reasonable juror would have convicted him in the light of the new evidence.’” *Id.*
25 at 1935 (quoting *Schlup v. Delo*, 513 U.S. 298, 327(1995)).

26 **III. Statute of Limitations**

27 This case is a bit unusual because Petitioner began seeking post-conviction relief
28 before the judgment against him became final. The original judgment was remanded for

1 further proceedings and the Superior Court reentered a judgment on January 27, 2012.
2 Petitioner could have appealed the January 27 decision until February 16, 2012. He did
3 not. Therefore, the Magistrate Judge calculated the deadline as follows.

4 Petitioner's one year for filing a petition for writ of habeas corpus began running
5 on February 17, 2012. By that time, Petitioner had already filed a petition for post-
6 conviction relief with the state court and been denied such relief. Thus, as of February 17,
7 2012 Petitioner did not have any petition for post-conviction relief pending. For roughly
8 five and a half months, from February 17 to August 4, Petitioner took no action to further
9 his case. His objection to the report and recommendation does not explain this lack of
10 action.

11 On August 3, 2012, Petitioner filed a Petition for Special Action, which the
12 Magistrate Judge concluded tolled the statutory period under 28 U.S.C. § 2244(d)(2). The
13 statutory tolling ended and the statute of limitations again began to run on January 31,
14 2013, when the Arizona Supreme Court denied Petitioner's Petition for Review. Taking
15 into account this period of statutory tolling, Petitioner's one-year statute of limitations for
16 filing his petition for writ of habeas corpus expired on August 17, 2013. Because August
17 17 was a Saturday, Petitioner had until August 19, 2013, the following Monday, to file
18 his petition. He did not file it, however, until March 14, 2014, six months past the
19 deadline.

20 In reaching this conclusion, the Magistrate Judge specifically addressed
21 Petitioner's argument that he is entitled to equitable tolling. The Magistrate Judge found
22 Petitioner's claims of ineffective assistance did not qualify him for equitable tolling
23 because they amounted to "nothing but garden variety negligence," not the "extreme
24 misconduct" required for equitable tolling. (Doc. 21 at 8-9). In addition, the Magistrate
25 Judge noted Petitioner's claims of ineffective assistance relate to exhaustion (failure to
26 raise certain claims) rather than timeliness (failure to file the petition within the statutory
27 period). Further, the Magistrate Judge concluded Petitioner's "bald assertions" of
28 diligence were insufficient to meet the standard for equitable tolling, as he failed to

1 provide any explanation—other than his flawed argument regarding ineffective assistance
2 of counsel—for his failure to file his petition within the statutory period.

3 Petitioner does not point to specific flaws in the Magistrate Judge’s analysis.
4 Instead, he merely cites the turnover in his representation as grounds for equitable tolling.
5 But, as previously stated, that turnover occurred during trial, well before the statute of
6 limitations for habeas began to run.

7 To make his petition timely, Petitioner would have needed to qualify for equitable
8 tolling for at least six months *after* the statutory period began to run. Petitioner has made
9 no such showing. He fails to identify a period of time after February 17, 2012 during
10 which he made diligent efforts to pursue his rights but was thwarted by extraordinary
11 circumstance. Therefore, Petitioner is not entitled to equitable tolling, and the Magistrate
12 Judge was correct in determining his petition was untimely.

13 **IV. Actual Innocence**

14 Petitioner also seeks to avoid the statute of limitations by arguing he would never
15 had been convicted had his suppression claim been properly presented in a timely manner
16 prior to trial. He maintains his trial counsel, in addition to moving to suppress evidence
17 due to lack of probable cause for his traffic stop, should have moved to suppress on the
18 grounds that Petitioner’s conduct did not constitute a traffic violation as a matter of law.

19 Petitioner confuses the standard for claims of actual innocence. The standard is
20 *not*: Would Petitioner have been convicted if certain evidence had been excluded?
21 Rather, the standard of review is: Considering *all reliable evidence*, whether admissible
22 or not, is it more likely than not Petitioner would not have been convicted? As the
23 Supreme Court has stated, the focus of the inquiry is *actual* innocence, not whether,
24 *excluding* certain evidence, the Petitioner would have been exonerated. *Schlup v. Delo*,
25 513 U.S. 298, 327-328 (1995). Petitioner makes no claim or showing the evidence he
26 sought to suppress was unreliable, nor does he proffer new evidence showing his
27 innocence. Therefore, Petitioner is not entitled to relief on this ground.

28 Accordingly,

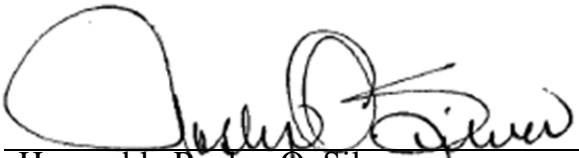
IT IS ORDERED the Magistrate Judge’s report and recommendation, (Doc. 21),

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is **ADOPTED IN FULL**, and the Petition for Writ of Habeas Corpus, (Doc. 1), is **DISMISSED**.

IT IS FURTHER ORDERED a Certificate of Appealability is **DENIED** because Petitioner has not made a substantial showing of the denial of a constitutional right.

Dated this 8th day of May, 2015.



Honorable Roslyn O. Silver
Senior United States District Judge