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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Shane Avington,

10 Petitioner,

11 v.

12 Charles L. Ryan, et al.,

13 Respondents.

No. CV-14-02284-PHX-DLR

**ORDER**

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15 Before the Court is the Report and Recommendation (“R&R”) of Magistrate Judge  
16 Bridget S. Bade, (Doc. 26), regarding Petitioner’s Petition for Writ of Habeas Corpus  
17 filed pursuant to 28 U.S.C. § 2254, (Doc. 1). Petitioner’s Writ of Habeas Corpus  
18 challenges Petitioner’s convictions in two different cases in Maricopa County Superior  
19 Court, CR 2005-121081-001-SE (the “Connolly case”) and CR 2005-034814-001-SE (the  
20 “Dunbar case”). The R&R recommends that the petition be denied and dismissed with  
21 prejudice. The Magistrate Judge advised the parties that they had fourteen days to file  
22 objections to the R&R. (Doc. 26 at 32-33 (citing Fed. R. Civ. P. 72(b)).) Petitioner filed  
23 objections on October 13, 2015. (Doc. 27.)

24 The R&R found that the Anti-Terrorism and Effective Death Penalty Act’s  
25 (“AEDPA”) one-year statute of limitations, 28 U.S.C. § 2244(d)(1), had expired as to all  
26 claims in both cases. In his objections, (Doc. 27), Petitioner argues that the statute of  
27 limitations should be equitably tolled under the actual innocence exception, which  
28 requires a petitioner to “show that it is more likely than not that no reasonable juror

1 would have convicted him in the light of the new evidence.” *Schlup v. Delo*, 513 U.S.  
2 298, 316 (1995). In support, Petitioner submitted the affidavit of Lottie Connolly, (Doc.  
3 24 at 3-4; Doc. 27 at 17-20). Regarding the Connolly case, the credibility of Connolly’s  
4 affidavit is called into question because of her relationship with Petitioner, her prior  
5 felony convictions, and her prior inconsistent statement. At trial, two unimpeached  
6 witnesses testified about the assault, as well as the police officers who took Connolly’s  
7 statement and photos of her injuries. The Connolly affidavit does not support a finding  
8 that no reasonable juror would have convicted Petitioner, and is therefore insufficient to  
9 establish the actual innocence exception in the Connolly case.

10 The result is no different in the Dunbar case. In that case, two officers testified  
11 that Connolly’s statements to them, like the statements in her affidavit, were that her  
12 boyfriend, not Petitioner, had beaten Dunbar. Additionally, Petitioner’s fiancée testified  
13 at trial that Petitioner was with her in California at the time of the events. The Connolly  
14 affidavit repeats this same evidence, which the jury considered and rejected. Not only is  
15 the Connolly affidavit cumulative, it does not meet the *Schlup* standard. The victim and  
16 two neighbors positively identified the Petitioner as the assailant. Therefore, Petitioner  
17 has failed to establish that it is more likely than not that no reasonable juror would have  
18 convicted him in the Dunbar case.

19 In conclusion, the Court agrees with the Magistrate Judge’s determination that the  
20 limitations period has run on both the Connolly and Dunbar cases. Petitioner has not  
21 established a basis to toll the statute of limitations on any claim in either case. The Court  
22 also declines to issue a certificate of appealability because the dismissal is based on a  
23 plain procedural bar and reasonable jurists could not dispute the resolution of this matter.  
24 *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Nor is Petitioner entitled to appeal in  
25 forma pauperis because any appeal would not be taken in good faith given the Court’s  
26 decision. *See Fed. R. App. P. 24(a)(3)(A)*.

