

1 **WO**

2

3

4

5

6

IN THE UNITED STATES DISTRICT COURT

7

FOR THE DISTRICT OF ARIZONA

8

Michael Gerard Schottenbauer,

)

No. CIV 15-017-TUC-DCB (LAB)

9

Petitioner,

)

REPORT AND RECOMMENDATION

10

vs.

)

11

Charles L. Ryan; et al.,

)

12

Respondents.

)

13

)

14

Pending before the court is a petition for writ of habeas corpus filed on January 15, 2015, by Michael Gerard Schottenbauer, an inmate confined in the Arizona State Prison Complex in Buckeye, Arizona. (Doc. 1)

15

16

17

Pursuant to the Rules of Practice of this court, the matter was referred to Magistrate Judge Bowman for report and recommendation. LRCiv 72.2(a)(2).

18

19

The Magistrate Judge recommends the District Court, after its independent review of the record, enter an order dismissing the petition. It is time-barred.

20

21

22

Summary of the Case

23

On May 19, 1995, Schottenbauer was convicted after a jury trial of “two counts of child molestation and one count of sexual conduct with a minor under the age of 14.” (Doc. 1, p. 1); (Doc. 12-2, p. 27) On June 20, 1995, the trial court sentenced Schottenbauer to “consecutive prison terms totaling 39 years.” (Doc. 12-2, p. 27); *see also* (Doc. 12-1, pp. 2-9)

24

25

26

27

28

1 On direct appeal, Schottenbauer challenged the trial court's denial of his motion to
2 suppress his videotaped confession. (Doc. 12-2, p. 28) He argued his confession was coerced
3 because he was encouraged to confess by his sister, Elizabeth Schottenbauer. (Doc. 12-1, pp.
4 17-21) Earlier that day, Elizabeth had spoken with detectives who told her that if Schottenbauer
5 confessed, he would get intensive counseling or intensive probation. *Id.* The Arizona Court of
6 Appeals affirmed Schottenbauer's convictions and sentences on June 11, 1996. (Doc. 12-2, p.
7 27) His motion for reconsideration was denied on July 2, 1996. (Doc. 12-2, p. 42) The
8 Arizona Supreme Court denied Schottenbauer's petition for review on December 23, 1996.
9 (Doc. 12-3, p. 24) It does not appear that Schottenbauer filed a petition for review with the U.S.
10 Supreme Court.

11 On February 11, 1997, Schottenbauer filed his first notice of post-conviction relief.
12 (Doc. 12-3, p. 26) The trial court summarily dismissed the petition on June 26, 1997. (Doc. 12-
13 4, p. 42) Schottenbauer appealed raising the claim that his sentence was cruel and unusual
14 punishment. (Doc. 12-4, pp. 44-47) He also filed an addendum pro se in which he argued three
15 of the state's witnesses were mentally unstable. (Doc. 12-4, pp. 12-28) The Arizona Court of
16 Appeals granted review but denied relief on April 30, 1998. (Doc. 12-5, p. 16) The court noted
17 that Schottenbauer's claims against the state's witnesses were based on information he had well
18 before trial. (Doc. 12-5, p. 17)

19 More than eleven years later, on February 18, 2010, Schottenbauer filed a second notice
20 of post-conviction relief. (Doc. 12-5, p. 30) He argued he uncovered "newly discovered facts"
21 in case reports and victim interview transcripts that would have constituted reasonable doubt
22 had they been raised at trial. (Doc. 12-5, p. 31) He further argued he had "new evidence" from
23 his son, Christopher, that the victim lied so she could live with her mother and that Elizabeth
24 Schottenbauer colluded with the detectives to coerce the defendant's confession. (Doc. 12-5,
25 p. 31) The trial court summarily dismissed the notice on March 5, 2010 because Schottenbauer
26 "raise[d] no new issue, legal or factual, that could not have been addressed through his first
27 Petition for Post-Conviction Relief." (Doc. 12-5, p. 30) The Arizona Court of Appeals
28

1 summarily dismissed his petition for review on September 7, 2010 for failing to file a petition
2 in compliance with the rules. (Doc. 12-5, pp. 36, 38)

3 On July 2, 2012, Schottenbauer filed a third notice of post-conviction relief. (Doc. 12-6,
4 p. 20); *but see* (Doc. 12-7, p. 52) Appointed counsel was unable to find any meritorious issues
5 and asked that Schottenbauer be permitted to file a petition pro se. (Doc. 12-6, p. 25)
6 Schottenbauer filed a petition on October 16, 2012 arguing trial counsel was ineffective for
7 failing to evaluate properly the state’s plea offer. (Doc. 12-6, p. 28, 33) On January 18, 2013,
8 the trial court denied the petition ruling that all issues “either should have been raised or were
9 previously raised . . . and are therefore barred from additional consideration by the rule.” (Doc.
10 12-7, p. 53) On May 30, 2013, the Arizona Court of Appeals granted review but denied relief.
11 (Doc. 12-8, p. 16); *State v. Schottenbauer*, 2013 WL 2395048, 1 (Ariz.App. 2013). On
12 January 21, 2014, the Arizona Supreme Court denied review. (Doc. 12-9, p. 34)

13 On January 15, 2015, Schottenbauer filed the pending petition for writ of habeas corpus
14 pursuant to 28 U.S.C. § 2254. (Doc. 1) His petition consists of four claims, which raise in turn
15 the arguments he made in his direct appeal and his first, second, and third post-conviction relief
16 proceedings. *Id.* He claims (1) the trial court should have suppressed his involuntary
17 confession, (2) trial counsel was ineffective for (a) failing to call his friends, the Van Dykes,
18 to testify, (b) failing to investigate the backgrounds of the state’s witnesses, and (c) failing to
19 investigate and argue the totality of the circumstances surrounding the false allegations and his
20 coerced confession, (3) trial counsel was ineffective for (a) failing to argue that his sister,
21 Elizabeth, was a state actor when she coerced him into confessing, (b) failing to call his friends,
22 the Van Dykes, to testify, and (c) failing to call a brain expert to testify about his motorcycle
23 injury, and (4) trial counsel was ineffective for failing to evaluate properly the state’s plea offer.
24 *Id.*

25 On April 23, 2015, the respondents filed an answer arguing among other things that the
26 petition is time-barred. (Doc. 12) Schottenbauer filed a reply on July 23, 2015. (Doc. 15) The
27 respondents are correct. The petition is time-barred.
28

1 Discussion

2 The writ of habeas corpus affords relief to persons in custody in violation of the
3 Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). The petition,
4 however, must be filed within the applicable statute of limitations or it will be dismissed. The
5 statute reads in pertinent part as follows:

- 6 (1) A 1-year period of limitation shall apply to an application for a writ of
7 habeas corpus by a person in custody pursuant to the judgment of a State
8 court. The limitation period shall run from the latest of--
9 (A) the date on which the judgment became final by the conclusion of
10 direct review or the expiration of the time for seeking such review;
11 (B) the date on which the impediment to filing an application created
12 by State action in violation of the Constitution or laws of the
13 United States is removed, if the applicant was prevented from filing
14 by such State action;
15 (C) the date on which the constitutional right asserted was initially
16 recognized by the Supreme Court, if the right has been newly
17 recognized by the Supreme Court and made retroactively
18 applicable to cases on collateral review; or
19 (D) the date on which the factual predicate of the claim or claims
20 presented could have been discovered through the exercise of due
21 diligence.
22 (2) The time during which a properly filed application for State
23 post-conviction or other collateral review with respect to the pertinent
24 judgment or claim is pending shall not be counted toward any period of
25 limitation under this subsection.

26 28 U.S.C. § 2244(d). The “one-year statute of limitations . . . applies to each claim in a habeas
27 application on an individual basis.” *Mardesich v. Cate*, 668 F.3d 1164, 1170 (9th Cir. 2012).

28 Claim (1) was raised for the first time in Schottenbauer’s direct appeal. Accordingly, the
limitation period for Claim (1) was triggered on “the date on which the judgment became final
by the conclusion of direct review or the expiration of the time for seeking such review.” 28
U.S.C. § 2244(d)(1)(A).

 The Arizona Court of Appeals affirmed Schottenbauer’s convictions and sentences on
June 11, 1996. (Doc. 12-2, p. 27) His motion for reconsideration was denied on July 2, 1996.
(Doc. 12-2, p. 42) The Arizona Supreme Court denied Schottenbauer’s petition for review on

1 December 23, 1996. (Doc. 12-3, p. 24) Schottenbauer then had 90 days to petition the U.S.
2 Supreme Court for review. Sup. Ct. R. 13. When he did not do so, his judgment became final.
3 *See Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999).

4 The one-year limitation period did not start immediately, however, because
5 Schottenbauer was pursuing post-conviction relief, which tolled the running of the limitation
6 period. *See* 28 U.S.C. § 2244(d)(2). Tolling pursuant to § 2244(d)(2) continued until the
7 Arizona Court of Appeals denied relief on April 30, 1998. (Doc. 12-5, p. 16) The limitation
8 period began running the next day and expired one year later on April 30, 1999. *See also White*
9 *v. Klitzkie*, 281 F.3d 920, 923 n. 4 (9th Cir. 2002) (“[I]t is the decision of the state appellate
10 court, rather than the ministerial act of entry of the mandate, that signals the conclusion of
11 review.”).

12 Approximately 15 years later, on January 15, 2015, Schottenbauer filed the pending
13 petition in this court. Claim (1) is time-barred. *See also Ferguson v. Palmateer*, 321 F.3d 820,
14 823 (9th Cir. 2003) (The limitation period is not renewed each time a petitioner files notice of
15 post-conviction relief.).

16 The facts underlying Claim (2) were known to Schottenbauer before trial. (Doc. 12-5,
17 p. 17) Accordingly, the limitations period for this claim was also triggered when the judgment
18 became final. Claim (2), like Claim(1), is time-barred. *See above*.

19 Claim (3) was presented in Schottenbauer’s second post-conviction proceeding. (Doc.
20 1, p. 10) In this claim, Schottenbauer argues counsel was ineffective for failing to introduce
21 certain evidence at trial. It is not clear when the facts that underlie this claim became known
22 to Schottenbauer. The court will assume, without deciding, that they were not known to
23 Schottenbauer at the time his conviction became final. *But see* (Doc. 12-5, p. 30) Accordingly,
24 the limitation period for this claim was triggered “on the date on which the factual predicate
25 of the claim . . . presented could have been discovered through the exercise of due diligence.”
26 28 U.S.C. § 2244(d)(1)(D).

27 The limitation period for this claim was triggered at the latest on February 18, 2010 when
28 Schottenbauer filed his second notice of post-conviction relief. (Doc. 12-5, p. 30); 28 U.S.C.

1 § 2244(d)(1)(D). The limitation period was statutorily tolled until September 7, 2010, when his
2 petition before the Arizona Court of Appeals was dismissed. (Doc. 12-5, 38); 28 U.S.C. §
3 2244(d)(2). The limitation period began running the next day and expired one year later on
4 September 7, 2011. Approximately three years later, on January 15, 2015, Schottenbauer filed
5 the pending petition in this court. Claim 3 is time-barred. *See also Ferguson v. Palmateer*,
6 321 F.3d 820, 823 (9th Cir. 2003) (The limitation period is not renewed each time a petitioner
7 files notice of post-conviction relief.).

8 Claim (4) was presented in Schottenbauer’s third post-conviction proceeding. (Doc. 1,
9 p. 11) In this claim, Schottenbauer argues his trial counsel failed to evaluate the state’s plea
10 offer properly. (Doc. 1, p. 11) According to Schottenbauer, counsel did not know about his
11 videotaped confession when the state offered a favorable plea. *Id.* Counsel therefore did not
12 know how advantageous the plea really was. *Id.* Schottenbauer maintains that in April of 1995,
13 trial counsel told him: “I didn’t know they had that videotape. Had I known, I would have taken
14 the plea deal. Damn, I wish we’d taken it now!” *Id.*

15 The facts underpinning this claim were known to Schottenbauer in April of 1995, before
16 his sentence was imposed. (Doc. 12-1, pp. 2-9); *see also* (Doc. 12-7, p. 53) The limitation
17 period for this claim was also triggered when his judgment became final. It is also time-barred.
18 *See above.*

19 In his reply, Schottenbauer argues his petition should be considered on the merits
20 because he has made a showing of “actual innocence.” (Doc. 15)

21 “Actual innocence, if proved, serves as a gateway through which a petitioner may pass
22 whether the impediment is a procedural bar or expiration of the statute of limitations.” *Stewart*
23 *v. Cate*, 757 F.3d 929, 937-938 (9th Cir. 2014). “When an otherwise time-barred habeas
24 petitioner presents evidence of innocence so strong that a court cannot have confidence in the
25 outcome of the trial unless the court is also satisfied that the trial was free of non-harmless
26 constitutional error, the Court may consider the petition on the merits.” *Id.* (punctuation
27 modified). “The Supreme Court has recently cautioned, however, that tenable actual-innocence
28 gateway pleas are rare.” *Id.* “A petitioner does not meet the threshold requirement unless he

1 persuades the district court that, in light of the new evidence, no juror, acting reasonably, would
2 have voted to find him guilty beyond a reasonable doubt.” *Id.* The court finds that
3 Schottenbauer’s allegation of “actual innocence” is insufficient to excuse his failure to file a
4 timely petition.

5 At trial, the state introduced evidence that Schottenbauer sexually abused his
6 stepdaughter one night when she was nine years old. (Doc. 12-2, p. 6) The child victim
7 testified, and the state introduced Schottenbauer’s videotaped confession in which he admitted
8 the abuse, said “he was very sorry,” and reported “I don’t even feel like I deserve to be alive
9 right now.” (Doc. 12-1, p. 21); (Doc. 12-2, pp. 10, 11, 15) The abuse was first reported when
10 Schottenbauer was in the hospital for eye surgery, and his children were in the temporary
11 custody of his girlfriend, Michelle Cole. (Doc. 12-5, pp. 4-5) Schottenbauer argued at trial that
12 his stepdaughter was unhappy with Michelle Cole and made a false accusation because she
13 wanted to live with her mother or her grandparents. (Doc. 12-5, p. 31) He testified that he
14 confessed falsely because he thought that he would get his children back if he did so. (Doc. 12-
15 2, p. 16, n. 6)

16 In the pending petition, Schottenbauer argues his son Christopher could offer additional
17 evidence that his stepdaughter was “desperate” to escape the care of his girlfriend during his 10-
18 day hospital stay. (Doc. 15, p. 13) He further argues his stepdaughter was encouraged to make
19 a false accusation by his girlfriend, his sister, and his mother. (Doc. 15, p. 14) All of these
20 women, he reports, were sexually molested, and therefore they were predisposed to see sexual
21 abuse even where it did not exist. Because he had previously suffered a head injury, he was
22 easily manipulated by his sister into making a false confession based on her assurance that by
23 doing so he would regain custody of his children. (Doc. 15, p. 13); He further argues his
24 friend, Sheila A. Van Dyke, could have offered testimony supporting his allegations that his
25 girlfriend was a poor care giver and “the setting was ripe for an accusation against Michael.”
26 (Doc. 12-5, p. 4)

27 The additional evidence cited by Schottenbauer in the pending petition would have
28 strengthened his case. Nevertheless, the court cannot conclude that had it been offered at trial

1 along with his confession and the victim’s testimony, “no juror, acting reasonably, would have
2 voted to find him guilty beyond a reasonable doubt.” *See McQuiggin v. Perkins*, __ U.S. __,
3 __, 133 S.Ct. 1924, 1928 (2013). At trial, the victim related in detail the abuse that occurred.
4 (Doc. 12-2, p. 16). She remembered what she had been wearing, described the color and pattern
5 of the bed sheets, and gave a detailed timeline of the abuse that occurred. *Id.* Schottenbauer’s
6 videotaped confession corroborated her testimony. He admitted to the abuse, said “he was very
7 sorry,” and reported “I don’t even feel like I deserve to be alive right now.” (Doc. 12-2, pp. 10,
8 11, 15) A reasonable juror could have believed the victim’s testimony and concluded
9 Schottenbauer’s videotaped confession was sincere. *See* (Doc. 12-2, p. 29) (“[E]very indication
10 is that appellant was remorseful and that he was doing what his sister had told him to do, that
11 is to tell the truth.”).

12 Schottenbauer has not presented “evidence of innocence so strong that a court cannot
13 have confidence in the outcome of [his] trial.” *See Stewart v. Cate*, 757 F.3d 929, 937-938 (9th
14 Cir. 2014). His allegation of “actual innocence” is insufficient to excuse his failure to file a
15 timely petition.

16
17 RECOMMENDATION

18 The Magistrate Judge recommends that the District Court, after its independent review
19 of the record, enter an order DISMISSING the petition for writ of habeas corpus. (Doc. 1) It
20 is time-barred.

21 Pursuant to 28 U.S.C. §636 (b), any party may serve and file written objections within
22 14 days of being served with a copy of this report and recommendation. If objections are not
23 timely filed, they may be deemed waived. The Local Rules permit a response to an objection.
24 They do not permit a reply to a response.

25 DATED this 29th day of July, 2015.

26 

27 Leslie A. Bowman
28 United States Magistrate Judge