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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Michael Gerard Schottenbauer,)
) CV-15-017-TUC-DCB
)
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v.)
)
Charles L. Ryan, et al.,) **ORDER**
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_____)

This matter was referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b) and the local rules of practice of this Court for a Report and Recommendation (R&R) on the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. Before the Court is the Magistrate Judge’s Report and Recommendation (Doc. 16), which recommends that the Petition be denied and dismissed. The Petitioner filed Objections to the Report and Recommendation. (Doc. 21.)

SUMMARY

Petitioner was convicted in Pima County Superior Court, case #CR-47264, of two counts of child molestation and one count of sexual conduct with a minor under the age of fourteen. He was sentenced to consecutive prison terms totaling 39 years’ imprisonment. In his Petition, Petitioner names Charles Ryan as Respondent and the Arizona Attorney General as an Additional Respondent. Petitioner raises four grounds for relief. In Ground One, Petitioner alleges he was denied his Fourteenth Amendment

1 right to due process because the trial court refused to suppress his
2 allegedly involuntary confession. In Grounds Two, Three, and Four, he
3 asserts that he was denied his Sixth Amendment right to the effective
4 assistance of counsel.

5 STANDARD OF REVIEW

6 When objection is made to the findings and recommendation of a
7 magistrate judge, the district court must conduct a de novo review.
8 *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003).

9 OBJECTIONS

10 Primarily, Petitioner objects to the R&R because the Magistrate
11 Judge did not give his evidence and allegations of innocence the
12 requisite weight and consideration. On the contrary, the R&R
13 painstakingly reviewed the allegations of innocence put forth by
14 Petitioner and point-by-point addressed each one. *McQuiggin v. Perkins*,
15 133 S.Ct. 1924 (2013).

16 Unqualifiedly, Petitioner failed to demonstrate diligence required
17 to equitably toll the period of filing the habeas petition:

18 On February 11, 1997, Schottenbauer filed his first notice
19 of post-conviction relief. (Doc. 12-3, p. 26) The trial
20 court summarily dismissed the petition on June 26, 1997.
21 (Doc. 12- 4, p. 42) Schottenbauer appealed raising the claim
22 that his sentence was cruel and unusual punishment. (Doc.
23 12-4, pp. 44-47) He also filed an addendum pro se in which
24 he argued three of the state's witnesses were mentally
25 unstable. (Doc. 12-4, pp. 12-28) The Arizona Court of
26 Appeals granted review but denied relief on April 30, 1998.
27 (Doc. 12-5, p. 16) The court noted that Schottenbauer's
28 claims against the state's witnesses were based on
information he had well before trial. (Doc. 12-5, p. 17)
More than eleven years later, on February 18, 2010,
Schottenbauer filed a second notice of post-conviction
relief. (Doc. 12-5, p. 30) He argued he uncovered "newly
discovered facts" in case reports and victim interview
transcripts that would have constituted reasonable doubt had
they been raised at trial. (Doc. 12-5, p. 31) He further
argued he had "new evidence" from his son, Christopher, that

1 the victim lied so she could live with her mother and that
2 Elizabeth Schottenbauer colluded with the detectives to
3 coerce the defendant's confession. (Doc. 12-5, p. 31) The
4 trial court summarily dismissed the notice on March 5, 2010
5 because Schottenbauer "raise[d] no new issue, legal or
6 factual, that could not have been addressed through his
7 first Petition for Post-Conviction Relief." (Doc. 12-5, p.
8 30)

9 (R&R at 2.)

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

25 Here, there is ample evidence of guilt apart from the questionable
26 evidence presented by Petitioner: At trial, the victim related in detail
27 the abuse that occurred. (Doc. 12-2, p. 16). She remembered what she had
28 been wearing, described the color and pattern of the bed sheets, and gave
a detailed timeline of the abuse that occurred. *Id.* Schottenbauer's
videotaped confession corroborated her testimony. He admitted to the

1 abuse, said "he was very sorry," and reported "I don't even feel like I
2 deserve to be alive right now." (Doc. 12-2, pp. 10, 11, 15) A reasonable
3 juror could have believed the victim's testimony and concluded
4 Schottenbauer's videotaped confession was sincere. See (Doc. 12-2, p. 29)
5 ("[E]very indication is that appellant was remorseful and that he was
6 doing what his sister had told him to do, that is to tell the truth.").

7 The R&R concluded that Schottenbauer has not presented "evidence
8 of innocence so strong that a court cannot have confidence in the outcome
9 of [his] trial." See *Stewart v. Cate*, 757 F.3d 929, 937-938 (9th Cir.
10 2014). His allegation of "actual innocence" is insufficient to excuse his
11 failure to file a timely petition.

12 This Court absolutely agrees with the R&R. The *Schlup v. Delo*, 513
13 U.S. 298 (1995) standard is demanding. The gateway should open only when
14 a petition presents "evidence of innocence so strong that a court cannot
15 have confidence in the outcome of the trial unless the court is also
16 satisfied that the trial was free of nonharmless constitutional error."
17 *Id.* at 316.

18 The Motion for Appointment of Counsel will also be denied because
19 Petitioner has more than adequately pursued this action without the need
20 for legal counsel. "A finding of exceptional circumstances requires an
21 evaluation of both the likelihood of success on the merits and the
22 ability of the petitioner to articulate his claims pro se in light of the
23 complexity of the issues involved. Neither of these factors is
24 dispositive and both must be viewed together before reaching a decision."
25 *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991).

26 CONCLUSION

27 Accordingly, after conducting a de novo review of the record,

