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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Donny Allen Hales,
10 Petitioner,

No. CV-15-00353-TUC-RM (BGM)

ORDER

11 v.

12 Charles L Ryan, et al.,
13 Respondents.
14

15 Pending before the Court is Petitioner Donny Allen Hales's Petition for Writ of
16 Habeas Corpus pursuant to 28 U.S.C. § 2254 ("§ 2254 Petition"). (Doc. 1.) Respondents
17 filed a Limited Answer (Doc. 15) on June 30, 2016, and Petitioner filed a Reply (Doc.
18 27) on August 9, 2016.¹

19 **I. Background and Procedural History**

20 Petitioner was convicted by a jury of disorderly conduct, unlawful discharge of a
21 firearm in city limits, aggravated assault with a deadly weapon, and kidnapping. (Doc.
22 16-1 at 2; Doc. 16-2 at 2; Doc. 21-2 at 3.)² The jury also found beyond a reasonable
23 doubt that Petitioner was on parole when he committed the offenses. (Doc. 16-2 at 3.)
24 After the jury trial, Petitioner pled guilty to possession of a deadly weapon by a
25 prohibited possessor, a charge which had been severed from the others. (Doc. 16-1 at 3;

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27 ¹ The Court previously referred the matter to Magistrate Judge Bruce G. Macdonald (Doc. 9 at 4). The Court now withdraws the magistrate-judge referral.

28 ² All record citations refer to the page numbers generated by the Court's electronic filing system.

1 16-3 at 2.) Petitioner's convictions stemmed from an incident outside a restaurant in
2 which Petitioner, armed with a gun, physically pulled and shoved his estranged girlfriend
3 into his truck. (Doc. 16-1 at 3.) The State presented evidence that Petitioner had grabbed
4 his estranged girlfriend's hair, dragged her outside, hit her repeatedly, pointed his gun at
5 her, and threatened to kill her. (*Id.*)³ Judge Christopher Browning sentenced Petitioner
6 to concurrent terms, the longest being 15.75 years. (Doc. 16-1 at 2-3; Doc. 16-4 at 3-6;
7 Doc. 21-2 at 3.)

8 Petitioner timely appealed, arguing that the trial court abused its discretion in
9 failing to give a *Willits*⁴ instruction; that there was insufficient evidence to support
10 Petitioner's kidnapping and aggravated assault convictions; and that the jury's on-parole
11 finding was deficient as a matter of law. (Doc. 16-6 at 3-4, 7, 16-38.) Petitioner's
12 argument concerning the *Willits* instruction was premised on the alleged existence of a
13 surveillance videotape from the restaurant at which the incident occurred. (*Id.* at 17-18.)
14 The Arizona Court of Appeals affirmed Petitioner's convictions and sentences in a
15 memorandum decision filed on May 24, 2012. (Doc. 16-1.) In rejecting Petitioner's
16 argument that the trial court abused its discretion in failing to give a *Willits* instruction,
17 the Court of Appeals found that Petitioner had failed to show that the alleged surveillance
18 videotape was exculpatory; the court also discussed testimony indicating that the State
19 never had the alleged surveillance videotape in its possession. (*Id.* at 6.) The Court of
20 Appeals affirmed the trial court's denial of a judgment of acquittal on the kidnapping and
21 aggravated assault charges, finding that substantial evidence supported Petitioner's
22 convictions on those charges. (*Id.* at 7-12.) Finally, the Court of Appeals found that
23 Petitioner had technically not been on parole at the time of the offenses but that Petitioner
24 could not show prejudice to entitle him to relief under the fundamental error standard of

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26 ³ The Arizona Court of Appeals' factual findings are presumed to be correct,
27 and Petitioner bears the burden of rebutting that presumption by clear and convincing
evidence. See 28 U.S.C. § 2254(e)(1); *Sumner v. Mata*, 449 U.S. 539, 547 (1981).

28 ⁴ *Arizona v. Willits*, 393 P.2d 274 (Ariz. 1964). A *Willits* instruction allows
the jury to draw an inference from the State's failure to preserve exculpatory evidence.
Arizona v. Fulminante, 975 P.2d 75, 93 (Ariz. 1999).

1 review because, if he had raised the error at trial, the State could have proven that
2 Petitioner was on community supervision at the time of the offenses. (*Id.* at 12-14.)
3 Petitioner did not seek review in the Arizona Supreme Court, and the trial court issued its
4 mandate on August 17, 2012. (Doc. 17-3.)

5 Petitioner filed a Notice of Post-Conviction Relief (“PCR”) on August 23, 2012.
6 (Doc. 17-4.) PCR Counsel was appointed (Doc. 17-5), and Petitioner filed his PCR
7 Petition on May 13, 2013 (Doc. 17-7), raising three ineffective-assistance-of-counsel
8 claims. Petitioner argued that trial counsel was ineffective in failing to demonstrate the
9 necessity of a *Willits* instruction, failing to assure compliance with Petitioner’s speedy
10 trial rights, and failing to adequately advise Petitioner with respect to his decision to
11 testify at trial. (*Id.* at 4-12) The trial court denied post-conviction relief (Doc. 19-5), and
12 the Arizona Court of Appeals granted review but denied relief (Doc. 21-2). The Court of
13 Appeals held that, given the speculative nature of Petitioner’s alleged entitlement to a
14 *Willits* instruction, and the strength of the evidence against him, Petitioner had not shown
15 that he was prejudiced by trial counsel’s performance with respect to the request for a
16 *Willits* instruction. (Doc. 21-2 at 4-6.) The Court of Appeals also found that Petitioner
17 had failed to demonstrate prejudice from trial counsel’s alleged failure to safeguard
18 Petitioner’s speedy trial rights. (*Id.* at 6-7.) Finally, the Court of Appeals agreed with the
19 trial court that the record contradicted Petitioner’s arguments concerning trial counsel’s
20 alleged failure to adequately advise him regarding his decision to testify, and that
21 Petitioner had not demonstrated prejudice from any deficient advice. (*Id.* at 7-8.) The
22 Arizona Supreme Court summarily denied review on August 12, 2014. (Doc. 22-2.)

23 **II. Discussion**

24 Because Petitioner’s federal habeas Petition was filed after April 24, 1996, the
25 effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”),
26 this case is governed by AEDPA. *See Patterson v. Stewart*, 251 F.3d 1243, 1245 (9th
27 Cir. 2001).

28 In their Limited Answer, Respondents argue that Petitioner’s § 2254 Petition is

1 barred by AEDPA's one-year statute of limitations, that Petitioner's claims are not
2 cognizable on federal review, and that two of the claims are procedurally defaulted.

3 **A. Timeliness**

4 **1. Legal Standard**

5 A one-year period of limitation applies to petitions for writ of habeas corpus filed
6 by persons in custody pursuant to the judgment of a state court. 28 U.S.C. § 2244(d)(1).
7 AEDPA's one-year limitation period runs from the latest of:

- 8 (A) the date on which the judgment became final by the conclusion of
9 direct review or the expiration of the time for seeking such review;
10 (B) the date on which the impediment to filing an application created by
11 State action in violation of the Constitution or laws of the United States is
12 removed, if the applicant was prevented from filing by such State action;
13 (C) the date on which the constitutional right asserted was initially
14 recognized by the Supreme Court, if the right has been newly recognized
15 by the Supreme Court and made retroactively applicable to cases on
16 collateral review; or
17 (D) the date on which the factual predicate of the claim or claims presented
18 could have been discovered through the exercise of due diligence.

19 *Id.* § 2244(d)(1). The limitation period is tolled during the time period in “which a
20 properly filed application for State post-conviction or other collateral review with respect
21 to the pertinent judgment or claim is pending.” *Id.* § 2244(d)(2).

22 The limitation period is subject to equitable tolling under certain circumstances,
23 *Holland v. Florida*, 560 U.S. 631, 634 (2010), but equitable tolling “is justified in few
24 cases,” *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). The threshold necessary to
25 trigger it is “very high, lest the exceptions swallow the rule.” *Miranda v. Castro*, 292
26 F.3d 1063, 1066 (9th Cir. 2002) (internal quotation marks omitted). The party seeking to
27 invoke equitable tolling “bears the burden of showing that this extraordinary exclusion
28 should apply to him.” *Miranda*, 292 F.3d at 1065.

29 A petitioner is entitled to equitable tolling of the § 2244(d) statute of limitations
30 only if he establishes: “(1) that he has been pursuing his rights diligently, and (2) that
31 some extraordinary circumstance stood in his way and prevented timely filing.” *Holland*,
32 560 U.S. at 649 (internal quotation marks omitted). The phrase “stood in his way” means
33 that “an external force”—as opposed to the petitioner's own “oversight, miscalculation,

1 or negligence”—must “cause the untimeliness.” *Waldron-Ramsey v. Pacholke*, 556 F.3d
2 1008, 1011 (9th Cir. 2009). “[A] pro se petitioner’s lack of legal sophistication is not, by
3 itself, an extraordinary circumstance warranting equitable tolling.” *Raspberry v. Garcia*,
4 448 F.3d 1150, 1154 (9th Cir. 2006).

5 “Under the ‘prison mailbox rule’ . . . a prisoner’s federal habeas petition is deemed
6 filed when he hands it over to prison authorities for mailing to the district court.” *Huizar*
7 *v. Carey*, 273 F.3d 1220, 1222 (9th Cir. 2001).

8 **2. Analysis**

9 On May 24, 2012, the Arizona Court of Appeals affirmed Petitioner’s convictions
10 and sentences on appeal. (Doc. 16-1.) Pursuant to Rule 31.21(b)(2)(A) of the Arizona
11 Rules of Criminal Procedure, Petitioner then had 30 days in which to file a petition for
12 review in the Arizona Supreme Court. The 30-day provision is extended by 5 days when
13 notice of the determination has been mailed by the clerk. *See* Ariz. R. Crim. P. 1.3(a)(5);
14 *Arizona v. Zuniga*, 786 P.2d 956, 957 (1990); *Arizona v. Goracke*, 106 P.3d 1035, 1036
15 n.1 (Ariz. App. 2005). Accordingly, the time for filing a petition for review expired on
16 June 28, 2012. *See* Ariz. R. Crim. P. 1.3(a)(5); Ariz. R. Crim. P. 31.19(a); Ariz. R. Crim.
17 P. 31.21(b)(2)(A). Although the trial court did not issue its mandate until August 17,
18 2012 (Doc. 17-3), Petitioner’s conviction became final on June 28, 2012. 28 U.S.C. §
19 2244(d)(1)(A);⁵ *Gonzalez v. Thaler*, 565 U.S. 134, 137 (2012) (“for a state prisoner who
20 does not seek review in a State’s highest court, the judgment becomes ‘final’ on the date
21 that the time for seeking such review expires”); *White v. Klitzkie*, 281 F.3d 920, 923 n.4
22 (9th Cir. 2002) (date of “the ministerial act of entry of the mandate” is not relevant for
23 purposes of calculating AEDPA limitation period). Accordingly, the statute of
24 limitations under 28 U.S.C. § 2244 began to run on June 28, 2012.

25 The limitations period ran for 56 days, until August 23, 2012, when Petitioner

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27 ⁵ Petitioner does not argue that any of the provisions set forth at §
28 2244(d)(1)(B)-(D) is applicable. The record does not reveal any impediment to filing
created by state action, *see* § 2244(d)(1)(B), the assertion of a constitutional right newly
recognized by the Supreme Court, *see* § 2244(d)(1)(C), or a claim predicated on newly
discovered facts, *see* § 2244(d)(1)(D).

1 filed his PCR Notice. (Doc. 17-4.) The limitations period was tolled under 28 U.S.C. §
2 2244(d)(2) from August 23, 2012 to August 12, 2014, when the Supreme Court denied
3 review. (Doc. 22-2.) Because 56 days of the limitation period had already elapsed by
4 that point, Petitioner had 309 days left in which to timely file his § 2254 Petition.
5 Petitioner waited 339 days—until July 17, 2015—before depositing his § 2254 Petition in
6 the prison mail system. (Doc. 1 at 12.)

7 Petitioner does not argue that he is entitled to equitable tolling, nor has he
8 identified any facts that would support a finding that equitable tolling is applicable.
9 Petitioner’s miscalculation of the limitations period is not sufficient to trigger equitable
10 tolling. *See Raspberry*, 448 F.3d at 1154 (holding that a pro se petitioner’s “inability
11 correctly to calculate the limitations period is not an extraordinary circumstance
12 warranting equitable tolling”).

13 Actual innocence may serve as a gateway allowing for federal habeas review of a
14 petition filed after expiration of the statute of limitations. *McQuiggin v. Perkins*, 569
15 U.S. 383, 386 (2013). To invoke this “miscarriage of justice” exception to AEDPA’s
16 statute of limitations, “a petitioner must show that it is more likely than not that no
17 reasonable juror would have convicted him,” *id.* at 399, in light of “new reliable
18 evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness
19 accounts, or critical physical evidence—that was not presented at trial,” *Schlup v. Delo*,
20 513 U.S. 298, 324 (1995). In Claim IV, Petitioner argues that the State failed to produce
21 sufficient evidence to support his kidnapping conviction. However, Petitioner does not
22 allege that he is innocent of the other charges for which he was convicted, and he has not
23 identified any new evidence that was not presented at trial. Without any new evidence
24 supporting a claim of actual innocence, Petitioner cannot make the showing required to
25 invoke the miscarriage of justice exception of AEDPA’s statute of limitations.

26 In conclusion, Petitioner’s § 2254 Petition is time-barred under 28 U.S.C. §
27 2244(d).

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1 **B. Procedural Default**

2 **1. Legal Standard**

3 A § 2254 petition subject to AEDPA cannot be granted unless it appears that (1)
4 the petitioner has exhausted all available state-court remedies, (2) there is an absence of
5 available state corrective process, or (3) state corrective process is ineffective to protect
6 the rights of the petitioner. 28 U.S.C. § 2254(b)(1); *see also Coleman v. Thompson*, 501
7 U.S. 722, 731 (1991). In cases not carrying a life sentence or the death penalty, “claims
8 of Arizona state prisoners are exhausted for purposes of federal habeas once the Arizona
9 Court of Appeals has ruled on them.” *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir.
10 1999) (per curiam).

11 To properly exhaust state-court remedies, the petitioner must “fairly present” his
12 claims to the state courts in a procedurally appropriate manner. *O’Sullivan v. Boerckel*,
13 526 U.S. 838, 848 (1999). A claim is fairly presented if the petitioner has described the
14 operative facts and the federal legal theory on which the claim is based. *See Picard v.*
15 *Connor*, 404 U.S. 270, 277-78 (1971). A petitioner must make the federal basis of the
16 claim explicit by citing specific provisions of federal law or federal case law or by citing
17 state cases that explicitly analyze the same federal constitutional claim. *Peterson v.*
18 *Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003); *Gatlin v. Madding*, 189 F.3d 882, 887-88
19 (9th Cir. 1999).

20 A claim is considered procedurally defaulted and thus precluded from federal
21 review if (1) the claim was not presented in state court and no state remedies are currently
22 available because the court to which the petitioner would be required to present the claim
23 in order to meet the exhaustion requirement would find the claims procedurally barred
24 under state law, or (2) the petitioner raised the claim in state court but the state court
25 rejected the claim based on “independent” and “adequate” state procedural grounds. *See*
26 *Coleman*, 501 U.S. at 729-32, 735 n.1.

27 Because the doctrine of procedural default is based on comity rather than
28 jurisdiction, federal courts retain the power to consider the merits of procedurally

1 defaulted claims. *Reed v. Ross*, 468 U.S. 1, 9 (1984). However, courts will do so only if
2 the petitioner demonstrates cause and prejudice, or a fundamental miscarriage of justice.
3 *Coleman*, 501 U.S. at 750. To demonstrate cause, a petitioner must show that “some
4 objective factor external to the defense impeded [his] efforts to comply with the State’s
5 procedural rule.” *Murray v. Carrier*, 477 U.S. 478, 488 (1986). To demonstrate
6 prejudice, the petitioner must show that the constitutional violations alleged in his § 2254
7 Petition “worked to his actual and substantial disadvantage, infecting his entire trial with
8 error of constitutional dimensions.” *United States v. Frady*, 456 U.S. 152, 170 (1982)
9 (emphasis omitted). To establish that a fundamental miscarriage of justice would occur if
10 a claim were not heard on the merits in federal court, a petitioner must demonstrate that
11 ““a constitutional violation has probably resulted in the conviction of one who is actually
12 innocent.”” *Schlup*, 513 U.S. at 327 (quoting *Murray*, 477 U.S. at 496). As noted above,
13 a credible miscarriage of justice claim must be supported by “new reliable evidence—
14 whether it be exculpatory scientific evidence, trustworthy eye-witness accounts, or
15 critical physical evidence—that was not presented at trial.” *Cook v. Schriro*, 538 F.3d
16 1000, 1028 (9th Cir. 2008) (quoting *Schlup*, 513 U.S. at 324).

17 **2. Analysis**

18 Respondents concede that Claims II, III, and V were fairly presented to the state
19 courts. (Doc. 15 at 13-14.) The Court agrees that Claims II, III, and V are properly
20 exhausted.

21 Respondents argue that Claims I and IV are procedurally defaulted. Petitioner
22 raised Claim I in state court, but he did not fairly present it for purposes of the doctrine of
23 procedural default because he failed to make the federal basis of the claim explicit. *See*
24 *Peterson*, 319 F.3d at 1158. When Petitioner raised Claim I in state court, he alleged
25 only an error of state law.⁶ If Petitioner were to return to state court in an attempt to
26 present Claim I as a federal constitutional claim, the state court would find the claim

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28 ⁶ Indeed, as discussed below, Petitioner still has not identified a federal legal theory on which Claim I is based.

1 procedurally barred under state law. *See* Ariz. R. Crim. P. 32.2(a). Accordingly, Claim I
2 is procedurally defaulted. Petitioner has not demonstrated cause and prejudice or a
3 fundamental miscarriage of justice to excuse the procedural default.

4 Claim IV was also presented to the state courts as a state-law claim. However, a
5 claim that the trial court erred in denying a judgment of acquittal is essentially the same
6 as a claim that insufficient evidence supports a conviction, and the latter is a federal
7 constitutional claim. *See Jackson v. Virginia*, 443 U.S. 307, 321 (1979) (“a state prisoner
8 who alleges that the evidence in support of his state conviction cannot be fairly
9 characterized as sufficient to have led a rational trier of fact to find guilt beyond a
10 reasonable doubt has stated a federal constitutional claim”). Petitioner did not cite any
11 federal constitutional provisions or federal case law when he presented this claim to the
12 state courts, but he did cite a state case that itself cites *Jackson*, 443 U.S. 307. (*See* Doc.
13 16-6 at 24 (citing *Arizona v. Mathers*, 796 P.2d 866, 869 (Ariz. 1990) (citing *Jackson*,
14 443 U.S. 307)).) The Court finds that Claim IV was fairly presented to the state courts.

15 C. Cognizable Claims

16 Respondents further argue that Petitioner’s claims are not cognizable on federal
17 habeas review because Petitioner does not refer to the federal constitution or federal law
18 with respect to any of the claims. Habeas relief under § 2254 is available “only on the
19 ground that [Petitioner] is in custody in violation of the Constitution or laws or treaties of
20 the United States.” 28 U.S.C. § 2254(a).

21 Even if Claim I were not procedurally defaulted, it is not cognizable on federal
22 habeas review because it asserts only a state-law violation. “[F]ederal habeas corpus
23 relief does not lie for errors of state law.” *Estelle v. McGuire*, 502 U.S. 62, 67 (1991)
24 (quotation marks omitted).

25 Claims, II, III, and V do not specifically reference any provisions of the federal
26 Constitution or federal law, but the Court interprets them as alleging ineffective
27 assistance of counsel in violation of the Sixth Amendment to the United States
28 Constitution. Furthermore, the Court interprets Claim IV as alleging insufficient

1 evidence to support Petitioner's kidnapping conviction. *See Jackson*, 443 U.S. at 321.
2 Accordingly, it appears that Claims II-V are cognizable on federal habeas review.
3 However, the Court does not reach the merits of these claims because, as discussed
4 above, Petitioner's § 2254 Petition is barred by AEDPA's statute of limitations.

5 **IT IS ORDERED** that the magistrate-judge referral (Doc. 9 at 4) is **withdrawn**.

6 **IT IS FURTHER ORDERED** that Petitioner's Petition for Writ of Habeas
7 Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1) is **denied**, and this action is **dismissed**
8 **with prejudice**. The Clerk of Court is directed to enter judgment accordingly and close
9 this case.

10 **IT IS FURTHER ORDERED** that, pursuant to Rule 11 of the Rules Governing
11 Section 2254 Cases, the Court declines to issue a certificate of appealability, because
12 reasonable jurists would not find the Court's ruling debatable. *See Slack v. McDaniel*,
13 529 U.S. 473, 478, 484 (2000).

14 Dated this 6th day of March, 2018.

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19 _____
20 Honorable Rosemary Márquez
21 United States District Judge
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