

APPENDICES

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**APPENDIX A
Ninth Circuit Order Denying COA
02/28/2018**

FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FEB 28 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MATTHEW MOUNIR AWAD,

No. 18-17073

Petitioner-Appellant,

D.C. No. 2:17-cv-01800-SPL

v.

District of Arizona,
Phoenix

CHARLES L. RYAN, Warden and
THOMAS CHARLES HORNE, Attorney
General,

ORDER

Respondents-Appellees.

Before: Trott and Murguia, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 7) is denied because appellant has not shown that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012).

Any pending motions are denied as moot.

DENIED.

**APPENDIX B
U.S. District Court Order
Adopting R& R and Denying COA
09/24/2018**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Matthew Mounir Awad, } No. CV-17-01800-PHX-SPL
Petitioner, }
v. }
Charles L. Ryan, et al., }
Respondents. }
ORDER

The Court has before it Petitioner’s Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (Doc. 11.) The Court has also received Respondents’ Limited Answer (Doc. 12), Petitioner’s Reply to the Limited Answer (Doc. 16), the Report and Recommendation of the Magistrate Judge (Doc. 19), and Petitioner’s Objections to the Report and Recommendation. (Doc. 24).

Petitioner argues in Ground 1 that the entry of his guilty plea was not knowing, intelligent, and voluntary. (Doc. 11 at 8-9.) In Ground 2, Petitioner contends that he received deficient plea advice due to ineffective assistance of counsel. (Doc. 11 at 9-10.) In Ground 3, Petitioner argues that his sentence was based on aggravating factors that were not found beyond a reasonable doubt, or admitted by Petitioner. (Doc. 11 at 10.) In Ground 4, Petitioner alleges that his counsel was ineffective at sentencing for failing to inform Petitioner of his rights related to the determination of aggravating factors. (Doc. 11 at 10.) In Ground 5, Petitioner argues that his due process rights were violated because he received an aggravated sentence and was not informed of his rights regarding aggravating factors.

1 (Doc. 11 at 10-11.) In Ground 6, Petitioner argues that his of-right post conviction
2 proceedings did not comply with *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18
3 L.Ed.2d 493 (1967). (Doc. 11 at 11-12.)

4 Respondents argue that Petitioner's claims are untimely. (Doc. 12 at 2, 5-6.)
5 Specifically, Respondents assert that Petitioner filed his habeas petition more than five
6 years after the statute of limitations had elapsed, and he failed to exhaust any of his claims
7 in state court. (Doc. 12 at 2.) Further, Respondents contend that Petitioner is not entitled
8 to equitable tolling. (Doc. 12 at 6.) The Magistrate Judge concluded that Petitioner failed
9 to file a timely habeas petition, and that he failed to satisfy the high threshold for equitable
10 tolling. (Doc. 19 at 4-5.)

11 Petitioner's case became final for purposes for the Antiterrorism and Effective
12 Death Penalty Act of 1996 ("AEDPA") on January 19, 2011.¹ The record reflects that the
13 instant Petition was not filed until June 9, 2017. (Doc. 1.)

14 A district judge "may accept, reject, or modify, in whole or in part, the findings or
15 recommendations made by the magistrate judge." 28 U.S.C. § 636(b). When a party files
16 a timely objection to an R&R, the district judge reviews *de novo* those portions of the R&R
17 that have been "properly objected to." Fed. R. Civ. P. 72(b). A proper objection requires
18 specific written objections to the findings and recommendations in the R&R. *See United*
19 *States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003); 28 U.S.C. § 636(b) (1). It
20 follows that the Court need not conduct any review of portions to which no specific
21 objection has been made. *See Reyna-Tapia*, 328 F.3d at 1121; *see also Thomas v. Arn*, 474
22 U.S. 140, 149 (1985) (discussing the inherent purpose of limited review is judicial
23 economy). Further, a party is not entitled as of right to *de novo* review of evidence or

24
25 ¹ Petitioner filed his timely post-conviction relief notice on October 14, 2009, but
26 failed to file a post-conviction relief petition. (Doc. 11-1 at 58-64.) The superior court
27 dismissed his petition for post-conviction relief on December 20, 2010. (Doc. 11-1 at 74.)
28 Petitioner had 30 days to file a petition for review with the Arizona Court of Appeals. Ariz.
R. Crim. P. 32.9(c). He failed to file a petition for review, therefore, his case became final
for purposes of the AEDPA on January 19, 2011, and the limitations period began running
the next day. The limitations period expired one year later, on January 20, 2012.

1 arguments which are raised for the first time in an objection to the R&R, and the Court's
2 decision to consider them is discretionary. *United States v. Howell*, 231 F.3d 615, 621-622
3 (9th Cir. 2000).

4 The Court has undertaken an extensive review of the sufficiently developed record.
5 Petitioner's objections to the findings and recommendations have also been carefully
6 considered.

7 After conducting a *de novo* review of the issues and objections, the Court reaches
8 the same conclusions reached by Judge Burns. This Court finds that the Petition is
9 untimely and that Petitioner has failed to meet the high threshold for equitable tolling.
10 Having carefully reviewed the record, the Petitioner has not shown that he is entitled to
11 habeas relief. The R&R will be adopted in full. Accordingly,

12 **IT IS ORDERED:**

13 1. That the Magistrate Judge's Report and Recommendation (Doc. 19) is
14 **accepted and adopted** by the Court;

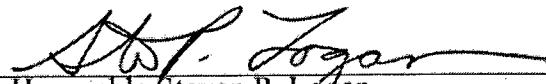
15 2. That Petitioner's Objections (Doc. 24) are **overruled**;

16 3. That the Amended Petition for Writ of Habeas Corpus (Doc. 11) is **denied**
17 and this action is **dismissed with prejudice**;

18 4. That a Certificate of Appealability and leave to proceed *in forma pauperis*
19 on appeal are **denied**; and

20 5. That the Clerk of Court shall **terminate** this action.

21 Dated this 24th day of September, 2018.

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24 
25 Honorable Steven P. Logan
26 United States District Judge
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**APPENDIX C
U.S. District Court
Magistrate Judge's R & R
04/23/2018**

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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
8

9 Matthew Mounir Awad, } CIV 17-01800-PHX-SPL (MHB)
10 Petitioner, } **REPORT AND RECOMMENDATION**
11 vs. }
12 Charles L. Ryan, et al., }
13 Respondents. }
14

15 TO THE HONORABLE STEVEN P. LOGAN, UNITED STATES DISTRICT COURT:

16 On June 9, 2017, Petitioner Matthew Mounir Awad, who is confined in the Arizona
17 State Prison Complex, through counsel filed a Petition for Writ of Habeas Corpus pursuant
18 to 28 U.S.C. § 2254. (Doc. 1.) On August 14, 2017, through counsel, Petitioner filed an
19 Amended Petition for Writ of Habeas Corpus (hereinafter “habeas petition”). (Doc. 11.)
20 Respondents filed an Answer (Doc. 12), and Petitioner has filed a Reply. (Doc. 16.)

21 **BACKGROUND¹**

22 On March 9, 2007, Petitioner was indicted by an Arizona state grand jury on one
23 count of kidnapping (“Count 1”), one count of attempted sexual assault (“Count 4”), and
24 three counts of sexual assault (“Counts 2, 3, and 5”) in Case No. CR 2007-113620. (Exh. A.)
25 On September 15, 2008, Petitioner was indicted on one count of conspiracy to commit first

26
27
28 ¹ Unless otherwise noted, the following facts are derived from the exhibits submitted
with Doc. 12 – Respondents’ Answer.

1 degree murder in Case No. CR 2008-155819. (Exh. B.) In the 2008 matter, the State offered
2 a plea agreement in which Petitioner would plead guilty to attempted first degree murder in
3 exchange for a stipulated, aggravated sentence of 10-years' imprisonment. (Exh. D.) In the
4 2007 matter, the State offered a plea agreement in which Petitioner would plead guilty to
5 Counts 2, 3 and 4 in exchange for dismissal of Counts 1 and 5. (Doc. 11-1.) The terms if this
6 agreement additionally provided that, following the completion of his 10-year sentence in
7 the 2008 matter, he would receive an aggravated sentence on Count 2 of 11-years'
8 imprisonment, followed by lifetime probation on Counts 3 and 4. (Doc. 11-1.) Petitioner
9 agreed to the terms set forth in the plea agreements and, thereafter, the court accepted the
10 pleas. (Doc. 11-1 at 8-23.) Petitioner was sentenced on August 14, 2009 pursuant to the terms
11 of the plea agreements. (Doc. 11-1 at 35-51.)

12 On October 14, 2009, Petitioner filed a notice of post-conviction relief. (Doc. 11-1 at
13 58-64.) Petitioner was subsequently appointed counsel, and on March 19, 2010, counsel filed
14 a notice of completion of post-conviction review, stating that he was "unable to find any
15 claims for relief to raise in post-conviction relief proceedings." (Doc. 11-1 at 70-71.) The
16 trial court thereafter granted Petitioner until May 13, 2010, to file his own *pro se* notice of
17 post-conviction relief; however, Petitioner failed to do so, and on December 20, 2010, the
18 court dismissed the Rule 32 proceedings. (Doc. 11-1 at 74.) Petitioner did not file a petition
19 for review to the Arizona Court of Appeals. (Doc. 11 at 7.)

20 Petitioner initiated habeas corpus proceedings on June 9, 2017. (Docs. 1, 11.)
21 Petitioner raises six grounds for relief. In Ground One, Petitioner alleges that his guilty plea
22 was not knowing, intelligent, and voluntary. In Ground Two, Petitioner asserts ineffective
23 assistance of counsel resulting in deficient plea advice. In Ground Three, Petitioner alleges
24 his sentence was based on aggravating factors not found beyond a reasonable doubt. In
25 Ground Four, Petitioner asserts ineffective assistance of counsel resulting from trial counsel's
26 failure to inform Petitioner of his rights regarding the determination of aggravating factors
27 for sentencing. In Ground Five, Petitioner alleges a violation of due process of law resulting
28 from improperly sentencing Petitioner to an aggravated sentence and failing to inform

1 Petitioner of his rights regarding aggravating factors. In Ground Six, Petitioner asserts his
2 of-right post-conviction proceedings did not comply with Anders v. California.

3 DISCUSSION

4 In their Answer, Respondents contend that Petitioner's habeas petition is untimely
5 and, as such, must be denied and dismissed.

6 The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a
7 statute of limitations on federal petitions for writ of habeas corpus filed by state prisoners.
8 See 28 U.S.C. § 2244(d)(1). The statute provides:

9 A 1-year period of limitation shall apply to an application for a writ of habeas
10 corpus by a person in custody pursuant to the judgment of a State court. The
limitation period shall run from the latest of –

11 (A) the date on which the judgment became final by the conclusion of direct
12 review or the expiration of the time for seeking such review;

13 (B) the date on which the impediment to filing an application created by State
14 action in violation of the Constitution or laws of the United States is removed,
if the applicant was prevented from filing by such State action;

15 (C) the date on which the constitutional right asserted was initially recognized
16 by the Supreme Court, if the right has been newly recognized by the Supreme
Court and made retroactively applicable to cases on 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 An "of-right" petition for post-conviction review under Arizona Rule of Criminal
20 Procedure 32, which is available to criminal defendants who plead guilty, is a form of "direct
21 review" within the meaning of 28 U.S.C. § 2244(d)(1)(A). See Summers v. Schriro, 481 F.3d
22 710, 711 (9th Cir. 2007). Therefore, the judgment of conviction becomes final upon the
23 conclusion of the Rule 32 of-right proceeding, or upon the expiration of the time for seeking
such review. See id.

24 Additionally, "[t]he time during which a properly filed application for State post-
25 conviction or other collateral review with respect to the pertinent judgment or claim is
26 pending shall not be counted toward" the limitations period. 28 U.S.C. § 2244(d)(2); see Lott
27 v. Mueller, 304 F.3d 918, 921 (9th Cir. 2002). A post-conviction petition is "clearly pending
28 after it is filed with a state court, but before that court grants or denies the petition." Chavis

1 v. Lemarque, 382 F.3d 921, 925 (9th Cir. 2004). A state petition that is not filed, however,
2 within the state's required time limit is not "properly filed" and, therefore, the petitioner is
3 not entitled to statutory tolling. See Pace v. DiGuglielmo, 544 U.S. 408, 413 (2005). "When
4 a postconviction petition is untimely under state law, 'that [is] the end of the matter' for
5 purposes of § 2244(d)(2)." Id. at 414.

6 In Arizona, post-conviction review is pending once a notice of post-conviction relief
7 is filed even though the petition is not filed until later. See Isley v. Arizona Department of
8 Corrections, 383 F.3d 1054, 1056 (9th Cir. 2004). An application for post-conviction relief
9 is also pending during the intervals between a lower court decision and a review by a higher
10 court. See Biggs v. Duncan, 339 F.3d 1045, 1048 (9th Cir. 2003) (citing Carey v. Saffold,
11 536 U.S. 214, 223 (2002)). However, the time between a first and second application for
12 post-conviction relief is not tolled because no application is "pending" during that period.
13 See id. Moreover, filing a new petition for post-conviction relief does not reinitiate a
14 limitations period that ended before the new petition was filed. See Ferguson v. Palmateer,
15 321 F.3d 820, 823 (9th Cir. 2003).

16 The statute of limitations under the AEDPA is subject to equitable tolling in
17 appropriate cases. See Holland v. Florida, 560 U.S. 631, 645-46 (2010). However, for
18 equitable tolling to apply, a petitioner must show "'(1) that he has been pursuing his rights
19 diligently and (2) that some extraordinary circumstances stood in his way'" and prevented
20 him from filing a timely petition. Id. at 2562 (quoting Pace, 544 U.S. at 418).

21 The Court finds that Petitioner's habeas petition is untimely. Initially, the Court notes
22 that Petitioner concedes that his habeas petition is untimely. Moreover, on August 14, 2009,
23 the trial court sentenced Petitioner pursuant to the terms set forth in the plea agreement. By
24 pleading guilty, Petitioner waived his right to a direct appeal, and had 90 days to file an
25 "of-right" petition for post-conviction relief under Rule 32 of the Arizona Rules of Criminal
26 Procedure. Petitioner filed his timely post-conviction relief notice on October 14, 2009, but
27 subsequently failed to file a post-conviction relief petition. Accordingly, the superior court
28 dismissed the petition for post-conviction relief on December 20, 2010. Under Ariz. R. Crim.

1 P. 32.9(c), Petitioner was allowed 30 days to file a petition for review to the Arizona Court
2 of Appeals, but failed to do so. Thus, Petitioner's case became final for purposes of the
3 AEDPA on January 19, 2011. The limitations period began the next day, January 20, 2011,
4 and expired one year later, on January 20, 2012. Petitioner did not initiate his habeas
5 proceedings until June 9, 2017. Accordingly, absent any tolling, his habeas petition was filed
6 over five years late.

7 The Ninth Circuit recognizes that the AEDPA's limitations period may be equitably
8 tolled because it is a statute of limitations, not a jurisdictional bar. See Calderon v. United
9 States Dist. Ct. (Beeler), 128 F.3d 1283, 1288 (9th Cir. 1997), overruled in part on other
10 grounds by Calderon v. United States Dist. Ct. (Kelly), 163 F.3d 530, 540 (9th Cir. 1998).
11 Tolling is appropriate when “extraordinary circumstances” beyond a [petitioner’s] control
12 make it impossible to file a petition on time.” Id.; see Miranda v. Castro, 292 F.3d 1063,
13 1066 (9th Cir. 2002) (stating that “the threshold necessary to trigger equitable tolling [under
14 AEDPA] is very high, lest the exceptions swallow the rule”) (citations omitted). “When
15 external forces, rather than a petitioner’s lack of diligence, account for the failure to file a
16 timely claim, equitable tolling of the statute of limitations may be appropriate.” Miles v.
17 Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999). A petitioner seeking equitable tolling must
18 establish two elements: “(1) that he has been pursuing his rights diligently, and (2) that some
19 extraordinary circumstance stood in his way.” Pace, 544 U.S. at 418. Petitioner must also
20 establish a “causal connection” between the extraordinary circumstance and his failure to file
21 a timely petition. See Bryant v. Arizona Attorney General, 499 F.3d 1056, 1060 (9th Cir.
22 2007).

23 Petitioner is not entitled to equitable tolling. In his Reply, Petitioner argues merits and
24 asserts that he “was left in the dark . . . until current counsel reviewed the record at the
25 request of Petitioner’s family” (Doc. 16.) However, Petitioner’s *pro se* status, indigence,
26 limited legal resources, ignorance of the law, or lack of representation during the applicable
27 filing period do not constitute extraordinary circumstances justifying equitable tolling. See,
28 e.g., Rasberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006) (“[A] *pro se* petitioner’s lack

1 of legal sophistication is not, by itself, an extraordinary circumstance warranting equitable
2 tolling.”). “Equitable tolling is justified in few cases,” and “threshold necessary to trigger
3 equitable tolling is very high” Spitsyn v. Moore 345 F.3d 796, 799 (9th Cir. 2003).
4 There is nothing in the record demonstrating that Petitioner has been diligently pursuing his
5 rights or that some extraordinary circumstance stood in his way.

6 Alternatively, Petitioner argues that his untimeliness “is excused by the fundamental
7 miscarriage of justice exception.”

8 In order to present otherwise time-barred claims, a petitioner must establish that his
9 case “falls within a narrow class of cases . . . implicating a fundamental miscarriage of
10 justice.” Schlup v. Delo, 513 U.S. 298, 314-315 (9th Cir. 2008). The Supreme Court has
11 “explicitly tied the miscarriage of justice exception *to the petitioner’s innocence*” and
12 stressed that habeas corpus petitions advancing a credible claim of actual innocence are
13 “extremely rare.” Id. at 321 (emphasis added). Actual innocence, if proved, serves as a
14 gateway through which a petitioner may pass whether the impediment is a procedural bar or
15 expiration of the AEDPA statute of limitations. McQuiggin v. Perkins, 133 S. Ct. 1924, 1925
16 (2013). In other words, “a credible claim of actual innocence constitutes an equitable
17 exception to AEDPA’s limitations period, and a petitioner who makes such a showing may
18 pass through the Schlup gateway and have his otherwise time-barred claims heard on the
19 merits.” Lee v. Lampert, 653 F.3d 929, 932 (9th Cir. 2011).

20 The Schlup gateway opens only when a petition presents “evidence of innocence so
21 strong that a court cannot have confidence in the outcome of the trial unless the court is also
22 satisfied that the trial was free of nonharmless constitutional error.” McQuiggin, 133 S. Ct.
23 at 1927. “A petitioner must show that it is more likely than not that no reasonable juror
24 would have convicted him in the light of the new evidence.” Schlup, 513 U.S. at 327. Schlup
25 requires a petitioner to “support his allegations of constitutional error with new reliable
26 evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness account, or
27 critical physical evidence – that was not presented at trial.” Lampert 653 F.3d at 938.
28 However, “without any new evidence of innocence, even the existence of a concededly

1 meritorious constitutional violation is not in itself sufficient to establish a miscarriage of
2 justice that would allow a habeas court to reach the merits of a barred claim.” *Id.* at 316.

3 Here, Petitioner expressly conceded his guilt. Petitioner accepted and consented to the
4 factual basis in the plea agreement which included, among other things, that Petitioner
5 “attempted to make arrangements to have [victim] killed,” “arrangements were made with
6 [accomplice],” and arrangements “were made to pay money to [accomplice] in order to
7 attempt to kill [victim] prior to having to testify at trials.” Furthermore, the record is deplete
8 of any instance of Petitioner claiming actual innocence.² “[T]he miscarriage of justice
9 exception is limited to those extraordinary cases where the petitioner asserts his innocence
10 and establishes that the court cannot have confidence in the contrary finding of guilt.”
11 Johnson v. Knowles, 541 F.3d 933, 937 (9th Cir. 2008). A petitioner who asserts only
12 procedural violations without claiming actual innocence fails to meet this standard.
13 Therefore, Petitioner’s concession of guilt and failure to claim actual innocence is fatal to his
14 untimely habeas petition.

15 Accordingly, Petitioner fails to show a fundamental miscarriage of justice adequate
16 to excuse his untimely petition.

CONCLUSION

Having determined that Petitioner's habeas petition is untimely, the Court will recommend that Petitioner's habeas petition be denied and dismissed with prejudice.

20 **IT IS THEREFORE RECOMMENDED** that Petitioner's Amended Petition for
21 Writ of Habeas Corpus (Doc. 11) **DENIED** and **DISMISSED WITH PREJUDICE**;

22 //
23 //

25 ²Additionally, many of Petitioner’s claims revolve around the imposition of an
26 aggravated sentence without a jury finding of aggravating factors. Petitioner explicitly
27 waived this right in his plea agreements – consented to “judicial fact-finding,” and the right
28 to a jury determination of facts used to enhance sentence – and furthermore stipulated to an
aggravated sentence in both cases. (Docs. 11-1 at 5-6 ¶¶ 7, 11; 12-1 at 29 ¶¶ 7, 11.) In
addition, the trial court found several aggravating circumstances. (Doc. 11-1 at 48.)

1 **IT IS FURTHER RECOMMENDED** that a Certificate of Appealability and leave
2 to proceed *in forma pauperis* on appeal be **DENIED** because the dismissal of the Petition is
3 justified by a plain procedural bar and jurists of reason would not find the procedural ruling
4 debatable.

5 This recommendation is not an order that is immediately appealable to the Ninth
6 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of
7 Appellate Procedure, should not be filed until entry of the district court's judgment. The
8 parties shall have fourteen days from the date of service of a copy of this recommendation
9 within which to file specific written objections with the Court. See 28 U.S.C. § 636(b)(1);
10 Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen
11 days within which to file a response to the objections. Pursuant to Rule 7.2, Local Rules of
12 Civil Procedure for the United States District Court for the District of Arizona, objections
13 to the Report and Recommendation may not exceed seventeen (17) pages in length. Failure
14 timely to file objections to the Magistrate Judge's Report and Recommendation may result
15 in the acceptance of the Report and Recommendation by the district court without further
16 review. See United States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure
17 timely to file objections to any factual determinations of the Magistrate Judge will be
18 considered a waiver of a party's right to appellate review of the findings of fact in an order
19 or judgment entered pursuant to the Magistrate Judge's recommendation. See Rule 72,
20 Federal Rules of Civil Procedure.

21 DATED this 23rd day of April, 2018.

Michelle H. Brown

Michelle H. Burns
United States Magistrate Judge

APPENDIX D
Petitioner's Objections to
Magistrate Judge's R & R
07/23/2018

1 **FAUSSETTE & FAUSETTE, PLLC**
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7 Attorneys for Petitioner Matthew Awad

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

8 Matthew Mounir Awad,) No. CV 17-01800-PHX-SPL
9 Petitioner,)
10 vs.) **PETITIONER'S OBJECTION**
11 Charles L. Ryan, *et al.*,) **TO MAGISTRATE'S REPORT**
12) **AND RECOMMENDATION**

13 **COMES NOW** Matthew M. Awad, through undersigned counsel, pursuant
14 to the extension granted by the Court, and hereby submits his Objection to the
15 **04/23/2018 Magistrate's Report and Recommendation (Doc.19)** (hereinafter,
16 "**04/23/2018 R & R**," "**R & R**") in this matter.

17 I. THE R & R'S CONCLUSIONS; UNTIMELINESS; NO
18 EQUITABLE TOLLING; NO MISCARRIAGE OF JUSTICE

19 A. The R & R Concluded That the Petition was Untimely

20 The Magistrate Judge made a finding that the Petition was untimely filed,
21 noting that Petitioner conceded the untimeliness (“*The Court finds that Petitioner’s*
22 *habeas petition is untimely. Initially, the Court notes that Petitioner concedes*
23 *that his habeas petition is untimely.*”). **04/23/2018 R & R (Doc.19)**, at page 4,
24 lines 21-22.

B. The R & R Concluded That Equitable Tolling was Not Applicable

The Magistrate Judge concluded that equitable tolling did not apply:

Petitioner is not entitled to equitable tolling. In his Reply, Petitioner argues merits and asserts that he “was left in the dark . . . until current counsel reviewed the record at the request of Petitioner’s family” (Doc. 16.) However, Petitioner’s *pro se* status, indigence, limited legal resources, ignorance of the law, or lack of representation during the applicable filing period do not constitute extraordinary circumstances justifying equitable tolling. See, e.g., *Raspberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006) (“[A] *pro se* petitioner’s lack of legal sophistication is not, by itself, an extraordinary circumstance warranting equitable tolling.”). “Equitable tolling is justified in few cases,” and [the] “threshold necessary to trigger equitable tolling is very high” *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). There is nothing in the record demonstrating that Petitioner has been diligently pursuing his rights or that some extraordinary circumstance stood in his way.

04/23/2018 R & R (Doc.19), from page 5, line 23, to page 6, line 5.

C. R & R's Conclusion *in re* Inapplicability of Miscarriage of Justice Exception

16 The Magistrate Judge also concluded that the “*fundamental miscarriage*
17 *of justice*” exception to an untimely filed Petition is not applicable to Petitioner,
18 on the ground that Petitioner did not assert and argue a claim of actual innocence
19 (“*Therefore, Petitioner’s concession of guilt [by plea agreement] and failure to*
20 *claim actual innocence [in the habeas petition] is fatal to his untimely habeas*
21 *petition. Accordingly, Petitioner fails to show a fundamental miscarriage of*
22 *justice adequate to excuse his untimely petition.*”). **04/23/2018 R & R (Doc.19),**
23 at page 7, lines 15-16. Petitioner disagrees the “*fundamental miscarriage of justice*”
24 exception to an untimely filed Petition is not applicable to Petitioner. See
25 next section, below.

1 **II. PETITIONER'S CASE DOES PRESENT A FUNDAMENTAL
2 MISCARRIAGE OF JUSTICE THAT SHOULD EXCUSE HIS
3 STATE COURT PROCEDURAL DEFAULT AND ALLOW
4 FOR FEDERAL HABEAS REVIEW OF HIS CLAIM OF
5 INEFFECTIVE ASSISTANCE OF COUNSEL**

6 Petitioner asserts that the Court's reading of the miscarriage of justice
7 exception to untimeliness is too narrow. *"A court may also excuse an untimely
8 petition if the prisoner shows that a fundamental "miscarriage of justice" has
9 occurred.* *McQuiggin v. Perkins*, 569 U.S. 383, 133 S. Ct. 1924, 1935 (2013). It
10 is correct that the *McQuiggin* case emphasizes the actual innocence issue in ruling
11 on the miscarriage of justice exception. **However, there is a quirk to this case that
12 was not present in any of the other cases cited by the Magistrate Judge.** Here,
13 there were **TWO JURY TRIALS** at issue. Petitioner waived his right to a jury trial
14 for guilt on the underlying offense, but was denied a jury trial on the greater
15 offense. Petitioner disputes that he was guilty of the greater offense and that the
16 complete and total denial of a jury trial on that greater offense qualifies for
17 application of the "*fundamental miscarriage of justice*" exception to an untimely
18 filed Petition.

19 For the miscarriage of justice exception to untimeliness to apply,
20 Petitioner need not prove his innocence beyond all doubt in order to reach the
21 safe haven of the miscarriage exception: it suffices that he can demonstrate
22 beyond a doubt that he was denied the entire proceeding at which the trial on
23 aggravating factors (*i.e.*, *Apprendi*'s "*functional equivalent of elements of a
24 greater offense*") were to be determined by a jury (*i.e.*, *Apprendi v. New Jersey*,
25 530 U.S. 466 (2000)).

26 Sentencing based on aggravating factors not implicit within the basic
27 judgment of guilt and not admitted for sentencing purposes by the defendant

1 constitute convictions for greater offenses than the underlying offense and
2 are entitled to the same fundamental constitutional rights and protections as
3 the conviction on the lesser offense:

4 Despite what appears to us the clear “elemental” nature of the
5 factor here, the relevant inquiry is one not of form, but of effect
6 — **does the required finding expose the defendant to a
greater punishment than that authorized by the jury's guilty
verdict?**

7 On the other hand, when the term “sentence enhancement” is
8 used to describe an increase beyond the maximum authorized
9 statutory sentence, it is the functional equivalent of an element
10 of a greater offense than the one covered by the jury's
11 guilty verdict. Indeed, it fits squarely within the usual
12 definition of an “element” of the offense. *See post*, at 2368-
13 2369 (THOMAS, J., concurring) (reviewing the relevant
14 authorities).

15 ****

16 The New Jersey procedure challenged in this case is an
17 unacceptable departure from the jury tradition that is an
18 indispensable part of our criminal justice system.

19 In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), at 494 and 497.

20 In *Jae Lee v. United States*, 137 S.Ct. 1958 (2017), the United States
21 Supreme Court drew a sharp contrast between two types of ineffective assistance,
22 separating for increased scrutiny those instances in which the deficient performance
23 arguably led not to a judicial proceeding of disputed reliability, but rather to the
24 forfeiture of a proceeding itself. The Court held that:

25 When a defendant alleges his counsel's deficient performance
led him to accept a guilty plea rather than go to trial, we do not
ask whether, had he gone to trial, the result of that trial “*would
have been different*” than the result of the plea bargain. That is
because, while we ordinarily “*apply a strong presumption of
reliability to judicial proceedings*,” “*we cannot accord*” any
such presumption “*to judicial proceedings that never took
place.*” (Internal citations omitted).

26 We instead consider whether the defendant was
27 prejudiced by the “*denial of the entire judicial proceeding ... to
which he had a right.*”

1 ***Jae Lee v. United States***, 137 S.Ct. 1958, 1965 (2017).

2 That is precisely what occurred here. Petitioner was constitutionally entitled
3 to a trial by a jury on any aggravating factors the State of Arizona might assert to
4 subject Petitioner to sentencing greater than the presumptive term. Petitioner was
5 not informed of that right by the Court, the State, or his defense counsel. Petitioner
6 was induced to enter a plea of guilty that subjected him to a stipulated aggravated
7 sentence, thereby IMPLICITLY waiving his federal constitutional rights to a jury
8 trial and to a determination of aggravating factors by proof beyond a reasonable
9 doubt.

10 Here, the constitutional violations and the intertwining of those violations
11 becomes important. Standing alone, a flawed state court procedure that does not
12 demonstrate actual innocence would not suffice to qualify for a miscarriage of
13 justice exception to untimeliness. However, in this case, the intertwining of the
14 violations does suffice:

15 To be sure, a habeas petitioner need not prove his innocence
16 beyond all doubt in order to reach the safe haven of the
17 miscarriage exception: it suffices if the petitioner can show a
 probability that a reasonable jury would not have convicted but
 for the constitutional violation.

18 ***Burks v. Dubois***, 55 F.3d 712, 718 (1995), citing ***Murray v. Carrier***, 477 U.S. 478,
19 496 (1986).

20 Here, Petitioner can show more than an error in proceedings where there
21 might have been a difference in the outcome; Petitioner's claim involves the
22 complete denial of a trial on the elements of the offense that subjected him to
23 sentencing greater than allowed pursuant to his plea of guilty. In this regard, the
24 United States Supreme Court has recently spoken.

1 Further, prejudice is unmistakable — Petitioner was subjected to a sentence
2 greater than that constitutionally permissible on the basis of his plea of guilty,
3 and this occurred solely because he was denied the jury trial to which he was
4 entitled un the federal constitution. Under the United States Supreme Court's
5 jurisprudence as set forth in *Jae Lee v. United States, supra*, Petitioner is entitled
6 to federal habeas corpus relief.

7 Petitioner was duped into a plea agreement on the basis of ineffective
8 assistance and failure of the state court and prosecutor to inform him of the federal
9 constitutional rights that are necessarily attached to state court plea agreements.
10 Petitioner was duped into unwittingly waiving (unconstitutionally waiving) his
11 federal constitutional rights to jury trial and proof beyond a reasonable doubt for
12 factors that are considered to be the functional equivalent of elements of a greater
13 offense. Petitioner was sentenced in ignorance of those rights because of the state's
14 and defense counsel's failures to comply with mandatory constitutional obligations.
15 Petitioner was appointed appellate counsel, who ignored all of the violations
16 previously enumerated and demonstrated and instead filed a Notice of Completion
17 of Post Conviction Review stating that there were no colorable claims. The state
18 PCR court then failed to perform a constitutionally required independent review of
19 the case for fundamental error and summarily dismissed the PCR action.

20 Petitioner was left in the dark about all of the constitutional violations in his
21 case until current counsel reviewed the record at the request of Petitioner's family
22 and informed him of the fundamental nature of the many constitutional violations.

23 Petitioner acted promptly to bring the action to this Court's attention with a
24 Petition for Writ of Habeas Corpus.

25

1 **III. PETITIONER IS ENTITLED TO HABEAS CORPUS RELIEF**
2 **ON GROUNDS ONE TO SIX**

3 **A. Grounds One to Six are Intertwined Violations of**
4 **Petitioner's Federal Constitutional Rights**

5 Ground One asserted that Petitioner's state court plea agreement is
6 constitutionally invalid because not knowingly, intelligently, and voluntarily entered
7 and integrally incorporates a constitutionally invalid sentencing waiver. The facts
8 underlying Ground One are found in **Petitioner's 08/14/2017 Amended Habeas**
9 **Corpus Petition (Doc.11)** (hereinafter, "**Amended Petition**"), from page 8, line 7,
10 to page 9, line 16, with specific citations to supporting Appendix Items.

11 Ground Two asserted that Petitioner was subjected to ineffective assistance
12 of counsel at time of plea negotiation and plea agreement for failure to inform
13 Petitioner of the applicable and essential federal constitutional rights necessarily
14 attached to his state court plea agreement. The facts underlying Ground Two are
15 found in the **Amended Petition (Doc.11)**, from page 9, line 23, to page 10, line 3,
16 with specific citation to the supporting Appendix Item.

17 It is clear, even upon cursory review, how Ground One and Ground Two are
18 intertwined. The constitutionally ineffective assistance that led directly to an
19 unconstitutional plea incorporating a constitutionally invalid waiver of rights
20 constitute claims that cannot be separated except for the technical legal aspects of
21 identifying the sources of the federal constitutional rights that are implicated.
22 Effective assistance of counsel arises from the Sixth Amendment; plea agreements
23 implicate due process rights under the Fifth Amendment; sentencing waivers are
24 governed by new rules of constitutional law announced by the United States
25 Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and reaffirmed in

1 **Blakely v. Washington**, 542 U.S. ___, 124 S.Ct. 2531 (2004).¹

2 Ground Three asserted that Petitioner's sentence was unconstitutional because
3 based upon the state court's consideration of improperly determined aggravating
4 factors, *i.e.*, aggravating factors not determined by proof beyond a reasonable
5 doubt or admitted by petitioner; and based upon Petitioner being induced to waive
6 constitutional rights of which he had never been informed. The facts underlying
7 Ground Three are found in the **Amended Petition (Doc.11)**, from page 10,
8 lines 9-14, expressly incorporating the facts presented for Ground One and Ground
9 Two.

10 Ground Four asserted that Petitioner was subjected to ineffective assistance
11 of counsel at time of sentencing for failure to inform Petitioner of the applicable and
12 essential federal constitutional rights necessarily attached to aggravated sentencing.
13 The facts underlying Ground Four are found in the **Amended Petition (Doc.11)**,
14 from page 10, line 23, to page 10, line 3, with specific citation to the supporting
15 Appendix Item. The facts underlying Ground Three are found in the **Amended**
16 **Petition (Doc.11)**, from page 10, lines 19-24, expressly incorporating the facts
17 presented for Ground One, Two, and Three.

18 Ground Five asserted that Petitioner was sentenced pursuant to a stipulated
19

20 ¹ The **Blakely** Court pointed out that **Apprendi** had held that the
21 “statutory maximum” available upon a mere finding of guilt was not the
22 maximum of a sentencing range but rather the sentence that could be
23 imposed upon a guilty verdict without further findings. Because
24 aggravated sentences under Arizona’s sentencing scheme require the
25 finder of fact to find sufficient additional findings beyond mere guilt of
 the offense itself — *i.e.*, aggravating factors — **Blakely** required that the
 rule announced in **Apprendi** was to be applied to sentencing in Arizona.
 Both **Apprendi** and **Blakely** require as a matter of federal constitutional
 law that such facts be found to be true beyond a reasonable doubt by the
 trier of fact.

1 aggravated sentence without Petitioner stipulating to any aggravating factor and
2 without being informed of the constitutional rights applicable to aggravated
3 sentencing and aggravating factors. The facts underlying Ground Five are found in
4 the **Amended Petition (Doc.11)**, from page 11, lines 5-15, including incorporating
5 the facts presented for Ground One, Two, Three, and Four.

6 Ground Six asserted that Petitioner was subjected to ineffective assistance of
7 counsel at time of direct appeal and post conviction relief for failure to assert the
8 constitutional violations set forth in Grounds One through Five; and that the state
9 court PCR court filed to perform a review of the record for fundamental error,
10 expressly including the violations asserted in Grounds One through Five. The facts
11 underlying Ground Six are found in the **Amended Petition (Doc.11)**, from page 11,
12 line 20, to page 12, line 14.

13 CONCLUSION

14 Here, defense counsel did not inform Petitioner of important — essential —
15 constitutional rights. The Plea Agreement did not inform Petitioner of those rights.
16 The change of plea court did not inform the defendant of those rights. As a result,
17 Petitioner was induced to enter a plea bargain that supposedly waived constitutional
18 rights of which he never was informed. When Petitioner was sentenced, he received
19 an aggravated term of imprisonment pursuant to a stipulation obtained without
20 informing him of essential associated constitutional rights. When Petitioner sought
21 appointment of counsel for purposes of direct appeal, his counsel failed to identify
22 any errors. Finally, the PCR court failed to perform an independent review of the
23 case documents that were available to the court. As a result, Petitioner has been
24 serving a prison sentence unconstitutionally obtained.

25

1 **RESPECTFULLY SUBMITTED** this 20th day of July, 2018.

2 **FAUSSETTE & FAUSETTE, PLLC**

3
4 /s/ Jacob Faussette
5 Jacob Faussette
6 Attorney for Petitioner Matthew Awad

7 **CERTIFICATE OF FILING AND SERVICE**

8 I hereby certify that on the 20th day of July, 2018, I electronically filed this
9 Notice of Status of Representation with the United States District Court for the
10 District of Arizona using the CM/ECF System for the filing and transmittal of a
11 Notice of Electronic Filing to the following CM/ECF registrant:

12 Terry M. Crist, III, Assistant Attorney General, 1275 West Washington
13 Street, Phoenix, Arizona 85007 (Attorney for Respondents)

14 and one additional copy provided to Petitioner Matthew Mounir Awad
15 by First Class Mail, addressed as follows:

16 Matthew M. Awad ADC 245359
17 Arizona Department of Corrections
18 Eyman Complex, Cook Unit
19 P.O. Box 3200
20 Florence, AZ 85132

21 /s/ Jacob Faussette
22 Char Synder, Legal Assistant