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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

VALENTINO JAVIER ROMERO)

Petitioner,)

vs.)

DORA SCHRIRO, et al.,)

Respondent.)

No. CV 07-1207-PHX-SMM

REPORT AND RECOMMENDATION

On June 19, 2007, Valentino Javier Romero, (“Petitioner”), an inmate confined under Department of Correction custody in the Lewis-Stiner Arizona State Prison Complex in Buckeye, Arizona, filed a pro se Petition for Writ of Habeas Corpus by a Person in State Custody, pursuant to Title 28, U.S.C. § 2254 (“Petition”). (Doc. No. 1.)¹ Respondents filed an Answer (“Answer”) to the Petition on September 27, 2007, with exhibits A through U attached. (Doc. No. 10.) No reply was filed.

Pursuant to the Rules of Practice of this Court, this matter was referred to Magistrate Judge Bernardo P. Velasco for a Report and Recommendation.

For the reasons discussed below, the Magistrate Judge recommends that the District Court enter an order dismissing the Petition.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Convictions and Sentences:

The Arizona Court of Appeals summarized the background and facts of Petitioner’s case as follows:

¹ “Doc. No.” refers to documents in this Court’s file.

1 On November 24, 1993, the State of Arizona (“State”) charged
2 [Petitioner] with five counts of aggravated assault and two counts of
3 endangerment for his involvement in a shooting incident between two
4 groups of people in a residential area. The State dismissed two of the
5 aggravated assault charges prior to trial. [Petitioner] was convicted by a
6 jury of all remaining offenses.

7 (Ex. A.)²

8 On May 20, 1994, Petitioner was sentenced to an aggravated term of 15 years’
9 imprisonment for the aggravated assault convictions and aggravated sentences of 3
10 years’ imprisonment for the endangerment convictions. (See Answer, at 3; Petition, at
11 1; and Ex. U, at 12.)

12 **B. Appeal**

13 Petitioner’s direct appeal of his conviction in the Arizona Court of Appeals was
14 denied on July 11, 1996. (Ex. A.) The court of appeals considered Petitioner’s claims
15 that (1) the trial judge’s statements during voir dire tainted the jury, preventing
16 Petitioner from receiving a fair trial, and (2) the trial court erred by giving the standard
17 jury instruction on deterring truthful testimony. (Id.) On July 11, 1996, the appellate
18 court affirmed the trial court’s decision. (Id.) Petitioner’s petition for review of the
19 appellate court’s decision was summarily denied by the Arizona Supreme Court on
20 December 6, 1996. (Id.)

21 **C. First and Second Petition for Post-Conviction Relief**

22 On September 19, 1994, while state review of his conviction was still pending,
23 Petitioner filed a petition for post-conviction relief. (See Ex. B, at 5) The trial court
24 appointed the Maricopa County Public Defenders Office to represent Petitioner, and,
25 subsequently, ordered substitution of counsel to order Petitioner represented by attorney
26 Michael L. Vaughn. (Id. at 6.) Attorney Vaughn filed an Amended Pro Per Petition for
27 Post-Conviction Relief and Memorandum of Points and Authorities on November 30,
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² “Ex.” refers to the corresponding Exhibit contained in Respondents
attached Exhibits found at Doc. No. 10.)

1 1995, raising three issues: (1) newly-discovered evidence related to the suppression
2 of exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); (2)
3 prosecutorial conduct related to the suppression of evidence and violation of *Brady* and
4 failure to inform the court of improper witness collaboration during trial; and (3)
5 ineffective assistance of trial counsel. (Ex. B, at 2.) An evidentiary hearing was held
6 on the petition for post-conviction relief on June 28, 1996. (Ex. C.) The trial court
7 denied the petition in court as to claims of newly discovered evidence and prosecutorial
8 misconduct and ordered counsel to contact the court to arrange further scheduling as to
9 the ineffective assistance of counsel claims. (Ex. C.) Subsequently, On October 17,
10 1996, Petitioner withdrew his claim for ineffective assistance of counsel, explaining
11 that, upon further investigation, the matters alleged in the petition “were not
12 deficiencies in trial counsel’s performance, but were matters of trial strategy grounded
13 in a reasonable basis.” (Ex. D.) The trial court denied Petitioner’s requests to forbid
14 withdrawal of the ineffectiveness claims and to appoint counsel to review whether the
15 claim of ineffective assistance of counsel claim had merit. (Ex. E, K at 3.) The trial
16 court granted the motion to withdraw the claim and entered a final order denying the
17 petition on February 18, 1997. (Ex. E.)

18 Petitioner filed a petition for review from the trial court’s order. (Ex. F.) That
19 petition for review, (consolidated with another petition for review from the trial court’s
20 denial of a *pro per* petition for post-conviction relief³), was denied in a memorandum
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22 ³ Respondents cite to another petition for post-conviction relief filed by
23 Petitioner, acting *pro per*, alleging that his sentence was illegally
24 enhanced and he was denied parole eligibility under *State v. Tarango*,
25 185 Ariz. 208 (1996). (See Answer, at 3, and Ex. K.) Respondents
26 refer to this as Petitioner’s first petition, but the petition is not contained
27 in the record before this Court and Respondents do not indicate when
28 it was filed. (Answer, at 3.) The date of filing is irrelevant for
purposes of any statutory tolling of the statute of limitations, however,
because the court of appeals consolidated the first and second petitions,

1 decision by the court of appeals on January 29, 1998. (Ex. K.) The supreme court
2 denied review of the consolidated petitions on February 23, 1999. (Ex. L.)

3 **D. Third Petition for Post-Conviction Relief**

4 Petitioner filed a third petition for post-conviction relief, *pro se*, on July 30,
5 1996. (Ex. G.) Petitioner raised the following claims: Petitioner was denied (1) “his
6 liberty interests and his rights under Rule 8 as well as his right to speedy trial under the
7 federal constitution...”; (2) “his sixth and fourteenth amendment rights by the failure of
8 appellate counsel to raise the issue that the denial of the motion to preclude...”; (3) his
9 due process rights “by the court instructing the jury, prior to the closing argument, upon
10 defense objections”; and (4) his right to effective assistance of appellate counsel by his
11 failure to raise the issue “that there was insufficient evidence under the sixth and
12 fourteenth amendments and hence the court erred in denying the motion for directed
13 verdict.” (Ex. G.)

14 The trial court summarily denied the petition on August 7, 1997 and Petitioner
15 filed a petition for review with the appellate court. (Exs. H, I.) The court of appeals
16 denied review on March 2, 1999. (Ex. J.)

17 **E. Fourth Petition for Post-Conviction Relief**

18 On January 30, 1998, Petitioner filed a fourth notice of petition for
19 post-conviction relief based on the affidavit of his wife that she had not been
20 interviewed by trial counsel. (Ex. M.) On March 9, 1998, the trial court referred the
21 claim to the Hon. Barry Schneider to determine whether, on its face, the claim would
22 constitute newly discovered material facts that would probably change the verdict.
23 Otherwise, the trial court noted, the claim was untimely and precluded pursuant to both
24 Rule 32.2 and A.R.S. § 13-4232. (Ex. O.) There is no minute entry in the record or

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26 both of which were filed while Petitioner’s appeal was pending, and
27 ruled on the consolidated petitions after the conclusion of direct review.
28 (Ex. K.)

1 other indication that the trial court denied the petition on the merits or as untimely. It
2 is immaterial, however, inasmuch as, thereafter, the Arizona Court of Appeals denied
3 a petition for review from the trial court's denial of post-conviction relief, on June 9,
4 1999, demonstrating that, in fact, the trial court denied the petition. (Ex. O.)

5 **F. Fifth Petition for Post-Conviction Relief**

6 On November 8, 2004, Petitioner filed a fifth petition for post-conviction relief.
7 (Ex. P.) Petitioner argued that (1) *Blakely v. Washington*, 542 U.S. 296 (2004),
8 constituted a significant change in the law requiring a reversal of his sentence; (2) The
9 decision in *Blakely* is a significant change in the law for the purposes of Rule 32.1(g);
10 (3) The trial judge used the same aggravating factors to impose consecutive sentences
11 in violation of the Sixth and Fourteenth Amendments of the United States Constitution;
12 and (4) *Blakely* applies retroactively.

13 On November 16, 2004, the trial court dismissed the petition. (Ex. Q.) The trial
14 court noted the petition was untimely, and that *Blakely* did not apply retroactively to
15 convictions that are final. The court further found that Petitioner's Rule 32-of right
16 petition was dismissed on June 28, 1996, and he did not seek review, therefore his
17 conviction was final and he was not entitled to relief under Rule 32.1(g). (Ex. Q.) On
18 December 2, 2004, Petitioner filed a motion for rehearing, arguing that the court had
19 improperly applied the time bar and erred in its finding that *Apprendi v New Jersey*,
20 530 U.S. 466 (2002), and *Ring v. Arizona*, 536 U.S. 584 (2002), do not apply
21 retroactively to convictions that are final. (Ex. R.) The court rejected the motion. (Ex.
22 S.) The Petitioner filed a petition for review before the Arizona Court of Appeals,
23 which it denied on June 19, 2006. (Id. at Ex. T.)

24 **G. First Federal Habeas**

25 Petitioner's first federal habeas petition was filed on August 25, 1995. (CIV 95-
26 01779 PHX-SMM (SLV), Doc. No. 1.) The petition was dismissed by order and
27 judgment of the District Court on May 29, 1996. (Id., Doc. No. 15, 16.) Petitioner was
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1 denied a certificate of appealability, (Id., Doc. No. 19), and the order was upheld by
2 the Ninth Circuit. (Id., at 20.)

3 **H. Second Federal Habeas**

4 Petitioner's second federal habeas petition, filed on December 17, 1998, was
5 dismissed without prejudice after a motion to dismiss filed by Petitioner was treated as
6 a notice of voluntary dismissal pursuant to Rule 41(a)(1) of the Federal Rules of Civil
7 Procedure. (CIV 98-02258 PHX-SMM (SLV), Doc. No. 1, 3, 4, 5.)

8 **I. Third Federal Habeas**

9 Petitioner's third federal habeas was timely filed on July 26, 1999, following the
10 conclusion of Petitioner's direct review and state collateral proceedings of his first two
11 consolidated petition's for review. (CIV 99-01341 PHX-SMM (SLV), Doc. No. 1) The
12 District Court considered the merits of three claims raised by Petitioner: (1) The trial
13 judge denied Petitioner due process of law under the Fourteenth Amendment when the
14 trial judge refused to grant Petitioner a new trial based on newly discovered evidence;
15 (2) Ineffective assistance of trial counsel; and (3) Ineffective assistance of appellate
16 counsel. The District Court denied the petition on the merits, and entered judgment
17 dismissing the action. (Id., Doc. No. 13, 14.)

18 Petitioner moved for a certificate of appealability, and both the District Court
19 and the Ninth Circuit denied Petitioner's request for a certificate of appealability. (Id.,
20 Doc. No. 15, 16, 17.)

21 **J. Present Federal Habeas**

22 Petitioner filed this present petition for habeas corpus in the District Court on
23 June 19, 2007. (Doc. No. 1.) Petitioner raises three grounds for relief: (1) Petitioner
24 was denied his right to have a jury determine aggravating factors used to enhance his
25 sentence, in violation of the Sixth Amendment; (2) the sentencing procedure used by
26 the trial court deprived Petitioner of his Sixth and Fourteenth Amendment rights to due
27 process; and (3) Petitioner's sentence violated the Sixth Amendment. (Id.)

1 **II. DISCUSSION**

2 **A. Standard of Review**

3 Because Petitioner filed his petition after April 24, 1996, this case is governed
4 by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)
5 (“AEDPA”). See 28 U.S.C. § 2244.

6 **B. Subject Matter Jurisdiction**

7 Under § 2244, a petitioner can file a second or successive habeas petition only
8 after obtaining an authorization order from a three-judge panel in the appropriate court
9 of appeals. 28 U.S.C. § 2244(b)(3); *see also* *Burton v. Stewart*, 549 U.S. 147, 127
10 S.Ct. 793, 799 (2007) (per curiam). In order to obtain an authorization order, a
11 petitioner must make a prima facie showing that the claim was not presented in a
12 previous federal habeas petition. 28 U.S.C. § 2244(b)(1). In addition, the petitioner
13 must show that (1) the new claim relies on a new rule of constitutional law that was
14 previously unavailable and that the Supreme Court made retroactive to cases on
15 collateral review; or (2) the factual basis for the new claim “could not have been
16 discovered previously through the exercise of due diligence” and the fact underlying
17 the claim, if proven and viewed in light of the whole evidence, show by clear and
18 convincing evidence that, but for the constitutional error, no reasonable factfinder
19 would have found the petitioner guilty of the offense. 28 U.S.C. § 2244(b)(2); §
20 2244(b)(3)(C); *see also* *Burton* 127 S.Ct. at 796. Absent approval from the Ninth
21 Circuit, the District Court lacks subject matter jurisdiction to consider a second or
22 successive petition. 28 U.S.C. § 2244(b)(3)(A); *Burton*, 127 S.Ct. at 799.

23 **C. Timeliness**

24 A one year period of limitation shall apply to an application for writ of habeas
25 corpus by a person in custody pursuant to the judgment of a State court. 28 U.S.C. §
26 2244(d)(1). Under the AEDPA, a state prisoner must generally file a petition for writ
27 of habeas corpus within one year from “the date on which the judgment became final
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1 by the conclusion of direct review or the expiration of time for seeking such review [.]”
2 28 U.S.C. § 2244(d)(1)(A). “The time during which a properly filed application for
3 state post-conviction or other collateral review with respect to the pertinent judgment
4 or claim is pending shall not be counted toward any period of limitation[.]” 28 U.S.C.
5 § 2244(d)(2).

6 **D. Analysis**

7 *1. The Court Lacks Subject Matter Jurisdiction to Consider the*
8 *Petition*

9 Petitioner’s fourth habeas is a “second or successive” habeas for which he has
10 neither sought nor obtained authorization to file. Petitioner has twice brought claims
11 contesting the same custody imposed by the same judgment of a state court.
12 Petitioner’s third federal habeas⁴, was decided and dismissed on the merits, and
13 judgment entered accordingly. Therefore, under the AEDPA, Petitioner is required to
14 "move in the appropriate court of appeals for an order authorizing the district court to
15 consider the application" for habeas relief. 28 U.S.C. § 2244(b)(3)(A). Petitioner's
16 failure to comply with the "gatekeeping" provisions of section 2244 deprive this Court
17 of jurisdiction to consider his section 2254 claims. *See Burton*, 127 S.Ct. at 794-99.

18 *2. The Petition is Untimely*

19 Should the District Court find that the Court has jurisdiction to consider the
20 Petition, the Magistrate Judge further finds that, pursuant to the AEDPA, the Petition
21 filed in this Court is untimely. Petitioner had until one year after his conviction and
22 sentence became final to file his federal petition. Petitioner’s state conviction in CR
23 93-09461 was based on the guilty verdict of a jury trial. Petitioner appealed his
24 conviction before the Arizona Court of Appeals, which found no error in the trial
25 court’s decision. Petitioner’s petition for review was denied by the Arizona Supreme
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27 ⁴ CIV 99-01341 PHX-SMM (SLV)

1 Court on December 6, 1996. His conviction therefore became final 90 days after his
2 petition for review was denied. *See Wixom v. Washington*, 264 F.3d 894, 897 (9th Cir.
3 2001). Therefore, the statute of limitations began to run on March 6, 1997. Absent any
4 statutory or equitable tolling periods, Petitioner's right to file a federal habeas petition
5 expired one year later on March 6, 1998.

6 Petitioner did not file the instant Petition until June 19, 2007. Petitioner does not
7 argue and this Court does not find that he is entitled to any equitable tolling⁵. Thus, the
8 Petition is untimely by over nine years unless statutory tolling applies and results in a
9 tolling of the limitations period for a sufficient length of time to bring the Habeas
10 Petition within the one-year limitations period.

11 **E. Statutory Tolling**

12 The limitations period was immediately tolled with no lapse of time in-between
13 the direct review and the first statutory tolling event, because Petitioner's first and
14 second petitions for post-conviction relief were initiated before his conviction became
15 final. The limitations period was statutorily tolled until the day the Arizona Supreme
16 Court issued its order denying review of the court of appeals denial of Petitioner's
17 consolidated petitions for review from the trial court's denial of his first two petitions
18 for post-conviction relief. The supreme court's order was filed on February 23, 1999.
19 (Ex. L.)

20 Similarly, Petitioner's third and fourth petitions for post-conviction relief
21 overlapped the earlier petitions. Respondents do not argue that these petitions were not
22 properly filed. (See Answer, at 10.) Because the record is not clear on whether these
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25 ⁵ Although the Court recognizes that Respondents have raised an argument
26 that equitable tolling is no longer available, in view of the Supreme
27 Court's recent decision in *Bowles v. Russell*, 127 S.Ct. 2360 (2007), the
28 Court need not resolve that issue because Petitioner does not assert or
satisfy the requirements for such tolling.

1 petitions were or were not “properly filed” in the state court, and because a resolution
2 of this issue is not necessary to resolve the issue of timeliness, this Court will assume
3 without deciding that the third and fourth petitions were properly filed within the
4 meaning of § 2244(d)(2). Thus, assuming the third and fourth petitions were properly
5 filed, the statutory tolling period continued until June 9, 1999, when the Arizona Court
6 of Appeals denied his petition for review of the trial court’s denial of his fourth petition
7 for post-conviction relief. Thus, Petitioner had a year from June 9, 1999, or until June
8 9, 2000, to file his federal habeas Petition.

9 Petitioner’s fifth petition for post-conviction relief was filed on November 9,
10 2004, well over five years after the conclusion of the fourth petition for post-conviction
11 relief.

12 This fifth petition could not toll the limitations period because it had already
13 expired, neither could it restart the already expired one-year limitations period. See
14 *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003); *Jiminez v. Rice*, 276 F.3d
15 478, 482 (9th Cir. 2001).

16 Further, Petitioner’s federal habeas petitions have no tolling effect. See *Duncan*
17 *v. Walker*, 533 U.S. 167, 191 (2001).

18 Petitioner’s instant habeas, filed on June 19, 2007, was filed more than seven
19 years beyond the AEDPA’s one-year statute of limitations, and is thus untimely.

20 The Magistrate Judge does not reach the Petitioner’s or Respondent’s alternate
21 arguments on the merits of this case.

22 **III. RECOMMENDATION**

23 The Magistrate Judge recommends that the District Court DISMISS this action
24 for lack of subject matter jurisdiction.

25 Alternatively, the Magistrate Judge recommends that the District Court
26 DISMISS this action as untimely.

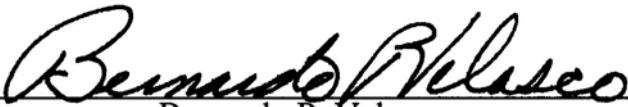
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1 Pursuant to 28 U.S.C. § 636(b), any party may serve and file written objections
2 within ten days after being served with a copy of this Report and Recommendation. A
3 party may respond to another party's objection within ten days after being served with
4 a copy thereof. Fed. R. Civ. P. 72(b). If objections are filed the parties should use the
5 following case number: **CV 07-1207-PHX-SMM**

6 If objections are not timely filed, then the parties' right to de novo review by the
7 District Court may be deemed waived. *See United States v. Reyna-Tapia*, 328 F.3d
8 1114, 1121 (9th Cir. 2003).

9 DATED this 26th day of September, 2008.

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Bernardo P. Velasco
United States Magistrate Judge