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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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Dale Faulkner,

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No. CV 07-1822-PHX-JAT

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Petitioner,

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**ORDER**

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vs.

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Dora B. Schriro; et al.,

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Respondents.

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Pending before this Court is Petitioner’s Petition for Writ of Habeas Corpus. On June 2, 2008, the Magistrate Judge issued a Report and Recommendation (R&R) (Doc. #12) recommending that the Petition in this case be dismissed because it is barred by the statute of limitations. Petitioner has filed objections to the R&R.

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This Court “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). It is “clear that the district judge must review the magistrate judge’s findings and recommendations *de novo if objection is made*, but not otherwise.” *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9<sup>th</sup> Cir. 2003) (*en banc*) (emphasis in original). Because Petitioner filed objections, the Court will review the R&R de novo.

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The Court finds that the R&R correctly recounts the law governing the statute of limitations under the Anti-Terrorism and Effective Death Penalty Act (AEDPA); and neither party disputes this discussion. R&R 4-6. Thus, the Court accepts the R&R’s conclusion that

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1 Petitioner's statute of limitations to file a habeas petition in this case expired on April 24,  
2 1997, absent some kind of tolling. R&R at 5-6. The Petition in this case was filed on  
3 September 24, 2007.

4 In his objections, Petitioner argues that the Supreme Court's decision in *Blakely v.*  
5 *Washington*, 542 U.S. 296 (2004) should restart his statute of limitations under 28 U.S.C. §  
6 2244(d)(1)(C). The Magistrate Judge addressed this argument and concluded that because  
7 *Blakely* is unavailable on collateral review, it did not restart the statute of limitations. R&R  
8 at 6-7. Similarly, this Court recently addressed this same question in another case and  
9 concluded that because *Blakely* is not available to habeas petitioners, it did not restart the  
10 statute of limitations under 28 U.S.C. § 2244(d)(1)(C). *See Souliere v. Edwards*, 2008 WL  
11 2797017, \*2-3 (D. Ariz. 2008). Accordingly, Petitioner's objections are overruled and the  
12 Court accepts the conclusion of the R&R that the statute of limitations was not restarted by  
13 *Blakely*.

14 Further, the Court agrees with the R&R that statutory tolling would not make the  
15 Petition in this case timely. Between the enactment of the AEDPA (April 24, 1996) and  
16 January 2, 2002, Petitioner did not have anything pending in state court that would toll his  
17 statute of limitations. Accordingly, his statute of limitations expired on April 24, 1997 and  
18 it could not be restarted by the filing of a petition in state court in 2002. *See* R&R at 7-8.

19 While the Court agrees with the conclusion that Petitioner is not entitled to statutory  
20 tolling, the Court notes that the R&R relies on *Nino v. Galaza*, 183 F.3d 1003, 1006 (9<sup>th</sup> Cir.  
21 1999), for the conclusion that the time between the issuance of the mandate on Petitioner's  
22 direct appeal (March 23, 1992) and the filing of Petitioner's first post-conviction relief  
23 petition (January 2, 2002) is not tolled. However, under *Summers v. Schriro*, 481 F.3d 710,  
24 (9<sup>th</sup> Cir. 2007) the Court of Appeals has concluded that under Arizona law, for a pleading  
25 defendant, the first post-conviction relief petition is part of direct review. This Court has  
26 previously addressed the question of whether a petitioner whose conviction became final  
27 before September 30, 1992, the enactment date of the current version of Arizona Rule of  
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1 Criminal Procedure 32, falls under *Summers*. And this Court has concluded that *Summers*  
2 would not apply to cases such as this one. Specifically, this Court found:

3 In *Summers*, the Court held that, for a defendant who pled guilty, the  
4 first Rule 32 petition “of-right” is part of the “direct review” of the defendant’s  
5 case; therefore, the Anti-Terrorism and Effective Death Penalty Act statute of  
6 limitations does not begin to run until the first Rule 32 petition is completed  
7 before the state courts. *Id.* at \*7.

8 The Ninth Circuit Court of Appeals held that the Rule 32 of-right was  
9 part of “direct review” based on the “direct review” language of the Anti-  
10 Terrorism and Effective Death Penalty Act. *See Summers*, 2007 WL at \*7  
11 (citing 28 U.S.C. § 2244(d)(1)(A)). The Ninth Circuit Court of Appeals based  
12 this conclusion, in part, on the language from *Montgomery v. Sheldon*, 889  
13 P.2d 614 (Ariz. 1995); specifically the Ninth Circuit Court of Appeal[s] found,  
14 “the Arizona Supreme Court recognized that a Rule 32 of-right proceeding is  
15 ‘procedurally distinct’ from a conventional direct appeal, but it observed that  
16 as ‘the only means available for exercising the constitutional right to appellate  
17 review’ the proceeding is ‘analogous to a direct appeal for a pleading  
18 defendant.’” *Id.* at \*6.

19 The Ninth Circuit Court of Appeals reached this conclusion without  
20 discussing that, after *Montgomery v. Sheldon*, in answering a certified question  
21 of the Ninth Circuit Court of Appeals, the Arizona Supreme Court held, “We  
22 also hold that a Rule 32 petition for post-conviction relief in the trial court is  
23 not an ‘appeal’ within the meaning of Rule 32.1(f), Ariz. R. Crim. P.” *Moreno*  
24 *v. Gonzalez*, 962 P.2d 205, 208 ¶ 18 (Ariz. 1998). However, perhaps this lack  
25 of discussion is because in *Moreno*, the Arizona Supreme Court was  
26 discussing a post-conviction relief petition for a defendant who, like Petitioner  
27 in this case, had a direct appeal before the changes to the Arizona Rules.

28 Specifically, before September 30, 1992 (the effective date of the  
amendments to Rule 32, ...), a pleading defendant could file a direct appeal (as  
Petitioner in this case did in August of 1992). *See Montgomery v. Sheldon*,  
889 P.2d 614, n.3 (Ariz. 1995) *supplemented by* 893 P.2d 1281 (in banc)  
*superceded in part by statute, Arizona v. Smith*, 910 P.2d 1, 4-5 (Ariz. 1996).  
After the amendments to the Rules, a pleading defendant did not have the right  
to a direct appeal. *See Summers*, 2007 WL at \*5 (“In 1992, Arizona Rule of  
Criminal Procedure 17.1(e) was amended to read: ‘By pleading guilty or no  
contest in a noncapital case, a defendant waives the right to have the appellate  
courts review the proceedings by way of direct appeal, and may seek review  
only by filing a petition for post-conviction relief pursuant to Rule 32, and if  
denied, a petition for review.’ Ariz. R. Crim. P. 17.1(e). Rule 32 was  
amended at the same time to add of-right review proceedings.”)

Based on the distinction between this case and *Summers*, namely that  
Petitioner in this case had a direct appeal, this Court finds that Petitioner’s  
post-conviction relief petition filed in 2004 was not “of-right.” As a result,  
Petitioner in this case falls under the *Moreno* analysis that his post-conviction  
relief petition was not an appeal, and, accordingly, was not part of “direct  
review” under the Anti-Terrorism and Effective Death Penalty Act. Therefore,  
Petitioner’s 2004 post-conviction relief petition is not part of direct review that

1 would cause the federal habeas statute of limitation[s] to not begin to run until  
2 the conclusion of the post-conviction relief process.<sup>1</sup>

3 *Dandridge v. Schriro*, 2007 WL 1063358, \*2-3 (D. Ariz. 2007) (footnote in original).

4 Similarly, in this case, Petitioner had a direct appeal because he was convicted before  
5 September 30, 1992. Therefore, his first post conviction relief petition will not be treated as  
6 his direct appeal under *Summers*. As a result, the Petition in this case is barred by the statute  
7 of limitations unless Petitioner is entitled to equitable tolling.

8 Preliminarily the Court acknowledges that the Respondents argue that the Supreme  
9 Court's decision in *Bowles v. Russell*, 127 S.Ct. 2360 (2007), stands for the proposition that  
10 the AEDPA statute of limitations is jurisdictional and, therefore, not subject to equitable  
11 tolling. R&R at 8. This Court has considered this question, and has held that equitable  
12 tolling remains available after *Bowles*. See e.g. *Hunt v. Schriro*, 2008 WL 3843659, \*1-2 (D.  
13 Ariz. 2008). However, the Court agrees with the R&R's conclusion that Petitioner has no  
14 shown a basis for equitable tolling. R&R at 9-12. Further, Petitioner offers not basis for  
15 equitable tolling in his objections that changes this conclusion. Therefore, this Court  
16 concludes that Petitioner is not entitled to equitable tolling of the statute of limitations.

17 Based on the foregoing, the Court finds that the statute of limitations in this case  
18 expired on April 24, 1997 and the Petition filed on September 24, 2007 is untimely.

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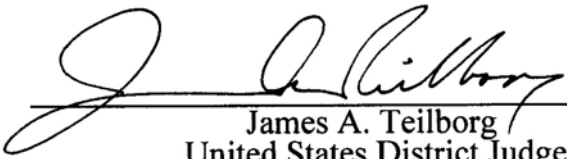
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25 <sup>1</sup> This conclusion is further supported by the Court's statement in *Summers* that, "Moreover,  
26 because the Rule 32 of-right proceeding is governed by short, definite deadlines, there is little  
27 danger that recognizing it as a form of direct review will 'open the door to abusive delay.'  
28 *Pace v. DiGuglielmo*, 544 U.S. 408, 413 (2005)." This statement shows that the *Summers*  
court did not intend to include post-conviction relief petitions that are not subject to short,  
definite deadlines under the amended version of Rule 32 in the "direct review" category.

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Accordingly, IT IS ORDERED that the R&R (Doc. #12) which concludes that the Petition is barred by the statute of limitations is accepted as indicated above; Petitioner's objections are overruled, the Petition in this case is denied and dismissed with prejudice and the Clerk of the Court shall enter judgment accordingly.

DATED this 3<sup>rd</sup> day of September, 2008.

  
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James A. Teilborg  
United States District Judge