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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Louis Alfred Adams, Jr.,

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No. CV-08-750-PHX-ROS (LOA)

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Petitioner,

)

REPORT AND RECOMMENDATION

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vs.

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Dora B. Schriro, et. al,

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Respondents.

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This matter is before the Court on Petitioner’s Petition for Writ of Habeas Corpus. (docket # 1) Respondents have filed an Answer (docket # 11) to which Petitioner has not replied and the deadline has passed. (see docket # 5)

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I. Factual and Procedural Background

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On October 28, 2004, the State of Arizona charged Petitioner, in case number CR 2004-130264-001, with one count of armed robbery, one count of theft of means on transportation, one count of unlawful flight from a law enforcement vehicle, and one count of possession or use of marijuana. (Respondents’ Exh. B)

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On November 15, 2004, the State of Arizona charged Petitioner, in case number CR 2004-048287-001, with one count of armed robbery and one count of attempted armed robbery. (Respondents’ Exh. A) Pursuant to the parties’ stipulation, the cases were subsequently consolidated. (Respondents’ Exh. E)

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On December 15, 2004, the Maricopa County Superior Court permitted the Public Defender’s Office to withdraw and appointed contract attorney, David Lockhart, to represent

1 Petitioner. (Respondents' Exh. C, 12/15/04 minute entry) On May 23, 2005, the State court
2 denied Petitioner's motion to dismiss counsel. That same day, the State court granted
3 Petitioner's separate motion to proceed *pro per*, finding that Petitioner had "knowingly,
4 intelligently, and voluntarily waived counsel." (Respondents' Exh. D, 7/5/05 minute entry)
5 The court appointed David Lockhart as advisory counsel to assist Petitioner. (*Id.*)

6 On July 5, 2005, pursuant to a plea agreement, Petitioner pled guilty to the following
7 charges: Count 1, armed robbery; Count 2, attempted armed robbery; Count 3, armed
8 robbery; Count 4, theft of means of transportation; Count 5, unlawful flight from a law
9 enforcement vehicle; and Count 6, possession or use of marijuana. (*Id.*) The trial judge¹
10 found that Petitioner knowingly, voluntarily, and intelligently pled guilty. (*Id.*)

11 On August 5, 2005, the trial court imposed the following concurrent sentences: Count
12 1, armed robbery, 15 years; Count 2, attempted armed robbery, 7.5 years; Count 3 armed
13 robbery, 19 years; Count 4, theft of means of transportation, 3.5 years; Count 5, unlawful
14 flight from a law enforcement vehicle, 1.5 years; and Count 6, possession or use of
15 marijuana, 1 year. (Respondents' Exh. F, 8/5/05 minute entry) The trial court also revoked
16 Petitioner's probation in a different case, CR 2004-15348, and sentenced him to time served.
17 (Respondents' Exh. G, 8/5/05 minute entry)

18 **A. Post-Conviction Proceeding**

19 On September 7, 2005, Petitioner filed a notice of post-conviction relief pursuant to
20 Ariz.R.Crim.P. 32. (Respondents' Exh. H) The trial court appointed counsel who filed a
21 notice, advising the court he had reviewed the record and found no colorable claim for relief.
22 (Respondents' Exh. I) Petitioner filed a *pro se* petition for relief on May 12, 2006.
23 (Respondents' Exh. J) On December 20, 2006, the trial court summarily dismissed the
24 petition finding that Petitioner had not raised any colorable claims. (Respondents' Exh. K)
25 The trial court specifically found Petitioner's claim of ineffective assistance of counsel
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27 ¹ The Honorable Jeffrey A. Hotham presided.
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1 lacked merit and noted that Petitioner failed to show either that counsel’s performance was
2 deficient or that counsel’s performance resulted in prejudice. (Respondents’ Exh. K)
3 Petitioner did not seek appellate review of the trial court’s order of dismissal. (Respondents’
4 Exh. L)

5 **B. Petition for Writ of Habeas Corpus**

6 On April 18, 2008, Petitioner filed the pending Petition for Writ of Habeas Corpus,
7 asserting that his constitutional rights under the Sixth, Eighth, and Fourteenth Amendments
8 were violated by ineffective of counsel in connection with his guilty plea and the trial
9 court’s denial of his motion to appoint alternative counsel. (docket # 1 at 7) Petitioner also
10 alleges that prison officials have failed to protect him from threats to his safety. (*Id.*) The
11 Court previously dismissed Petitioner’s allegations based on prison officials’ failure to
12 protect him as not cognizable in a petition for writ of habeas corpus pursuant to § 2254.
13 (docket # 5) Accordingly, only Petitioner’s ineffective assistance of counsel claim is before
14 the Court. Respondents assert that the Petition is untimely. Respondents alternatively assert
15 that Petitioner’s claims are procedurally defaulted and lack merit. Petitioner has not filed a
16 reply.

17 **II. Statute of Limitations**

18 On April 24, 1996, the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”)
19 went into effect drastically altering the time limit imposed on state prisoners filing habeas
20 corpus petitions in federal court. The AEDPA established a one-year period in which to file
21 a petition for writ of habeas corpus in federal court. 28 U.S.C. § 2244(d)(1). Because
22 Petitioner filed his Petition after the effective date of the AEDPA, it governs this action.
23 The statute of limitations is a threshold issue the Court must resolve before reaching other
24 procedural issues or the merits of Petitioner’s claims. *White v. Klitzkie*, 283 F.3d 920, 921-
25 22 (9th Cir. 2002).

26 Title 28 U.S.C. § 2244(d)(1) provides, in pertinent part, that:
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1 (1) A 1-year period of limitation shall apply to an application for
2 a writ of habeas corpus by a person in custody pursuant to the
3 judgment of a State court. The limitation period shall run from
4 the latest of-

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

5 28 U.S.C. § 2244(d)(1)(A). Respondents assert that the Petition is time-barred.

6 **A. Application of § 2244(d)(1)(A)**

7 By pleading guilty, Petitioner waived his right to a direct appeal, but retained the
8 right to seek review in an “of-right” proceeding under Rule 32. Ariz.R.Crim.P. 32.1.² In
9 *Summers v. Schriro*, 481 F.3d 710, 711 (9th Cir. 2007), the Ninth Circuit considered whether
10 Arizona’s Rule 32 of-right proceeding is direct or collateral review under the ADEPA.
11 *Summers* held that an “‘of-right proceeding,’ available under Arizona Rule of Criminal
12 Procedure 32 to criminal defendants who plead guilty [or no contest], is a form of ‘direct
13 review’ within the meaning of 28 U.S.C. § 2244(d)(1).” *Id.* at 711. The *Summers* court
14 explained that “[b]ecause a Rule 32 of-right proceeding is a form of direct review, AEDPA’s
15 one-year statute of limitations does not begin to run until the conclusion of the Rule 32 of-
16 right proceeding and review of that proceeding, or until the expiration of the time for
17 seeking such proceeding or review.” *Id.*

18 Pursuant to *Summers*, because Petitioner pled guilty, his conviction became final
19 upon “the conclusion of the Rule 32 of-right proceeding and review of that proceeding, or
20 the expiration of the time for seeking such proceeding or review.” *Summers*, 418 F.3d at
21 711. Here, Petitioner entered his plea and was sentenced on August 5, 2005. Pursuant to
22 Ariz.R.Crim.P. 32.4, Petitioner had ninety days from the entry of judgment and sentence
23 within which to file a notice of Rule-32 review. Ariz.R.Crim.P. 32.1, 32.4(a) stating that
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26 ² Arizona Rule of Criminal Procedure 32.1 provides: “Any person who pled guilty or no
27 contest . . . shall have the right to file a post-conviction relief proceeding, and this proceeding
28 shall be known as a Rule 32 of-right proceeding.” Ariz.R.Crim.P. 32.1.

1 “[i]n a Rule 32 of-right proceeding the notice must be filed within ninety days after the entry
2 of judgment and sentence or within thirty days after the issuance of the final order or
3 mandate by the appellate court in the petitioner’s first petition for post-conviction relief
4 proceeding.”)

5 Petitioner filed a notice of Rule 32 relief within the 90-day time period. The trial
6 court dismissed that proceeding on December 22, 2006 and Petitioner did not seek further
7 review. Because Petitioner did not seek appellate review within 30 days, his judgment
8 became final on the date the 30-day deadline for seeking appellate review expired, on
9 January 21, 2007. *See* Ariz.R.Crim.P. 32.9(c); *Summers*, 481 F.3d at 711.

10 Because Petitioner’s conviction became final on January 21, 2007, the AEPDA
11 limitations period commenced the following day, on January 22, 2007, and expired on
12 January 22, 2008. 28 U.S.C. § 2244(d)(1). Petitioner did not file his § 2254 Petition until
13 April 18, 2008. (docket # 1) Thus, absent tolling, Petitioner’s Petition is untimely.

14 **B. Tolling the Limitations Period**

15 **1. Statutory Tolling**

16 The AEDPA one-year limitations period is tolled during the time that a “properly
17 filed application for State post-conviction or other collateral review with respect to the
18 pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2).

19 Statutory tolling does not apply. Petitioner only filed a Rule 32 of-right proceeding
20 and did not file a subsequent petition for post-conviction relief. Because statutory tolling is
21 unavailable, the pending Petition should be dismissed as untimely unless equitable tolling
22 applies.

23 **2. Equitable Tolling**

24 Respondents assert that equitable tolling is not available because that remedy “does
25 not survive” the Supreme Court’s decision in *Bowles v. Russell*, ___ U.S. ___, 127 S.Ct.
26 2360 (2007). (docket # 11 at 5-8) Respondents alternatively argue that, even if equitable
27 tolling is available, Petitioner is not entitled to equitable tolling. (docket # 11 at 8-10)

1 Respondents argue that in view of the Supreme Court's recent decision in *Bowles v.*
2 *Russell*, ___ U.S. ___, 127 S.Ct. 2360 (2007), the AEDPA statute of limitations is
3 jurisdictional and not subject to equitable tolling. In *Bowles*, Supreme Court held that the
4 timely filing of an appeal in a civil case is a jurisdictional requirement. *Id.* at 2366. The
5 *Bowles* Court reasoned that because federal statutes set forth time limits on filing a notice of
6 appeal and reopening the appeal period, Congress intended to preclude a federal court from
7 exercising jurisdiction over otherwise legitimate cases after a certain period of time had
8 elapsed after final judgment. *Id.*

9 Similar to the federal statutes at issue in *Bowles*, the AEDPA establishes time limits
10 on when a petitioner may file a petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1).
11 On two occasions, the Supreme Court has denied certiorari on the issue of whether these
12 limits are jurisdictional. *See, David v. Hall*, 540 U.S. 815 (2003); *Flanders v. Graves*, 537
13 U.S. 1236 (2003). The Supreme Court has noted that it has never squarely addressed
14 whether equitable tolling applies to the AEDPA's statute of limitations. *Lawrence v.*
15 *Florida*, ___ U.S. ___, 127 S.Ct. 1079, 1085 (2007). Accordingly, whether the AEDPA is
16 subject to equitable tolling remains an open question. However, a recent decision in the
17 District of Arizona followed the Second Circuit in holding that *Bowles* does not apply to the
18 AEDPA. *Hernandez v. Arpaio*, CV-07-1712-PHX-DGC, 2008 WL 370900, * 2 (D.Ariz.,
19 Feb. 11, 2008) (citing *Diaz v. Kelly*, No. 1-2687-RR, 2008 WL 199846, * 3) (2d Cir., Jan.
20 25, 2008). Although this Court is inclined to follow *Hernandez* and hold that *Bowles* does
21 not apply to the AEDPA, the Court need not resolve that issue because even assuming
22 equitable tolling remains viable after *Bowles*, as Respondents alternatively argue, Petitioner
23 does not satisfy the requirements for such tolling.

24 The Ninth Circuit has held that the AEDPA's limitations period may be equitably
25 tolled because it is a statute of limitations, not a jurisdictional bar. *Calderon v. United States*
26 *Dist. Ct. (Beeler)*, 128 F.3d 1283, 1288 (9th Cir. 1997), *overruled, in part, on other grounds*
27 *by, Calderon v. United States Dist. Ct. (Kelly)*, 163 F.3d 530, 540 (9th Cir. 1998).

1 Likewise, Petitioner’s status as a prison inmate does not constitute an extraordinary
2 circumstance beyond his control warranting the tolling of the one-year limitations period.
3 *Marsh*, 223 F.3d at 1220. The ordinary difficulties inherent in prison life do not constitute
4 extraordinary circumstances sufficient to toll the AEDPA limitations period. *Shannon v.*
5 *Newland*, 410 F.3d 1083, 1090 (9th Cir. 2005) (stating that “[e]ach of the cases in which
6 equitable tolling has been applied have involved wrongful conduct, either by state officials
7 or occasionally, by the petitioner’s counsel.”).

8 Finally, Petitioner’s conclusory statement that he lacks access to a law library does
9 not constitute an extraordinary circumstances for purposes of equitable tolling. *Atkins v.*
10 *Harris*, 1999 WL 13719, * 2 (N.D.Cal., Jan. 7, 1999) (“lockdowns, restricted library access
11 and transfers do not constitute extraordinary circumstances sufficient to equitably toll the
12 [AEDPA] statute of limitations. Prisoners familiar with the routine restrictions of prison life
13 must take such matters into account when calculating when to file a federal [habeas] petition
14 [petitioner’s] alleged lack of legal sophistication also does not excuse the delay.”)

15 In summary, Petitioner fails to demonstrate that he diligently pursued his
16 rights and that an “extraordinary circumstance” prevented him from filing a timely petition.
17 *Pace*, 544 U.S. at 418. Accordingly, there is no basis for equitably tolling the AEDPA
18 statute of limitations and the Petition should be dismissed as untimely.

19 **III. Summary**

20 Because Petitioner’s habeas petition is untimely under the ADEPA and equitable
21 tolling is not justified, the Court does not address Respondents’ contention that Petitioner’s
22 claims are procedurally defaulted or otherwise lack merit.

23 Accordingly,

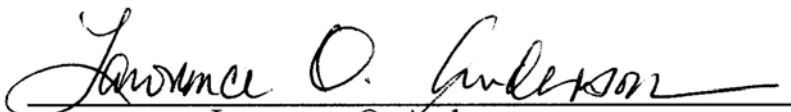
24 **IT IS HEREBY RECOMMENDED** that Petitioner’s Petition for Writ of Habeas
25 Corpus (docket # 1) be **DENIED**.

26 This recommendation is not an order that is immediately appealable to the Ninth
27 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of
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1 Appellate Procedure, should not be filed until entry of the District Court's judgment. The
2 parties shall have ten days from the date of service of a copy of this recommendation within
3 which to file specific written objections with the Court. *See*, 28 U.S.C. § 636(b)(1); Rules
4 72, 6(a), 6(e), Federal Rules of Civil Procedure. Thereafter, the parties have ten days within
5 which to file a response to the objections.

6 Failure timely to file objections to the Magistrate Judge's Report and
7 Recommendation may result in the acceptance of the Report and Recommendation by the
8 District Court without further review. *See United States v. Reyna-Tapia*, 328 F.3d 1114,
9 1121 (9th Cir. 2003). Failure timely to file objections to any factual determinations of the
10 Magistrate Judge will be considered a waiver of a party's right to appellate review of the
11 findings of fact in an order or judgment entered pursuant to the Magistrate Judge's
12 recommendation. *See*, Rule 72, Federal Rules of Civil Procedure.

13 DATED this 10th day of November, 2008.

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16 Lawrence O. Anderson
17 United States Magistrate Judge
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