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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Gregory Richard Torrez,
Petitioner,
vs.
Charles L. Ryan et. al.,
Respondents.

No. CV 08-952-PHX-NVW

ORDER

Pending before the court is the Report and Recommendation (“R&R”) of Magistrate Judge David K. Duncan (doc. # 15) regarding Gregory Richard Torrez’s (“Torrez”) Petition for Writ of Habeas Corpus by a Person in State Custody filed pursuant to 28 U.S.C. § 2254 (doc. # 1). Torrez has moved for leave to file untimely objections to the R&R. (Doc. # 16.) That motion will be granted. The Court has conducted de novo review of the portions of the R&R to which Torrez objects. The Court agrees with the Magistrate Judge’s determinations and will accept the recommended decision, subject to the following clarification of the reason that Torrez’s petition is untimely. Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1) (stating that the district court may “may accept, reject, or modify” the recommended disposition).

Petitioner pleaded guilty in state court and therefore waived his right to a conventional direct appeal under Arizona law, but retained the right to seek review in an “of-right proceeding” under Rule 32 of the Arizona Rules of Criminal Procedure.

1 Petitioner timely sought review in a Rule 32 of-right proceeding. The trial court denied
2 relief and Torrez sought review by the Arizona Court of Appeals.

3 While Torrez's appeal was pending, on June 24, 2004, the United States Supreme
4 Court decided *Blakely v. Washington*, 542 U.S. 296 (2004). Torrez filed notice of a
5 second petition for post-conviction relief on July 27, 2004, invoking Rule 32.1(g) of the
6 Arizona Rules of Criminal Procedure to assert that *Blakely* was a "significant change in
7 the law." On July 13, 2005, after Torrez had filed his second petition, the Arizona Court
8 of Appeals denied review of his first petition. Torrez did not seek review of his first
9 petition in the Arizona Supreme Court. Subsequently, the Arizona Court of Appeals
10 denied review of Torrez's second petition. On February 21, 2007, the Arizona Supreme
11 Court also denied review of his second petition. Torrez filed his federal petition for a writ
12 of habeas corpus on May 10, 2008.

13 The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") requires a
14 petition for writ of habeas corpus to be filed within one-year of "the date on which the
15 judgment became final by the conclusion of direct review or the expiration of the time for
16 seeking such review." 28 U.S.C. § 2244(d)(1)(A). Torrez's first Rule 32 of-right
17 proceeding was a form of "direct review" within the meaning of AEDPA. *Summers v.*
18 *Schriro*, 481 F.3d 710, 717 (9th Cir. 2007). Direct review of Torrez's conviction was
19 complete and the judgment against him became final on August 12, 2005, when his time
20 to seek review of that petition expired. *See* Ariz. R. Crim. P. 32.9(g), 31.19(a) (providing
21 thirty days to petition the Arizona Supreme Court for review of an appellate court
22 decision entered pursuant to Rule 32).

23 AEDPA's statute of limitations did not begin to run immediately after the
24 judgment became final. Torrez had already filed his second petition, tolling the statute of
25 limitations. 28 U.S.C. § 2244(d)(2). The statute of limitations began to run on February
26 22, 2007, after the Arizona Supreme Court denied review of his second petition. Torrez
27 had one year from that date, until February 22, 2008, to file his federal petition for a writ
28 of habeas corpus. He untimely filed his federal habeas petition on May 10, 2008.

1 Torrez asserts that his two petitions were, in reality, one continued direct challenge
2 to the aggravated sentence imposed upon him. He therefore argues that he had ninety-
3 days to petition the United States Supreme Court for a writ of certiorari after the Arizona
4 Supreme Court denied review of his second petition. If Torrez is correct, his petition was
5 timely because, under *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999), AEDPA's
6 statute of limitations did not begin to run until that ninety-day period expired. For
7 Torrez's assertion to be correct, his second petition must qualify as a form of "direct
8 review" under AEDPA. See *Summers*, 481 F.3d at 717 (applying the holding of *Bowen* to
9 Rule 32 of-right proceedings because such proceedings are a form of direct review under
10 AEDPA).

11 Torrez's second petition invoked Rule 32.1(g) to assert that *Blakely* was a
12 "significant change in the law" that required overturning his sentence. In determining
13 whether Torrez's proceeding under Rule 32.1(g) constituted direct review within the
14 meaning of AEDPA, "the determinative factor is how it functions in the Arizona criminal
15 justice system." *Id.* at 714. For example, a Rule 32 "of-right proceeding" is a form of
16 direct review within the meaning of AEDPA because it is the functional equivalent of a
17 direct appeal for persons who have plead guilty and, as such, must be filed within ninety
18 days of conviction and sentencing by the trial court. *Id.* at 715 (citing Ariz. R. Crim. P.
19 32.4(a)). In contrast, a claim under Rule 32.1(g) does not have to be filed within ninety
20 days of conviction and sentencing. Ariz. R. Crim. P. 32.4(a). Rule 32.1(g) enables a
21 person to attack a final judgment using legal principles declared after the judgement
22 became final. It is therefore not the functional equivalent of a direct appeal, is not
23 governed by "short, definite deadlines," *Summers*, 481 F.3d at 717, and is more akin to a
24 collateral attack on the conviction or sentence than it is to direct review.

25 The posture of Torrez's second petition makes it somewhat awkward to describe it
26 as a collateral attack on the judgment. Torrez filed his second petition while his original
27 Rule 32 of-right proceeding was still pending before the Court of Appeals. Because
28 direct review of his conviction and sentence was still ongoing, the judgment against him

1 was not yet final when he filed his second petition. Torrez’s objective was to attack his
2 sentence under *Blakely*, which announced a new rule of constitutional law. *Schardt v.*
3 *Payne*, 414 F.3d 1025, 1038 (9th Cir. 2005) (“[T]he Supreme Court announced a new rule
4 in *Blakely v. Washington* . . .”). That new rule applies to Torrez’s conviction and
5 sentence because direct review of his case was not complete when the Supreme Court
6 decided *Blakely*. See *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004) (“When a decision
7 of this Court results in a ‘new rule,’ that rule applies to all criminal cases still pending on
8 direct review.”). Torrez’s *Blakely* claim therefore could have been asserted on direct
9 review of his sentence.

10 To do so, Torrez should have moved to amend his original petition to assert a
11 claim under *Blakely*. Ariz. R. Crim. P. 32.6(d) (“After the filing of a post-conviction
12 relief petition, no amendments shall be permitted except by leave of court upon a showing
13 of good cause.”). Because Torrez instead filed notice of a second petition in the trial
14 court, the Court of Appeals was not even aware of his *Blakely* claim at the time it denied
15 review in his original “of-right proceeding.” The judgment against Torrez became final
16 thirty days after the Court of Appeals denied review of his original petition. By asserting
17 his *Blakely* claim in a second petition under Rule 32.1(g), it took the form of a collateral
18 attack on that judgment.

19 Since Torrez’s second petition was a collateral attack, it merely tolled the statute of
20 limitations until the Arizona courts resolved it on February 21, 2007. Accordingly,
21 AEDPA’s statute of limitations began to run on February 22, 2007. Torrez had one year
22 from that date to file his federal habeas petition. Had he done so, he would have been
23 afforded federal review of all of his grounds for relief, including his *Blakely* claim.
24 Torrez filed his federal habeas petition on May 10, 2008, so it is barred by the statute of
25 limitations.


26 With that clarification, the Court accepts the recommended decision of the
27 Magistrate Judge within the meaning of Rule 72(b) of the Federal Rules of Civil
28 Procedure.

1 IT IS THEREFORE ORDERED that Petitioner Gregory Richard Torrez's motion
2 for leave to file untimely objections (doc. # 16) is granted.

3 IT IS FURTHER ORDERED that the report and recommendation of the
4 Magistrate Judge (doc. # 15) is accepted.

5 IT IS FURTHER ORDERED that the Clerk enter judgment denying Petitioner
6 Gregory Richard Torrez's petition for writ of habeas corpus (doc. # 1) and dismissing it
7 with prejudice. The Clerk shall terminate this action.

8 DATED this 25th day of June, 2009.

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12 Neil V. Wake
13 United States District Judge
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