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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Dennis Alan Hipskind,  
10 Petitioner,

11 v.

12 Charles L Ryan, et al.,  
13 Respondents.  
14

No. CV-16-01713-PHX-DGC

**ORDER**

15  
16 Petitioner Dennis Hipskind filed a pro se petition for writ of habeas corpus  
17 pursuant to 28 U.S.C. § 2254. Doc. 1. On March 6, 2018, the Court accepted Magistrate  
18 Judge Michelle H. Burns's report and recommendation (R&R) and denied the petition.  
19 Doc. 27. The Clerk entered judgment accordingly. Doc. 28. Petitioner now moves for  
20 reconsideration under Rule 59 of the Federal Rules of Civil Procedure. Doc. 32. For the  
21 reasons set forth below, the Court will deny the motion.

22 **I. Legal Standard.**

23 Motions for reconsideration are disfavored and are not the place for parties to  
24 make new arguments not raised in their original briefs and arguments. *See Carroll v.*  
25 *Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003). Nor should such motions ask the Court to  
26 rethink what it has already considered. *See United States v. Rezzonico*, 32 F. Supp. 2d  
27 1112, 1116 (D. Ariz. 1998) (citing *Above the Belt, Inc. v. Mel Bohannon Roofing, Inc.*, 99  
28 F.R.D. 99, 101 (E.D. Va. 1983)). Rule 59(e) permits alteration or amendment only if:

1 (1) newly discovered evidence has been presented, (2) the Court committed clear error,  
2 (3) the judgment is manifestly unjust, or (4) there is an intervening change in controlling  
3 law. *See United Nat'l Ins. Co. v. Spectrum Worldwide, Inc.*, 555 F.3d 772, 780 (9th Cir.  
4 2009).

5 **II. The R&R and the Court's Order Accepting It.**

6 Petitioner's § 2254 petition asserted seven grounds for relief (Doc. 1), but the  
7 Court did not reach the merits. Petitioner's claims are both barred by the one-year statute  
8 of limitations under the Anti-Terrorism and Effective Death Penalty Act of 1996  
9 ("AEDPA") and procedurally defaulted. *See Doc. 27.*

10 **III. Petitioner's Rule 59 Arguments.**

11 Petitioner's motion for reconsideration argues that his seven grounds for relief  
12 "have been so minimized as to disguise the real facts not to reveal the actual  
13 constitutional issues." Doc. 32 at 2. But the Court did not reach the substance of  
14 Petitioner's grounds for relief because the claims are time barred. *See Doc. 27* at 4-7; 28  
15 U.S.C. § 2244(d).

16 Petitioner also argues that certain findings are "in error and contrary to the record  
17 or to Arizona law." Doc. 32 at 3. But the findings Petitioner cites appear in the state  
18 court's opinion denying Petitioner's state petition for post-conviction relief. *See Doc. 27*  
19 at 2-3. The Court quoted this opinion solely for background purposes. *Id.* The Court  
20 made no findings regarding the merits of Petitioner's grounds for relief.

21 Petitioner's motion also reargues several of his claims on the merits. *See Doc. 32*  
22 at 9-12. The Court did not consider the substance of the claims in its order accepting the  
23 R&R, and will not consider them in the context of a Rule 59 motion.

24 **A. Statute of Limitations.**

25 With respect to the statute of limitations, Petitioner argues – just as he did in his  
26 objections – that the 28-day period between the Arizona Court of Appeals' issuance of  
27 the initial mandate and Petitioner's filing of a motion to recall the mandate should be  
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1 tolled. Doc. 32 at 3-4; *see also* Doc. 23 at 3. Petitioner has not shown circumstances  
2 warranting reconsideration of this issue.

3 Petitioner concedes that the relevant facts are undisputed and does not assert  
4 newly discovered evidence, an intervening change in law, or manifest injustice. *See*  
5 Doc. 32 at 3-4. He simply repeats his argument that the state appellate court's granting of  
6 Petitioner's motion to recall rendered the initial mandate null and void for purposes of  
7 AEDPA's statute of limitations. *Id.* As explained in the Court's order, the statute of  
8 limitations is tolled only while a state post-conviction proceeding is "pending." Doc. 27  
9 at 6; 28 U.S.C. § 2244(d)(2). After the Arizona Court of Appeals issued its initial  
10 mandate, nothing was pending in Petitioner's post-conviction proceeding until 28 days  
11 later when Petitioner filed a motion to recall the mandate.

12 Petitioner does not cite, and the Court has not found, any case holding otherwise.  
13 Federal courts that have addressed this issue have also found that the limitations period is  
14 not tolled during the time between the expiration of a petitioner's time to appeal and the  
15 filing of a request to file a belated appeal. *See Streu v. Dormire*, 557 F.3d 960, 966 (8th  
16 Cir. 2009) ("We thus agree with the conclusion of several other courts that an application  
17 is not 'pending' between the expiration of the time for appeal and the filing of a petition  
18 for belated appeal.") (citing *McMillan v. Sec'y for Dep't of Corr.*, 257 F. App'x 249, 252  
19 (11th Cir. 2007); *Allen v. Mitchell*, 276 F.3d 183, 186 (4th Cir. 2001); *Melancon v.*  
20 *Kaylo*, 259 F.3d 401, 407 (5th Cir. 2001); *Gibson v. Klinger*, 232 F.3d 799, 807 (10th  
21 Cir. 2000); *Fernandez v. Sternes*, 227 F.3d 977, 979 (7th Cir. 2000)).

22 Petitioner has not shown clear error in the Court's holding that Petitioner's claims  
23 are untimely.

24 **B. Procedural Default.**

25 The Court also held that each of Plaintiff's seven grounds for relief is procedurally  
26 defaulted. Doc. 27 at 7-11. Specifically, Grounds One, Two, and Three were not  
27 presented in Petitioner's direct appeal and were subsequently procedurally barred under  
28 Arizona Rule of Criminal Procedure 32.2(a) in Petitioner's post-conviction-relief

1 proceeding. *Id.* at 8. Grounds Four, Five, and Seven were never presented in state court,  
2 and Petitioner will now be procedurally barred from bringing them under Rule 32.2(a).  
3 *Id.* Ground Six, a claim for ineffective assistance of appellate and post-conviction-  
4 proceeding counsel, was argued for the first time in Petitioner’s reply in support of his  
5 state petition for post-conviction relief, and was not addressed in his subsequent petition  
6 for review with the Arizona Court of Appeals. *Id.* at 9. Thus, this claim was not fairly  
7 presented in state court.

8 Petitioner argues that the Court’s reading of Rule 32.2 is incorrect, asserting:  
9 “There is no language anywhere in Rule 32 that says that if an issue has not been raised  
10 in a direct appeal, it is deemed waived and cannot be raised in post-conviction  
11 proceedings.” Doc. 32 at 14. Rule 32.2(a) states that a “defendant is precluded from  
12 relief under Rule 32 based on any ground: . . . waived at trial, on appeal, or in any  
13 previous collateral proceeding.” Arizona courts apply this rule to preclude a defendant  
14 from raising a claim in a Rule 32 petition where the defendant failed to timely raise it in  
15 prior proceedings. *See Stewart v. Smith*, 46 P.3d 1067, 1070 (Ariz. 2002) (“For most  
16 claims of trial error, the state may simply show that the defendant did not raise the error  
17 at trial, on appeal, or in a previous collateral proceeding, and that would be sufficient to  
18 show that the defendant has waived the claim.”). There is an exception for certain types  
19 of claims enumerated in Rule 32.2(b) and for claims of “sufficient constitutional  
20 magnitude.” *See State v. Espinosa*, 29 P.3d 278, 280 (Ariz. Ct. App. 2001). But as  
21 explained in the Court’s order accepting the R&R, Petitioner’s claims do not fall into the  
22 exception. *See Doc. 27* at 10.

23 If Petitioner were to bring a second Rule 32 petition, Grounds One through Five  
24 and Seven would be deemed waived and thus precluded under Rule 32.2(a)(3) because  
25 Petitioner failed to raise them on direct appeal. Ground Six would also likely be deemed  
26 waived because it was not raised until Petitioner’s reply brief in support of his first  
27 Rule 32 petition, and was not raised in his subsequent petition for review to the court of  
28 appeals. *See State v. Bennett*, 146 P.3d 63, 67 (Ariz. 2006) (“[W]hen ‘ineffective

1 assistance of counsel claims are raised, or could have been raised, in a Rule 32 post-  
2 conviction relief proceeding, subsequent claims of ineffective assistance will be deemed  
3 waived and precluded.”). In any event, the Court cannot hear Petitioner’s claims  
4 because they were not exhausted in state court. *See* 28 U.S.C. § 2254(b)(1)(A);  
5 *O’Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999) (“Before a federal court may grant  
6 habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court.”).

7 Petitioner argues that Grounds Four through Seven were fairly presented in state  
8 court. Doc. 32 at 15. The Court considered and rejected this same argument in its order  
9 accepting the R&R. *See* Doc. 27 at 11. Petitioner identifies no clear error in the Court’s  
10 analysis.

11 **C. Certificate of Appealability.**

12 Petitioner asks the Court to reconsider its decision to deny a certificate of  
13 appealability. Doc. 32 at 6-8. Specifically, Petitioner argues that reasonable minds could  
14 differ as to whether the 28-day period should be tolled because “no case law cited by the  
15 Court requires or authorizes” the Court’s holding. *Id.* at 8. Although there is no binding  
16 precedent requiring the Court’s conclusion on this issue, Petitioner has identified no law  
17 in support of the opposite conclusion. Since the Supreme Court’s decision in *Carey v.*  
18 *Saffold*, 536 U.S. 214 (2002), it appears that every court to address this issue has agreed  
19 that tolling is not available during the time between the expiration of an appeal period  
20 and a request to file a belated appeal. *See supra* Part III(A). The Court therefore does  
21 not find this issue fairly debatable. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000)  
22 (“When the district court denies a habeas petition on procedural grounds without reaching  
23 the prisoner’s underlying constitutional claim, a [certificate of appealability] should issue  
24 when the prisoner shows, at least, that jurists of reason would find it debatable . . .  
25 whether the district court was correct in its procedural ruling.”). Nor could reasonable  
26 minds differ as to Petitioner’s failure to exhaust his claims and resulting procedural  
27 default. The Court will not reconsider its decision to deny a certificate of appealability.

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**IT IS ORDERED** that Petitioner's motion to alter or amend judgment (Doc. 32) is **denied**.

Dated this 19th day of June, 2018.



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David G. Campbell  
United States District Judge