

1 terms of imprisonment for the molestation convictions and consecutive terms of
2 imprisonment for life with no possibility of parole for thirty-five years for the remaining
3 convictions. (Answer, Ex. B.)

4 On December 4, 1997, the Arizona Court of Appeals affirmed all but one of
5 Petitioner's convictions and sentences. (Answer, Ex. G.) Petitioner petitioned for review
6 by the Arizona Supreme Court; the Arizona Supreme Court denied the petition on September
7 24, 1998. (Answer, Ex. H.)

8 On May 13, 1998, Petitioner initiated post-conviction relief proceedings pursuant to
9 Rule 32, Ariz. R. Crim. P., by filing a notice of post-conviction relief ("First Rule 32
10 Proceedings"). (Answer, Ex. I.) He later filed a petition for post conviction relief.¹
11 (Answer, Ex. C.) The trial court denied Petitioner's First Rule 32 Proceedings, and
12 Petitioner petitioned for review by the Arizona Court of Appeals. (*Id.*) On May 18, 2000,
13 the Court of Appeals denied the petition for review. (*Id.*)

14 On December 26, 2008, Petitioner filed a Notice of Post-Conviction Relief ("Second
15 Rule 32 Proceedings"). (Answer, Ex. D.) On January 8, 2009, the trial court denied
16 Petitioner's Second Rule 32 Proceedings. (Answer, Ex. E.) Petitioner petitioned for review
17 by the Arizona Court of Appeals; the Court of Appeals denied the petition on June 3, 2009.
18 (Answer, Exs. A, F.)

19 On June 29, 2009, Petitioner filed a Petition for Writ of Habeas Corpus in federal
20 court, in which he presents three grounds for relief:²

21 Ground 1: Petitioner's Fifth & Fourteenth Amendment rights were violated when he
22 received illegally enhanced multiple sentences;

23 Ground 2: Petitioner's Sixth Amendment rights were violated when (a) his sentence
24 was enhanced by facts neither found by a jury nor admitted by Petitioner; (b) the trial court

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26 ¹ According to the trial court's order denying Petitioner's Second Rule 32 Petition,
27 Petitioner filed his First Rule 32 Petition on February 19, 1999 and the trial court denied it on
November 2, 1999. (Answer, Ex. E.) The First Rule 32 Petition is not included in the record,
nor does the record include the trial court's order denying the First Rule 32 Petition.

28 ² Petitioner's Petition for Writ of Habeas Corpus presents various arguments within each
"Ground for Relief" and is difficult to decipher.

1 sentenced Petitioner based on statements of witnesses whom Petitioner did not have an
2 opportunity to confront; (c) Petitioner received ineffective assistance of counsel; and (d)
3 Petitioner was not properly informed of the nature and cause of the charges against him; and

4 Ground 3: Petitioner's Due Process and Equal Protection rights were violated when
5 he was selectively prosecuted and the state withheld exculpatory evidence.

6 DISCUSSION

7 Federal petitions for writ of habeas corpus filed by state prisoners are governed by a
8 one-year statute of limitations period. *See* 28 U.S.C. § 2244(d)(1). The statute of limitations
9 begins to run from the latest of: (1) the date on which the judgment became final by the
10 conclusion of direct review or the expiration of the time for seeking such review; (2) the date
11 on which the impediment to filing an application created by State action in violation of the
12 Constitution or laws of the United States is removed, if the applicant was prevented from
13 filing by such State action; (3) the date on which the constitutional right asserted was initially
14 recognized by the Supreme Court, if the right has been newly recognized by the Supreme
15 Court and made retroactively applicable to cases on collateral review; or (4) the date on
16 which the factual predicate of the claim or claims presented could have been discovered
17 through the exercise of due diligence. 28 U.S.C. § 2244(d)(1).

18 Of these possible starting dates, only the first, second and third are relevant to the
19 present action. Petitioner does not allege that his Petition is predicated on newly-discovered
20 evidence that could not have been discovered earlier through the exercise of due diligence.

21 The judgment against Petitioner became final on December 23, 1998, 90 days after
22 the Arizona Supreme Court denied Petitioner's petition for review of the Arizona Court of
23 Appeals' decision on appeal. *See Bowen v. Roe*, 188 F.3d 1157 (9th Cir. 1999) (holding that
24 the period within which a petitioner could have sought direct review of his conviction
25 includes the ninety-day period within which petitioner could have filed a petition for a writ
26 of certiorari from the United States Supreme Court); *see also* 28 U. S.C. § 2244(d)(1)(A)
27 (stating that a judgment becomes final at the later of either the conclusion of direct review
28 or the expiration of the time for seeking such review). Under ordinary circumstances, the

1 one- year statute of limitations would have began to run on that date. However, on May 13,
2 1998, before the Arizona Supreme Court denied Petitioner’s petition for review of the Court
3 of Appeals’ decision, Petitioner initiated his First Rule 32 Proceedings. When a properly
4 filed state post-conviction relief request is pending, the proscribed one year statute of
5 limitations may be tolled. *See* 28 U.S.C. § 2244(d)(2). Since Petitioner properly filed his
6 First Rule 32 Proceedings, the one-year statute of limitations was tolled until May 18, 2000,
7 when the Arizona Court of Appeals denied review of the trial court’s denial of Petitioner’s
8 First Rule 32 Proceedings. The statutory period then ran for one year, from May 19, 2000
9 to May 19, 2001, when it expired. *See Patterson v. Stewart*, 251 F.3d 1243, 1246 (9th Cir.
10 2001) (calculating the 1-year period using the “anniversary method” of Rule 6(a), Fed. R.
11 Civ. P.).

12 Petitioner alleges in his Reply, however, that the statute of limitations should not
13 begin to run from the date that his judgment became final because he claims he was impeded
14 by State action in violation of the Constitution or laws of the United States from timely filing
15 his federal Petition. The “state action” that Petitioner alleges, however, is that the title of the
16 AEDPA is confusing and led Petitioner to believe that it only applies to cases involving
17 terrorism and/or the death penalty, not his own criminal proceedings. Section 2244(d)(1)(B)
18 applies only to impediments created by state action that violate the Constitution or laws of
19 the United States. *See* 28 U.S.C. § 2244(d)(1)(B); *Shannon v. Newland*, 410 F.3d 1083, 1088
20 n. 4 (9th Cir.2005). In order “[t]o obtain relief under section 2244(d)(1)(B), the petitioner
21 must show a causal connection between the unlawful impediment and his failure to file a
22 timely habeas petition.” *Bryant v. Arizona Attorney Gen.*, 499 F .3d 1056, 1060 (9th Cir.
23 2007). Petitioner’s lack of understanding of the law is not “unlawful state action” within the
24 meaning of 28 U.S.C. § 2244(d)(1), and is not grounds for statutory tolling.

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1 Petitioner also alleges that his sentence violates *Blakely v. Washington*, 542 U.S. 296
2 (2004).³ *Blakely* was decided on June 24, 2004. *See* 542 U.S. 296 (2004). If *Blakely*
3 recognized a new constitutional right and made that right retroactive to cases on collateral
4 review then, pursuant to 28 U.S.C. § 2244(d)(1), Petitioner's statute of limitations began to
5 run on June 24, 2004. However, *Blakely* does not apply retroactively on collateral review.
6 *See Schardt v. Payne*, 414 F.3d 1025, 1036 (9th Cir. 2005). Accordingly, the statute of
7 limitations began to run on May 19, 2000, the date that Petitioner's conviction became final
8 and was no longer tolled by pending Rule 32 Proceedings, not on the date that the *Blakely*
9 decision was issued.

10 The filing of Petitioner's Second Rule 32 Proceedings does not affect this Court's
11 conclusion that Petitioner's limitations period is expired. It was not filed until December 26,
12 2008, well after the federal statute of limitations had expired. *See Ferguson v. Palmateer*,
13 321 F.3d 820, 823 (9th Cir. 2003) (holding that § 2244(d) does not permit the re-initiation of
14 the limitations period that has ended before the state petition was filed).

15 Equitable tolling may be available even after the statute of limitations period has
16 expired if "extraordinary circumstances beyond a prisoner's control make it impossible to file
17 a petition on time." *Calderon v. United States Dist. Ct. (Beeler)*, 128 F.3d 1283, 1288 (9th
18 Cir. 1997), overruled on other grounds, *Calderon v. United States Dist. Ct.*, 163 F.3d 530
19 (9th Cir. 1998)(en banc). Equitable tolling is unavailable in most cases. *Miranda v. Castro*,
20 292 F.3d 1063, 1066 (9th Cir. 2002) (quoting *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th
21 Cir.1999) and *Beeler*, 128 F.3d at 1288). Petitioner has not argued that he was unable to
22 timely file the pending petition due to extraordinary circumstances beyond his control.

23 The last day of the limitations period was May 19, 2001. The instant petition was
24 filed on June 26, 2009. It is therefore time-barred.

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28 ³ The Court construes Petitioner's claim in Ground 2 that "Petitioner's Sixth Amendment rights were violated when his sentence was enhanced by facts neither found by a jury nor admitted by Petitioner," as a claim brought pursuant to *Blakely*.

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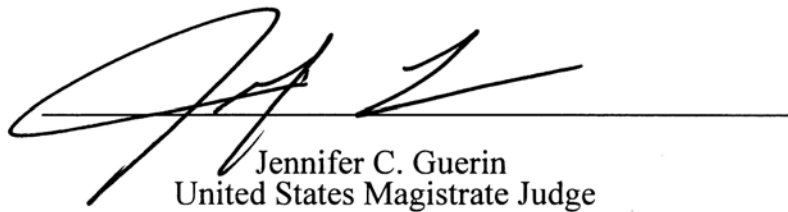
RECOMMENDATION

Based on the foregoing, the Magistrate Judge recommends that the District Court enter an order DISMISSING the Petition for Writ of Habeas Corpus.

Pursuant to 28 U.S.C. §636(b), any party may serve and file written objections within ten days of being served with a copy of the Report and Recommendation. If objections are not timely filed, they may be deemed waived. The parties are advised that any objections filed are to be identified with the following case number: **CV-09-357-TUC-DCB**.

The Clerk is directed to mail a copy of the Report and Recommendation to Petitioner and counsel for Respondents.

DATED this 4th day of November, 2009.


Jennifer C. Guerin
United States Magistrate Judge