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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

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Patrice E. Brown, ) No. CV-07-1363-PHX-GMS (JRI)

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Petitioner, ) **AMENDED ORDER**

11

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v.

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Mark A. Bezy, et al.,

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Respondents.

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Pending before the Court is the Writ of Habeas Corpus of Petitioner, Patrice E. Brown. (Dkt. # 1.) On March 27, 2008, Magistrate Judge Jay R. Irwin issued a Report and Recommendation (“March 27 R & R”) recommending that the Petition be denied. (Dkt. # 15.) Petitioner timely filed objections. (Dkt. # 16.) The matter was remanded back to Judge Irwin for a revised Report and Recommendation addressing Petitioner’s equitable tolling objection. (Dkt. # 17.) On September 15, 2008, Judge Irwin issued a Supplemental Report and Recommendation (“September 15 Supplemental R & R”), again recommending that the Petition be denied. (Dkt. # 23.) Petitioner again filed objections. (Dkt. # 24.) For the reasons below, the Court adopts both the March 27 R & R and the September 15 Supplemental R & R.

1 **BACKGROUND**

2 On November 20, 2000, Petitioner was found guilty of one count of child molestation,  
3 three counts of sexual conduct with a minor, and two counts of sexual abuse. Petitioner was  
4 sentenced to consecutive prison terms totaling seventy-seven years. The March 27 R & R  
5 and September 15 R & R set forth the factual and procedural background of this case, to  
6 which neither party objected. Accordingly, the Court adopts this background as an accurate  
7 recital.  
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10 Petitioner asserts three grounds for relief in his Petition for Writ of Habeas Corpus:  
11 (1) Petitioner’s trial counsel was ineffective in violation of the Fifth, Sixth, and Fourteenth  
12 Amendments; (2) Petitioner’s Fifth, Sixth, and Fourteenth Amendment right to a fair trial  
13 was violated when the prosecutors knowingly used perjured testimony to obtain his  
14 conviction; and (3) Petitioner’s due process rights were violated when he received a harsher  
15 sentence because he stated that he intended to appeal his conviction. (Dkt. # 1.) The  
16 Magistrate Judge recommended that all three grounds be dismissed with prejudice.  
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19 **STANDARD**

20 A “district judge may refer dispositive pretrial motions, and petitions for writ of  
21 habeas corpus, to a magistrate, who shall conduct appropriate proceedings and recommend  
22 dispositions.” *Thomas v. Arn*, 474 U.S. 140, 141 (1985); *see also* 28 U.S.C. § 636(b)(1)(B);  
23 *Estate of Connors v. O’Connor*, 6 F.3d 656, 658 (9th Cir. 1993). Any party “may serve and  
24 file written objections” to the R & R. 28 U.S.C. § 636(b)(1). “A judge of the court shall  
25 make a *de novo* determination of those portions of the report or specified findings or  
26 recommendations to which objection is made.” *Id.* A district judge “may accept, reject, or  
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1 modify, in whole or in part, the findings or recommendations made by the magistrate.” *Id.*

2 **DISCUSSION**

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4 Petitioner’s objections to the March 27 R & R contained only one objection arguing  
5 that he is entitled to equitable tolling to avoid the effect of his delinquent filing. This  
6 objection was considered by the Magistrate Judge in the September 15 Supplemental R &  
7 R. Petitioner’s objections to the September 15 Supplemental R & R again present the same  
8 argument that “he is entitled to equitable tolling for the time after he became aware of the  
9 denial of his ‘lost petition.’” (Dkt. # 24, at 1.) The Magistrate considered this argument:  
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11 Therefore, at best, Petitioner would be entitled to tolling for the  
12 period from the expiration of his review time until he received  
13 notice of the petition’s denial, *i.e.* from July 15, 2006[,] until  
14 October 17, 2006. Or, more generously allowing for  
15 Petitioner’s receipt of that advice, until October 27, 2006[,]  
when he again wrote the Superior Court discussing the  
information from the Court of Appeals.

16 (Dkt. # 23, at 3.) As explained, Petitioner only had approximately eighty-one days left in  
17 which to file his federal habeas petition. Assuming that tolling is proper through October 27,  
18 2006, Petitioner would have needed to file his petition prior to mid-January 2007. The  
19 Petition was filed nearly six months after this time.  
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21 Petitioner maintains that he should be entitled to further equitable tolling based on the  
22 argument that “Petitioner would not have been able to file a Writ of Habeas Corpus with the  
23 Federal Court without transcripts and superior court records.” (*Id.*) The Court, however,  
24 agrees with the analysis of the Magistrate on this matter. (*See* Dkt. # 23, at 4) (“[N]othing in  
25 federal habeas law would require Petitioner to provide copies of his state petition, or proof  
26 of its filing beyond the state court’s ruling, as a prerequisite to filing his federal petition.”);  
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1 *see also* 28 U.S.C. § 2254(f) (“If the applicant, because of indigency or other reason is unable  
2 to produce such part of the record, then the State shall produce such part of the record and  
3 the Federal court shall direct the State to do so by order directed to an appropriate State  
4 official.”). Because equitable tolling only applies “if extraordinary circumstances beyond  
5 a prisoner’s control make it *impossible* to file a petition on time,” *Calderon v. U.S. Dist.*  
6 *Court for the Cent. Dist. Of Cal. (Beeler)*, 128 F.3d 1283, 1288 (9th Cir. 1997), Petitioner  
7 will not be granted tolling for the time he spend attempting to obtain misplaced records.  
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10 **CONCLUSION**

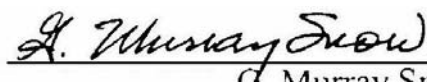
11 Accordingly,

12 **IT IS HEREBY ORDERED** adopting the March 27, 2008, Report and  
13 Recommendation (Dkt. # 15) and the September 15, 2008, Supplemental Report and  
14 Recommendation (Dkt. # 23).  
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16 **IT IS FURTHER ORDERED** denying and dismissing with prejudice Petitioner’s  
17 Petition for Writ of Habeas Corpus (Dkt. # 1).  
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19 **IT IS FURTHER ORDERED** directing the Clerk of the Court to terminate this  
20 action.  
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22 DATED this 22<sup>nd</sup> day of October, 2008.  
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27 G. Murray Snow  
28 United States District Judge