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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Stephen Lewis Smith,

10 Petitioner,

11 v.

12 Charles L. Ryan, et al.,

13 Respondents.
14

No. CV-12-2031-PHX-JAT

ORDER

15 Pending before this Court is Petitioner's Petition for Writ of Habeas Corpus
16 ("Petition"). Magistrate Judge Bade issued a Report and Recommendation ("R&R")
17 recommending that the Petition be denied and dismissed because it is barred by the Anti-
18 Terrorism and Effective Death Penalty Act's ("AEDPA") statute of limitations.

19 **I. Factual Background**

20 The R&R summarized the factual and procedural history and the Petitioner did not
21 object to this history. (Doc. 36 at 2–5; Doc. 43). The Court adopts the R&R's history in
22 this case. For ease of reference, that history is as follows:¹

23 On September 21, 2007, Petitioner pled guilty in the Arizona Superior Court to
24 two counts of attempted sexual exploitation of a minor. (Doc. 20, Ex. A at 13–21, Ex.
25 B). On January 22, 2008, the superior court sentenced Petitioner to a mitigated sentence
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28 ¹ The Magistrate Judge made factual findings concerning the order and timing of
Petitioner's various post-conviction appeals. This Court describes the procedural history
in accord with the Magistrate Judge's findings of fact.

1 of nine year's imprisonment and a consecutive term of lifetime probation. (Doc. 20, Ex.
2 C at 31–34, Ex. D at 2).

3 On October 8, 2008, Petitioner filed a notice of post-conviction relief under
4 Arizona Rule of Criminal Procedure 32 (the “Rule 32 Petition”). (Doc. 20, Exs. F, G).
5 The trial court denied the Rule 32 Petition on February 9, 2009. (Doc. 20, Exs. K, L).
6 The Arizona Court of Appeals denied review of the Rule 32 petition on April 13, 2010.
7 (*See* Doc. 36 at 3).

8 On October 14, 2009, Petitioner filed a second Rule 32 Petition. (Doc. 20, Exs. N,
9 O). The state trial court dismissed the petition on December 8, 2009. (Doc. 20, Ex. P).
10 Petitioner failed to appeal. (*See* Doc. 36 at 4).

11 On January 27, 2010, Petitioner filed a “Motion to Dismiss Case with Prejudice
12 for Trial Court’s Lack of Subject-Matter Jurisdiction from Prosecutorial Misconduct” in
13 the state trial court. (Doc. 20, Ex. R). On November 3, 2010, the trial court construed
14 this as a third Rule 32 Petition and dismissed it as untimely. (Doc. 20, Ex. T). Again,
15 Petitioner did not appeal. (*See* Doc. 36 at 4).

16 On June 9, 2010, Petitioner filed a petition for special action in the Arizona
17 Supreme Court, which was dismissed on September 15, 2010. (Doc. 20, Exs. S, U).
18 Petitioner also filed a petition for writ of habeas corpus in the Arizona Supreme Court,
19 HC-12-008, which was dismissed on September 17, 2012. (Doc.1 at 6–8; Doc. 24 at 3).

20 Finally, on September 25, 2012, the Petitioner filed a Petition for Writ of Habeas
21 Corpus in this Court. (Doc. 1).

22 **II. R&R**

23 On August 16, 2013, the Magistrate Judge issued an R&R recommending that the
24 Petition be denied as barred by the AEDPA’s statute of limitations. (Doc. 36). As
25 explained by the Magistrate Judge, the AEDPA provides a one year statute of limitations
26 for state prisoners to file a petition for writ of habeas corpus in federal court. (*Id.* at 5
27 (citing 28 U.S.C. § 2244(d)(1))). That period generally commences on “the date on
28 which the judgment became final by the conclusion of direct review or the expiration of

1 the time for seeking such review.” (Doc. 36 at 5 (quoting 28 U.S.C. § 2244(d)(1)(A))).
2 Examining Petitioner’s procedural history in state court, the Magistrate Judge concluded
3 that Petitioner’s conviction became final on May 13, 2010, after the Petitioner failed to
4 appeal the Arizona Court of Appeals decision denying his first Rule 32 Petition. (Doc.
5 36 at 6). Thus, the Magistrate Judge determined that the Petition filed over a year later,
6 on September 25, 2012, is untimely absent statutory or equitable tolling. (*Id.*).

7 Starting with statutory tolling, the Magistrate Judge explained that the one-year
8 limitations period is tolled during the time that a “properly filed application for State
9 post-conviction or other collateral review with respect to the pertinent judgment or claim
10 is pending.” (Doc. 36 at 7 (quoting 28 U.S.C. § 2244(d)(2))). Examining each post-
11 conviction proceeding in turn, the Magistrate Judge determined that the AEDPA statute
12 of limitations was not tolled because the various post-convictions proceedings were: (1)
13 concluded before the statute of limitations began to run; (2) filed after the end of the
14 statute of limitations period; or (3) improperly filed. (Doc. 36 at 7–8).

15 Turning to equitable tolling, the Magistrate Judge explained that the Petitioner is
16 entitled to equitable tolling if he shows: “(1) that he has been pursuing his rights
17 diligently, and (2) that some extraordinary circumstance stood in his way.” (*Id.* at 9
18 (quoting *Pace v. Diguglielmo*, 544 U.S. 408, 418 (2005))). The Magistrate Judge
19 determined that the Petitioner failed both prongs of this test because he “did not address
20 whether he diligently pursued his rights” and “nothing in the record suggests
21 extraordinary circumstances.” (Doc. 36 at 9–10).

22 **III. Review of an R&R**

23 This Court “may accept, reject, or modify, in whole or in part, the findings or
24 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). It is “clear that
25 the district judge must review the magistrate judge’s findings and recommendations *de*
26 *novo if objection is made*, but not otherwise.” *United States v. Reyna–Tapia*, 328 F.3d
27 1114, 1121 (9th Cir. 2003) (en banc). District courts are not required to conduct “any
28 review at all . . . of any issue that is not the subject of an objection.” *Thomas v. Arn*, 474

1 U.S. 140, 149 (1985) (emphasis added); *see also* 28 U.S.C. § 636(b)(1) (“the court shall
2 make a *de novo* determination of those portions of the [report and recommendation] to
3 which objection is made.”). In this case, Petitioner filed objections to the R&R, and the
4 Court will review any objections *de novo*.

5 **IV. Request for Appointment of Counsel**

6 There is no constitutional right to counsel on habeas. *Bonin v. Vasquez*, 999 F.2d
7 425 (9th Cir. 1993). Indigent state prisoners applying for habeas corpus relief are not
8 entitled to appointed counsel unless the circumstances indicate that appointed counsel is
9 necessary to prevent due process violations. *Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th
10 Cir. 1986), *cert. denied*, 107 S.Ct. 1911 (1987)

11 The Court has discretion to appoint counsel when a magistrate or the district court
12 determines that the interests of justice so require. *Terrovona v. Kincheloe*, 912 F.2d
13 1176, 1181 (9th Cir. 1990) (quoting 18 U.S.C. § 3006A(a)(2)(B)). In deciding whether to
14 appoint counsel in a habeas proceeding, the district court must evaluate the likelihood of
15 success on the merits as well as the ability of the petitioner to articulate his claims *pro se*
16 in light of the complexity of the legal issues involved. *Weygandt v. Look*, 718 F.2d 952,
17 954 (9th Cir. 1983).

18 In this case, for the reasons stated below, the Court finds that the Petitioner has no
19 likelihood of success on the merits of his Petition. Additionally, the Court finds that the
20 issues in this case are not complex and that the Petitioner has articulated his claims
21 adequately *pro se*. As a result, the Court denies the request for appointment of counsel.

22 **V. The Petitioner’s Objections**

23 The Petitioner does not object to the Magistrate Judge’s application of the
24 AEDPA’s statute of limitations to his procedural history and the Court adopts those
25 recommendations. Instead, the Petitioner objects to the R&R by arguing that the AEDPA
26 statute of limitations does not apply to his case because the state trial court lacked subject
27 matter jurisdiction during his sentencing. (Doc. 43 at 3). In particular, Petitioner argues
28 that the trial court lacked jurisdiction because: (1) the charging documents were time

1 stamped by the clerk’s office approximately two hours after the beginning of his change
2 of plea hearing; and (2) the charging documents failed to charge Petitioner with a valid
3 offense under Arizona law. (*Id.* at 2–3).

4 The Petitioner is correct in recognizing that “equitable exceptions” can apply to
5 the AEDPA’s statute of limitations, such as diligence, extraordinary circumstances, and
6 actual innocence. *Lee v. Lampart*, 653 F.3d 929, 933–34 (9th Cir. 2011) (en banc).
7 However, the Petitioner cites no authority that places the state court’s alleged lack of
8 subject matter jurisdiction among such exceptions. Thus, the Court is unpersuaded by the
9 Petitioner’s arguments that the AEDPA’s statute of limitations does not apply to his case.
10 Accordingly, the Court adopts the Magistrate Judge’s R&R concluding that the Petition is
11 barred by the AEDPA’s statute of limitations.

12 Further, even if Petitioner’s Petition was not barred by the AEDPA statute of
13 limitations, habeas relief would not be available. Specifically, Petitioner’s arguments fail
14 because: (1) this Court cannot review alleged state court errors, such as a state court’s
15 lack of jurisdiction; and (2) Petitioner’s arguments fail on their merits.

16 **A. Habeas Relief is not Available based on State Law Errors**

17 First, under *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991), a federal habeas court
18 cannot reexamine state court determinations of state law questions. When the Arizona
19 Court of Appeals denied Petitioner’s post-conviction relief proceeding, the Arizona Court
20 of Appeals effectively concluded that the state trial court had jurisdiction. *See Reel v.*
21 *Ryan*, CV 12-8084-PCT-JAT, 2013 WL 2284988 at *5 (D. Ariz. May 22, 2013). This
22 Court cannot review the state court’s decision regarding state law. Accordingly, the
23 Court cannot grant habeas relief under a theory that the state court lacked jurisdiction.

24 **B. The Petitioner’s Arguments Fail on their Merits**

25 Next, even if this Court could consider the state trial court’s jurisdiction,
26 Petitioner’s arguments do not establish that state trial court lacked jurisdiction.
27 Petitioner’s first argument relies on an alleged discrepancy between the filing time
28 stamped on his charging documents and the time of his change-of-plea hearing. The

1 change-of-plea hearing transcript, however, shows that the trial court ordered that the
2 charging documents be filed before the Petitioner entered his guilty plea. (Doc. 20, Ex. A
3 at 4). The fact that the state clerk’s office stamped the documents a short time later is
4 immaterial.

5 Petitioner’s second argument, that the charging documents failed to state a valid
6 crime in Arizona, is incorrect under Arizona law. As explained, Petitioner pled guilty to
7 two counts of attempted exploitation of a minor. (See Doc. 14, Ex. 1). The underlying
8 factual basis for his plea was the possession of computer files depicting “a minor under
9 fifteen years of age [who] is engaged in exploitive exhibition or other sexual conduct.”
10 *Id.* Petitioner argues that, under *State v. Hazlett*, 73 P.3d 1258 (Ariz. Ct. App. 2003), the
11 State of Arizona was required to identify a known victim in his computer images.

12 In *Hazlett*, the Arizona Court of Appeals considered whether Arizona’s child
13 pornography statute, A.R.S. § 13-3553, was unconstitutionally overbroad. *Id.* at 1260 ¶
14 1. The Court of Appeals concluded that the statute was not overbroad because the statute
15 only criminalizes the possession of images of “actual children” and not “fictitious
16 person[s].” *Id.* at 1262–63 ¶¶ 11–12. The Court of Appeals did not conclude, however,
17 that the state had to identify the specific identity of the actual child involved. Thus,
18 Petitioner’s reliance on *Hazlett* is misplaced and his argument is unpersuasive.²

19 **VI. The Petitioner’s Request for an Evidentiary Hearing**

20 In his objections to the R&R, the Petitioner requests an evidentiary hearing.
21 Under 28 U.S.C. § 2254(e)(2), a petitioner is entitled to an evidentiary hearing if he
22 presents a “meritorious claim” and he exercised reasonable diligence in developing the
23 factual record in the state proceedings. *Williams v. Taylor*, 529 U.S. 420, 434–37 (2000).
24 A petitioner exercises the diligence necessary to preserve a claim if the petitioner “made
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27 ² The Court also notes that the interpretation of a state statute is a state law
28 question. Thus, the Court is barred from reexamining this issue in a habeas petition
because the state trial court implicitly decided that the charging documents were
sufficient under Arizona law. *Estelle*, 502 U.S. at 67–68.

1 a reasonable attempt, in light of the information available at the time, to investigate and
2 pursue claims in state court.” *Id.* at 435.

3 Thus, in order to qualify for an evidentiary hearing, the Petitioner must both: “(1)
4 allege facts which, if proven, would entitle him to relief, and (2) show that he did not
5 receive a full and fair hearing in a state court, either at the time of the trial or in a
6 collateral proceeding.” *Belmontes v. Brown*, 414 F.3d 1094, 1124 (9th Cir. 2005). No
7 hearing is necessary, however, if this Court “is able to determine without a hearing that
8 the allegations are without credibility or that the allegations if true would not warrant a
9 new trial” *United States v. Navarro–Garcia*, 926 F.2d 818, 822 (9th Cir. 1991); *see*
10 *also Siripongs v. Calderon*, 35 F.3d 1308, 1314 (9th Cir. 1994) (In a capital case, a
11 habeas petitioner who asserts a colorable claim to relief, and who has never been given
12 the opportunity to develop a factual record on that claim, is entitled to an evidentiary
13 hearing in federal court.).

14 In his objections to the R&R, Petitioner fails to offer any specific information on
15 what additional evidence will be revealed by the evidentiary hearing. Thus, the Court
16 finds that Petitioner has not made any allegations that, if true, would warrant habeas
17 relief. Accordingly, the Court denies the Petitioner’s request for an evidentiary hearing.

18 **VII. Conclusion**

19 Based on the foregoing,

20 **IT IS ORDERED** that the Report and Recommendation is accepted and adopted
21 (Doc. 36), the objections are overruled (Doc. 43), the requests for an evidentiary hearing
22 and for appointment of counsel (Doc. 43) are denied; the Petition in this case is denied
23 with prejudice, and the Clerk of the Court shall enter judgment accordingly

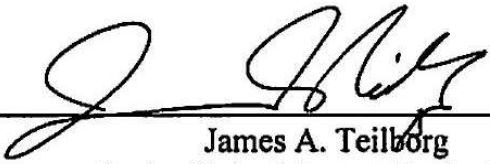
24 **IT IS FURTHER ORDERED** that the Petitioner’s Motion to Expedite Granting
25 of Objections (Doc. 45) is denied.

26 **IT IS FINALLY ORDERED** that Pursuant to Rule 11 of the Rules Governing
27 Section 2554 Cases, in the event the Petitioner files an appeal, the Court denies issuance
28 of a certificate of appealability because dismissal of the petition is based on a plain

1 procedural bar and jurists of reason would not find this Court's procedural ruling
2 debatable. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Further, the Petitioner has
3 not made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. §
4 2253(c)(2).

5 Dated this 12th day of December, 2013.

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James A. Teilborg
Senior United States District Judge