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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Robert William Dutcher,)	
)	CV-08-015-TUC-DCB
Petitioner,)	
v.)	
)	
Robert Stewart, et al.,)	ORDER
)	
Respondents.)	
)	
_____)	

This matter was referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b) and the local rules of practice of this Court for a Report and Recommendation (R&R) on the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. Before the Court is the Magistrate Judge’s Report and Recommendation, which recommends that the Petition be denied and dismissed. The Petitioner filed Objections to Report and Recommendation and the Respondents filed a Response to Objections.

PETITIONER’S OBJECTIONS

Petitioner objects to the Report and Recommendation because: (1) “There is nothing in the controlling statute setting forth the period of time in which a person in custody in a state court is required to file for post-conviction relief”, (Objections at 2); and (2) “Although not previously put before this Honorable Court, Petitioner was mentally unable to pursue relief in any court...Petitioner now asserts that his

1 mental health coupled with the lack of reference materials and inability
2 to obtain his legal file demonstrate adequate diligence and extraordinary
3 circumstances to permit equitable tolling." (Objections at 4-5.)

4 STANDARD OF REVIEW

5 When objection is made to the findings and recommendation of a
6 magistrate judge, the district court must conduct a de novo review.
7 *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003).

8 DISCUSSION

9 Petitioner must file a federal habeas petition in a district court
10 within 1 year of the conviction's finality, and not a single day of that
11 1-year period will be deemed to have run during any period in which a
12 properly filed application for State post-conviction relief remained
13 "pending" in State court under § 2244(d)(2). See *Duncan v. Walker*, 533
14 U.S. 167, 172-74 (2001). That Petitioner timely applied for State post-
15 conviction relief after the federal limitations period ended cannot
16 transform that limitations period into something that unfairly closes the
17 federal courthouse doors. *Ferguson v. Palmateer*, 321 F.3d 820 (9th Cir.
18 2003). Petitioner's objection contradicts the explicit language of §
19 2244(d)(2) that tolls the federal 1-year limitations period for a
20 properly filed post-conviction petition that is "pending" during the
21 federal limitations period. That Petitioner properly and timely filed his
22 post-conviction petition after the federal limitations period expired
23 means that the federal limitations period did, in fact, expire. See
24 *Ferguson*, 321 F.3d at 823. This objection is meritless.

25 The documentation attached to the Objections does not account for
26 the period of time in which Petitioner seeks equitable tolling (April 24,
27 1997 through May 3, 2004). In addition, a review of the entire record

1 before the Court belies the assertions of mental health issues and
2 inability to obtain records. Petitioner has not satisfied his burden to
3 prove equitable tolling.

4 **CONCLUSION**

5 Accordingly, after conducting a de novo review of the record,

6 **IT IS ORDERED** that the Court **ADOPTS** the Report and Recommendation
7 (Doc. No. 18) in its entirety. The Objections raised by the Petitioner
8 are **OVERRULED**.

9 **IT IS FURTHER ORDERED** that the Petition for Writ of Habeas Corpus
10 is **DENIED** and this action is **DISMISSED** with prejudice. Final Judgment
11 to enter separately. This action is closed.

12 DATED this 6th day of July, 2009.

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17 David C. Bury
18 United States District Judge
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