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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ERNEST J. BROOKS, III,

Petitioner,

v.

KEN CLARK, Warden,

Respondent.

CASE NO. 08 cv 0125 JM (BLM)

**ORDER ADOPTING REPORT
AND RECOMMENDATION AS
MODIFIED AND DENYING
PETITION FOR WRIT OF
HABEAS CORPUS**

Doc. No. 15

Ernest J. Brooks, III (“Petitioner”), a state prisoner proceeding *pro se* and *in forma pauperis*, filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 in January 2008. Petitioner challenges the state court sexual molestation convictions for which he is incarcerated, arguing the trial court violated his right to a fair trial by improperly admitting evidence of prior, similar acts. (Doc. No. 1 at 6-23.) Respondent, warden of the detention facility where Petitioner is incarcerated, filed a response (Doc. No. 9) and Petitioner filed a traverse (Doc. No. 14).

On November 12, 2008, Magistrate Judge Barbara L. Major issued a Report and Recommendations (“R&R”) in which she advised the court to deny Petitioner’s § 2254 petition as well as his requests for an evidentiary hearing and appointment of counsel. (Doc. No. 15.) Petitioner was granted several extensions of time in which to file his objections and did so on March 2, 2009, *nunc pro tunc*. (Doc. No. 28.)

Having carefully considered the thorough and thoughtful R&R, the record before the court,

1 Petitioner’s objections, and the applicable authorities, the court **ADOPTS** the R&R **AS MODIFIED**
2 **HEREIN.**

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4 **I. BACKGROUND**

5 The court reviews a magistrate judge’s R&R according to the standards set forth in Federal
6 Rule of Civil Procedure 72(b) and 28 U.S.C. § 636. The court “shall make a de novo determination
7 of those portions of the report . . . to which objection is made. A judge of the court may accept, reject,
8 or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28
9 U.S.C. § 636(b)(1); United States v. Raddatz, 447 U.S. 667, 673-74 (1980).

10 The court hereby incorporates by reference the Factual and Procedural Background presented
11 in the R&R with two clarifications. (Doc. No. 15 at 2-4.) The R&R cites January 1, 2007 as the date
12 the California Supreme Court denied Petitioner’s habeas petition, but the ruling issued on January 17,
13 2007. (Lodg. 12.) In addition, while Petitioner’s federal petition was received by the court on January
14 22, 2008, as discussed below, it appears to have been filed on January 17, 2008. (Doc. No. 1 at 12.)

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16 **II. DISCUSSION**

17 **A. Statute of Limitations**

18 The R&R concludes the instant petition is time-barred by the AEDPA’s one-year statute of
19 limitations. See 28 U.S.C. § 2244(d). In particular, the R&R finds 386 days lapsed between the
20 conclusion of Petitioner’s state proceedings and the filing of his federal petition. (R&R at 7.) Further,
21 even with statutory tolling during Petitioner’s state court efforts, the R&R determines Petitioner’s
22 lengthy delays between successive state court filings were presumptively unreasonable and added
23 another 301 days to the elapsed time. (R&R at 9.) Finally, the R&R finds Petitioner is not entitled
24 to equitable tolling. (R&R at 10.) Based on the analysis in the R&R, Petitioner exceeded the statute
25 of limitations by 322 days.

26 As mentioned above, the final state court decision in Petitioner’s case actually issued on
27 January 17, 2007. While the R&R notes the federal petition was filed January 22, 2008, Petitioner
28 may be entitled to an earlier filing date based on the “prison mailbox rule.” Houston v. Lack, 487 U.S.

1 266, 276 (1988); Saffold v. Newland, 250 F.3d 1262, 1268 (9th Cir. 2000), cert. granted, 534 U.S. 971
2 (2001)(holding the prison mailbox rule applies to prisoners filing habeas petitions in both federal and
3 state courts). In his petition, signed under penalty of perjury, Petitioner asserts he mailed the petition
4 to this court (or handed it to a corrections officer for that purpose) on January 17, 2008. (Doc. No.
5 1 at 12.) Absent evidence to the contrary, the court adopts January 17, 2008 as the operative filing
6 date. Houston, 487 U.S. at 276 (holding a prisoner’s notice of appeal is deemed “filed at the time [he]
7 deliver[s] it to the prison authorities for forwarding to the court clerk”). Therefore, the elapsed time
8 between the final state court denial and Petitioner’s federal habeas filing was 365 days. The court
9 hereby adopts the conclusions of the R&R with respect to the calculation of statutory tolling. (R&R
10 at 9.) On this analysis, the court finds Petitioner exceeded the allowed statute of limitations by 301
11 days rather than 321 days.

12 To satisfy the AEDPA statute of limitations, then, Petitioner must show he is entitled to
13 equitable tolling for at least 301 days. Petitioner was put on notice of the statute of limitations issue,
14 both by the court at the outset of this case (Doc. No. 2) and by Respondent in addressing the petition’s
15 merits (Doc. No. 9 at 4 n.3). Petitioner made no attempt to explain the delays until he filed objections
16 to the R&R. Petitioner now argues he is entitled to equitable tolling for the lengthy delays between
17 each step in his state court habeas process and between his final state court denial and his federal
18 filing. (Doc. No. 28 at 4-7.) The court generally does not address factual arguments presented for the
19 first time in objections, but may do so under unusual circumstances. Brown v. Roe, 279 F.3d 742 (9th
20 Cir. 2002)(abuse of discretion for court not to consider equitable tolling argument raised for first time
21 in objections to R&R where pro se prisoner was illiterate and raising relatively novel claim under
22 relatively new statute). While the present circumstances do not rise to the level as in Brown, the court
23 evaluates Petitioner’s equitable tolling plea and finds it unpersuasive.

24 The court reiterates, equitable tolling is “unavailable in most cases,” Miles v. Prunty, 187 F.3d
25 1104, 1107 (9th Cir. 1999), but is appropriate where a habeas petitioner demonstrates “he has been
26 pursuing his rights diligently, and...some extraordinary circumstance stood in his way.” Pace v.
27 DiGuglielmo, 544 U.S. 408, 418 (2005). Furthermore, Petitioner must show the “extraordinary
28 circumstances” he has identified, rather than merely a lack of diligence on his part, were the proximate

1 cause of his untimeliness. Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003); Stillman v.
2 LaMarque, 319 F.3d 1199, 1203 (9th Cir. 2003).

3 Petitioner argues the delay in filing his habeas petition to the state appellate court (June 4, 2004
4 to June 3, 2005) was caused by the difficulties he faced obtaining school records addressing the
5 credibility of one victim and declarations from other witnesses who were not called by his trial
6 counsel. (Doc. No. 28 at 4.) Petitioner also contends his appellate attorney took seven months to
7 return documentation related to Petitioner’s ineffective assistance of counsel claim. (Id. at 5.)

8 Petitioner next addresses the delay between the appellate court denial on July 15, 2005 and
9 Petitioner’s submission to the California Supreme Court on May 8, 2006. Petitioner alleges between
10 August and October, 2005, he submitted a “habeas corpus petition” to the state supreme court which
11 was “lost” by prison officials.¹ (Id. at 5-6.) Thereafter, Petitioner purchased federal habeas books to
12 assist him in preparing and filing his petitions. (Id. at 5.) Further, Petitioner alleges he was placed
13 in administrative segregation (“Ad-Seg”) for more than five months beginning January 22, 2006,
14 based on allegations he was possessing and distributing drugs in prison. (Id. at 5-6.) Petitioner’s legal
15 materials were confiscated and after 30 days, a small portion of those materials were returned to him.
16 (Id. at 6.) Petitioner remained in Ad-Seg for more than five months and during that time, on January
17 27, 2006, he suffered a stroke which left him paralyzed on his left side for approximately nine months.
18 (Id. at 6.) Even after Petitioner’s release from Ad-Seg, his complete legal materials were not returned
19 despite his continued requests. (Id.) Finally, Petitioner avers the delay was caused by time spent
20 obtaining corporate documents through the Freedom of Information Act. (Id.)

21 To explain the delay between the end of Petitioner’s state court proceedings and the filing of
22 his habeas petition in federal court, Petitioner offers that, in May 2007, all federal law books at his
23 facility law library were removed and replaced with legal research computers. (Id. at 7.) Petitioner
24 contends the library staff did not know how to use the computers, and the databases were not updated
25 with current cases. (Id.) Moreover, the library did not have staff trained to assist prisoners,
26 particularly those with developmental and/or physical disabilities. As a result, Petitioner contends he

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28 ¹In fact, this submission appears to have been an untimely petition for review. It was rejected
by the state supreme court for lack of jurisdiction and therefore does not confer any statutory tolling
benefit on Petitioner. (Id.)

1 was unable to locate and research “appropriate points and authorities, in which to support his
2 arguments....” (Id.)

3 In light of the high standard in proving entitlement to equitable tolling, the court generally
4 finds Petitioner’s allegations unpersuasive. Petitioner ascribes the delays at several junctures to his
5 inability to secure or recover various documents, none of which appear to have any relevance to the
6 single evidentiary claim he presents to this court. Thus, these facts do not constitute “extraordinary
7 circumstances” sufficient to explain the delay in filing his federal petition. Other courts have
8 concluded placement in administrative segregation, difficulty in gaining library access, prison
9 lockdowns, and lack of legal training fail to make the grade. See Miller v. Marr, 141 F.3d 976, 978
10 (10th Cir.), cert. denied, 119 S.Ct. 210 (1998) (limited library access); Hizbullahankhamon v. Walker,
11 105 F. Supp. 2d 339, 344-45 (S.D.N.Y. 2000) (solitary confinement), aff’d, 255 F.3d 65, 75 (2d Cir.
12 2001); Atkins v. Harris, No. C 98-3188, 1999 WL 13719 at *2 (N.D. Cal. Jan. 7, 1999) (lockdowns,
13 limited library access, lack of legal training). Prisoners must take such restrictions into account when
14 calculating when to file a federal petition.

15 While denial of access to one’s legal file during Ad-Seg may qualify as an “extraordinary
16 circumstance,” Petitioner has not credibly shown the denial was the proximate cause of his lengthy
17 delay in filing his state supreme court petition. See Espinoza-Matthews v. California, 432 F.3d 1021,
18 1027-28 (concluding equitable tolling was warranted where prisoner, who had been placed in Ad-Seg
19 for his own protection, was denied access to his legal file for nearly the entire statutory period).
20 According to the timeline set forth in Petitioner’s objections, restricted access to his legal file could
21 not have presented too great an impediment because he filed his state supreme court petition during
22 the lockdown period. Similarly, while Petitioner suffered temporary paralysis following a stroke in
23 January 2006, any suggestion the delays resulted from these health issues is undermined by the filing
24 of his state habeas petition less than four months later. See Gaston v. Palmer, 417 F.3d 1030 (9th Cir.
25 2005) (physical and mental disabilities did not provide for equitable tolling because they did not
26 prevent the prisoner from meeting other filing deadlines). Even if the court were to find equitable
27 tolling appropriate for the January to May 2006 timeframe, Petitioner would still have exceeded the
28 statute of limitations by more than six months.

1 Any deficiencies in the law library's substantive resources in 2007 did not pose an
2 "extraordinary circumstance" and were not the proximate cause of Petitioner's tardy federal filing.
3 Petitioner's sole federal claim was presented during the state appeals process in documents prepared
4 by his appointed appellate attorney. (Lodgs. 3, 7.) His federal evidentiary claim does not rely on any
5 new rule of constitutional law or interpretation thereof. Furthermore, the pleading standards for a
6 habeas petition are exceedingly low, requiring only that the petition specify the grounds for relief, the
7 facts in support, and the relief requested. See Rule 2(c), Rules Governing § 2254 Cases, 28 U.S.C.
8 foll. § 2254. Under this standard, Petitioner was not required to support factual assertions with any
9 legal authority or otherwise submit a fully-researched petition. All Petitioner needed to do to file his
10 federal petition was to reformat the claim from the state court documents and mail it to the court.
11 Finally, Petitioner alleges the lack of staff trained to assist disabled prisoners prevented him from
12 filing his federal petition expeditiously. As discussed above, this contention is undercut by
13 Petitioner's state habeas filing in May 2006.

14 In sum, as concluded in the R&R, Petitioner is not entitled to equitable tolling, and his petition
15 is time-barred by the AEDPA statute of limitations.

16 **B. Evidentiary Claim**

17 Magistrate Judge Major determined Petitioner failed to present a federal question in his
18 petition and, even if the court were to construe allegations of a federal constitutional violation,
19 Petitioner's claim fails. (Doc. No. 15 at 15.) In his objections, Petitioner concedes he did not
20 expressly invoke federal constitutional law, but argues the petition clearly states a claim for violation
21 of his rights to a fair trial and due process under the Sixth and Fourteenth Amendments. (Doc. No.
22 28 at 7.) As to the substance of the claims, Petitioner's objections reiterate arguments he has
23 presented previously.

24 The court wholly agrees with the conclusions of the R&R. To the extent Petitioner's claims
25 rely on violations of California law, this court has no jurisdiction to entertain them. On the federal
26 constitutional front, admission of prejudicial prior act evidence only amounts to a due process
27 violation if "there are *no* permissible inferences the jury may draw from the evidence," and even then,
28 the "evidence must be of such quality as necessarily prevents a fair trial." Jammal v. Van de Kamp,

1 926 F.2d 918, 920 (9th Cir. 1991) (citation and quotation omitted) (emphasis in original). The
2 California Court of Appeal appropriately determined there “was minimal potential for undue
3 prejudicial effect” because of the similarities between the conduct charged and revealed through the
4 prior acts evidence. (Lodg. 6.) Further, even if the evidence was improperly admitted, the evidence
5 at issue did not alter the outcome of the case. (Id.) In a thorough analysis of the impact of the
6 evidence in light of the record as a whole, the R&R properly concludes admission of the evidence did
7 not violate Petitioner’s constitutional rights.

8 **C. Evidentiary Hearing**

9 Under 28 U.S.C. § 2254(e)(2), a petitioner can only receive an evidentiary hearing upon a
10 showing (A) the claim relies on a new rule of constitutional law or facts “that could not have been
11 previously discovered through the exercise of due diligence,” and (B) “the facts underlying the claim
12 would be sufficient to establish by clear and convincing evidence that but for constitutional error, no
13 reasonable factfinder would have found the applicant guilty of the underlying offense.” 28 U.S.C. §
14 2254(e)(2). Petitioner has failed to satisfy either of these requirements. In the context of equitable
15 tolling, a district court must conduct an evidentiary hearing to evaluate allegations which, if true,
16 would support such tolling. Whalem/Hunt v. Early, 233 F.3d 1146 (9th Cir. 2000) (en banc).
17 However, as discussed above, even assuming Petitioner’s factual contentions are true, he is not
18 entitled to equitable tolling, and an evidentiary hearing is therefore unnecessary.

19 For these reasons, as well as those presented in the R&R, Petitioner’s request for an
20 evidentiary hearing is **DENIED**.

21 **D. Appointment of Counsel**

22 As discussed in the R&R, Petitioner fails to demonstrate “exceptional circumstances” warrant
23 appointment of counsel to assist him in this case. Petitioner’s request for appointment of counsel is
24 therefore **DENIED**.

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3 **III. Conclusion**

4 For the reasons set forth above, the court **ADOPTS** the R&R in **AS MODIFIED HEREIN**.
5 (Doc. No. 15.) Accordingly, the court **DENIES** the petition for writ of habeas corpus (Doc. No. 1),
6 **DENIES** the request for an evidentiary hearing, and **DENIES** the request for appointment of counsel.
7 Further, the court **DISMISSES** all allegations made against California Attorney General Edmund G.
8 Brown, who was improperly named as a respondent. (See Doc. No. 15 at 2 n. 1.) The Clerk of Court
9 is instructed to close the case file.

10 **IT IS SO ORDERED.**

11 DATED: April 3, 2009

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13 _____
14 Hon. Jeffrey T. Miller
15 United States District Judge

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