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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DARREN LEE WHITNEY,)	Civil No. 08cv2195 LAB(RBB)
)	
Petitioner,)	REPORT AND RECOMMENDATION
)	GRANTING RESPONDENT'S MOTION
v.)	TO DISMISS [DOC. NO. 11] AND
)	ORDER DENYING REQUEST FOR
A. HEDGPETH, Warden,)	EVIDENTIARY HEARING
)	
Respondent.)	
_____)	

Petitioner Darren Whitney, a prisoner proceeding pro se and in forma pauperis, filed his Petition for Writ of Habeas Corpus on November 24, 2008, pursuant to 28 U.S.C. § 2254 [doc. no. 1]. Petitioner claims he is entitled to habeas relief for the following reasons: (1) The trial court erred in admitting his codefendant's prior conviction; (2) Whitney received ineffective assistance of trial counsel; (3) the trial judge erred by imposing enhancements at sentencing; (4) Petitioner received ineffective assistance of appellate counsel; (5) his sentences for counts three and four

1 should have been stayed; and (6) there were errors in his re-
2 sentencing brief.¹ (Pet. 7.)

3 On February 25, 2009, Respondent Hedgpeth filed a Motion to
4 Dismiss with a Memorandum of Points and Authorities and Lodgments
5 [doc. no. 11]. Respondent argues the Petition should be dismissed
6 because the claims are time barred by the statute of limitations in
7 28 U.S.C. § 2244(d), and although there is some statutory tolling,
8 it is not sufficient to make the Petition timely. (Mot. Dismiss
9 Attach. #1 Mem. P. & A. 5.) Petitioner's Opposition Motion to
10 Respondent's Request to Dismiss was filed nunc pro tunc to March
11 30, 2009 [doc. nos. 15, 17].

12 I. FACTUAL BACKGROUND

13 On January 14, 2003, a jury convicted Whitney of two counts of
14 robbery and two counts of assault with a firearm, and found that
15 multiple enhancement allegations were true. (Pet. 20.) On April
16 16, 2003, he was sentenced to a total of forty-five years to life
17 on count one. (Id. at 20-21.) He received the same sentence for
18 the remaining robbery and two assault convictions, but the
19 sentences were concurrent. (Id. at 21.) Whitney appealed his
20 conviction, and on December 13, 2004, the California Court of
21 Appeal affirmed the convictions but held that the trial court erred
22 in not striking section 12022.5 sentencing enhancements and
23 violated Whitney's rights under Blakely v. Washington, 542 U.S. 296
24 (2004). (Pet. 21-22, 70.) The appellate court concluded that the
25 trial court "committed Blakely error by imposing upper term
26 enhancements with respect to counts 3 and 4 on the basis of facts

27
28 ¹ Because Whitney's Petition is not consecutively paginated,
the Court will use the page numbers assigned by the electronic case
filing system.

1 not found by the jury beyond a reasonable doubt." (Id. Ex. 1,
2 People v. Gains, Case No. D042073, slip op. at 4 (Cal. Ct. App.
3 Dec. 13, 2004). The court remanded Petitioner to the trial court
4 for resentencing. (Id.) "On remand, the court corrected the
5 errors and again imposed the 45-year term." (Lodgment No. 1,
6 People v. Whitney, No. D046443, slip op. at 4 (Cal. Ct. App. Sept.
7 14, 2005).)

8 **II. PROCEDURAL BACKGROUND**

9 After resentencing, Whitney filed his second appeal. His
10 appointed counsel did not raise any issues; instead, he provided a
11 summary of the proceedings and facts with citations to the
12 transcript pursuant to People v. Wende, 25 Cal. 3d 436, 600 P.2d
13 1071, 158 Cal. Rptr. 839 (1979), and Anders v. California, 386 U.S.
14 738 (1967). (Pet. Attach. #1 (Ex. J at 1, Appellant's Opening Br.,
15 Whitney v. People, No. D046443).) Whitney filed two supplemental
16 briefs on his own behalf. (Mot. Dismiss Attach. #1 Mem. P. & A.
17 3.)

18 On September 14, 2005, the California Court of Appeal affirmed
19 Whitney's conviction and resentencing. (Lodgment No. 1, People v.
20 Whitney, No. D046443, slip op. at 4-5; see Pet. 2.) Although
21 Whitney states that he filed a petition for review with the
22 California Supreme Court that was denied on July 11, 2007, it
23 appears that he filed a petition for habeas corpus relief.
24 (Compare Pet. 2-4, with Lodgment No. 2, In re Whitney, No S146087,
25 and Lodgment No. 3, In re Whitney, No. S146087, slip op. at 1.)
26 His habeas corpus petition was submitted to the California Supreme
27 Court on August 18, 2006, over eleven months after his conviction
28 was affirmed. (Lodgment No. 2, In re Whitney, No. S146087.) On

1 July 11, 2007, the California Supreme Court summarily denied the
2 habeas petition. (Lodgment No. 3, In re Whitney, No. S146087, slip
3 op. at 1.)

4 On August 10, 2007, Whitney timely filed a federal Petition
5 for Writ of Habeas Corpus. Whitney v. Hedopeth, Case No. 07cv1592
6 LAB (PLC) (S.D. Cal. filed Aug. 10, 2007) (petition for habeas
7 corpus).² The petition was dismissed without prejudice on
8 September 6, 2007, due to Whitney's failure to use the proper form.
9 Whitney v. Hedopeth, Case No. 07cv1592 LAB (PLC) (S.D. Cal. Sept.
10 6, 2007) (amended order dismissing petition without prejudice). He
11 filed a First Amended Petition that was also dismissed without
12 prejudice on September 28, 2007, for failure to name the proper
13 respondent and failure to allege exhaustion of state judicial
14 remedies. Whitney v. Hedopeth, Case No. 07cv1592 LAB (PLC) (S.D.
15 Cal. Sept. 28, 2007) (order dismissing amended petition at 2-4).
16 Whitney was given until November 16, 2007, to file a second amended
17 petition that cured the pleading deficiencies. He did not file an
18 amended petition by the deadline. Instead, Whitney filed his
19 Petition for Writ of Habeas Corpus on November 24, 2008, over a
20 year later and sixteen months after the state supreme court denied
21 his last state petition [doc. no. 1].

22 III. STANDARD OF REVIEW

23 Whitney is subject to the Antiterrorism and Effective Death
24 Penalty Act (AEDPA) of 1996 because he filed his Petition after
25

26
27 ² In that petition, Whitney named the respondent as Warden
28 Hedopeth, and the Court's docket identifies the case as Whitney v.
Hedopeth, Case No. 07cv1592 LAB (PCL). The respondent's actual
name appears to be Hedgpeth, and some subsequent court orders
identify the respondent as Warden Hedgpeth.

1 April 24, 1996. 28 U.S.C.A. § 2244 (West 2006). AEDPA sets forth
2 the scope of review for federal habeas corpus claims:

3 The Supreme Court, a Justice thereof, a circuit
4 judge, or a district court shall entertain an application
5 for a writ of habeas corpus in behalf of a person in
6 custody pursuant to the judgment of a State court only on
7 the ground that he is in custody in violation of the
8 Constitution or laws or treaties of the United States.

9 28 U.S.C.A. § 2254(a) (West 2006); see also Hernandez v. Ylst, 930
10 F.2d 714, 719 (9th Cir. 1991).

11 To present a cognizable federal habeas corpus claim, a state
12 prisoner must allege that his conviction was obtained "in violation
13 of the Constitution or laws or treaties of the United States." See
14 28 U.S.C.A. § 2254(a). Petitioner must allege that the state court
15 violated his federal constitutional rights. See Reed v. Farley,
16 512 U.S. 339, 347 (1994); Hernandez, 930 F.2d at 719; Jackson v.
17 Ylst, 921 F.2d 882, 885 (9th Cir. 1990).

18 In 1996, Congress "worked substantial changes to the law of
19 habeas corpus." Moore v. Calderon, 108 F.3d 261, 263 (9th Cir.
20 1997) (abrogated on other grounds by Williams v. Taylor, 529 U.S.
21 362 (2000)). Amended § 2254(d) now reads:

22 An application for a writ of habeas corpus on behalf
23 of a person in custody pursuant to the judgment of a
24 State court shall not be granted with respect to any
25 claim that was adjudicated on the merits in State court
26 proceedings unless the adjudication of the claim --

27 (1) resulted in a decision that was
28 contrary to, or involved an unreasonable
29 application of, clearly established Federal
30 law, as determined by the Supreme Court of the
31 United States; or

32 (2) resulted in a decision that was based
33 on an unreasonable determination of the facts
34 in light of the evidence presented in the State
35 court proceeding.

36 28 U.S.C.A. § 2254(d).

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IV. DISCUSSION

A. The One-Year Statute of Limitations

The statute of limitations for habeas corpus petitions is set forth in AEDPA. As amended by AEDPA, 28 U.S.C. § 2244(d) provides:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date one which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C.A. § 2244(d)(1). Petitioner has not asserted that subsections (B)-(D) of § 2244(d)(1) apply to his case, so § 2244(d)(1)(A) provides the applicable standard for determining when the limitations period began to run.

Petitioner timely appealed his conviction to the California Court of Appeal, and on September 14, 2005, the court affirmed his conviction and resentencing. (Lodgment No. 1, People v. Whitney, No. D046443, slip op. at 3-4.) Whitney did not file a petition for review in the California Supreme Court. (See Pet. 2-3, 164, 166; Mot. Dismiss Attach. #1 Mem. P. & A. 3.) Consequently, his conviction became final thirty days after the court of appeal's

1 decision. Cal. R. Ct. 8.366(b)(1). Whitney could have filed a
2 petition for review in the state supreme court within ten days of
3 the appellate decision becoming final, but he did not. See Cal. R.
4 Ct. 8.500(e)(1); Waldrip v. Hall, 548 F.3d 729, 735 (9th Cir.
5 2008). Accordingly, the statute of limitations for Petitioner's
6 federal habeas corpus claims began to run on October 24, 2005, and,
7 absent statutory or equitable tolling, would have expired on
8 October 23, 2006. See Patterson v. Stewart, 251 F.3d 1243, 1245-46
9 (9th Cir. 2001) (quoting Fed. R. Civ. Pro. 6(a)) (explaining that
10 "[i]n computing any amount of time prescribed or allowed . . . by
11 any applicable statute, the day of the act, event, or default from
12 which the designated period of time runs shall not be included[]").

13 Whitney's first state habeas corpus petition was filed on
14 August 25, 2006, approximately ten months after his conviction
15 became final; the petition was summarily denied by the California
16 Supreme Court on July 11, 2007. (Lodgment No. 2, In re Whitney,
17 No. S146087; Lodgment No. 3, In re Whitney, No. S146087, slip op.
18 1.) The Petition for Writ of Habeas Corpus, which is the subject
19 of the Respondent's Motion to Dismiss, was filed on November 24,
20 2008 [doc. no. 1]. Unless Petitioner is entitled to sufficient
21 statutory or equitable tolling, this action is barred by AEDPA's
22 statute of limitations.

23 **1. Statutory Tolling**

24 Under AEDPA, the statute of limitations is tolled during
25 periods when a petitioner has a properly filed application for
26 collateral review pending in state court. Specifically, 28 U.S.C.
27 § 2244(d)(2) states, "The time during which a properly filed
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1 application for State post-conviction or other collateral review
2 with respect to the pertinent judgment or claim is pending shall
3 not be counted toward any period of limitation under this
4 subsection." 28 U.S.C.A. § 2244(d)(2).

5 In addition, the interval between the disposition of one state
6 petition and the filing of another may be tolled under "interval
7 tolling." Carey v. Saffold, 536 U.S. 214, 223 (2002). "[T]he
8 AEDPA statute of limitations is tolled for 'all of the time during
9 which a state prisoner is attempting, through proper use of state
10 court procedures, to exhaust state court remedies with regard to a
11 particular post-conviction application.'" Nino v. Galaza, 183 F.3d
12 1003, 1006 (9th Cir. 1999) (quoting Barnett v. Lemaster, 167 F.3d
13 1321, 1323 (10th Cir. 1999)); see also Carey, 536 U.S. at 219-22.

14 AEDPA's limitations period is tolled from the time a
15 petitioner's first state habeas petition is filed until state
16 collateral review is concluded, but it is not tolled before the
17 first state collateral challenge is filed. Thorson v. Palmer, 479
18 F.3d 643, 646 (9th Cir. 2007) (citing Nino, 183 F.3d at 1006). A
19 subsequently filed petition for state collateral relief cannot
20 revive an expired statute of limitations. Pace v. DiGuglielmo, 544
21 U.S. 408, 417 (2005); see also Jiminez v. Rice, 276 F.3d 478, 482
22 (9th Cir. 2001); Green v. White, 223 F.3d 1001, 1003 (9th Cir.
23 2000).

24 When Whitney submitted his state habeas corpus petition to the
25 California Supreme Court on August 18, 2006, he had sixty-seven
26 days remaining before the AEDPA statute of limitations expired.
27 While his state petition was pending, the limitations period was
28 tolled. Thorson, 479 F.3d at 646. On July 11, 2007, the

1 California Supreme Court denied Whitney's habeas petition. Thus,
2 he had until September 17, 2007, to file his federal habeas corpus
3 petition. See Fed. R. Civ. P. 6.

4 On August 10, 2007, Whitney timely filed a federal Petition
5 for Writ of Habeas Corpus. Whitney v. Hedopeth, Case No. 07cv1592
6 LAB (PLC) (S.D. Cal. filed Aug. 10, 2007) (petition for habeas
7 corpus). The petition was dismissed without prejudice on September
8 6, 2007. Whitney filed a First Amended Petition that was also
9 dismissed without prejudice on September 28, 2007, for failure to
10 name the proper respondent and failure to allege exhaustion of
11 state judicial remedies. Whitney v. Hedopeth, Case No. 07cv1592
12 LAB (PLC) (order dismissing amended petition at 2-4). Whitney was
13 given until November 16, 2007, to file a second amended petition
14 that cured the pleading deficiencies. He did not file an amended
15 petition by the deadline. Instead, Whitney filed this second
16 action on November 24, 2008 [doc. no. 1]; see also Whitney v.
17 Hedopeth, Case No. 07cv1592 LAB (PLC) (S.D. Cal. Dec. 3, 2008)
18 (order striking second amended petition at 2) (explaining that
19 "[t]he Court has since determined the petition was erroneously
20 filed in this case and that, instead, Petitioner intended to file a
21 new petition[]").

22 "Whether a habeas application is deemed second or successive
23 can be critical because 'AEDPA greatly restricts the power of
24 federal courts to award relief to state prisoners who file second
25 or successive habeas corpus applications.'" United States v.
26 Lopez, 534 F.3d 1027, 1033 (9th Cir. 2009) (quoting Cooper v.
27 Calderon, 274 F.3d 1270, 1272-73 (9th Cir. 2001) (internal
28 quotation marks omitted).

1 Whitney's August 10, 2007, petition does prevent consideration
2 of the Petition in this case because the former was never properly
3 filed and was not decided on the merits. See Thai v. United
4 States, 391 F.3d 491, 495 (2nd Cir. 2004) (citation omitted)
5 (making a distinction between original and second or successive
6 petitions by explaining that "an initial petition that is dismissed
7 without prejudice because it contains curable procedural defects or
8 because it presents unexhausted claims is not a first petition for
9 purposes of §§ 2244 and 2255[]"); Felder v. McVicar, 113 F.3d 696,
10 697 (7th Cir. 1997) (quoting Benton v. Washington, 106 F.3d 162,
11 164-65 (7th Cir. 1996)) (finding that "if the first petition was
12 not accepted (maybe it was returned for nonpayment of the filing
13 fee . . . or it simply was unintelligible), . . . then the second
14 petition is not a successive petition, because the first is a
15 nullity[]".) Whitney's current Petition is not a second or
16 successive petition; consequently, the Court must evaluate whether
17 the statute of limitations bars this proceeding.

18 After Petitioner's state petition was denied by the California
19 Supreme Court on July 11, 2007, Whitney had sixty-seven days to
20 file his federal Petition before the statute of limitations ran.
21 Thirty days later, he filed a petition in Whitney v. Hedopeth, Case
22 No. 07cv01592 LAB (PCL). The petition was dismissed with leave to
23 amend.

24 Whitney is not entitled to statutory tolling between the time
25 his first federal petition was filed and the date he filed the
26 Petition initiating this proceeding. "[T]he filing of a petition
27 for habeas corpus in federal court does not toll the statute of
28 limitations" Rhines v. Weber, 544 U.S. 269, 274-75 (2005)

1 (citing Duncan v. Walker, 533 U.S. 167, 181-82 (2001)). The
2 situation Whitney faced has been addressed before.

3 Petitioner argues he is entitled to tolling because
4 his federal habeas petition was dismissed without
5 prejudice. The limitations period is not statutorily
6 tolled during the pendency of a federal habeas petition
7 that is subsequently dismissed without prejudice. See
8 Grooms v. Johnson, 208 F.3d 488, 489 (5th Cir. 1999).
9 Further, the dismissal without prejudice did not excuse
10 Petitioner from complying with any applicable limitations
11 statutes.

12 Hampton v. Dretke, 2004 U.S. Dist. LEXIS 24017, at **6-7 (N.D. Tex.
13 Nov. 29, 2004); accord Singleton v. Vasquez, 2008 U.S. Dist. LEXIS
14 14000, at *16 (C.D. Cal. Feb. 1, 2008). Although some statutory
15 tolling applies to the period during which Whitney's state
16 petitions were pending, statutory tolling does not apply to his
17 first federal petition. As a result, this Petition was filed over
18 fourteen months past too late.

19 **2. Equitable Tolling**

20 Equitable tolling of the statute of limitations is appropriate
21 when "'extraordinary circumstances beyond a prisoner's control make
22 it impossible'" to file a timely petition. Spitsyn v. Moore, 345
23 F.3d 796, 799 (9th Cir. 2003) (quoting Brambles v. Duncan, 330 F.3d
24 1197, 1202 (9th Cir. 2003)); Stillman v. LaMarque, 319 F.3d 1199,
25 1202 (9th Cir. 2003). "[A] litigant seeking equitable tolling
26 bears the burden of establishing two elements: (1) that he has
27 been pursuing his rights diligently, and (2) that some
28 extraordinary circumstance stood in his way." Pace v. DiGuglielmo,
544 U.S. at 418 (citations omitted); see also Lawrence v. Florida,
549 U.S. 327, 335 (2007); Rouse v. U.S. Dept. of State, 548 F.3d
871, 878-79 (9th Cir. 2008); Espinoza-Matthews v. California, 432
F.3d 1021, 1026 (9th Cir. 2005).

1 F. Supp. 2d 232, 235 (E.D. N.Y. 2002).) Petitioner's ignorance of
2 the legal requirements for satisfying AEDPA's statute of
3 limitations does not justify equitable tolling. Even if Whitney
4 believed his August 10, 2007, petition tolled the statute of
5 limitations, he did not pursue his rights diligently. Although
6 Whitney was instructed to file a second amended petition no later
7 than November 16, 2007, he did not file the current Petition until
8 over a year later on November 24, 2008. Whitney v. Hedgpeth, Case
9 No. 07cv1592 LAB (PLC), slip op. 2-4; see (Pet. 1.)

10 **(B) Whitney's Declaration**

11 Whitney attached a declaration to his Petition, signed on
12 August 3, 2006, in which he explains there was "good cause for the
13 delay" in filing his state habeas corpus petition. (Pet. Attach.
14 #1 Ex. 3, at 43-51.) Petitioner alleges the following
15 circumstances prevented him from filing earlier: (1) He was on
16 lockdown so he was unable to access the law library between August
17 2005 and September 12, 2005; (2) he did not have access to one of
18 his appellate transcripts until October 2005; (3) his appellate
19 counsel did not help him prepare his state habeas corpus petition;
20 and (4) he was a "special Ed student all [his] life[.]" (Id. at
21 48-51.) He did not make similar arguments in his Opposition Motion
22 to Respondent's Request to Dismiss [doc. nos. 15, 17].

23 Whitney's first two explanations for his delay involve events
24 that occurred before his AEDPA statute of limitation began running
25 on October 24, 2005; therefore, they are not relevant to any
26 request for equitable tolling.

27 Whitney's allegation that he was delayed by his appellate
28 counsel's failure to help him prepare a state habeas corpus

1 petition does not justify equitable tolling. See Lawrence v.
2 Florida, 549 U.S. at 337 (explaining that "a State's effort to
3 assist prisoners in postconviction proceedings does not make the
4 State accountable for a prisoner's delay[]"); see also Miranda v.
5 Castro, 292 F.3d 1063, 1068 (9th Cir. 2002) (holding that
6 petitioner has no right to appointed counsel for post-conviction
7 relief).

8 Petitioner's unsupported allegation that he had a learning
9 disability that prevented him from filing sooner does not establish
10 "extraordinary circumstances" justifying equitable tolling.
11 Lawrence v. Florida, 549 U.S. at 337 (finding that petitioner had
12 fallen short of showing "extraordinary circumstances" where
13 petitioner "has made no factual showing of mental incapacity[]");
14 see also Gaston v. Palmer, 417 F.3d 1030, 1034 (9th Cir. 2005)
15 (holding that petitioner had the burden to show a "causal
16 connection" between his self-represented mental disability and a
17 failure to file a timely petition). Furthermore, the chronology
18 outlined above establishes that Whitney was able to file his first
19 federal petition on August 10, 2007. He was not, however, diligent
20 in filing an amended petition, although he was given leave to do
21 so, or in filing a new action. Petitioner is not entitled to
22 equitable tolling.

23 Corjasso v. Ayers, 278 F.3d 874, 878-79 (9th Cir. 2002), cited
24 by Whitney in his Opposition, is consistent with this Court's
25 conclusion that extraordinary circumstances did not prevent Whitney
26 from timely filing his Petition. In Corjasso, the Ninth Circuit
27 held that "[t]he district court's incorrect dismissal [of the
28 original petition], combined with its loss of the body of

1 Corjasso's petition, constitutes an 'extraordinary circumstance' as
2 contemplated by our equitable tolling cases." The circumstances in
3 Whitney's case do not rise to the level of extraordinary.

4 Petitioner has made no other arguments that he has been
5 pursuing his rights diligently but extraordinary circumstances
6 prevented him from timely filing. See Pace, 544 U.S. at 418.
7 Thus, equitable tolling is not appropriate.

8 **B. Evidentiary Hearing**

9 Whitney asks that an evidentiary hearing be held in connection
10 with his request for habeas relief. (Pet. 1.) An evidentiary
11 hearing is not required "when the files and records in the case
12 conclusively show that the prisoner is entitled to no relief."
13 Totten v. Merkle, 137 F.3d 1172, 1176 (9th Cir. 1998) (quoting
14 United States v. Birtle, 792 F.2d 846, 849 (9th Cir. 1986).
15 Furthermore, conclusory allegations that are unsupported by
16 specific facts do not warrant an evidentiary hearing. Williams v.
17 Woodford, 384 F.3d 567, 588 (9th Cir. 2004).

18 Because the record establishes that Whitney's Petition is
19 barred by the one-year statute of limitations, the Court will not
20 conduct an evidentiary hearing.

21 **V. CONCLUSION**

22 Whitney is entitled to statutory tolling during the pendency
23 of his state habeas corpus petition, but he is not entitled to any
24 equitable tolling. Therefore, his second federal Petition was
25 filed after the expiration of the AEDPA statute of limitations.
26 Respondent's Motion to Dismiss the Petition for Writ of Habeas
27 Corpus [doc. no. 11] should be **GRANTED**. The accompanying request
28 for an evidentiary hearing is **DENIED**.

1 This Report and Recommendation will be submitted to the United
2 States District Court judge assigned to this case, pursuant to the
3 provisions of 28 U.S.C. § 636(b)(1). Any party may file written
4 objections with the Court and serve a copy on all parties on or
5 before August 31, 2009. The document should be captioned
6 "Objections to Report and Recommendation." Any reply to the
7 objections shall be served and filed on or before September 14,
8 2009. The parties are advised that failure to file objections
9 within the specified time may waive the right to appeal the
10 district court's order. Martinez v. Ylst, 951 F.2d 1153, 1157 (9th
11 Cir. 1991).

12
13 Dated: July 28, 2009


RUBEN B. BROOKS
United States Magistrate Judge

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15 cc: Judge Burns
All parties of record
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