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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

PATRICK CURTIS JACKSON, )  
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 Petitioner, )  
 )  
 vs. )  
 )  
 DWIGHT NEVENS, *et al.*, )  
 )  
 Respondents. )  
 \_\_\_\_\_ )

2:10-cv-01698-KJD-LRL

**ORDER**

This is a habeas corpus case pursuant to 28 U.S.C. § 2254 in which petitioner, a state prisoner, is proceeding *pro se*. Before the court is respondents' motion to dismiss. (ECF No. 12.) Petitioner has opposed the motion. (ECF No. 15.) There is no reply.

**I. Procedural History and Background**

On March 23, 2006, the State of Nevada filed a criminal complaint in Clark County Justice Court charging petitioner with the following counts: (1) burglary; (2) possession of forged instrument; (3) forgery; and (4) attempt theft. (Mot. to Dismiss Ex. 7, ECF No. 13.) At an arraignment held in the Eighth Judicial District Court for the State of Nevada on June 7, 2006, the parties stated that although they had previously negotiated a guilty plea agreement, and petitioner had waived his right to a

1 preliminary hearing, the State would no longer abide by the negotiated terms of the agreement. (*Id.* Ex.  
2 2.) According to the State, the Deputy District Attorney who entered into negotiations with petitioner  
3 agreed to terms that were in contravention of the office’s policy. (*Id.*) Specifically, the Deputy District  
4 Attorney was not authorized to enter into a guilty plea agreement that dismissed a “ROP case.”<sup>1</sup> (*Id.*)  
5 Because the agreement negotiated with petitioner provided that a “ROP case” pending against him would  
6 be dismissed, the State withdrew its negotiated offer based on the offer’s ineligibility under the office  
7 policy. (*Id.*) Accordingly, the case was remanded to Justice Court for a preliminary hearing. (*Id.*)

8         At a preliminary hearing held August 3, 2006, the Justice Court concluded that reasonable cause  
9 supported the charges against petitioner and bound petitioner over to the District Court on all charges.  
10 (*Id.* Ex. 5.) On October 11, 2006, petitioner entered into a guilty plea agreement with the State in which  
11 he agreed, among other things, to plead guilty to burglary and to be sentenced under the small habitual  
12 criminal statute. (*Id.* Ex. 9.) The parties retained the right to argue for consecutive or concurrent time  
13 between this case and another case at sentencing. (*Id.*) Petitioner entered a guilty plea on November  
14 10, 2006, and appeared before the court on November 29, 2006, for sentencing. (*Id.* Ex. 10, Ex. 11.)  
15 At sentencing, the court adjudicated petitioner a habitual criminal and sentenced him to 84 to 240  
16 months to run concurrent with the sentence from the other case. (*Id.* Ex. 11.) The court entered the  
17 judgment of conviction on December 6, 2006. (*Id.* Ex. 12.) On January 22, 2007, petitioner filed a *pro*  
18 *se* motion for an amended judgment of conviction to include jail time credits. (*Id.* Ex. 13.) The court  
19 denied the motion on April 4, 2007. (*Id.* Ex. 14.) Petitioner did not directly appeal.

20         On November 17, 2007, petitioner, appearing *pro se*, filed a post-conviction petition in state  
21 court. (*Id.* Ex. 15.) Petitioner argued that his counsel was ineffective on various grounds. (*Id.*) The  
22 District Court denied the petition on April 3, 2008. (*Id.* Ex. 19.) Petitioner appealed. (*Id.* Ex. 21.) On  
23 September 3, 2009, the Nevada Supreme Court affirmed the District Court’s decision. (*Id.* Ex. 22.) On  
24 September 25, 2009, petitioner filed a motion for rehearing and/or reconsideration. (*Id.* Ex. 23.) The

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26         <sup>1</sup> The parties do not define the term “ROP.” However, for purposes of this order, the exact  
meaning of the term is not material.

1 court denied the motion on October 21, 2009, and issued remittitur on November 20, 2009. (*Id.* Ex. 24,  
2 Ex. 25.) Petitioner mailed his petition for writ of habeas corpus to this court on September 17, 2010.  
3 (ECF No. 1.)

## 4 **II. Discussion**

5 Respondents argue in their motion to dismiss that the petition must be dismissed as untimely.  
6 In opposition to the motion to dismiss, petitioner argues that the statute of limitations was tolled while  
7 his petition for post-conviction relief was pending in state court, and thus, his petition is timely.  
8 Petitioner contends that a fundamental miscarriage of justice will occur if this court does not rule on the  
9 merits of his petition.

### 10 **A. Limitations**

11 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996  
12 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas corpus filed  
13 after the date of its enactment. *Lindh v. Murphy*, 521 U.S. 320 (1997); *Jeffries v. Wood*, 114 F.3d 1484,  
14 1499 (9th Cir. 1997) (en banc), *cert. denied*, 118 S.Ct. 586 (1997). The instant petition was filed on  
15 September 30, 2010, and thus, it is subject to the provisions of the AEDPA.

16 The AEDPA imposes a one-year period of limitation on petitioners seeking to file a federal  
17 petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As amended, Section 2244, subdivision (d)  
18 reads:

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

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

24 (B) the date on which the impediment to filing an  
25 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;

26 (C) the date on which the constitutional right asserted was  
initially recognized by the Supreme Court, if the right has been newly

1 recognized by the Supreme Court and made retroactively applicable  
2 to cases on collateral review; or

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

6 (2) The time during which a properly filed application for  
7 State post-conviction or other collateral review with respect  
8 to the pertinent judgment or claim is pending shall not be  
9 counted toward any period of limitation under this subsection.

10 A “properly filed application” is one in which the “delivery and acceptance are in compliance  
11 with the applicable laws and rules governing filings.” *Dictado v. Ducharme*, 244 F.3d 724, 726-27 (9th  
12 Cir. 2001) (quoting *Artuz v. Bennett*, 531 U.S. 4, 121 S.Ct. 361, 364 (2000)). Time limits on post  
13 conviction petitions are “condition[s] to filing,” such that an untimely petition would not be deemed  
14 “properly filed.” *Pace v. DiGuglielmo*, 544 U.S. 408, 413, 125 S.Ct. 1807, 1812 (2005). With respect  
15 to the filing of a federal petition for writ of habeas corpus, a *pro se* petitioner effectively files a federal  
16 petition when he delivers it to prison authorities for mailing to the court. *Stillman v. Lamarque*, 319 F.3d  
17 1199, 1201 (9th Cir. 2003).

18 Under the provision applicable to this case, 28 U.S.C. § 2244(d)(1)(A), the statute of  
19 limitations began to run on the date the judgment became final by the conclusion of direct review or the  
20 expiration of the time for seeking such review. In Nevada, a notice of appeal in a criminal case must  
21 be filed within thirty days after the entry of judgment or order being appealed. Nev. R. App. P. 4(b)(1).  
22 In this case, the District Court entered the judgment of conviction on December 6, 2006, and denied  
23 petitioner’s motion for amended judgment of conviction to include jail time credits on April 4, 2007.  
24 The statute of limitations does not begin to run until both the judgment and sentence are final. *Burton*  
25 *v. Stewart*, 549 U.S. 147, 157 (2007) (“Final judgment in a criminal case means sentence. The sentence  
26 is the judgment.”). Because petitioner’s motion for an amended judgment to include jail time credits  
pertained to his sentence, the limitations period did not start until the District Court denied the motion  
and the time for appeal expired. The District Court denied the motion on April 4, 2007. Therefore, the  
statute of limitations began to run on May 5, 2007.

1           Petitioner filed his petition for post-conviction relief in state court on November 17, 2007 –  
2 196 days after the time for appealing his conviction expired. Under 28 U.S.C. § 2244(d)(2), the statute  
3 of limitations was tolled while the post-conviction petition remained pending in state court. On  
4 November 20, 2009, the Nevada Supreme Court issued remittitur, which concluded the post-conviction  
5 proceedings in state court. Petitioner mailed his petition for writ of habeas corpus in this court 301 days  
6 later on September 17, 2010. Thus, petitioner’s petition is untimely because it was filed 132 days after  
7 the one-year statute of limitations expired.

8           **B.       Equitable Tolling**

9           In addition to the statutory tolling provided in 28 U.S.C. § 2244 (d)(1), the AEDPA limitations  
10 period is subject to equitable tolling. *See Calderon v. United States District Court (Beeler)*, 128 F.3d  
11 1283, 1288 (9th Cir. 1997), *overruled in part on other grounds, Calderon v. United States District Court*  
12 (*Kelly*), 163 F.3d 530 (9th Cir. 1998). Equitable tolling is available only “if extraordinary circumstances  
13 beyond a prisoner’s control make it impossible to file a petition on time.” *Beeler*, 128 F.3d at 1288.

14           *Tillema v. Long*, 253 F.3d 494 (9th Cir. 2001) contains a clear statement of the basic law  
15 governing equitable tolling of the AEDPA statute of limitations:

16                       As we have previously held, “[w]hen external forces, rather  
17 than a petitioner’s lack of diligence, account for the failure to file a  
18 timely claim, equitable tolling of the statute may be appropriate.”  
19 *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999); *see also*  
20 *Calderon v. United States Dist. Court (Kelly)*, 128 F.3d 1283, 1288-  
21 89 (9th Cir. 1997), *overruled on other grounds by Calderon v. United*  
22 *States Dist. Court*, 163 F.3d 530 (9th Cir. 1998) (en banc) (petitioner  
entitled to equitable tolling where petitioner’s counsel withdrew and  
left replacement counsel with unusable work product that made  
timely filing impossible); *Kelly*, 163 F.3d at 541-42 (petitioner  
entitled to equitable tolling because the district court ordered a stay  
preventing petitioner’s counsel from filing a timely habeas petition  
and because petitioner was allegedly mentally incompetent).

23 *Tillema*, 253 F.3d at 504; *see also Holland v. Florida*, 130 S.Ct. 2549, 2562-63 (2010).

24           The Ninth Circuit Court of Appeals has also made clear that equitable tolling is unavailable  
25 in most cases. *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002); *Miles v. Prunty*, 187 F.3d 1104,  
26 1107 (9th Cir. 1999). Equitable tolling is only appropriate “if *extraordinary* circumstances beyond a

1 prisoner's control make it impossible to file a petition on time." *Miranda*, 292 F.3d at 1066 (quoting  
2 *Calderon v. United States Dist. Court (Beeler)*, 1289 F.3d 1283, 1288 (9th Cir. 1997), *overruled in part*  
3 *on other grounds by Calderon v. United States Dist. Court (Kelly)*, 163 F.3d 530 (9th Cir. 1998)(*en*  
4 *banc*))(emphasis in original). "Indeed, 'the threshold necessary to trigger equitable tolling [under  
5 AEDPA] is very high, lest the exceptions swallow the rule.'" *Miranda*, 292 F.3d at 1066 (quoting *United*  
6 *States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir.), *cert. denied*, 531 U.S. 878 (2000)).

7 Here, aside from generally arguing that a miscarriage of justice will result if the court fails to  
8 reach the merits of his petition, petitioner fails to articulate any extraordinary circumstances beyond his  
9 control that warrant the equitable tolling of the statute of limitations. Accordingly, the court declines  
10 to equitably toll the statute and dismisses the petition as untimely.<sup>2</sup>

### 11 **III. Certificate of Appealability**

12 In order to proceed with an appeal, petitioner must receive a certificate of appealability. 28  
13 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951 (9th  
14 Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). Generally, a  
15 petitioner must make "a substantial showing of the denial of a constitutional right" to warrant a  
16 certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000).  
17 "The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the  
18 constitutional claims debatable or wrong." *Id.* (quoting *Slack*, 529 U.S. at 484). In order to meet this  
19 threshold inquiry, the petitioner has the burden of demonstrating that the issues are debatable among  
20 jurists of reason; that a court could resolve the issues differently; or that the questions are adequate to  
21 deserve encouragement to proceed further. *Id.* This court has considered the issues raised by petitioner,  
22 with respect to whether they satisfy the standard for issuance of a certificate of appealability, and  
23 determines that none meet that standard. The court will therefore deny petitioner a certificate of  
24 appealability.

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26 <sup>2</sup> Respondents also argue that ground two of the petition is unexhausted, and thus, the petition  
should be dismissed as a mixed petition. Because the court finds that the petition is time-barred, it  
declines to reach this issue.

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**IT IS THEREFORE ORDERED** that respondents' motion to dismiss (ECF No. 12) is **GRANTED**.

**IT IS FURTHER ORDERED** that the petition (ECF No. 1) is **DISMISSED IN ITS ENTIRETY**, as untimely.

**IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE OF APPEALABILITY**.

**IT IS FURTHER ORDERED** that the Clerk **SHALL ENTER JUDGMENT ACCORDINGLY**.

DATED: June 1, 2011



UNITED STATES DISTRICT JUDGE