

1
2 UNITED STATES DISTRICT COURT
3 DISTRICT OF NEVADA

4 MONTRAIL D. SMITH,

5 Petitioner,

6 v.

7 BRIAN E. WILLIAMS, SR., *et al.*,

8 Respondents.
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Case No. 2:15-cv-00487-KJD-VCF

ORDER

11
12 I. Introduction

13 This action is a petition for a writ of habeas corpus by Nevada prisoner Montrail
14 D. Smith. There are, before the court, a motion to dismiss and motion to strike filed by
15 the respondents, and a motion for leave to conduct discovery and motion for evidentiary
16 hearing filed by Smith. The Court will grant the motion to dismiss, and dismiss this
17 action as barred by the statute of limitations. The Court will deny the motion for leave to
18 conduct discovery, the motion for evidentiary hearing, and the motion to strike.

19 II. Background

20 Smith was convicted on May 24, 2005, following a jury trial in Nevada's Eighth
21 Judicial District Court, of murder with use of a deadly weapon, and he was sentenced to
22 two consecutive terms of life in prison with the possibility of parole after twenty years.
23 See Judgment of Conviction, Exh. 25 (ECF No. 26-8).

24 Smith appealed, but the Nevada Supreme Court ruled that his notice of appeal
25 was untimely and dismissed the appeal for lack of jurisdiction. See Order Dismissing
26 Appeal, Exh. 29 (ECF No. 26-12).

27 On December 6, 2005, Smith initiated a state habeas action. In that action, Smith
28 litigated what is known in Nevada as a "*Lozada* petition," in which he asserted claims

1 that could have been asserted in a timely direct appeal. See *Lozada v. State*, 110 Nev.
2 349, 871 P.2d 944, 947 (1994). The state district court denied that petition in a written
3 order filed on August 8, 2007. See Findings of Fact, Conclusions of Law and Order,
4 Exh. 48 (ECF No. 27-6). Smith appealed, and the Nevada Supreme Court affirmed on
5 February 20, 2009. See Order of Affirmance, Exh. 59 (ECF No. 27-17).

6 On December 14, 2009, Smith initiated a second state habeas action. See
7 Motion for Appointment of Counsel, Exh. 61 (ECF No. 27-19); Supplement to Post-
8 Conviction Petition, Exh. 72 (ECF No. 27-30). In a written order filed on June 18, 2013,
9 the state district court dismissed that action, ruling it procedurally barred. See Findings
10 of Fact, Conclusions of Law and Order, Exh. 78 (ECF No. 28-5). Smith appealed, and
11 the Nevada Supreme Court affirmed on April 10, 2014. See Order of Affirmance, Exh.
12 85 (ECF No. 29-2).

13 Smith initiated this federal habeas corpus action, pro se, on March 18, 2015. See
14 Motion Seeking Permission from the Court to File Habeas Petition (ECF No. 1). He
15 submitted his original petition for filing on April 1, 2015 (ECF No. 2-1). The petition was
16 filed on May 26, 2015, after the matter of payment of the filing fee was resolved. See
17 Petition for Writ of Habeas Corpus (ECF No. 10). Counsel was appointed for Smith.
18 See Order entered May 26, 2015 (ECF No. 9). With counsel, Smith filed an amended
19 petition for writ of habeas corpus on April 11, 2016 (ECF No. 24).

20 Respondents filed a motion to dismiss on August 10, 2016 (ECF No. 35). In
21 response, on December 20, 2016, Smith filed a motion for a stay, to allow him to further
22 exhaust claims in state court (ECF No. 50). Respondents filed a notice of non-
23 opposition to the motion for stay (ECF No. 56). On March 28, 2017, the Court granted
24 the motion for stay and stayed this action pending Smith's further proceedings in state
25 court; the Court denied, as moot, the motion to dismiss and other pending motions (ECF
26 No. 63).

27 Meanwhile, Smith had initiated a third state habeas action in Nevada's Eighth
28 Judicial District Court on May 19, 2016. See Motion for Stay (ECF No. 50), p. 2;

1 Amended Petition for Writ of Habeas Corpus, Exh. 113 (ECF No. 74-65). The state
2 district court denied that petition, ruling it procedurally barred, on September 22, 2017.
3 See Findings of Fact, Conclusions of Law and Order, Exh. 143 (ECF No. 75-21). Smith
4 appealed, and the Nevada Supreme Court affirmed on January 17, 2019. See Order of
5 Affirmance, Exh. 163 (ECF No. 75-41).

6 Smith then moved to lift the stay of this action, and that motion was granted, and
7 the stay was lifted on April 24, 2019 (ECF Nos. 67, 68). Smith submitted a second
8 amended habeas petition with his motion to lift the stay; the second amended petition
9 was filed (ECF No. 69) and is now Smith's operative petition.

10 On September 18, 2020, Respondents filed the motion to dismiss that is now
11 before the Court (ECF No. 72); Respondents contend that Smith's petition is barred by
12 the statute of limitations, that certain of Smith's claims are unexhausted in state court,
13 that certain of Smith's claims are procedurally defaulted, and that one of Smith's claims
14 is not cognizable in this federal habeas corpus action. The parties have fully briefed the
15 motion to dismiss (ECF Nos. 82, 91).

16 With his opposition to the motion to dismiss, Smith filed a motion for leave to
17 conduct discovery, which has been fully briefed (ECF Nos. 86, 92, 97) and a motion for
18 evidentiary hearing, which has been fully briefed (ECF Nos. 85, 94, 98).

19 Respondents filed a motion to strike (ECF No. 93), requesting that the Court
20 strike from the record a demonstrative exhibit filed by Smith; that motion, too, has been
21 fully briefed (ECF No. 99).

22 III. Discussion

23 A. Statute of Limitations

24 The Antiterrorism and Effective Death Penalty Act (AEDPA), enacted in 1996,
25 established a one-year statute of limitations for federal habeas petitions filed by
26 prisoners challenging state convictions; the statute provides:

27 (1) A 1-year period of limitation shall apply to an application for a
28 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 --

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

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

6 (C) the date on which the constitutional right asserted
7 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

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

10 28 U.S.C. 2244(d)(1). The one-year AEDPA limitations period is tolled during the time
11 that a properly filed application for state post-conviction or other collateral review is
12 pending in state court. See 28 U.S.C. § 2244(d)(2). The limitations period is also subject
13 to equitable tolling; a habeas petitioner is entitled to equitable tolling if the petitioner
14 shows “(1) that he has been pursuing his rights diligently, and (2) that some
15 extraordinary circumstance stood in his way’ and prevented timely filing.” *Holland v.*
16 *Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418
17 (2005)); *Ramirez v. Yates*, 571 F.3d 993, 997 (9th Cir. 2009).

18 In this case, the judgment of conviction was entered on May 24, 2005 (see
19 Judgment of Conviction, Exh. 25 (ECF No. 26-8)), and the conviction became final on
20 June 23, 2005, when the time for Smith to appeal expired. See Order Dismissing
21 Appeal, Exh. 29 (ECF No. 26-12). When Smith’s conviction became final, his one-year
22 AEDPA limitations period began to run, and 165 days ran against the limitations period
23 before Smith initiated his first state habeas action on December 6, 2005. While Smith’s
24 first state habeas petition was pending, the limitations period was tolled under 28 U.S.C.
25 § 2244(d)(2). That action was concluded, and the statutory tolling ceased, on March 17,
26 2009, when the Nevada Supreme Court issued its remittitur after affirming the denial of
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1 relief. See Remittitur, Exh. 78 (ECF No. 74-28). The one-year limitations period then
2 began to run again, and it expired 200 days later, on October 4, 2009.

3 Smith initiated two more state habeas actions, one on December 14, 2009, and
4 one on May 19, 2016, but both of those were initiated after the AEDPA statute of
5 limitations expired, so they had no effect on the running of the limitations period.
6 Furthermore, both were ruled untimely, ruling out statutory tolling based on them under
7 28 U.S.C. § 2244(d)(2). See *Pace*, 544 U.S. 412–13.

8 Smith did not submit his original petition for mailing to this Court, to initiate this
9 action, until March 29, 2015, more than five years after the AEDPA limitations period
10 expired. See Petition for Writ of Habeas Coprus (ECF No. 10), p. 1. Therefore, this
11 action is barred by the statute of limitations, and subject to dismissal on that ground.

12 Seeking to overcome the statute of limitations bar, Smith argues that he should
13 receive the benefit of equitable tolling. First, he argues for equitable tolling from May 24,
14 2005, to December 6, 2005, on account of his trial counsel's failure to file a notice of
15 appeal on his behalf. See Opposition to Motion to Dismiss (ECF No. 82), pp. 6–8. He
16 then argues that his *Lozada* petition should be treated as the functional equivalent of a
17 reopened direct appeal, with the result that his conviction should not be considered final
18 until May 21, 2009, after the Nevada Supreme Court affirmed the denial of relief in that
19 action, or with the result of equitable tolling up to that point. See *id.* at 8–14. Next, he
20 argues that he should receive the benefit of equitable tolling from May 21, 2009, to May
21 5, 2014, on account of actions of his first state habeas counsel in his state court
22 proceedings. See *id.* at 14–38. Finally, he argues he should receive the benefit of
23 equitable tolling from May 5, 2014, to March 29, 2015, because he submitted a petition
24 for writ of habeas corpus to this Court for filing in May 2014, but that petition was
25 returned to him without it being filed. See *id.* at 38–41.

26 Regarding Smith's first argument, that he should receive the benefit of equitable
27 tolling from May 24, 2005, to December 6, 2005, because of his trial counsel's failure to
28 file a notice of appeal on his behalf, Smith makes no showing that such failure of trial

1 counsel prevented Smith from filing a timely federal habeas petition. There is no
2 explanation how Smith's counsel's failure to initiate a timely direct appeal had any effect
3 on Smith's ability to initiate a federal habeas petition. *See Randle v. Crawford*, 604 F.3d
4 1047, 1055 (9th Cir. 2010) ("In this case, Randle has not suggested any such causal
5 connection between his state-appointed counsel's failure to perfect a direct appeal
6 timely and his own failure to file his federal habeas petition timely."). This argument for
7 equitable tolling fails.

8 Next, concerning Smith's argument that his *Lozada* petition was the functional
9 equivalent of a reopened appeal, and his conviction should therefore should not be
10 considered final until May 21, 2009, or he should receive the benefit of equitable tolling
11 to that date, his argument is contrary to the Ninth Circuit Court of Appeals' holding in
12 *Randle*. In that case, the court of appeals held that a *Lozada* petition did not restore the
13 pendency of a direct appeal, and therefore did not alter the date of finality of the
14 judgment of conviction. *See Randle*, 604 F.3d at 1056–57. The court in *Randle*
15 distinguished Nevada's procedure under *Lozada* from the procedure in Texas
16 addressed in *Jimenez v. Quarterman*, 555 U.S. 113 (2009) (where state court reopens
17 direct appeal, statute of limitations does not begin to run until conclusion of the
18 reopened appeal). *See id.* The court in *Randle* explained the distinction as follows:

19 In the case before us, Randle argues that the Nevada Supreme
20 Court's decision on his first state habeas petition [his *Lozada* petition] is
21 equivalent to a decision on an out-of-time direct appeal. But
22 unlike *Jimenez*, the Nevada Supreme Court never granted Randle leave
23 to file an out-of-time direct appeal. Rather, the state supreme court
24 explicitly stated that an untimely direct appeal was foreclosed by state
25 rules, and that "[a]n untimely notice of appeal fails to vest jurisdiction in
26 this court." At no point did the Nevada Supreme Court "restor[e] the
27 pendency of the direct appeal," nor was "petitioner's conviction ... again
28 capable of modification through direct appeal to the state courts and to
[the Supreme Court] on certiorari review." *Jimenez*, 129 S.Ct. at
686 (internal citation omitted). Randle sought to restore his direct appeal,
and that request was rejected by the Nevada Supreme Court. Although
Randle was entitled to present, pursuant to *Lozada*, the arguments that he
would have presented on direct appeal in his state postconviction relief
proceeding, his direct appeal was not, and could not be, reinstated.
Jimenez therefore does not apply....

1 *Id.* Following *Randle*, this Court rejects Smith's argument that his conviction did not
2 become final until the completion of his *Lozada* petition. The Court finds meritless
3 Smith's arguments that unpublished orders of the Nevada Supreme Court, and a
4 change in the Nevada Rules of Appellate Procedure, subsequent to the completion of
5 his *Lozada* petition, undermined the holding in *Randle* with respect to his case. See
6 Opposition to Motion to Dismiss (ECF No. 82), pp. 9–14. It remains that, under Nevada
7 law, Smith's *Lozada* petition did not reopen his direct appeal. And, with respect to the
8 question of equitable tolling, there is no showing by Smith that his litigation of the
9 *Lozada* petition prevented him from filing a timely federal habeas petition.

10 Next, turning to the question whether some action, or inaction, of Smith's first
11 state post-conviction counsel, in Smith's state court proceedings, entitles Smith to
12 equitable tolling, the Court determines that, whatever complaints Smith has about the
13 performance of his state post-conviction counsel, that counsel did not abandon him, and
14 did not cause him to miss his federal court filing deadline. *Cf. Maples v. Thomas*, 565
15 U.S. 266, 281 (2012); *Gibbs v. Legrand*, 767 F.3d 879, 886 (9th Cir. 2014). Smith's
16 extensive argument in this regard appears to assume that he could not have filed a
17 federal habeas petition until his untimely second state habeas action was completed.
18 See Opposition to Motion to Dismiss (ECF No. 82), pp. 14–38. But that is not the case.
19 Nothing stood in the way of Smith initiating a timely federal habeas action while his state
20 proceedings were pending. Moreover, the Court notes Smith's specific statement that
21 "January through May 2010 is the time that Smith's case languished and his deadline
22 for filing both a state and federal petition lapsed" (*see id.* at 32); that, however, was after
23 the AEDPA limitations period had already expired on October 4, 2009.

24 Regarding the question of Smith's diligence, after the Nevada Supreme Court
25 affirmed the denial of relief on his *Lozada* petition, and issued its remittitur on March 17,
26 2009, Smith did not diligently pursue his rights. Without good reason, Smith did not
27 attempt to file a federal habeas petition until at least some five years later. Smith's only
28 attempt to explain this delay is to cast blame on his first state post-conviction counsel,

1 pointing to alleged shortcomings of counsel's performance in his state habeas
2 proceedings, but he does not show how that counsel in any way prevented him from
3 initiating a timely federal habeas action.

4 Finally, regarding Smith's argument that he should receive the benefit of
5 equitable tolling from May 5, 2014, to March 29, 2015, because the first federal habeas
6 petition he sent to this Court for filing was returned to him unfiled, the Court determines
7 that, without the benefit of the other equitable tolling Smith requests, this argument is
8 moot. This occurred long after the AEDPA limitations period expired. The Court,
9 therefore, does not address this argument for equitable tolling.

10 The Court will grant Respondents' motion to dismiss and will dismiss this action
11 as barred by the statute of limitations. The Court does not reach Respondents' other
12 arguments, that certain of Smith's claims are unexhausted, that certain of his claims are
13 procedurally defaulted, and that one of his claims is not cognizable in this federal
14 habeas action.

15 B. Motions for Leave to Conduct Discovery and for an Evidentiary Hearing

16 In his motion for leave to conduct discovery (ECF No. 86), Smith requests leave
17 of court to serve discovery requests seeking visiting logs, phone logs and mail logs from
18 institutions where he has been incarcerated, as well as records and information
19 regarding the law practice of his first state post-conviction counsel. See Motion for
20 Discovery (ECF No. 86), pp. 2–4. Smith argues that such discovery might lead to
21 information supporting his arguments that he is entitled to equitable tolling, particularly
22 equitable tolling based on the performance of his first state post-conviction counsel. A
23 habeas petitioner, “unlike the usual civil litigant in federal court, is not entitled to
24 discovery as a matter of ordinary course.” *Bracy v. Gramley*, 520 U.S. 899, 904 (1997).
25 Under Rule 6(a) of the Rules Governing Section 2254 Cases, a federal district court
26 may authorize discovery in a habeas action for good cause. See *id.* at 904–05. Good
27 cause exists if “specific allegations before the court show reason to believe that the
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1 petitioner may, if the facts are fully developed,” demonstrate entitlement to habeas
2 relief. *Smith v. Mahoney*, 611 F.3d 978, 996–97 (9th Cir. 2010).

3 In his motion for evidentiary hearing (ECF No. 85), Smith requests an evidentiary
4 hearing with respect to his arguments that he is entitled to equitable tolling. Evidentiary
5 hearings are authorized in federal habeas corpus actions by Rule 8 of the Rules
6 Governing § 2254 Cases. However, an evidentiary hearing is not required if the issues
7 can be resolved by reference to the state court record. See *Totten v. Merkle*, 137 F.3d
8 1172, 1176 (9th Cir. 1998) (“It is axiomatic that when issues can be resolved with
9 reference to the state court record, an evidentiary hearing becomes nothing more than a
10 futile exercise.”); see also *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) (“[I]f the
11 record refutes the applicant’s factual allegations or otherwise precludes habeas relief, a
12 district court is not required to hold an evidentiary hearing.”). Moreover, “an evidentiary
13 hearing is not required if the claim presents a purely legal question and there are no
14 disputed facts.” *Beardslee v. Woodford*, 358 F.3d 560, 585 (9th Cir. 2004); see also
15 *Hendricks v. Vasquez*, 974 F.2d 1099, 1103 (9th Cir. 1992).

16 The Court determines that Smith does not show factual development by either
17 discovery or an evidentiary hearing to be warranted. The Court resolves the questions
18 of Smith’s entitlement to equitable tolling based on the briefing of the parties and on the
19 record before the Court, without need for further factual development. As is discussed
20 above, even if Smith’s allegations regarding the performance of his first state post-
21 conviction counsel’s performance are taken as true, there is no showing that counsel’s
22 performance in Smith’s state habeas proceedings prevented Smith from timely filing his
23 federal habeas petition. Smith does not make any showing that further factual
24 development could possibly alter this outcome. Smith’s motion for leave to conduct
25 discovery and his motion for an evidentiary hearing will be denied.

26 C. Motion to Strike

27 In their motion to strike (ECF No. 93), Respondents request that the Court strike
28 from the record Smith’s Exhibit 94 (ECF No. 53-6), which is a demonstrative exhibit

1 visually depicting Smith's position regarding the operation of the AEDPA statute of
2 limitations in this case. As a demonstrative exhibit clarifying Smith's argument, Smith's
3 Exhibit 94 is not improper. The Court will deny the motion to strike.

4 D. Certificate of Appealability

5 The standard for the issuance of a certificate of appealability requires a
6 "substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c). The
7 Supreme Court has interpreted 28 U.S.C. § 2253(c) as follows:

8 Where a district court has rejected the constitutional claims on the
9 merits, the showing required to satisfy § 2253(c) is straightforward: The
10 petitioner must demonstrate that reasonable jurists would find the district
11 court's assessment of the constitutional claims debatable or wrong. The
12 issue becomes somewhat more complicated where, as here, the district
13 court dismisses the petition based on procedural grounds. We hold as
14 follows: When the district court denies a habeas petition on procedural
15 grounds without reaching the prisoner's underlying constitutional claim, a
16 COA should issue when the prisoner shows, at least, that jurists of reason
17 would find it debatable whether the petition states a valid claim of the
18 denial of a constitutional right and that jurists of reason would find it
19 debatable whether the district court was correct in its procedural ruling.

20 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); see also *James v. Giles*, 221 F.3d 1074,
21 1077–79 (9th Cir. 2000).

22 Applying the standard articulated in *Slack*, the Court finds that a certificate of
23 appealability is unwarranted. The Court will deny Smith a certificate of appealability.

24 IV. Conclusion

25 **IT IS THEREFORE HEREBY ORDERED** that Petitioner's Motion for Discovery
26 (ECF No. 86) is **DENIED**.

27 **IT IS FURTHER ORDERED** that Petitioner's Motion for Evidentiary Hearing (ECF
28 No. 85) is **DENIED**.

IT IS FURTHER ORDERED that Respondents' Motion to Strike (ECF No. 93) is
DENIED.

IT IS FURTHER ORDERED that Respondents' Motion to Dismiss (ECF No. 72)
is **GRANTED**. This action is dismissed.

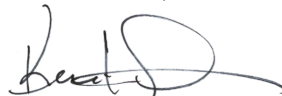
1 **IT IS FURTHER ORDERED** that Petitioner is denied a certificate of appealability.

2 **IT IS FURTHER ORDERED** that the Clerk of the Court is directed to enter
3 judgment accordingly.

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5 DATED THIS 10 day of August, 2020.

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KENT J. DAWSON,
UNITED STATES DISTRICT JUDGE

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