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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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JUAN TEUTLE-RAMIREZ,

Case No. 3:15-cv-00136-MMD-WGC

Petitioner,

ORDER

v.

ROBERT LEGRAND, et al.,

Respondents.

I. SUMMARY

Before the Court are the first amended petition for writ of habeas corpus (ECF No. 24), Respondents' motion to dismiss (ECF No. 37), Petitioner's opposition (ECF No. 43), and Respondents' reply (ECF No. 47). The Court grants the motion in part because the Petition is untimely.

II. BACKGROUND

The state district court convicted Petitioner of one count of battery with intent to commit sexual assault, four counts of sexual assault with the use of a deadly weapon, one count of first-degree kidnaping with the use of a deadly weapon, one count of robbery with the use of a deadly weapon, and one count of open or gross lewdness. Petitioner did not negotiate. He pleaded guilty as charged. The state district court entered its original judgment of conviction on August 9, 2010. (Exh. 42 (ECF No. 26-16).) The state district court entered an amended judgment of conviction on October 13, 2010, to add the statutorily required special sentence of lifetime supervision for a sexual offender. (Exh. 44 (ECF No. 26-18).) Petitioner did not appeal.

1 On October 28, 2012, Petitioner filed in the state district court a motion for
2 production of transcripts at state expense. (Exh. 48 (ECF No. 26-22).) The state district
3 court denied the motion on October 2, 2012. (Exh. 52 (ECF No. 26-26).) On or around
4 November 19, 2012, Petitioner sent a letter to the state district court. (Exh. 53 (ECF No.
5 27).) He asked for a copy of the order denying the motion so that he could appeal. (Id.)
6 He noted that he wanted the transcripts to file either a motion to correct an illegal sentence
7 or a petition for a writ of habeas corpus. (Id.) Petitioner filed a notice of appeal on January
8 3, 2013. (Exh. 56 (ECF No. 27-3).) On January 24, 2013, the Nevada Supreme Court
9 dismissed the appeal. (Exh. 61 (ECF No. 27-8).) It held that no statute or court rule
10 authorized an appeal from the denial of this motion, and thus it lacked jurisdiction. (Id.)
11 Remittitur issued on February 19, 2013. (Exh. 63 (ECF No. 27-10).)

12 On March 5, 2013, Petitioner filed in the state district court a motion for modification
13 of sentence. (Exh. 62 (ECF No. 27-9).) He asked for all the sentences to run concurrently
14 because he accepted responsibility and because he needed to provide for his daughter.
15 (Id.) The state district court denied the motion on April 4, 2013. (Exh. 66 (ECF No. 27-13).)
16 Petitioner did not appeal.

17 On January 23, 2014, Petitioner filed in the state district court a motion to vacate
18 dual conviction based upon a change in the law (double jeopardy) precluding redundancy
19 principle law. (Exh. 67 (ECF No. 27-14).) He argued that the multiple counts of sexual
20 assault were redundant, and he argued that battery with intent to commit sexual assault
21 was a lesser-included offense to sexual assault. (Id.) The state district court denied the
22 motion on February 19, 2014. (Exh. 69 (ECF No. 27-16).) Petitioner filed a notice of appeal
23 on March 6, 2014. (Exh. 70 (ECF No. 28).) On April 4, 2014, the Nevada Supreme Court
24 dismissed the appeal. (Exh. 72 (ECF No. 28-2).) It held that no statute or court rule
25 authorized an appeal from the denial of this motion, and thus it lacked jurisdiction. (Id.)
26 Remittitur issued on April 29, 2014. (Exh. 73 (ECF No. 28-3).)

27 On May 27, 2014, Petitioner filed in the state district court a post-conviction habeas
28 corpus petition. (Exh. 74 (ECF No. 28-4).) On July 28, 2014, the state district court orally

1 denied the petition. (Exh. 81 (ECF No. 28-11).) On October 8, 2014, the state district court
2 filed its written decision. (Exh. 86 (ECF No. 28-16).) The state district court held that the
3 petition was untimely under NRS § 34.726(1). (Id.) Petitioner appealed. On February 4,
4 2015, the Nevada Court of Appeals affirmed the state district court's decision. (Exh. 90
5 (ECF No. 29).) The Nevada Supreme Court denied review and issued its remittitur on April
6 21, 2015. (Exh. 91 (ECF No. 29-1); Exh. 92 (ECF No. 29-2).)

7 Petitioner mailed his original, proper-person Petition pursuant to 28 U.S.C. § 2254
8 to this Court on March 2, 2015, thus effectively commencing this action.

9 **III. LEGAL STANDARD**

10 Congress has limited the time in which a person can petition for a writ of habeas
11 corpus pursuant to 28 U.S.C. § 2254:

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

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

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

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

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

20 28 U.S.C. § 2244(d)(1). If the judgment is not appealed, then it becomes final thirty days
21 after entry, when the time to appeal to the Nevada Supreme Court has expired. See
22 *Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012); see also Nev. R. App. P. 4(b), 26(a).

23 Any time spent pursuing a properly filed application for state post-conviction review
24 or other collateral review does not count toward this one-year limitation period. 28 U.S.C.
25 § 2244(d)(2). The period of limitation resumes when the post-conviction judgment
26 becomes final upon issuance of the remittitur. *Jefferson v. Budge*, 419 F.3d 1013, 1015
27 n.2 (9th Cir. 2005). An untimely state post-conviction petition is not “properly filed” and
28 does not toll the period of limitation. *Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005). A

1 prior federal habeas corpus petition does not toll the period of limitation. *Duncan v. Walker*,
2 533 U.S. 167, 181-82 (2001).

3 Section 2244(d) is subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631, 645
4 (2010). “[A] ‘petitioner’ is ‘entitled to equitable tolling’ only if he shows ‘(1) that he has been
5 pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his
6 way’ and prevented timely filing.” *Id.* at 649 (quoting *Pace*, 544 U.S. at 418).

7 The petitioner effectively files a federal petition when he delivers it to prison officials
8 to be forwarded to the clerk of the court. Rule 3(d), Rules Governing Section 2254 Cases
9 in the United States District Courts.

10 **IV. DISCUSSION**

11 By statute, this action is untimely. Petitioner did not appeal the amended judgment
12 of conviction, entered October 13, 2010, and the judgment became final with the expiration
13 of time to appeal on November 12, 2010. Petitioner had nothing pending in the state courts
14 in the following year, and the one-year period of § 2244(d)(1) expired on November 14,
15 2011, because the period otherwise would have expired on a weekend. None of the
16 motions and petitions filed in the state courts after that date tolled the period under
17 § 2244(d)(2) because no time was left to be tolled. *Ferguson v. Palmateer*, 321 F.3d 820,
18 823 (9th Cir. 2003). Furthermore, at least two of the motions and petitions would have
19 been ineligible for tolling even if the one-year period had not expired. The motion for
20 transcripts was not a petition for post-conviction or other collateral review. The post-
21 conviction habeas corpus petition was untimely under state law and thus not properly filed.
22 *Pace*, 544 U.S. at 417.

23 Petitioner proposes several blocks of time in which the period of limitation should
24 be equitably tolled, which in turn would make the Petition timely. First, he argues that
25 because of the nature of his crimes and his inability to speak English, he was afraid to
26 seek help among other inmates. (ECF No. 43 at 5-6.) He states that he was in protective
27 custody at High Desert State Prison for seven months after he was sentenced. (*Id.*) After
28 seven months, Petitioner moved to Lovelock Correctional Center, in the general

1 population. (Id. at 6.¹) However, Petitioner states that he still acted slowly, out of fear, until
2 he could find people whom he could trust. He argues that this period ended on August 28,
3 2012, when he filed his motion for transcripts at state expense. (Id.) Second, Petitioner
4 argues that the Court should equitably toll the time spent on the motion for transcripts,
5 until the Nevada Supreme Court issued its remittitur. (Id. at 6.) Petitioner argues that at
6 that time he had no exhausted claims, so this Court would have dismissed any federal
7 habeas corpus petition that he would have filed, because it was an open question whether
8 this Court could stay the action while he pursued state-court remedies. (Id.) Third,
9 Petitioner argues that the Court should toll the time spent on the motion for modification
10 of sentence, the motion to vacate dual convictions, and the post-conviction habeas corpus
11 petition.

12 The Court finds that equitable tolling is not warranted for several reasons. First, the
13 Court will assume for the moment that Petitioner's language barrier and fear of inmate
14 retaliation for his crimes kept him from filing anything until August 28, 2012, when he filed
15 his motion for transcripts.² Petitioner argues that if he had filed a federal habeas corpus
16 petition at that time, then this Court might have dismissed the petition without opportunity
17 for a stay because it was completely unexhausted. However, Petitioner's argument does
18 not explain why he filed a motion for transcripts, then a motion to modify his sentence,
19 then a motion to vacate sentence, before filing his post-conviction habeas corpus petition.
20 The post-conviction habeas corpus petition is the exclusive procedure for Petitioner to
21 challenge the validity of his judgment of conviction. NRS § 34.724(2)(b). The post-
22 conviction habeas corpus petition also was the only procedure that Petitioner could have
23 exhausted his state-court remedies. See *Castille v. Peoples*, 489 U.S. 346, 351 (1989);
24 *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994). Petitioner should have filed the post-
25 conviction petition first. Everything else was futile, piecemeal litigation that could not have
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27 ¹Petitioner's case notes from the Nevada Department of Corrections confirm these
28 dates. (See Exh. 121 (ECF No. 47-2).)

²The Court finds this argument to be suspect for the reasons discussed below.

1 given Petitioner any relief and did nothing but waste a year and a half that Petitioner did
2 not have. Petitioner knew about the availability of the post-conviction petition at or around
3 the start of this chain of useless litigation, because the form motion that Petitioner used
4 noted that it was in support of an already filed habeas corpus petition or motion to correct
5 an illegal sentence. (Exh. 48 at 1 (ECF No. 26-22 at 2).³) Then, after the state district court
6 denied the motion for transcripts, Petitioner wrote a letter, dated November 19, 2012,
7 asking for a copy of the district court's order so that he could appeal and then pursue a
8 motion to correct an illegal sentence or a post-conviction habeas corpus petition. (Exh. 53
9 (ECF No. 27).⁴) In other words, no later than November 19, 2012, Petitioner knew what
10 the correct procedure to obtain relief was. However, Petitioner did not file a post-conviction
11 habeas corpus petition soon after that letter. By November 19, 2012, Petitioner had no
12 extraordinary circumstances that would have prevented him from filing the correct petition
13 in the state court. Petitioner might have been relentless, as he puts it now, but relentless
14 litigation to no valid purpose is not diligence.

15 Second, even if the Court would equitably toll the time that Petitioner's motions and
16 post-conviction habeas corpus petition were pending in the state courts, as if statutory
17 tolling under 28 U.S.C. § 2244(d)(2) applied, not enough time would be tolled to make the
18 federal petition timely. Petitioner assumes that the time he spent on his appeal from the
19 denial of the motion for transcripts and the time that he spent on his appeal from the denial
20 of the motion to vacate sentence would be tolled. However, the Nevada Supreme Court
21 dismissed the appeals for lack of jurisdiction because no statute or court rule authorized
22 those appeals. (See Exh. 61 (ECF No. 27-8); Exh. 72 (ECF No. 28-2).) If the Nevada
23 Supreme Court lacks jurisdiction to consider an appeal, then the appeal is not "properly
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25 ³Petitioner modified that form to state that he had not yet filed a motion to correct
an illegal sentence. (Exh. 48 at 1-2 (ECF No. 26-22 at 2-3).)

26 ⁴Petitioner did not file a motion to correct an illegal sentence. If he did, it likely would
27 have been futile. A motion to correct an illegal sentence assumes the validity of a
conviction and is limited to correct a sentence that is outside the statutory limits. A motion
28 to correct an illegal sentence is not a method to challenge the validity of a conviction.
Edwards v. State, 918 P.2d 321, 324-25 (Nev. 1996). Petitioner's sentences are within the
statutory limits, and he has not claimed otherwise in any motion or petition.

1 filed” under § 2244(d)(2), and it is ineligible for statutory tolling. *Pace*, 544 U.S. at 414-15
2 & n.4 (citing *Artuz v. Bennett*, 531 U.S. 4, 9 (2000)). Petitioner is asking the Court, without
3 explanation why, to give him a greater benefit of equitable tolling than what statutory tolling
4 would give him. The Court declines.

5 Taking that into account, the Petition would still be untimely even with equitable
6 tolling. Assuming that Petitioner was unable to file anything before August 28, 2012, when
7 he filed his motion for transcripts, no time under § 2244(d)(1) had passed when the state
8 district court denied that motion on October 2, 2012. One hundred fifty-four (154) days
9 passed until Petitioner filed his motion for sentence modification on March 5, 2013, and
10 the state district court denied that motion on April 4, 2013. Two hundred ninety-four (294)
11 days passed until Petitioner filed his motion to vacate on January 23, 2014, and the state
12 district court denied that motion on February 19, 2014. Ninety-seven (97) days passed
13 until Petitioner filed his post-conviction habeas corpus petition on May 27, 2014, and the
14 remittitur after Petitioner’s appeal issued on April 21, 2015.⁵ Petitioner had mailed his
15 federal habeas corpus petition to the court before then, on March 2, 2015, and thus no
16 time passed. A total of five hundred forty-five (545) non-tolled days passed, exceeding the
17 one-year period. The current federal petition would be untimely even with equitable tolling.

18 Moreover, the Court questions Petitioner’s contention that he was unable to file
19 anything until August 28, 2012, when he filed his motion for transcripts. When Petitioner
20 was in protected custody at High Desert State Prison, he does not allege that the prison
21 did not provide either law-library access or translation services. See *Mendoza v. Carey*,
22 449 F.3d 1065, 1069-70 (9th Cir. 2006). Respondents show that the prison does provide
23 law library access to inmates in segregated confinement. (Exh. 120 (ECF No. 47-1).)
24 Petitioner transferred to the general population at Lovelock Correctional Center on or
25 around May 12, 2011. (Exh. 121 (ECF No. 47-2 at 2); see also Exh. 118 at ¶ 4 (ECF No.
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27 ⁵For the purposes of this paragraph, the Court includes the time spent on the appeal
28 from the denial of the post-conviction habeas corpus petition is equitable tolling because
state law does allow an appeal from the denial of the petition. NRS § 34.575(1).

1 44-1 at 2.) Petitioner then had six months remaining in his one-year period. The case
2 notes show that inmate translators not only were available, but that Petitioner used them
3 in his discussions with prison officials about his case. (Exh. 121 (ECF No. 47-2).) Petitioner
4 cannot claim that his limited English proficiency is an extraordinary circumstance when
5 translation services were not only available, but used. *Yow Ming Yeh v. Martel*, 751 F.3d
6 1075, 1078 (9th Cir. 2014). Similarly, if Petitioner used inmate translators to talk with prison
7 officials about his case, then his claim that he was afraid of inmate retaliation for his crimes
8 is suspect. Nonetheless, Petitioner waited a year and a half after transferring to Lovelock
9 to file his transcripts motion. This was not the diligence required for equitable tolling.

10 Respondents present other arguments in their motion to dismiss. The Court does
11 not address them because the Court is dismissing the action as untimely.

12 Reasonable jurists would not find the Court's conclusions on equitable tolling to be
13 debatable or wrong. The Court will not issue a certificate of appealability.

14 **V. CONCLUSION**

15 It is therefore ordered that Respondents motion to dismiss (ECF No. 37) is granted
16 in part. This action is dismissed with prejudice as untimely. The Clerk of the Court is
17 instructed to enter judgment accordingly and close this action.

18 It is further ordered that a certificate of appealability will not issue.

19 DATED THIS 13th day of September 2018.

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MIRANDA M. DU
23 UNITED STATES DISTRICT JUDGE
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