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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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KEITH MORRIS HALE,

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Petitioner,

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vs.

No. CIV 08-551-TUC-CKJ

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DORA B. SCHRIRO, et al.,

ORDER

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Respondents.

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Pending before the Court is the Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a Person in State Custody filed by Keith Morris Hale (“Hale”). Respondents have filed an Answer.

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Factual and Procedural Background

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The Court of Appeals of Arizona summarized the state trial court proceedings as follows:

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Hale was initially charged as to victim M. with two counts of molestation of a child and one count each of sexual conduct with a minor under fifteen and sexual abuse of a minor under fifteen. He was also charged with one count of molestation of a child as to victim S. During trial the court dismissed one count of molestation as to M. At the close of the evidence, defense counsel moved for a judgment of acquittal on the remaining counts under Rule 20(a), Ariz.R.Crim.P. 17 A.R.S., and also moved for a mistrial. The court granted a judgment of acquittal on the count involving S. and denied it on the counts involving M. The court also denied the motion for a mistrial.

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Petition, Doc. # 1, p. 36 of 40.¹ The Court of appeals also stated:

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¹The attachments to the Petition are not labeled as separate exhibits. The Court will cite to the CM/ECF document number and page number.

1 Following a jury trial conducted in his absence, petitioner Keith Hale was convicted
2 of molestation of a child, sexual conduct with a minor, and sexual abuse. The trial
3 court sentenced Hale to concurrent, presumptive, seventeen- and five- year prison
terms for the molestation and sexual abuse convictions and to a consecutive term of
life imprisonment for the sexual conduct conviction.

4 Petition, Doc. # 1-1, pp. 54-55 of 78.

5 On September 29, 2004, the Court of Appeals of Arizona affirmed Hale’s convictions
6 and sentences. On April 19, 2005, the Supreme Court of Arizona denied review.

7 On February 14, 2006, Hale filed a Petition for Post-Conviction Relief.² Hale asserted
8 that counsel was ineffective for (1) not making an opening statement, not making a closing
9 argument, and not presenting a defense and (2) not conveying the State’s plea offer to Hale.

10 Petition, Doc. # 1-1, pp. 22-23 of 78. In making these claims, Hale asserted that counsel had
11 conducted minimal cross-examination of the State’s witnesses and only called one witness.

12 Petition, Doc. # 1-1, pp. 24 of 78. Hale also asserted that he should not have been considered
13 voluntarily absent from trial because counsel had allegedly implied that Hale should flee.

14 Petition, Doc. # 1-1, pp. 23 of 78. On May 26, 2006, the post-conviction court denied relief.

15 On December 20, 2006, the Court of Appeals concluded that the post-conviction court did
16 not abuse its discretion in denying relief and by dismissing the petition without an
17 evidentiary hearing. On June 5, 2007, the Supreme Court denied review.

18 On or about October 5, 2008, Hale filed the pending Petition for Writ of Habeas
19 Corpus by a Person in State Custody Pursuant to 28 U.S.C. § 2254. On January 13, 2009,
20 Respondents filed an Answer. Although this Court had advised Hale that he could file a
21 reply within 30 days from the date of service of the Answer, *see* October 20, 2008, Order,
22 Hale has not filed a Reply.

23 In his Petition, Hale asserts that “[t]rial counsel was ineffective when he abdicated his
24 role as defense counsel by failing to make an opening statement, failing to make a closing
25 argument, and presenting no defense at all to the jury.” Petition, Doc. # 1, p. 6 of 40. Hale
26 asserts that counsel failed to meaningfully challenge the State’s witnesses and only called one
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28 ²The Notice of Post-Conviction Relief was filed on or about May 19, 2005.

1 witness. Hale also asserts that counsel was “ineffective for failing to convey the State’s plea
2 offer to [him].” *Id.* at p. 7 of 40.

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4 *Statute of Limitations*

5 This Court must review claims consistent with the provisions of the Antiterrorism and
6 Effective Death Penalty Act of 1996 ("AEDPA"). Under the AEDPA, a state prisoner must
7 generally file a petition for writ of habeas corpus within one year from the latest of:

- 8 (A) the date on which the judgment became final by the conclusion of direct review
9 or the expiration of the time for seeking such review;
10 (B) the date on which the impediment to filing an application created by State action
11 in violation of the Constitution or laws of the United States is removed, if the
12 applicant was prevented from filing by such State action;
13 (C) the date on which the constitutional right asserted was initially recognized by the
14 Supreme Court, if the right has been newly recognized by the Supreme Court and
15 made retroactively applicable to cases on collateral review; or
16 (D) the date on which the factual predicate of the claim or claims presented could
17 have been discovered through the exercise of due diligence.

18 28 U.S.C. § 2244(d)(1); *Shannon v. Newland*, 410 F.3d 1083 (9th Cir. 2005).

19 Hale’s direct review concluded on July 18, 2005, or 90 days after the Arizona
20 Supreme Court denied his petition for review on April 19, 2005. *Bowen v. Roe*, 188 F.3d
21 1157, 1159 (9th Cir. 1999). Additionally, Hale tolled the statute of limitations by filing a
22 notice of post-conviction relief. The statute of limitations was tolled until June 5, 2007,
23 when the Arizona Supreme Court notified Hale that the petition for review had been denied.³

24 In addressing this issue in the context of Arizona’s Rules 32 proceeding, the Ninth Circuit
25 stated:

26 Here, the matter was determined by the Arizona Supreme Court on February 20,
27 2003, when it denied review. There was nothing left for it to do and it thus returned
28 the record to the appeals court. The subsequent March 19, 2003, letter from the clerk
of the court of appeals was not a mandate, but instead was the performance of a
ministerial function of returning the record to the trial court. We conclude that after
the February 20, 2003, denial by the Arizona Supreme Court, nothing remained
“pending” for purposes of § 2244(d)(2). Accordingly, the statute of limitations set
forth in § 2244(d)(1) began running again on this date.

³The limitations period is statutorily tolled during the time in which a "properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending" in the state courts. 28 U.S.C. § 2244(d)(2).

1 *Hemmerle*, 495 F.3d 1069, 1077 (9th Cir. 2007); *see also Lawrence v. Florida*, 549 U.S. 327,
2 127 S.Ct. 1079, 166 L.Ed.2d 924 (2007).

3 Therefore, Hale had 365 days from June 5, 2007, or until June 5, 2008, to file his
4 federal habeas petition. However, Hale did not file his Petition until October 5, 2008.

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6 *Equitable Tolling of Limitations Period*

7 The United States Supreme Court has determined that 28 U.S.C. § 2244(d) allows for
8 equitable tolling. *See Holland v. Florida*, — S.Ct. —, 2010 WL 2346549 (June 14, 2010);
9 *see also Lawrence v. Florida; Pace v. DiGuglielmo*, 544 U.S. 408, 418 n. 8, 125 S.Ct. 1807,
10 1815, 161 L.Ed.2d 669 (2005); *Harris v. Carter*, 515 F.3d 1051, 1054-57 (9th Cir. 2008);
11 *Waldron-Ramsey v. Pacholke*, 556 F.3d 1008 n. 2 (9th Cir. 2009).

12 Equitable tolling is not available in most cases, "as extensions of time will only be
13 granted if extraordinary circumstances beyond a prisoner's control make it impossible to file
14 a petition on time." *Gaston v. Palmer*, 417 F.3d 1030, 1034 (9th Cir. 2005) (internal
15 quotation marks omitted); *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002) ("the
16 threshold necessary to trigger equitable tolling [under the AEDPA] is very high, lest the
17 exceptions swallow the rule"); *Shannon*, 410 F.3d at 1090 ("Each of the cases in which
18 equitable tolling has been applied have involved *wrongful* conduct, either by state officials,
19 or occasionally, by the petitioner's counsel."); *Roy v. Lampert*, 465 F.3d 964 (9th Cir. 2006).
20 However, "[t]he 'flexibility' inherent in 'equitable procedure' enables courts 'to meet new
21 situations [that] demand equitable intervention, and to accord all the relief necessary to
22 correct . . . particular injustices.'" *Holland*, 2010 WL at *12, *quoting Hazel-Atlas Glass Co.*
23 *v. Hartford-Empire Co.*, 322 U.S. 238, 248, 64 S.Ct. 997, 88 L.Ed. 1250 (1944). Hale bears
24 the burden of establishing "'(1) that he has been pursuing his rights diligently, and (2) that
25 some extraordinary circumstance stood in his way' and prevented timely filing." *Holland*,
26 2010 WL at * 12, *quoting Pace*, 544 U.S. at 418.

27 Hales asserts that he "was in the process of receiving the rest of [his] appeals when
28 [he] was moved to three different ADOC yards from the beginning of April thru the end of

1 June,” causing delay in “receiving and compiling [] information for [his] habeas petition.”
2 Petition, Doc. # 1, p. 12 of 40. As pointed out by Respondents, Hale does not specify the
3 year to which he is referring. Even if the Court were to assume Hale is referring to 2007 or
4 2008, Hale has not provided any facts to support his claim (e.g., identification of the yards).
5 Moreover, Hale does not explain why the movements for three months prevented him from
6 preparing the Petition in the remaining time. *See United States v. Van Poyck*, 980 F.Supp.
7 1108 at 1111 (C.D.Cal. 1997) (inability to secure copies of transcripts from court reporters
8 and lockdowns at prison lasting several days, including lack of access to law library, did not
9 equitably toll statute of limitations); *see also Galaz v. Harrison*, No. 1:04CV05383TAGHC,
10 2006 WL 768813 (E.D.Cal. Mar. 27, 2006) (38 day delay due to prison lockdown did not
11 equitably toll statute of limitations); *Atkins v. Harris*, No. C 98-3188 MJJ(PR), 1999 WL
12 13719 (N.D.Cal. Jan.7, 1999) (“lockdowns, restricted library access and transfers do not
13 constitute extraordinary circumstances sufficient to equitably toll the [AEDPA] statute of
14 limitations. Prisoners familiar with the routine restrictions of prison life must take such
15 matters into account when calculating when to file a federal [habeas] petition.... Petitioner's
16 alleged lack of legal sophistication also does not excuse the delay.”). For example, Hale does
17 not assert that he was occupied with other court proceedings or was without his legal papers
18 during the year preceding the deadline. *See Allen v. Lewis*, 255 F.3d 798 (9th Cir. 2001)
19 (petitioner did not produce any evidence demonstrating the loss of access to habeas material
20 for 27 days due to habeas transfer); *Johnson v. McCaughtry*, 265 F.3d 559, 565-66 (9th Cir.
21 2001) (petitioner not entitled to equitable tolling where “substantial time elapsed when [he]
22 had no motions or cases pending before any court). Indeed, where a petitioner was confined
23 in a special unit, without access to legal materials, for 17 days, the Fifth Circuit rejected an
24 equitable tolling claim because the prisoner “still had over six months to complete his federal
25 habeas petition after his return to his usual quarters[.]” *Fisher v. Johnson*, 174 F.3d 710, 715
26 (5th Cir. 1999).

27 Moreover, even if the Court were to assume that Hale was referring to 2008, Hale
28 does not provide any basis for this Court to conclude that he was diligently pursuing his

1 rights when, following the yard movements through June 2008, Hale failed to file his Petition
2 until October 5, 2008. *See Fisher*, 174 F.3d at 716 (in rejecting equitable tolling claim, court
3 notes that “[i]f this event had occurred shortly before the required filing, [petitioner] would
4 have a stronger case”). In considering this lack of diligence, the Court also considers that
5 Hale’s Petition raises the same claims as those raised in his Petition for Post-Conviction
6 Relief.

7 Lastly, the Court agrees with Respondents that, even if the Court were to equitably
8 toll the limitations period from April 1, 2008, through June 30, 2008, Hale’s Petition was still
9 untimely filed.

10 Hale has not shown that he has been pursuing his rights diligently and Hale has not
11 established that some extraordinary circumstance prevented Hale from timely filing a habeas
12 petition. It is Hale’s burden to establish equitable tolling and he has not provided any
13 allegations or evidence showing that he is entitled to equitable tolling. Hale has failed to
14 meet the “very high threshold,” *United States v. Battles*, 362 F.3d 1195, 1197 (9th Cir. 2004),
15 of establishing that extraordinary circumstances beyond his control made it impossible for
16 him to timely file a habeas petition *and* that those extraordinary circumstances were the cause
17 of his untimeliness. Rather, it appears that Hale’s lack of diligence caused his failure to meet
18 the AEDPA’s one year statute of limitations. *See Miles v. Prunty*, 187 F.3d 1104, 1107 (9th
19 Cir. 1999) (equitable tolling is only appropriate where “external forces, rather than a
20 petitioner’s lack of diligence, account for the failure to file a timely claim”).

21 The Court finds that Hale has failed to establish that he is entitled to equitable tolling.
22 Hale’s habeas petition, therefore, is untimely.

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24 *Certificate of Appealability (“COA”)*

25 Rule 11(a), Rules Governing Section 2254 Cases, requires that in habeas cases the
26 “district court must issue or deny a certificate of appealability when it enters a final order
27 adverse to the applicant.” Such certificates are required in cases concerning detention arising
28 “out of process issued by a State court”, or in a proceeding under 28 U.S.C. § 2255 attacking

1 a federal criminal judgment or sentence. 28 U.S.C. § 2253(c)(1). Here, the Petition is
2 brought pursuant to 28 U.S.C. § 2254, and challenges detention pursuant to a State court
3 judgment. This Court must determine, therefore, if a COA shall issue.

4 The standard for issuing a COA is whether the applicant has “made a substantial
5 showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). “Where a district
6 court has rejected the constitutional claims on the merits, the showing required to satisfy §
7 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would
8 find the district court's assessment of the constitutional claims debatable or wrong.” *Slack*
9 *v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). “When the district
10 court denies a habeas petition on procedural grounds without reaching the prisoner's
11 underlying constitutional claim, a COA should issue when the prisoner shows, at least, that
12 jurists of reason would find it debatable whether the petition states a valid claim of the denial
13 of a constitutional right and that jurists of reason would find it debatable whether the district
14 court was correct in its procedural ruling.” *Id.* In the certificate, the Court must indicate
15 which specific issues satisfy the showing. *See* 28 U.S.C. § 2253(c)(3).

16 This Court determined that Hale’s Petition is untimely under the one-year statute of
17 limitations of the AEDPA. This Court further determined that Hale has failed to establish
18 that he is entitled to equitable tolling and that, even if Hale had established that he was
19 entitled to equitable tolling, the Petition was still not filed before the extended expiration of
20 the limitations period. The Court finds that jurists of reason would not find it debatable
21 whether the Petition stated a valid claim of the denial of a constitutional right and the Court
22 finds that jurists of reason would not find it debatable whether the district court was correct
23 in its procedural ruling. A COA shall not issue as to Hale’s claims.

24 Any further request for a COA must be addressed to the Court of Appeals. *See* Fed.
25 R.App. P. 22(b); Ninth Circuit R. 22-1.

26 Accordingly, IT IS ORDERED:

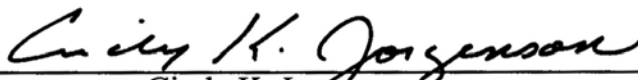
27 1. Hale’s Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a
28 Person in State Custody is DISMISSED WITH PREJUDICE;

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2. The Clerk of the Court shall enter judgment and shall then close its file in this matter, and;

3. A Certificate of Appealability shall not issue in this case.

DATED this 22nd day of June, 2010.


Cindy K. Jorgenson
United States District Judge