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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

MARTIN MURILLO-ORTEGA,	)	No. CV-F-05-1585 OWW
	)	(No. CR-F-98-5259 OWW)
)	
	)	MEMORANDUM DECISION AND
Petitioner,	)	ORDER DENYING PETITIONER'S
	)	MOTION TO VACATE, SET ASIDE
vs.	)	OR CORRECT SENTENCE PURSUANT
	)	TO 28 U.S.C. § 2255 AND
	)	DIRECTING CLERK OF COURT TO
UNITED STATES OF AMERICA,	)	ENTER JUDGMENT FOR
	)	RESPONDENT AND CLOSE THE
	)	CASE
Respondent.)	
)	
)	

On December 14, 2005, Petitioner Martin Murillo-Ortega, proceeding *in pro per*, filed a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255.

Petitioner, represented by Thomas Alan Stanley, pleaded guilty pursuant to a written Plea Agreement. Petitioner was sentenced on October 12, 1999 to 235 months incarceration and a 60 month term of supervised release.

Petitioner, still represented by Thomas Alan Stanley, filed

1 a Notice of Appeal to the Ninth Circuit, which was docketed in
2 the Ninth Circuit on March 10, 2000 and assigned Case No. 00-
3 10101.¹ Mr. Stanley failed to file an opening brief after being
4 given two extensions of time to do so. On October 5, 2000, the
5 Ninth Circuit filed a default order for failure to prosecute and
6 ordered Mr. Stanley to respond within 14 days. The January 19,
7 2001 docket entry states:

8 Filed Order (Appellate Commissioner) Aplt's
9 opening brief was due July 28, 00. On Oct.
10 5, 00 and again on Nov. 27, 00, the ct
11 ordered aplt's retained counsel, Tom A.
12 Stanley, Esq., to correct this deficiency
13 within 14 days and file a motion for relief
14 from default. To date, counsel has not
15 complied with the ct's order. Within 14 days
16 of this order, Tom A. Stanley Esq., shall
17 show cause in writin [sic] why he should not
18 be sanctioned in an amount not less than \$500
19 for failing to comply with this court's rules
20 and orders. Failure to file a timely
21 response or provide an adequate explanation
22 may result in the imposition of sanctions
23 without further notice. Aplt is informed
24 that retained counsel has failed to prosecute
25 this appeal. (cite) [sic] Within 28 days of
26 this order, aplt shall: (1) retain new
counsel who shall file a notice of
appearance; or (2) file a motion for appt of
counsel at govt expense based upon a
completed financial affidavit (CJA Form 23);
or (3) inform the court in writin [sic] of
aplt's clear and unequivocal intention to
seek self-representation on appeal. Failure
to comply with this order may result in
imposition of monetary and other sanctions on
counsel. A new briefing schedule shall be
established upon compliance with this order.

24 ¹The Court may take judicial notice of matters of public
25 record, including duly recorded documents, and court records
26 available to the public through the PACER system via the internet.
See Fed. R. Evid. Rule 201(b); *United States v. Howard*, 381 F.3d
873, 876, fn.1 (9th Cir. 2004).

1 The Clerk shall serve this order by certified
2 mail (return receipt requested) on counsel
3 Stanley. The Clerk also shall serve this
4 order on aplt individually at Reg. No. 58484-
5 097, FCI Terminal Island, 1299 Seaside
6 Avenue, Reservation Pt., Terminal Island, CA
7 90731-0207. (P196-169-886) (MoAtt) [00-10101]
8 (AF)

9 The January 22, 2000 docket entry states: "Return receipt
10 received P 196 169 886 Cert. no. (JC)." The March 27, 2001
11 docket entry states:

12 Filed order (Appellate Commissioner) ... to
13 date, appellant has not complied with the
14 court's order. Appellant shall have one
15 final opportunity to prosecute this appeal.
16 Within 28 days of this order, appellant shall
17 (1) retain new counsel; or (2) file a motion
18 for appointment of new counsel; or (3) inform
19 the court in writing of appellant's clear
20 intention to seek self-representation on
21 appeal. Failure to comply with this order
22 within the time allowed may result in
23 dismissal of this appeal ... This order and a
24 CJA Form 23 shall be served on appellant
25 individually by certified mail (7000 0520
26 0024 4796 4097) @ Reg. no. 57841-097, FCI
Terminal Island, 1299 Seaside Avenue,
Reservation Point, Terminal Island, CA 90731-
0207. (MoAtt) [00-10101] (DL)

18 The April 9, 2001 docket entry states: "Return receipt received
19 7000 0520 0024 4796 4097 Cert. no. (DC)." The April 13, 2001
20 docket entry states:

21 Filed order (William C. CANBY, Alex KOZINSKI,
22 Pamela A. RYMER) Thomas Stanley, Esq.
23 sanctioned and disbarred on 4/13/01 in No.
24 0180026. [00-10101] (RR)

25 The August 17, 2001 docket entry states:

26 Order filed, on Jan. 19, 2001 and again on
March 27, 2001 the ct informed aplt that
retained counsel has failed to prosecute this
appeal and ordered aplt to (1) retain new

1 counsel; (2) file a motion for appt of new
2 counsel; or (3) inform the ct in writing of
3 appt's clear intention to seek self-
4 representation on appeal. To date, appt has
5 not complied with the ct's order.
6 Accordingly, this appeal is DISMISSED for
7 failure to prosecute. The Clerk shall served
8 by certified mail (return receipt requested)
9 a copy of this order on counsel at Tom A.
10 Stanley, Esq., 5525 Oakdale Ave, Woodland
11 Hills, CA 91364 and appt individually at Reg.
12 No. 58484-097, Taft Community Correctional
13 Facility, 330 Commerce Way, Taft, CA 93268.
14 DISMISSED (Procedurally Terminated After
15 Other Judicial Action; F.R.A.P. 42. Michael
16 D. HAWKINS, A.W. TASHIMA, Ronald GOULD [00-
17 10101] (AF)

18 The August 17, 2001 docket entry states:

19 Sent certified mail (7000-0520-0024-4796-
20 8644) to Tom Stanley, Esq. and sent certified
21 mail (7000-0520-0024-4796-8811) to Martin
22 Murillo-Ortega. [00-10101] (AF)

23 The August 27, 2001 docket entry states: "Return receipt received
24 7000-0520-0024-4796 Cert. no. (JC)." The mandate issued on
25 September 10, 2001. The June 27, 2005 docket entry states: "Sent
26 copy of general docket to appellant per request." On July 14,
2005, Appellant Martin Murillo-Ortega filed a motion to reinstat
the appeal. By Order filed on September 19, 2007, the Ninth
Circuit construed Appellant's motion reinstate his appeal as a
motion to recall the mandate and to reinstate the appeal and
denied the motion.

The threshold issue is whether Petitioner's Section 2255
motion is timely.

Section 2255 provides that a one-year period of limitation
applies to a Section 2255 motion, which limitation period runs

1 from the latest of:

2 (1) the date on which the judgment of
3 conviction became final;

4 (2) the date on which the impediment to
5 making a motion created by governmental
6 action in violation of the Constitution or
7 laws of the United States is removed, if the
8 movant was prevented from making a motion by
9 such governmental action;

10 (3) the date on which the right asserted was
11 initially recognized by the Supreme Court, if
12 that right has been newly recognized by the
13 Supreme Court and made retroactively
14 applicable to cases on collateral review; or

15 (4) the date on which the facts supporting
16 the claim or claims presented could have been
17 discovered through the exercise of due
18 diligence.

19 Applicable here is Section 2255(4).²

20 In his declaration in support of the Section 2255 motion,
21 Petitioner avers:

22 4. I recall receiving two notices from the
23 Ninth Circuit court in the early part of the
24 year 2001, but I did not understand what the
25 notices meant.

26 5. In regards to the two notices from the
Ninth Circuit, I trusted Tom Stanley to
handle the matter, if in fact, the two
notices indicated that their [sic] was a
problem with the appeal.

6. I am a Mexican National, and in my home
country, when an attorney accepts money for
representation, that attorney is trusted to
handle all matters concerning the case, and
if for some reason, the retained attorney is
not able to handle matters regarding the

²Although Petitioner refers to Section 2255(2), no governmental action prevented Petitioner from filing the Section 2255 motion.

1 case, that attorney is trusted to refer the
2 matter to another attorney who is more
3 knowledgeable.

4 7. I did not seek help from any of the
5 inmate legal assistants at either Terminal
6 Island or Taft, because I trusted that Tom
7 Stanley would turn over the case to another
8 attorney if he had any problems with
9 perfecting the appeal.

10 8. After more than four years of hearing
11 nothing from Tom Stanley, I asked one of the
12 bilingual education department workers at the
13 Taft institution, what the terms 'disbarred'
14 and 'sanctioned' meant in reference to Tom
15 Stanley and the appeal, and the bilingual
16 inmate assistant informed me that the Ninth
17 Circuit imposed fines on Tom Stanley and
18 banned him from practicing law in their court
19 for failure to prosecute the appeal.

20 9. On or about July 7, 2005, the same
21 bilingual inmate assistant informed me that
22 the two notices from the Ninth Circuit gave
23 me instructions to either retain new counsel,
24 ask the court for the appointment of counsel,
25 or to proceed In Pro Per.

26 10. I did not know of the Ninth Circuit's
instructions until the bilingual inmate
assistant informed me on or about July 7,
2005.

11. The bilingual inmate assistant wrote a
motion for me to file in the Ninth Circuit on
July 7, 2005 ..., however, through the aid of
a former inmate legal assistant, I realized
that the Ninth Circuit lost jurisdiction over
the direct appeal after the spread of the
mandate, and that it would be difficult to
attempt a recall of the mandate after four
years. As a result, I made the choice to
bring the instant motion under 28 U.S.C. §
2255 ¶ 6(2) [sic] under the extraordinary
circumstances addressed herein.

12. Had Tom Stanley informed me on his own
that he was unable to handle the direct
appeal, and that he was unable to turn the
case over to another attorney on his own, I

1 would have informed the Ninth Circuit in
2 April of 2001, that I seek replacement
3 counsel so as to prosecute the appeal.

4 13. The foregoing statements were translated
5 from my native language of Spanish into
6 English, and then read back to me in Spanish.

7 "The statute does not require the maximum feasible
8 diligence, only due, or reasonable diligence." *Wims v. United*
9 *States*, 225 F.3d 186, 190 n.4 (2nd Cir.2000). "Due diligence ...
10 does not require a prisoner to undertake repeated exercises in
11 futility or to exhaust every imaginable option, but rather to
12 make reasonable efforts." *Aron v. United States*, 291 F.3d 708,
13 712 (11th Cir.2002). This test requires courts to consider
14 certain external requirements such as "the conditions of [the
15 petitioner's] confinement." *Wims, id.* Because "a defendant who
16 instructs counsel to initiate an appeal reasonably relies upon
17 counsel to file the necessary notice," *Roe v. Flores-Ortega*,
18 *supra*, 528 U.S. at 476, a petitioner is not required "to check up
19 on his counsel's pursuit of an appeal on ... the very day on
20 which [his] conviction becomes final." *Wims, id.* However, "a
21 duly diligent person" does not require "three and a half years
22 ... to discover that counsel had not filed a notice of appeal
23" *Zapata v. United States*, 2000 WL 1610801 at *3
24 (S.D.N.Y.2000); see *Tineo v. United States*, 2002 WL 1997801 at *2
25 (S.D.N.Y.2002) ("A duly diligent person in Tineo's shoes would not
26 have needed more than three years to discover the alleged
ineffectiveness of counsel, including whether his attorney had
failed to file a direct appeal."); *Gonzalez v. United States*,

1 2002 WL 31512728 at *4 (S.D.N.Y.2002) .

2 Petitioner's claim that he did not discover with due or
3 reasonable diligence that the appeal had been dismissed because
4 of Mr. Stanley's failure to prosecute it until July 2005 is
5 without merit. Petitioner was twice served by the Ninth Circuit
6 with orders advising him that Mr. Stanley had failed to prosecute
7 the appeal and directing Petitioner to either retain new counsel,
8 file a motion for appointment of counsel, or inform the Ninth
9 Circuit that he intended to represent himself in the appeal. The
10 Ninth Circuit served these orders on Petitioner by certified
11 mail, return receipt requested. The Ninth Circuit docket
12 establishes that Petitioner received the two orders because the
13 certified receipt was returned to the Ninth Circuit. On August
14 17, 2001, Petitioner was also personally served by the Ninth
15 Circuit with the August 17, 2001 Order dismissing the appeal for
16 lack of prosecution. The Ninth Circuit served the August 17,
17 2001 dismissal order on Petitioner by certified mail, return
18 receipt requested. The Ninth Circuit docket establishes that
19 Petitioner received the August 17, 2001 dismissal order because
20 the certified receipt was returned to the Ninth Circuit.

21 Petitioner's claim that he did not understand the Ninth Circuit's
22 orders, that he expected Mr. Stanley to take care of the matter
23 cannot stand in the face of this record, and that he did not know
24 until July 2005 that the appeal had been dismissed cannot stand
25 in the face of the Ninth Circuit record.

26 In *Calderon v. U.S. Dist. Court for Central Dist. of Cal.*,

1 128 F.3d 1283 (9th Cir. 1997), *cert. denied*, 522 U.S. 1099 and
2 523 U.S. 1061 (1998), *overruled on other grounds*, 163 F.3d 530
3 (9th Cir. 1998), the Ninth Circuit held that the one-year
4 limitations period applicable to Section 2255 motions is subject
5 to equitable tolling. However, the Ninth Circuit further held:

6 Equitable tolling will not be available in
7 most cases, as extensions of time will only
8 be granted if 'extraordinary circumstances'
9 beyond a petitioner's control make it
10 impossible to file a petition on time ... We
11 have no doubt that district judges will take
12 seriously Congress's desire to accelerate the
13 federal habeas process, and will only
14 authorize extensions when this high hurdle is
15 surmounted.

16 Id. at 1288-1289.

17 "A litigant seeking equitable tolling [of the one-year AEDPA
18 limitations period] bears the burden of establishing two
19 elements: (1) that he has been pursuing his rights diligently,
20 and (2) that some extraordinary circumstance stood in his way."
21 *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). "[T]he threshold
22 necessary to trigger equitable tolling under [the] AEDPA is very
23 high, lest the exceptions swallow the rule." *Miranda v. Castro*,
24 292 F.3d 1063, 1066 (9th Cir.2002).

25 In *Mendoza v. Carey*, 449 F.3d 1065, 1068 (9th Cir.2006), the
26 Ninth Circuit addressed whether a petitioner's inability to
obtain Spanish-language materials or procure translation
assistance can be grounds for equitable tolling of the AEDPA's
one-year limitation period:

While *Whalem/Hunt* does not directly control
the facts of this case, we find its reasoning

1 instructive. In *Whalem/Hunt*, the state's
2 failure to provide access to the text of the
3 AEDPA constituted possible grounds for
4 equitable tolling because, according to the
5 petitioner's allegations, the absence of a
6 copy of the AEDPA prevented him from learning
7 about the AEDPA's one-year deadline and
8 therefore prevented a timely filing ... We
9 concluded that remand was the appropriate
10 remedy because the district court had
11 provided the petitioner 'no opportunity to
12 amend his petition or expand his
13 declaration,' and had failed to hold an
14 evidentiary hearing

15 By analogy, Mendoza has alleged that lack of
16 access to Spanish-language legal materials
17 prevented him from learning about the AEDPA's
18 deadline and thereby prevented his timely
19 filing. According to his declaration, when
20 Mendoza was first incarcerated, he requested
21 Spanish-language legal materials but was told
22 to 'wait until [he] got to [his] regular
23 assigned prison.' After arriving at Solono
24 State Prison, he made several trips to the
25 library but found only English-language books
26 and only English-speaking clerks and
librarians. Not until Mendoza found an
newly-arrived, bilingual inmate willing to
offer assistance was he able to file his
habeas petition; however, by this time, the
AEDPA deadline had already passed. We
conclude that this combination of (1) a
prison library's lack of Spanish-language
legal materials, and (2) a petitioner's
inability to obtain translation assistance
before the one-year deadline, could
constitute extraordinary circumstances.

27 This holding comports with the decisions of
28 other Circuits, which have rejected a per se
29 rule that a petitioner's language limitations
30 can justify equitable tolling, but have
31 recognized that equitable tolling may be
32 justified if language barriers actually
33 prevent timely filing. In *Cobas v. Burgess*,
34 306 F.3d 441, 441 (6th Cir.2002), the court
35 held that a petitioner's 'inability to speak,
36 write, or understand English, in and of
itself, does not automatically' justify
equitable tolling. The court emphasized that

1 the 'existence of a translator who can read
2 and write English and who assists a
3 petitioner during appellate proceedings'
4 renders equitable tolling in applicable for
5 that petitioner ... Because Cobas had written
6 a detailed letter to his counsel in English
7 and had otherwise demonstrated his ability to
8 either communicate in English or communicate
9 with a translator, the record in Cobas' case
10 'belie[d] any claim that language
11 difficulties prevented Cobas from filing his
12 petition in a timely manner.'

13 We find this reasoning persuasive, because it
14 implicitly identifies the category of non-
15 English-speaking inmates whose situations
16 could constitute 'extraordinary
17 circumstances.' Although the petitioner was
18 ultimately denied relief in *Cobas*, the
19 decision's rationale left open the
20 possibility that a non-English speaker who
21 could not find a willing translator could
22 qualify for equitable tolling. Following
23 this reasoning, we conclude that a non-
24 English-speaking petitioner seeking equitable
25 tolling must, at a minimum, demonstrate that
26 during the running of the AEDPA time
27 limitation, he was unable, despite diligent
28 efforts, to procure either legal materials in
29 his own language or translation assistance
30 from an inmate. We agree with *Cobas* that a
31 petitioner who demonstrates proficiency in
32 English or who has the assistance of a
33 translator would be barred from equitable
34 relief

35 ...

36 Because *Mendoza* alleged that he lacks English
37 language ability, was denied access to
38 Spanish-language legal materials, and could
39 not procure the assistance of a translator
40 during the running of the AEDPA limitations
41 period, he has alleged facts that, if true,
42 may entitle him to equitable tolling.

43 449 F.3d at 1069-1071.

44 Here, the record establishes that Petitioner was not
45 pursuing his rights diligently and he makes no showing that some

1 extraordinary circumstance stood in his way; Petitioner is not
2 entitled to equitable tolling. Although Petitioner asserts that
3 he expected Mr. Stanley to take care of the matter, Petitioner
4 was specifically advised by the Ninth Circuit of his remedies to
5 continue the prosecution of his appeal and, when Petitioner did
6 not comply with those orders, was served by the Ninth Circuit
7 with the order dismissing the appeal for lack of prosecution.
8 Although Petitioner avers that he only speaks Spanish, he makes
9 no contention that he was unable to obtain a translation of the
10 Ninth Circuit's orders when he was served with them or that he
11 made any effort to do so.

12 For the reasons stated:

13 1. Petitioner Martin Murillo-Ortega's motion to vacate, set
14 aside or correct sentence pursuant to 28 U.S.C. § 2255 is DENIED;

15 2. The Clerk of the Court is directed to ENTER JUDGMENT FOR
16 RESPONDENT and to close this case.

17 IT IS SO ORDERED.

18 Dated: February 17, 2009

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE