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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

BILLY CEPERO,

Petitioner,

vs.

BRIAN WILLIAM, et al.,

Respondents.

Case No. 2:14-cv-01397-JAD-PAL

**Order Denying Motion to Stay, Granting  
Motion for Leave to File Excess Pages, and  
Directing Petitioner to Show Cause Why This  
Action Should Not Be Dismissed as Untimely**

Petitioner has filed a motion for permission to file a petition with additional pages (#11) and an amended petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (#12). The court grants petitioner's motion.

Petitioner also has filed a motion to stay proceedings (#10), asking the court to stay this action until his state post-conviction proceedings conclude. The court takes judicial notice of the on-line docket of the Nevada Supreme Court in Cepero v. State, Case No. 65785.<sup>1</sup> The Nevada Supreme Court referred the action to the Nevada Court of Appeals. On March 17, 2015, the Nevada Court of Appeals ruled that the state post-conviction habeas corpus petition was untimely.<sup>2</sup> Petitioner did not seek review of that decision, and the Nevada Supreme Court issued its remittitur on May 8, 2015. The conclusion of the state-court proceedings has made the motion to stay (#10) moot, and the court denies it.

The court has reviewed the amended petition (#12) pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts. Two problems exist. First,

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<sup>1</sup><http://caseinfo.nvsupremecourt.us/public/caseView.do?csIID=33981> (last visited June 11, 2015).

<sup>2</sup>[http://nvcourts.gov/Supreme/Decisions/Court\\_of\\_Appeals/Orders/65785OrderofAffirmance/](http://nvcourts.gov/Supreme/Decisions/Court_of_Appeals/Orders/65785OrderofAffirmance/) (last visited June 11, 2015).

1 petitioner has not corrected the problems with the original petition (#6). The court directed  
2 petitioner to file an amended petition because the original petition (#6) contained three grounds that  
3 did not allege any facts. See Mayle v. Felix, 545 U.S. 644, 649, 656 (2005). The amended petition  
4 (#12) contains nineteen grounds that do not allege any facts. The court could dismiss the action  
5 because petitioner not only has failed to correct the defects of the original petition, he has enlarged  
6 those same defects. However, a dismissal of that nature should leave open the possibility that  
7 petitioner could return in a new action with properly pleaded grounds for relief, and that leads to the  
8 second problem: it appears that this action is untimely.

9 Title 28 USC section 2244(d)(1) provides:

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

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

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

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

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

23 28 U.S.C. § 2244(d)(1). If the judgment is appealed, then it becomes final when the Supreme Court  
24 of the United States denies a petition for a writ of certiorari or when the time to petition for a writ of  
25 certiorari expires. Jimenez v. Quarterman, 555 U.S. 113, 119-20 (2009). See also Sup. Ct. R.

26 13(1). Any time spent pursuing a properly filed application for state post-conviction review or other  
27 collateral review does not count toward this one-year limitation period. 28 U.S.C. § 2244(d)(2).

28 The period of limitation resumes when the post-conviction judgment becomes final upon issuance  
of the remittitur. Jefferson v. Budge, 419 F.3d 1013, 1015 n.2 (9th Cir. 2005). An untimely state

post-conviction petition is not “properly filed” and does not toll the period of limitation. Pace v.  
DiGuglielmo, 544 U.S. 408, 417 (2005). Section 2244(d) is subject to equitable tolling. Holland v.

Florida, 560 U.S. 631, 645 (2010). “[A] ‘petitioner’ is ‘entitled to equitable tolling’ only if he  
shows ‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary

1 circumstance stood in his way' and prevented timely filing." Id. at 649 (quoting Pace, 544 U.S. at  
2 418). Actual innocence can excuse operation of the statute of limitations. McQuiggin v. Perkins,  
3 133 S. Ct. 1924, 1928 (2013). "[A] petitioner does not meet the threshold requirement unless he  
4 persuades the district court that, in light of the new evidence, no juror, acting reasonably, would  
5 have voted to find him guilty beyond a reasonable doubt." Id. (quoting Schlup v. Delo, 515 U.S.  
6 298, 329 (1995)). "[A]ctual innocence' means factual innocence, not mere legal insufficiency."  
7 Bousley v. United States, 523 U.S. 614, 623 (1998). "In cases where the Government has forgone  
8 more serious charges in the course of plea bargaining, petitioner's showing of actual innocence must  
9 also extend to those charges." Id. at 624. The petitioner effectively files a federal petition when he  
10 mails it to the court. Stillman v. Lamarque, 319 F.3d 1199, 1201 (9th Cir. 2003). The court can  
11 raise the issue of timeliness on its own motion. Day v. McDonough, 547 U.S. 198, 209 (2006);  
12 Herbst v. Cook, 260 F.3d 1039, 1043 (9th Cir. 2001).

13           Petitioner was convicted of home invasion after a jury trial. The state district court  
14 adjudicated him a habitual criminal and sentenced him to life imprisonment with eligibility for  
15 parole starting after 10 years. The judgment of conviction was entered on September 20, 2010. Ex.  
16 1 (#14). Petitioner appealed, and the Nevada Supreme Court affirmed on September 14, 2011. Ex.  
17 8 (#14). For the purposes of § 2244(d)(1), the judgment became final on December 13, 2011.  
18 Petitioner filed nothing in either state court or this court with regard to this judgment of conviction  
19 in the following year, and the federal one-year period expired at the end of December 13, 2012.

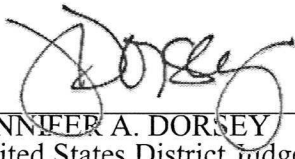
20           On January 31, 2013, petitioner filed in state district court a post-conviction petition for a  
21 writ of habeas corpus. Ex. 27 (#14). The state district court held a hearing on the timeliness of the  
22 petition. Ex. 28 (#14). The state district court concluded that the petition was untimely pursuant to  
23 Nev. Rev. Stat. § 34.726(1) because petitioner filed the petition more than one year after the Nevada  
24 Supreme Court issued its remittitur in the direct appeal from the judgment. Ex. 29 (#14). Petitioner  
25 appealed. As noted above, the Nevada Supreme Court referred the matter to the Nevada Court of  
26 Appeals. On March 17, 2015, the Nevada Court of Appeals affirmed the dismissal of the state  
27 petition as untimely. The remittitur issued on May 8, 2015.

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1 consideration by the court. Petitioner must include with the original paper submitted for filing a  
2 certificate stating the date that a true and correct copy of the document was mailed to the  
3 respondents or counsel for the respondents. The court may disregard any paper received by a  
4 district judge or magistrate judge that has not been filed with the clerk, and any paper received by a  
5 district judge, magistrate judge, or the clerk that fails to include a certificate of service.

6 DATED: June 19, 2015

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10 JENNIFER A. DORSEY  
11 United States District Judge  
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