

1
2
3
4
5
6
7
8
9

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

FARRIN HAWKINS,

Petitioner,

vs.

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

Respondents.

Case No. 2:14-cv-01421-GMN-PAL

ORDER

10 This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254
11 by a Nevada state prisoner.

12 Petitioner's application to proceed *in forma pauperis* establishes that the petitioner qualifies
13 for *in forma pauperis* status. He shall be granted leave to proceed *in forma pauperis*, and shall not
14 be required to pay the filing fee for his habeas corpus petition. The petition will be ordered filed.

15 Petitioner challenges a 1989 criminal conviction in the Eighth Judicial District Court, in
16 Clark County, Nevada. The Court will not order the petition served on respondents, because it
17 appears likely that the petition was filed outside the AEDPA one-year limitations period, and may
18 be subject to dismissal on that basis. 28 U.S.C. § 2244(d)(1). The Antiterrorism and Effective
19 Death Penalty Act (AEDPA) imposes a one-year statute of limitations on the filing of federal habeas
20 corpus petitions. Specifically, and in pertinent part, the statute reads:

21 (d)(1) A 1-year period of limitation shall apply to an application for
22 a writ of habeas corpus by a person in custody pursuant to the
23 judgment of a State court. The limitation period shall run from the
latest of—

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

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

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

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

5 28 U.S.C. § 2244(d)(1). Moreover, the United States Supreme Court has held that the AEDPA's
6 statute of limitations "is subject to equitable tolling in appropriate cases." *Holland v. Florida*, 560
7 U.S. 631, 645 (2010). "A petitioner is entitled to equitable tolling only if he shows: '(1) that he has
8 been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way'
9 and prevented timely filing." *Holland*, 560 U.S. at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S.
10 408, 418 (2005)).

11 The AEDPA statute of limitations has serious implications for petitioner. According to the
12 petition, petitioner was convicted on July 20, 1989. Petitioner signed his federal habeas petition and
13 dispatched it for mailing on August 20, 2014. It appears likely that the petition was filed well
14 outside the AEDPA one-year limitations period. Petitioner will be granted an opportunity to
15 demonstrate either that he submitted his federal habeas corpus petition in a timely manner, or that he
16 is entitled to equitable tolling of the one-year limitations period imposed by the AEDPA.

17 Additionally, on the face of the federal petition, petitioner states that his grounds for relief
18 were not exhausted in state court. A federal court will not review a state prisoner's petition for
19 habeas relief until the prisoner has exhausted his available state remedies for all claims raised. *Rose*
20 *v. Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). A petitioner must give the state courts a fair
21 opportunity to act on each of his claims before he presents those claims in a federal habeas petition.
22 *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *see also Duncan v. Henry*, 513 U.S. 364, 365
23 (1995). A claim remains unexhausted until the petitioner has given the highest available state court
24 the opportunity to consider the claim through direct appeal or state collateral review proceedings.
25 *See Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004); *Garrison v. McCarthey*, 653 F.2d 374, 376
26 (9th Cir. 1981). A habeas petitioner must "present the state courts with the same claim he urges upon
27 the federal court." *Picard v. Connor*, 404 U.S. 270, 276 (1971). Petitioner will be granted an
28 opportunity to demonstrate when and how he exhausted in the state courts each ground contained in

1 the federal petition.

2 Petitioner has filed a motion for the appointment of counsel. (ECF No. 2). Pursuant to 18
3 U.S.C. § 3006(a)(2)(B), the district court has discretion to appoint counsel when it determines that
4 the “interests of justice” require representation. There is no constitutional right to appointed counsel
5 for a federal habeas corpus proceeding. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Bonin v.*
6 *Vasquez*, 999 F.2d 425, 428 (9th Cir. 1993). The decision to appoint counsel is generally
7 discretionary. *Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir. 1986), *cert. denied*, 481 U.S. 1023
8 (1987); *Bashor v. Risley*, 730 F.2d 1228, 1234 (9th Cir.), *cert. denied*, 469 U.S. 838 (1984). In the
9 instant case, petitioner’s motion for counsel is a “form motion” which contains no facts specific
10 regarding petitioner and states no particular reason why petitioner is unable to litigate this action
11 himself. While the petition is not the model of clarity, it is sufficiently clear in presenting the issues
12 that petitioner wishes to bring. It does not appear that counsel is justified in this instance. The
13 motion for the appointment of counsel is denied.

14 **IT IS THEREFORE ORDERED** that petitioner’s application to proceed *in forma pauperis*
15 (ECF No. 1) is **GRANTED**. Petitioner shall not be required to pay a filing fee to file his habeas
16 corpus petition. The habeas corpus petition shall be **FILED** by the Clerk of Court.

17 **IT IS FURTHER ORDERED** that within **thirty (30) days** from the date of entry of this
18 order, petitioner **SHALL FILE** points and authorities, together with such evidence he may have,
19 that demonstrates either that he submitted his federal habeas corpus petition in a timely manner, or
20 that he is entitled to equitable tolling of the one-year limitations period imposed by the AEDPA.
21 Petitioner’s failure to comply with this order will result in the dismissal of this action.

22 **IT IS FURTHER ORDERED** that within **thirty (30) days** from the date of entry of this
23 order, petitioner **SHALL FILE** points and authorities, together with such evidence he may have,
24 that demonstrates when and how he exhausted his grounds for relief in state court. Petitioner’s
25 failure to comply with this order will result in the dismissal of this action.

26 **IT IS FURTHER ORDERED** that petitioner’s motion for the appointment of counsel (ECF
27 No. 2) is **DENIED**.

28 **IT IS FURTHER ORDERED** that petitioner’s motion for free copies (ECF No. 3) is

1 **GRANTED** only to the extent that the Clerk **SHALL SEND** petitioner the CM/ECF printout of the
2 docket in this action.

3 **IT IS FURTHER ORDERED** that the Clerk shall not serve respondents with the habeas
4 corpus petition at this time.

5 **DATED** this 8th day of December, 2014.



6
7
8
9 _____
Gloria M. Nayarro, Chief Judge
United States District Court

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28