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UNITED STATES DISTRICT COURT

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DISTRICT OF NEVADA

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8 MONTRAIL D. SMITH,

9 Petitioner,

2:15-cv-00487-KJD-VCF

10 vs.

ORDER11 TIMOTHY FILSON, *et al.*,

12 Respondents.

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15 The petitioner in this habeas corpus action, Montrail D. Smith, filed a first amended petition
16 for writ of habeas corpus on April 11, 2016 (ECF No. 24). The respondents then filed a motion to
17 dismiss (ECF No. 35) on August 10, 2016, asserting that Smith's petition is barred by the statute of
18 limitations, as it was filed over six years beyond the expiration of the applicable one-year limitations
19 period, that certain of Smith's claims are unexhausted in state court, and that certain of his claims are
20 procedurally defaulted.

21 Smith's response to respondents' motion to dismiss was originally due on September 12,
22 2016. *See* Order entered June 15, 2016 (ECF No. 32). On September 13, 2016, however, the court
23 granted Smith a twenty-nine day extension of time, to October 11, 2016, to respond to the motion to
24 dismiss. *See* Order entered September 13, 2016 (ECF No. 37).

25 On October 11, 2016, Smith filed a "Motion to Stay Briefing Schedule on Respondent's
26 Motion to Dismiss" (ECF No. 38), requesting "an order staying the briefing schedule for the pending

1 Motion to Dismiss and setting a deadline in 60 days, on December 10, 2016, for Smith to file either a
2 formal discovery motion or a status report on discovery.” Smith’s counsel acknowledges that his
3 petition was filed “[several] years late.” Motion to Stay Briefing Schedule (ECF No. 38), p. 2.
4 Counsel suggests, however, that Smith may be entitled to equitable tolling of the statute of
5 limitations. *See id.* Counsel states that, regarding Smith’s argument for equitable tolling,
6 “[e]vidence of diligence, or a lack of diligence, will be found in records maintained by the Nevada
7 Department of Corrections, specifically, in the incoming and outgoing legal and non-legal mail and
8 telephone logs.” *Id.* Counsel goes on to inform the court that on October 5, 2016 -- almost two
9 months after the motion to dismiss was filed, and six days before the response to the motion to
10 dismiss was due -- she communicated with respondents’ counsel about obtaining the relevant prison
11 mail and telephone logs without a formal discovery request. *See id.* Smith requests that the briefing
12 of the motion to dismiss be stayed while he pursues that informal request for information from the
13 respondents.

14 The court will deny Smith’s motion to stay the briefing of the motion to dismiss. A habeas
15 petitioner is entitled to equitable tolling of the AEDPA statute of limitations if the petitioner shows:
16 ““(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance
17 stood in his way’ and prevented timely filing.” *Holland v. Florida*, 560 U.S. 631, 649 (2010)
18 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). The issue of equitable tolling, therefore,
19 turns on factual matters within the knowledge of the petitioner: the petitioner’s own diligence, and
20 circumstances preventing him from initiating his federal habeas action on time. There is no reason
21 shown why Smith cannot respond to respondents’ motion to dismiss, with respect to the statute of
22 limitations, without informal or formal discovery.

23 If Smith believes that the prison mail and telephone logs contain information supporting his
24 argument for equitable tolling, Smith may pursue such information informally from the respondents
25 -- as he apparently has done in the last week -- and, if he believes such informal means are
26 unavailing, he may move for leave to conduct formal discovery. The scheduling orders in this case

1 set forth a schedule for Smith to move for leave to conduct formal discovery, if need be, in the
2 context of the briefing of a motion to dismiss. *See* Order entered July 1, 2015 (ECF No. 13)
3 (briefing schedule for motion to dismiss); Order entered June 15, 2016 (ECF No. 32) (schedule for
4 filing and briefing of motion for leave to conduct discovery). In the order entered June 15, 2016, the
5 court ordered that “if petitioner wishes to move for leave to conduct discovery, petitioner shall file
6 such motion concurrently with, but separate from, his response to respondents’ motion to dismiss....”
7 *See* Order entered June 15, 2016 (ECF No. 32). Smith shows no need for a stay the briefing of the
8 motion to dismiss. The court will deny Smith’s motion in that regard.

9 The court will grant Smith a 45-day extension of time to respond to the motion to dismiss.
10 With this extension, Smith will have had three and a half months to respond to the motion to
11 dismiss, and to seek information supporting his response by informal means. *The court will not look*
12 *favorably upon any motion to further extend this deadline.*

13 **IT IS THEREFORE ORDERED** that petitioner’s Motion to Stay Briefing Schedule on
14 Respondent’s Motion to Dismiss (ECF No. 38) is **DENIED**.

15 **IT IS FURTHER ORDERED** that petitioner shall have until **November 25, 2016**, to
16 respond to respondents’ motion to dismiss (ECF No. 35).

17 **IT IS FURTHER ORDERED** that, in all other respects, the schedule for further
18 proceedings set forth in the orders entered July 1, 2015 (ECF No. 13) and June 15, 2016 (ECF No.
19 32) shall remain in effect.

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21 Dated this 13 day of October, 2016.

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25 UNITED STATES DISTRICT JUDGE
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