

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CURT MCLELLAN,

Case No. 2:22-cv-00281-GMN-EJY

Petitioner,

ORDER

v.

TIM GARRETT, ET AL.,

Respondents.

Counseled Petitioner Curt McLellan petitions for a writ of habeas corpus under 28 U.S.C. § 2254, arguing that the trial court improperly admitted prior bad act evidence, the prosecution engaged in prosecutorial misconduct, he was not given adequate notice of the crimes charged, his trial and appellate counsel were ineffective, and cumulative error. (ECF No. 1.) Respondents move to dismiss McLellan’s petition as untimely, or alternatively, to dismiss ground 5 as procedurally defaulted. (ECF No. 8.) McLellan opposed the motion, and Respondents replied. (ECF Nos. 12, 16.)

I. BACKGROUND

McLellan challenges his 2006 convictions, pursuant to a jury trial, of 22 counts of sexual assault with a minor under 14 years of age and 20 counts of lewdness with a child under 14 years of age. (ECF No. 9-38.) McLellan appealed his judgment of conviction, and the Nevada Supreme Court affirmed. (ECF No. 10-3.) McLellan filed a state habeas corpus petition and a counseled amended state habeas corpus petition. (ECF Nos. 10-6, 10-16.) The state district court denied the amended petition. (ECF No. 10-25.) McLellan appealed, and the Nevada Supreme Court affirmed the denial. (ECF No. 11-16.)

1 McLellan filed a federal habeas corpus petition in this Court on December 30, 2016, in
2 case number 2:16-cv-03038-JCM-CWH.¹ Respondents moved to dismiss McLellan’s petition,
3 and this Court granted the motion, in part, on August 23, 2018. In that August 23, 2018, order,
4 this Court found ground E, a claim of cumulative error, to be unexhausted. This Court concluded
5 that McLellan’s petition was “mixed, containing both claims exhausted in state court and claims
6 not exhausted in state court, and it is subject to dismissal.” This Court, therefore, ordered
7 McLellan, within 30 days, “to file a motion for dismissal without prejudice of the entire petition,
8 for partial dismissal of ground E, or for other appropriate relief.” This Court warned that “[f]ailure
9 to comply with th[e] order [would] result in the dismissal of this action.” McLellan failed to file
10 anything in accordance with the August 23, 2018, order, so this Court dismissed McLellan’s
11 petition without prejudice for his failure to exhaust his available state-court remedies. This Court
12 stated that it “makes no statement about the timeliness of any subsequently commenced action.”
13 Judgment was entered on November 14, 2018.

14 More than a year and three months later, on March 9, 2020, McLellan moved to reopen
15 case number 2:16-cv-03038-JCM-CWH and to stay the case. On April 10, 2020, this Court found
16 that McLellan had “not demonstrated the extraordinary circumstances necessary to grant him relief
17 under Rule 60(b)(6) of the Federal Rules of Civil Procedure,” so this Court denied McLellan’s
18 motion to reopen and motion for stay. In its April 10, 2020, order this Court explained McLellan’s
19 lack of action following the dismissal of his petition:

20 The time to move to alter or amend the judgment expired. *See* Fed. R. Civ. P. 59(e).
21 The time to appeal expired. *See* Fed. R. App. P. 4(a)(1)(A). The time to move for
22 an extension of the time to appeal expired. *See* Fed. R. App. P. 4(a)(5). The time to
23 move for a reopening of the time to appeal expired. *See* Fed. R. App. P. 4(a)(6).
 The time to move for relief from the judgment under Rules 60(b)(1), (2), and (3)
 expired. *See* Fed. R. Civ. P. 60(c)(1).

¹This Court takes judicial notice of the docket in this case.

1 This Court also explained that McLellan failed to “explain[] why he waited more than fifteen
2 months to file the motion to reopen.” This Court again stated that it “makes no statement whether
3 any [new petition] would be timely under 28 U.S.C. § 2244(d)(1).”

4 Simultaneously with his motion to reopen in case number 2:16-cv-03038-JCM-CWH,
5 McLellan filed a second, counseled state habeas petition on March 6, 2020, alleging a single claim
6 of cumulative error. (ECF No. 11-20.) The state district court denied McLellan’s petition as time-
7 barred and successive. (ECF No. 11-26.) McLellan appealed, and the Nevada Court of Appeals
8 affirmed the denial on November 17, 2021. (ECF No. 11-47.)

9 McLellan filed his instant federal habeas petition in case number 2:16-cv-03038-JCM-
10 CWH on February 7, 2022. On February 14, 2022, this Court struck the petition and instructed
11 the clerk of the court to “open a new civil action, and file the petition for a writ of habeas corpus
12 in that action.” This Court noted that “the title of the petition is ‘Petition for Writ of Habeas
13 Corpus,’ without any indication that McLellan intended to file an amended petition” in case
14 number 2:16-cv-03038-JCM-CWH.

15 On that same day, February 14, 2022, the instant case was opened, and McLellan’s petition
16 was filed. (ECF No. 1.) This Court ordered Respondents to file a response to the petition, including
17 potentially by motion to dismiss. (ECF No. 2.) Respondents filed a motion to dismiss, McLellan
18 responded, and Respondents replied. (ECF Nos. 8, 12, 16.)

19 **II. DISCUSSION**

20 The Antiterrorism and Effective Death Penalty Act (AEDPA) establishes a one-year
21 limitation period for state prisoners to file a federal habeas petition under 28 U.S.C. § 2254. The
22 one-year limitation period begins to run from the latest of four possible triggering dates, with the
23 most common being the date on which the petitioner’s judgment of conviction became final by

1 either the conclusion of direct appellate review or the expiration of the time for seeking such
2 review. 28 U.S.C. § 2244(d)(1)(A). For a Nevada prisoner pursuing a direct appeal, a conviction
3 becomes final when the 90-day period for filing a petition for certiorari in the Supreme Court of
4 the United States expires after a Nevada appellate court has entered judgment or the Supreme
5 Court of Nevada has denied discretionary review. *Harris v. Carter*, 515 F.3d 1051, 1053 n.1 (9th
6 Cir. 2008); *Shannon v. Newland*, 410 F.3d 1083, 1086 (9th Cir. 2005); Sup. Ct. R. 13.

7 The AEDPA limitation period is tolled while a “properly filed” state post-conviction
8 proceeding or other collateral review is pending. 28 U.S.C. § 2244(d)(2). But no statutory tolling
9 is allowed for the period between finality of a direct appeal and the filing of a petition for post-
10 conviction relief in state court because no state court proceeding is pending during that time. *Nino*
11 *v. Galaza*, 183 F.3d 1003, 1006–07 (9th Cir. 1999); *Rasberry v. Garcia*, 448 F.3d 1150, 1153 n.1
12 (9th Cir. 2006). And no statutory tolling is allowed for the period between the finality of a post-
13 conviction appeal and the filing of a federal petition. *Nino*, 183 F.3d at 1007.

14 In this case, McLellan’s conviction became final when the time expired for filing a petition
15 for writ of certiorari with the Supreme Court of the United States on July 30, 2008. The federal
16 limitations period began running the following day. McLellan timely filed his state petition on
17 April 29, 2009, tolling the AEDPA clock. As a result, 272 days elapsed between the finality of
18 the judgment and the filing of the state petition. The remaining 93 days of the AEDPA limitation
19 period was statutorily tolled during the pendency of all proceedings related to his state petition.
20 The period of statutory tolling ended on October 25, 2016, when the Nevada Supreme Court issued
21 its remittitur following its affirmation of the denial of McLellan’s state habeas petition. The federal
22 limitations period began running again the following day: October 26, 2016. Absent any tolling
23 or delayed accrual, McLellan’s federal limitations period expired 93 days later on January 27,

1 2017. McLellan’s instant federal habeas petition, which was filed February 14, 2022, more than
2 5 years later, is untimely on its face. McLellan must therefore show cause why the petition should
3 not be dismissed with prejudice as time-barred under § 2244(d).

4 McLellan appears to concede that his one-year statutory period under § 2244(d)(1) expired
5 prior to the filing of his instant federal habeas petition, but he argues that he is entitled to equitable
6 tolling to excuse his failure to file within the one-year period. (ECF No. 12 at 5.) The Supreme
7 Court has held that AEDPA’s statute of limitations “is subject to equitable tolling in appropriate
8 cases.” *Holland v. Florida*, 560 U.S. 631, 645 (2010). However, equitable tolling is appropriate
9 only if (1) a petitioner has been pursuing his rights diligently, and (2) some extraordinary
10 circumstance stood in his way and prevented timely filing. *Id.* at 649 (quoting *Pace v.*
11 *DiGuglielmo*, 544 U.S. 408, 418 (2005)). To satisfy the first element, a petitioner “must show that
12 he has been reasonably diligent in pursuing his rights not only while an impediment to filing caused
13 by an extraordinary circumstance existed, but before and after as well, up to the time of
14 filing.” *Smith v. Davis*, 953 F.3d 582, 598–99 (9th Cir. 2020) (en banc) (expressly rejecting stop-
15 clock approach for evaluating when petitioner must be diligent). To satisfy the second element, a
16 petitioner must demonstrate that the “extraordinary circumstances” were the *cause* of his
17 untimeliness. *Grant v. Swarthout*, 862 F.3d 914, 926 (9th Cir. 2017). In other words, “that some
18 external force caused his untimeliness, rather than mere oversight, miscalculation or
19 negligence.” *Velasquez v. Kirkland*, 639 F.3d 964, 969 (9th Cir. 2011) (internal quotation
20 omitted).

21 McLellan argues that he is entitled to equitable tolling because this Court’s August 23,
22 2018, order in case number 2:16-cv-03038-JCM-CWH “failed to provide sufficient guidance to
23 [him] in drafting a subsequent motion to dismiss on [his] own claims,” and this Court’s dismissal

1 order in that case “compounded that failure by further using ambiguous language regarding
2 timeliness and procedural barring of subsequent motions.” (ECF No. 12 at 5.) The Supreme Court
3 has indicated that equitable tolling may be appropriate where a court misleads a habeas
4 petitioner. *Pliler v. Ford*, 542 U.S. 225, 234 (2004) (remanding to address Ninth Circuit’s concern
5 that prisoner may have been affirmatively misled by the magistrate judge); 542 U.S. at 235
6 (O’Connor, J., concurring) (“if the petitioner is affirmatively misled, either by the court or by the
7 State, equitable tolling might well be appropriate”). However, a petitioner’s “misunderstanding
8 of accurate information [provided by a court] cannot merit relief.” *Ford v. Pliler*, 590 F.3d 782,
9 789 (9th Cir. 2009) (internal citation and quotation marks omitted).

10 Although this Court’s August 23, 2018, order in case number 2:16-cv-03038-JCM-CWH
11 did not specifically instruct McLellan that he had the option of filing a motion for a stay and
12 abeyance so that he could return to state court to exhaust ground E, it did instruct him “to file a
13 motion for dismissal without prejudice of the entire petition, for partial dismissal of ground E, or
14 for other appropriate relief.” (ECF No. 15 at 4.) McLellan fails to articulate how this instruction
15 was vague or ambiguous, especially since he was represented by counsel during the entirety of his
16 proceedings in case number 2:16-cv-03038-JCM-CWH. As such, this Court finds that McLellan
17 was provided accurate information by this Court in case number 2:16-cv-03038-JCM-CWH, so
18 McLellan is not entitled to equitable tolling on this basis. *See Brambles v. Duncan*, 412 F.3d 1066,
19 1070–71 (9th Cir. 2005) (denying equitable tolling where the district court’s statement was not
20 affirmatively misleading, even though the petitioner was not told that the stay and abey process
21 was available; district court accurately told the *pro se* petitioner, who had filed a mixed petition,
22 to either dismiss his unexhausted claims and proceed in federal court with only his then-exhausted
23

1 claims, or request dismissal of the entire petition without prejudice and exhaust his then-
2 unexhausted claims before returning to federal court).

3 Further, McLellan fails to demonstrate that he was diligent in pursuing his rights. This
4 Court instructed McLellan, within 30 days, “to file a motion for dismissal without prejudice of the
5 entire petition, for partial dismissal of ground E, or for other appropriate relief.” McLellan failed
6 to file anything within that 30-day period. Indeed, if McLellan was confused by this Court’s order,
7 as he claims, he could have filed a motion for clarification. Instead, McLellan waited a year and
8 a half before filing his motion to reopen his federal case and his new state habeas petition to exhaust
9 ground E. This certainly fails to show that McLellan acted with diligence.

10 In sum, McLellan filed his federal petition after the expiration of the AEDPA statute of
11 limitations. He has failed to meet the burden of establishing that he is entitled to equitable tolling,
12 and McLellan alleges no other basis for tolling, equitable or statutory, does not allege delayed
13 accrual, and does not allege actual innocence. Accordingly, his petition (ECF No. 1) is dismissed
14 with prejudice as untimely.

15 **III. CERTIFICATE OF APPEALABILITY**

16 A district court is required to issue or deny a certificate of appealability when it enters a
17 final order adverse to a habeas petitioner, rather than waiting for a notice of appeal and request for
18 certificate of appealability to be filed. *See* Fed. § 2254 R. 11(a); 9th Cir. R. 22- 1(a). Generally, a
19 petitioner must make “a substantial showing of the denial of a constitutional right” to warrant a
20 certificate of appealability. 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).
21 Where a district court denies relief on procedural grounds without reaching the underlying
22 constitutional claim, the court applies a two-step inquiry to decide whether a certificate of
23 appealability is appropriate. *See Payton v. Davis*, 906 F.3d 812, 820 (9th Cir. 2018). A petitioner

1 must show both that jurists of reason would find it debatable (1) ““whether the petition states a
2 valid claim of the denial of a constitutional right,”” and (2) ““whether the district court was correct
3 in its procedural ruling.”” *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (quoting *Slack*, 529
4 U.S. at 484); *Payton*, 906 F.3d at 820 (“Both components must be met before [the Ninth Circuit]
5 may entertain the appeal.”). To meet the threshold inquiry, a petitioner has the burden of
6 demonstrating that the issues are debatable among jurists of reason; that a court could resolve the
7 issues differently; or that the questions are adequate to deserve encouragement to proceed further.
8 *See Allen v. Ornoski*, 435 F.3d 946, 950-951 (9th Cir. 2006).

9 Applying this standard, the Court finds that no reasonable jurist would find this Court’s
10 dismissal of the petition to be debatable or wrong. The Court therefore denies McLellan a
11 certificate of appealability.


12 **IV. CONCLUSION**

13 It is therefore ordered that Respondents’ Motion to Dismiss (ECF No. 8) is granted.
14 McLellan’s petition (ECF No. 1) is dismissed with prejudice as untimely.

15 It is further ordered that a certificate of appealability is denied, as reasonable jurists would
16 not find the district court’s dismissal of the petition as untimely to be debatable or wrong, for the
17 reasons discussed herein.

18 It is further ordered that the Clerk of Court is directed to enter final judgment accordingly,
19 in favor of Respondents and against Petitioner, dismissing this action with prejudice, and close
20 this case.

21 Dated: **September 12, 2022**

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23 _____
Gloria M. Navarro, Judge
United States District Court