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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

MATTHEW TJELTVEIT,

*Petitioner,*

vs.

E.K. MCDANIEL, *et al.*,

*Respondents.*

3:11-cv-00163-RCJ-VPC

ORDER

This habeas matter under 28 U.S.C. § 2254 comes before the Court for initial review under Rule 4 of the Rules Governing Section 2254 Cases. Following initial review, it appears that the petition is subject to dismissal with prejudice as time-barred for failure to file the petition within the one-year limitation period in 28 U.S.C. § 2244(d)(1). Petitioner therefore will be directed to show cause why the petition should not be dismissed as time-barred.

***Background***

According to the allegations of the petition, petitioner Matthew Tjeltveit challenges his Nevada state conviction, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon.

The Court takes judicial notice of the state court procedural history reflected in the January 13, 2011, Order of Affirmance, in No. 55773 in the Supreme Court of Nevada, which is available both on Westlaw and on the online docket records of the state supreme court.<sup>1</sup>

The judgment of conviction was filed on June 7, 2007.

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<sup>1</sup> *Tjeltveit v. Warden*, 2011 WL 222503 (Nev., Jan. 13, 2011). The order can be accessed online, at <http://www.nevadajudiciary.us/index.php/supremecourt>, under the "Case Search" link in the upper right.

1 No notice of appeal was filed within the thirty-day time period for filing a direct appeal.  
2 The time to do so expired on Monday, July 9, 2007.

3 On November 7, 2007, petitioner filed a proper person notice of appeal. The state  
4 supreme court dismissed the untimely appeal for lack of jurisdiction on December 27, 2007;  
5 and the remittitur issued on January 22, 2008.

6 On August 5, 2008, petitioner filed a state post-conviction petition. On January 13,  
7 2011, the state supreme court affirmed the dismissal of the petition on the basis that the  
8 petition was untimely. The remittitur issued on February 7, 2011.

9 On or about March 1, 2011, petitioner mailed the federal petition to the Clerk of this  
10 Court for filing.

### 11 ***Discussion***

12 Pursuant to *Herbst v. Cook*, 260 F.3d 1039 (9<sup>th</sup> Cir. 2001), the Court *sua sponte* raises  
13 the question of whether the petition is time-barred for failure to file the petition within the one-  
14 year limitation period in 28 U.S.C. § 2244(d)(1).

15 Under 28 U.S.C. § 2244(d)(1)(A), the federal one-year limitation period, unless  
16 otherwise tolled, begins running after "the date on which the judgment became final by the  
17 conclusion of direct review or the expiration of the time for seeking such direct review." In the  
18 present case, the limitation period, unless tolled or subject to a different starting date on some  
19 other basis, thus began running on the face of the present record after the expiration of the  
20 time period for filing a direct appeal, *i.e.*, after July 9, 2007. Absent tolling or a different  
21 accrual date, the one-year limitation period would expire one year later, on July 9, 2008.

22 Under 28 U.S.C. § 2244(d)(2), the federal one-year limitation period is statutorily tolled  
23 during the pendency of a properly filed application for state post-conviction relief. However,  
24 an untimely state post-conviction petition is not "properly filed;" and it thus does not statutorily  
25 toll the federal limitation period. *Pace v. DiGuglielmo*, 544 U.S. 408, 125 S.Ct. 1807, 161  
26 L.Ed.2d 669 (2005). Petitioner's state post-conviction petition was denied as untimely, and  
27 the petition therefore did not statutorily toll the federal limitation period under Section  
28 2244(d)(2).

1 Absent other tolling, or a later accrual date, the federal limitation period therefore  
2 expired on July 9, 2008. Petitioner did not mail the federal petition until March 1, 2011, two  
3 years, seven months, and twenty days after the limitation period had expired, absent tolling  
4 or a later accrual date. The petition therefore is untimely on the face of the record.

5 Petitioner therefore must show cause in writing why the petition should not be  
6 dismissed with prejudice as time-barred.

7 In this regard, petitioner is informed that the one-year limitation period may be equitably  
8 tolled. Equitable tolling is appropriate only if the petitioner can show "(1) that he has been  
9 pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way'  
10 and prevented timely filing." *Lawrence v. Florida*, 549 U.S.327, 336, 127 S.Ct. 1079, 1085,  
11 166 L.Ed.2d 924 (2007)(quoting *Pace*, 544 U.S. at 418, 125 S.Ct. at 1814). Equitable tolling  
12 is "unavailable in most cases," *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir.1999), and "the  
13 threshold necessary to trigger equitable tolling is very high, lest the exceptions swallow the  
14 rule," *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir.2002)(quoting *United States v.*  
15 *Marcello*, 212 F.3d 1005, 1010 (7th Cir.2000)). The petitioner ultimately has the burden of  
16 proof on this "extraordinary exclusion." 292 F.3d at 1065. He accordingly must demonstrate  
17 a causal relationship between the extraordinary circumstance and the lateness of his filing.  
18 *E.g., Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). *Accord Bryant v. Arizona Attorney*  
19 *General*, 499 F.3d 1056, 1061 (9th Cir. 2007).

20 Petitioner also is informed that, under certain circumstances, the one-year limitation  
21 period may begin running on a later date or may be statutorily tolled. See 28 U.S.C. §  
22 2244(d)(1)(B), (C) & (D) & (d)(2).

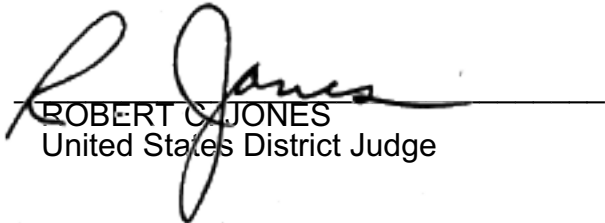
23 IT THEREFORE IS ORDERED that, within thirty (30) days of entry of this order,  
24 petitioner shall SHOW CAUSE in writing why the petition should not be dismissed with  
25 prejudice as time-barred. If petitioner does not timely respond to this order, the petition will  
26 be dismissed with prejudice as time-barred without further advance notice. If petitioner  
27 responds but fails to show with competent evidence that the petition is timely, the action will  
28 be dismissed with prejudice.

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IT FURTHER IS ORDERED that all assertions of fact made by petitioner must be detailed, must be specific as to time and place, and must be supported by competent evidence. The Court will not consider any assertions of fact that are not specific as to time and place, that are not made pursuant to a declaration under penalty of perjury based upon personal knowledge, and/or that are not supported by competent evidence filed by petitioner in the record in this Court.

The Court will hold the motion for counsel under submission pending petitioner's response to this show cause order. The Court does not find that the interests of justice require the appointment of counsel prior to petitioner's response to the show cause order.<sup>2</sup>

DATED: 04-25-2011.



ROBERT C. JONES  
United States District Judge

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<sup>2</sup>This order does not signify by omission that either the petition or the claims therein otherwise are free of deficiencies. The Court defers consideration of any other deficiencies in the papers presented until after a determination in the first instance as to whether the petition is timely.