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UNITED STATES DISTRICT COURT

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DISTRICT OF NEVADA

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PAUL PROVENZANO,

Case No. 3:12-cv-00500-MMD-VPC

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Plaintiff,

ORDER

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v.

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ROBERT LeGRAND, *et al.*,

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Defendants.

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This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by a Nevada state prisoner. Before the Court is respondents' motion to dismiss. (Dkt. no. 10.)

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I. PROCEDURAL HISTORY

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On April 4, 2007, a grand jury indictment charged petitioner with five counts of sexual assault with a minor under fourteen years of age and eleven counts of lewdness with a child under the age of fourteen. (Exhibit 2.)¹ On November 27, 2007, petitioner signed a guilty plea agreement in which he plead guilty to one count of attempted sexual assault on a minor under fourteen years of age. (Exhibits 3 & 4.) On February 22, 2008, a judgment of conviction was filed, sentencing petitioner to 72-240 months imprisonment, with credit for one day served. (Exhibit 5.) An amended judgment of conviction was filed on November 12, 2008, correcting a clerical error, adding a

¹The exhibits referenced in this order are found in the Court's record at dkt. no. 11.

1 sentence of lifetime supervision upon his release from prison and an order that
2 petitioner shall register as a sex offender pursuant to NRS 179D.460 upon release from
3 custody. (Exhibit 6.) Petitioner did not file a direct appeal of his conviction.

4 On May 26, 2009, petitioner filed a motion to correct an illegal sentence in state
5 district court. (Exhibit 7.) The motion alleged that his sentence was illegal and that the
6 court had no jurisdiction because the charges in the indictment were barred by the
7 statute of limitations. (*Id.*) By order filed June 30, 2009, the state district court denied
8 the motion. (Exhibit 10.) Petitioner filed a notice of appeal as to the court's order.
9 (Exhibit 12.) By order filed April 7, 2010, the Nevada Supreme Court affirmed the state
10 district court's denial of petitioner's May 26, 2009, motion to correct an illegal sentence.
11 (Exhibit 23.) Remittitur issued on May 3, 2010. (Exhibit 24.)

12 On May 24, 2010, petitioner filed a post-conviction habeas petition in state district
13 court. (Exhibit 25.) By written order filed September 8, 2010, the state district court
14 dismissed the petition because it was time-barred pursuant to NRS 34.726. (Exhibit
15 29.) On September 21, 2010, petitioner filed a notice of appeal. (Exhibit 30.) On April
16 6, 2011, the Nevada Supreme Court entered an order affirming the state district court's
17 denial of the petition as time-barred, because the petition was filed more than two (2)
18 years after entry of the judgment of conviction, and petitioner failed to show cause and
19 prejudice to excuse the late filing. (Exhibit 32.) –Remittitur issued on May 2, 2011.
20 (Exhibit 33.)

21 Petitioner filed a second motion to correct an illegal sentence on June 1, 2011.
22 (Exhibit 34.) The State opposed the motion. (Exhibit 35.) On September 1, 2011, the
23 state district court held a hearing on the motion, and on September 13, 2011, the state
24 district court filed its order denying petitioner's second motion to correct an illegal
25 sentence. (Exhibit 36.) Four (4) months later, on January 17, 2012, petitioner filed a
26 motion for rehearing. (Exhibit 38.) By written order filed February 23, 2012, the state
27 district court denied petitioner's motion for rehearing, which was construed as a motion
28 for reconsideration of the court's order denying petitioner's second motion to correct an

1 illegal sentence. (Exhibit 40.) On March 21, 2012, petitioner filed a notice of appeal from
2 the denial of his second motion to correct an illegal sentence, along with a *pro per*
3 opening brief. (Exhibits 41 & 42.) On May 17, 2012, the Nevada Supreme Court filed an
4 order dismissing the appeal, finding that the notice of appeal was untimely, and that the
5 Court lacked jurisdiction to hear the appeal from a denial of a motion for
6 reconsideration. (Exhibit 43.) On July 25, 2012, the Nevada Supreme Court denied
7 petitioner's motion for rehearing. (Exhibit 44.) Remittitur issued on August 20, 2012.
8 (Exhibit 45.)

9 On August 30, 2012, petitioner dispatched his federal petition and supporting
10 brief to this Court in the instant case. (Dkt. no. 8, at p. 1.) The petition contains four (4)
11 main grounds for relief, with sub-claims within each ground. (*Id.*, at pp. 1-11.)
12 Respondents have filed a motion to dismiss the petition. (Dkt. no. 10.) Petitioner has
13 filed a response to the motion. (Dkt. no. 13.) Respondents have filed a reply. (Dkt. no.
14 14.)

15 II. DISCUSSION

16 Respondents argue that the petition is untimely, as it was filed after the expiration
17 of the AEDPA statute of limitations.

18 The Antiterrorism and Effective Death Penalty Act (AEDPA) amended the
19 statutes controlling federal habeas corpus practice to include a one-year statute of
20 limitations on the filing of federal habeas corpus petitions. With respect to the statute of
21 limitations, the habeas corpus statute provides:

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

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

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

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

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

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitations under this subsection.

28 U.S.C. § 2244(d).

The United States Supreme Court has held that a habeas petitioner’s state post-conviction petition, which was rejected by the state court as untimely under the statute of limitations, is not “properly filed,” within the meaning of the statutory tolling provision of the AEDPA limitations period. *Pace v. DiGuglielmo*, 544 U.S. 408, 412-16 (2005). The Court in *Pace v. DiGuglielmo* held as follows:

In common understanding, a petition filed after a time limit, and which does not fit within any exceptions to that limit, is no more “properly filed” than a petition filed after a time limit that permits no exception.

* * *

What we intimated in *Saffold* we now hold: When a post-conviction petition is untimely under state law, “that [is] the end of the matter” for the purposes of § 2244(d)(2).

Id. at 413-14.

The AEDPA limitations period is tolled while a “properly filed application” for post-conviction relief is pending before a state court. 28 U.S.C. § 2244(d)(2). No statutory tolling is allowed for the period of time between finality of the appeal and the filing of a petition for post-conviction relief or other collateral review in state court, because no state court application is pending during that time. *Nino v. Galaza*, 183 F.3d 1003, 1006-07 (9th Cir. 1999); *Rasberry v. Garcia*, 448 F.3d 1150, 1153 n.1 (9th Cir. 2006). No statutory tolling is allowed for the period between the finality of an appeal and the filing of a federal petition. *Nino*, 183 F.3d at 1007. The AEDPA limitation period is not tolled during the time that a federal habeas petition is pending. *Duncan v. Walker*, 533 U.S.

1 167, 181-82 (2001). An application for state post-conviction relief that violates the state
2 statute of limitations is not “properly filed” for purposes of 28 U.S.C. § 2244(d)(2). *Pace*
3 *v. DiGuglielmo*, 544 U.S. 408, 412-16 (2005). An application for state post-conviction
4 relief does not toll the AEDPA statute of limitations where the petitioner files it after the
5 AEDPA statute of limitations has expired. *Ferguson v. Palmateer*, 321 F.3d 820, 823
6 (9th Cir. 2003); *Jimenez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001).

7 A criminal defendant in Nevada has thirty (30) days from the entry of judgment to
8 file his notice of appeal. Nev. R. App. P. 4(b). If the defendant does not seek direct
9 review from the highest state court, the conviction becomes final when the time for
10 seeking such review elapses. 28 U.S.C. § 2244(d)(1)(A); *Hemmerle v. Schriro*, 495
11 F.3d 1069, 1073-74 (9th Cir. 2007); *Wixom v. Washington*, 264 F.3d 894, 898 (9th Cir.
12 2001). Once the judgment of conviction is final, the defendant has 365 days to file a
13 federal habeas petition. 28 U.S.C. § 2244(d).

14 In the present case, petitioner’s judgment of conviction was filed on February 22,
15 2008. (Exhibit 5.) Because petitioner did not file a direct appeal, his conviction became
16 final thirty (30) days later, upon the expiration of the time to file a direct appeal, on
17 March 23, 2008. The AEDPA one-year statute of limitations began to run the next day.
18 On March 24, 2009, the AEDPA statute of limitations expired.

19 On May 26, 2009, petitioner filed his first motion to correct an illegal sentence.
20 (Exhibit 7.) On April 7, 2009, the Nevada Supreme Court affirmed the state district
21 court’s denial of the motion to correct an illegal sentence. (Exhibit 23.) While a motion to
22 correct an illegal sentence is generally considered an application for post-conviction
23 relief that may toll the statute of limitations, in the instant case, petitioner filed the motion
24 after the AEDPA limitations period had expired. *Ferguson v. Palmateer*, 321 F.3d 820,
25 823 (9th Cir. 2003) (an application for state post-conviction relief does not toll the
26 AEDPA statute of limitations where the petitioner files it after the AEDPA statute
27 of limitations has expired). Thus, petitioner’s motion to correct an illegal sentence did not
28 toll the AEDPA statute of limitations.

1 On May 24, 2010, petitioner filed an untimely post-conviction habeas petition in
2 the state district court. (Exhibit 25.) The state district court denied the post-conviction
3 habeas petition as untimely pursuant to NRS 34.726. (Exhibit 29.) By order filed April 6,
4 2011, the Nevada Supreme Court ruled that petitioner's state habeas petition was
5 untimely pursuant to NRS 34.726 and that petitioner failed to show cause and prejudice
6 to excuse the late filing. (Exhibit 32.) An application for state post-conviction relief that
7 violates the state statute of limitations is not "properly filed" for purposes of 28 U.S.C. §
8 2244(d)(2). *Pace v. DiGuglielmo*, 544 U.S. 408, 412-16 (2005). Thus, the state habeas
9 petition was not a "properly filed application" and did not toll the AEDPA statute of
10 limitations under 28 U.S.C. § 2244(d)(2).

11 Petitioner's second motion to correct an illegal sentence, filed June 1, 2011, also
12 did not toll the statute of limitations for purposes of 28 U.S.C. § 2244(d)(2), because it
13 was filed after the AEDPA limitations period had expired. *Ferguson v. Palmateer*, 321
14 F.3d 820, 823 (9th Cir. 2003).

15 Petitioner dispatched the federal habeas petition on August 30, 2012. The federal
16 petition was filed over three years after the AEDPA limitations period expired on March
17 24, 2009. The federal petition is untimely.

18 The United States Supreme Court has held that the AEDPA's statute of
19 limitations "is subject to equitable tolling in appropriate cases." *Holland v. Florida*, 560
20 U.S. 631, 645 (2010). The Supreme Court reiterated that "a petitioner is entitled to
21 equitable tolling only if he shows: '(1) that he has been pursuing his rights diligently, and
22 (2) that some extraordinary circumstance stood in his way' and prevented timely filing."
23 *Holland*, 560 U.S. at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). In
24 making a determination on equitable tolling, courts must "exercise judgment in light of
25 prior precedent, but with awareness of the fact that specific circumstances, often hard to
26 predict in advance, could warrant special treatment in an appropriate case." *Holland*,
27 560 U.S. at 650. The petitioner bears the burden of demonstrating that he is entitled to
28 equitable tolling. *Espinoza-Matthews v. California*, 432 F.3d 1021, 1026 (9th Cir. 2005).

1 "[A] petitioner must show that his untimeliness was caused by an external impediment
2 and not by his own lack of diligence." *Bryant v. Arizona Att. Gen.*, 499 F.3d 1056, 1061
3 (9th Cir. 2007). A petitioner "must show that some 'external force' caused his
4 untimeliness, rather than mere 'oversight, miscalculation or negligence.'" *Velasquez v.*
5 *Kirkland*, 639 F.3d 964, 969 (9th Cir. 2011) (*quoting Waldron-Ramsey v. Pacholke*, 556
6 F.3d 1008, 1011 (9th Cir. 2009)). A *pro se* petitioner's lack of legal knowledge or
7 sophistication is not, by itself, an extraordinary circumstance warranting tolling.
8 *Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006).

9 In his opposition, petitioner argues that the issue of whether the petition is timely
10 "has been laid to rest" because the Court accepted for filing petitioner's affidavit on
11 November 27, 2012, which contained arguments that he is entitled to equitable tolling.
12 (Dkt. no. 13, at pp. 1-2, referring to dkt. no. 6.) Petitioner also asserts that the timeliness
13 of his federal petition has been settled because this Court issued an order on February
14 13, 2013, requiring respondents to respond to the federal petition, instead of dismissing
15 the petition *sua sponte* as time-barred. (Dkt no. 13, at pp. 1-2, referring to dkt. no. 7.)
16 The Court rejects petitioner's reasoning that, because the Court accepted his affidavit
17 for filing, issues concerning the petition's timeliness and equitable tolling are settled.
18 The Court further rejects petitioner's assertion that the Court's order directing
19 respondents to file an answer or other response to the petition somehow implied that
20 the petition was timely filed. This Court has not previously ruled that petitioner is entitled
21 to equitable tolling, nor has this Court implied that the petition is timely.

22 In his opposition to the motion to dismiss, petitioner relies on the equitable tolling
23 arguments he raised in his November 27, 2012 affidavit. (Dkt. nos. 13 & 6.) In his
24 affidavit, petitioner claims that he could not timely file his federal petition because from
25 March 9, 2008, to January 9, 2009, he was housed in a 24-hour per day lock-down
26 intake classification unit (administrative segregation) and that he had no access to the
27 law library or legal runners. (Dkt. no. 6.) Petitioner's records from the Nevada
28 Department of Corrections (NDOC) indicate that on his arrival to High Desert State

1 Prison's intake unit, petitioner met with a caseworker on March 10, 2008, and because
2 he was convicted of attempted sexual assault on a minor, he was housed in
3 administrative segregation pending a transfer to Lovelock Correctional Center. (Exhibit
4 A to Respondents' Reply, at dkt. no. 14-1.) The NDOC case notes show that on March
5 25, 2008, petitioner requested to be placed in administrative segregation because he
6 claimed numerous enemies due to the nature of his conviction. (*Id.*) The case notes
7 further show that petitioner was transferred to Lovelock Correctional Center on January
8 9, 2009. (*Id.*)

9 Petitioner makes conclusory allegations regarding his lack of access to materials
10 needed to file a petition during the time period in question, from March 9, 2008, to
11 January 9, 2009, at High Desert State Prison. Petitioner provides no documents or other
12 proof to support his allegations that he diligently pursued his rights but that
13 extraordinary circumstances prevented him from timely filing his federal petition.
14 Petitioner does not provide, and does not allege that he submitted to prison officials,
15 any grievance documents, inmate request forms, letters, or complaints regarding not
16 having access to the law library or runners. Petitioner does not allege or provide
17 documentation to show that he requested any state or federal form petitions from the
18 law library. Petitioner also fails to provide any documentation showing that he attempted
19 to contact his counsel to have him send his case file to assist petitioner in filing a state
20 or federal petition. Petitioner filed no documents in state court requesting his case file
21 during the relevant time period, from March 9, 2008, to January 9, 2009. High Desert
22 State Prison's law library operational procedures provide that, for inmates housed in a
23 unit not allowed to physically attend the law library, the inmate may request legal forms
24 and publications from the law library. (Exhibit B to Respondents' Reply, at dkt. no. 14-1.)
25 The written operational procedures indicate that requests received by law library staff
26 will be delivered the next working day following the request. Finally, petitioner's claim
27 that he acted diligently and that he wanted to file a petition, but could not, during his
28 incarceration at High Desert State Prison is belied by the fact that he arrived at Lovelock

1 Correctional Center on January 9, 2009, but he did not file pleadings in state court until
2 four and a half months later, on May 26, 2009. (Exhibit 7.) Petitioner has not
3 demonstrated that his untimeliness in filing the federal petition was caused by an
4 external impediment, rather than by his own lack of diligence.

5 Even assuming that petitioner is entitled to equitable tolling during the time period
6 in which petitioner claims that he was denied access to the law library at High Desert
7 State Prison, from March 9, 2008, to January 9, 2009, the federal petition is still time-
8 barred. Starting the AEDPA statute of limitations on January 9, 2009, 137 days of
9 untolled time had passed before petitioner filed his first motion to correct an illegal
10 sentence on May 26, 2009. (Exhibit 7.) On April 7, 2010, the Nevada Supreme Court
11 entered its order affirming the state district court's denial of petitioner's May 26, 2009,
12 motion. (Exhibit 23.) Remittitur issued on May 3, 2010. (Exhibit 24.) The federal
13 limitations period then would have recommenced on May 4, 2010, and, absent tolling,
14 would have expired 228 days later on December 17, 2010.

15 On May 24, 2010, twenty-one (21) days after the AEDPA limitations period would
16 have recommenced, petitioner filed an untimely post-conviction habeas petition in state
17 court. (Exhibit 25.) On April 6, 2011, the Nevada Supreme Court entered its order
18 affirming the state district court's dismissal of the post-conviction habeas petition.
19 (Exhibit 32.) The Nevada Supreme Court found that the petition was time-barred
20 because it was filed more than two (2) years after the entry of the judgment of
21 conviction and petitioner failed to show cause and prejudice to excuse the untimely
22 filing. (*Id.*) Remittitur issued on May 2, 2011. (Exhibit 33.) Petitioner's post-conviction
23 state habeas petition did not statutorily toll the AEDPA limitations period under 28
24 U.S.C. § 2244(d)(2) because it was untimely filed. *Pace v. DiGuglielmo*, 544 U.S. 408,
25 412-16 (2005) (a state post-conviction petition that violates the state statute of
26 limitations is not "properly filed" for purposes of 28 U.S.C. § 2244(d)(2)). Thus, with
27 equitable tolling, the AEDPA limitations period would have expired on December 17,

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1 2010. Petitioner did not dispatch his federal petition until twenty (20) months later, on
2 August 30, 2012. (Dkt. no. 8, at p. 1.)

3 In summary, the federal petition was filed after the expiration of the AEDPA
4 statute of limitations. Petitioner has failed to meet the burden of establishing that he is
5 entitled to equitable tolling. Further, even if the Court equitably tolled the time period
6 from March 9, 2008, to January 9, 2009, during which petitioner claims a denial of
7 access to the prison law library, the federal petition is still untimely. Accordingly, the
8 federal petition is dismissed with prejudice as untimely.

9 **III. CERTIFICATE OF APPEALABILITY**

10 District courts are required to rule on the certificate of appealability in the order
11 disposing of a proceeding adversely to the petitioner or movant, rather than waiting for a
12 notice of appeal and request for certificate of appealability to be filed. Rule 11(a). In
13 order to proceed with his appeal, petitioner must receive a certificate of appealability.
14 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d
15 946, 950-951 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52
16 (9th Cir. 2001). Generally, a petitioner must make “a substantial showing of the denial
17 of a constitutional right” to warrant a certificate of appealability. *Id.*; 28 U.S.C. §
18 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). “The petitioner must
19 demonstrate that reasonable jurists would find the district court's assessment of the
20 constitutional claims debatable or wrong.” *Id.* (*quoting Slack*, 529 U.S. at 484). In order
21 to meet this threshold inquiry, the petitioner has the burden of demonstrating that the
22 issues are debatable among jurists of reason; that a court could resolve the issues
23 differently; or that the questions are adequate to deserve encouragement to proceed
24 further. *Id.* In this case, no reasonable jurist would find this Court's dismissal of the
25 petition debatable or wrong. The Court therefore denies petitioner a certificate of
26 appealability.

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IV. CONCLUSION

It is therefore ordered that the respondents' motion to dismiss (dkt. No. 10) is granted. The petition for a writ of habeas corpus is dismissed with prejudice as untimely.

It is further ordered that petitioner is denied a certificate of appealability.

It is further ordered that the Clerk shall enter judgment accordingly.

DATED THIS 14th day of February 2014.



MIRANDA M. DU
UNITED STATES DISTRICT JUDGE